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Marry Me, Bill: Should Cohabitation Be the (Legal) Default Option?

Margaret F. Brinig*

Steven L. Nock**

*Bill, I love you so, I always will, I look at you and see the
passion eyes of May. Oh, but am I ever gonna see my
wedding day?*

*Oh, I was on your side, Bill, when you were losin'. I'd never
scheme or lie Bill, there's been no foolin'. But kisses and
love won't carry me 'til you marry me, Bill . . .*

“Wedding Bell Blues,” by Laura Nyro
Recorded by The 5th Dimension

INTRODUCTION

Are cohabitation and marriage similar enough to warrant similar legal treatment? Earlier public reports on cohabitation have focused on the question of whether cohabitation before marriage increases or decreases the divorce rate.¹

But increasingly cohabitation is being proposed not as a testing ground for marriage, but as a functional substitute for it. The trend in family law and scholarship in Europe and Canada is to treat married and cohabiting couples similarly, or even identically.²

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1. See, e.g., David Popenoe & Barbara Dafoe Whitehead, *Should We Live Together? What Young Adults Need to Know about Cohabitation Before Marriage: a Comprehensive Review of Recent Research* (Rutgers University National Marriage Project 2d ed. 2002) available at <http://marriage.rutgers.edu/Publications/swlt2.pdf> (visited March 31, 2004).

2. See, e.g., Winifred Holland, *Intimate Relationships in the New Millennium: The Assimilation of Marriage and Cohabitation?*, 17 Can. J. Fam. L. 114 (2000); Miron v. Trudel, [1995] 2 S.C.R. 418, 13 R.F.L. (4th) 1; M v. H, [1999] 2 S.C.R. 3, 46 R.F.L. (4th) 32; Katharina Boele-Woelki, *Private International Law Aspects of Registered Partnerships and Other Forms of Non-Marital Cohabitation in*

In this country, the American Law Institute [ALI] recently proposed that, at least when it comes to the law of dissolution, couples who have been living together for a substantial period of time should be treated the same as married couples.³ The ALI recommendations carry particularly intellectual weight, given they are the product of ten years of study by one of the most influential and mainstream voices on legal reform.

These legal and intellectual trends no doubt reflect in part the increasing prevalence of cohabiting couples including cohabiting families. Our best evidence (from 1991) indicates that twelve percent of cohabiting couples have a biological child together.⁴ Births to cohabiting women now account for thirty-nine percent of all births to unmarried women.⁵

How will “institutionalizing” cohabitation, or treating cohabiting couples as if they were married, affect the couple, their children, and the well-being of marriage? These are the questions that need to be asked and answered, before courts, state legislators, policymakers, and scholars embrace legal proposals to treat cohabitation as a form of marriage.

Should law and social policy actively support the cohabitation option and if so, how? This could be accomplished by removing barriers to it. These might include laws against fornication,⁶ sodomy,⁷

Europe, 60 La. L. Rev. 1063 (2000) (discussing recent statutory enactments giving legal status to nonmarital cohabitation between same or opposite-sex partners).

3. American Law Institute, *Principles of Family Dissolution*, Chapter 6 (2002).

4. Larry L. Bumpass, Andrew J. Cherlin & James A. Sweet, *The Role of Cohabitation in Declining Rates of Marriage*, 53 J. Marriage & Fam. 913 (1991).

5. Larry L. Bumpass & Hsien-Hen Lu, *Trends in Cohabitation and Implications for Children's Family Contexts in the United States*, 54 Population Stud. 29 (2000).

6. See, e.g., Ga. Code Ann. §16-6-18 (2004); Idaho Code § 18-6603 (2004); Mass. Gen. Laws ch. 272, § 18 (2004); Minn. Stat. §609.34 (2004); Utah Code Ann. § 76-7-104 (2004); Va. Code Ann. § 18.2-344 (2004); N.C. Gen. Stat. §14-184 (2004); W. Va. Code §61-8-3 (2004).

7. See, e.g., Ala. Code § 13A-6-65A (2004); Fla. Stat. Ann. § 800.02 (2004); Idaho Code § 18-6605 (2004); Mass. Gen. Laws ch. 272, § 34 (2004); Mich. Comp. Laws § 28.355/750.158 (2004); Minn. Stat. § 6509.293 (2004); Miss. Code Ann. §97-29-59 (2004); N.C. Gen. Stat. § 14-177 (2004); S.C. Code Ann. § 16-15-12 (2004); Utah Code Ann. § 76-5-403 (2004); Va. Code Ann. § 18.2-67.1; Ark. Code Ann. § 5-14-122 (2004); Ga. Code Ann. § 16-6-2 (2004); Kan. Stat. Ann. § 21-3505 (2004); Md. Code Ann. § 3-321 [Criminal Law] (2004); Mo. Rev. Stat. § 566.060 (2004); Okla. Stat. tit. 21, § 888 (2004); R.I. Gen. Laws §11-10-1 (2004); Tex. [Penal] Code Ann. § 21.06 (2004). Ryan Goodman points out that even if not enforced, laws against sodomy inhibit relationships and character. Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 Cal. L. Rev. 643 (2001).

or cohabitation⁸ and prescribing remaining legal differences in children's treatment based on their parents' marital state.⁹

Courts and legislatures in some jurisdictions have taken more affirmative actions to institutionalize and support cohabitation including establishing legal principles of "non-discrimination" between married and cohabiting couples and equalizing government benefits for formal and informal unions.¹⁰ Government could remove

8. See, e.g., Fla. Stat. Ann. § 798.02 (2004); Mich. Comp. Laws § 750.32 (2004) (if divorced) and § 750.335 (2004); Miss. Code Ann. § 93-5-29 (2004) (by divorced former spouse) and § 97-29-1 (2004); N.C. Gen. Stat. § 14-184 (2004); N.D. Cent. Code § 12.1-20-10 (2004); Va. Code Ann. § 18.2-345 (2004); W. Va. Code § 61-8-4 (2004) (lewd and lascivious); Mass. Gen. Laws ch. 208, § 40 (2004) (after divorce). See also *Rehak v. Mathis*, 238 S.E.2d 81 (Ga. 1977); *Long v. Marino*, 441 S.E.2d 475 (Ga. Ct. App. 1994); *Liles v. Still*, 335 S.E.2d 168 (Ga. Ct. App. 1985); *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979); *Crawford v. City of Chicago*, 710 N.E.2d 91 (Ill. App. Ct. 1999); *Schwegmann v. Schwegmann*, 441 So. 2d 316 (La. App. 5th Cir. 1984) (The court wouldn't even recognize agreements between cohabiting couples because of the underlying illegality of the relationship.); *Zysk v. Zysk*, 404 S.E.2d 721 (Va. 1990) (The court would not even allow a wife to sue her husband for the venereal disease she contracted from him while they were cohabiting.).

9. Though parents have the duty to support children regardless of marital status, in order for the child to be able to recover under a father's will, for example, some states require affirmative action on his or the mother's part. *Levy v. Louisiana*, 391 U.S. 68, 88 S. Ct. 1509 (1968). Sometimes states have gone out of their way to recognize "marriage" or "putative marriage" between children's parents in order to escape the hard distinction between legitimate and illegitimate children. *Kasey v. Richardson*, 331 F. Supp. 580 (W.D. Va. 1971). Unwed fathers have increasingly been granted at least the opportunity to "grasp the relationship" with their children; but this is their right, not the child's. *Lehr v. Robertson*, 463 U.S. 248, 103 S. Ct. 2985 (1983); *Quilloin v. Walcott*, 434 U.S. 246, 98 S. Ct. 549 (1978); *Caban v. Mohammed*, 441 U.S. 380, 99 S. Ct. 1760 (1979); *Stanley v. Illinois*, 405 U.S. 635, 92 S. Ct. 1221 (1972). But see *Michael H. v. Gerald G.*, 491 U.S. 110, 109 S. Ct. 2333 (1989) (right belonged to adults in marriage relationship, not adulterous genetic father).

10. Some domestic partner legislation, and C-23 in Canada, does this. On December 19, 2000, the Dutch upper house of parliament passed the two bills that had been previously approved by the lower house in September 2000. *Upper House Approves Bill Allowing Same-Sex Marriages*, Justitie, available at http://www.justitie.nl/english//Press/Press_releases/archive/archive_2000/index.asp?ComponentID=42558&SourcePageID=191200. Effective April 2001, marriage and adoption in the Netherlands became open to both heterosexual and homosexual couples. *Id.* According to provisional figures from the Netherlands Central Bureau of Statistics, for the first six months same-sex marriages made up 3.6 percent of the total number of marriages—a peak of around six percent in the first month followed by around three percent in the remaining months,—about 2,100 men and 1,700 women in total. *Same Sex Marriage in the Netherlands*, word iQ, at http://www.wordiq.com/definition/Same-Sex_Marriage_in_the_Netherlands. It is rarer, but the civil union legislation in Vermont would be an example, for the duty of support during the relationship to be the same as in marriage. 2000 Vermont Laws P.A. 91, §§ 1202 *et seq.* Even in Norway, where about 25% of couples are

barriers to cohabitation for single mothers such as “man-in-the-house” welfare rules.¹¹

The most radical view, espoused by some academics,¹² would abolish marriage as a legal institution (although it could of course remain a religious practice). In this view, the law should treat all family forms the same. The move towards recognizing same-sex marriage in Massachusetts has created surprising support for this view from some advocates of the traditional legal definition of marriage. Douglas Kmiec and Mark Scarberry of Pepperdine University recently urged that Massachusetts “temporarily get out of the new marriage business entirely,” rather than offer same-sex couples marriage licenses.¹³

This essay evaluates (a) the weight of social science evidence on the extent to which, and the condition under which, cohabitation is the functional equivalent of marriage (b) the mechanisms, from a law and economics perspective, through which formal recognition of a relationship as a marriage may boost well-being, and (c) the likely consequences of blurring the legal distinction between formal and informal unions, as the ALI proposes.

Generally, we see too many problems with cohabitation defined as an alternative to marriage to believe that law and social policy

unmarried, “[U]nlike married couples, cohabiting couples have no legal responsibility to provide for each other.” Truid Noack, *Cohabitation in Norway: An Accepted and Gradually More Regulated Way of Living*, 15 Int’l J. L, Pol’y & Fam. 102, 110 (2001). Compare the domestic partnership rules for medical insurance at the University of Iowa (available only to same-sex couples), which require mutual support. Student Health, University of Iowa available at <http://www.uiowa.edu/~shs/ship.htm>.

11. Aid to Families with Dependent Children (AFDC) historically worked to deny benefits to cohabiting indigent adults. *King v. Smith*, 392 U.S. 309, 88 S. Ct. 2128 (1968). This was on the theory that the cohabitant could support the indigent mother and children, so the government didn’t need to. More recently, Temporary Assistance for Needy Families (TANF) payments have been structured to encourage marriage. Though married couples may receive temporary assistance, the second wage earner must be unemployed or disabled if the couple cohabits. Many states now terminate spousal support if the former wife cohabits with another—it would cease anyway if she remarried since the second spouse would assume the responsibility of supporting a needy wife. Wendell E. Primus & Jennifer Beeson, *Safety Net Programs, Marriage, and Cohabitation*, in *Just Living Together: Implications of Cohabitation on Children, Families, and Social Policy* 191, 197, 205 (Alan Booth & Ann C. Crouter, eds., 2002).

12. Martha Ertman, *Reconstructing Marriage: An InterSEXional Approach*, 75 Denv. U. L. Rev. 1215 (1998); Martha Fineman, *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies* (1995).

