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Marital Versus Nonmarital Entitlements

Raymond C. O'Brien
The Catholic University of America, Columbus School of Law

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The percentage of adult couples living in intimate nonmarital cohabitation continues to increase. The period of cohabitation is most often for a short period of time and entered into for several reasons. But for a small percentage of these and an increasing percentage of longer-term cohabitants, dissolution during life or at death often results in the unjust enrichment of one party. This Article examines methods of redress. In piecemeal fashion, a variety of states enforce nonmarital agreements, written and oral, during lifetime, while some enforce equitable remedies. Very few states enforce contract or equity remedies at death.

The paucity of remedies available to nonmarital cohabitants prompts the issue as to whether marital entitlements should be extended to nonmarital cohabitants who meet objective criteria. A modicum of states has begun to do this, and additional proposals have been introduced by the American Law Institute and by legal commentators. They propose that once a couple meets the criteria, they will be treated as spouses under state statutes. This is often the first step towards federal entitlements. This approach would entitle each party to federal and state entitlements associated with marriage, particularly distribution of property at dissolution during lifetime, or at death.

This Article discusses the evolution of family structure and the ascendency of privacy, liberty, and self-determination. Partially in response, an array of nonmarital unions have become commonplace in the past fifty years in the United States. Cases reveal the insufficiency of remedies available to these nonmarital couples at dissolution—even for those couples living in states willing to enforce express or implied nonmarital agreements. Strikingly, there are fewer remedies for nonmarital cohabitants at death.

Public policy mandates concern for all citizens, including the evolution of individualized family structures formed by its citizens. The issue addressed in this Article is whether public policy concerns warrant an extension of the marital presumptions traditionally associated with the commitment structure of marriage to a defined group of nonmarital co-

* Professor of Law, The Catholic University of America, Columbus School of Law; Visiting Professor of Law, The Georgetown University Law Center. The author is grateful to Steve Young for his research assistance, and to Thomas J. Garrity III, for his editorial assistance.

habitants. Although increasingly rejected by state legislatures—in an effort to better control the workhorse functions of marriage—common law marriage may offer a remedy if enacted as common law commitment. Freed of the nitpicking elements of legislative proposals, common law commitment may better meet the needs of modern-day evolutions in human nature.

I. Introduction

Late in the nineteenth century the English playwright and philosopher Oscar Wilde observed that the "only thing that one really knows about human nature is that it changes."[1] Comparing the era of Mr. Wilde with the current age, human nature has changed little, but the laws that govern human nature have changed dramatically.

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[1] Oscar Wilde, The Soul of Man Under Socialism 51 (1891). The essay in which his observation appears was published four years before Mr. Wilde was convicted of the crime of gross indecency, a crime in Great Britain resulting from Mr. Wilde's intimate assignation with a person of the same sex.

Evolutions in assessing human behavior have prompted radical revisions to family law rules and presuppositions. Surprisingly, even marriage has changed. During the eighteenth century, as an array of immigrants fanned out from the east coast to the southern and western regions of what would become the United States, the "dispersed patterns of settlement and the insufficiency of officials who could solemnize vows meant that couples with community approval simply married themselves."[2] Based solely upon the consent of the couple, cohabitation, and reciprocal economic contributions, informal or common law marriage flourished.[3] A marriage deemed valid where celebrated is then valid elsewhere too.

"Except in the few states that absolutely prohibited or nullified self-marriage by law, courts were generally satisfied when a couple's cohabitation looked like and was reputed in the community to be a marriage, whether or not authorized ceremonies could be documented."[4] Compare this informal attitude towards marriage to provisions in the mid-twentieth century Uniform Marriage and Divorce Act, which mandated that a couple submit a signed application for a marriage license to the appropriate state agent, pay a fee, prove that each party was over a certain age, that the parties were not prohibited from marrying because of prior marriage or incest, and that they met medical requirements if imposed by the state in which they sought to marry.[5] Over time, requirements for marriage and subsequently divorce, became more objective as governments pursued better control mechanisms for policy objectives that supported state goals.[6]

Adults of the same and opposite sex have always shared nonmarital cohabitation arrangements; they always will. But at some point, the state became more involved—initially to regulate public morals, but then to legitimize children, establish social networking, illustrate public virtue, create a time-tested economic milieu for raising children, and lastly for transferring property at death. The evolution of state involvement in marriage is illustrated in the statement of Professor Barbara Dafoe Whitehead given to the Congressional Subcommittee on Children and Families. In her remarks she described marriage as a *workhorse institu-*

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2 NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 31 (2000).

3 *See, e.g.*, *In re* Estate of Duval, 777 N.W.2d 380, 385 (S.D. 2010) (holding that a common law marriage must be established with clear and convincing evidence in a state recognizing it).

4 COTT, *supra* note 2, at 39.

5 UNIF. MARRIAGE & DIVORCE ACT § 203 (UNIF. LAW COMM'N 1974).

6 For example, Alabama recently abolished common law marriages celebrated after Jan. 1, 2017. *See* ALA. CODE. § 30-1-20 (2019).

tion that performs a number of social functions.[7] She states, "Marriage organizes kinship, establishes family identities, regulates sexual behavior, attaches fathers to their offspring, supports child rearing, channels the flow of economic resources and mutual caregiving between generations, and situates individuals within families, kin groups, and communities."[8] Throughout this Article reference will be made to the commitment structure generated by marriage. The commitment of two persons within a framework designed by the state is not incidental to societal goals. Indeed, this commitment structure fosters many public policy benefits.

Because state objectives were fostered by the commitment structure of marriage, couples received state and federal benefits upon marriage. Simply by being married a couple garnered entitlements, among them the presumption of title to property and eligibility for support during lifetime and at death. For example, tax status and financial entitlements such as community property and common law equitable prerogatives, were enacted to support the status of marriage. The commitment structure inherent in marriage warrants such benefits; "kin groups organized on the basis of marriage and descent provide the substance which integrates people in the larger social structure."[9] To illustrate, "there are approximately 1,049 federal laws in the United States Code that consider marital status as a factor."[10] In 1996, a report from the U.S. General Accounting Office identified more than one thousand places in federal law where legal marriage conferred a distinctive status, right, or benefit.[11] Ostensibly, these laws were enacted because marriage, kinship, and family traditionally occupied a position in society perceived as promoting a stable social environment, which is especially supportive of children's developmental needs. Overall, marriage provides "stability and the structure that are essential to sustaining individual liberty over the long term."[12] As one commentator observed

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7 *Healthy Marriage: What is it and Why Should We Promote It?: Hearing Before the Subcomm. on Children and Families of the S. Comm. on Health, Educ., Labor, and Pensions*, 108th Cong. 18 (2004) (statement of Barbara Dafoe Whitehead, Co-Director, National Marriage Project, Rutgers University) [hereinafter *Healthy Marriage Hearing*].

8 *Id.*

9 Bruce C. Hafen, *The Constitutional Status of Marriage, Kinship, and Sexual Privacy – Balancing the Individual and Social Interests*, 81 MICH. L. REV. 463, 482 (1983) (citing BERNARD FARBER, FAMILY AND KINSHIP IN MODERN SOCIETY 8-9 (1973)).

10 Deborah Zalesne, *The Contractual Family: The Role of the Market in Shaping Family Formations and Rights*, 36 CARDOZO L. REV. 1027, 1036 (2015) (citing U.S. GOV'T ACCOUNTABILITY OFF., GAO/OGC 97-16, DEFENSE OF MARRIAGE ACT (1997)).

11 COTT, *supra* note 2, at 2.

12 Hafen, *supra* note 9, at 472-73; *see also* Schwegmann v. Schwegmann, 441 So. 2d 316, 323-24 (La. Ct. App. 1983) ("The State has valid reason to discourage relationships which serve to erode the cornerstone of society, i.e., the family.").

"Marriage was not about bringing two individuals together for love and intimacy, although that was sometimes a welcome side effect. Rather, the aim of marriage was to acquire useful in-laws and gain political or economic advantage."[13]

Commitment structure is one of the reasons why marriage is viewed as a status arrangement more significant than a contract between two private persons. As was summarized by the Supreme Court of North Carolina as early as 1869, marriage

> is more than a civil contract; it is a relation, an institution, affecting not merely the parties, like business contracts, but offspring particularly, and society generally. [Because of benefit to society] every State has always assumed to regulate it, and to declare who are capable of contracting marriage,—what shall be the ceremony, what shall be the duties and privileges, and how it shall be dissolved.[14]

In addition to government regulation and concomitant benefits, "history and tradition cement the hold of marriage on individual desires and social ideals."[15] And of course religious values are supportive of the stabilizing elements desired by the government authorities.[16]

The United States Congress illustrated commitment structure when it passed the Personal Responsibility and Work Opportunity Act of 1996 (PRWO).[17] This landmark federal legislation changed the traditional federal approach to child welfare, concluding that federal grants to the states would be considered for funding only if the entity seeking the grant could demonstrate that funding would foster "healthy marriage promotion activities and activities promoting responsible fatherhood."[18] The federal legislation changed many facets of welfare law in the United States. Some changes were good and some were bad, but one certainty is that there was a shift in perspective. Certainly, though, the statute's emphasis upon marriage as a basis for a commitment structure that would achieve public goals was clearly expressed.[19] One commentator

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13 STEPHANIE COONTZ, MARRIAGE, A HISTORY: HOW LOVE CONQUERED MARRIAGE 306 (2005).

14 State v. Hairston, 63 N.C. 451, 453 (1869).

15 COTT, *supra* note 2, at 225.

16 *See, e.g.*, Cleveland v. United States, 329 U.S. 14 (1946); Mormon Church v. United States, 136 U.S. 1 (1889); Reynolds v. United States, 98 U.S. 145 (1878); Raymond C. O'Brien, *Family Law's Challenge to Religious Liberty*, 35 U. ARK. LITTLE ROCK L. REV. 3, 34-54 (2012).

17 Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

18 42 U.S.C. § 603(a)(2)(A)(ii) (2011).

19 For a commentary on the federal legislation, see THOMAS MASSARO, CATHOLIC SOCIAL TEACHING AND UNITED STATES WELFARE REFORM 87-129 (1998).

describes the impact of the federal legislation as the federal government throwing its weight behind the marriage promotion movement, adopting a welfare reform bill that made getting poor people married one of its central goals.[20]

The Supreme Court's same-sex marriage decision in 2015, *Obergefell v. Hodges*, placed particular emphasis on the benefits of marriage.[21] This landmark decision heralded the singular significance of marriage, stating that it is the "basis for an expanding list of governmental rights, benefits, and responsibilities."[22] Professor Lawrence W. Waggoner offers a brief summary of marital entitlements to which a cohabitant would become entitled if included in the status of spouse:

> Marriage carries significant psychological, health, and financial benefits. Marriage also creates federal and state rights, obligations, and immunities—including social security, taxation, spousal communication and testimonial privileges, obligation of support, the right to a property settlement and perhaps the possibility of alimony in divorce, a large intestate share for a surviving spouse, and protection against disinheritance via a right to elect a forced share. In community property states, property acquired during marriage other than by gift or inheritance is community property and is owned fifty-fifty by each married partner.[23]

In spite of entitlements and the commitment structure associated with marriage, there continues to be a rise in the percentage of adults otherwise able to be married but instead entering into nonmarital living arrangements. And many of these couples have children. Statistics reveal that of the total number of adults in the United States otherwise able to marry, 7% were cohabiting in 2016, for a total of 18 million persons.[24] This number increased 29% since 2007.[25] And while "roughly

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20 COONTZ, *supra* note 13, at 287. "Some states have implemented their own programs to boost marriage rates. Oklahoma paid a married couple to go around the state 'organizing marriage rallies.' West Virginia welfare department offered single mothers an extra $100 a month if they got married. By 2003 nearly every state was funding programs to promote marriage, and President George W. Bush had promised to earmark $1.5 billion in federal funds to promote marriage." *Id.*

21 Obergefell v. Hodges, 135 S. Ct. 2584, 2601 (2015).

22 *Id.*

23 Lawrence W. Waggoner, *Marriage is on the Decline and Cohabitation is on the Rise: At What Point, if Ever, Should Unmarried Partners Acquire Marital Rights?*, 50 FAM. L. Q. 215, 226-27 (2016).

24 A.W. Geiger & Gretchen Livingston, *8 Facts about Love and Marriage in America*, PEW RESEARCH CTR. (Feb. 13, 2018), http://www.pewresearch.org/fact-tank/2018/02/13/8-facts-about-love-and-marriage/ (last visited Feb. 2, 2020).

