2008

Nonmartial Cohabitation: Social Revolution and Legal Regulation

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I. Introduction

Fifty years ago, nonmarital cohabitation was rare. Today, it is common. This article analyzes the sources and results of increasing nonmarital cohabitation as well as family law's response to this behavioral shift. Surveying the case law, I find that, although the California Supreme Court's widely cited decision in *Marvin v. Marvin*[1] appeared to inaugurate a new era of expanding law and rights for nonmarital cohabitants, courts and legislatures—both within California and outside of it—have in fact responded to *Marvin* quite cautiously. Surveying the research data on cohabitation, I conclude that this cautious approach is justified and that a more dramatic legal response to nonmarital cohabitation is at this point unwarranted.

II. The Cohabitation Revolution

In 1958, members of the American Bar Association's new Section of Family Law were not expecting their membership dues to provide them with new opportunities to master the law of cohabitation—there *was* no law of cohabitation. Prostitution was regulated by the criminal code. Common-law marriage was regulated by marriage law, and at this time about a third of the states recognized a cohabiting couple as a married couple if they had held themselves out as married and the evidence showed that promises to be married had been exchanged.[2]

In between these two extremes, legal regulation of cohabitation was

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1. 557 P.2d 106 (Cal. 1976).
2. *See* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS 45–46 (1st ed. 1968).

sparse. Indeed, it could be boiled down to two sentences: Cohabitation created no rights or obligations. Cohabitants could not agree to create rights or obligations based on their intimate relationship.[3]

The bar on relationship-based contracts between cohabitants did not bar other sorts of deals, however; cohabitants in most states could enter into any arrangement that was open to noncohabitants. Thus, one cohabitant might enter into a valid and binding business partnership with the other.[4] Cohabitants could also enter into legally binding contracts for nonsexual services severable from their relationship.[5]

In addition to these contract alternatives, a disappointed cohabitant could often rely on one or another equitable doctrine for relief. The purchase money resulting trust frequently protected the cohabitant who had paid money toward the purchase of property when title was taken in the name of his or her partner.[6] Quantum meruit provided a means of obtaining payment for services rendered for which the expected payment had not been made.[7] Constructive trust provided "a flexible remedy imposed in a wide variety of situations to prevent unjust enrichment."[8] These vari-

3. *See, e.g.*, Hill v. Estate of Westbrook, 247 P.2d 19 (Cal. 1952); Otis v. Freeman, 85 N.E. 168 (Mass. 1908); Jane Massey Draper, Annotation, *Recovery for Services Rendered by Persons Living in Apparent Relation of Husband and Wife Without Express Agreement for Compensation*, 94 A.L.R.3d 552 (1980). Professor Clark's 1968 treatise on family law does not even include an entry on cohabitation. *See generally* CLARK, *supra* note 2.

4. *See, e.g.*, Fernandez v. Zorrilla, 354 P.2d 260 (Ariz. 1960) (enforcing contract to care for rental properties in exchange for a portion of the rents); Bridges v. Bridges, 270 P.2d 69 (Cal. Dist. Ct. App. 1954) (holding that an agreement to pool earnings and share joint accumulations was enforceable even though performance was contemporaneous with meretricious relations); Zytka v. Dmochowski, 18 N.E.2d 332 (Mass. 1938) (finding that former cohabitant was entitled to an accounting); *see also* RICHARD A. LORD, 7 WILLISTON ON CONTRACTS § 16:23 (4th ed. 2008) ("The fact that past cohabitation is the motive for a promise will not invalidate it.").

5. *See, e.g.*, Chenowth v. McDowell, 226 P. 535 (Ariz. 1924); Henderson v. Spratlen, 98 P. 14 (Colo. 1908); Kurtz v. Frank, 76 Ind. 594 (1881); Emmerson v. Botkin, 109 P.531 (Okla. 1910); Stewart v. Waterman, 123 A.524 (Vt. 1924); *see also* RESTATEMENT OF CONTRACTS § 589 (1932).

6. *See* RESTATEMENT (THIRD) OF TRUSTS §§ 7–9; Sugg v. Morris, 392 P.2d 313 (Alaska 1964) (holding that plaintiff had failed to demonstrate the amount she had contributed toward the purchase price); Hall v. Hall, 219 P.2d 808 (Cal. Dist. Ct. App. 1950) (quieting title in favor of plaintiff who had transferred title to property to cohabitant because of restriction on a prisoner owning property).

7. "[C]ourts use quantum meruit to compensate a person for services rendered in the absence of a contract.. . . [The doctrine] lacks readily ascertainable rules for the determination of the proper amount of compensation. The technique used to determine recovery varies according to the circumstances of each case." Jeffrey L. Oakes, Comment, *Article 2298, the Codification of the Principle Forbidding Unjust Enrichment, and the Elimination of Quantum Meruit as a Basis for Recovery in Louisiana*, 56 LA. L. REV. 873, 874–75 (1996). *See generally* Judy Becker Sloan, *Quantum Meruit: Residual Equity in Law*, 42 DEPAUL L. REV. 399 (1992) (surveying history and usage of quantum meruit doctrine). For pre-1958 cases endorsing the use of quantum meruit principles in cases involving unmarried cohabitants, *see* Draper, *supra* note 3.

8. *See* JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 585 (6th

ous forms of equitable relief ensured that, in many cases, one cohabitant who had been cheated by the other could obtain recovery for some or all of his losses.

Although family law sanctioned business contracts and provided equitable remedies for cohabitants, it did not provide for relationship-based relief. The principle that cohabitation in itself—a "meretricious relationship" as the courts put it during this time period—created no legal rights or obligations flowed from several different public-policy concerns. First, courts viewed nonmarital cohabitation as socially undesirable, and they wanted to discourage such arrangements. Second, relational contracts between cohabitants were widely viewed as thinly veiled prostitution contracts. Third, because the parties' arrangement was private and litigation occurred only when their relationship had broken down, solid evidence of their understanding was often lacking. Finally, open cohabitation was rare, and those who engaged in the practice were generally very poor, very bohemian, or both; existing equitable remedies seemed adequate to handle the legal problems such cohabitants brought to court.[9]

The last point deserves special emphasis. In 1958, cohabitation outside of marriage was widely viewed as shameful, and middle-class Americans thus cohabited very rarely. It is likely that the vast majority of the new Family Law Section members literally did not know anyone who did cohabit or had cohabited outside of marriage. The movies and television offered no glimpses of such relational possibilities, and the Census Bureau did not even bother counting cohabiting couples. What almost no one foresaw in 1958 was the rapidity with which the stigma traditionally attached to nonmarital cohabitation would vanish. The culturally cataclysmic 1960s were about to begin and, by the time the decade ended, youthful attitudes toward cohabitation had already shifted dramatically.[10]

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ed. 2000) ("The usual requirements for imposition of a constructive trust are: 1) a confidential or fiduciary relationship; 2) a promise, express or implied, by the transferee; 3) a transfer of property in reliance on the promise; and 4) unjust enrichment of the transferee. But the constructive trust remedy is not limited to these circumstances . . . [and] may be imposed in situations where . . . the court is moved simply by the desire to prevent unjust enrichment."); *see also* 5 AUSTIN W. SCOTT, TRUSTS §§ 461–552 (William F. Fratcher ed., 4th ed. 1987). For pre-1958 cases applying constructive trust principles to cohabitants, see, *for example*, Cole v. Manning, 248 P. 1065 (Cal. Dist. Ct. App. 1926); Wosche v. Kraning, 46 A.2d 220 (Pa. 1946).

9. *See* RESTATEMENT OF CONTRACTS § 512 (1932); J. Thomas Oldham & David S. Caudill, *A Reconnaissance of Public Policy Restrictions upon Enforcement of Contracts Between Cohabitants*, 18 FAM. L.Q. 93 (1984) (surveying public policies in favor of restrictions on cohabitation contracts).