13. Quoted in Adam Liptak, *A Troubled ‘Marriage’: Core of Massachusetts Dispute is Tied to Traditional Exclusivity of the Word*, N.Y. Times, Feb. 12, 2004, at A26.

should actively support this emerging family form.¹⁴ Looking at the weight of social science evidence on marriage and cohabitation, this paper suggests what we believe is a middle ground: law and public policy should distinguish between cohabitation as a prelude to marriage (or a courtship strategy) and cohabitation as an alternative to marriage. The evidence, we suggest, points to many fewer problems with the former than the latter.¹⁵

I. THE FUZZY MEANING OF COHABITATION

Modern couples carry many hopes for the informal relationship. When they move in together, they may be holding a number of different expectations (and may differ even among themselves about the meaning of this step). Part of the reason we will argue for restraint in supporting cohabiting relationships when marriage is possible stems simply from this lack of individual and social meaning. Because we mean different things by cohabiting, there can be no community support through ritual.¹⁶ Thus, “[c]ohabitation is an incomplete institution. No matter how widespread the practice, nonmarital unions are not yet governed by strong consensual norms or formal laws.”¹⁷ Couples may not even see the importance of the step they take in “just living together.”¹⁸ One or both members of a cohabiting couple may even cohabit (rather than marry) in order to

14. What about same-sex cohabitation vis à vis marriage? As a matter of social science evidence, until more jurisdictions legalize same-sex marriage, we cannot compare the consequences of marriage versus cohabitation for same-sex couples, although there are reasons for believing that some if not all of the benefits of formal marriage would apply to these couples. The benefits of domestic partnership or civil unions (or religious commitment ceremonies) for same-sex couples compared to more informal unions have not received adequate scholarly attention. Until more jurisdictions adopt same-sex marriage and other legal recognitions and more research is done, the case for public policies encouraging same-sex marriage and/or for ritualized public celebrations of commitment for these couples are generally made on other grounds.

15. *Atherley v. Atherley* suggests that the court start counting as “marital” property accumulated while engaged. 44 Cal. App. 3d 758, 119 Cal. Rptr. 41 (1975). Do some legislatures currently do this? See also Margaret F. Brinig, *Domestic Partnership: Missing the Target*, 4 J. of L. & Fam. Stud. 19 (2002). But see the new feminist pieces complaining about common law marriage. Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 Colum. L. Rev. 957, 1021 (2000); Barbara Stark, *Marriage Proposals: From One-Size-Fits-All To Postmodern Marriage Law*, 89 Cal. L. Rev. 1479 (2001).

16. Steven L. Nock, *A Comparison of Marriages and Cohabiting Relationships*, 16 J. Fam. Issues. 53 (1995).

17. Nock, *supra* note 16, at 74.

18. *Just Living Together: Implications of Cohabitation on Families, Children and Social Policy* (Alan Booth & Ann C. Crouter, eds., 2002).

side-step difficult disagreements about the meaning and future of their relationship.

The lack of common definition of the term, either culturally or empirically, also makes study of cohabitation difficult. How does one phrase a survey question that would get at the complexity of informal intimate unions (especially since perceptions may change with time)? Some individuals who live together undoubtedly see cohabitation as an alternative to marriage (perhaps because they cannot marry; or sometimes because they don't see the need for marrying, and sometimes because they see an overwhelming dark side to the institution of marriage itself). In some couples, one or both partners may see cohabitation as a prelude to marriage. One or both may wish to cohabit simply because it is a convenient way to live until the wedding or because, like the transition from dating to going steady to "getting pinned" to engagement, living together seems another stage in a deepening relationship.¹⁹ Finally, a person may cohabit to test the relationship: Can I live with this partner without squabbling about cleanliness or sharing household chores?²⁰ Will we still find each other sexually attractive lounging in threadbare gym clothes? Can we really spend all our leisure time together without being bored of one another?

II. IS COHABITATION THE FUNCTIONAL EQUIVALENT OF MARRIAGE? EVIDENCE FROM THE SOCIAL SCIENCES

However, we do know some empirical facts about cohabiting couples as a result of research conducted since the mid 1980s. First, there are growing proportions of them, particularly among African Americans.²¹ Second, the relationships themselves last a shorter time than marriage, even if there are children.²² Third, cohabitation

19. Pamela J. Smock and Sanjiv Gupta note that "evidence has recently begun to emerge from both Canada and the United States that cohabitation's central features have been changing fairly substantially over very short periods of time. Pamela J. Smock and Sanjiv Gupta, *Cohabitation in Contemporary North America, in Just Living Together*, *supra* note 18, at 53, 66. The most important implication of these changes is that cohabitation has lost much ground as a precursor to marriage. *Id.* The matter is complex, however. Although cohabitations appear to be increasingly unstable and less likely to lead to marriage, there may be a growing segment of cohabiting unions that do endure, with or without childbearing." *Id.*

20. Surprisingly, cohabiting men do the same amount of housework as married men (on average 19 and 18 hours per week), while cohabiting women do 31 hours of housework per week compared to 37 for married women. Smock & Gupta, *supra* note 19, at 68-69.

21. Andrea G. Hunter, *(Re)Envisioning Cohabitation: A Commentary on Race, History, and Culture*, in *Just Living Together*, *supra* note 18, at 41, 42.

22. Kathleen Kiernan, *Cohabitation in Western Europe: Trends, Issues, and*

followed by marriage (particularly when the couple cohabits without being engaged) leads to less stable marriages than marriages not preceded by living together.²³ Fourth, cohabiting couples experience a larger incidence of domestic violence than do married ones.²⁴ The Justice Department reports that “those who never married became violent crime victims at more than four times the rate of married persons.”²⁵ Compared to married couples of the same duration (i.e., couples who have been together for the same length of time) those in informal (cohabiting) unions are less committed to their partnership (they see fewer costs should the relationship end), and report poorer quality relationships with one another and with parents.²⁶

Scholars debate whether to view such findings as healthy adaptations to the constantly changing institution of marriage²⁷ or a sign of social decline and growing impermanence in the intimate lives of children and adults.²⁸ Still, there is little disagreement that cohabitation is still an informal union ungoverned by strong cultural beliefs and presumptions. As such, it is not a social institution; marriage is. In sharp contrast to cohabitation, marriage is surrounded by legal, social, and cultural beliefs about the broad contours of the relationship. This is the defining difference between legal marriage and informal cohabitation.²⁹ Thus, not only do scholars have difficulty pinning down the meaning of cohabitation, but (often) so do cohabitators themselves.

Implications, in *Just Living Together*, *supra* note 18, at 171; Smock & Gupta, *supra* note 19, at 59 (“Given the wide variation in data, samples, measures of marital instability, and independent variables, the degree of consensus about this central finding is impressive.”).

23. Larry L. Bumpass & Hsien-Hen Lu, *supra* note 5; Susan L. Brown, *Child Well-Being in Cohabiting Families*, in *Just Living Together*, *supra* note 18, at 173; Kiernan, *supra* note 22.

24. Susan Brown & Alan Booth, *Cohabitation Versus Marriage: A Comparison of Relationship Quality*, 58 *J. Marriage & Fam.* 668 (1996); Jon Stets, *Cohabiting and Marital Aggression: The Role of Social Isolation*, 53 *J. Marriage & Fam.* 669 (1991); Jan Stets & Marta Stets, *The Marriage License as a Hitting License: A Comparison of Assaults in Dating, Cohabiting and Married Couples*, in *Violence in Dating Relationships: Emerging Social Issues* 89 (M.A. Pirog-Good and J.E. Stets, eds., 1989).

25. United States Department of Justice, Bureau of Justice Statistics, 2002 available at http://222.ojp.usdoj.gov/bjs/cvict_v.htm/marital.

26. Nock, *supra* note 16.

27. Martha A. Fineman, *Why Marriage?*, 9 *Va. J. Soc. Pol’y & L.* 239 (2001); Judith Stacey, *Good Riddance to “The Family”*: *A Response to David Popenoe (in An Exchange on American Family Decline)*, 55 *J. Marriage & Fam.* 545-47 (1993).

28. Steven L. Nock, *Why Not Marriage?*, 9 *Va. J. Soc. Pol’y & L.* 273 (2001); David Popenoe, *American Family Decline, 1960-1990: A Review and Appraisal*, 55 *J. Marriage & Fam.* 527 (1993).

29. Nock, *supra* note 16.

The cohabiting relationship itself is qualitatively different from marriage³⁰ (This may be for some couples exactly what they wanted: an alternative to marriage.). Couples who cohabit, though they may boast of the strength of their love, as the song tells us,³¹ express less interdependence than typical married couples.³² The strong health effects seen by married couples—especially men, though women, too—are not as pronounced.³³ Sex is reportedly not as good, on average.³⁴ Fathers are less likely to stay involved with their children, or to support them.³⁵

While we suspect that many of these undesirable features are not just “selection effects” but (at least in part) come from cohabitation itself, proving this thesis definitively is difficult. To begin with,

30. This set of effects is hard to sort out. Do couples cohabit because they are precisely the sort who are less likely to be dependent upon one another, or does causation work the other way?

31.

I love you so, I always will
And though devotion rules my heart, I take no bows,
Oh, but Bill, you're never gonna take my wedding vows.

Laura Nyro, *Wedding Bell Blues* (Whether the couple in the song are cohabiting as opposed to just in love is unclear from the lyrics). See also the following statement from *Marvin v. Marvin*:

On cross-examination, plaintiff testified that they were “always very proud of the fact that nothing held us. We weren’t—we weren’t legally married.” After the breakup she declared to an interviewer: “We used to laugh and feel a great warmth about the fact that either of us could walk out at any time.”

557 P.2d 106, 134 Cal. Rptr. 815 (Cal. 1976), (Opinion of the Trial Court on Remand, Superior Court of Los Angeles County) (1979).

32. In the United States, at any rate, social class, measured by educational attainment and economic standing, does much to determine those who cohabit rather than marry. Among 19-44 year old women, nearly 60% of high school drop-outs cohabited compared to less than 37% for college educated women. Bumpass and Lu, *supra* note 23, at 3; Smock and Gumpta, *supra* note 19, at 61-62.

33. Amy Mehraban Pienta, et al, *Health Consequences of Marriage for the Retirement Years*, 21 J. Family Issues 559 (2000). Brown & Booth, *supra* note 24; Brown, *supra* note 23.

34. Linda J. Waite & Karen Joyner, *Emotional and Physical Satisfaction with Sex in Married, Cohabiting and Dating Sexual Unions: Do Men and Women Differ?* in *Sex, Love, and Health in America* 239 (E.O. Lawrence & R.T. Michael, eds., 2001).

35. Wendy D. Manning, *The Implications of Cohabitation for Children's Well-Being*, in *Just Living Together*, *supra* note 18, at 121, 143. Shelley Lundberg and Elaina Rose suggest that although men respond with more work and higher wages at the birth of a child, they do so significantly more in response to births of sons than to the births of daughters. Shelley Lundberg and Elaina Rose, *The Effects of Sons and Daughters on Men's Labor Supply and Wages*, 84 Rev. Econ. & Stats. 251 (2002). The authors stated, “Our results are consistent with a model in which the gender composition of a couple's offspring affects the returns to marriage.” *Id.* at 252. They found no difference in the effect of child gender on the labor market outcomes of mothers. *Id.*

studies in the United States simply haven't collected the right data.³⁶ Empirically, causation is difficult to tease out.³⁷ For example, did a particular couple cohabit (and then divorce) because they were less dependent on each other, or did the smaller degree of interdependence cause the instability (or both)? Or did the cohabitation produce some other effects that led to unhappiness, but in a case where divorce would have been practical only if the couple weren't dependent?

Because the meaning of cohabitation is difficult to establish and the consequences of cohabitation difficult to prove, the social policy implications have been the subject of considerable debate.