25 *Id.*

half of cohabiters are younger than 35—cohabitation is rising most quickly among Americans ages 50 and older."[26] Some foreign countries extend marital benefits to nonmarital cohabitants if certain conditions are met.[27] And increasingly, American states have extended parental rights to nonmarital partners during cohabitation or upon dissolution of the adult relationship.[28] It follows therefore that some legal and social commentators support extending entitlements heretofore restricted to marital cohabitants to nonmarital cohabitants.[29] These states believe that for those couples reaching an objective standard of commitment, for example length of time together, consent, children, or a court determination, the couples have "self-married" and deserve the entitlements available to formally married couples. Such a result is occasioned by the increasing percentage of such couples, the decreasing number of states permitting common law marriage, and equity's role in addressing unjust enrichment.

This Article discusses whether it is appropriate to extend marital entitlements to nonmarital cohabitants meeting objective standards. Are entitlements justified because of the increase in the percentage of couples choosing to delay or avoid marriage? Are entitlements warranted because single persons in an individually committed relationship are, in substance, identical to married couples? Or are entitlements warranted because far too often one of the parties suffers a significant disparity in treatment when dissolution occurs during life or at death of one of the parties?

The argument for equitable redress at the termination of a nonmarital relationship is compelling. As such, state courts and legislatures take a variety of approaches to petitions for redress submitted by one nonmarital cohabitant against the other, some applying redress during life, a very few at death. Other states, the naysayers, refuse recovery

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26 *Id.*

27 *See* Waggoner, *supra* note 23, at 233-34; *see also* Bill Atkin, *The Legal World of Unmarried Couples: Reflections on "De Facto Relationships" in Recent New Zealand Legislation*, 39 VICT. U. WELLINGTON L. REV. 793, 795, 799-800 (2008).

28 *See, e.g.*, *In re* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 500 (N.Y. 2016) (holding that clear and convincing evidence that the child's parent entered into a preconception agreement with a nonparent to raise the child together gives the nonparent standing as a parent); *see also* Raymond C. O'Brien, *Assessing Assisted Reproductive Technology*, 27 CATH. U. J. L. & TECH. 1, 10-11 (2018) (describing the increasing use of ART among marital and nonmarital couples). *See generally* O'Brien, *supra* note 16, at 79-88.

29 *See, e.g.*, Tom Andrews, *Cohabiting With Property in Washington: Washington's Committed Intimate Relationship Doctrine,* 53 GONZ. L. REV. 293, 332-33 (2018); Waggoner, *supra* note 23, at 236 (suggesting enactment of a Uniform de Facto Marriage Act that would permit unmarried partners to gain marital rights in a fashion similar to the ALI Principles).

altogether.[30] Yet, among the states offering redress, they take into consideration, among other factors, the evolution of societal structures in the last one-hundred years. The number of cohabitants and equity disparities compel these courts to balance the interests of the cohabitants within the cumbersome confines of redress, the standard of proof, expectations, and the length of the relationship. Overall, most states will enforce express written contracts, a few oral contracts, and if a contract is unavailable, some will apply the traditional equity grounds to thwart unjust enrichment by one party at the expense of the other. [31]

While the United States federal courts treat nonmarital cohabitation claims for redress as domestic matters, consigned to state courts, [32] a few foreign governments have enacted legislation to provide a remedy.[33] These foreign statutes illustrate models for possible enactment by those advocating for entitlements to be extended to nonmarital cohabitants. And, in the United States, the American Law Institute drafted a model statute that would permit certain committed cohabitants to have rights similar to married couples whenever a marital or nonmarital union dissolves.[34] The force of these approaches, foreign and domestic, is that couples who are personally committed—as defined by these individual statutes—deserve the same entitlements as married couples. But as this Article discusses, *infra*, the commitment required by these statutes demands far more of cohabitants than do the state requirements of a valid marriage. Very few cohabitants would qualify because, "cohabitation is a temporary or short-term state. The parties either break up or

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30 *See, e.g.*, Blumenthal v. Brewer, 69 N.E.3d 834, 851-52, 856-57 (Ill. 2016) (rejecting claims under nonmarital cohabitation because they would undermine marriage); Schwegmann v. Schwegmann, 441 So. 2d 316, 323-24 (La. Ct. App. 1983) (stating enforcement of nonmarital cohabitation claims undermines the family); Margaret Ryznar & Anna Stepien-Sporek, *Cohabitation Worldwide Today*, 35 GA. ST. U. L. REV. 299, 306 (2019) (citing legislative abolition of common law marriage).

31 *See, e.g.*, Dooner v. Yuen, No. 16-1939, 2016 WL 6080814, at *1, *3 (D. Minn. Oct. 17, 2016) (holding that promissory estoppel may be used to prevent injustice); Bumb v. Young, No. 63825, 2015 WL 4642594, at *1 (Nev. Aug. 4, 2015) (stating that the court permits unmarried parties to enter into an oral agreement permitting enforcement through promissory estoppel). *But see* Williams v. Ormsby, 966 N.E.2d 255, 265 (Ohio 2012) (holding that any agreement between the parties must have valid consideration to be enforceable, hence if no consideration there is no promissory estoppel).

32 *See* Anastasi v. Anastasi, 544 F. Supp. 866, 867 (D. N.J. 1982) (noting that federal courts abstain from domestic relations matters); *see also* Ankenbrandt v. Richards, 504 U.S. 689, 700, 715 n.8 (1992) (holding that the federal exception to domestic relations jurisdiction is found in the power of Congress to grant jurisdiction under Article III of the United States Constitution).

33 *See* Waggoner, *supra* note 23, at 246 (discussing, for example, Australia, New Zealand, Ireland and the United Kingdom).

34 PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 6.01-6.06, app. II, § 5.09 (AM. LAW INST. 2002) [hereinafter ALI PRINCIPLES].

get married fairly quickly. . . . Only about 10% remain cohabiting after five years."[35]

Those in favor of extending marital entitlements to unmarried cohabitants have several arguments. First, the array of protections currently available to some nonmarital cohabitants are inadequate. They argue that the legal and equitable remedies initially permitted under a seminal California decision are inadequate to meet the expectations of the parties in today's society.[36] This argument rests on the empirical evidence of the rising percentage of nonmarital cohabitants and the frequency of inequitable distribution of property upon dissolution of the relationship.

But those not in favor of extending marital entitlements to nonmarital cohabitants first argue that the state should not become involved in what are, in essence, private arrangements between two adults who should be aware of the dangers. Second, there are adequate remedies available to individuals before entering a nonmarital relationship. Of course, they can marry, but if not, they can enter into an express written contract defining their expectations in the event of dissolution. Such an agreement would be enforceable during life and at death as a creditor claim. Also, many states enforce oral agreements proven by clear and convincing evidence. Equity permits recovery wherever evidence of fraud, unjust enrichment, and sufficient reliance exists as to permit promissory estoppel. Third, courts ought not be called upon to decipher vague enforceable duties involving the private lives of two adult cohabitants. And fourth, the foundation for state and federal marital entitlements rests on the commitment structure brought about through marriage. Nonmarital cohabitants, personally committed as they may be, do not involve the state in their relationship, thereby reducing the historical level of commitment required to warrant entitlements.

This Article seeks to provide data, cases, and commentary put forth by advocates prior to and post *Obergefell*—the Court's decision mandating the allowance of same-sex marriage. The Court's emphasis in *Obergefell* on the status of marriage in the modern world is modern evidence that marriage is unique, vibrant, and sufficiently serving public policy through a commitment structure. The issue for those advocating

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35 Waggoner, *supra* note 23, at 231 (citing CASEY E. COPEN ET AL., NAT'L HEALTH STATS. REPS., NO. 64, FIRST PREMARITAL COHABITATION IN THE UNITED STATES: 2006-2010 NATIONAL SURVEY OF FAMILY GROWTH, at 5-6 (Apr. 4, 2013), http://www.cdc.gov/nchs/data/nhsr/nhsr064.pdf).

36 *See* Marvin v. Marvin, 557 P.2d 106, 111 (Cal. 1976) (holding that a party to a nonmarital relationship may find redress in law and equity to enforce a claim for damages). *But see* Marvin v. Marvin, 176 Cal. Rptr. 555, 559 (Cal. Ct. App. 1981) (holding that any contract must be established with clear and convincing evidence).

for the unique nonmarital entitlements suggested is to prove not that their numbers are rising or that inequities are occurring. Rather, the burden is to demonstrate a social good commensurate with marriage.

First, this Article will provide a brief background on the evolution of various two-person societal unions in the United States, to include the rise of individual privacy and privacy's interpretation within the United States Constitution.

Second, ambiguity exists within courts and legislatures as to what constitutes a qualifying nonmarital cohabiting relationship. Therefore, we will explore what objective criteria, including what some term "de facto marriage," currently qualifies as objectively sufficient to warrant a status as committed cohabitants. Also, because a significant number of nonmarital couples currently derive a modicum of entitlement through the enforcement of express and implied contracts, equitable remedies, and a degree of legislative protections we will discuss whether these suffice to meet current expectations of the parties. We will offer cases and statistics.

Throughout we will offer critique discussing the appropriateness of awarding marital entitlements to nonmarital couples. Because of the federalist nature of the American democracy and the certainty that societal norms will continue to evolve, it is impossible to arrive at a definitive answer. But it seems reasonable to proceed with a discussion as to whether states might revive common law marriage in the form of common law commitment. Perhaps this is a remedy that would best serve the equities involved.

II. Background of Societal Unions

A. Status of Marriage

In the early nineteenth century, America gradually progressed from farms and ranches into an increasingly urbanized society. From urbanization came centralized government tasked with the devolution of property during life and at death, establishing parentage of children, and mandating the security of support for persons who contribute to family formation and relinquished career options. The government sought structures to establish presumptions of order and regulation. And the structure to which governments turned to accomplish this was one that existed for millennia: marriage. "Far from being an institution fixed by God, marriage was in the hands of the legislature,"[37] seeking a mechanism to facilitate government. Religious denominations worked in tandem with state legislatures to fashion laws that would serve both God and man, but overall the practical benefits of civil marriage primarily

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37 Cott, *supra* note 2, at 54.

motivated lawmakers to fashion obligations and entitlements attendant upon marriage.[38] Those religious practices that conflicted with state control were forbidden, thereby illustrating the hierarchical control of the state.[39] Because of state managerial control, marriage became a status, something more than a contract between two persons.

> [Marriage] organized the production and distribution of goods and people. It set up political, economic, and military alliances. It coordinated the division of labor by gender and age. It orchestrated people's personal rights and obligations in everything from sexual relations to the inheritance of property. Most societies had very specific rules about how people should arrange their marriages to accomplish these tasks.[40]

State and federal legislatures both grasped the utility of marriage as a pillar of public morality, a restriction on promiscuity, incest, and child molestation, but also an economic bedrock upon which society rests. "Monogamous marriages that distinguished citizen-heads of households had enormous instrumental value for governance, because orderly families, able to accumulate and transmit private property and to sustain an American people, descended from them."[41] In addition, and illustrative of the commitment structure of marriage, "probably the single most important function of marriage through most of history . . . was its role in establishing cooperative relationships between families and communities."[42] Historically, the "transcendent importance of marriage"[43] occurred because of the following:

> For both men and women, marriage was the major determinant of wealth and status. For men, marriage secured the legitimacy of their offspring, and with legitimacy and primogeniture, the right of succession and authority over the family's holdings. For women, marriage provided the only available form of support and the only socially sanctioned role outside the convent.

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38 *See* O'Brien, *supra* note 16, at 47 (2012). *See also* Perez v. Lippold, 198 P.2d 17, 18 (Cal. 1948) ("The regulation of marriage is considered a proper function of the state. It is well settled that a legislature may declare monogamy to be the 'law of social life under its dominion,' even though such a law might inhibit the free exercise of certain religious practices.").

39 *See, e.g.*, Reynolds v. United States, 98 U.S. 145, 166 (1878) (holding that state could prohibit religious practice of polygamy).

40 COONTZ, *supra* note 13, at 9.

41 COTT, *supra* note 2, at 157. "[The] nation's public backing of conventional marriage became a synecdoche for everything valued in the American way of life." *Id.* at 219.