10. *See, e.g.*, Andrew J. Cherlin, *Toward a New Home Socioeconomics of Union Formation*, *in* THE TIES THAT BIND: PERSPECTIVES ON MARRIAGE AND COHABITATION 126, 127 (Linda J. Waite ed. 2000) [hereinafter THE TIES THAT BIND] ("[S]ince the 1970s, cohabitation outside of marriage, which had previously been confined to the poor, has become increasingly

Among the remarkable cultural shifts of the 1960s was a new attitude toward premarital sex. To be more precise, the 1960s witnessed a profound shift in attitudes toward *female* premarital sex. Before the 1960s, a young man could "sow a few wild oats" without fear of serious social censure. Of course, he risked venereal disease if he patronized a prostitute. And he risked a shotgun wedding if he impregnated a girl from a respectable family. But if the young man got away with it—whatever the "it" might be—he typically suffered no reputational harm. For young women, on the other hand, premarital sex posed extraordinary risks. The first and largest of these risks was pregnancy. The best outcome that pregnancy could produce was a shotgun wedding. A furtive stay at a home for unwed mothers or an illegal, and perhaps dangerous, abortion represented the only alternatives to that wedding. Even if pregnancy was averted, the young woman who engaged in premarital sex risked serious reputational loss. "Nice" girls did not; "fast" girls who did faced gossip, snickers, and damaged marriage prospects.[11]

During the 1960s, technology and social change combined to change these traditional norms.[12] The new birth control pill offered young women, for the first time, near certain protection from pregnancy that was both within their own control and divorced from the sexual act itself; in order to obtain the safety that the pill offered, a young woman did not even have to admit, to herself or her partner, that she had planned to engage in intercourse. The women's movement offered this same young woman the chance to imagine gaining what had always been male prerogatives, including the possibility of premarital sex without reputational loss. And the social upheaval that accompanied the civil rights movement and Vietnam War produced a new world in which the vision of sex without reputational harm became a reality. In 1958, nice girls did not engage

common and acceptable among the general population. It has emerged as an important part of the union formation process, often preceding first marriages and sometimes substituting for them.").

11. *See* Winston Ehrmann, *Premarital Sexual Behavior and Sex Codes of Conduct with Acquaintances, Friends, and Lovers*, 38 SOC. FORCES 158 (1959); Mary Z. Ferrell et al., *Maturational and Societal Changes in the Sexual Double-Standard: A Panel Analysis (1967–1971; 1970–1974)*, 39 J. MARRIAGE & FAM. 255 (1977); Ira L. Reiss, *The Double Standard in Premarital Sexual Intercourse: A Neglected Concept*, 34 SOC. FORCES 226 (1956).

12. Economists George Akerlof, Janet Yellin, and Michael Katz have argued, in a widely cited analysis of nonmarital birth, that the invention of the birth control pill coupled with the legalization of abortion constituted a significant "technological shock" that radically shifted patterns of sexual behavior. *See* George Akerlof et al., *An Analysis of Out-of-Wedlock Childbearing in the United States*, 111 Q. J. ECON. 279 (1996). However, given evidence of a significant shift in sexual mores *before* the Supreme Court's 1973 decision in *Roe v. Wade*, 410 U.S. 113 (1973), it seems unlikely that legal innovation was a significant factor in producing the shift. *See* Arland Thornton, *Changing Attitudes Toward Family Issues in the United States*, 51 J. MARRIAGE & FAM. 873 (1989).

in premarital sex. In 1968, many young women, particularly college-age women, no longer wanted to be nice girls. And by 1978, the divide between nice and naughty girls had simply disappeared.[13]

With premarital sex came open premarital cohabitation. What began as a countercultural innovation associated with hippies and antiwar activists became, with remarkable rapidity, an accepted part of youth culture. The new norms for the young also rapidly spread into older age cohorts; by 1988, the parents of young cohabitants were often choosing to cohabit themselves.[14]

The numbers tell the story here. Between 1970 and 2000, the number of U.S. unmarried-cohabitant households rose almost ten-fold, from 523,000 to 4,880,0000.[15] The number of individuals who have ever cohabited has also risen sharply; among women born between 1950 and 1954, women who came of age in the late 1960s and early 1970s, 24% cohabited before marriage; among women born between 1965 and 1969, 55% cohabited before marriage.[16] Nor is there any sign that the trend in favor of premarital cohabitation has yet abated.

In recent years, the ranks of cohabitants have been further swelled by older couples who have already been married.[17] Some of these older cohabitants have already been divorced and thus feel hesitant about a new marital commitment; some, making use of cohabitation's new respectability, have chosen cohabitation over marriage for more pragmatic reasons.

The net result is that cohabitation is now a multifaceted and multigenerational phenomenon. It includes young men and women who are sharing living space with a dating partner in order to save money, more committed couples who are testing the strength of their relationship, engaged couples who are planning to marry, committed couples who view their relationship as marital but have chosen to avoid marriage for practical reasons such as the potential loss of alimony or a surviving-spouse entitlement, and many couples whose motives are mixed or who disagree about the nature of their relationship.[18]

13. *See* Thornton, *supra* note 12, at 884 tbl.4 (reporting that in 1965, 69% of surveyed women and 65% of surveyed men under thirty said that premarital sex was "always" or "almost always" wrong while, in 1972, only 24% of women and 21% of men did so).

14. *See infra* note 18.

15. *See* JASON FIELDS & LYNNE M. CASPER, U.S. CENSUS BUREAU, P20-537, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS: POPULATION CHARACTERISTICS (2001).

16. *See* Kelly Raley, *Recent Trends and Differentials in Marriage and Cohabitation*, *in* THE TIES THAT BIND, *supra* note 10, at 19, 23 tbl.2.1.

17. *See* Susan L. Brown et al., *Cohabitation Among Older Adults: A National Portrait*, 61 J. GERONTOLOGY SERIES B: PSYCHOL. SCI. & SOC. SCI. S71 (2006) (reporting that more than one million older adults, representing 4% of unmarried individuals, currently cohabit and that about 90% of these older cohabitants were previously married).

18. *See* Susan L. Brown, *Union Transitions Among Cohabiters: The Significance of*

The extraordinary rise of cohabitation is not unique to the United States. Equivalent developments have taken place in all common-law countries and across the civil-law nations of northern and central Europe.[19] With cohabitation has come an enormous increase in nonmarital birth. In 1940, 3.8% of U.S. births were nonmarital; in 2002, 33.8% of U.S. births were.[20] In some Scandinavian nations, nonmarital births now outweigh marital births.[21]

III. The Legal Response: A Bang or a Whimper?

A. Marvin and Its Reception

Once cohabitation moved from the fringes to the center of society, it was less obvious that law should play the same role in regulating cohabitational relationships. Thus, in the watershed *Marvin* case , the California Supreme Court urged that "the prevalence of nonmarital relationships in modern society and the social acceptance of them" required courts to forgo the application of traditional legal standards "based on alleged moral considerations that have apparently been so widely abandoned by so many":[22]

> [T]he nonenforceability of agreements expressly providing for meretricious conduct rested upon the fact that such conduct, as the word suggests, pertained to and encompassed prostitution. To equate the nonmarital relationship of today to such a subject matter is to do violence to an accepted and wholly different practice . . . .

Relationship Assessment and Expectations, 62 J. MARRIAGE & FAM. 833, 838 (2000) (reporting that about 20% of cohabitants disagree about the strength of their relationship); Larry L. Bumpass et al., *The Role of Cohabitation in Declining Rates of Marriage*, 53 J. MARRIAGE & FAM. 913, 923 (1991) (reporting same); Patrick Heuveline & Jeffrey M. Timberlake, *The Role of Cohabitation in Family Formation: The United States in Comparative Perspective*, 66 J. MARRIAGE & FAM. 1214 (2004) (describing range of cohabitation types); Kathleen Kiernan, *The Rise of Cohabitation and Childbearing Outside Marriage in Western Europe*, 15 INT'L J.L. POL'Y & FAM. 1 (2001) (same); Sharon Sassler & James McNally, *Cohabiting Couple's Economic Circumstances and Union Transitions: A Re-examination Using Multiple Imputation Techniques*, 32 SOC. SCI. RES. 553 (2004) (finding that 42% of surveyed cohabitants disagreed about the strength of their relationship).

19. *See* Kiernan, *supra* note 18; Kathleen Kiernan, *Unmarried Cohabitation and Parenthood: Here to Stay? European Perspectives*, *in* THE FUTURE OF THE FAMILY 66 (Daniel P. Moynihan et al. eds., 2004) [hereinafter THE FUTURE OF THE FAMILY].

20. *See* STEPHANIE J. VENTURA & CHRISTINE BACHRACH, NONMARITAL CHILDBEARING IN THE UNITED STATES 1940–99, 48 NAT'L VITAL STAT. REP. 16 (2000), http://www.cdc.gov/nchs/data/nvsr/nvsr48/nvs48_16.pdf.

21. *See* Timothy M. Smeeding et al., *The Challenge of Family System Changes for Research and Policy*, *in* THE FUTURE OF THE FAMILY, *supra* note 19, at 1, 8 fig.1.3 (showing increases in European nonmarital birth rates between 1960 and 2000).

22. Marvin v. Marvin, 557 P.2d 106, 121–22 (Cal. 1976).

> We conclude that the judicial barriers that may stand in the way of a policy based upon the fulfillment of the reasonable expectations of the parties to a nonmarital relationship should be removed.[23]

Relying on the new social acceptability of cohabitation, the *Marvin* majority not only approved the enforcement of explicit relational contracts between cohabitants, but also authorized trial courts to "inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract or implied agreement of partnership or joint venture, or some other tacit understanding between the parties."[24] In addition to recovery based on express and implied contracts, the court also approved continued reliance on equitable remedies—quantum meruit, constructive trust, resulting trust—that had provided relief to cohabitants in the pre-*Marvin* era, and it left open the possibility of "additional equitable remedies to protect the expectations of the parties to a nonmarital relationship in cases in which existing remedies prove inadequate. . . ."[25] In sum, *Marvin* promised to dramatically expand the range of rights and remedies available to cohabiting couples. The decision also suggested that a major shift in the legal status of cohabitation was underway.

