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Lessons from Jerry Hall v. Mick Jagger Regarding U.S. Regulation of Heterosexual Cohabitants or, Can't Get No Satisfaction

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LESSONS FROM *JERRY HALL v. MICK JAGGER* REGARDING U.S. REGULATION OF HETEROSEXUAL COHABITANTS OR, CAN'T GET NO SATISFACTION

*J. Thomas Oldham**

INTRODUCTION

Jerry Hall apparently thought she was married to Mick Jagger. She lived with him two decades and bore four children. When they broke up, it was determined that, although they participated in a Balinese marriage ceremony in 1990, they did not comply with the Balinese marriage formalities.[1] Under English law, it was determined that they were not married, and she had only a right to claim child support; no other rights or obligations arose under English law due to their cohabitation.[2]

Had this case arisen in the United States today, in most states the result may well have been the same, because under the laws of most states, "cohabitation" alone does not create a status that confers rights and obligations.[3] This Article will consider whether U.S. private law

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1 *See* Ruth Gledhill, *The Marriage That Never Was*, TIMES (London), Aug. 14, 1999, at 5. The marriage was not registered with the proper authorities and neither Hall nor Jagger was a true member of the Hindu faith.

2 *Id.*

3 *See* J.T. OLDHAM, DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY § 1.02 (2001). Many U.S. states accept putative marriage, which gives a claimant (even though not actually married) rights like those of a spouse if he or she believes in good faith that they were married. *See* HARRY D. KRAUSE ET AL., FAMILY LAW, CASES, COMMENTS AND QUESTIONS 106 (4th ed. 1998). In those U.S. states that accept common-law marriage, the couple would have been considered married.

rules regarding straight unmarried couples should be changed.[4] In addition, I do not address in detail appropriate policies toward gay couples; these issues have been ably discussed by many commentators.[5]

I. THE REGULATION OF COHABITATION IN THE TWENTIETH CENTURY

A. A Survey of the Legal Landscape

A century ago, in many states almost all cohabiting heterosexual couples were married. At least in part, this was due to the acceptance of common-law marriage by a majority of American states.[6] (By 1922, only twenty-seven states still accepted common-law marriage.[7]) So, in many states, if a heterosexual couple lived together and represented to the community that they were married, they were (regardless of whether they participated in any marriage ceremony). Because of this rule, and due to the then-prevailing social conventions that considered unmarried cohabitation socially unacceptable, it seems likely that, in states which accepted common-law marriage, almost all cohabiting heterosexual couples would have been considered married. (It

4 This Article focuses on private law rights and obligations, such as quasi-marital property rights and post-dissolution support obligations. I do not address the extent to which unmarried partners should be considered a couple for various public purposes, such as taxation or the receipt of state benefits.

5 *See generally* WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE (1996); SAME-SEX MARRIAGE: PRO AND CON (Andrew Sullivan ed., 1997); David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447 (1996) (arguing that the insitution of marriage is here to stay for good reason and that homosexuals should not shun marriage, but should make an effort to attain the legal right to marry); Steven K. Homer, *Against Marriage*, 29 HARV. C.R.-C.L. L. REV. 505 (1994) (arguing that "marriage lacks legal as well as experiential coherence"); Lynn D. Wardle, Williams v. North Carolina, *Divorce Recognition, and Same-Sex Marriage Recognition*, 32 CREIGHTON L. REV. 187 (1998) (discussing *Williams I* and *Williams II* in the context of the potential for interstate recognition of same-sex marriages); Jennifer Wriggins, *Marriage Law and Family Law: Autonomy, Interdependence, and Couples of the Same Gender*, B.C. L. REV. 265 (2000) (analyzing recent scholarship and arguing that the quest for marriage by same-gender couples should be seen as positive, as it strives toward connection, duty, and responsibility).

6 *See generally* OTTO E. KOEGEL, COMMON LAW MARRIAGE (1922); Stuart J. Stein, *Common Law Marriage: Its History and Certain Contemporary Problems*, 9 J. FAM. L. 271 (1969); Nancy R. Shaw, Note, *Common Law Marriage and Unmarried Cohabitation: An Old Solution to a New Problem*, 39 U. PITT. L. REV. 579, 580 (1978).

For example, in 1878 the Supreme Court, in referring to a private agreement to be married, stated in *Meister v. Moore*, 96 U.S. 76 (1878), "That such a contract constitutes a marriage at common law there can be no doubt . . . ." *Id.* at 78.

7 KOEGEL, *supra* note 6, at 164–65.

would have been too embarrassing to proclaim to the community that you were not married.)

During the twentieth century, both the law and social conventions changed. Many states abolished common-law marriage.[8] In addition, unmarried cohabitation has become much more common and socially acceptable in many levels of society. In contrast to the nineteenth and early twentieth centuries, it is now quite possible, even in a state that accepts common-law marriage, that a heterosexual couple could live together and have a sexual relationship and not be considered married. (A couple no longer has to feign marriage or risk social opprobrium.) As a result, and because in most states cohabitants have no "status"-like rights, regardless of the duration of the cohabitation or whether the relationship was childless or minor children were in the household, an "unmarried" couple can cohabit for a long period and raise children and still have no rights or obligations (other than child support) when the relationship ends.

As is true in most of the Western world,[9] unmarried cohabitation is becoming an increasingly common family form in the United States. As of 1994, about 7% of all heterosexual American couples were unmarried partners.[10] In most of Western Europe, the percentage is higher; in Denmark, more than 20% of all couples are unmarried

8 About ten states now accept this form of marriage. *See* KRAUSE ET AL., *supra* note 3, at 96.

9 *See* Kathleen Kiernan, *Cohabitation in Western Europe*, 96 POPULATION TRENDS 25, 25 (1999).

10 *See Having It Both Ways, à la Française*, ECONOMIST, Sept. 26, 1998, at 54 [hereinafter *Having It Both Ways*]; *see also* ARLENE F. SALUTER, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P20-484, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1994 at xiii (1996) (reporting national statistics for "unmarried-couple households" and comparing them to the 1970 statistics). According to the Census Bureau's Current Population Survey of March 1998, 1,674,000 same-sex couples existed, compared to 4,236,000 heterosexual unmarried couples and 54,317,000 married couples. *See* U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1998 (UPDATE) at v tbl.C, 71 tbl.8 (1998), *available at* http://www.census.gov/population/www/socdemo/ms-la.html (last modified June 29, 2001). For a chart showing the trends in cohabitation in the U.S., see Grace Ganz Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 NOTRE DAME L. REV. 1265, 1268 n.11 (2001). The most recent Census report found that unmarried partners now comprise 9% of all couples. *See* Eric Schmitt, *For First Time, Nuclear Families Drop Below 25% of Households*, N.Y. TIMES, May 15, 2001, at A1.

Of course, cohabitation might be more common among certain segments of society than others. *See* Kathleen Kiernan, *The Rise of Cohabitation and Childbearing Outside Marriage in Western Europe*, 15 INT'L J.L. POL'Y & FAM. 1, 8–10 (2001).

partners.[11] In Australia, as of 1996, it was estimated that, of all couples, more than 10% were de facto couples.[12] In 1996, 14% of all Canadian couples residing together were unmarried.[13]

Cohabitation is particularly popular among the young. For example, one study found that 23% of all unmarried Americans aged twenty-five to twenty-nine were cohabiting with someone of the opposite sex.[14] Another study found that 13% of all United States adults (not only unmarried ones) aged twenty-five to twenty-nine were cohabiting.[15] This suggests that cohabitation will become an increasingly common family type in the United States.

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11 *See Having It Both Ways*, *supra* note 10, at 54; *see also* Kiernan, *supra* note 9, at 26 (including a table giving the percentage of cohabitating people according to age group and sex). Denmark has the highest percentage. It has been estimated that the approximate percentage of all couples that are unmarried couples is 18% in Sweden, 14% in France, 9% in Great Britain, 8% in Germany, 4% in Italy, and 3% in Spain. *See Having It Both Ways*, *supra* note 10, at 54. *But see* Pascale Krémer, *Le Mariage a Cessé d'être l'acte Fondateur du Couple*, LE MONDE, Dec. 9, 1999, at 10 (estimating that 16% of all French couples are cohabitants).

See also Claude Martin & Irene Thery, *The PACS and Marriage and Cohabitation in France*, 15 INT'L J.L. POL'Y & FAM. 135, 136 (2001) (estimating that about one-sixth of all couples in France are cohabitants). One commentator estimated that one of every eight couples in England is a cohabitant. *See* John Haskey, *Demographic Aspects of Cohabitation in Great Britain*, 15 INT'L J.L. POL'Y & FAM. 51, 66 (2001).