A. Cohabitation as Courtship and Search

Gary Becker³⁸ pioneered a discussion of courtship in terms of the search behavior that leads to what he called "assortative mating." This term implies that people sort themselves and others on some scale of desirability, finally choosing the most desirable person they can attract with their own attributes.³⁹ "Desirable" does not usually mean identical, however. In addition to the legal requirement that they be a man and a woman, each will seek out a mate who will be a complement—who will have strong points the other does not possess.⁴⁰ Young people usually begin the search for a mate after

36. Some questions that we would like answered in addition to those currently on the National Survey of Families and Households include:

If you answered yes to whether you cohabited with your spouse prior to marriage, were you already engaged when you moved in together? Did you anticipate you'd be marrying even though you had made no formal pledge? What made you decide to get married? When did you decide to marry? Which of you first proposed getting married? Did you cohabit because you were unsure whether you wanted to marry (if ever cohabited with someone other than the spouse)? Why did your relationship end? Did you decide that you'd found out too many things about the other person, or about your relationship, to make a marriage work? Did you simply tire of each other? Did you receive any financial settlement from that other relationship? How did your relationship change when you got married?

37. Larry L. Bumpass & James A. Sweet, *National Estimates of Cohabitation*, 26 *Demography* 615 (1989); Neil G. Bennett et al., *Commitment and the Modern Union: Assessing the Link Between Premarital Cohabitation and Subsequent Marital Stability*, 53 *Am. Soc. Rev.* 127 (1988); William G. Axinn & Arland Thornton, *The Relationship Between Cohabitation and Divorce: Selectivity or Causal Influence?* 29 *Demography* 357 (1992); Bumpass & Lu, *supra* note 23; Smock & Gupta, *supra* note 19, at 59-60 (reviewing other studies).

38. Gary S. Becker, *A Theory of Marriage, in Economics of the Family: Marriage, Children and Human Capital* (Theodore W. Schultz, ed., 1974); Gary S. Becker, *A Treatise on the Family* 324-27 (Second ed. 1991).

39. Paula England & George Farkas, *Households, Employment and Gender: A Social, Economic, and Demographic View* 31-42 (1986).

40. Becker, *supra* note 38, at 327.

they have "played the field" for some time to discover what they want in a spouse and what they are worth to others.⁴¹ They then date to find out enough about the other person to see whether he or she matches the characteristics that hypothetically would make a good marriage partner.⁴² Finally, each attempts to convince the other party that he or she is capable of fulfilling the other's expectations. Engagement occurs when the expected utility from getting married outweighs the expected utility of remaining single and continuing the search.⁴³ The way in which people conduct these searches has varied through history.

At all times, courtship rituals have enjoyed major significance. Rituals are both forms of communications and instruments for the creation of meaning. They have always played a major role in courtship. In wealthy families at least (where parents arranged or strongly influenced children's mate choices), courtship involved an attempt by the two sets of parents to convince each other of the validity of an alliance. In ancient times, marriages could be repudiated if the intended did not conform to "specifications," such as virginity or fertility, that were needed to guarantee lineal descendants.⁴⁴ Presents were exchanged, and a dowry paid to cement the bargain.⁴⁵

This practice of arranged marriage began to change as early as the twelfth century, when church reformers wrote that marital unions "should be contracted freely by the parties themselves, not by their parents or families." Increasingly affection, rather than property, now initiated the relationship.⁴⁶ In colonial America, the parents still had a role in approving the prospective son or daughter and in providing the necessary means of support for the new household, but the choice essentially belonged to the couple involved.⁴⁷

Until the early twentieth century, American courtship was mainly carried on in the woman's home, with the suitor making a "call" upon her and her parents. The woman could elect whether or not he would be received, and could serve him tea or small sandwiches.⁴⁸ He

41. Margaret F. Brinig, *Rings and Promises*, 6 J. L. Econ. & Org. 203 (1990).

42. England & Farkas, *supra* note 39; Margaret F. Brinig & Michael Alexeev, *Fraud in Courtship: Annulment and Divorce*, 2 Eur. J. L. & Econ. 45 (1995).

43. Becker, *supra* note 38, at 325.

44. William Brundage, *Law, Sex and Christian Society in Medieval Europe* 453 (1987); Brinig, *supra* note 41.

45. Edward Shorter, *The Making of the Modern Family* 55 (1975).

46. *Id.*, at 21.

47. John Demos, *The American Family in Past Time*, 43 Am. Scholar 422, 425 (1978).

48. Beth Bailey, *From Front Porch to Back Seat: Courtship in Twentieth Century America* 17 (1988).

might escort her to church, if the relationship became serious, and he called upon her father to ask permission to marry before the engagement became formal. As historian Beth Bailey points out, the woman had little control over whether the man ever presented his card, signaling his wish to call upon her, but almost complete control over the progress of the courtship thereafter.⁴⁹

With the advent of the automobile, courtship changed. It left the wife's home and increasingly took place in public. At first there was little "pairing off" during dates: at dances the woman sought to be "cut in upon" by a large number of men to show her attractiveness and popularity.⁵⁰ Her escort also wished her to be popular, since that enhanced his prestige in bringing her to the social event.⁵¹

Until fairly recently, a woman's marriage was necessary to secure her social position, so that the "old maid" would not only be scarred because she was not attractive enough to snag a husband, but also would be disadvantaged because in later life she would not be secure financially.⁵² Marriage was, as one writer noted, the "one career open to her," and once she had made her choice of husbands, the woman's "options were suddenly, irrevocably gone."⁵³ The options may have been drastically limited even by a serious relationship short of marriage.

Particularly during the time between the two World Wars, a woman was expected to remain chaste until the time of her engagement. Once she was betrothed, however, sexual intimacy with her fiancé reportedly occurred nearly half the time.⁵⁴ If a marriage never came about, she was henceforth unable to offer an unblemished self to a new suitor,⁵⁵ and consequently she suffered a loss in "market value."⁵⁶ While a man could pretend inexperience, a woman's virginity or lack of it was considered a verifiable physical fact.⁵⁷

49. *Id.*, at 21.

50. Willard Waller, *The Rating and Dating Complex*, 2 *Am. Soc. Rev.* 726, 730 (1937).

51. Bailey, *supra* note 48, at 26-31.

52. Mary Ann Glendon, *The New Family and the New Property* 31-32 (1981); *Marriage and Property* 166-67 (Elizabeth Craik, ed., 1984); Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth Century America* 36 (1985).

53. Ellen Rothman, *Hands and Hearts: A History of Courtship in America* 162-163 (1987).

54. Alfred C. Kinsey, et al., *Sexual Behavior in the Human Male* 336 (1948); Paul Gebhard and Alan Johnson, *The Kinsey Data: Marginal Tabulations of the 1938-63 Interviews Conducted by the Institute for Sex Research* 20 (1979).

55. Theodore W. Cousins, *The Law of Damages as Applied to Breach of Promise of Marriage*, 17 *Cornell L. Q.* 367, 382 (1932).

56. Nathan P. Feinsinger, *Legislative Attack on Heart Balm*, 33 *Mich. L. Rev.* 979, 983 (1935).

57. W.J. Brockelbank, *The Nature of the Promise to Marry—A Study in*

After World War II, however, this mating practice changed. Although theoretically she was free to initiate a date, or to pay for it, during the latter part of the twentieth century most dating began with the man asking the woman "out" and financing the evening's expeditions.⁵⁸ Once the relationship became more serious, there was sexual intimacy in many cases. More than half the men reporting to Alfred Kinsey even before World War II said they had sexual intercourse during engagement.⁵⁹ And, since 1970, an increasing number of couples have been cohabiting prior to (or outside of) marriage. The National Center for Health Statistics reported in 1990⁶⁰ that forty-seven percent of women ages twenty to twenty-nine had cohabited, while Larry Bumpass⁶¹ reports that forty-four percent of those marrying in the early 1980s cohabited first. As of Census 2000, fifty-two percent of marriages are formed from cohabiting relationships.⁶² This more modern pattern of courtship gives the couple more opportunity to discover the good and bad characteristics of each other.

Indeed, attempts to formulate comprehensive theories of mate selection in the latter twentieth century incorporated such ideas about searching and matching as central elements. Murstein's⁶³ Stimulus-Value-Role theory, for example, argued that initial attraction (stimulus) is based on obvious personal attributes that tend to be matched (equal levels of education, physical attractiveness, styles of dress, preferences for recreation, etc.). Those who navigate this stage move on to the "value" stage during which information is obtained about basic orientations to such things as children, marriage, gender roles, and so on. Those who find each other's values compatible move on to the final "role" stage which provides information about styles of interaction in a relationship. Is one's partner insistent on having the final word in decisions? Does one's partner interact in compatible ways on important dimensions (decorum, centrality of work versus family, and so on)? Comparable attempts focused on the complementarity (or lack thereof) of each partner's needs (dominant

Comparative Law, 41 Ill. L. Rev. 1, 8 (1946).

58. Bailey, *supra* note 48, at 26-31.

59. Kinsey, *supra* note 54, at 336.

60. K.A. Loudon, *Advance Data from Vital and Health Statistics*, no. 194, Center for Health Statistics (1991). See also D'Vera Cohn, *Cohabiting Couples Are a Settled Bunch; Many Unwed Partners Own Homes, Have Children, Census Reveals*, Washington Post, Mar. 20, 1994 at B1.

61. Larry L. Bumpass, *The Changing Significance of Marriage in the United States in The Changing Family in Comparative Perspective: Asia and the United States* 63 (K. O. Mason, et. al., eds., 1998)

62. Bumpass & Lu, *supra* note 23.

63. Bernard Murstein, *Mate Selection in the 1970s*, 42 J. Marriage & Fam. 777 (1980).

partners were thought to pair with submissive, a nurturant individual will be attracted to someone who seeks nurturance, etc.).⁶⁴

The later states of courtship induce significant reliance expenditures, meaning that these “serious” couples give up other opportunities for intimacy.⁶⁵ At the very least, the engaged person is removed from the marriage market for some period of time.⁶⁶ There may also be increasing specific investment in the other person: learning the favorite foods, establishing relationships with future in-laws, taking the other’s career plans into account, beginning wedding preparations. If the reliance results in a marriage, there are weighty social and personal consequences.

B. Search and Fraud in the Marriage Market

Law and economics suggests that we examine the search process itself. When couples become engaged, they do not tell each other everything. Sometimes they misinform or fail to inform each other about important personal characteristics. When returning to the single state is more attractive than accepting the other spouse’s true characteristics, the disappointed spouse may bring an action for annulment on the grounds of fraud.⁶⁷ Whether or not the action succeeds depends upon characteristics of the marriage market. Some of the incidence of fraud in courtship can be reduced through nonlegal means.

Historically, this often meant that one limited the search for a mate to individuals with good “reputations” within the relevant community. This provides the single person with a strong incentive to establish a good reputation. Such incentives are particularly important in small communities where “everyone knows everyone else.”⁶⁸ In general, reputation will have less effect in a large urban

64. Robert F. Winch, *Mate Selection: A Study of Complementary Needs* (1958).

65. *Compare The Beach Boys, I Get Around* (“None of the guys go steady/cause it wouldn’t be right/To leave your best girl home/ on a Saturday night...”).

66. William Bishop, *Is He Married? Marriage as Information*, 34 U. Toronto L.J. 245, 258-59 (1984); Ellen Rothman, *Hands and Hearts: A History of Courtship in America* 162-163 (1987). However, on college campuses today, young people have apparently abandoned the dating approach in favor of more casual and less well-defined “hook ups.” Norval Glenn & Elizabeth Marquardt, *Hooking Up, Hanging Out, and Hoping for Mr. Right: College Women on Dating and Mating Today* (2001). This may be, in part, because as the age of marriage has risen, college students are less likely to see themselves as participating in a “marriage market” search.