The extended national press coverage and academic commentary that the *Marvin* case received, both before and after the California Supreme Court's decision, furthered the impression that *Marvin* had ushered in a new era for cohabitants. And *Marvin* has undeniably assumed the stature of a path-breaking opinion.

> Marvin has been cited in approximately 200 other court decisions, about half of which came from the California courts, and approximately 300 law review articles. It is still a fixture of family law classes, appearing as a principal case in each of the eleven casebooks currently on the market. The term "palimony" has entered general usage, particularly in the context of entertainers, sports figures, and wealthy entrepreneurs.[26]

There is no question that *Marvin* altered the way both courts and the public think about cohabitant rights and remedies.

B. The Aftermath of Marvin

Today, *Marvin* represents, at least in the United States, the dominant approach to cohabitant claims. Appellate courts in at least twenty-six states and the District of Columbia have now approved some relational contract

23. *Id.* at 122.

24. *Id.*

25. *Id.* at 122 n.25.

26. Ann Lacquer Estin, *Unmarried Partners and the Legacy of* Marvin v. Marvin*: Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1382–83 (2001).

claims between cohabitants,[27] although a few of these jurisdictions have disapproved recovery based on an implied contract.[28] Only five states have disapproved of all forms of relief based on a cohabiting relationship.[29] Perhaps surprisingly, however, *Marvin*'s bold language has not produced results markedly different from those permissible under pre-*Marvin* case law. As Professor Ann Lacquer Estin put it, "[w]ith all its celebrity, the *Marvin* decision stands more as a cultural icon than as a legal watershed."[30]

Consider the aftermath of the *Marvin* decision itself. On remand, the trial court held a three-month trial, at the end of which it found that "no express contract was negotiated between the parties" and that "the conduct of the parties . . . does not reveal any implementation of any contract nor . . . give rise to an implied contract."[31] The court went on to conclude that there was no "mutual effort" that might support a recovery and that, "in good conscience," no equitable remedies—resulting trust, constructive trust, or quantum meruit—were applicable. In the court's view, the plaintiff's relationship with wealthy, successful Lee Marvin had been helpful to her, not hurtful. Despite its finding that there was unjust enrichment and no contract, express or implied, the court nonetheless awarded the plaintiff $104,000 in alimony "so that she may have the economic means to reeducate herself and to learn new, employable skills or to refur-

27. *See* Levar v. Elkins, 604 P.2d 602 (Alaska 1980); Cook v. Cook, 691 P.2d 664 (Ariz. 1984); Salzman v. Bachrach, 996 P.2d 1263 (Colo. 2000); Boland v. Catalano, 521 A.2d 142 (Conn. 1987); Mason v. Rostad, 476 A.2d 662 (D.C. 1984); Wilcox v. Trautz, 693 N.E.2d 141 (Mass. 1998); Carlson v. Olson, 256 N.W.2d 249 (Minn. 1977); Kinkenon v. Hue, 301 N.W.2d 77 (Neb. 1981); Hay v. Hay, 678 P.2d 672 (Nev. 1984); Tapley v. Tapley, 449 A.2d 1218 (N.H. 1982); Kozlowski v. Kozlowski, 403 A.2d 902 (N.J. 1979); Morone v. Morone, 413 N.E.2d 1154 (N.Y. 1980); Beal v. Beal, 577 P.2d 507 (Or. 1978); Doe v. Burkland, 808 A.2d 1090 (R.I. 2002); Hinkle v. McColm, 575 P.2d 711 (Wash. 1978); Goode v. Goode, 396 S.E.2d 430 (W. Va. 1990); Watts v. Watts, 405 N.W.2d 303 (Wis. 1987); Kinnison v. Kinnison, 627 P.2d 594 (Wyo. 1981); Posik v. Layton, 695 So. 2d 759 (Fla. Dist. Ct. App. 1997); Bright v. Kuehl, 650 N.E.2d 311 (Ind. Ct. App. 1980); Kerkove v. Thompson, 487 N.W.2d 693 (Iowa Ct. App. 1992); Ellis v. Berry, 867 P.2d 1063 (Kan. Ct. App. 1993); Hudson v. DeLonjay, 732 S.W.2d 922 (Mo. Ct. App. 1987); Dominguez v. Cruz, 617 P.2d 1322 (N.M. Ct. App. 1980); Suggs v. Norris, 364 S.E.2d 159 (N.C. Ct. App. 1988); Mullen v. Suchko, 421 A.2d 310 (Pa. Super. Ct. 1980); Small v. Harper, 638 S.W.2d 24 (Tex. Ct. App. 1982); J. THOMAS OLDHAM, DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY § 1.02 (2002) (listing decisions following *Marvin*); George L. Blum, Annotation, *Property Rights Arising from Relationship of Couple Cohabiting without Marriage*, 69 A.L.R. 5th 219 (1999).

28. *See* MINN. STAT. § 513.075 (2008); TEX. FAM. CODE ANN. § 1.108 (Vernon 2007); *Morone*, 413 N.E.2d at 1155; *Tapley*, 449 A.2d at 1219.

29. *See* Hewitt v. Hewitt, 394 N.E.2d 1204 (Ill. 1979); Davis v. Davis, 643 So. 2d 931 (Miss. 1994); Long v. Marino, 441 S.E.2d 475 (Ga. Ct. App. 1994); Schwegmann v. Schwegmann, 441 So. 2d 316 (La. Ct. App. 1983); Carnes v. Sheldon, 311 N.W.2d 747 (Mich. Ct. App. 1981).

30. Estin, *supra* note 26, at 1383.

31. HARRY D. KRAUSE ET AL., FAMILY LAW: CASES, COMMENTS, AND QUESTIONS 235 (2007) (quoting Marvin v. Marvin, 5 Fam. L. Rep. (BNA) 3077 (Cal. Ct. App. 1979)).

bish those utilized, for example, during her most recent employment and so that she may return from her status as companion of a motion picture star to a separate, independent but perhaps more prosaic existence."[32] But this award—one that was not sanctioned by the contract approach outlined in *Marvin*—was promptly struck down on appeal.[33] Michele Triola "Marvin" walked away from the landmark decision that she had won in the California Supreme Court with nothing.

Cohabitants who followed Michele Marvin into California courtrooms learned that her failure to turn what looked like a favorable decision into a solid cash recovery was not entirely due to the specifics of Michele's case. While we have no solid evidence of how many *Marvin* plaintiffs have won in the courtroom or accepted a favorable settlement, California appellate decisions show that the *Marvin* requirements have been strictly construed and that an award is by no means easy to obtain. Nor did the California courts use *Marvin* as a springboard for fashioning new cohabitant rights and obligations.

Indeed, since *Marvin*, the California Supreme Court has revisited the legal problems posed by cohabitation only rarely. I could find only two decisions in which a supreme court majority cited *Marvin* for a proposition related to its substantive holding:[34] in *Foley v. Interactive Data Corp.*,[35] the court held that the claims of a discharged employee for breach of an implied-contract promise to discharge only for good cause survived the statute of frauds, and in *Koebke v. Bernardo Heights Country Club*,[36] the court held that California's civil rights act barred discrimination against registered domestic partners by denying them benefits or services extended to spouses. Dissenting members of the court have cited *Marvin* in decisions denying cohabitants the right to maintain a claim for loss of consortium,[37] finding that cohabitants are not protected against housing discrimination by California's Fair Employment and Housing Act,[38] and holding that a cohabitant who quit her job to follow her boyfriend did not have good cause and thus was not entitled to unemployment insurance

32. *Id.*

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

34. Based on Shepardizing *Marvin* using headnotes 2–3, 7–8, 10–12, 14, 21–23, 27–28, 32–33, 35–36.

35. 765 P.2d 373 (Cal. 1988).

36. 115 P.3d 1212 (Cal. 2005).

37. *See* Elden v. Sheldon, 758 P.2d 582 (Cal. 1988); Coon v. Joseph, 237 Cal. Rptr. 873 (Ct. App. 1987); Lewis v. Hughes Helicopter, Inc., 220 Cal. Rptr. 615 (Ct. App. 1985); Hendrix v. Gen. Motors Corp., 193 Cal. Rptr. 922 (Ct. App. 1983); Nieto v. City of Los Angeles, 188 Cal. Rptr. 31 (Ct. App. 1982).