42 COONTZ, *supra* note 13, at 31. "Marriage usually grew out of a collaboration among parents, friends, and the two individuals involved, and it was often based on very practical considerations." *Id.* at 117-18.

43 Obergefell v. Hodges, 135 S. Ct. 2584, 2594 (2015).

> Women had few opportunities for an independent economic existence, and in societies that prized virginity, little opportunity for remarriage once the union was consummated.[44]

In spite of the state's pervasive interest in marriage, "local communities tolerated even such seeming aberrations as self-divorce and remarriage, if the situation seemed to warrant it."[45] Most often self-divorce occurred after one spouse deserted the other; the fact that few records were kept or found facilitated this and it was easy to start over again in distant locations.[46] Inevitably, as communities became more stable "legislators wanted to reassert their authority over what (some) people had done under the aegis of local tolerance."[47] As a result, as with marriage laws, states enacted legislation to more pervasively manage divorce too.

B. Ascent of Individuality

As the state became more aggressive, individuality began its ascent, a development that should be considered in any appraisal of nonmarital cohabitation. Arguably the amalgamation of societies in the Great War's aftermath, the first decades of the twentieth century not only deposed three monarchical dynasties, it also initiated a greater sense of individuality, of human autonomy, of personal freedom.[48] "[T]echnological innovations such as electric lights and electrified urban transportation [that] quickened the pace of life" augmented this societal evolution towards greater individuality.[49] Incrementally, "government authorities eased up on political and moral strictures about marriage and concentrated more on enforcing [marriage's] economic usefulness."[50] The state's emphasis on economics rather than morality is statistically evident; married people fared better economically. From a practical point of view, married couples are much less likely to be poor than are single parents or nonmarital couples. To illustrate, in 1999 about one in twenty (4.8%) married couples fell below the official government poverty threshold, compared with 27.8% of single female-

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44 Margaret F. Brinig & June Carbone, *The Reliance Interest in Marriage and Divorce*, 62 TUL. L. REV. 855, 859-60 (1988) (footnotes omitted).

45 COTT, *supra* note 2, at 37.

46 *Id.* at 38.

47 *Id.* at 48.

48 *See, e.g.*, COONTZ, *supra* note 13, at 313 ("The structure of our economy and the values of our culture also encourage or even force people to make much more individualistic decisions than in the past.").

49 COTT, *supra* note 2, at 156.

50 *Id.* at 157. *But see* COONTZ, *supra* note 13, at 203 ("The revolutionary innovations of the early twentieth century were meant to strengthen, not weaken, marriage's hold on people's emotions and loyalties.").

headed households.[51] And two decades into the twenty-first century single parents continue to have a greater incidence of poverty (27%).[52] Even though nonmarital partners are statistically less likely to be in poverty (16%) than single parents, married parents are the least likely to be in poverty (8%).[53]

The "twentieth-century revolution in gender roles and sexuality . . . actually increased the primacy of marriage in people's lives,"[54] because a female spouse was necessary and able to contribute to the responsibilities of the family's economic life by working outside the home. An increasing number of women entered the work force, thereby able to contribute to the household budget, something unheard of in the nineteenth century. But in spite of employment opportunities for women, the start of the twentieth century "did not seriously threaten the traditional gender order."[55] In fact, "job segregation and pay discrimination against women actually increased during the first forty years of the twentieth century."[56] Undaunted, married women "poured into the workforce during World War II," and the "female labor force increased by almost 60 percent in the United States between 1940 and 1945."[57] By the end of the Second World War, 1945, and the start of the second half of the twentieth century a "long decade"[58] began. During that decade, roughly from 1947 until 1960, called by some the "golden age of marriage in the West," the rate of marriage among young couples soared, life spans lengthened, and divorce rates fell.[59] For many it was a golden age.

By the 1960s birth control became reliable enough that the fear of pregnancy no longer constrained women's sexual conduct, and increasing legal autonomy permitted women to eschew stereotypical jobs and roles.[60] Overall, the primary social shift during the latter half of the

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51 Stephen L. Nock, Commentary, *Why Not Marriage?*, 9 VA. J. SOC. POL'Y & L. 273, 285 (2001) (citing U.S. CENSUS BUREAU, POVERTY IN THE UNITED STATES, CURRENT POPULATION REPORTS, Series P-60-210 (2000)).

52 Gretchen Livingston, *The Changing Profile of Unmarried Parents*, PEW RESEARCH CTR. 9 (Apr. 25, 2018), https://www.pewsocialtrends.org/2018/04/25/the-changing-profile-of-unmarried-parents/unmarried-parents-full-report-pdf/.

53 *Id.*

54 COONTZ, *supra* note 13, at 208.

55 *Id.*

56 *Id.* at 210.

57 *Id.* at 221.

58 *Id.* at 226.

59 *Id.* "Remarkably, the golden age of marriage crossed socioeconomic and ethnic lines." *Id.* at 227.

60 Significant emphasis is placed on the role of individual choice when rejecting a state's ban on birth control. *See* Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("[If] the right of privacy means anything, it is the right of the individual, married or single, to be

twentieth century was the departure from the necessity of marrying in order to establish cooperative relationships among families and communities.[61] It became increasingly evident that "women's and men's arenas of possible accomplishment now overlapped far more."[62] And in the context of marriage, "marriage ideals had become less hierarchical amidst the language of true love and companionate partnership; more wives were in the labor force; in legal terms the wife's personal identity was freer of her husband's imprint; and a wider spectrum of sexual behavior had become acceptable."[63] Arguably, the diminished importance of close-knit relationships and the communal support they generate "has liberated some people from restrictive, inherited roles in society. But it has stripped others of traditional support systems and rules of behavior without establishing new ones."[64] Yet, personal choice nurtures the arena of individual liberty inherent in nonmarital relationships, prompting the issue of whether nonmarital relationships that meet objective criteria should be accorded marital entitlements.

The second half of the twentieth century witnessed significant legislative and judicial recognition of the social acceleration of private autonomy. For example, the right to *marital* privacy was enumerated by the Supreme Court in 1965,[65] then extended by the Court to *individual* privacy in 1972.[66] During this seven year period, impediments to interracial marriage were found to violate Equal Protection and Due Process guarantees in 1967,[67] and the Due Process right of unwed fathers to custody of their children was established in 1972.[68] In the next year, 1973, nonmarital children were granted a right under the Equal Protection Clause to parental support equal to marital children.[69] A woman's Constitutional right to privacy was extended to abortion in 1973,[70] and states increasingly recognized the right of a married woman to maintain eco-

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free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

61 COONTZ, *supra* note 13, at 31.

62 COTT, *supra* note 2, at 179.

63 *Id.*

64 COONTZ, *supra* note 13, at 308.

65 Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965). "Justice Douglas here fused the protection of marital intimacy with the political principles of American democracy, to provide a crucial underpinning of modern constitutional doctrine on privacy rights." COTT, *supra* note 2, at 198.

66 Eisenstadt v. Baird, 405 U.S. 438, 456 (1972).

67 Loving v. Virginia, 388 U.S. 1, 2 (1967). In 1948, the California Supreme Court held that a state statute prohibiting marriage solely because of race violated equal protection. Perez v. Sharp, 198 P.2d 17, 29 (Cal. 1948).

68 Stanley v. Illinois, 405 U.S. 645, 658 (1972).

69 Gomez v. Perez, 409 U.S. 535, 538 (1973).

70 Roe v. Wade, 410 U.S. 113, 153 (1973).

nomic independence from her husband.[71] In addition, states incrementally abolished through legislation or judicial decree the marital rape exception to criminal prosecution of the woman's husband for rape.[72] Many states began permitting one spouse to sue the other spouse in tort.[73] Individuality flourished.

In response to domestic violence between intimate partners states made it easier for one spouse to obtain a civil order of protection from the other spouse based on the testimony of only one of the parties, known as an *ex parte* order.[74] Eventually, a significant federal response to combat domestic violence began in 1994 with the passage of targeted legislation and the adoption of a culture of condemning domestic violence.[75] As secular authority guaranteed greater personal privacy, the religious underpinnings of legal norms and practices gradually became less noticeable as the country became more secular.[76] "Where mid-nineteenth-century judges and other public spokesmen had hardly been able to speak of marriage without mentioning Christian morality, mid-twentieth-century discourse saw the hallmarks of the institution in liberty and privacy, consent and freedom."[77]

In 1969 California became the first state to permit divorce without regard to marital fault—defined as adultery, cruelty or desertion. As a result of the California legislation either spouse could petition to terminate a marriage through no fault grounds, asserting, for example, irreconcilable differences that have caused the irremediable breakdown of the marriage.[78] The remaining states rapidly adopted no-fault divorce in one form or another, some rejecting phrases of irreconcilability and instead specifying a period of time for separation prior to awarding a final decree of divorce.[79] One consequence of no-fault divorce was that an "at fault" spouse committing any of the marital faults was now able to separate and divorce the other spouse under a no-fault ground, thereby

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71 *See, e.g.*, MINN. STAT. § 519.05 (2019) (Liability of husband and wife).

72 *See, e.g.*, ARK. CODE ANN. § 5-14-103 (2019); Warren v. State, 336 S.E.2d 221 (Ga. 1985); People v. Liberta, 474 N.E.2d 567 (N.Y. 1984).

73 *See, e.g.*, Bozman v. Bozman, 830 A.2d 450, 471 (Md. 2003).

74 *See, e.g.*, State *ex rel.* Williams v. Marsh, 626 S.W.2d 223, 227 (Mo. 1982).

75 *See* Violence Against Women Act (VAWA), Pub. L. No. 103-322, §§ 2001, 108 Stat. 1796, 1910 (1994).

76 *See* O'Brien, *supra* note 16, at 14-20.

77 COTT, *supra* note 2, at 197.

78 CAL. FAM. CODE § 2310(a) (West 2019). "Irreconcilable differences are those grounds which are determined by the court to be substantial reasons for not continuing the marriage and which make it appear that the marriage should be dissolved." *Id.* § 2311.

79 *Grounds for Divorce, 50 State Statutory Surveys: Family Law: Divorce and Dissolution*, 0080 SURVEYS 9 (West 2016).

permitting unilateral divorce.[80] Previously, when only marital fault could warrant a divorce, only an innocent spouse could petition for divorce, but this barrier fell with the uniform adoption of no-fault.

In addition to being the first state to adopt no-fault divorce in 1969, California, in 1976, became the first state to permit judicial enforcement of express and implied contracts between unmarried cohabitants that involved property rights to assets accumulated during the period of cohabitation. When deciding to permit judicial enforcement, the state's highest court took judicial notice of the fact that a societal change was underway—a significant number of couples were living together without marrying and these couples shared their assets in a manner similar to married couples. Based in part on judicial recognition of this observation, the court decided that the time had come to enforce express and implied contracts between unmarried intimate couples with legal and equitable remedies. Thus, public policy no longer barred enforcement of oral or written agreements between nonmarital cohabitants given a mutual understanding respecting earnings and property despite the couple engaging in sexual contact during the contract period.[81]

Gradually, other state courts decided to enforce nonmarital cohabitation agreements too,[82] many because of the individual liberties of each party. For example, the Supreme Court of Nevada held that, "Unmarried couples who cohabit have the same rights to lawfully contract with each other regarding their property as do other unmarried individuals. Thus, this court must protect the reasonable expectations of unmarried cohabitants with respect to transactions concerning their property rights."[83]

By 1995, at least two state courts were willing to include nonmarital cohabitants within the same entitlements available at divorce as those that apply to married couples.[84] The Supreme Court of Washington

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80 New York State became the last state to permit unilateral divorce, whereby in New York one spouse may end his or her marriage simply by swearing that the marriage is irretrievably broken. *See* Palermo v. Palermo, No. 2010/15824, N.Y. Slip Op. 52506(U) at *2 (N.Y. Sup. Ct. Oct. 20, 2011).

81 Marvin v. Marvin, 557 P.2d 106, 115 (Cal. 1976). "[W]e base our opinion on the principle that adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other person to contract respecting their earnings and property rights." *Id.* at 116.

82 *See* Ryznar & Stepien-Sporek, *supra* note 30, at 303.