12 *See* Brendan Bolger, *Census Consensus*, SYDNEY STAR OBSERVER, Sept. 4, 1997, at 11.

13 Nicholas Bala, *Canada: Court Decisions on Same-Sex & Unmarried Partners, Spousal Rights & Children*, *in* INTERNATIONAL SOCIETY OF FAMILY LAW 2001 SURVEY (Andrew Bainham ed., forthcoming 2001) (manuscript at text accompanying n.22, on file with author) (citing STATISTICS CANADA, 1996 CENSUS).

14 *See* LARRY L. BUMPASS & JAMES A. SWEET, COHABITATION, MARRIAGE AND UNION STABILITY: PRELIMINARY FINDINGS FROM NSFH2 fig.4 (Center for Demography and Ecology, Univ. of Wis.-Madison, NSFH Working Paper No. 65, 1995); Larry Bumpass & Hsien-Hen Lu, *Trends in Cohabitation and Implications for Children's Family Contexts in the United States*, 54 POPULATION STUD. 29, 32 (2000). The English government estimates that 25% of unmarried men and women age sixteen to forty-nine are cohabiting. Frances Gibb, *Law Society to Support Gay Reforms*, TIMES (London), Sept. 20, 1999, at 2.

15 *See* Linda J. Waite, *Does Marriage Matter?*, 32 DEMOGRAPHY 483, 485 (1995). Gore Vidal made this comment about the trend, with characteristic Vidalian hyperbole: "My impression is that the only people interested in marriage are Catholic priests and homosexualists. Most enlightened heterosexuals now avoid marriage in much the same way as Count Dracula steers clear of garlic." VIEWS FROM A WINDOW: CONVERSATIONS WITH GORE VIDAL 301 (Robert J. Stanton & Gore Vidal eds., 2d ed. 1980).

1. Regulation of Heterosexual Cohabitation

Many Western jurisdictions do not consider unmarried cohabitation a separate status.[16] When the relationship ends, neither party has rights vis-a-vis the other (except for child support), unless a generally accepted cause of action between parties who were not cohabiting can be established, such as one based on a theory of contract, unjust enrichment, or trust.[17]

No American state currently lets heterosexual couples register for any meaningful status.[18] In most states, the choices are among marriage, contract cohabitation, or no rights.[19] (And, of course, contract cohabitation is not a "status" that would entitle a partner to benefits such as health insurance coverage through his or her partner's employer and the partners couldn't file a joint tax return.)

The current United States "majority rule" toward unmarried heterosexual cohabitants is consistent with the policies in a number of other Western countries. A few countries now let straight couples opt into some status other than marriage. For example, the Netherlands lets straight couples opt into a status other than marriage ("registered partnership"), and that election has significant consequences.[20] Like-

16 *See, e.g.*, JOHN MEE, THE PROPERTY RIGHTS OF COHABITEES 21 (1999).

17 In two states, Texas and Minnesota, any contractual claim must be based on a written agreement. *See* TEX. FAM. CODE ANN. § 1.108 (Vernon 1998); MINN. STAT. ANN. § 513.075 (West 1990). For a discussion of cohabitants' property rights in four common-law countries, see generally MEE, *supra* note 16.

It apparently is unclear whether cohabitation contracts are enforceable in England. *See* Mark Pawlowski, *Cohabitation Contracts—Are They Legal?*, 146 NEW L.J. 1125, 1125 (1996). The enforceability of cohabitation contracts in Canada, as of 1993, is discussed in ONTARIO LAW REFORM COMM'N, REPORT ON THE RIGHTS AND RESPONSIBILITIES OF COHABITANTS UNDER THE FAMILY LAW ACT 9 n.5 (1993).

18 California permits a couple to register as domestic partners for very limited purposes, if each of them is older than sixty-two. CAL. FAM. CODE § 298 (West 1994 & Supp. 2001).

19 *See* OLDHAM, *supra* note 3, § 1.02 (discussing the claims available for disputes between cohabitants). *See generally* Joel E. Smith, Annotation, *Property Rights, Arising from Relationship of Couple Cohabitation Without Marriage*, 3 A.L.R.4th 13 (1979).

In some states, if cohabitants marry and later divorce, in fashioning the economic award at divorce some courts consider as an equitable factor that the parties cohabited before marriage. *See, e.g., In re* Rolf, 27 Fam. L. Rep. (BNA) 1106 (Mont. Dec. 27, 2000). Some courts treat the cohabitants in such a situation as effectively having a common-law marriage, even in states that ostensibly don't accept that type of marriage. *See* Northrop v. Northrop, 27 Fam. L. Rep. (BNA) 1191 (N.D. Jan. 18, 2001). Of course, not all states agree with this approach. *See* Stoner v. Stoner, 27 Fam. L. Rep. (BNA) 1143 (Tenn. Ct. App. Feb. 15, 2001).

20 *See* Wendy M. Schrama, *Registered Partnership in the Netherlands*, 13 INT'L J.L. POL'Y & FAM. 315, 315–18 (1999). Nova Scotia now permits straight couples to opt

wise, the French "PACS" (Pacte Civil de Solidarite et du Concubinage) lets straight couples (and other family members) opt into a status other than marriage, but this has less private law significance than that resulting under Dutch law for a registered partnership filing.[21] Couples are required to draw up a written agreement summarizing the rights and obligations that will arise in connection with the relationship.[22] In Belgium, straight or gay couples may elect into a status other than marriage; if this is done, one ramification is that there is a presumption that all property acquired during the relationship is jointly owned.[23] Catalonia lets gay or straight couples elect to form a "stable union."[24]

An increasing number of jurisdictions treat unmarried heterosexual cohabitation as a status for some purposes even if no affirmative joint filing is made. In New South Wales, since 1984 heterosexual cohabitants have had the right to claim post-dissolution support and a property award in some instances, if the relationship lasted at least two years or the parties had a child together.[25] The right to a property

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into the status of "domestic partners," which is the equivalent to marriage. Law Reform (2000) Act, ch. 29, § 45, *available at* http://www.gov.ns.ca/legi/legc/bills/58th_1st/3rd_read/b075.htm.

21 *See* Martin & Thery, *supra* note 11, at 149. *See generally* Anne Barlow & Rebecca Probert, *Reforming the Rights of Cohabitants—Lessons from Across the Channel*, 29 FAM. L. 477, 477–79 (1999); Suzanne Deley, *France Gives Legal Status to Unmarried Couples*, N.Y. TIMES, Oct. 14, 1999, at A3; Eva Steiner, *The Spirit of the New French Registered Partnership Law—Promoting Autonomy and Pluralism or Weakening Marriage?*, 12 CHILD & FAM. L.Q. 1 (2000).

22 *See generally* Anne Barlow & Rebecca Probert, *Addressing the Legal Status of Cohabitation in Britain and France: Plus ça Change . . .?*, *at* http://webjcli.ncl.ac.uk/1999/issue3/barlow3.html (last modified June 28, 1999).

23 *See* Caroline Forder, *European Models of Domestic Partnership Law: The Field of Choice*, 17 CAN. J. FAM. L. 371, 383–85 (2000) (citing BELGIAN CIV. CODE Art. 1478 (1998)). This does not apply to property if the record title is in the name of one party. *Id.*

24 Dr. Miquel Martin Casals, Marriage-like Relationships and New Family Forms: The Legislation of the Catalan Parliament Within the Spanish Framework, Address at the International Society of Family Law, North American Conference 1 (June 10–12, 1999) (transcript on file with author). The new law is also discussed generally in Gabriel Garcia Cantero, *The Catalan Family Code of 1998 and Other Autonomous Region Laws on De Facto Unions*, *in* THE INTERNATIONAL SURVEY OF FAMILY LAW 397 (Andrew Bainham ed., 2001).