67. Brinig & Alexeev, *supra* note 42.

68. Bailey, *supra* note 48.

area, where one can conceivably take advantage of (cheat) any number of the members of the opposite sex without ever being discovered. Mechanisms have evolved, however, in which reputation or other signaling devices once again become important.⁶⁹ This is why there may be so much dating within particular organizations (university alumni clubs, church "singles" groups, sporting or exercise groups, or even computer dating services).⁷⁰ In circumstances where reputation is less effective in reducing fraud, other devices such as the "trial marriage" or cohabitation may be used. As England and Farkas note, premarital cohabitation is the search mechanism that provides the most relevant information about the performance of the other person as a marriage partner. Note also that such additional search mechanisms of course imply greater reliance expenditures than more traditional courtship behavior. Paradoxically, though, the selection of marriages that are preceded by cohabitation apparently includes some couples who are less committed to lifelong relationships, since these marriages end in divorce at a far higher rate than those not preceded by cohabitation.⁷¹

C. Cohabitation as a Search

Search before any kind of contract formation becomes complicated when there is asymmetric information between the parties, that is, when either or both can keep meaningful secrets from the other. Philip Nelson, writing in a more general contract context, distinguished between "search" goods and "experience" goods.⁷² The qualities of the search goods can be examined in a short time or otherwise at low cost to the consumer, who can therefore make an inspection before purchase. (Think of the purchase of a tomato or a hair brush.) The qualities of the experience goods, on the other hand, cannot be ascertained until after purchase. (Nelson uses the example of a can of tuna fish.) Nelson predicts, among other things, that there

69. England & Farkas, *supra* note 39, at 41.

70. As Brinig's colleague Hillary Sale noted, however, too much "inbreeding" among those united by close bonds of group membership may result in a lack of information and, ultimately, a bad match because so much is taken for granted or assumed that ordinary inquiry may be foregone. For an application to law school hiring, see Theodore Eisenberg & Martin Wells, *Inbreeding In Law School Hiring: Assessing The Performance of Faculty Hired From Within*, 29 J. Legal Stud. 369 (2000).

71. Bumpass, Sweet & Cherlin, *supra* note 4. Cohabitation changes attitudes about domestic life. It reduces interest in marriage, and makes divorce appear more acceptable (net of attitudes prior to cohabitation.) Axinn & Thornton, *supra* note 37.

72. Phillip Nelson, *Information and Consumer Behavior*, 78 J. Pol. Econ. 311, 312 (1970).

would be fewer of each type of seller of experience goods, and that buyers would seek advice of others more frequently.⁷³ Darby and Karni⁷⁴ introduced an additional category of “credence” goods. The quality of these goods may not be easily determined even after the purchase.⁷⁵

The “good” of the person you marry has the characteristics of all three categories of goods mentioned above. The experience good aspect of a marriage is, perhaps, its most important attribute for this paper. In the marriage context, as with the purchase of tuna fish, some things can’t be known for certain until after the contract is made: for example, whether the other party desires (or is able) to have children, will be a good parent, will practice a particular religion, or generally will be interesting to live with.

However, there is a significant difference between marriage and Nelson’s experience goods. At least in theory marriage is for life, and there will be no “repeat purchase” or “purchase of another brand.” Also, the non-repetitive nature of marriage increases the importance of its credence goods aspect,⁷⁶ and perhaps provides some basis for distinguishing between dating (probably invaluable for marriages based upon love) and cohabitation (perhaps threatening to them). The search goods aspect of marriage is reflected in the fact that there are some things that a “diligent buyer” of marriage services can know, such as whether an admitted prior marriage was dissolved by death or by divorce. More obviously, we can know height and weight and facial characteristics. (Sociobiologists in fact

73. *Id.*, at 327.

74. Michael Darby & Edi Karni, *Free Competition and The Optimal Amount of Fraud in Contracts*, 16 J.L. & Econ. 67 (1973).

75. Darby and Karni write about situations involving service as well as sale of a particular good, where the buyer can’t discern how much service was really needed even after the service has been performed. *Id.* For example, it may be costly or impossible for a surgery patient to find out after the fact if the removal of her appendix was warranted or not. *Id.*

76. In the marriage market, each party possesses complete information only about him- or herself. If one party is naive about what really goes on in marriage, whether it is about whether all wives put their husband’s laundry away or all couples engage in some bizarre sexual practice, much of what Darby and Karni have to say about car sales and appendix operations can be applied in the marriage context. They suggest that one form of government intervention that may become necessary in situations involving commercial credence goods is occupational licensing. In marriage, there is at least some rough screening by the state through the marriage license, in which both parties swear to have the capacity to be married, that they are of the opposite sexes, and that each is of the appropriate age. There may also be a state requirement of blood testing to assure freedom from venereal diseases. (Illinois had such a requirement involving testing for the AIDS virus in 1988, during which the marriage rates in that state declined dramatically, and those in neighboring states rose as they took up the excess. Center for Health Statistics, *supra* note 60.)

assert that we find them attractive if they predict future health and success in childbearing.)⁷⁷ Fraud about such traits will not lead to annulment (although a spouse's disillusionment may result eventually in a divorce.)⁷⁸

However, even when the couple becomes engaged, there are "secrets" that can only, if ever, be revealed after marriage. Becker, Landes, and Michael⁷⁹ note that divorce occurs when the new revelations make staying inside the marriage less desirable than resuming the single state.

Cohabitation might be expected to reveal some of these secrets, even if imperfectly. Those who share domestic space in a sexual relationship will likely learn about their partner's *personal habits* (cleanliness, fastidiousness, willingness, or desire to perform household chores such as laundry, timeliness in paying bills or preparing to go out, accuracy or diligence in taking telephone messages) and *tastes* (musical preferences, hobbies, feelings about pets, desired temperature in the dwelling, desired time together or apart, friends, and sleep habits). They are also likely to discover intimate personal characteristics (personal hygiene, medical practices, sleep habits, security fears, prayer behavior, religious beliefs, gender ideals). However, cohabitation is not typically associated with more stable marriages in the United States (even when it is in Europe). As we will develop, the search model may actually work for American couples, but it ignores the larger cultural context in which marriage and cohabitation exist. Marriage continues to be a distinct legal and social institution in America, unlike the case in Europe.

While United States data shows couples who live together are actually *more* likely to divorce than couples who marry directly, the European experience is different. The economic search model for cohabitation appears to work for European marriages in many countries, at least in so far as Kiernan points out, in some Western European countries, marriages preceded by cohabitation evidenced "little difference in the risk of dissolution of converted unions compared with direct marriages."⁸⁰ (Switzerland, Austria, and East Germany had lower rates of dissolution, or the difference was not statistically significant). Kiernan discusses the stages through which

77. Matt Ridley, *The Red Queen: Sex and The Evolution of Human Nature* 159-60 (1994).

78. It may be that courts are using the fact that the defect is discoverable when they assume that the spouse in fact *did* know of the defect prior to the marriage.

79. Gary Becker, Elisabeth M. Landes & Robert T. Michael, *An Economic Analysis of Marital Instability*, 85 J. Pol. Econ. 1141 (1977).

80. Kiernan, *supra* note 22, at 5, 16.

Sweden passed in recognizing cohabitation.⁸¹ During the first state, cohabitation emerges:

... as a deviant or avant-garde phenomenon practiced by a small group of the single population, while the great majority of the population marries directly. In the second stage, cohabitation functions as either a prelude to or a probationary period where the strength of the relationship may be tested prior to committing to marriage and is predominantly a childless phase. In the third stage, cohabitation becomes socially acceptable as an alternative to marriage and becoming a parent is no longer restricted to marriage. Finally, in the fourth stage, cohabitation and marriage become indistinguishable with children being born and reared within both, and the partnership transition could be said to be complete. Sweden and Denmark are countries that have made the transition to this fourth stage. At any time, cohabitation may have different meanings for the men and women involved.⁸²

It is possible, of course, that for Western European nations, enough time has passed to move through these various stages. In the United States, where cohabitating couples were first counted in the 1970s, we may simply be at an earlier phase. It is equally possible that the social support given to cohabiting couples, particularly those with children, make these relationships attractive and possible to couples elsewhere where they would not be in the United States.⁸³ The Netherlands, at the beginning of 1998, instituted formal registration of partnerships for both heterosexual and homosexual couples and made legally registered cohabitation functionally equivalent to marriage (except that cohabiting couples do not have the right to adopt).⁸⁴ Denmark instituted legal registration of homosexual partnerships in the early 1990s.

81. *Id.* See also Jan M. Hoem & Britta Hoem, *The Swedish Family: Aspects of Contemporary Developments*, 9 J. Fam. Issues 397 (1988).

82. Dorien Manning, *The Changing Meaning of Cohabitation and Marriage*, 12 Eur. Soc. Rev. 53 (1996).

83. Chong-Bum An, Robert Haveman & Barbara Wolfe, *Teen Out-of-Wedlock Births and Welfare Receipt: The Role of Childhood Events and Economic Circumstances*, 75 Rev. of Econ. & Stat. 195 (1993); Robert Moffitt, *Incentive Effects of the U.S. Welfare System: A Review*, 30 J. Econ. Literature 1 (1992); Sara S. McLanahan and Irwin Garfinkel, *Single Mothers, the Underclass, and Social Policy*, 501 Annals Am. Acad. Pol. & Soc. Sci. 92 (1989); Peter Gottschalk, *AFDC Participation Across Generations*, 80 Am. Econ. Rev. 367 (1990).

84. Wendy M. Schrama, *Registered Partnerships in the Netherlands*, 13 Int'l J. Law, Pol'y & Fam. 315 (1999).

Alternatively, the reason that cohabitation is closer to marriage in Europe than in the United States is that in Europe marriage, *per se*, has been gradually and effectively deinstitutionalized. To the extent that marriage is no longer a legal status carrying differential privileges or obligations, and to the extent that such legal changes were in response to popular opinion, we may say that the cultural script that defined marriage as a distinct relationship has been rewritten to equate marriage and cohabitation. If marriage is treated in law and culture as the functional equivalent of cohabitation, it may no longer produce distinctive results. To the extent that this has happened (our impression is that it has in many Western European countries), cohabitation would be treated in law and custom as marriage. Alternatively, marriage would come to be viewed as one more alternative form of cohabitation.

Kiernan's work also points out the role of religiosity and parental divorce in predicting whether couples would marry directly or cohabit first.⁸⁵

Proportions Married Directly According to Some Church Attendance Versus None Among Women Who Had Partnership and Were Aged Twenty to Thirty-Nine Years at the Time of the Survey⁸⁶

	Some Church Attendance	Never Attends Church	% Reporting Never
Sweden	12	4	66
Norway	50	23	67
Finland	25	14	35
Great Britain	59	41	45
Switzerland	31	14	4
West Germany	32	14	77
East Germany	23	14	77
Spain	90	80	53
Italy	90	18	9

As in the United States, Kiernan found that Western European couples whose parents had separated or divorced were more likely to cohabit first rather than marry directly.⁸⁷ This was true for couples in Sweden, Finland, France, Austria, Switzerland, West and East Germany, Spain, and Italy.

85. Kiernan, *supra* note 22, at 12 & Table 1.3.

86. From *Id.* (from UN ECE Family and Fertility Survey (1992)).

87. *Id.*, at 13 & Table 1.4.

Controlling for age at first marriage, church attendance, and experience of parental divorce, Kiernan reports⁸⁸ that marriages preceded by cohabitation in Norway were more stable than those without cohabitation (while the difference was not statistically significant),⁸⁹ while for couples in Finland and Austria,⁹⁰ the risk of dissolution was greater,⁹¹ but not statistically significant. In these countries at least, cohabitation appears to help some high-risk couples make better matches.

In Sweden, France, Switzerland, and the two Germanys, controlling for age at the time of marriage, religious attendance and parental divorce, first marriages that are also first unions are less stable than those preceded by prior cohabitation.⁹²

However, in all the Western European countries surveyed, Kiernan reports that, controlling again for age at first marriage, church attendance, and experience of parental divorce, cohabitation without marriage was the least stable arrangement.⁹³ The differences are large (ranging from fifty percent more to more than six times more likely to dissolve). In Europe, then, cohabitation as a search process for marriage appears to “work.” Cohabitation as an alternative to marriage, however, appears no more stable in Europe than in America.

Relative Risk of Partnership Dissolution According to Type of First Partnership for Women Aged Twenty to Thirty-Nine Years at the Time of the Survey

Country	Married	Cohabitated	Cohabitated Only
Sweden	1.00	1.5	3.96***
Norway	1.00	0.85	4.92***
Finland	1.00	1.12	3.44***
France	1.00	1.49**	6.04***

88. *Id.* at 15 & Table 1.5.