83 W. States Constr., Inc. v. Michoff, 840 P.2d 1220, 1224 (Nev. 1992).

84 *See, e.g.*, Tomal v. Anderson, 426 P.3d 915, 920 (Alaska 2018) ("Our case law has treated the end of a domestic partnership as coextensive with both the end of a marriage-like relationship and the end of the partners' cohabitation."); *W. States Constr., Inc.*, 840 P.2d at 1224; Connell v. Francisco, 898 P.2d 831, 836 (Wash. 1995); *see also* Goode v. Goode, 396 S.E.2d 430, 438 (W. Va. 1990) (permitting courts to apply equitable treatment to division of property acquired during cohabitation); Emily J. Stolzenberg, *The New*

held, "The property that would have been characterized as community property had the couple been married is before the trial court for a just and equitable distribution."[85] Although nascent, the issue being discussed there mirrors this Article: should nonmarital cohabitants be included in the presumptions and entitlements long reserved for married couples?

Firstly, what constitutes a nonmarital cohabiting couple deserving of inclusion within marital entitlements? Currently, the parameters of a qualifying nonmarital relationship vary among the state courts.[86] Uncertainty over who qualifies restrains state courts, but increasingly courts appear open to including at least some couples in the frameworks reserved to married couples. For example, the Supreme Court of New Hampshire held in 2012 that, "While unmarried parties are expressly within the family division's jurisdiction for purposes of child-related matters, this statutory scheme plainly restricts all divorce remedies and property distribution to married couples."[87] Nonetheless, even though divorce statutes are restricted to married couples, judges have broad powers to look to these same statutes when providing equitable relief to nonmarital couples.[88] What prompts courts to be inclusive? First, the increasing percentage of nonmarital cohabitants. Then there is the issue of unjust enrichment of one to the detriment of the other. There is also a heightened awareness of liberty that questions why remedies available to married couples should not be applicable to certain nonmarital cohabitants.

C. Heightened Liberty

The twenty-first century continued the ascent of personal autonomy, to include increasing percentages of nonmarital cohabitants. In addition, the Supreme Court under the aegis of the Due Process Clause of the Fifth Amendment and the Fourteenth Amendment enhanced individual liberty, the basis of personal autonomy. That protection is embodied in the provision that "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."[89] The parameters

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Family Freedom, 59 B.C. L. REV. 1983, 2024 (2018); ALI PRINCIPLES, *supra* note 34, § 6.04(1).

85 *Connell*, 898 P.2d at 837.

86 *See* Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1, 10-18 (2017).

87 *In re* Mallett, 37 A.3d 333, 338 (N.H. 2012).

88 *See* Brooks v. Allen, 137 A.3d 404, 404 (N.H. 2016) (holding that trial court's award of 40 percent of the value of the properties to ex-girlfriend was not an improper "divorce-like" remedy); *see also Goode*, 396 S.E.2d at 438.

89 U.S. CONST. amend. V. U.S. CONST. amend. XIV enjoins the states from depriving any person of life, liberty, or property without due process of law.

of that liberty interest guaranteed in the Constitution continue to spark debate.[90] Because the extent of that liberty interest guaranteed to individuals is at the heart of nonmarital cohabitation, it is useful to consider the impact of *Lawrence* and *Obergefell*, two significant liberty interest decisions.

The Supreme Court addressed the extent of individual liberty as described in the Constitution in *Lawrence v. Texas*, decided in 2003. The facts involved two same-sex adults engaging in consensual intimate conduct in a private residence. State police gained entry to the personal residence in response to a reported weapons disturbance. Upon entry and witnessing the two men engaging in sodomy the police arrested both for deviate sexual intercourse in accordance with validly enacted state statutes.[91] The issue before the Court involved "the validity of a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct."[92] The Court thus confronted the legality of state action within the confines of the Fourteenth Amendment's liberty interest pertaining to private sexual conduct between consenting adults. In holding the state statute unconstitutional, the Court ruled that, "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."[93]

Writing for the majority in *Lawrence*, Justice Anthony Kennedy relied extensively on the past judicial and statutory foundation created during the latter half of the twentieth century. He drew upon decisions like *Griswold*, *Eisenstadt*, and *Roe*, to recognize the changeability of human nature as it applies to adult consensual sexual activity.[94] Illustrating the evolution of personal liberty throughout the twentieth century, Justice Kennedy wrote: "As the Constitution endures, persons in every generation can invoke its principles in their search for greater freedom."[95] Then, in holding the Texas state statute at issue unconstitutional, the Court proposed a broad scope of protected human liberty, writing that "liberty presumes an autonomy of self that includes free-

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90 *See, e.g.*, Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 148 (2015).

91 Lawrence v. Texas, 539 U.S. 558, 563 (2003) (citing TEX. PENAL CODE ANN. § 21.06(a) (2003)).

92 *Id.* at 562.

93 *Id.* at 567.

94 *See e.g.*, *id.* at 571-72 ("In all events we think that our laws and traditions in the past half century are of most relevance here. These references show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.").

95 *Id.* at 579.

dom of thought, belief, expression, and certain intimate conduct." [96] This liberty applies equally to heterosexual and homosexual adults. "Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."[97] The Court then overrules precedents that permitted discrimination against same-sex couples while at the same time permitting liberty to opposite sex couples. Henceforth, in reference to same-sex couples, the Court ruled the "State cannot demean their existence or control their destiny by making their private sexual conduct a crime."[98] The Court's decision in *Lawrence* enhances the liberty guaranteed under the Constitution, a holding that will find further expression in subsequent judicial opinions from the Court, but not without eliciting pointed dissent.

Justices dissenting from *Lawrence*'s approach to the scope of the liberty interest granted under the Constitution argued that the Constitution does not guarantee a general right to privacy, or specifically a "liberty of the person both in its spatial and more transcendent dimensions."[99] And furthermore, the dissent argues that the Court's majority opinion usurps legislative prerogatives by pretending it "possesses a similar freedom of action."[100] This argument is crucial to the scope of liberty's protection. Dissenters argue that usurpation by the judicial branch occurs because *Lawrence* holds that liberty in the context of intimate conduct deserves "substantial" protection,[101] and thus any state law that does not establish a fundamental (compelling) state interest cannot survive the strict scrutiny of the Fourteenth Amendment. Although many state statutes, validly enacted by an elected legislature, may survive a rational basis of scrutiny, many will not be able to overcome the compelling scrutiny now mandated by the Court.[102] A common argument among the dissenters focuses on this issue, whether sexual liberty should rise to the level of a fundamental right.

Justice Antonin Scalia's dissent in *Lawrence* argues that homosexual intimacy does not rise to the level of a fundamental right. As a re-

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96 *Id.* at 562.

97 *Id.* at 574.

98 *Id.* at 578.

99 *Id.* at 606 (Thomas, J., dissenting).

100 *Id.* at 604 (Scalia, J., dissenting); *see also* Yoshino, *supra* note 90, at 148 (arguing that *Obergefe*ll placed a strong emphasis on the intertwined nature of liberty and equality and was a game changer for substantive due process analysis).

101 *Lawrence*, 539 U.S. at 572. "Our opinions applying the doctrine known as 'substantive due process' hold that the Due Process Clause prohibits States from infringing fundamental liberty interests, unless the infringement is narrowly tailored to serve a compelling state interest." *Id.* at 593 (Scalia, J., dissenting).

102 *See generally* Jer Welter, *Sexual Privacy After* Lawrence, 7 GEO. J. GENDER & L. 723, 724 (2006).

sult, he argues for judicial restraint on the reach of the liberty interest within the Fourteenth Amendment, and for a return to what is rationally, not compellingly, related to a governmental interest. He writes that "liberty interests may be abridged or abrogated pursuant to a validly enacted state law if that law is rationally related to a legitimate state interest."[103] As a result, if the legislative process brings about enactment of laws rationally related to a valid state purpose, courts may not annul these laws in pursuit of liberty because the Court concludes the state's approach is not in accordance with the Due Process Clause. Specifically, the Due Process Clause may not be used to overturn validly enacted state statutes that adequately express a rational state interest. "What [any state] has chosen to do is well within the range of traditional democratic action, and its hand should not be stayed through the invention of a brand-new 'constitutional right' by a Court that is impatient of democratic change."[104]

While Justice Kennedy's majority opinion implies a fundamental right for all consenting adults, heterosexual or homosexual, to engage in intimate conduct as a product of personal liberty, Justice Scalia, on the other hand, narrows the focus to the Texas statute pertaining to same-sex consenting adults. He concludes that there exists no fundamental right to engage in sodomy derived from history and human behavior. Consequently, Justice Scalia's dissent concludes that the state statute criminalizing sodomy need not establish a compelling state interest to survive scrutiny, only a rational basis. He writes that, ". . . homosexual sodomy is not a right 'deeply rooted in our Nation's history and tradition.'"[105] Thus it does not deserve mandating a compelling state interest, the use of which would overcome validly enacted state legislation.

Judicial disagreement over the scope of the liberty interest in the Due Process Clause did not end with the *Lawrence* decision in 2003. Rather, *Lawrence* provided the groundwork for subsequent Court decisions. In addition to his alarm over the Court's approach to the extent of an individual's liberty interest, Justice Scalia's dissent contained a prediction that occurred twelve years later. He predicted in 2003 that the Court's expansive use of liberty to accommodate an "emerging awareness" that liberty that gives substantial protection to adult persons in deciding how to conduct their "private lives in matters pertaining to sex"[106] would bring about same-sex marriage. Specifically, he wrote that in his view, "the [*Lawrence*] opinion dismantles the structure of constitutional law that has permitted a distinction to be made between hetero-

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103 *Lawrence*, 539 U.S. at 593 (Scalia, J., dissenting).
104 *Id.* at 603 (Scalia, J., dissenting).
105 *Id.* at 596 (Scalia, J., dissenting).
106 *Id.* at 597 (Scalia, J., dissenting) (citing *id*. at 572).

sexual and homosexual unions, insofar as formal recognition in marriage is concerned."[107] He was correct; *Lawrence* provided the analytical base that permitted the definition of marriage to include same-sex couples. Thus, in 2015, the Court, in a majority opinion also authored by Justice Anthony Kennedy, changed the definition of marriage by mandating that states permit and recognize same-sex marriages. The Court, in *Obergefell*, relied on similar reasoning as found in *Lawrence*.

The Court held in *Obergefell v. Hodges* that "the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty."[108] As a result of the Court's decision in *Obergefell*, that the United States Constitution guarantees to same-sex adult couples the right to state-sanctioned marriage, the patchwork of state entitlements and prohibitions then in existence became obsolete.[109] By deciding that persons of the same sex may marry, the Court changed the definition of marriage, which had formed the basis of some states' prohibition of same-sex marriage. There was precedent for this. In 1967 the Court held that persons of different races may marry by force of the Constitution.[110] But *Loving* is distinguishable in that it focused primarily on the Equal Protection Clause, with only a minor reference to Due Process.[111]

Justice Anthony Kennedy authored the majority opinions in both *Lawrence* and *Obergefell*, both of which emphasized the evolving nature of constitutional protections, to the consternation of those jurists preferring to adhere to the original meaning of the text and leaving the task of updating to the legislatures.[112] Rejecting this textual approach, Justice Kennedy writes in *Obergefell* that

> [The] nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of

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107 *Id.* at 604 (Scalia, J., dissenting).

108 Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015).

109 *See* Raymond C. O'Brien, Obergefell*'s Impact on Functional Families*, 66 CATH. U. L. REV. 363, 374-79 (2016); O'Brien, *supra* note 16, at 38-41; Raymond C. O'Brien, *Domestic Partnership: Recognition and Responsibility*, 32 SAN DIEGO L. REV. 163, 170 (1995).

110 Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding was based on the Due Process Clause and Equal Protection Clause).

111 *Id.* ("These statutes also deprive the Lovings of liberty without due process of law in violation of the Due Process Clause of the Fourteenth Amendment. The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.").

112 *See, e.g.*, ANTONIN SCALIA, A MATTER OF INTERPRETATION 23 (1997) ("A text should not be construed strictly, and it should not be construed leniently; it should be construed reasonably to contain all that it fairly means.").

> Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning.[113]

Arguably, *Lawrence* and *Obergefell*—and the judicial philosophy espoused therein—are a product of the evolution of human behavior evidenced throughout the last two centuries. This evolution has witnessed a social, judicial, and legislative shift towards greater individual liberty in choice and status. Pertinent to this Article is that individual liberty has brought about an increasing number of nonmarital cohabitants as part of the overall percentage of cohabiting couples. The sheer prevalence of nonmarital cohabitants, plus the heightened scrutiny afforded intimate relationships evidenced in cases such as *Lawrence* and *Obergefell*, prompts the question whether we should extend social and financial entitlements heretofore associated solely with marriage to couples in nonmarital cohabitation.[114] As an evolving form of family should they not enjoy—as of right—the structural entitlements heretofore reserved to married cohabitants? Certainly, the liberty envisioned by these two cases—*Lawrence* and *Obergefell*—supports the proposition that the state structure of marriage should not thwart the fundamental right of individuals to form families in the manner that privacy and liberty sustains, and to which they are entitled. Are the equities involved in nonmarital relationships compellingly met through current legal and equitable remedies initiated in *Marvin v. Marvin*? To address this issue, we need to explore the parameters of nonmarital unions.

III. Nonmarital Union Parameters

Couples have been sharing domicile, material resources, children, and hopes and disappointments for countless centuries. Most of these couples were unmarried cohabitants, with no government approbation.

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113 *Obergefell*, 135 S. Ct. at 2598. Note the similar statement in Justice Kennedy's *Lawrence* opinion: "They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom." Lawrence v. Texas, 539 U.S. 558, 579 (Tex. App. 2003).

114 *Obergefell*, 135 S. Ct. at 2600 (Marriage confers material protection for children and families.); *id.* at 2601 ("Indeed, while the States are in general free to vary the benefits they confer on all married couples, they have throughout our history made marriage the basis for an expanding list of governmental rights, benefits, and responsibilities. These aspects of marital status include: taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decision making authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules.").

Yet the couple shared a mutual commitment to one another, usually predicated upon survival, care of children, and perhaps emotional attachment. As the state evolved, the status of marriage arose as a result of public necessity and approbation, based on the state's need for the assignment of parenting responsibilities or spousal support duties, sexual restraint, and efficient transmission of property. "Modern sovereigns generally want to prescribe marriage rules to stabilize the essential activities of sex and labor and their consequences, children and property."[115] Furthermore,

> [M]arriage was certainly an early and vitally important human invention. One of its crucial functions in the Paleolithic era was its ability to forge networks of cooperation beyond immediate family group or local band. Bands needed to establish friendly relations with others so they could travel more freely and safely in pursuit of game, fish, plants, and water holes or move as the seasons changed.[116]

And consistent with evolving human relationships, the "effect of marriage on people's individual lives has always depended on its function in economic and social life, functions that have changed immensely over time."[117] Nonetheless, even amidst the evolution of societies, "marriage adds something extra, over and above its selection effects. It remains the highest expression of commitment in our culture and comes packaged with exacting expectations about responsibility, fidelity, and intimacy."[118]

A. Defining a Nonmarital Relationship

What objective factors constitute a nonmarital relationship sufficiently analogous to warrant marital entitlements? Both common law marriage and statutory marriage have objective criteria that, if present, constitute a valid state-sanctioned marriage.[119] Therefore, what constitutes a nonmarital relationship? Legal commentators vary in their definitions of a nonmarital relationship. Some look to human activities to define the status. For example,

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115 COTT, *supra* note 2, at 6.

116 COONTZ, *supra* note 13, at 40.

117 *Id.* at 44.

118 *Id.* at 309.

119 *See, e.g.*, Coates v. Watts, 622 A.2d 25, 27 (D.C. App. 1993) (noting that a common law marriage proponent must prove by a preponderance of the evidence that both parties cohabited and mutually agreed to be married); VA. CODE ANN. § 20-13 (2019) ("Every marriage in this Commonwealth shall be under a license and solemnized in the manner herein provided.").

> [I]t includes couples who are having, or could be having sex with each other. . . . They are composed of individuals who lived together before getting married; they are those who continue to live with the partner they were once married to but now divorced from; they are those who are in a nonmarital relationship while receiving alimony payments from a prior marriage.[120]

Other commentators look to the intentionalities of the parties, particularly in reference to permanency, intimacy, and commitment, [121] but concurring with social scientists describing "nonmarital relationships as essentially heterogeneous."[122]

But commentators also agree that if the law is to identify when legal rights and obligations are to attach, the law "must also identify the objective conduct that will trigger legal obligations." [123] For better or for worse, courts will often look to conduct suggesting the "broad commitment to live like a married couple," [124] such as sharing a common household, pooling resources, and doing so for an extended period of time. But the marriage standard itself remains nebulous: "it is not clear what the hallmarks of marriage are: many marriages do not bear all the hallmarks of marriage."[125]

Some commentators suggest providing an objective standard via a de facto list of factors for courts to take into consideration in determining if a nonmarital partnership was intended. But still, a court must decide, based on these factors, whether there was a de facto marriage. [126] Thus, a court has the last word, deciding on its own whether a nonmarital relationship resulted after it reviews the list of factors. Notably on this list is the intention of the nonmarital partners. Overall, as described by one commentator, if a

> relationship that has been edging toward de facto marriage continues to progress along that continuum, the relationship

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120 Antognini, *supra* note 86, at 7.

121 *See, e.g.*, Kaiponanea T. Matsumura, *Consent to Intimate Regulation*, 96 N.C. L. REV. 1013, 1026 (2018).

122 *Id*. at 1037 (citing Fiona Rose-Greenland & Pamela J. Smock, *Living Together Unmarried: What Do We Know About Cohabiting Families?*, *in* HANDBOOK OF MARRIAGE AND THE FAMILY 255, 256 (Gary W. Peterson & Kevin R. Bush eds. 2013)).

123 *Id.* at 1039-40.

124 *Id.* at 1041. *See, e.g.*, Connell v. Francisco, 898 P.2d 831, 834 (Wash. 1995) ("A meretricious relationship is a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist.").

125 Matsumura, *supra* note 121, at 1044-45.

126 *See, e.g.*, Waggoner, *supra* note 23, at 236 (suggesting enactment of a Uniform de Facto Marriage Act that would permit unmarried partners to gain marital rights in a fashion similar to the ALI Principles).

> will likely, at some point, cross the line between cohabitation and marriage in fact. That would be the tipping point—the time when a court of competent jurisdiction could justifiably declare the couple's relationship as having reached marital status.[127]

Then, once a state court declares a de facto marriage, this status would "entitle de facto spouses to all marital rights and obligations under both federal and state laws."[128]

The American Law Institute (ALI) may serve as a model for comprising a de facto list of factors. The ALI defines a nonmarital couple as "domestic partners" once the couple meets certain criteria: "two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple."[129] To simplify matters the ALI employs a *presumption* that persons are domestic partners whenever they maintain a common household[130] for a continuous period of time as defined by each individual state.[131] The ALI then lists thirteen factors that are meant to provide *rebuttal* of the presumption of domestic partnership. These factors include:

> (a) the oral or written statements or promises made to one another, or representations jointly made to third parties, regarding their relationship;
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> (b) the extent to which the parties intermingled their finances;
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> (c) the extent to which their relationship fostered the parties' economic interdependence, or the economic dependence of one party upon the other;
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> (d) the extent to which the parties engaged in conduct and assumed specialized or collaborative roles in furtherance of their life together;
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> (e) the extent to which the relationship wrought change in the life of either or both parties;

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127 *Id.*

128 *Id.* at 246.

129 ALI PRINCIPLES, *supra* note 34, § 6.01(1).

130 "Persons *maintain a common household* when they share a primary residence only with each other and family members; or when, if they share a common household with other related persons, they act jointly, rather than as individuals, with respect to management of the household." *Id.* § 6.03(4); *see also* Duff-Kareores v. Kareores, 52 N.E.3d 115, 121 (Mass. 2016) (listing six factors a judge may consider in ascertaining whether there was a common household).

131 ALI PRINCIPLES, *supra* note 34, § 6.03(3).

> (f) the extent to which the parties acknowledged responsibilities to each other, as by naming the other the beneficiary of life insurance or of a testamentary instrument, or as eligible to receive benefits under an employee benefit plan;
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> (g) the extent to which the parties' relationship was treated by the parties as qualitatively distinct from the relationship either party had with any other person;
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> (h) the emotional of physical intimacy of the parties' relationship;
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> (i) the parties' community reputation as a couple;
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> (j) the parties' participation in a commitment ceremony or registration as a domestic partnership;
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> (k) the parties' participation in a void or voidable marriage that, under applicable law, does not give rise to the economic incidents of marriage;
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> (l) the parties' procreation of, or adoption of, or joint assumption of parental functions towards a child;
>
> (m) the parties' maintenance of a common household [as defined in the ALI].[132]

The domestic partnership commences when the partners begin sharing a primary residence and it ends when the parties cease sharing a primary residence.[133] And for the ALI, as with some of the states, any property acquired by the partners may be divided in the same manner as marital property.[134] Furthermore, in addition to the distribution of property, "a domestic partner is entitled to compensatory payments on the same basis as a spouse,"[135] thus permitting support from one partner to the other at dissolution. Finally, statutes of limitations apply within which a party must sue to establish that the domestic partnership ever existed.[136]

Although the ALI provides a presumption and a rebuttal with explicit factors identifying a nonmarital union (domestic partnership), states grapple with their own criteria—objective and subjective indices

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132 *Id.* § 6.03(7).

133 *Id.* § 6.04(2).

134 *See id.* § 6.05; *see also* Tomal v. Anderson, 426 P.3d 915, 922 (Alaska 2018) (holding that when a domestic partnership begins and ends is a question of fact); *see also* Walsh v. Reynolds, 335 P.3d 984, 996 (Wash. App. 2014) (holding that courts should determine when a relationship began and ended as a matter of what is just and equitable).

135 ALI PRINCIPLES, *supra* note 34, § 6.06(1)(a).

136 *See, e.g.*, *In re* Kelly, 287 P.3d 12, 18 (Wash. Ct. App. 2012) (specifying a three-year statute of limitations).

that identify a nonmarital union. Although far less inclusive, state court decisions often utilize one of more of the factors listed by the ALI. For example, the Supreme Court of Hawaii looks to "both the financial and nonfinancial contributions of the parties during the [nonmarital] relationship."[137] Additionally, the Hawaiian court looks to

> relevant considerations [that] may include, but are not limited to, joint acts of a financial nature, the duration of cohabitation, whether—and the extent to which—finances were commingled, economic and non-economic contributions to the household for the couple's mutual benefit, and how the couple treated finances before and after [any] marriage.[138]

The focus is not solely upon finances. The Hawaiian courts consider, in addition to commingling of assets, whether a commingling of "energies" sufficient enough to establish a partnership existed.[139] Similarly, the Supreme Court of Alaska requires "energies" in the relationship too. "We emphasize that simply living together is not sufficient to demonstrate intent to share property as though married, and, moreover, that parties who intend to share some property do not preemptively intend to share all property."[140] And while the possibility of sexual involvement is consistent with a nonmarital relationship,[141] it also signals a commitment between the parties.[142] "Sexual activity is treated as a marker of a healthy relationship and is often included in measures of relationship quality. The assumption being that sex accompanies love and closeness."[143] Nonetheless, the Supreme Court of Illinois held that proof of sexual conduct is not needed—a conjugal relationship does not require sex, so that an impotent male is capable of a nonmarital cohabitation relationship.[144]

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137 Collins v. Wassell, 323 P.3d 1216, 1229 (Haw. 2014) (premarital cohabitation may be considered in dividing marital assets upon subsequent divorce); *But see* Antognini, *supra* note 86, at 31 ("[I]n most cases the plaintiff fares better in a nonmarital relationship where both individuals contribute financially than in a relationship where the individuals follow a breadwinner-homemaker model.").

138 Hamilton v. Hamilton, 378 P.3d 901, 915 (Haw. 2016) (holding that a valid premarital partnership existed and should be considered in dividing property).

139 *See* Collins v. Wassell, 323 P.3d 1216, 1222 (Haw. 2014).

140 Tomal v. Anderson, 426 P.3d 915, 923 (Alaska 2018).

141 *See, e.g.*, Williams v. Ormsby, 966 N.E.2d 255, 258 (Ohio 2012) ("[T]he essential elements of cohabitation are (1) sharing of familial or financial responsibilities, and (2) consortium." (quoting State v. Williams, 683 N.E.2d 1126, 1130 (Ohio 1997))).

142 *See* Matsumura, *supra* note 121, at 1036; *see also* Tompkins v. Jackson, No. 104745/2008, 2009 WL 513858, at *14 (N.Y. Sup. Ct. Feb. 3, 2009) (holding that providing care and assistance does not evidence a contract or a relationship).