38. *See* Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909 (Cal. 1996); Donahue v. Fair Employment & Hous. Comm'n, 2 Cal. Rptr. 2d 32 (Ct. App. 1991).

when she had not shown an imminent marriage or a marriage-related obligation.[39]

California appellate courts have cited *Marvin* more frequently, but they too have only rarely expanded on *Marvin*'s central holding. In *Cochran v. Cochran*,[40] the appellate court held that a viable *Marvin* claim does not require full-time cohabitation. But in *Taylor v. Fields*[41] and *Bergen v. Wood*,[42] appellate courts disallowed *Marvin* claims when there had been no cohabitation. California courts have held that a post-mortem *Marvin* action does not violate a no-contest clause in the decedent cohabitant's will, at least as long as the will does not specifically disallow such an action.[43] But they have also held that when title to real property is at issue, the *Marvin* plaintiff must establish her claim to the property by clear and convincing evidence.[44] They have held that *Marvin* claims are civil actions based on contract law[45] and dismissed *Marvin* lawsuits that violate the statute of limitations for contract claims.[46] They have disallowed the award of temporary alimony to a *Marvin* plaintiff[47] and declined to permit cohabitants not registered under California's Domestic Partnership Law to make use of its dissolution procedures or rely on the putative spouse doctrine.[48] They have held that the marital communication privilege is inapplicable to cohabitants.[49]

California courts have also been fairly cautious in interpreting *Marvin*'s continued ban on prostitution agreements. They have disallowed contracts that clearly involved the exchange of valuable consideration for sex.[50] Although they have concluded that agreements to have a child together and to perform services as a bodyguard, secretary, and real estate

39. *See* Norman v. Unemployment Ins. Appeals Bd., 663 P.2d 904, 910 (Cal. 1983).

40. 106 Cal. Rptr. 2d 899 (Ct. App. 2001).

41. 224 Cal. Rptr. 186 (Ct. App. 1986).

42. 18 Cal. Rptr. 2d 75 (Ct. App. 1993).

43. *See* Estate of Black, 206 Cal. Rptr. 663, 669 (Ct. App. 1984).

44. *See* Tannehill v. Finch, 232 Cal. Rptr. 749, 751 (Ct. App. 1986).

45. *See* Schafer v. Superior Court, 225 Cal. Rptr 513, 517 (Ct. App. 1986).

46. *See* Kurokawa v. Blum, 245 Cal. Rptr. 463 (Ct. App. 1988); Estate of Fincher, 174 Cal. Rptr. 18 (Ct. App. 1981); *see also* Nelson v. Nevel, 201 Cal. Rptr. 93 (Ct. App. 1984) (finding that plaintiff's contract claim was time barred but permitting her to amend complaint to include constructive trust claims subject to four-year statute of limitations);

47. *See* Friedman v. Friedman, 24 Cal. Rptr. 2d 892, 899 (Ct. App. 1993).

48. *See* Velez v. Smith, 48 Cal. Rptr. 3d 642, 658 (Ct. App. 2006).

49. *See* People v. Delph, 156 Cal. Rptr. 422, 426 (Ct. App. 1979).

50. *See* Estate of Brandl v. Mall, No. B192529, 2007 Cal. App. Unpub. LEXIS 4955, at *1–2, 8–9 (June 21, 2007) (holding that alleged holographic will providing that "I leave everything to [appellant] if she fucks and sucks me 1 million times before I die" was based on an illegal condition precedent and thus invalid); *see also* Goines v. Wilkes, No. B191720, 2007 Cal. App. Unpub. LEXIS 2857 (Apr. 9, 2007) (limiting recovery to $600 dental bill based on promissory estoppel).

counselor did not represent impermissible sex-for-pay contracts,[51] they have found that an agreement to be a lover, companion, homemaker, traveling companion, and cook was an invalid sex-for-hire contract.[52]

Finally, like the *Marvin* trial court, California courts have treated the evidentiary requirements implied in *Marvin* very seriously. Although there are reported appellate decisions upholding judgments in favor of *Marvin* plaintiffs,[53] there are more decisions affirming judgments against *Marvin* plaintiffs where the trial court found insufficient evidence of a cohabitation agreement or unjust enrichment.[54] There are also cases in which the appellate court overturned a trial court judgment based on insufficient evidence of a cohabitation agreement or unjust enrichment.[55]

Courts outside of California have also tended to take a cautious approach to claims based on cohabitation. Although the majority of U.S. jurisdictions have followed *Marvin*,[56] only one high court, in Washington, has gone beyond *Marvin*'s contract model to permit recovery based on the fact of cohabitation, without any showing of unjust enrichment or an agreement.[57] Courts in other states have also been wary of expanding the

51. *See* Della Zoppa v. Della Zoppa, 103 Cal. Rptr. 2d 901 (Ct. App. 2001); Whorton v. Dillingham, 248 Cal. Rptr. 405 (Ct. App. 1988).

52. *See* Jones v. Daly, 176 Cal. Rptr. 130 (Ct. App. 1981).

53. *See* Alderson v. Alderson, 225 Cal. Rptr. 610 (Ct. App. 1986) (upholding equal property division award in case of twelve-year cohabitation when parties held themselves out as married, had three children, acquired substantial real property, and the evidence supported the trial court's finding of an implied contract to share equally all property acquired during the course of their relationship); *In re* Marriage of Barter, No. B142934, 2001 Cal. App. Unpub. LEXIS 884 (Dec. 10, 2001) (upholding divorce court's award of property acquired before marriage to husband based on his contributions of separate property).

54. *See* Miller v. Kline, No. B193605, 2008 Cal. App. Unpub. LEXIS 362 (Jan. 16, 2008); *In re* Marriage of Bernie, No. E040127, 2007 Cal. App. Unpub. LEXIS 7035 (Aug. 28, 2007); Schoenig v. Levin, No. C047640, 2006 Cal. App. Unpub. LEXIS 4113 (May 11, 2006); Lorch v. Lorch, No. H026669, 2005 Cal. App. Unpub. LEXIS 11599 (Dec. 16, 2005); Koach v. Gates, No. F044000, 2004 Cal. App. Unpub. LEXIS 10689 (Nov. 23, 2004); Ng v. Wong, No. H023323, 2003 Cal. App. Unpub. LEXIS 458 (Jan. 14, 2003); Robertson v. Reinhart, No. A095025, 2003 Cal. App. Unpub. LEXIS 204 (Jan. 8, 2003); Estate of Boben, No. A092609, 2001 Cal. App. Unpub. LEXIS 1398 (Nov. 21, 2001).

55. *See* Fontes v. McCarty, No. E039755, 2006 Cal. App. Unpub. LEXIS 11392 (Dec. 19, 2006) (reversing judgment in favor of plaintiff when trial court found that defendant's agreement to convey interest in house to plaintiff was procured through undue influence); Taylor v. Polackwich, 194 Cal. Rptr. 8 (Ct. App. 1983) (affirming judgment insofar as it denied plaintiff girlfriend an ownership interest in defendant boyfriend's house because there had been no evidence to support a constructive trust claim; reversing judgment that ordered defendant to allow plaintiff to live in his house for a four-year period, to pay plaintiff a rehabilitative award, and to pay plaintiff for moving costs; and holding that the rehabilitative award could not stand because plaintiff did not have a legal or equitable basis for such relief).

56. *See supra* note 27.

57. *See* Connell v. Francisco, 898 P.2d 831 (Wash. 1995). An intermediate appellate court in Oregon has also held that judges have "equitable powers" to reach a "fair result" at the end

legal status of cohabitants: they have almost invariably followed the California Supreme Court in declining to extend to cohabitants rights available to married couples; virtually none, for example, have extended the right to obtain loss of consortium damages to cohabitants when a partner is injured[58] or authorized cohabitants to obtain other public benefits available to married couples.[59]

Equally notable is the dearth of case law dealing with cohabitant claims. One has to be cautious in toting up the number of states that today follow *Marvin* for the simple reason that there are still high courts that have not squarely considered the issue, and these invariably are not states with small populations. In Virginia, for example, the twelfth most populous state and home to more than 7.5 million people,[60] there is not a single reported decision that cites *Marvin*, and I could find no reported cases in which Virginia courts have considered the viability of a contract between unmarried cohabitants without citing *Marvin*. In neighboring Maryland,[61] the high court has cited *Marvin* only once, in a decision dealing with an attorney disciplinary proceeding appeal. One of the charges against the attorney in question was that he had advertised representation in cases involving "palimony"—a type of action, the grievance committee argued, "that Maryland law had never recognized. . . ."[62] The Maryland Court of Appeals rejected the Attorney Grievance Commission's argument, citing its earlier decision involving a will-contract claim—a case that was neither brought nor decided on a *Marvin* theory[63]—two decisions made in 1937 and 1940,[64] and an intermediate appellate decision relying on this early case law to enforce an oral promise to repay various business services and loans with 1,000 shares of stock—an agreement that would

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of a period of cohabitation. *See* Wilbur v. De Lapp, 850 P.2d 1151, 1153 (Or. Ct. App. 1993).