89. Norway had no information on parental divorce, so the only controls are for parental divorce and age at marriage. *Id.* Dorien Manting, suggests that the Netherlands, not included in Kiernan’s chapter, will resemble Norway. Manting, *supra* note 82.

90. Austria had no control for religious attendance, so the only controls are for age at prior marriage and parental divorce. Kiernan, *supra* note 22.

91. The relative risk in Finland was 1.16, in Austria 1.24. *Id.* Kiernan used Cox proportional hazard models with the survival time being the duration of marriage to dissolution or censoring at the time of the survey. *Id.*, at 14.

92. France had no question on religion, so the only controls were for age at prior marriage and parental divorce. *Id.* In Sweden (1.58), Switzerland (1.28) and East Germany (1.38), the difference was significant at $p < .05$; while in France (1.63) and West Germany (1.42), the difference was significant at $p < .01$. *Id.*

93. *Id.*, at 17 & Table 1.7 (Model 2). Norway had no information on parental divorce and France and Austria had no question on religion. *Id.*

Austria	1.00	1.01	3.08***
Switzerland	1.00	1.11	4.84***
West Germany	1.00	1.38*	3.07***
East Germany	1.00	1.35*	1.55***

*** $p < 0.001$; ** $p < .01$; * $p < .10$.

There are potential risks to using cohabitation as a mate selection strategy, however. Legally, the problem of trying to figure out whether a couple intended to marry when they first cohabited can be compared with a Virginia case dealing with intent to separate permanently at the time of separation. When both parties are sane, the law requires an intention to separate to commence the statutory "separate and apart" period required before divorce in some states. Thus, when the husband went overseas in connection with his employment, but wrote to an attorney two years later to institute divorce proceedings, the period of separation began at the later time, for "there must be proof of an intention on the part of at least one of the parties to discontinue permanently the marital cohabitation, followed by physical separation" without any cohabitation.⁹⁴ Many if not most couples probably changed their minds about the expected outcome of their relationship some time after moving in together. And sometimes only one individual may have had a change of expectation.

What happens to Western European couples who cohabit only to discover they shouldn't marry (and later find someone else)? If a failed search made through cohabitation produced no further costs than the waste of time and energy invested in the relationship, search theory would predict that the information gleaned about one's preferences would simply be kept for the next search. The research shows however that this doesn't seem to be what happens. Like a divorce, a "failed cohabitation" increases the risk of future relationship failure. For the next relationship, the partner who came from the failed cohabitation would already have cohabited prior to marriage even if this new relationship proceeded directly to marriage. The marriage would therefore have a lower rather than a higher chance of success. To our knowledge, this pattern has not been studied in the West European context. However, in repeated studies in the United States, a history of cohabitation (with another person or persons) that did *not conclude* in marriage is associated with higher rates of divorce.

III. THE USES OF COHABITATION: A THEORETICAL ANALYSIS

The studies of cohabitation in Europe focus on couples who transition from cohabitation to marriage. Absent empirical evidence

94. *Hooker v. Hooker*, 215 Va. 415, 417, 211 S.E.2d 34, 36 (1975).

one way or the other, we are unable to assert that a history of cohabitation with others would produce less stable marriages in Europe as it does in the United States. As we explain below, however, we suspect that it would (See chart on United States cohabitations, from the National Survey of Families and Households [NSFH]). Why?

Consider the search and hiring practices of law schools as an analogy. Most law schools hire “entry level” candidates who have graduated law school fairly recently and who show promise for succeeding in the academic world (as measured in class standing, law review editing, prestigious clerkships, writing during and especially after law school, and references by trusted academics who know them well). Since there are only short term contracts binding the school or candidate, we make an analogy to the engagement process. (It is exclusive for a “slot” and each candidate may only be full-time at one institution). After several years (varying from three or four to six) of short term appointments, the candidates apply for tenure. The vast majority of these are given tenure, or lifetime appointments (in our terms, like marriage). A few, however, are not successful on the teaching or especially the publishing front. If their institutions discover this early on, they may suggest that they find work elsewhere, or even arrange for fellowships or visits at other schools. By the sixth year, the American Association of University Professors [AAUP] rules require that a tenure decision be made or the applicant to receive a “terminal year’s” appointment. Were the economists’ search predictions true, the institution would simply hire another entry person to fill the slot, and the candidate would simply choose another law school that would better fit his or her needs.

Yet we know that tenure denials in fact inflict substantial costs on both the faculty member and the department involved. In this analogous situation, both sides will feel a loss of trust and more guilt or anger (or both) about what happened. To demonstrate, we conducted an unofficial and unsystematic survey of twenty American law schools where we knew that there had been tenure denials during the twelve year period of the *U.S. News and World Report* rankings of graduate schools. In each case, we know the ranking of the school at the time of the tenure denial, the ranking some years later (when any costs to reputation would have worked into the system), and the ranking of the school to which the candidate moved (ascertainable from the American Association of Law Schools Directory of Law Teachers). (Some of these people got out of law teaching altogether. These are not counted.) The average loss in rank by the tenure candidate from the original school to the new school was forty-three places, while the difference between the original school’s rank in the last year of service to two years later was a loss of nearly one place.

While the first loss is not surprising (given the strong signal that there was a problem with scholarship or teaching), the fact that there's any loss in the original school's rank one might be.

While potential spouses are not "ranked" in the same way law schools are, they do occupy varying positions in the marriage market—as more or less desirable husbands or wives. A failed search in the marriage market (cohabitation that did not lead to marriage) may have similar consequences for ex-cohabitators as does a failed search in the law school hiring process. Both parties, that is, may experience a loss in attractiveness as potential spouses.

IV. MARRIAGE WITHOUT COHABITATION

Why might marriage work as well when *not* preceded by cohabitation? There are a number of reasons marriage might be more successful when the spouses did not cohabit first. One idea is that the couple saved sexual intimacy until marriage. Current estimates indicate that sixteen and three-tenths percent of men, and twenty and one-tenth percent of women are virgins at the time of their first marriage.⁹⁵ We do not know the percentage of marriages involving virgins among those who did not cohabit, though it would probably be higher.

V. MECHANISMS OF MARRIAGE

Marriage, unlike cohabitation, also signifies commitment to a decision to in some ways scrap one's individuality for a new identity and responsibilities.⁹⁶ At this point each spouse views the other as someone whose well-being must always be taken into account. Further (and obviously circular in a discussion of why marriage should be given legal protection), the marriage, in this respect like a corporation, becomes a legal person, an identity.

From a sociological perspective, cohabitation is not a social status, while marriage is. Once married, the same people on the outside (parents, friends, and employers) treat the couple differently. That difference may be a problem for couples who cohabit first, but it won't be for those who directly enter marriage.

If relationships are envisioned developmentally, we may expect that early experiences inform and influence subsequent ones. The evidence from the United States suggests that the early experiences

95. Edward O. Laumann, John H. Gagnon, Robert T. Michael & Stuart Michaels, *The Social Organization of Sexuality: Sexual Practices in the United States* 503 & Table 13.2 (University of Chicago Press 1994).

96. Steven L. Nock, *Marriage in Men's Lives* (1998); Nock, *supra* note 16.

of cohabitation may establish relationship trajectories that conflict with the expectations of legal marriage. The most obvious way in which American cohabitation might do this is by fostering greater individuality or independence while discouraging commitment. American cohabitators, in fact, are more independent, more egalitarian in who does what in the household, and less committed to conventional systems of beliefs about lifelong marriage. Marriage, on the other hand, is well defined in American culture and law⁹⁷ and the elements that constitute American marriages (pledge of lifetime commitment, dependency, childbearing, etc.) differ notably from the typical pattern observed among cohabiting couples.

Most heterosexual cohabiting couples fall into one of two groups. They may view themselves as on their way to marriage,⁹⁸ in which case the abolition of heartbalm actions⁹⁹ by legislatures and common law suggests a public policy to treat them differently from married persons.

Another set of couples affirmatively wishes to reject marriage.¹⁰⁰ As Canadian academic Nicholas Bala writes: “[t]he motivations for living together outside of marriage are complex, but these relationships frequently arise because one party (often the man) is unwilling to make the commitment of marriage and does not want to undertake the legal obligations of marriage.”¹⁰¹ The Comments to the American Law Institute’s *Principles of the Law of Family Dissolution* note that Chapter Six on Domestic Partnerships “diminishes the effectiveness of that strategy” of avoiding responsibility.¹⁰² To the extent that the goal of other chapters involving property distribution and “compensatory payments” is to encourage specialization between spouses and investment in the family,¹⁰³ applying the same principles to dissolving domestic

97. Nock, *supra* note 96.

98. Bumpass & Sweet, *supra* note 37, at 615.

99. For a review, see Margaret F. Brinig, *Rings and Promises*, 6 J. L. Econ. & Org. 203 (1990). The heartbalm actions typically involving engaged couples were breach of marriage promise and seduction. For a recent case discussion, see *Miller v. Ratner*, 688 A.2d 976 (Md. Ct. App. 1997).

100. Nicholas Bala, Review of From Contract to Covenant, 2 *Isuma* 1, 1 (2001) available at www.isuma.net/v02n02/bala/bala_e.shtml; Comment to American Law Institute, *Principles of the Law of Family Dissolution*, § 6.02, at 14 (2002) (hereinafter Comment to ALI).

101. Bala, *supra* note 100, at 1.

102. Comment to ALI, *supra* note 100, at 14.

103. Ira M. Ellman, *The Theory of Alimony*, 77 Cal. L. Rev. 1 (1989); June Carbone & Margaret F. Brinig, *Rethinking Marriage: Feminist Ideology, Economic Change, and Divorce Reform*, 65 Tul. L. Rev. 953 (1991); June Carbone, *Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 Vand. L. Rev. 1463 (1990); Jana B. Singer, *Alimony and Efficiency: The Gendered*

partnerships flies in the face of reality: cohabiting couples are less specialized than married couples, are less interdependent, and have far more embedded equality goals.¹⁰⁴

On the other hand, couples can be in relationships featuring permanence, which encourages unconditional love. At this point we have what "looks like" a family: people who are committed to each other over the very long time horizon and who are giving to each other without an expectation of immediate return (or perhaps any return). In Steve Nock's terminology,¹⁰⁵ they are living in the past and future, in a world of debts and futures, rather than the present. At this point, society (the community, meaning the religious community, the state, and even extended families) will act to support the family.¹⁰⁶ There will be laws promoting families,¹⁰⁷ giving constitutional rights,¹⁰⁸ and protecting the entity from outside assault.¹⁰⁹ There will be benefits that flow from being in such a family¹¹⁰ and obligations that "are the threads from which intimacy is woven."¹¹¹ The members of the family live in covenant.

Policy makers are unlikely to want to provide default rules for cohabitation that would encourage cohabitation as an alternative to marriage¹¹² then, since empirical studies show it is far less stable than marriage.¹¹³ Further, the partners invest less in each other or in the relationship than they do if married. In other words, cohabitation does not promote "economic efficiency" in the same way marriage does. For example, when men marry, they do much better financially than if single or cohabiting,¹¹⁴ presumably either because their wives "nag" them into more responsible behavior¹¹⁵ or because women

Costs and Benefits of the Economic Justification for Alimony, 82 Geo. L.J. 2423 (1994); Elisabeth M. Landes, *Economics of Alimony*, 7 J. Legal Stud. 35 (1978).

104. Nock, *supra* note 16, at 508.

105. Steve L. Nock, *Turn-Taking as Rational Behavior*, 27 Soc. Science Res. 235, 239-41 (1998).

106. Margaret F. Brinig, *Troxel and the Limits of Community*, 32 Rutgers L.J. 733 (2001).

107. Compare Patricia A. Cain, *Imagine There's No Marriage*, 16 Quinnipiac L. Rev. 27 (1996).

108. *As in* Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054 (2000).

109. For example, consider the household exemption from bankruptcy and the "family estate" or tenancy by the entireties that shields marital property from creditors.