143 Matsumura, *supra* note 121, at 1036.

144 *In re* Marriage of Sappington, 478 N.E.2d 376, 381 (Ill. 1985) (Both parties admitted that they had no sexual interest in the other party, and that they were just friends.).

Commentators also offer suggestions as to alternate criteria for establishing an objective and viable nonmarital relationship. For example, Professor Kaiponanea T. Matsumura argues that consent should be the basis for identifying informal intimate relationships.[145] Professor Matsumura believes the way consent is established concentrates on two considerations. First is the presence of objective factors, such as the financial interdependence of the parties, economic dependency, raising of children together, and any pattern exhibited in previous relationships, cohabitation, and the couple's attitude towards sexual exclusivity.[146] Second, evidence of consent "should focus on discrete commitments—whether property sharing, ongoing financial support, or companionship—rather than all of the bundled rights and obligations of marriage."[147] Overall, the approach of Professor Matsumura emphasizes the point made by other commentators—in judging whether a nonmarital relationship deserves entitlements courts should move beyond the marriage-nonmarriage dyad.[148]

> Specifically, courts rely on marriage as the relevant unit of analysis in determining whether to: award [palimony]; apply the laws of divorce to a couple that is not married; include a nonmarital period in distributing property where a couple had also been married; or terminate alimony payments on the basis of an ex-spouse's new, nonmarital relationship.[149]

The conclusion being that, "in an era where marriage is not the only reality, the law has to do more than depend on marriage in deciding whether and how to assign property."[150]

As we will discuss *infra*,[151] a few foreign countries have enacted legislation that identifies the existence of viable nonmarital cohabitation couples. For the most part these mimic the ALI factors and de facto couples.

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145 *See* Matsumura, *supra* note 121, at 1078-82.

146 *See id*. at 1029-37.

147 *Id*. at 1014.

148 *See, e.g.*, Antognini, *supra* note 86, at 61 (The thread underlying the approaches taken by courts in addressing nonmarital relationships and their attendant effects is that they "rely on marriage to give it content and meaning; there are those that rely on marriage to distinguish it from nonmarriage. In all cases, marriage is the preferred status.").

149 *Id.* at 10. "Although marriage no longer provides the substance that courts rely on in analyzing nonmarital relationships, or the doctrines that courts apply, marriage continues to be central to the project of defining nonmarriage—by opposition instead of analogy." *Id.* at 30.

150 *Id.* at 63.

151 *See infra* Part IV.B.

B. Statistical Data

The need to fairly define a nonmarital union deserving of entitlements results from the fact that an increasing number of couples are choosing nonmarital cohabitation rather than marriage.[152] Repeatedly, courts have taken judicial notice of this fact.[153] But problems arise at the cessation of the relationship when courts are then tasked with allocating property, mandating support, or ordering specific performance, all to do equity. Concern over unjust enrichment by one of the parties to the detriment of the other prompts judges and legislatures to scrutinize the facts of each case to arrive at a fair, objective standard.[154] Once the objective standard is met, then courts may apportion accumulated assets in a manner similar to what would occur at divorce were the couple married. This is the goal of nonmarital cohabitation entitlements—to be included as a spouse for purposes of state and federal presumptions.

It is pertinent then to review the personal characteristics of those adults choosing to cohabit with another adult rather than enter into marriage. Current statistics may be misleading, but the future 2020 U.S. Census Bureau form offers an expanded list of categories pertaining to relationships, two more categories than in 2010.[155] "For 2020, the census form [includes] separate categories for 'opposite-sex' and 'same-sex' spouses and unmarried partners."[156] The census form may provide better data, but, even without new data, undoubtedly "changes in marriage and childbearing have reshaped the American family over the past half-century."[157] Among these characteristics are the following.

1. *Intent to Cohabit*

While many persons remain single because of financial considerations, "A majority of American who have never married but may want

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152 *See, e.g.*, Marvin v. Marvin, 557 P.2d 106, 109 (Cal. 1976) ("During the past 15 years, there has been a substantial increase in the number of couples living together without marrying.").

153 *Id.* at 110.

154 *See, e.g.*, Cates v. Swain, 215 So. 3d 492, 496-97 (Miss. 2013) (holding that court could award nonmarital cohabitant compensation for improvements made to residences under theory of unjust enrichment).

155 *See* U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, *2010 Census Form*, https://www.census.gov/history/pdf/2010questionnaire.pdf; D'Vera Cohn, *2020 Census Will Ask about Same-Sex Marriage for the First Time*, PEW RESEARCH CTR. (Apr. 10, 2018), https://www.pewresearch.org/fact-tank/2018/04/10/2020-census-will-ask-about-same-sex-marriages-for-the-first-time/ (last visited Feb. 2, 2020) [hereinafter Cohn, *2020 Census*].

156 Cohn, *2020 Census*, *supra* note 155.

157 Gretchen Livingston, *Family Life is Changing in Different Ways Across Urban, Suburban and Rural Communities in the U.S.*, PEW RESEARCH CTR. (June 19, 2018), https://www.pewresearch.org/fact-tank/2018/06/19/family-life-is-changing-in-different-ways-across-urban-suburban-and-rural-communities-in-the-u-s/ (last visited Feb. 2, 2020).

to say one reason for not marrying is that they are not financially stable."[158] Statistics indicate that the overriding consideration for couples deciding if they should marry is financial stability. "Full time work, median wages, women's poverty, housing costs, owning a home and living in a parent's home all were significantly linked with higher or lower marriage rates among young adults to some degree."[159] Among couples surveyed, those who did marry were more likely to have reached some threshold of economic security; the likelihood of marriage was highest for couples in which both partners met the bar of economic security.[160]

In reviewing the statistics on nonmarital cohabitating couples it appears that a significant number of couples do not intend to cohabit; rather cohabitation is a default prompted by other considerations. Among these considerations are independence, possible loss of government benefits if marriage occurs, poverty, fear of divorce, and a prelude to marriage.[161]

2. *Who Gets Married?*

"Half of Americans ages 18 and over were married in 2016, a share that has remained relatively stable in recent years but is down 9 percentage points over the past quarter-century."[162] In spite of the rise in the number of people remaining single, some "90 percent of all Americans will marry during their lifetimes, and more than 70 percent of people who divorce remarry."[163] Overall, statistics tell us that

> Wealthier, better educated adults tend to marry each other and have children within the marriage. Studies have found that higher male earnings have a positive effect on marriage, the transition between cohabitation and marriage, and childbirth within marriage. Higher education levels for women also have a positive effect on marriage rates.[164]

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158 D'Vera Cohn, *Research from 2018 Demographers' Conference: Migration, Self-Identity, Marriage and Other Key Findings*, PEW RESEARCH CTR. (May 24, 2018), http://pewresearch.org/fact-tank/2018/05/24/research-from-2018-demographers-conference-migration-self-identity-marriage-and-other-key-findings/ (citing Kim Parker & Renee Stepler, *As U.S. Marriage Rate Hovers at 50%, Education Gap in Marital Status Widens*, PEW RESEARCH CTR. (Sept. 14, 2017), https://www.pewresearch.org/fact-tank/2017/09/14/as-u-s-marriage-rate-hovers-at-50-education-gap-in-marital-status-widens/) (last visited Feb. 2, 2020).

159 *Id.*

160 *Id.*

161 COONTZ, *supra* note 13, at 281-301.

162 Geiger & Livingston, *supra* note 24.

163 Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL'Y & L. 307, 326 (2004).

164 Matsumura, *supra* note 121, at 1038.

Almost 90% of Americans cited love as a very important reason to get married and married adults reported in a 2015 survey that having a shared interest primarily helped people to stay married, followed by a satisfying sexual relationship, and sharing household chores.[165] While the median age for a first marriage rose in 2017 to 29.5 years for men and 27.4 years for women, for those persons 65 years and older the divorce rate roughly tripled since 1990.[166]

The number of Americans remarrying is increasing. "In 2013, 23% of married people had been married before, compared with just 13% in 1960. Four-in-ten new marriages in 2013 included a spouse who had said 'I do' (at least) once before, and in 20% of new marriages both spouses had been married at least once before."[167] Remarriage is more common among men than among women, with 54% of women completing a 2014 survey reporting that they never wished to remarry, but only 30% of men responded that they did not want to remarry.

And a 2015 Pew Research Center survey reported that a total of 15% of American adults used online dating sites and/or mobile apps. Similarly, a 2013 survey revealed that "[r]oughly four-in-ten Americans (41%) know someone who uses online dating, and 29% know someone who has entered a long-term relationship via online dating."[168]

Marriage may be initiated by love, but the state regulates who may enter it and how participants may depart from it. As we have discussed *supra*,[169] there are significant reasons why the state becomes involved in the marriage. First, marriage provides for dependent caretaking and mandates economic support when the marriage dissolves.[170] Second, marriage emphasizes permanency, an "insistence on the conditions that maximize stability."[171] This permanency that the state attaches to the private commitment of marriage serves important social functions, even if the commitment is dissoluble with the state's permission. The "commitments inherent in formal families do increase the likelihood of stability and continuity for children. Those factors are so essential to child development that they alone may justify the legal incentives and preferences traditionally given to permanent kinship units based on mar-

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165 Geiger & Livingston, *supra* note 24.

166 *Id.*

167 *Id.*

168 Aaron Smith & Maeve Duggan, *Online Dating & Relationships,* PEW RESEARCH CTR. (Oct. 21, 2013), https://www.pewresearch.org/internet/2013/10/21/online-dating-relationships/ (last visited Feb. 2, 2020).

169 *See supra* notes 9-13 and accompanying text.

170 *See, e.g.*, Hamilton, *supra* note 163, at 325.

171 Hafen, *supra* note 9, at 473.

riage."[172] Permanence is consistently a factor in judicial opinions addressing the purpose of marriage.[173] Third, marriage provides citizens with a virtuous sexual outlet. In 1890 the Supreme Court of Alabama captured this ideal when it wrote in dicta that, "Animal desire between the sexes is one of the incitements to matrimony, the lawful gratification of which is encouraged and protected alike by moral sentiment and municipal regulation."[174] And fourth, the status of marriage has evolved to the point that entering into it is now viewed by the courts as a fundamental right. The landmark 1967 decision of *Loving v. Virginia*[175] initiated a greater understanding of marriage as a fundamental right. Then, in 1978, the Court was more explicit in *Zablocki v. Redhail*.[176] And in 2015 when the Court mandated that the fundamental right of marriage extend to persons of the same sex, the Court wrote:

> From their beginning to their most recent page, the annals of human history reveal the transcendent importance of marriage. The lifelong union of a man and a woman always has promised nobility and dignity to all persons, without regard to their station in life. Marriage is sacred to those who live by their religions and offers unique fulfillment to those who find meaning in the secular realm. Its dynamic allows two people to find a life that could not be found alone, for a marriage becomes greater than just the two persons. Rising from the most basic human needs, marriage is essential to our most profound hopes and aspirations.[177]

Such noble dicta referencing marriage is reflected in legislation and judicial opinions. This leads to the conclusion that marriage connotes permanency, stability, and virtue. Public hearings and legislative enactments begin with and conclude that marriage, "like adoption, carries with it a commitment toward permanence that places it in a different category of relational interests than if it were temporary."[178] This, in

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172 *Id.* at 475-76. *See also* Maynard v. Hill, 125 U.S. 190, 205 (1888) ("Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature.").

173 *See, e.g.*, Michael H. v. Gerald D., 491 U.S. 110 (1989) (upholding the irrebuttable presumptive rights of a man married to a woman who gave birth to a child over the child's biological father); Moore v. City of E. Cleveland, 431 U.S. 494, 503-04 (1977) ("It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.").

174 Anonymous, 7 So. 100, 100 (Ala. 1890).

175 388 U.S. 1 (1967); *see also* Perez v. Lippold, 198 P.2d 17, 19 (Cal. 1948).

176 434 U.S. 374 (1978).