25 *See* Reg Graycar & Jenni Millbank, *The Bride Wore Pink . . . to the Property (Relationships) Legislation Amendment Act 1999: Relationship Law Reform in New South Wales*, 17 CAN. J. FAM. L. 227, 238–40 (2000). Similar legislation exists in South Australia, Victoria, the Northern Territory, and the Australian Capital Territory. *See id.* at 244 n.39; *see also* DOROTHY KOVACS, DEFACTO PROPERTY PROCEEDINGS IN AUSTRALIA 10–11 (1998); Rebecca Bailey-Harris, *Financial Rights in Relationships Outside Marriage: A Dec-*

award is much more limited than the marital property rights of spouses.[26] (Parties may opt out of this system via a written contract, but few appear to be doing so.[27]) Legislation adopted by the Catalan Parliament provides an expanded quantum meruit claim and a potential claim for maintenance upon the termination of a "stable" heterosexual union, which is defined as one lasting at least two years or one where there is a common child.[28] Similarly, in most Canadian provinces a heterosexual cohabitant is able to sue for post-dissolution support (but not a property award) if the relationship lasted more than the specified minimum duration, which differs from province to province.[29] In *Walsh v. Bona*,[30] the Nova Scotia Court of Appeals ruled in

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ade of Reforms in Australia, 9 INT'L J.L. & FAM. 233, 234–37 (1995) (discussing durational requirements for cohabitation in South Australia and New South Wales).

26 *See* Graycar & Millbank, *supra* note 25, at 244 n.39; *see also* Bailey-Harris, *supra* note 25, at 238–39; Judith Housego, *De Facto Relationships Property Claims—Some Certainty, at Least for Now*, 11 AUSTL. J. FAM. L. 239, 239–40 (1997) (discussing cases that have shaped property division between cohabitants in Australia).

27 Belinda Fehlberg & Bruce Smyth, *Pre-nuptial Agreements for Australia: Why Not?*, 14 AUSTL. FAM. L.J. 80, 94 (2000).

28 Act 10 of Ley de Uniones Estables de Parejas (Regarding Stable Pair Relationships) (D.O.G.C. 1998, 9155) (Spain), *available at* http://www.gencat.es/justicia/normes/angl/110e.htm (last modified Aug. 10, 2001); Martin Casals, *supra* note 24, at 5–7.

29 *See generally* Martha Bailey, *Marriage and Marriage-like Relationships*, Law Commission of Canada, *available at* http://www.lcc.gc.ca/en/themes/pr/cpra/bailey/index.html (last modified Jan. 2, 2001). Dr. Bailey states that post-dissolution support is possible in Nova Scotia if the relationship lasted at least one year, while a relationship duration of three years is required in Ontario and five years in Manitoba. *Id.*; *see, e.g.*, Ontario Family Law Reform Act of 1986, R.S.O., ch. F-3, §§ 29–30 (1990) (Can.).

In Alberta, a person now may claim support at the end of a heterosexual relationship if (i) it lasted at least three years, or (ii) they had a common child and the relationship was of some permanence. *See* Domestic Relations Amendment Act, 1999, ch. 20, § 2, 2 S.A. 539, 539 (Can.); Alberta Law Foundation, *Common Law Relationships FAQs, at* http://www.law-faqs.org/ab/comm.htm (last modified June 2000).

British Columbia permits a spousal support claim for a "marriage-like relationship" (straight or gay) that lasted at least two years. Family Relations Act, R.S.B.C., ch. 128, §§ 1, 89 (1996) (amended Oct. 1, 1998) (Can.).

For a discussion of recent developments in Canada, see generally Bala, *supra* note 13.

Shared property rights due to cohabitation is a possible remedy for heterosexual cohabitants only in the Northwest Territories. *See* Family Law Act, S.N.W.T., ch. 18, § 1 (1997) (Can.). Compared to U.S. law, Canadian law does permit a much broader constructive trust remedy for a partner who provides domestic services in a long cohabitation relationship. *See* Peter v. Beblow, [1993] S.C.R. 980 (Can.). *See generally* W. HOLLAND & B. STALBECKER-POUNTNEY, COHABITATION: THE LAW IN CANADA (1990).

30 97 A.C.W.S.3d 287 (Nova Scotia Ct. App. 2000), *available at* 2000 A.C.W.S.J. LEXIS 4240.

2000 that it was a violation of Canada's Charter of Rights and Freedoms not to include within the definition of "spouse," for purposes of the right to a division of property at the end of a relationship, heterosexual cohabitants who had cohabited for a long period.[31] The court gave the legislature a period of time to respond to this decision.[32] Washington courts have established a rule that heterosexual cohabitants may seek an award relating to property accumulated during the relationship (but not a support award), if the relationship was of a duration and had other characteristics that cause the court to determine that it was "meretricious."[33] An Oregon court has stated that a court has "equitable powers" to reach a "fair result" at the end of a cohabitation.[34] In Denmark, a heterosexual cohabitant might receive an award based on unjust enrichment; in Sweden and Norway, heterosexual cohabitants are considered to own jointly property acquired for the home.[35] In Hungary, there is a presumption that property acquired by gay or straight cohabitants during their relationships is jointly owned.[36] In France, a *union libre* (sometimes called *concubinage*) has for some purposes been treated as a marriage.[37]

So, it seems that two different regulatory models for heterosexual cohabitation seem to be evolving. One model (the Jerry Hall/Mick Jagger view and currently the U.S. majority view) gives cohabitants no status-based rights at the end of a cohabitation, other than child sup-

31 *See* Bala, *supra* note 13 (manuscript at text accompanying n.28).

32 *Id.* (manuscript at text accompanying n.31).

33 *See In re* Marriage of Pennington, 14 P.3d 764, 769–70, 773 (Wash. 2000); Connell v. Francisco, 898 P.2d 831, 836–37 (Wash. 1995). Oregon may permit equitable awards at dissolution even absent a recognized claim based on contract, unjust enrichment, or trust theories. Wilbur v. DeLapp, 850 P.2d 1151, 1153 (Or. Ct. App. 1993); Shuraleff v. Donnelly, 817 P.2d 764, 768 (Or. Ct. App. 1991).

34 *Wilbur*, 850 P.2d at 1153.

35 *See* Cohabitees (Joint Homes) Act, S.F.S. 1987:232, § 3, *amended by* S.F.S. 1991:627 (Swed.); Matthew Fawcett, *Taking the Middle Path: Recent Swedish Legislation Grants Minimal Property Rights to Unmarried Cohabitants*, 24 FAM. L.Q. 179, 179 (1990); Forder, *supra* note 23, at 376–81; Deborah M. Henson, *A Comparative Analysis of Same-Sex Partnership Protections: Recommendations for American Reform*, 7 INT'L J.L. & FAM. 282, 287 (1993); Ingrid Lund-Andersen, *Cohabitation and Registered Partnership in Scandinavia: The Legal Position of Homosexuals*, *in* THE CHANGING FAMILY—FAMILY FORMS AND FAMILY LAW 397, 402–03 (John Eekelaar & Thandabantu Nhlapo eds., 1998) (discussing the Norwegian Joint Household Act 1991, Act No. 45, and explaining that, in Norway, a cohabitant might also be given an interest in the family home, if the cohabitation lasted at least two years); Ingrid Lund-Andersen, *Moving Towards an Individual Principle in Danish Law*, 4 INT'L J.L. & FAM. 328, 336–39 (1990).

36 *See* PTK., ch. 46, § 578 (Hung.); Forder, *supra* note 23, at 376.

37 *See* Daniele Huet-Weiller, *"L'union libre" (La cohabitation sans Mariage)*, 29 AM. J. COMP. L. 247, 250–56 (1981); Steiner, *supra* note 21, at 6.

port, even if there is a common child. The other model gives cohabitants some status rights, but not all the rights of a married couple, if the cohabitation meets the minimum duration standard set forth. Of this latter group, some give cohabitants a right to claim post-dissolution support,[38] while others give shared property rights.[39]

2. Regulation of Gay Cohabitation

For purposes of regulating unmarried couples, most U.S. states do not distinguish between straight and gay couples. No significant status is possible; the only option offered is contract cohabitation.[40] A couple of states have adopted a different policy, in both instances prodded to do so by their respective state supreme court.[41] Hawaii adopted a "reciprocal beneficiary" law, which permits gay couples to register and thereby obtain some rights.[42] Vermont's "civil union" law permits gay couples to register and obtain almost all of the private rights married couples have.[43] California now permits a gay couple to file a "declaration of domestic partnership," but its effects are minimal.[44] In Washington, heterosexual cohabitants can be treated as a

38 For example, many Australian states and Canadian provinces give cohabitants such rights. *See supra* notes 24, 28–29 and accompanying text.

39 For example, Washington, Hungary, and Scandinavia give shared property rights. *See supra* notes 33, 35–36 and accompanying text.

40 California does let gay couples register as domestic partners, which has very limited effects. *See* CAL. FAM. CODE § 298 (West 1994 & Supp. 2001). The status election possible in Hawaii and Vermont (available only to gay couples) has more significant effects. *See* sources cited *infra* notes 42–43.