110. Vermont Civil Union Legislation, 2000 Vermont Laws P.A. 91 (H. 847), § 1204(c).

111. Nock, *supra* note 105, at 243.

112. Comment to ALI, *supra* note 100, at § 6.02.

113. Bumpass, Sweet & Cherlin, *supra* note 4; Bumpass & Sweet, *supra* note 37, at 620-21.

114. Victor Fuchs, *Women's Quest for Economic Equality* 58-60 (1988); Nock, *supra* note 105, at 66, 143.

115. Linda J. Waite & Maggie Gallagher, *The Case for Marriage: Why Married*

contribute “backup” support that makes men’s labor force participation more focused.¹¹⁶ Cohabitants are more likely than married couples to share household tasks relatively more equally, though still with less sharing and more gendered behavior than one would expect,¹¹⁷ and to generally value gender equality.¹¹⁸

Cohabiting partners thus have less commitment to each other than do married spouses,¹¹⁹ and are more likely to think in terms of short-term rather than long-term consequences. In fact, cohabitation is usually an exchange relationship, which produces less satisfaction¹²⁰ than one taking an “internal stance”¹²¹ central to a meaningful interpersonal relationship. In marriage, a relationship centered upon short-run gains signals instability.¹²²

Even the landmark cohabitation opinion, *Marvin v. Marvin*,¹²³ noted that “[l]est 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.” As a community, we in effect don’t give the relationship trust, so why treat cohabitation as though we do? Brinig and Nock in their recent work have found that where young people grow up in areas where there is a higher percentage of divorced people, the males delay first marriages.¹²⁴ In other words, one of the effects of a relatively high divorce rate seems to be a higher rate of cohabitation. As noted earlier, American

People are Happier, Healthier, and Better Off Financially (2000); Linda J. Waite, *Does Marriage Matter?*, 32 *Demography* 483, 496 (1995).

116. Margaret F. Brinig, *Property Distribution Physics: The Talisman of Time and Middle Class Law*, 31 *Fam. L.Q.* 93 (1997); Arlie Hochschild with Anne Machung, *The Second Shift: Working Parents and the Revolution at Home* (1989); Joan Williams, *Unbending Gender: Why Family and Work Conflict and What to Do About It* (2000).

117. Sanjiv Gupta, *The Effect of Transitions in Marital Status on Men’s Performance of Housework*, 61 *J. Marriage & Fam.* 700 (1999).

118. Nock, *supra* note 105, at 16.

119. *Id.*, at 53.

120. Gary L. Hansen, *Moral Reasoning and the Marital Exchange Relationship*, 131 *J. Soc. Psychol.* 71 (1991).

121. Milton C. Regan, *Alone Together: Law and the Meaning of Marriage* 24 (1999).

122. See Steven L. Nock and Margaret F. Brinig, *Weak Men and Disorderly Women: Divorce and the Division of Labor*, in *Marriage and Divorce: A Law and Economics Approach* (Dnes and Rowthorn, eds., 2002).

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

124. Brinig & Nock, *supra* note 122, at 483 & Table 4. For an indication that this greater selectivity in marriage may be the reason for the decline in the divorce rate since 1991, see Stéphane Méchoulan, Department of Economics, Northwestern University, *Divorce Laws and the Structure of the American Family*, paper presented at the American Law and Economics Association Annual Meeting, May 7, 2000.

marriages entered into after cohabitation are less, not more stable, than those of couples who do not cohabit first.¹²⁵ Generally speaking, presence of a child increases union stability,¹²⁶ though boys apparently stabilize relationships more than do girl children.¹²⁷

In sum, by using (as the ALI proposes) a default rule that is *not* what people would most likely agree to in advance, we force those who do not want this type of relationship into contract-mode, which is hard on the relationship (forcing over-planning)¹²⁸ and destroys "covenantal" thinking (as the parties focus on what they can get out of the venture and how long it will last). As those of us who read family law cases know, couples in committed relationships are unlikely to choose contracting.¹²⁹

There is no requirement that *during* the relationship, cohabiting partners support one another or provide medical care.¹³⁰ They do not

125. Axinn & Thornton, *supra* note 37, at 161; John Ermisch & Marco Francesconi, *Cohabitation in Great Britain: Not for Long, But Here to Stay*, *Journal of the Royal Statistical Society, Series A*, vol. 163, Part 2, 153-172 (2000); Kathleen Kiernan, *Cohabitation in Western Europe*, 96 *Population Trends* 25, 30 & Table 7 (1999).

126. Bumpass, Sweet & Cherlin, *supra* note 4; Lee A. Lillard & Linda J. Waite, *A Joint Model of Marital Childbearing and Marital Dissolution*, 30 *Demography* 653 (1993); Linda J. Waite & Lee A. Lillard, *Children and Marital Disruption*, 96 *Am. J. Soc.* 930 (1991).

127. Aphra R. Katzev, Rebecca L. Warner and Alan C. Acock, *Girls or Boys? Relationship of Child Gender to Marital Instability*, 56 *J. Marriage & Fam.* 89 (1994).

128. Lenore J. Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 *Cal. L. Rev.* 1169 (1974).

129. Some data from surveys of same-sex couples (who have very high incentives to contract) reveals that as of 1995 ten percent or less had written agreements. Information on Same-Sex Relationships (Self-Reported), Survey of 21,000 Couples Who Answered Website Questionnaire, *The Advocate* (1994-1995). Data for married couples is nearly impossible to obtain, since it will not be filed anywhere unless the marriage dissolves. By definition, then, we cannot know how often American couples write antenuptial contracts. Even if we were to survey individuals, the numbers writing antenuptial contracts would probably be too small to permit meaningful analysis. Further, those who rely on such contracts are so unrepresentative (and perhaps more inclined to divorce) that such a query would be tremendously expensive. It is impossible to rely on divorce records because those with antenuptial agreements may be more likely to divorce anyway. Therefore, any research on this issue would face daunting problems in establishing a causal connection. An article written in 1988 suggests that there are "more" such agreements than formerly. Sheryl Nance, *'Til Some Breach Doth Them Part*, *Nat'l L. J.*, November 7, 1988 at 1.

130. This objection seems to be met, at least at a minimal level, by California's domestic partnership provisions, which apply to same sex couples and to persons over 62. Section 297 of the California Family Code allows registration of domestic partnerships in which partners must agree to assume joint responsibility for each other's "basic living expenses" and authorizes state and local employers to offer health care coverage and other benefits to domestic partners of employees and

enjoy the privileges of confidential communications¹³¹ or tort immunities. They cannot hold property as a community or by the entirety. If one of them dies, the other does not have the benefit of intestacy laws (as would a putative spouse). Supporting children does not become a common enterprise because of the adults' relationship,¹³²

requires health-care facilities to permit visits by a patient's domestic partner. Cal. Fam. Code § 297 (2000). See also Canadian C-23, the Modernization of Benefits and Obligations Act (2000), which amends Criminal Code § 215(1)(b) (Can.) to punish those who fail to provide necessities to a common law partner. Denmark, through the Danish Registered Partnership Act, 1989; Norway, in the Norwegian Registered Partnership Act of 1991; Sweden (1995) and Iceland (1996), all have registered same-sex partnerships, which have almost all of the consequences of marriage.

The ALI Principles apply to family dissolution, not ongoing relationships. State laws presumably govern ongoing relationships. State laws limit requirements of support to married couples or parents of minor children. For example, Illinois Statutes Chapter 750, section 16/15 provides in sections a (1) and (b):

§ 15. Failure to support.

(a) A person commits the offense of failure to support when he or she:

(1) willfully, without any lawful excuse, refuses to provide for the support or maintenance of his or her spouse, with the knowledge that the spouse is in need of such support or maintenance, or, without lawful excuse, deserts or willfully refuses to provide for the support or maintenance of his or her child or children in need of support or maintenance and the person has the ability to provide the support; or

(2) willfully fails to pay a support obligation required under a court or administrative order for support, if the obligation has remained unpaid for a period longer than 6 months, or is in arrears in an amount greater than \$5,000, and the person has the ability to provide the support; or

(3) leaves the State with the intent to evade a support obligation required under a court or administrative order for support, if the obligation, regardless of when it accrued, has remained unpaid for a period longer than 6 months, or is in arrears in an amount greater than \$10,000; or

(4) willfully fails to pay a support obligation required under a court or administrative order for support, if the obligation has remained unpaid for a period longer than one year, or is in arrears in an amount greater than \$20,000, and the person has the ability to provide the support.

(a-5) Presumption of ability to pay support. The existence of a court or administrative order of support that was not based on a default judgment and was in effect for the time period charged in the indictment or information creates a rebuttable presumption that the obligor has the ability to pay the support obligation for that time period.

(b) Sentence. A person convicted of a first offense under subdivision (a)(1) or (a)(2) is guilty of a Class A misdemeanor. A person convicted of an offense under subdivision (a)(3) or (a)(4) or a second or subsequent offense under subdivision (a)(1) or (a)(2) is guilty of a Class 4 felony.

131. Milton C. Regan, *Spousal Privilege and the Meanings of Marriage*, 81 Va. L. Rev. 2045 (1995).

132. What we mean by this is the following. If a couple marries, the stepparent may well have support obligations for the children of the spouse at least during the pendency of the relationship. See, e.g., Wash. Rev. Code § 26.16.205 (2004):

and former cohabitant fathers seem to support less often than noncustodial fathers following divorce.¹³³

A. Courtship and Expectations

More than men, American women initiate divorce,¹³⁴ and are the ones wanting the divorce,¹³⁵ even though they all too frequently end up in poverty following marital dissolution.¹³⁶ In fact, depression following divorce corresponds closely with being the spouse who did not want the marriage to end.¹³⁷

Divorce might be taken to indicate a failure to satisfactorily conduct a marriage search since it typically occurs so early in the relationship. Recent national figures from the National Center for Health Statistics estimate that forty-two percent of first marriages

The expenses of the family and the education of the children, including stepchildren, are chargeable upon the property of both husband and wife, or either of them, and they may be sued jointly or separately. When a petition for dissolution of marriage or a petition for legal separation is filed, the court may, upon motion of the stepparent, terminate the obligation to support the stepchildren. The obligation to support stepchildren shall cease upon the entry of a decree of dissolution, decree of legal separation, or death.

N.D. Cent. Code § 14-09-09 provides:

a. Liability of stepparent for support. A stepparent is not bound to maintain the spouse's dependent children, as defined in section 50-09-01, unless the child is received into the stepparent's family. If the stepparent receives them into the family, the stepparent is liable, to the extent of his or her ability, to support them during the marriage and so long thereafter as they remain in the stepparent's family.

But see Wood v. Woods, 184 Cal. Rptr. 471 (Cal. App. 1982) (no requirement that stepparent repay country for AFDC). Whether this lasts beyond dissolution depends, under the Principles, upon whether the stepparent has become a de facto parent or parent by estoppel. Compare *Johnson v. Johnson*, 617 N.W.2d 97 (N.D. 2000) (parent liable under doctrine of equitable adoption), with *Bagwell v. Bagwell*, 698 So.2d 746 (La. App. 2nd Cir. 1997) (no obligation after divorce). But no such obligation exists for the child of a cohabitant.

133. Manning, *supra* note 35, at 143.

134. Margaret F. Brinig & Douglas W. Allen, "These Boots Are Made for Walking": *Why Most Divorce Filers are Women*, 2 Am. Econ. & L. Rev. 126 (2000).

135. Sanford L. Braver, Marnie Whitley, & Christine Ng, *Who Divorced Whom? Methodological and Theoretical Issues*, 20 J. Divorce & Remarriage 1 (1993).