58. *See* Lisha M. Carlile, Note, *Like Family: Rights of Nonmarried Cohabitational Partners in Loss of Consortium Actions*, 46 B.C. L. REV. 391 (2005). *But see* Lozoya v. Sanchez, 66 P.3d 948 (N.M. 2003).

59. *See* KRAUSE ET AL., *supra* note 31, at 248–49; Katherine M. Forbes, Note, *Time for a New Privilege: Allowing Unmarried Cohabitating Couples to Claim the Spousal Testimony Privilege*, 40 SUFFOLK U. L. REV. 887 (2007) (noting that courts have not developed evidentiary privilege for cohabitants).

60. *See* U.S. Census Bureau, State & County QuickFacts, http://quickfacts.census.gov/qfd/states/51000.html (last visited Aug. 4, 2008); Wikipedia, List of U.S. States by Population, http://en.wikipedia.org/wiki/List_of_U.S._states_by_population (last visited Aug. 4, 2008).

61. The Maryland population is more than 5.5 million. *See* Wikipedia, *supra* note 60.

62. Attorney Grievance Comm'n v. Ficker, 572 A.2d 501, 506 (Md. 1990).

63. *See* Unitas v. Temple, 552 A.2d 1285, 1291 n.6 (Md. 1989) ("There is not a suggestion in this case that the social relationship was meretricious. Counsel for Temple have also deliberately steered wide of any 'palimony' theory.").

64. *See* Baxter v. Wilburn, 190 A. 773 (Md. 1937); Lynch v. Rogers, 10 A.2d 619 (Md. 1940).

have been enforceable in Maryland in the 1930s.[65]

Even in states that have accepted some variant of the *Marvin* doctrine, reported case law is typically sparse. Consider New York, the third largest state in the nation.[66] The New York Court of Appeals ruled on the issues raised in *Marvin* in 1980 in the case of *Morone v. Morone*;[67] the court announced that express, but not implied, relational contracts between cohabitants were enforceable. In the twenty-eight years since *Morone* was decided, New York courts have cited the decision for its substantive holding only twenty-seven times,[68] and several of the citing cases do not even deal with claims between cohabitants.[69] By contrast, New York courts have cited the Court of Appeals's 1985 decision in *O'Brien v. O'Brien*,[70] determining that a professional degree or license is marital property subject to distribution at divorce, for its substantive holding 249 times over twenty-three years.[71] Yet only a very small portion of divorce actions involve professional degrees of separate assets while, under *Morone*, an agreement is essential in all cohabitation claims.[72]

Of course, we do not know how many claims between cohabitants are settled or tried without an opinion. But the very limited appellate case law certainly suggests that *Marvin* did not open any floodgates. In sum, *Marvin* did not inaugurate a new era of expanding rights for cohabitants; courts in virtually all states have refused to go beyond the legal principles enunciated in *Marvin* and many have stopped short of *Marvin*'s boundaries. Courts appear to have maintained fairly strict evidentiary standards; "[t]he case law of cohabitation makes it clear that courts will not order compensation for services performed by one partner that can be characterized as part of the ordinary give and take of a shared life."[73] And cohabitants themselves do not seem to have read *Marvin* as a signal that some

65. *See* Donovan v. Scuderi, 443 A.2d 121 (Md. 1982).

66. *See* Wikipedia, *supra* note 60.

67. 413 N.E.2d 1154 (N.Y. 1980).

68. Based on Shepardizing *Morone* using headnote 1. (*Morone* has only two headnotes.)

69. *See, e.g.,* PDK Labs, Inc. v. Krape, 716 N.Y.S.2d 323 (App. Div. 2000); Ratteni v. Cerreta, 728 N.Y.S.2d 401 (App. Div. 2001); People *ex rel.* Conyers v. Dalsheim, 540 N.Y.S.2d 201 (App. Div. 1989); NCJ Cleaners, L.L.C. v. ALM Media, Inc., 844 N.Y.S.2d 619 (Sup. Ct. 2007); Roth v. United Fed. of Teachers, 787 N.Y.S.2d 603 (Sup. Ct. 2004).

70. 489 N.E.2d 712 (N.Y. 1985).

71. Based on Shepardizing *O'Brien* using headnotes 1–12.

72. Cases that go to trial are more likely to involve professional degrees and separate property than are settled cases, but even among this relatively wealthy group, when I reviewed judicial decision-making under New York's Equitable Distribution law over the first ten years that the statute was in effect (1984–1993), only 12% of my sample of all reported decisions in which the property award could be determined (n=383) involved a professional degree or license. *See* Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401, 530 tbl.A3 (1996).

73. Estin, *supra* note 26, at 1400.

financial recovery should invariably, or even typically, follow the dissolution of a cohabitational relationship.

C. The Reasons for the Results

Cohabitant claims for financial relief have not flooded the courts for a variety of reasons. One important factor is that cohabitation in the United States is typically brief and transitional: approximately 60% of all U.S. cohabitants and 70% of those in a first, premarital cohabitation marry within five years.[74] More tellingly, only about 10% of cohabitants who do not marry are still together five years later.[75] Indeed, the median duration of cohabitation in the United States now appears to be less than 1.5 years,[76] a period that is not, at this point, increasing.[77]

A second reason that *Marvin* has not spurred more litigation is that cohabitants tend to be younger and poorer than married couples. Despite smaller proportions of youthful cohabitants in recent years,[78] the median age of cohabitants is still considerably lower than that of marriage partners.[79] At least among men, cohabitants have less education and lower socioeconomic prospects than their married counterparts.[80] As a result of these demographic differences, cohabitants frequently do not have valuable resources to fight about.

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74. *See* M.D. BRAMLETT & W.D. MOSHER, COHABITATION, MARRIAGE, DIVORCE, AND REMARRIAGE IN THE UNITED STATES 22, 22 tbl.9 (2002). However, the likelihood that cohabitation will lead to marriage appears to be declining. *See* 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, 71 (Karen O. Mason et al. eds., 1998).

75. *See* Pamela J. Smock, *Cohabitation in the United States: An Appraisal of Research Themes, Findings, and Implications*, 26 ANN. REV. SOC. 1, 3 (2000) (summarizing research); *see also* BRAMLETT & MOSHER, *supra* note 74, at 22, 22 tbl.15 (reporting that 49% of first premarital cohabitations are disrupted within five years).

76. *See* Heuveline & Timberlake, *supra* note 18, at 1223 tbl.2.

77. *See* Cherlin, *supra* note 10, at 135 (summarizing evidence).

78. *See* LYNNE M. CASPER & SUZANNE M. BIANCHI, CONTINUITY AND CHANGE IN THE AMERICAN FAMILY 44–45 (2002) (stating that in 1978, 35% of cohabiting women and 38.5% of cohabiting men were age thirty-five or older, and those numbers increased in 1998 to 44% of cohabiting women and 48% of cohabiting men); BRAMLETT & MOSHER, *supra* note 74, at 17–18 tbl.21.

79. *See* CASPER & BIANCHI, *supra* note 78, at 11 tbl.C (noting that of women age twenty to twenty-four, 11% were cohabiting, and 27% were married; among women age thirty-five to forty-four, less than 5% were cohabiting, and 68% were married).

80. *See id.* at 52–53 tbl.2.3 (showing that Caucasian and African-American married men had significantly higher levels of college education and income than cohabiting men, and Hispanic married men had higher income levels but not higher levels of college education); Steven L. Nock, *A Comparison of Marriages and Cohabiting Relationships*, 16 J. FAM. ISSUES 53, 66 tbl.1 (1995); *see also* Larry Bumpass & H.H. Lu, *Trends in Cohabitation and Implications for Children's Family Contexts in the United States*, 54 POPULATION STUD. 29, 32 (2000); Smock, *supra* note 75, at 4.