41 *See* Robert E. Rains, *The Evolving Status of Same-Sex Unions in Hawaii, Alaska, Vermont and Throughout the United States*, *in* 4 CONTEMPORARY ISSUES IN LAW 71, 82, 90–91 (Deborah Lockton et al. eds., 1999).

42 *See* HAW. REV. STAT. ANN. § 572C-4 (Michie 1999); Martha Bailey, *Hawaii's Same-Sex Marriage Initiatives: Implications for Canada*, 15 CAN. J. FAM. L. 153, 161 (1998); W. Brian Burnette, Note, *Hawaii's Reciprocal Beneficiaries Act: An Effective Step in Resolving the Controversy Surrounding Same-Sex Marriage*, 37 BRANDEIS L.J. 81, 81–82 (1998–1999).

43 *See* VT. STAT. ANN. tit. 18, § 5160 (2000); VT. STAT. ANN. tit. 15, §§ 1201–1207 (Supp. 2000); KRAUSE ET AL., *supra* note 3, at 37; Carey Goldberg, *Vermont Gives Final Approval to Same-Sex Unions*, N.Y. TIMES, Apr. 26, 2000, at A12.

44 *See* CAL. FAM. CODE § 298 (West 1994 & Supp. 2001). A number of cities permit gay couples to register as domestic partners; the effect of such a registration is also quite limited, although a partner may be able thereby to obtain health insurance coverage if the other partner is a city employee. *See* Sanford N. Katz, *Emerging Models for Alternatives to Marriage*, 33 FAM. L.Q. 663, 669 (1999); *see, e.g.*, CAMBRIDGE, MASS., MUN. CODE ch. 2.119 (2000); S.F., CAL., ADMIN. CODE §§ 62.1–62.8 (2001); N.Y., N.Y., ADMIN. CODE §§ 3-240 to -244 (1998).

"meretricious" relationship (with shared property rights); one case has ruled, however, that gay couples cannot.[45]

Although the rule in most U.S. states regarding unmarried straight couples is consistent with one of the two prevailing regulatory models in the West, the majority rule toward gay couples differs from the emerging Western consensus. During the past decade, more and more countries have accepted that gay couples should be able to elect into some status (but not marriage),[46] and this election has significant consequences. This policy was first promulgated in Denmark in 1989[47] and then was accepted throughout Scandinavia,[48] and has recently been adopted by the Netherlands.[49] Gay couples may establish

45 *See* Vasquez v. Hawthorne, 994 P.2d 240, 243 (Wash. Ct. App. 2000), *appeal docketed*, 11 P.3d 825 (Wash. 2000).

46 In 2000, the Netherlands became the first country to permit gays to marry. *See Same-Sex Dutch Couples Gain Marriage and Adoption Rights*, N.Y. TIMES, Dec. 20, 2000, at A6; *see also* Caroline Forder, *Opening Up Marriage to Same Sex Partners and Providing for Adoption by Same Sex Couples, Managing Information on Sperm Donors, and Lots of Private International Law*, *in* THE INTERNATIONAL SURVEY OF FAMILY LAW 239, 247–51 (Andrew Bainham ed., 2000) (discussing the process by which the legislation permitting same-sex marriages came about).

The various approaches to gay cohabitation that now exist in Europe are discussed in LAW COMMISSION OF NEW ZEALAND, STUDY PAPER 4, RECOGNISING SAME-SEX RELATIONSHIPS (1999).

47 *See* Linda Nielsen, *Family Rights and the "Registered Partnership" in Denmark*, 4 INT'L J.L. & FAM. 297, 298 (1990).

48 Norway adopted its legislation in 1993, Sweden in 1995, Iceland in 1996, and the Netherlands in 1998. Kees Waaldijk, *Civil Developments: Patterns of Reform in the Legal Position of Same-Sex Partners in Europe*, 17 REVUE CANADIENNE DE DROIT FAMILIAL 62, 80 (2000); *see also* Lund-Andersen, *Cohabitation and Registered Partnership in Scandanavia*, *supra* note 35, at 397 & nn.2–4.

For translations of some of these laws, see Marianne Roth, *The Norwegian Act on Registered Partnership for Homosexual Couples*, 35 U. LOUISVILLE J. FAM. L. 467, 467–68 (1996–1997) (Norway); and Jorge Martin, Note, *English Polygamy Law and the Danish Registered Partnership Act: A Case for the Consistent Treatment of Foreign Polygamous Marriages and Danish Same-Sex Marriages in England*, 27 CORNELL INT'L L.J. 419, 430–31 (1994) (Denmark).

For a comparative discussion of these laws, see generally Henson, *supra* note 35.

49 *See* Schrama, *supra* note 20, at 315. In late 2000, the Netherlands became the first country to enact a law permitting gay couples to marry. *See supra* note 46. Both gay and straight partners can opt into the status of "domestic partners" in Nova Scotia. *See* Law Reform (2000) Act, S.N.S., ch. 29, § 45, *available at* http://www.gov.ns.ca/legi/legc/bills/58th_1st/3rd_read/b075.htm.

As of August 1, 2001, Germany permits couples to enter into a "registered life partnership." This status creates inheritance rights in the surviving partner, but such couples do not get the same tax advantages of married couples and cannot adopt. *See Same-Sex Partners Win Legal Status in Germany*, N.Y. TIMES, Aug. 2, 2001, at A3.

a "PACS" in France and a "stable union" in Catalonia, both by an affirmative act by both parties.[50]

New South Wales took a different approach toward gay couples with its 1999 amendments, which extended its policy adopted in 1984 regarding heterosexual cohabitants to gay couples. Pursuant to this change, all cohabiting gay couples now potentially may sue for post-dissolution support and a (limited) property adjustment claim, as long as the relationship lasted at least two years (even if the parties did not formally opt into any status).[51] Queensland apparently adopted a similar law in late 1999.[52] Similarly, in British Columbia, a partner in a gay cohabitation relationship may sue the other for support at the end of the relationship, as long as the relationship lasted at least two years.[53] The Canadian Supreme Court has suggested that it is a violation of Canada's Charter to bar a dependent member of a same-sex cohabitation relationship from seeking post-dissolution support.[54]

So, some countries have merely extended their rules regarding heterosexual cohabitants to gay couples. The growing trend, however, is to create a status that only gay couples may opt into.

In most Western jurisdictions, I would summarize prevailing policies in this way: (i) unmarried partners either (a) have no rights or obligations arising from the relationship (other than child support) unless they either enter into an agreement or take an affirmative act to create a status or (b) are given some rights, but fewer rights than married people (even if they do not opt into a status); (ii) unmarried heterosexual couples may not elect any status other than marriage; and (iii) it is increasingly common that gay couples may opt into some status, but not marriage. Is this a sensible regime?

B. The American Law Institute's Recommendations

Compared to the evolving Western consensus discussed above, the drafters of the American Law Institute's *Principles of the Law of Family Dissolution* take a very different approach to the rights of unmarried

50 *See* Steiner, *supra* note 21, at 1; Martin Casals, *supra* note 24, at 5. On "PACS," see *supra* note 21 and accompanying text.

51 *See* Graycar & Millbank, *supra* note 25, at 248–54; Jenni Millbank, *The Property (Relationships) Legislation Amendment Act 1999 (NSW)*, 13 AUSTL. FAM. L.J. 93, 93 (1999).

52 *See* Graycar & Millbank, *supra* note 25, at 244 n.39, 247 n.46.

53 *See* Family Relations Act, R.S.B.C., ch. 128, §§ 1, 89 (1996) (amended Oct. 1, 1998) (Can.).