136. Richard R. Peterson, *A Reevaluation of the Economic Consequences of Divorce*, 61 Am. Soc. Rev. 528 (1996); Greg G. Duncan & Saul D. Hoffman, *A Reconsideration of the Economic Consequences of Marital Dissolution*, 22 Demography 485 (1985); Ross Finnie, *Women, Men, and the Economic Consequence of Divorce: Evidence from Canadian Longitudinal Data*, 30 Canadian Rev. Soc. & Anthro. 205 (1993); Pamela J. Smock, *Gender and the Short-Run Economic Consequences of Marital Disruption*, 73 Soc. Forces 243 (1994).

137. We have shown this using data from the National Survey of Families and Households. Results are available from the authors.

will end in divorce. However, thirty-four percent of first marriages end in the first ten years (seventeen percent of first marriages end in the first five years.) Subsequent marriages have minimally higher rates of disruption at each year of duration.¹³⁸ Assuming that people are not systematically fooled,¹³⁹ we have thought of two possible reasons women might be willing to marry (and, relatedly, why they might divorce). One has to do with payoffs from marriage that differ between men and women. The other has to do with different views of courtship and what it predicts—or doesn't predict—about married life.

Although the expected value¹⁴⁰ of the payoff from marriage might be the same for men and women, the variance¹⁴¹ in what they will experience may be different. In other words, both men and women usually hope for health, wealth, and happiness when they seek to marry.¹⁴² (In fact, such good wishes are the staples of toasts at receptions.) Empirical data show that men receive the first two whether or not the third good wish is present.¹⁴³ There is a small

138. M.D. Bramlett, & W.D. Mosher, *Cohabitation, Marriage, Divorce, and Remarriage in the United States*, National Center for Health Statistics, *Vital Health Statistics* 23, Table 21 (2002).

139. People's rationality is a basic assumption of both micro- and macroeconomics. For example, if there is inflation, people will only adjust their spending momentarily, until they realize that their wages did not really increase relative to prices. See, e.g., Milton Friedman, *The Role of Monetary Policy*, 58 *Am. Econ. Rev.* 1, 7-11 (1968); Edmund Phelps, *Money Wage Dynamics and Labor Market Equilibrium*, in *Macroeconomic Foundations of Employment and Unemployment and Inflation Theory* 124 (Edmund Phelps, ed. 1970).

140. Expected value is defined as the probability of something occurring times its value. The expected value of an asset of P currently worth \$100 is calculated as follows:

Say we want to know its expected rate in a year. There is an 80% probability that it will have a normal rate of return, and be worth \$110. There is a 10% probability that it will do exceptionally well, and be worth \$120, and a 10% probability that it will do badly, and be worth only \$105.
 $EV(P) = (.8 \times \$110) + (.1 \times \$120) + (.1 \times \$105) = \$88 + \$12 + \$10.50 = \$110.50.$

See John von Neumann & Oskar Morgenstern, *Theory of Games and Economic Behavior* (1964).

141. Variance is defined as the sum of the squared deviances from the mean divided by one less than the total number of deviations. A small variance would indicate that most people would cluster tightly around the average value. A large variance would mean that the various outcomes would be widely spread. For example, if sample A included observations of 1, 2, 3, 4, and 5, and sample B 2, 3, 3, 4 and 3, the variance in sample A would be 2.5, while of sample B only .5. For a discussion of this concept, see Steven M. Crafton & Margaret F. Brinig, *Quantitative Methods for Lawyers* 293-95 (1994).

142. "What's Love Got to Do With It," *Saturday Review*, September/October 11 (1985).

143. Nock, *supra* note 16, at 14.

variance, therefore, in men's return from marriage. In a small number of cases, though, the marriage may be a disastrous mismatch.¹⁴⁴ For women, the second and third wish are tied together, and in fact the "wealth" is usually a derived benefit from the increase in her husband's wealth.¹⁴⁵ A man's private wealth, that wealth tied to his earning capacity, almost always increases when he marries, and particularly grows when he has children.¹⁴⁶ A woman's private wealth, that which is tied to her earning capacity, frequently decreases when she marries,¹⁴⁷ and almost always does so when the couple has children.¹⁴⁸

Married men live longer, have more satisfying sex lives, participate more in beneficial social organizations,¹⁴⁹ and are physically and mentally healthier than their single counterparts. They receive these benefits even in low-quality marriages¹⁵⁰ (in terms of communication with their spouse or shared experiences with her or even desire to make her happy). Married women live longer,¹⁵¹ have more satisfying sex lives, participate more in social organizations, and are healthier¹⁵² than their single counterparts only in high quality marriages.¹⁵³ When they are unhappy in their marriage, women have more physical and emotional problems and consult mental health professionals more frequently than either single or divorced women.¹⁵⁴ But the wife in a good marriage is happier

144. Becker, Landes & Michael, *supra* note 79.

145. Fuchs, *supra* note 114, at 58-64.

146. Arlie Hochschild, *The Time Bind: When Work Becomes Home and Home Becomes Work* (1997); Suzanne Bianchi & Daphne Spain, *Women, Work and Family in America*, 51 *Population Bull.* 1 (1996); Gillian K Hadfield, *The Gender Gap in Compensation: Households at Work: Beyond Labor Market Policies to Remedy the Gender Gap*, 82 *Geo. L.J.* 89 (1993); Joyce P. Jacobsen, *The Effects of Intermittent Labor Force Attachment on Women's Earnings*, 118 *Monthly Lab. Rev.* 14 (1995).

147. Williams, *supra* note 116; Hochschild, *supra* note 146.

148. Fuchs, *supra* note 114, at 58-64.

149. *Id.* at 60-64; Nock, *supra* note 96.

150. Nock, *supra* note 96, at 14; Walter R. Gove et al., *Does Marriage Have Positive Effects on the Psychological Well Being of the Individual?*, 24 *J. of Health & Soc. Behavior* 122, 128 (1983).

151. Waite, *Does Marriage Matter?*, *supra* note 115.

152. Charlotte A. Schoenborn & Marie Marano, *Health Characteristics of Married and Unmarried Persons, Current Estimates from the National Health Interview Survey*, Series 10, No. 166 (1988); Lois Verbrugge & Jennifer Madans, *Women's Roles and Health*, 7 *Am. Demographics* 36 (1985).

153. Waite, *Does Marriage Matter?*, *supra* note 115, at 499.

154. Nadine Marks, *Flying Solo at Midlife: Gender, Mental Status, and Psychological Well Being*, 58 *J. Marriage and Fam.* 917 (1996); Martha L. Bruce & Kathleen M. Kim, *Differences in the Effects of Divorce on Major Depression in Men and Women*, 149 *Am. J. Psychiatry* 914 (1992).

than any other category of woman.¹⁵⁵ On another front, the most stable marriages of all are those in which the husbands perceive the unfairness of the housework and labor force situation for their wives, not those in which everyone perceives all divisions of responsibility as fair.¹⁵⁶ Thus, the woman sees a large variance from the returns to marriage. She may find herself in a disaster, a mediocre relationship in which she receives few rewards, or a glorious one in which the rewards overflow and she is appreciated.

Since the emotional success of the marriage has little to do with the man's payoff, and a great deal to do with his wife's,¹⁵⁷ it is not surprising that she will frequently be the one to break things off if it turns out that the marriage is not a happy one, despite producing material rewards.¹⁵⁸ Thus she is usually the one to file for divorce or seek separation, particularly if she can obtain custody of the children. According to Brinig and Allen, "[t]he proportion of wife-filed cases has ranged from around sixty percent for most of the nineteenth century to, immediately after the introduction of no-fault divorce, more than seventy percent in some states. Today, with some variation among states, it remains slightly above two-thirds."¹⁵⁹ Though she is less likely than he to repeat the marriage experience, she will be happier outside marriage than in an emotionally unsatisfying one. Women may thus seek marriage despite the fact that they may be less successful in finding Prince Charming¹⁶⁰ than their mates in finding Cinderella.¹⁶¹

The alternative explanation, one garnered from unscientific surveys of students (attending American schools) over the years, is that men and women think courtship is "about" different things. Men

155. Norvall D. Glenn, *Marriage on the Rocks*, 21 *Psychol. Today* 20 (1987); Norvall D. Glenn, *The Contribution of Marriage to the Psychological Well-Being of Males and Females*, 37 *J. Marriage & Fam.* 594 (1975); Norval Glenn & C.N. Weaver, *The Changing Relationship of Marital Status to Reported Happiness*, 50 *J. Marriage & Fam.* 317 (1988); G. Lee, K. Seccombe & C. Shehan, *Marital Status and Personal Happiness: An Analysis of Trend Data*, 53 *J. Marriage & Fam.* 839 (1991).

156. Nock & Brinig, *supra* note 122.

157. Women will divorce more often if they are highly educated and hold outside jobs, since by divorcing they have less to lose. Marilyn Manser & Murray Brown, *Marriage and Household Decision-Making: A Bargaining Analysis*, 21 *Int'l Econ. Rev.* 31 (1980); Suzanne Bianchi & Daphne Spain, *Women, Work and Family in America*, 51 *Population Bull.* 2 (1996).

158. Demie Kurz, *For Richer, For Poorer: Mothers Confront Divorce* 188-89 (1995).

159. Brinig & Allen, *supra* note 134, at 126-27.

160. Margaret F. Brinig, *In Search of Prince Charming*, 4 *J. of Gender, Race & Justice* 321 (2001).

161. These and following comments are drawn from patterns found in America. We know of no related work from Western Europe. Whether comparable generalizations would apply in that context, therefore, is speculation.

view courtship as a contest in which they triumph over other suitors.¹⁶² Dating and courtship are therefore quite distinct from marriage, and the behavior in the early period need not have anything to do with that in marriage, when they are free to “be themselves.” Cohabitation may be a time in which the conquest is not complete, in which their behavior is still not “normal.”

The women in class, both married and unmarried, think that courtship is about successively revealing things about themselves to the men involved. They view the activities and the emotions involved with courtship as necessarily precursors to what will lie ahead in marriage. In terms of the economic explanation already given, courtship to women provides necessary information for their search. They regard courtship behavior as signaling what the man will be like as a husband.

Many of these women complained that their husbands changed after they married. Instead of being focused on their wives, they spent time with friends. Instead of being romantic, they wanted to just relax in front of the television when they got home from work. Instead of lengthy foreplay, they were interested almost immediately in intercourse. Many women felt that they'd been asked to shoulder the emotional work of the relationship, that they couldn't even get help with such simple matters as what to fix for dinner. Their husbands, who had been so spontaneously wonderful prior to marriage, were now much less interesting and more demanding creatures.

The men complained that what they'd thought of as discerning behavior before marriage they now saw as demanding. They didn't see why they should be expected to put on an act for their wives. They found it very difficult to figure out what their wives wanted from them because, they said, their own needs were simple compared to their wives'.¹⁶³ It's no wonder, if these differences in perceptions hold true among larger and broader samples than our own, that over forty percent of American marriages begun after 1980 may end in divorce in the next two or three decades. Perhaps, as one of us claimed some years ago, a good portion of courtship behavior is fraud.¹⁶⁴

162. David M. Buss, *The Evolution of Human Intrasexual Competition: Tactics of Mate Attraction*, 54 *J. of Personality & Soc. Psych.* 616 (1988); Susan Sprecher, Quintin Sullivan & Elaine Hatfield, *Mate Selection Preferences: Gender Differences Examined In A National Sample*, 66 *J. of Personality & Soc. Psych.* 1074 (1994).

163. Deborah Tannen, *You just don't understand: Women and Men in conversation* (1991); John Gray, *Men Are From Mars, Women Are From Venus: A Practical Guide for Improving Communication and Getting More out of Relationships* (1992).

164. Brinig & Alexeev, *supra* note 42.

Many parents, ourselves included, may caution children against cohabiting. Parents, after all, are more likely to have grown up when cohabitation was stigmatized (or, at least, frowned upon). The generational difference in acceptability of cohabiting leads to a predictable problem. Those children who cohabit without their parents' approval lack an important form of social support.¹⁶⁵

Goodman¹⁶⁶ shows that removal of stigmatizing laws can have an extremely beneficial effect on self-esteem and relationship quality even if the laws are seldom, if ever, enforced. This study (of the removal of sodomy laws in South Africa) indicates that removing the laws that still exist in many states¹⁶⁷ that tend to stigmatize cohabiting behavior might improve outside perceptions and cohabitants' feelings about their unions. This change has clearly occurred in Scandinavia, where there have been no laws prohibiting cohabitation for many years.