Third, the evidence suggests that cohabitants do not typically adopt sharing behaviors of the sort that *Marvin* envisions. Cohabitants are less likely than married couples to support their partners.[81] They are much more likely to split expenses instead of pooling their resources.[82] They are more likely than married couples to value independence.[83] And, at least in the United States, cohabitation seems to arise from practical considerations far more often than from a relational commitment or agreement. For example, in a recent, small survey of New York City cohabitants, respondents overwhelmingly reported finances, convenience, and housing needs as the reasons for their decisions to cohabit;[84] in a larger midwestern survey, *none* of the cohabitant interviewees indicated that cohabitation represented a commitment to the relationship. As one cohabitant put it, the decision to cohabit meant that:

> I wasn't ready . . . to get like, I mean, that close to somebody and I mean I lived with her but we still had our freedom we still let each other do what we wanted to do so I had my space and she had her space.[85]

Even the arrival of a child does not appear to alter the feeling that cohabitation connotes independence rather than sharing. The U.S. Fragile Family Study, which sponsored indepth interviews of a nationally representative group of unmarried parents, found that "most of these cohabiting pairs espouse a strong *individualistic ethic* . . . in which personal happiness and fulfillment hold the highest value."[86]

Of course, some cohabiting relationships do involve commitment and sharing. Surveying the data, demographers have enumerated six or seven different cohabitation "types," ranging from a substitute for being single—that type that seems most prevalent in the United States—to a stage in the marriage process, to informal marriage.[87] But at least in the United

81. *See* Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligations*, 52 UCLA L. REV. 815, 840 (2005) [hereinafter Garrison, *Is Consent Necessary?*] (reviewing evidence); Marsha Garrison, *Marriage Matters: What's Wrong with the ALI's Domestic Partnership Proposal*, *in* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION* 305 (Robin H. Wilson ed., 2006) [hereinafter Garrison, *Marriage Matters*] (same).

82. *See* Garrison, *Is Consent Necessary?*, *supra* note 81, at 840–43 (reviewing evidence); Garrison, *Marriage Matters*, *supra* note 81, at 307–15 (same).

83. *See* Garrison, *Is Consent Necessary?*, *supra* note 81, at 841–43 (summarizing evidence); Garrison, *Marriage Matters*, *supra* note 81, at 310–11 (same).

84. *See* Sharon Sassler, *The Process of Entering into Cohabiting Unions*, 66 J. MARRIAGE & FAM. 491, 498–501 (2004).

85. Wendy Manning & Pamela J. Smock, *Measuring and Modeling Cohabitation: New Perspectives from Qualitative Data*, 67 J. MARRIAGE & FAM. 989, 999 (2005).

86. Kathryn Edin et al., *A Peek Inside the Black Box: What Marriage Means for Poor Unmarried Parents*, 66 J. MARRIAGE & FAM. 1007, 1011 (2004).

87. *See* Heuveline & Timberlake, *supra* note 18, at 1216–18; Kiernan, *supra* note 18; *see*

States, cohabitation that creates expectations of financial interdependence and continued sharing seems to be relatively rare.

IV. Looking Ahead: Is a Legal Revolution Warranted?

At the time *Marvin* was decided, the approach adopted by the California Supreme Court represented a more expansive approach to cohabitation-based claims than courts—both in the United States and abroad—had previously adopted. Today, in an international context, *Marvin* offers a fairly conservative legal model. Courts and legislatures in a number of other developed nations have developed a "conscriptive" approach that bases cohabitant obligation on status instead of contract.[88] The conscriptive model imposes on the cohabiting couple that has chosen to avoid marriage some or all of the obligations the couple would have incurred had they chosen to marry. Various Canadian provinces, for example, now impose a support obligation on cohabitants who have lived together for periods ranging from one to three years.[89] All Australian states have adopted legislation that extends marital property rights to cohabitants who have a common child or have lived together for at least two years.[90] And New Zealand has extended *all* of the rights and obligations of marriage to couples who have been "de facto partners" for three years.[91]

In the United States, the conscriptive model has thus far met with little success. Although some states have adopted registration schemes that per-

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also Anne Barlow & Grace James, *Regulating Marriage and Cohabitation in 21st Century Britain*, 67 MOD. L. REV. 143, 157–61 (2004) (quoting British cohabitants describing range of reasons for cohabitation).

88. I have used the term "conscriptive" to emphasize the fact that the obligations imposed by laws of this type are both compulsory and involuntary. The Canadian Law Reform Commission has referred to such laws as *ascriptive*, emphasizing the fact that they impute marital status to the unmarried. *See* LAW COMM'N OF CAN., BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS (2001), http://tabletology.com/docs/beyond_conjugality.pdf.

89. *See* Nicholas Bala, *Controversy Over Couples in Canada: The Evolution of Marriage and Other Adult Interdependent Relationships*, 29 QUEEN'S L.J. 41, 45–49 (2003) (describing provincial support rules). The only exception is Quebec. *See id.* at 48–49. A cohabitant right to share property accrued during the relationship appears to be available only to couples in the Northwest Territories. *See* Family Law Act, S.N.W.T. 1997, ch. 18, § 1.

90. *See* Lindy Wilmott et al., *De Facto Relationships Property Adjustment Law—A National Direction*, 17 AUSTL. J. FAM. L. 1, 2–5 (2003) (describing differences in state rules).

91. *See* Property (Relationships) Amendment Act 2001, http://www.austlii.edu.au/nz/legis/consol_act/paa2001378.pdf (last visited Aug. 4, 2008). For descriptions of the legislation and its development, see Bill Atkin, *The Challenge of Unmarried Cohabitation—The New Zealand Response*, 37 FAM. L.Q. 303 (2003); Virginia Grainer, *What's Yours Is Mine: Reform of the Property Division Regime for Unmarried Couples in New Zealand*, 11 PAC. RIM L. & POL'Y J. 285 (2002).

mit some cohabitants to opt into status-based rights and obligations, only the state of Washington has adopted a cohabitant obligation model in which rights arise simply from the fact of cohabitation.[92] The American Law Institute (ALI) has urged that states should shift course and abandon *Marvin*'s contractual approach in favor of the conscriptive alternative.[93] The ALI's position "reflects a judgment that it is usually just to apply to [cohabitants] . . . the property and support rules applicable to divorcing spouses, that individualized inquiries are usually impractical or unduly burdensome, and that it therefore makes more sense to require parties to contract out of these property and support rules than to contract into them."[94]

However, as I have explained in much greater detail elsewhere, all the evidence we have suggests that the ALI is wrong. It supports continuation of a cautious, contract-based approach instead of a conscriptive model.[95] First, as the typically short duration and relatively rare sharing expectations suggest, cohabitation and marriage are simply not equivalent states. The ALI offers no evidence to support its claim of equivalence, and there is none: the research data unequivocally show that, in the United States, cohabitation and marriage typically produce different behaviors and have different social meanings.[96]

Second, conscriptive schemes either create serious risks of misclassification or present daunting fact-finding challenges. Those schemes that rely on individualized fact-finding recreate and exaggerate the fact-finding problems that have led most states to abandon the common-law-marriage doctrine; the other, probably more numerous, schemes that rely on the duration of cohabitation or the birth of a common child as a trigger for rights and obligations resolve most of these fact-finding difficulties but reduce individual autonomy and risk the imposition of obligations on individuals who lack marital understandings or—worse—who have affirmatively chosen to avoid marital obligations by remaining single.[97]

Third, the research evidence shows that marriage is associated with a range of health, wealth, and happiness benefits for both adult partners and their children, benefits that might be lost if increasing numbers of couples

92. *See* Connell v. Francisco, 898 P.2d 831 (Wash. 1995).

93. *See* AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 6.01 et seq. (2002).

94. *Id.* § 6.03 cmt. b.

95. *See* Garrison, *Is Consent Necessary?*, *supra* note 81, at 848–54 (reviewing evidence); Garrison, *Marriage Matters*, *supra* note 81, at 315–18 (same).

96. *See* Garrison, *Is Consent Necessary?*, *supra* note 81, at 839–48 (reviewing evidence); Garrison, *Marriage Matters*, *supra* note 81, at 307–15 (same).

97. *See* Garrison, *Is Consent Necessary?*, *supra* note 81, at 848–64 (reviewing evidence); Garrison, *Marriage Matters*, *supra* note 81, at 315–27 (same).

spend more time in cohabiting relationships and bear children within them. Researcher after researcher has reported that married individuals typically live longer, happier, and healthier lives than the unmarried.[98] Married men and women do better economically than their unmarried counterparts; they have a higher savings rate and thus accrue greater wealth than the unmarried.[99]

The marital advantage also provides substantial benefits to a couple's children. Children born to cohabiting parents are two to four times more likely to experience their parents' separation than are children born to married parents.[100] Because of the greater stability that marriage provides, marital children are exposed to many fewer financial,[101] physical,[102] and

98. *See* Marsha Garrison, *The Decline of Formal Marriage: Inevitable or Reversible?*, 41 FAM. L.Q. 491, 495 (2007) (reviewing evidence).

99. *See id.* at 495–96.