54 *See* Bala, *supra* note 13 (manuscript at text accompanying nn.5–8) (discussing *M. v. H.*, [1999] 2 S.C.R. 3 (Can.)).

partners.[55] They appear to agree that, when the relationship begins, unmarried partners initially should have no rights or obligations due to the relationship. This is not totally clear, because any partner to a relationship of *any* duration may attempt to prove that the partners "for a significant period of time . . . shared a primary residence and a life together as a couple."[56] The drafters do not define what should constitute a "significant period" for this purpose.[57]

The most surprising aspect of the suggested model is that it proposes (for private law purposes) that gay or straight unmarried partners be treated as spouses if the relationship satisfies certain standards. If partners maintain a common household for a period greater than a specified "cohabitation period," it would be presumed that the parties shared "life together as a couple."[58] No specific "cohabitation period" is recommended, but the report states that three years would be a "reasonable choice."[59] Whether partners in fact shared a common life together as a couple would be determined based on a review of thirteen factors.[60] Alternatively, parties could also be treated as spouses if they cohabit with their common child for a minimum specified period, known as the "cohabitation parenting period."[61] It is suggested that this period be shorter than the "cohabitation period" chosen.[62] The Comment suggests that a period of two years would be "appropriate" for this purpose.[63]

No affirmative act by both parties, such as a registration of some type, is required to create the status proposed under the ALI model. Very few jurisdictions have adopted a policy of this type toward unmarried partners.[64] (It might be thought of as an attempt to update

55 *See generally* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (Tentative Draft No. 4, 2000) [hereinafter ALI PRINCIPLES (Tentative Draft 2000)].

56 *Id.* § 6.03(6).

57 The statute does suggest that an important factor is whether the relationship has changed the circumstances of either party. *See id.*

58 *Id.* § 6.03(3).

59 *Id.* cmt. at 23.

60 *Id.* § 6.03(7).

61 *Id.* § 6.03(2).

62 *Id.* cmt. at 23.

63 *Id.* Parties may opt out of this system by written agreement, subject to the same equitable limits applicable to premarital agreements. *Id.* § 6.01(3).

64 Nova Scotia may have backed into such a policy due to *Walsh v. Bona*, discussed *supra* text accompanying note 30. This policy apparently now exists in the Northwest Territories in Canada. *See supra* note 29. The current New Zealand government has proposed legislation that would treat cohabitants who have lived together for three years as spouses. *See* Blumberg, *supra* note 10, at 1299 n.140.

the definition of common-law marriage, which is accepted in some U.S. jurisdictions.) I will discuss below why I do not support these recommendations.[65]

So, it seems that at least three policy questions regarding unmarried partners are ripe for consideration: (i) what is a sensible regulatory regime for gay couples; (ii) what rights and obligations, if any, should unmarried straight partners have if they make no express agreement or take no affirmative act to elect into any status; and (iii) is there any need for some alternative status, other than marriage, for straight couples? In this Article, I will focus on the last two questions.

II. THE REGULATION OF UNMARRIED HETEROSEXUAL PARTNERS IN THE TWENTY-FIRST CENTURY

A. Rules Regarding the Initial Relationship Period

There seems little support for a reversion to what in practice apparently was U.S. policy in many states toward unmarried heterosexual partners living together about a century ago—to treat them immediately as married.[66] Almost all commentators, as well as the drafters of the ALI proposal, accept that some "trial" period should be accepted where no rights arise (unless the parties agree to the contrary).[67] If this is so, what "trial" period seems sensible?

As this Article was going to press, this legislation was enacted. *See* Property (Relationships) Amendment Act of 2001 (N.Z.), *available at* http://www.brookers.co.nz/property_act/default.htm (last visited July 29, 2001). In addition to this New Zealand legislation, one might also note that Canada appears to be heading in a similar direction. Unmarried partners have post-dissolution support rights if the relationship lasted a certain specified minimum period, and cohabitants in long-term cohabitation relationships have broad rights to property accumulated by the partners during the relationship pursuant to an expanded constructive trust remedy. *See supra* note 29.

In Australia, many states permit cohabitants to make a claim for property when a relationship ends, but the grounds for such a claim are much more limited than those given spouses. (Post-dissolution support rights are also possible.) *See supra* note 25.

Some Latin American countries have created substantial private law remedies for cohabitants in some instances. *See* Jose E. Arraros, *Concubinage in Latin America*, 3 J. FAM. L. 330, 334–39 (1963); Delia B. Iñigo, *Argentina—A New Legal Approach to the De Facto Union*, *in* THE INTERNATIONAL SURVEY OF FAMILY LAW 1997, at 13, 15–20 (Andrew Bainham ed., 1999); Eduardo Le Riverend-Brusone, *Anomalous Marriages*, 10 Miami L.Q. 481, 484–87 (1956); A. Sanchez-Cordero, *Cohabitation Without Marriage in Mexico*, 29 AM. J. COMP. L. 279, 282–84 (1981).

65 *See infra* text accompanying notes 66–106.

66 *See supra* text accompanying notes 5–6.

67 *See, e.g.*, ALI PRINCIPLES (Tentative Draft 2000), *supra* note 55, § 6.03(1)–(3), (7).

Empirical studies have found that, in the United States, most unmarried heterosexual partners either marry or break up in a relatively short time. About half of U.S. cohabitants marry.[68] Of those who do not marry, one-sixth last three years and about 10% last five years.[69] So, if a trial period of three years would be accepted, it appears that most cohabitants would still be able to experience a "trial" period during which no rights or responsibilities would result (unless the parties made an agreement to the contrary).

Some have been critical of any such "safe harbor" trial period, expressing concern that such a system would permit "strategic behavior," such as breaking up shortly before the specified trial period expires.[70] Such "strategic behavior" may well have been reflected in the timing of the divorce decision by the actor Tom Cruise. He alleges in his divorce petition that he and his wife separated days before their tenth anniversary.[71] Until a recent change in the California Family Code, California courts presumptively awarded lifetime support to spouses married at least ten years before separation.[72] In marriages of shorter duration, the California custom has been to award support for, at most, half the duration of the marriage.[73] I would submit that this is precisely the advantage of what I am proposing. Under such a system, people would be given the freedom to cohabit for less than a

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68 *See* Bumpass & Lu, *supra* note 14, at 33.

69 *Id.; see also* Larry L. Bumpass et al., *The Role of Cohabitation in Declining Rates of Marriage*, 53 J. MARRIAGE & FAM. 913, 919 (1991) (discussing the characteristics of cohabitors); Arland Thornton, *Cohabitation and Marriage in the 1980s*, 25 DEMOGRAPHY 497, 504–06 (1988) (discussing rates of cohabitation termination).

For similar Canadian results, see Zheng Wu & T.R. Balakrishnan, *Dissolution of Premarital Cohabitation in Canada*, 32 DEMOGRAPHY 521, 526 (1995). Kiernan finds that the median duration of cohabitation in Europe is less than two years in most countries. Kiernan, *supra* note 9, at 29.

The average duration of cohabitation in France may be longer. *See generally* Henri Leridon, *Cohabitation, Marriage, Separation: An Analysis of Life Histories of French Cohorts from 1968 to 1985*, 44 POPULATION STUD. 127 (1990) (analyzing cohabitation in France and its effect on marriage).

For a discussion of the rate of breakdown of cohabitation relationships in Europe, see Kiernan, *supra* note 10, at 7–8.

70 *See* ALI PRINCIPLES (Tentative Draft 2000), *supra* note 55, § 6.03(2)–(3) cmt. at 28.

71 *See* Anne-Marie O'Neill, *Cruising for Control*, PEOPLE, Feb. 26, 2001, at 74, 76; *The End of the Aussie-American Pact*, TIME, Feb. 19, 2001, at 88.

72 *See, e.g., In re* Marriage of Baker, 4 Cal. Rptr. 2d 553, 557 (Ct. App. 1992) (pointing out that the ten-year standard is not absolute and that permanent alimony is possible in shorter marriages).

73 *See* O'Neill, *supra* note 71, at 74, 76; *The End of the Aussie-American Pact*, *supra* note 71, at 88.

specified trial period, knowing that no rights or obligations would result, unless a contract to the contrary was made. Courts would be spared a large number of mostly frivolous claims.

I have expressed elsewhere my belief that claims for shared property rights and post-dissolution support are more persuasive in relationships when a person is acting as the primary caretaker of a common child.[74] So, I would contend that the case for a trial period creating no rights and obligations is particularly strong for those in childless relationships. At a minimum, any "trial" period for childless relationships, therefore, should be longer than that for those involving a common child.

One could imagine a similar and potentially more serious "strategic" issue. People might break up shortly before the end of the trial period and then resume cohabiting shortly thereafter. To the extent that longer duration cohabitation relationships do create more rights, different periods of cohabitation should probably be added together to determine whether the minimum duration specified had been satisfied, at least where the period of "break-up" was relatively brief.