177 Obergefell v. Hodges, 135 S. Ct. 2584, 2593-94 (2015).

178 Hafen, *supra* note 9, at 486.

turn, contributes significantly to the achievement of general and political stability.[179] Bruce Hafen summarizes this point in an article he wrote in 1983, which supported the uniqueness of marriage and why it is deserving of government entitlements. He writes:

> Impermanent relationships that perform some intimate or associational "functions" cannot claim the same position as marriage and kinship in ensuring a political structure that limits government, stabilizes social patterns, and protects pluralistic liberty through the power of its own relational permanency. Social scientists may never succeed in verifying this conclusion empirically; the obstacles to meaningful comparative research appear insurmountable. But the structure of formal family relationships both reflects and fosters the enduring personal commitments essential to social mediation and political pluralism.[180]

Arguments emphasizing the singular importance of permanency and the resulting commitment structure compete with accelerating social policies that focus on individual liberty. No less today than in 1983 when Professor Hafen summarized the importance of marital permanency, the "policies of social interest that seek to uphold formal family ties are having increasing difficulty defending themselves against an emerging set of legal concepts whose most potent powers are now reserved for the enforcement of equal individual rights." [181] And yet, Professor Hafen concludes that the "individual tradition and the family tradition, both historically at the heart of American culture, are the products of two very different heritages, both conceptually and historically."[182] Although there are two heritages, "the reality is that liberty and duty are two poles in a single construct. Neither is meaningful without the other."[183] The point made by Professor Hafen and others is that individuality finds its counterpoint in marriage because it willingly submits to the duty of fostering the basic unit of society, the basis of the commitment structure.

It is arguable that two adults can certainly commit themselves to permanency without the participation of the state in the status of marriage, that these two adults may through personal commitment be a part of the commitment structure. Therefore, by providing marital entitle-

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179 *Id.* at 482. *See, e.g.*, *Benefits of a Healthy Marriage: Hearing Before the Subcomm. on Soc. Sec. and Family Policy of the S. Comm. on Fin.*, 108th Cong. (2004); *Healthy Marriage Hearing*, *supra* note 7.

180 Hafen, *supra* note 9, at 482-83.

181 *Id.* at 568.

182 *Id.* at 569.

183 *Id.* at 574.

ments to these committed couples the state would provide for "the economic well-being of its citizens."[184] Do the statistics concerning nonmarital cohabitants support this thesis? No, they do not.

3. *Who Cohabits?*

The number of adults cohabiting in the United States in 2016 reached about 18 million, up 29% since 2007.[185] Even though statistics prove elusive, it appears that racially, 55% of cohabiting parents are white and 13% are black, and only 3% of solo or cohabiting parents are Asian.[186] Professor Matsumura reports that "African Americans have felt the marriage decline particularly acutely."[187] Specifically, she reports, "Black women are half as likely to marry as white women, and black spouses are nearly twice as likely as white spouses to divorce."[188] Among the causes for this disparity include the shortage of eligible men, a refusal on the part of women to settle for lower earning men, and the complicated dynamics of interracial relationships.[189]

"Roughly half of the cohabiters are younger than 35–but cohabitation is rising most quickly among Americans ages 50 and older."[190] Courts and commentators focus most often on the increasing number of adults choosing nonmarital cohabitation over marriage and these numbers continue to increase. This is illustrated in the fact that, "[b]etween 2000 and 2010, the population grew by 9.71%, but the husband-and-wife households only grew by 3.7%, while unmarried-couple households grew by 41.4%."[191] Among those cohabitants are those who simply cohabit, those who live together prior to marriage, those who continue to live with a partner with whom they were just divorced, and those in a

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184 Hamilton, *supra* note 163, at 368. "Why should sexual and procreative freedom be contingent either upon one's marital or economic status? Why shouldn't the state do more to provide economic support for caretaking—the aspect of family functioning most crucial to its own future well-being?" *Id.* at 370.

185 Geiger & Livingston, *supra* note 24.

186 Livingston, *supra* note 52, at 7.

187 Matsumura, *supra* note 121, at 1039.

188 *Id.* (citing RALPH RICHARD BANKS, IS MARRIAGE FOR WHITE PEOPLE?: HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE 7-8 (2011)).

189 RALPH RICHARD BANKS, IS MARRIAGE FOR WHITE PEOPLE?: HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE 29-33, 37-38, 45-47, 83-85, 89, 91-92 (2011).

190 Geiger & Livingston, *supra* note 24.

191 Waggoner, *supra* note 23, at 215*; see also* Matsumura, *supra* note 121, at 1013 ("[F]ifteen percent of the adult population in the United States—more than 35 million people—are in informal intimate relationships."); Ryznar & Stepien-Sporek, *supra* note 30, at 300 ("[M]arital households recently comprised less than half of all households in the United States, while almost 6% of households were opposite-sex, unmarried partners.").

nonmarital relationship while receiving alimony payments from a prior marriage.[192] And an "even greater share of the adult population report being in committed intimate relationships while living in separate residences, giving rise to the label 'Living Apart Together' (LATs)." [193] And finally, there is an increasing number of "shotgun cohabitations" of couples cohabiting after conception but before childbirth. [194]

Another statistic is the increasing percentage of nonmarital cohabitants who are parents of children under the age of eighteen. [195] "In 1997, the first year for which data on cohabitation are available, 20% of unmarried parents who lived with their children were also living with a partner. Since that time, the share has risen to 35%." [196] In 2017, more than 16 million nonmarital parents lived with their child aged 18 or younger. This number was 14 million in 1997 and only 4 million in 1968.[197]

While the number of solo mothers used to predominate (88% in 1968), by 2017 the percentage of solo mothers declined to 53%, while the percentage of unmarried parents living with a child has increased to 35%.[198] Because of nonmarital cohabitation, the share of unmarried fathers living with their children has more than doubled over the past fifty years. "Now, 29% of all unmarried parents who reside with their children are fathers, compared with just 12% in 1968." [199] Nonetheless, nonmarital cohabitants are less wealthy and less educated and more likely to be in comparatively unstable relationships. [200] "Data from The Fragile Families and Child Wellbeing Study demonstrate that by the time their children were five years old, only one-third of unmarried couples were still together, in comparison to eighty percent of their married counterparts."[201]

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192 *See* Antognini, *supra* note 86, at 7. *See, e.g.*, Devaney v. L'Esperance, 949 A.2d 743, 744 (N.J. 2008) (holding that cohabitation is not an essential requirement for a cause of action for palimony, but a marital-type relationship is required).

193 Matsumura, *supra* note 121, at 1016.

194 *Id.* at 1033, 1034-35.

195 *See* Livingston, *supra* note 52, at 5. For a discussion of the impact of same-sex marriage on parenting structures see Raymond C. O'Brien, Obergefell*'s Impact on Functional Families*, 66 CATH. U. L. REV. 363 (2016).

196 Livingston, *supra* note 52, at 6.

197 *Id.* at 5. The rise has been driven by several factors, such as the decline in the share of people getting married, it being more acceptable for unmarried people to have babies, and of course the increase in the number of nonmarital cohabitants. *See id.* at 6.

198 *Id.* at 3.

199 *Id.* at 3-4.

200 Matsumura, *supra* note 121, at 1038.

201 *Id.* (citing ISABEL V. SAWHILL, GENERATION UNBOUND: DRIFTING INTO SEX AND PARENTHOOD WITHOUT MARRIAGE 70-71 (2014)).

Nonmarital cohabiting parents tend to be younger than solo or married parents, suggesting one reason why many nonmarital cohabitants are parents. "Their median age [for a nonmarital cohabitant parent] is 34 years, compared with 38 among solo parents and 40 among married parents."[202] In addition, nonmarital cohabiting parents have lower levels of education compared to married couples; the latter are more than twice as likely to have a bachelor's degree (43% do).[203] Specifically, only 54% of nonmarital cohabiting parents have a high school diploma, compared to 69% of married parents.[204] And the lack of education is particularly acute among nonmarital cohabiting fathers; only 39% have a high school diploma.[205]

Not surprisingly, studies indicate that people in nonmarital relationships are less likely than people in marriages to be sexually exclusive,[206] but that nonmarital and marital couples report having sex equally frequently and with similar levels of satisfaction.[207] Cohabiting nonmarital couples have indicated that they "do not reject marriage. Rather, they idealize marriage as something they want to do when they are ready—something they want to do right."[208]

Whenever nonmarital parents cohabit with a partner they are less likely to fall below the poverty line than solo parents, but they still do less well economically than married parents. "All told, 16% of unmarried parents living with a partner are living below the poverty line, while about one-fourth (27%) of solo parents are living below the poverty line. In comparison, just 8% of married parents are living in poverty."[209] "Data from the U.S. Census Bureau indicate that out of 8,075,000 unmarried opposite-sex couples in 2016, 5,331,000, or 66%, were both in the labor force."[210] Married couples, on the other hand, had a lower percentage of both spouses being in the labor force (51%), 22% in which only the husband was in the labor force, and 8% in which only the wife was in the labor force.[211]

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202 Livingston, *supra* note 52, at 8.

203 *Id.* "Just over half (54%) of cohabiting parents have a high school diploma or less education, compared with 45% of solo parents and 31% of married parents." *Id.*

204 *Id.*

205 *Id.*

206 Matsumura, *supra* note 121, at 1036.

207 *Id.*

208 *Id.* at 1038 (citing KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE 106-09 (2005)).

209 Livingston, *supra* note 52, at 9.

210 Matsumura, *supra* note 121, at 1030.

211 *Id.* at 1031 (citing *America's Families and Living Arrangements: 2016*, U.S. CENSUS BUREAU, https://www.census.gov/data/tables/2016/demo/families/cps-2016.html [http://perma.cc/J5HV-893A] (last modified Apr. 6, 2017) (follow "Table FG2 Married

C. Enforcement Mechanisms

When couples marry the state is near always a third party to the relationship, thereby establishing objective criteria that, once satisfied, establish boundaries as to when the marriage begins, the obligations throughout, and if the couple complies with objective criteria, when they officially separate and the marriage dissolves.[212] Upon marital dissolution each state has objective criteria for division of property, support, and any applicable child visitation and custody provisions.

> Married couples receive more protections and benefits than do nonmarital couples—social security, pension, and health insurance benefits are among the measures that assist marital families. While federal income tax laws currently require some two-earner marital families to pay higher taxes than if they were to file singly, they do benefit the family with one primary wage-earner and a stay-at-home dependent spouse (or secondary wage earner).[213]

By complying with state regulatory procedures each married person and the children resulting receive presumptive entitlements mandated by the federal and state governments.

But the objectivity of marriage—license and solemnization—is absent when a couple cohabits, thereby precipitating legal disputes upon dissolution of the cohabitation. Often, especially when nonmarital cohabitation includes children, women perform most domestic work, including caretaking for children, and thus it is the woman who often abandons a career in the marketplace resulting in economic disparity upon dissolution.[214] The woman's recompense is often negligible. Alber-

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Couple Family Groups, by Family Income, and Labor Force Status of Both Spouses: 2016")).

212 *See, e.g.*, Thomas v. Thomas, No. 2170710, 2019 WL 101132 (Ala. Civ. App. Jan. 4, 2019) (noting that Alabama abolished common marriages occurring after January 1, 2017). Note that, *contra*, seven states retain common law marriage by statute (Colorado, Iowa, Kansas, Montana, New Hampshire, Texas and Utah). *See* COLO. REV. STAT. § 14-2-109.5 (2019); IOWA CODE § 252A.3(8) (2019); KAN. STAT. ANN. § 23-2714(b) (2019); MONT. CODE ANN. § 40-1-403 (2019); N.H. REV. STAT. ANN. § 457:39 (2019); TEX. FAM. CODE ANN. § 2.401 (West 2019); UTAH CODE ANN. § 30-1-4.5 (LexisNexis 2019). Also, two states (Oklahoma and Rhode Island) and the District of Columbia retain common law marriage in case law. *See* Coates v. Watts, 622 A.2d 25, 27 (D.C. 1993); *In re* Estate of Brown, 384 P.3d 496, 499-500 (Okla. 2016); Luis v. Gaugler, 185 A.3d 497, 502-03 (R.I. 2018). This status requires eligibility, holding out as married, and living for a sufficient period of time in an approving jurisdiction for it to be valid.

213 Hamilton, *supra* note 163, at 357-58.

214 *Id.* at 318.

tina Antognini comments on the research of Reva Siegel[215] to conclude that a plaintiff—usually the female—fares better in a nonmarital relationship where both individuals contribute *financially* rather that a relationship where the individuals follow a breadwinner-homemaker model.[216] In other words, whenever a court discusses terms of endearment or acts of love or homemaking as a cohabitant's contribution to the relationship, the plaintiff's services are considered by the court to be gratuitous and not entitled to remuneration.[217] As one court characterized it, "To overcome the presumption that [plaintiff] rendered the services gratuitously, plaintiff must show that she expected compensation from the defendant at the time she rendered services for defendant and defendant expected to pay for them."[218] Such a standard is seldom met.