100. *See, e.g.*, Cynthia Osborne et al., *Instability in Fragile Families: The Role of Race-Ethnicity, Economics, and Relationship Quality* 12–13 (Ctr. for Research on Child Wellbeing, Working Paper No. 2004-17FF, 2004) (finding in nationally representative study that, even after controlling for the "mother's characteristics, parents' fertility history, the couple's economic characteristics, and relationship quality, . . . [p]arents who are cohabiting at their child's birth still have over twice the odds of separation as compared to parents who are married . . . ."); Wendy Manning et al., *The Relative Stability of Cohabiting and Marital Unions for Children*, 23 POP. RES. & POL'Y REV. 135 (2004) (finding that U.S. White, Black, and Hispanic children born to cohabiting parents experience greater levels of instability than children born to married parents and that White and Hispanic children whose cohabiting parents marry do not experience the same levels of family stability as those born to married parents); Wendy Manning & Ronald E. Bulanda, *Cohabitation and Family Trajectories*, *in* HANDBOOK OF MEASUREMENT ISSUES IN FAMILY RESEARCH 199 (Sandra Hofferth & Lynne Casper eds., 2006) (reporting that, by age fourteen, three-fifths of children who lived with two cohabiting biological parents experienced family change in contrast to only one-third of children who lived with two married biological parents); R. Kelly Raley & Elizabeth Wildsmith, *Cohabitation and Children's Family Instability*, 66 J. MARRIAGE & FAM. 210 (2004); *see also* Kiernan, *supra* note 18, at 84 fig.3.6 (showing European marriage and cohabitation dissolution rates by country).

101. *See* CASPER & BIANCHI, *supra* note 78, at 111–12 fig.4.3 (reporting, in 1998, 6.9% poverty rate for married-parent households and 38.7% rate for single-mother households). Noncustodial divorced and never-married parents are also less likely to pass wealth on to their adult children. *See* Frank F. Furstenberg, Jr., et al., *The Effect of Divorce on Intergenerational Transfers: New Evidence*, 32 DEMOGRAPHY 319 (1995); Nadine F. Marks, *Midlife Marital Status Differences in Social Support Relationships with Adult Children and Psychological Well-Being*, 16 J. FAM. ISSUES 5 (1995).

102. Rates of physical and sexual abuse are significantly higher when children live with an adult stepparent or cohabitant. *See* Michael N. Stiffman et al., *Household Composition and Risk of Fatal Child Maltreatment*, 109 PEDIATRICS 615 (2002) (reporting that children residing in households with an unrelated adult were eight times more likely to die of maltreatment than children in households with two biological parents and that risk of maltreatment death was not increased for children living with a sole biological parent); Robin Fretwell Wilson, *Undeserved Trust: Reflections on the ALI's Treatment of de Facto Parents*, *in* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 90 (Robin H. Wilson ed., 2006) (reviewing evidence).

educational risks;[103] these lower risks are associated with higher levels of well-being.[104] There is also evidence that the advantages conferred by marital childbearing and rearing transcend the specific benefits associated with residential and economic stability. For example, married fathers appear to be more involved and spend more time with their children than unmarried fathers; if parental separation occurs, these fathers see their children more often and pay child support more regularly.[105] The advantages of marriage appear to extend into a child's adulthood and even to his or her children. Researchers have documented a strong link between growing up in a single-parent household and adult income, health, and emotional stability.[106] A number of studies have also found that both men and women who experience a single-parent household as children are more likely, as adults, to experience marital discord and to divorce or separate.[107]

103. *See* SARA MCLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS 39–63 (1994) (reviewing evidence); Wendy Sigle-Rushton & Sara McLanahan, *Father Absence and Child Well-Being: A Critical Review*, *in* THE FUTURE OF THE FAMILY, *supra* note 19, at 116, 120–22 (same).

104. *See* Paul R. Amato & Jacob Cheadle, *The Long Reach of Divorce: Divorce and Child Well-Being Across Three Generations*, 67 J. MARRIAGE & FAM. 191, 193 (2005) (summarizing studies); Sigle-Rushton & McLanahan, *supra* note 103, at 122–25 (same).

105. *See* CASPER & BIANCHI, *supra* note 78, at 46 (reporting that children whose parents never married see their fathers less frequently after parental separation); Marcy Carlson et al., *Unmarried But Not Absent: Fathers' Involvement with Children After a Nonmarital Birth* (Ctr. for Research on Child Wellbeing, Working Paper No. 2005-07, 2005) (finding that parents' relationship status at child's birth is key predictor of paternal involvement); Lingxin Hao, *Family Structure, Private Transfers, and the Economic Well-Being of Families with Children*, 75 SOC. FORCES 269 (1996) (finding that married fathers were more likely to pay child support); Sandra L. Hofferth & Kermyt G. Anderson, *Are All Dads Equal? Biology Versus Marriage as a Basis for Paternal Investment*, 65 J. MARRIAGE & FAM. 213, 223–24 (2003) (finding that unmarried fathers were significantly less involved with their children than married fathers); *see also* Julie E. Artis, *Maternal Cohabitation and Child Well-Being Among Kindergarten Children*, 69 J. MARRIAGE & FAM. 222 (2007) (finding no differences in child well-being for children living in cohabiting stepfamilies and cohabiting biological-parent households); Susan L. Brown, *Family Structure and Child Well-Being: The Significance of Parental Cohabitation*, 66 J. MARRIAGE & FAM. 351 (2004) (reporting that children living in cohabiting-parent families experienced worse outcomes, on average, than those residing with married-parent families; among children ages six to eleven, economic and parental resources attenuated these differences, but resources did not make a difference among adolescents age twelve to seventeen). Living with married parents is also significantly linked to age of sexual initiation, likelihood of having a teen birth, and high school graduation, even after family instability is taken into account. *See* Wendy E. Manning & Ronald D. Bulanda, *Parental Cohabitation Experiences and Adolescent Behavioral Outcomes* (Bowling Green State Univ., Working Paper No. 06-15, 2006), http:// www.bgsu.edu/ downloads/cas/file35768.pdf.

106. *See* Sigle-Rushton & McLanahan, *supra* note 103, at 124–26 (reviewing research).

107. *See* PAUL R. AMATO & ALAN BOOTH, A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL 106–17 (1997) (summarizing studies); Amato & Cheadle, *supra* note 104, at 192–93 (same); *see also* Kathleen Kiernan, *European Perspectives on Union Formation*, *in* THE TIES THAT BIND, *supra* note 10, at 40, 55 tbl.3.8; Jay D. Teachman, *The Childhood Living Arrangements of Children and the Characteristics of Their Marriages*, 25 J. FAM. ISSUES 86 (2004).

The benefits of marriage are not, of course, invariable. So-called "selection effects" explain away a significant portion of the marital advantage.[108] Remarriage does not confer the same advantages as a first marriage.[109] Moreover, for both adults and children, the marital advantage is concentrated in low-conflict relationships. Researchers have found that the continuation of a high-conflict marriage is *negatively* associated with health and happiness;[110] indeed, longitudinal surveys show that "parents' marital unhappiness and discord have a broad negative impact on virtually every dimension of offspring well-being."[111]

However, despite these important caveats, the evidence strongly suggests that the marital advantage is real and that it persists across national, cultural, and socioeconomic boundaries.[112] Even in Scandinavia, which has the longest experience with cohabitation as a mainstream family form, demographers continue to find that marital childbearing is associated with much greater childhood stability,[113] smaller risks to youth and adult well-

108. *See* Garrison, *supra* note 98, at 498–99 (reviewing research).

109. *See id.* at 498 (reviewing research).

110. *See* J.K. Kiecolt-Glaser & T.L. Newton, *Marriage and Health: His and Hers*, 127 PSYCHOL. BULL. 472 (2001) (finding that unhappy marriages have negative physical-health consequences); Catherine E. Ross et al., *Reconceptualizing Marital Status as a Continuum of Social Attachment*, 57 J. MARRIAGE & FAM. 129 (1995) (finding that individuals with unhappy relationships have higher distress levels than people without partners); Debra Umberson et al., *You Make Me Sick: Marital Quality and Health over the Life Course* (Population Research Ctr., Working Paper No. 03-04-05, 2003-2004), http://www.prc.utexas.edu/working_papers/wp_pdf/030405.pdf (reviewing evidence).

111. AMATO & BOOTH, *supra* note 107, at 219.

112. *See, e.g.*, Donna K. Ginther & Madeline Zavodny, *Is the Male Marriage Premium Due to Selection? The Effect of Shotgun Weddings on the Return to Marriage*, 14 J. POP. ECON. 313 (2001) (finding that "at most 10% of the estimated marriage premium [in men's wages] is due to selection"); H.K. Kim & P.C. McHenry, *The Relationship Between Marriage and Psychological Well-Being—A Longitudinal Analysis*, 23 J. FAM. ISSUES 885 (2002) (stating that data that "confirmed the strong effects of marital status on psychological well-being, supporting the protection perspective," indicated that "the transition to cohabiting did not have the same beneficial effects as marriage for psychological well-being" and produced "weak and inconsistent" evidence of selection effects); Sigle-Rushton & McLanahan, *supra* note 103, at 126–30, 130 (analyzing selection effects and finding that they "do not account for all the differences in children, families, and subsequent outcomes"); Pamela J. Smock et al., *The Effect of Marriage and Divorce on Women's Economic Well-Being*, 64 AM. SOC. REV. 794, 809 (1999) (stating that "the economic benefits of marriage are large, even above and beyond the characteristics of those who marry").