B. Longer-Term Relationships

If one accepts that a "trial" period of some short duration should not create any rights or obligations, the only remaining question would be whether another regulatory approach seems appropriate for cohabitation relationships that endure for a longer period. This is not an insignificant percentage of cohabitants. One study found that 19% of all cohabitants had neither broken up nor married after four years.[75]

Some defend the current English and U.S. majority view (that cohabitation never should impose any right or obligation, other than child support, absent an agreement) because this policy is consistent with the parties' intentions.[76] Unfortunately, no study clearly shows what heterosexual cohabitants "intend" by not marrying. Few seem to

74 *See* J. Thomas Oldham, *Putting Asunder in the 1990s*, 80 CAL. L. REV. 1091, 1125–29 (1992).

75 *See* Wendy D. Manning & Pamela J. Smock, *Why Marry?: Race and Transition to Marriage Among Cohabitors*, 32 DEMOGRAPHY 509, 512 (1995).

76 *See generally* MICHAEL D.A. FREEMAN & CHRISTINA M. LYON, COHABITATION WITHOUT MARRIAGE (1983) (arguing, predominantly in the context of the British system, against forcing marriage upon parties who do not want it); Ruth L. Deech, *The Case Against Legal Recognition of Cohabitation*, 29 INT'L & COMP. L.Q. 480 (1980) (objecting to legal recognition of cohabitation because of the negative effects such recognition would have upon women).

sign express agreements.[77] Some may indeed not want the rights and responsibilities of marriage. Other couples may disagree—one may want to marry while the other does not.[78] A third group of couples may have gradually evolved into a cohabitation relationship to save rent or for some reason unrelated to a choice of rights and responsibilities. From this perspective, it does seem unlikely that one can conclude *all* cohabitants have impliedly agreed that no rights and obligations ever should arise from a cohabitation.

All studies to date have found that, when compared to spouses, cohabitants are much less likely to pool their money.[79] An Australian study of divorced couples who had re-partnered found that 64% of those who had remarried pooled their money, compared to 36% of those who cohabited.[80] Of course, this does not show what *all* couples intend. One might even wonder whether keeping money separate reflects a clear understanding not to share accumulations upon separation.

Alternatively, one could defend the current U.S. majority view on the basis that unmarried cohabitation is so morally offensive that parties should be barred from litigating their rights in U.S. courts. Although this may have been true generations ago,[81] given the current

77 *See* Kirsti Strom Bull, *Nonmarital Cohabitation in Norway*, 30 SCANDINAVIAN STUD. L. 29, 39 (1986) (reporting that 5% of Norwegian cohabitants and 6% of Danish cohabitants signed agreements). For a similar statement about Australian cohabitants, see Fehlberg & Smyth, *supra* note 27, at 93.

78 One interviewer of cohabitants found that, in about 20% of the couples, one partner expected an eventual marriage and the other did not. Bumpass et al., *supra* note 69, at 921.

79 *See* PHILIP BLUMSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES 94 (1983). This study of American couples found that about two-thirds of all spouses immediately after marriage favored pooling their money, and fewer than 20% opposed it. *Id.* at 95 fig.8. In contrast, fewer than one-third of all heterosexual cohabitants favored pooling, and more than one-third opposed it. *Id.* at 95 fig.8.

An English study found that 24% of cohabitants kept their money separate, as compared to 6% of married couples. *See* Helen Glezer & Eva Mills, *Controlling the Purse Strings*, 29 FAM. MATTERS 35, 35 (1991).

80 *See* Ruth E. Weston, *Financial Arrangements and Personal Income*, *in* SETTLING UP: PROPERTY AND INCOME DISTRIBUTION ON DIVORCE IN AUSTRALIA 131, 132 (Peter McDonald ed., 1986).

81 *See* J. Thomas Oldham & David S. Caudill, *A Reconnaissance of Public Policy Restrictions upon Enforcement of Contracts Between Cohabitants*, 18 FAM. L.Q. 93, 106–07 (1984).

prevalence of cohabitation and its increasing social acceptance, this seems a poor justification for the current U.S. rule.[82]

In contrast to the current U.S. view, a number of commentators argue that, after some specified duration, the private law effects of cohabitation should be the same as marriage.[83] These commentators emphasize that longer-duration cohabitation relationships resemble marriages in many ways.[84] For example, career damage can occur due to roles assumed during a marriage or cohabitation. Due to this functional resemblance, it is argued that the private law effects should be identical.

In addition, some argue that cohabitants believe their legal rights will be the same as those of a married couple (so they should be treated the same).[85] As mentioned above, there is little empirical evidence showing what cohabitants believe. To justify the "U.S view," proponents make the opposite argument, that cohabitants intend *not* to share property.[86]

One concern that has been voiced regarding treating cohabitation as more of a status is that doing so would undermine marriage.[87] It is hard to be certain whether recognizing cohabitation as a status would discourage marriage. In jurisdictions that largely do not now recognize cohabitation as a status, such as most of the U.S., England, and Denmark, cohabitation continues to become more popular. Would this trend be exacerbated with more legal recognition?

Eric Clive has argued that "it seems . . . absurd to suggest that nowadays people marry exclusively or primarily for property rea-

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82 A few states do still criminalize cohabitation and sometimes prosecutions result. *See, e.g.*, Jim Yardley, *Unmarried and Living Together, Till the Sheriff Do Us Part*, N.Y. TIMES, Mar. 25, 2000, at A9.

83 *See, e.g.*, ALI PRINCIPLES (Tentative Draft 2000), *supra* note 55, § 6.02 cmt. at 10–14; LAW REFORM COMM'N OF NOVA SCOTIA, FINAL REPORT ON REFORM OF THE LAW DEALING WITH MATRIMONIAL PROPERTY IN NOVA SCOTIA 18–24 (1997); ONTARIO LAW REFORM COMM'N, *supra* note 17, at 27–31; Rebecca Bailey-Harris, *Law and the Unmarried Couple—Oppression or Liberation?*, 8 CHILD & FAM. L.Q. 137, 137 (1996); Richard Chisholm et al., *De Facto Property Decisions in NSW: Emerging Patterns and Policies*, 5 AUSTL. J. FAM. L. 241, 241 (1991).

84 *See* sources cited *supra* note 83.

85 *See* ONTARIO LAW REFORM COMM'N, *supra* note 17, at 28.

86 *See supra* text accompanying note 76.

87 *See* Anders Agell, *The Swedish Legislation on Marriage and Cohabitation: A Journey Without a Destination*, 24 SCANDINAVIAN STUD. L. 9, 45–47 (1980); Stephen Cretney, *The Law Relating to Unmarried Partners from the Perspective of a Law Reform Agency*, *in* MARRIAGE AND COHABITATION IN CONTEMPORARY SOCIETIES 357, 365 (John M. Eekelaar & Sanford N. Katz eds., 1980); Lund-Andersen, *Moving Towards an Individual Principle in Danish Law*, *supra* note 35, at 331.

sons."[88] In contrast, data from Sweden could be used to support the idea that giving cohabitants more rights can undermine marriage. Between 1977 and 1987, before Sweden had adopted any protection for cohabitants, the annual number of women entering a first marriage, per 1000 of population, dropped from seventy-six to forty-nine.[89] In the decade after the Swedish legislature adopted cohabitation rights (1987–1996), the number dropped from forty-nine to thirty-three.[90] One could argue that this continued decline is related to the cohabitation legislation. Alternatively, it could be argued that this merely reflects the increasing popularity of cohabitation. Indeed, it could be pointed out that the first marriage rate per 1000 population dropped 35% from 1977 to 1987, while it dropped "only" 32% from 1987 to 1996.

In addition to the "discouraging marriage" concern, the proposal to equate the private law effects of longer-term cohabitation with marriage starkly presents the question of why the law of many Western jurisdictions now provides that marital property rights and post-dissolution support obligations can result from marriage. It seems to me there are two rationales: (i) roles assumed in an intimate relationship can create career damage to a partner; and (ii) the parties have agreed to assume the status of spouses, which operates as an implied acceptance of the legal rights and obligations of marriage. The former could be true in a cohabitation relationship, while the latter could not (absent an agreement).

Another reason to be hesitant to treat unmarried partners like spouses stems from the fact that cohabitants differ in significant ways from spouses. In addition to the different ways mentioned above that spouses and cohabitants often handle their finances,[91] social scientists have found that cohabitants are less committed to each other.[92] For example, Bumpass and Lu assert that "[a]s cohabitation becomes increasingly accepted, cohabitations may include a greater proportion

88 E.M. Clive, *Marriage: An Unnecessary Legal Concept?*, *in* MARRIAGE AND COHABITATION IN CONTEMPORARY SOCIETIES, *supra* note 87, at 71, 75.

89 *See* Forder, *supra* note 23, at 379.

90 *See id.*

91 *See supra* note 79.