Professional baseball used to be followed by fans of particular teams (usually the home team).¹⁶⁸ Today, with free agency and thus no expected loyalty to a team, young people learning about baseball owe their allegiance to players rather than to teams. They will cheer for Jason Giambi whether he's an A or a Yank. A community finds it harder to be enthusiastic about a team or finds it brings people together, since the community can't count on continued success or presence of particular players. Roger Clemons, for example, has won notoriously high salary contracts from two different and very successful clubs: Boston, in 1991 (\$5,380,250 a year for four seasons), and New York Yankees (\$15.45 million a year for two seasons, in 2000). The average attendance at games, perhaps as a result at least in part, has decreased since the advent of free agency,¹⁶⁹ while the average salary has increased from \$19,000 in 1967 to \$1,895,630 in 2000 (Blum, 2000) and \$2.3 million in 2002.¹⁷⁰ Free agency in baseball thus resembles the Scandinavian situation, where informal unions are sanctioned and treated as the same as marriages. But is there still a cost? What happens to the partners to trial

165. This may be changing with time. Most parents of 25 years olds today came of age as cohabitation was gaining in popularity. A large proportion grew up in the sexual revolution of the 1970s. Whether these historical experiences translate into more tolerant views of their children's cohabiting intentions or behaviors is not known. Our sense, however, is that most parents are relieved to learn that their children have decided to marry.

166. Goodman, *supra* note 7.

167. See sources cited, *supra* note 14.

168. Hal Bodley, *Free Agency Brought Big Changes*, USA Today, Dec. 22, 2000.

169. Thomas Heath, *Baseball Facing a Stop in Play: Familiar Problems Haunt Game as Threat of Strike Looms*, Washington Post, July 7, 2002, at A1.

170. *Id.*

marriages that don't work out? This data has never been collected systematically, but many studies would seem to lump these people with others who "cohabited before marriage," a group that has less successful marriage experiences. This we will turn to shortly.

The Canadian Supreme Court, in *M. v. H.*,¹⁷¹ held that benefits granted to heterosexual cohabitants under the definition of "spouse" under the Family Law Act § 29, granting benefits to separating cohabitants who have lived together at least three years or who have a common child and have lived together in a relationship of some permanence, must be extended to same-sex couples as a matter of equality. In the legislation passed in 2000, C-23, the definition of "common law partner" for purposes of numerous federal benefits and obligations includes those in a conjugal relationship for one year or more. The Canadian Criminal Code § 215(1)(b) punishes those who do not furnish necessities to the common law partner. The application of the benefits and obligations of domestic partnership law to ongoing relationships is a major difference from Chapter Six of the ALI Principles,¹⁷² which do not impose a support obligation while the relationship continues. This is also a difference between Chapter Six and Vermont's Civil Union status¹⁷³ and implicitly the ALI (2002), both think that by imposing duties on separating cohabiting couples, men will not be discouraged from marrying. But they may miss the powerful evidence that men benefit powerfully from marriage, not cohabitation.¹⁷⁴

PCT22. Unmarried-Partner Households and Sex of Partners¹⁷⁵

Data Set: Census 2000 Summary File 2 (SF 2) 100-Percent Data

	United States	
Total:	105,480,101	
Unmarried-partner households:	5,475,768	
Male householder & male partner:		301,026
Male householder & female partner:		2,615,119
Female householder & female partner:		293,365
Female householder & male partner:		2,266,258
All other households:	100,004,333	

171. 2 S.C.R. 3 (1999).

172. Comment to ALI, *supra* note 100.

173. Bala, *supra* note 100.

174. Nock, *supra* note 96; Waite & Gallagher, *supra* note 115.

While increasing stability arguably may not be a value (if it's patriarchal or at the expense of happiness), it does increase the productivity of a couple. While increased productivity again may not be worth pursuing through private relationships, we do find persuasive evidence that stability is good for kids. Were cohabiting relationships stable, whether or not parents married would be a matter of indifference. As Wendy Manning notes, "[g]enerally, the marital status of biological parents does not have much impact on children's social well-being. Children in cohabiting-parent families have similar behavior and emotional problems as children in married-parent families."¹⁷⁶

There are some differences in parenting behavior, however. Cohabiting parents are less likely to take their children on outings, and are less likely to read to their children under the age of six.¹⁷⁷ However, "[t]he disadvantage of being born to a cohabiting parent seems to emerge once the child and father live apart. Children born to cohabiting-parent families experience lower levels of nonresident father involvement for measures of visitation and child support payments than children born in a marriage."¹⁷⁸

Further, cohabiting relationships are not stable. Children whose parent or parents cohabit are more likely to experience transitions in family structure. Graefe and Lichter¹⁷⁹ argue that "virtually all children in cohabiting-couple families will experience rapid subsequent changes in family status. For most, family reorganization involves forming married-couple families, but for a significant share, the dissolution of the parent's cohabiting relationship precipitates additional family transitions."¹⁸⁰ Thus, even if children in cohabiting unions have two parents, the possible problems posed by the instability of such unions are sufficient to caution us against encouraging such arrangements until we know more about how they affect children's lives.

Undoubtedly, cohabitation is increasingly popular in the United States and elsewhere. It has rapidly emerged as at least three things. First, for the majority of couples that marry (fifty-two

175. The table, taken from complete census data, is available by a search for "unmarried-partner" at <http://factfinder.census.gov>.

176. Manning, *supra* note 35, at 142.

177. Brown, *supra* note 23, at 184-85.

178. Manning, *supra* note 35, at 143; E. Mavis Hetherington et al., *What matters? What does not? Five Perspectives On The Association Between Marital Transitions and Children's Adjustment*, 53 *Am. Psychol.* 167 (1998).

179. D.R. Graefe & D. T. Lichter, *Life Course Transitions of American Children: Parental Cohabitation, Marriage and Single Motherhood*, 36 *Demography* 205 (1999).

180. *Id.*, at 215.

percent during 1990-1994)¹⁸¹ cohabitation is a prelude to marriage. Second, some young people elect to live in informal cohabiting relationships rather than marriage, even when children are involved. Finally, for a large and growing segment of previously married individuals, cohabitation substitutes for remarriage. While there is much to learn about the practice, it is safe to say that it has become an important option in the range of relationship possibilities in America and elsewhere. There is little evidence to suggest that cohabitation is superior to marriage in any measurable way.

At the moment, marriage and cohabitation exist as alternatives. As such, we have a situation much like housing tenure. Individuals have an option to rent or buy a residence. There are legal (financial) advantages to buying a home that are denied to renters. And presumably these benefits are recognized as legitimate by most Americans. Given what we know about marriage, isn't the same true with respect to intimate relationships? Even if marriage continued to convey some legal benefits, of what possible value is its abolition?

Still, certain forms of cohabitation may play a very useful and stabilizing role in our society. If our speculations about searching for a partner are correct, and if our interpretation of patterns in Western Europe are also correct, then for individuals who use cohabitation as part of a marriage search, cohabitation may lead to a better match between married partners. At the same time, there may be enduring consequences for individuals (and especially children) when cohabitations fail.¹⁸² At least so long as marriage and cohabitation coexist as alternative regimes, the individual who has a history of failed cohabiting relationships faces greater chances of disruption should she or he decide to marry. Abolishing legal marriage will be a very difficult case to make in a society such as ours given the high degree of religiousness of most Americans.¹⁸³ We will do better by focusing on the connection between cohabitation and marriage, and studying the potential search benefits cohabitation may produce.

Given the centrality of marriage in our culture, and given the established and verified benefits it confers, any argument for

181. Bumpass & Lu, *supra* note 23.

182. In the same way that our society lacks a word for one's cohabiting partner (friend? partner? girl/boy friend?), we do not have a word for the breakup of such a relationship. Both are clear evidence of the lack of institutionalization of the practice.

183. Indeed, by comparison with other nations, America stands as one of the most religious in the world, no matter which measures one uses (church attendance, frequency of prayer, reliance on religion in making decisions, evangelizing, belief in God, belief in sin, etc.). George Gallup, Jr., & D. Michael Lindsay. *Surveying the Religious Landscape: Trends in U.S. Beliefs* (1999).

abolishing it has its primary value in making us realize the vast and pervasive benefits that flow to the adults and children embedded in such an institution.

Table 1. Relative risk of partnership dissolution according to type of first partnership for women aged twenty to thirty-nine years. Model 2 with controls for age at first partnership.

Country	Model 1	Model 2
Sweden		
Married Directly	1.00	1.00
Cohabitated-married	0.88	0.88
Cohabitated	7.73**	7.81***
Norway		
Married Directly	1.00	1.00
Cohabitated-married	0.70**	0.71**
Cohabitated	8.23***	8.69***
Finland		
Married Directly	1.00	1.00
Cohabitated-married	0.97	0.89
Cohabitated	4.91***	4.35***
France		
Married Directly	1.00	1.00
Cohabitated-married	1.20	1.15
Cohabitated	2.27***	2.01***
Austria		
Married Directly	1.00	1.00
Cohabitated-married	0.89	0.87
Cohabitated	5.12***	4.58***
Switzerland		
Married Directly	1.00	1.00
Cohabitated-married	1.01	1.03
Cohabitated	12.3***	12.9***
West Germany		
Married Directly	1.00	1.00
Cohabitated-married	1.21	1.15
Cohabitated	4.14***	3.83***
East Germany		
Married Directly	1.00	1.00
Cohabitated-married	1.08	1.07
Cohabitated	1.63***	1.55***
Great Britain		
Married Directly	1.00	1.00
Cohabitated-married	1.08	1.07
Cohabitated	10.5***	10.2***
Italy		
Married Directly	1.00	1.00
Cohabitated-married	1.52	1.48
Cohabitated	19.1**	16.8***

Spain		
Cohabitated-married	1.00	1.00
Married Directly	2.59***	2.52***
Cohabitated	18.71**	16.5***

Kathleen Kiernan, *Cohabitation in Western Europe*, 96 Population Trends 25, 30 & Table 7 (1999). Data based on Eurobarometer Surveys from 1996, typically several thousand respondents per country.

Table 2. Life-table estimates of percentage of unions surviving three and five years after the birth of first child among women aged twenty to forty-five years according to type of first partnership.

Country	% surviving thirty-six months	% surviving sixty months	Number in the risk set
Norway*			
Married	97	94	1,677
Cohabitation	87	82	456
Cohabited/Married	98	95	131
Cohabited Only	79	71	325
Sweden*			
Married	96	93	817
Cohabitation	90	84	1,424
Cohabited/Married	97	94	493
Cohabited Only	84	75	931
Austria			
Married	97	94	2,161
Cohabitation	92	86	670
Cohabited/Married	98	96	246
Cohabited Only	86	71	424
Switzerland			
Married	97	95	2,191
Cohabitation	82	73	166
Cohabited/Married	95	86	65
Cohabited Only	64	53	101
West Germany**			
Married	95	91	873
Cohabitation	92	85	161
Cohabited/Married	97	91	45
Cohabited Only	89	80	116

Great Britain			
Married	96	92	1,242
Cohabitation	71	57	149
Cohabited/Married	90	75	43
Cohabited Only	61	48	106
Italy			
Married	99	98	2,677
Cohabitation	95	91	90
Cohabited/Married	-	-	31
Cohabited Only	93	82	59
Spain			
Married	99	98	1,540
Cohabitation	79	67	74
Cohabited/Married	-	-	16
Cohabited Only	71	51	58

From Kathleen Kiernan, *Childbearing Outside Marriage in Western Europe*, 98 *Population Trends*, 11, 19 & Table 11 (1999).

Data based on UN ECE European Family and Fertility Surveys and British Household Panel Survey, taken 1992-96.