113. *See* An-Magritt Jensen & Sten-Erik Clausen, *Children and Family Dissolution in Norway: The Impact of Consensual Unions*, 10 CHILDHOOD 65 (2003) (finding that children of Norwegian cohabiting parents run a much higher risk of dissolution compared to children in marital unions and that "this risk is not diminishing as cohabitation becomes more widespread"); Kiernan, *supra* note 18, at 84 fig.3.6 (showing that 6% of Swedish marital unions and 25% of nonmarital unions dissolve within five years after the birth of a first child).

being,[114] and lower rates of divorce and nonmarital childbearing.[115] There is also evidence that, even after controlling for observable characteristics like education, academic test scores, and premarital pregnancy, marriage contributes significantly to living standards, "not only relative to single parents living alone but also compared to parents in cohabiting relationships and single parents living with other adult relatives."[116] As family sociologist Paul Amato has put it, "the evidence consistently indicates that children with two happily and securely married parents have a statistical advantage over children raised in other family groups."[117] And "because we all have an interest in the well-being of children, it is reasonable for social institutions (such as the state) to attempt to increase the proportion of children raised by married parents with satisfying and stable marriages."[118]

114. *See* Kyrre Breivik & Dan Olweus, *Children of Divorce in a Scandinavian Welfare State: Are They Less Affected than US Children?*, 47 SCANDINAVIAN J. PSYCH. 61 (2006) (based on study of more than 4,000 twelve- to fifteen-year-old children in Norway, concluding that the negative associations between parental divorce and various adverse child outcomes were "generally very similar in Norway and the United States in spite of the great differences in family policy and welfare benefits for single mothers"); Jan O. Jonsson & Michael Gahler, *Family Dissolution, Family Reconstitution, and Children's Educational Careers: Recent Evidence for Sweden*, 34 DEMOGRAPHY 277, 287 (1997) (finding that, even after controlling for all independent variables, children of divorced and separated parents and children living in reconstituted families have low school-continuation propensities compared to children living with both biological parents); Helen Hansagi et al., *Parental Divorce: Psychosocial Well-Being, Mental Health and Mortality During Youth and Young Adulthood: A Longitudinal Study of Swedish Conscripts*, 10 EUR. J. PUB. HEALTH 335 (2000) (reporting that in a group of Swedish conscripts, several indicators of low levels of well-being and mental illness, including alcoholism, were significantly correlated with parental divorce even after adjustment for antecedents and other factors); Ingunn Storksen et al., *Marriages and Psychological Distress Among Adult Offspring of Divorce: A Norwegian Study*, 48 SCANDINAVIAN J. PSYCH. 467 (2007) (based on study of more than 8,000 adolescents, concluding that parental divorce was associated with significantly higher mean levels and larger variances in adolescent problems and that, in general, these effects persisted after controlling for demographic factors); Gunilla Ringback Weitoft et al., *Mortality, Severe Morbidity, and Injury in Children Living with Single Parents in Sweden: A Population-Based Study*, 361 LANCET 289 (2003) (reporting, based on analysis of almost a million cases and controlling for factors such as socioeconomic status and parental mental health, that Swedish children in single-parent households showed significantly increased risks of "all adverse outcomes analyzed, including psychiatric disease, suicide or suicide attempt, injury, and addiction"); *see also* Taru H. Makikyro et al., *Hospital-Treated Psychiatric Disorders in Adults with a Single-Parent and Two-Parent Family Background: A 28-Year Follow-Up of the 1966 Northern Finland Cohort*, 37 FAM. PROCESS 335 (1998).

115. *See* Kathleen Kiernan, *Redrawing the Boundaries of Marriage*, 66 J. MARRIAGE & FAM. 980, 983 (2004).

116. ROBERT I. LERMAN, MARRIED AND UNMARRIED PARENTHOOD AND ECONOMIC WELL-BEING: A DYNAMIC ANALYSIS OF A RECENT COHORT 32 (2002), http://www.urban.org/UploadedPDF/410540_Parenthood.pdf; *see also* Adam Thomas & Isabel Sawhill, *For Love and Money? The Impact of Family Structure on Family Income*, 15 FUTURE OF CHILDREN 57 (2005).

117. Paul Amato, *Tension Between Institutional and Individual Views of Marriage*, 66 J. MARRIAGE & FAM. 959, 962–63 (2004).

118. *Id.* at 962–63.

In addition to their other disadvantages, conscriptive schemes conflict with social policies favoring formal marriage and marital childbearing by suggesting that public support for marriage is declining. This is undesirable because "bandwagon" effects often play an important role in determining public opinion, and public opinion, over time, plays an important role in determining private attitudes and behavior.[119] A set of British experiments demonstrates just how large this bandwagon effect can be. The researchers gave two sets of research subjects, all unaware of the research experiment, information about public attitudes toward abortion. One group was told that public attitudes were becoming more permissive, the other that public attitudes were becoming more disapproving. The personal views of individuals in both groups on tightening restrictions on abortion were then solicited; 12% more of the group told that attitudes were becoming more permissive expressed opposition to tightening restrictions.[120] In other words, a *perception* about public opinion appears to have swayed the opinions of more than 10% of the research subjects. And "[e]ach new person on [an] . . . upward bandwagon induces additional people to climb on."[121] Of course, the fact that individuals expect their own position to be a minority view does not necessarily make them abandon that position. But most of us can be swayed by our expectations about the views of others, with the result that a major shift in public attitudes can complete its course with remarkable speed.

Consider the rapid shift in attitudes toward premarital sex noted in Part I: in 1965, 69% of surveyed women and 65% of surveyed men under age thirty said that premarital sex was "always" or "almost always" wrong; in 1972, only 24% of women and 21% of men did so.[122] A similar, although somewhat less dramatic shift in attitudes toward marriage and divorce took place during the same time period: in the early 1960s, 80% of the public agreed that "a couple should stay together" for the sake of the children; by the 1980s, agreement with this statement had dropped to 50%.[123] As these examples demonstrate, if individuals *believe* that public opinion about formal marriage is increasingly dismissive, individuals without

119. The "bandwagon" phenomenon is the subject of a large literature. *See generally* JAMES S. COLEMAN, FOUNDATIONS OF SOCIAL THEORY (1990); STEPHEN R.G. JONES, THE ECONOMICS OF CONFORMISM (1984); THOMAS C. SCHELLING, MICROMOTIVES AND MACROBEHAVIOR (1978). *See also* TIMUR KURAN, PRIVATE TRUTHS, PUBLIC LIES: THE SOCIAL CONSEQUENCES OF PREFERENCE FALSIFICATION 69–82 (1995).

120. *See* Catherine Marsh, *Back on the Bandwagon: The Effect of Opinion Polls on Public Opinion*, 15 BRIT. J. POL. SCI. 51 (1984).

121. KURAN, *supra* note 119, at 71.

122. *See* Thornton, *supra* note 12, at 884 tbl.4.

123. *See* Larry Bumpass, *The Changing Context of Parenting in the United States*, PARENTHOOD IN AMERICA, 1999, http://parenthood.library.wisc.edu/Bumpass/Bumpass.html.

strongly held views on the subject may well become more dismissive themselves. Indeed, there is evidence suggesting that the low marriage rate in Quebec—a rate that is about half that of the other Canadian provinces[124]—has been induced, in part, by such a bandwagon effect.[125]

The cautious approach to cohabitant claims and status that American courts have thus far taken therefore appears to be not only warranted, but desirable. Given the public and private advantages associated with formal marriage, the variety of cohabiting relationships and attendant difficulty of drafting standards that separate relationships involving expectations of sharing from the majority that do not give rise to such expectations, and the risk of creating bandwagon effects that might reduce public support for formal marriage and marital childbearing, there is every reason for courts and legislatures to remain cautious.

124. *See* Statistics Canada, *Marriages 2003*, THE DAILY, Jan. 11, 2007, http://www.statcan.ca/Daily/English/070117/ d070117a.htm (showing marriage rates of 2.9 per 1,000 population in Quebec and rates of 4.9 (Manitoba) or higher in all other Canadian provinces except the frontier provinces of Nunavit and Northwest Territories). Correspondingly, the proportion of adults living in nonmarital relationships is double the proportion in the rest of Canada. *See* Rejean Lachapelle, *The High Prevalence of Cohabitation Among Franco-phones: Some Implications for Exogamous Couples* (2007) (unpublished paper presented at 2007 annual meeting of the Canadian Population Society) (on file with author); Benoit Laplante, *The Rise of Cohabitation in Quebec: Power of Religion and Power Over Religion*, 31 CAN. J. SOC. 1 (2006).

125. *See* Garrison, *supra* note 98, at 512–16 (summarizing evidence).