92 *See, e.g.*, Stephen L. Nock, *A Comparison of Marriages and Cohabiting Relationships*, 16 J. FAM. ISSUES 53, 65–67 (1995); Carol Smart, *Stories of Family Life: Cohabitation, Marriage, and Social Change*, 17 CAN. J. FAM. L. 20, 32 (2000).

of couples with less serious commitments."[93] Infidelity is more common as well.[94]

Should the private law rules regarding marriage be extended to all cohabitation relationships that last a certain period? Alternatively, should this rule only extend to cohabitations if there is a common child (and career damage)? I am not persuaded that, for private law purposes, childless cohabitation relationships of any duration should be equated with spouses, because career damage due to roles assumed in the relationship is unlikely. I have argued elsewhere that the justification for marital property rights and post-divorce support is much stronger in relationships where there is a common child, because career damage of a partner seems much more likely.[95] In my view, the claim for status-like rights for cohabitants is stronger in such households.

Some have argued that creating status-like rights for cohabitants who have not jointly elected the status is paternalistic and sexist, in that it is actually intended to provide protection for women who are assumed to be unable on their own to protect themselves legally.[96] Indeed, some contend that such a policy would "treat cohabitation as long term prostitution with delayed payment subject to arbitration."[97]

One compromise policy approach, which would acknowledge the dependence that can result from cohabitation, particularly if there is a common child, would be to consider cohabitation as a status if certain specified attributes would be satisfied, but this status would entail fewer rights and obligations than marriage.[98] This "status" would result even though the parties had made no formal declaration or filing to obtain it. This policy would respond to the fact that the parties had not jointly agreed to assume a formal status. It would be consistent with policies now in existence in many states in Australia, many Canadian provinces, and in Washington, Norway, and Sweden.[99] In addi-

93 Bumpass & Lu, *supra* note 14, at 33.

94 *See* Judith Treas & Deirdre Giesen, *Sexual Infidelity Among Married and Cohabiting Americans*, 62 J. MARRIAGE & FAM. 48, 59 (2000).

95 *See* Oldham, *supra* note 74, at 1114. Career damage could also result from the relationship if a partner assumes a primary caretaker role for the other partner's child. *Cf. id.* at 1107.

96 *See* Ruth Deech, *The Case Against Legal Recognition of Cohabitation*, *in* MARRIAGE AND COHABITATION IN CONTEMPORARY SOCIETIES, *supra* note 87, at 300, 303.

97 *Id.* at 303.

98 Professor Reppy has made a similar suggestion. *See* William A. Reppy, Jr., *Property and Support Rights of Unmarried Cohabitants: A Proposal for Creating a New Status*, 44 LA. L. REV. 1677, 1716–23 (1984).

99 *See supra* notes 31–35 and accompanying text.

tion, because this approach treats cohabitants differently from spouses, it presumably would be less likely to discourage marriage.

If this proposed compromise policy would be perceived as a sensible compromise, one would have to decide (i) what types of cohabitation relationships give rise to such rights, and (ii) what the rights would be. The Australian and Canadian approaches focus on a right to post-separation support as the main right flowing from the relationship, while Washington, Norway, and Sweden create joint ownership of certain property, but do not provide for post-separation support rights.[100]

If U.S. marital property rules would be used as a guide for a joint ownership policy, one cause for concern would be the time and expense required to determine what is jointly owned. Namely, what was acquired during marriage due to efforts, and what was acquired before marriage or during marriage by gift or inheritance?[101] Also, the size of the marital estate may bear little resemblance to what may be the most important concern—being able to provide adequate transitional support to a dependent partner. So, it does seem that the current Australian/Canadian approach offers some advantages to a

100 *See supra* notes 37 and 38.

Of course, these remedies would exist if the parties' relationship ended when both were still alive. What might be appropriate if the relationship continued until the death of a partner? Professor Fellows has found that, when asked, a substantial majority of unmarried partners wanted their partners to receive a large portion of their estate. Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 LAW & INEQ. 1, 38 (1998). This was true even when the partner was also survived by a child from a prior relationship. *Id.*; *see also* Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21 (1994). This study suggests that creating intestacy rights for a surviving unmarried partner may well be congruent with the intentions of many unmarried partners. Professor Waggoner goes one step farther and advocates a forced share for a surviving unmarried partner in some circumstances, even if the will of the deceased partner does not leave anything to the survivor. *See* Fellows et al., *supra*, at 92–95; Waggoner, *supra*, at 78–86. I would not support such a forced share. A potential support right from the decedent's estate for a dependent surviving partner, similar to the right which now exists under English law, would be more consistent with my proposal.

England does give a surviving cohabitant certain support rights from the deceased partner's estate, but not equivalent to those granted spouses. *See* Gillian Douglas, *Marriage, Cohabitation, and Parenthood—From Contract to Status?*, *in* CROSS CURRENTS 211, 219 n.39 (Sanford N. Katz et al. eds., 2000) (citing Law Reform (Succession) Act 1995, § 2).

In New Hampshire, those cohabitants who have cohabited for at least three years and are still cohabiting when one dies are treated as married. N.H. REV. STAT. ANN. § 457:39 (1992).

101 For a general discussion of U.S. rules about these matters, see OLDHAM, *supra* note 3.

marital property approach.[102] Of course, one drawback of post-dissolution support is that enforcement can be a problem.

I would propose that a cohabitant should be eligible for a post-dissolution transitional support award, if the relationship lasted longer than the "trial" period selected and the claimant was the primary caretaker of a common child. In addition, a state could permit a transitional support order in childless relationships that lasted longer than the trial period if a claimant suffered career damage due to the relationship. This right to post-dissolution support for cohabitants could be opted out of via an agreement, with the rules governed by the state's law regarding waivers of post-divorce spousal support.[103]

One could highlight the differences in approaches toward unmarried partners by considering how the Marvins would be treated under each regime. As everyone knows, after remand, Ms. Triola eventually received nothing.[104] The ALI approach presumably would treat the Marvins as if they had married. Under my approach, Ms. Triola would have a transitional support right, as long as she could establish career damage due to the relationship. So, the remedy granted Ms. Triola by the trial court may well be appropriate under the approach I propose.[105]

If a new private law status for some "cohabitants" is created, one could expect some gray areas. For example, what is "cohabitation"?[106] If parties still have separate residences, but spend some nights together each week, would this be included?[107] If one party "moves in" with another and spends most if not all nights there, but still maintains an apartment elsewhere, has cohabitation begun? Or should the critical date be when the person moves his or her belongings out of the other apartment? The *ALI Principles* would require cohabitants to be sharing a "primary residence,"[108] which "must be the primary

102 Professor Reppy has suggested that the partners should have common property rights in property accumulated during the relationship and limited support rights. *See* Reppy, *supra* note 98, at 1720–21.

103 Some U.S. states permit such a waiver; others do not. *See* OLDHAM, *supra* note 3, § 4.03[3](a).

104 Marvin v. Marvin, 176 Cal. Rptr. 555, 559 (Ct. App. 1981).

105 Marvin v. Marvin, 5 Fam. L. Rep. (BNA) 3077, 3085 (Cal. Super. Ct. 1979).

106 Possibly only the French would argue about whether one could have two "cohabitants" simultaneously. *See* Steiner, *supra* note 21, at 6 n.28 (noting a split of authority).

107 In the Canadian case of *Thauvette v. Maylon*, [1996] 23 R.F.L.4th 217, 222–24 (Ontario Gen. Div.), *available at* 1996 Ont. C.J. LEXIS 1464, such parties were considered cohabitants.

108 ALI PRINCIPLES (Tentative Draft 2000), *supra* note 55, § 6.03(1).

abode of both parties."[109] So, it would appear that, at least under the ALI view, the couple discussed above would not be "cohabitants" until the party had given up the apartment.

A related practical question would be whether it would be difficult to prove whether a cohabitation relationship existed. Some have suggested this would be difficult. Harry Krause has concluded,

> It is difficult to avoid the conclusion that unless a legal formality "sanctifies" the partnership, the expense and uncertainty of litigating *ex post facto* whether a status actually existed and what it was or is may well not be worth the unpredictability and trouble it would cause in human relations.[110]

While it is conceivable that a party's residence might be unclear at times, it would seem that, in a world with driver's licenses, tax returns, credit card bills, bank statements, utility bills, cable bills, telephone bills, magazine subscriptions, and W-2 forms, among other things, it would not be difficult after-the-fact to try to reconstruct the general contours of where people lived. Certainly it would be useful to investigate whether this has been a problem in Australia or Canada, where post-dissolution support rights can flow from cohabitation, as long as the cohabitation period lasted a certain specified minimum duration.[111]

RIGHTS OF UNMARRIED COHABITANTS

	Short Term Relationship	Longer Term; No Common Child	Longer Term With Common Child
Current U.S. View	No rights	No rights	No rights
ALI Proposal	No rights probably	Treat like spouses	Treat like spouses
Canada/Australia	No rights	Post-dissolution support possible	Post-dissolution support possible
Oldham Proposal	No rights	Post-dissolution support possible	Post-dissolution support possible

C. Is a New "Marriage Lite" Needed?

For generations, American theorists have speculated regarding whether different types of marriage would be a good idea. For example, the idea of a "trial marriage" has been proposed on more than

109 *Id.* § 6.03 cmt. at 20.

110 Harry D. Krause, *Marriage for the New Millenium: Heterosexual, Same-Sex—Or Not at All?*, 34 FAM. L.Q. 271, 297 (2000).

111 *See supra* notes 21–26, 33 and accompanying text.

one occasion for young, childless couples.[112] (Unmarried cohabitation may well serve this role now for many couples.) More recently, legislators and commentators have proposed covenant marriage, a type of marriage with more restricted exits.[113]

A question less frequently asked today, at least regarding straight couples, is whether couples should be given another status choice other than marriage, one that would be "lighter" in its private law effects. "Temporary marriage" is possible in Iran, but this seems to have no private law effect; it apparently exists so couples can evade the otherwise substantial penalties for premarital sex.[114]

California is the only state to date that has accepted such a "lite" marriage status for straight couples. In California, a straight couple may elect to be "domestic partners," but only if both are sixty-two or older.[115] This permits older couples to elect into a status without losing rights either partner has as a surviving or divorced spouse, which would be lost upon "remarriage." In addition, it may thereby be easier to get health insurance coverage through the partner's employer.

Hawaii's "reciprocal beneficiary" status creates more private law rights than California's domestic partnership, but fewer than those of spouses.[116] Reciprocal beneficiaries also get the right to sue for wrongful death of a partner, hospital visitation rights, and inheritance rights from the partner. (This status is now only available for gay couples in Hawaii.[117])

A number of other countries, such as France and the Netherlands, have created a status "lighter" in private law effects than marriage that is available to straight couples.[118]

One could imagine that a significant number of straight couples of any age might wish to establish some type of status, even though they are not interested in all the traditional private law effects of marriage.[119] In addition to establishing another type of (albeit limited)

112 *See* Deborah Schupack, *'Starter' Marriages: So Early, So Brief*, N.Y. TIMES, July 7, 1994, at C1 (discussing, among other things, the proposal made by Margaret Meade in the 1960s to recognize "trial marriages").

113 *See* ARIZ. REV. STAT. ANN. §§ 25-901 to -906 (West 2000); LA. REV. STAT. ANN. §§ 9:272, 9:275.1 (West 2000). *See generally* Katherine Shaw Spaht, *Louisiana's Covenant Marriage: Social Analysis and Legal Implications*, 59 LA. L. REV. 63 (1998).

114 *See* Elaine Sciolino, *Love Finds a Way in Iran: "Temporary Marriage,"* N.Y. TIMES, Oct. 4, 2000, at A3.

115 CAL. FAM. CODE § 297 (West Supp. 2001).

116 *See* HAW. REV. STAT. ANN. § 572C-4 (Michie 1999).

117 *See supra* text accompanying note 42.

118 *See supra* notes 20–24.

119 For a detailed discussion of this matter, see Craig A. Bowman & Blake M. Cornish, Note, *A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordi-*

public commitment, another incentive for people to opt into it would be an increased ability to obtain health insurance coverage.[120] If increased coverage could be achieved via this new status, this would have a number of positive social effects. More citizens would be insured and have adequate health care. (This obviously is more of a concern in the United States, compared to the many other Western countries that have national health insurance for all.) Also, such a result should reduce public expenditures for health care costs of the uninsured poor.

Such a "lite" marriage option could have other ramifications, if thought desirable, such as intestate inheritance rights of some kind and the right to sue for wrongful death. It may be possible to incorporate into this election some type of clarification about the parties' understanding about their property rights. For example, the election form could state that the parties will have no joint ownership rights in property accumulated during the relationship or post-dissolution support rights unless they sign an agreement to the contrary. This is done in connection with the French "PACS," for example.[121] Only unmarried people should be permitted to opt into this status, and only one such relationship could be registered at any one time. Since the norm would be that (subject to an agreement to the contrary) the parties would have no shared property rights or post-divorce support obligations, terminating such a status would be fairly simple and could be unilaterally done by a partner, with notice given to the other partner.

Any discussion of creating a "lite" marriage runs into the challenge that it would undermine marriage.[122] But at least in those states that have adopted the Uniform Premarital Agreement Act, and in other states that give spouses free reign to change marital property rights and post-dissolution support rules contractually, parties are already given almost unlimited freedom to define the private law effects of marriage.[123] They merely must draft a contract setting forth the

nances, 92 COLUM. L. REV. 1164, 1165–79 (1992). *See also* Chambers, *supra* note 5, at 485–86 (discussing the advantages, financial and otherwise, of marital status over single, cohabiting status).

120 *See* Bowman & Cornish, *supra* note 119, at 1177 & n.25.

121 *See* Steiner, *supra* note 21, at 1.

122 Mike Allen, *Cardinal Sees Marriage Harm in Partners Bill*, N.Y. TIMES, May 25, 1998, at A1; Adrian Walker & Tina Cassidy, *Cellucci Rejects City's Partners Bill*, BOSTON GLOBE, July 31, 1998, at A1.

123 UNIF. PREMARITAL AGREEMENT ACT § 3, 9B U.L.A. 373 (1987); *see also* OLDHAM, *supra* note 3, § 4.02 n.10 (listing the states that have adopted the original version of the UPAA or a modified version).

rules.[124] So, people now may "marry" but, via a premarital agreement, have no marital property rights or post-divorce support obligations.[125] How is this different, except in name, from the domestic partner relationship status I am proposing? It would merely save the DeLoreans of the world the transaction cost of drafting the agreement.

If one would adopt such a status, a drafter would need to be concerned about other effects of such a status. Would a joint tax return be required? Could a partner leave an estate of any amount free of estate tax to the other partner? Would a post-dissolution support obligation be dischargeable in bankruptcy?[126]

For political purposes, and to reduce public confusion, if such an additional status would be created, it should be called something other than marriage. Past terms that have been used are "domestic partners" or "registered partners"; "intimate partners" also would be possible. The term "registered partner" is helpful in that it connotes that the status is obtained by registering.

CONCLUSION

I have summarized above comparative trends in the regulation of heterosexual cohabitation. There currently is a great debate about the best regulatory approach. Some jurisdictions retain the current U.S. majority approach.[127] An increasing number, however, treat long-term cohabitation as a private law status, albeit one with fewer ramifications than marriage.[128] Finally, a growing number of commentators urge that long-duration cohabitation should be treated like marriage.[129]

I have proposed that the current United States approach should be changed, at least for those cohabitation relationships of some duration where a partner has suffered career damage due to the relationship, either by being a primary caretaker for a common child or for some other reason. Post-dissolution support should be possible in such cases, unless the parties had made an enforceable agreement to the contrary. So, as to the Jagger/Hall household, under this approach Ms. Hall would be entitled to post-dissolution "spousal" sup-

124 UNIF. PREMARITAL AGREEMENT ACT, *supra* note 123, at § 2.

125 *See, e.g.*, DeLorean v. DeLorean, 511 A.2d 1257, 1261–62 (N.J. Super. Ct. Ch. Div. 1986).

126 Professor Reppy discusses these matters in his article. *See* Reppy, *supra* note 98, at 1714–16.

127 *See* OLDHAM, *supra* note 3, § 1.02; MEE, *supra* note 16, at 21.

128 *See supra* notes 25–37.

129 *See* sources cited *supra* note 83.

port, but not marital property rights (unless she would be considered a putative spouse).

I also propose the creation of some form of "lite" marriage for heterosexuals (a registered partnership status or the like) that would be created by a joint filing by a couple. Choosing this option could create some potential benefits for the partners, not the least of which would be to facilitate health insurance coverage. However, choosing this status would result in no joint property rights or post-dissolution support obligations, as long as the parties did not sign an agreement to the contrary.