But many nonmarital cohabitants may do better—and choose to do better—by remaining single as a cohabitant of a nonmarital partnership rather than entering marriage. For example, as a single person an applicant could qualify for federal loans for which he or she might have been ineligible if his or her partner's income were included. In addition, they both save money each year in income tax payments. Another partner could avoid liability under the necessities doctrine if the two remain unmarried. And another partner may retain Social Security or pension benefits derived from a spouse by remaining unmarried. And of course, all nonmarital partners avoid the expense and hassle of a divorce should they dissolve their union.[219]

Because of the increasing number of nonmarital cohabiting couples and the inadequate enforcement mechanisms throughout the various states, the question arises as to whether states should adopt objective criteria that, if met, would entitle the nonmarital cohabitants to entitlements similar to marriage.[220] Some would argue that the marital paradigm should not be exclusive,[221] that it should include those in a de facto marriage. The argument being that governments should focus on caretaking and economic support of *all* types of family structures, emphasizing intimate relationships "that have the potential for individual realization and also fulfill the socially useful caretaking and support

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215 Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L. J. 2127, 2127-28 (1994) (tracing the history of how courts continue to enforce the substance of coverture under the more modern guise of "separate spheres" in marital relationships in the early twentieth century).

216 Antognini, *supra* note 86, at 31.

217 *Id.* at 32-33.

218 Featherston v. Steinhoff, 575 N.W.2d 6, 10 (Mich. Ct. App. 1997).

219 Matsumura, *supra* note 121, at 1016-17.

220 *See, e.g.*, Waggoner, *supra* note 23, at 233.

221 Hamilton, *supra* note 163, at 369-70.

functions."[222] "Why should government privilege marriage as an exclusive instrument of expression (especially when the content of that expression is largely predetermined)? Why should it privilege one form of companionate relationship over others that may serve societal functions?"[223] Indeed, the premise of the Court's reasoning in *Lawrence* and *Obergefell* would sustain a constitutional right to support for diverse family structures.

The discussion regarding extending marital benefits to nonmarital partners occurs in part because current benefits and protections extended to nonmarital couples when their partnerships dissolve are frequently inadequate to meet the equities involved. But there are obstacles defining which cohabiting relationships should benefit. Ideally, something akin to what was required for common law marriage would suffice. But states continue to reject common law marriage and concomitantly continue to espouse the virtues of marriage.

Beginning then with establishing the criteria for a cohabitating relationship sufficient for marriage entitlements we look at how states are currently meeting contractual, equitable, and societal demands. These issues are addressed in a decision from the New York Court of Appeals *infra*.[224] What follows is a brief description of current mechanisms meant to enforce the expectations of one or both nonmarital partners.

1. *Agreements*

The enforcement of agreements between nonmarital cohabitants through law and equity most notably began in 1976 with the Supreme Court of California's decision in *Marvin v. Marvin*.[225] Afterwards, additional states took note of the increasing number of nonmarital cohabitants and their frequent inequitable dissolutions, then recognizing remedies at law and in equity. The remedies at law involved the cohabitant's written and oral contracts that could be evidenced by clear and convincing evidence. A 1980 decision from the Court of Appeals of New York is illustrative of the process by which the judiciary came to enforce these contracts.[226]

The facts of the New York case involved a man and a woman who began nonmarital cohabitation in 1952, had two children together, and in 1975 the defendant stopped paying the plaintiff support or mainte-

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222 *Id.* at 371.

223 *Id.* at 370.

224 *See infra* text accompanying notes 226-33.

225 557 P.2d 106, 122 (Cal. 1976) (holding that nonmarital cohabiting couples could enter into enforceable agreements even though they were engaged in sexual contact).

226 Morone v. Morone, 413 N.E.2d 1154, 1154-55 (N.Y. 1980) (noting that the couple was in a nonmarital relationship for 28 years with no children).

nance. Termination of support prompted the plaintiff to petition the court seeking monetary recovery for domestic services that the plaintiff performed at the defendant's request and, in addition, to enforce an oral partnership agreement alleged by the plaintiff to exist between the parties.[227] In response the New York court distinguished the plaintiff's petition from a complaint originating in a marital relationship. "The theory of these cases is that while cohabitation without marriage does not give rise to the property and financial rights which normally attend the marital relation, neither does cohabitation disable the parties from making an agreement within the normal rules of contract law." [228] Note that had the couple been married, an organized body of law would have provided division of property and an order of support. But they were not married. Nonetheless, the New York court will enforce any express contract between the nonmarital cohabitants. The burden then lies with the plaintiff to prove the existence of the contract. Rather than rely on the presumptive status of marriage, the plaintiff must prove the existence of an agreement, specifying that the defendant would "take care of the plaintiff and do right by her."[229] This is a substantial burden, specifically as the oral promise lacked specificity.

The New York court denied the plaintiff's petition based on factors that will become the basis of future judicial opinions. First, the court explained the dilemma in evaluating the worth of domestic services involved in the relationship:

> Is the length of time the relationship has continued a factor? Do the principles apply only to accumulated personal property or do they encompass earnings as well? If earnings are to be included how are the services of the homemaker to be valued? Should services which are generally regarded as amenities of cohabitation be included? Is there unfairness in compensating an unmarried renderer of domestic services but failing to accord the same rights to the legally married homemaker? Are the varying types of remedies allowed mutually exclusive or cumulative?[230]

Second, not surprisingly, the New York court held that "it is not reasonable to infer an agreement to pay for the services rendered when the relationship of the parties makes it natural that the services were

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227 *Id.* at 1155.

228 *Id.* at 1156-57 (noting that common law marriage was abolished in New York by statute). *See also* Schwegmann v. Schwegmann, 441 So. 2d 316, 324 (La. Ct. App. 1983) ("Under present Louisiana law, unmarried cohabitation does not give rise to property rights analogous to or similar to those of married couples.").

229 *Morone*, 413 N.E.2d at 1155.

230 *Id.* at 1156.

rendered gratuitously."[231] And this uncertainty over gratuitous domestic services leads to the court's conclusion that for "courts to attempt through hindsight to sort out the intentions of the parties and affix jural significance to conduct carried out within an essentially private and generally noncontractual relationship runs too great a risk of error." [232]

The New York decision illustrates the distinction between what occurs at divorce and what occurs at dissolution of a nonmarital cohabitation. There is no doubt that a plaintiff's domestic services would be taken into consideration in the former but, as evidenced by the decision, domestic services were not considered upon the latter. One remedy for nonmarital cohabiting couples is to provide clear and convincing evidence of, and express agreement to, domestic services rendered. States will enforce written agreements and some of the states will enforce agreements even though they are oral.[233] But, few couples execute such agreements.

While New York will enforce an oral contract clearly and convincingly executed by the couple, not all states will do so. For example, Minnesota requires, to be enforceable, that any contract between the nonmarital cohabitants where sexual relations is contemplated, be written, signed by the parties, and enforcement sought after termination of the relationship.[234] A decision that involved two nonmarital cohabitants who lived together for five years illustrates the Minnesota statute. [235] During their time together defendant financially contributed to plaintiff's divorce from another woman and supported him throughout. After they had been together for three years defendant wrote out an agreement between the two parties that specified if their union dissolved, she

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231 *Id.* at 1157. *See also* Tompkins v. Jackson, No. 104745/2008, 2009 WL 513858, at *14 (N.Y. Sup. Ct. Feb. 3, 2009) ("The services involved—to devote time and attention to the defendant, to act as companion, to accompany him to social events and perform household duties—are of a nature which would ordinarily be exchanged without expectation of pay."). *But see* Woodridge v. Woodridge, 856 So. 2d 446, 451 (Miss. Ct. App. 2003) (holding that where one party to the relationship acts without compensation to perform work or render services to a business enterprise or performs work or services generally regarded as domestic in nature, these are nonetheless economic contributions to the joint accumulation of property and should be recompensed); Evan v. Wall, 542 So. 2d 1055, 1056 (Fla. Dist. Ct. App. 1989) (after contributing capital, materials and labor over a five year period the plaintiff is entitled to reimbursement).

232 *Morone*, 413 N.E.2d at 1157.

233 *Id.* Sexual intimacy cannot be the consideration. *See, e.g.*, Marvin v. Marvin, 557 P.2d 106, 112 (Cal. 1976).

234 MINN. STAT. § 513.075 (2019). *See also* N.J. STAT. ANN. § 25:1-5 (West 2019) (requiring agreements related to palimony to be in writing); *In re* Estate of Palmen, 588 N.W.2d 493, 495-96 (Minn. 1999); *In re* Estate of Eriksen, 337 N.W.2d 671, 673 (Minn. 1983).

235 Dooner v. Yuen, No. 16-1939, 2016 WL 6080814 (D. Minn. Oct. 17, 2016).

was entitled to certain monthly payments from the plaintiff, as well as half of the proceeds from the sale of any real property that plaintiff sold. Plaintiff allegedly paid defendant support on a monthly basis but failed to split the proceeds from the sale of real property titled in his name. Because defendant did not comply with the terms of their agreement the plaintiff sued to enforce it.

The Minnesota court acknowledged the existence of a written agreement but held that it was not a valid contract because it did not recite consideration other than the couple's cohabitation. "Consideration requires that a contractual promise be the product of a bargain . . . . It means a negotiation resulting in the voluntary assumption of an obligation by one party upon condition of an act or forbearance by the other."[236] Hence, even with a written agreement and financial, not domestic, services involved, the agreement was unenforceable because there was no reference in the contract to any benefit conferred on one party by the other. The only consideration appeared to be the cohabitation between the parties, implicitly involving sexual relations. Since sexual intimacies cannot be valid consideration, there was no consideration and hence no contract.[237] This decision illustrates the complicated nature of cohabitation agreements, often drafted unartfully by novices. If the parties had been included within the reach of the marital presumption, property would have been equitably divided without the necessity of an express contract.

Minnesota's statutory requirements, including that the agreement be in writing, signed, and with adequate consideration, is not common among other states.[238] Nevada, for example, is not so strict. Nevada enforces express and implied agreements between unmarried cohabitants and, in addition, permits a court to apply "community property by analogy" to any property acquired when the cohabitation dissolves. [239] The

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236 *In re* Estate of Peterson, 579 N.W.2d 488, 491-92 (Minn. Ct. App. 1998).

237 *See also* Williams v. Ormsby, 966 N.E.2d 255, 264 (Ohio 2012) (holding that because the agreement between the parties only recited love and affection it was unenforceable due to lack of consideration). *But see* Bumb v. Young, No. 63825, 2015 WL 4642594 (Nev. Aug. 4, 2015) (holding that agreement providing the other party with a permanent home in exchange for companionship, partnership, and business and personal assistance was an enforceable contract).

238 *But see* Schwegmann v. Schwegmann, 441 So. 2d 316, 321 (5th Cir. 1983) (holding Louisiana does not recognize as a valid universal partnership an oral agreement between a man and a woman who live together and agree to split certain properties standing in the name of one of them).

239 *See Bumb*, 2015 WL 4642594, at *2 (holding that an express and implied agreement between the parties was enforceable following a twenty-two year period of cohabitation and the birth of a child); *see also* Salzman v. Bachrach, 996 P.2d 1263, 1276-68 (Colo. 2000) (suggesting that trend is towards enforcement of cohabitation contracts); Connell v. Francisco, 898 P.2d 831, 836 (Wash. 1995).

Nevada court ruled in one case that an oral agreement to provide plaintiff with "a permanent home in exchange for [plaintiff's] companionship, partnership, and business and personal assistance" was enforceable.[240] Nevada has a long history of enforcing nonmarital cohabitation agreements. In 1992 the state's highest court held that a couple clearly and convincingly established the existence of an implied agreement between them to hold their accumulated property as if they were married.[241] That they held each other out as husband and wife, filed federal tax returns as husband and wife, and filed corporate papers as such sufficiently established an agreement that they jointly owned the property.[242] These personal and financial elements are factors that evince nonmarital cohabitation sufficient to warrant marital entitlements in many of the statutory proposals discussed *infra*.[243] Similar results are rare among the other states' courts considering similar facts.

If an agreement between the parties is neither express nor implied, thereby unenforceable, courts may be willing to consider equitable remedies, such as unjust enrichment, promissory estoppel, and quantum meruit. However, as with the enforcement of express or oral contracts, actual recovery by plaintiff is spotty.

2. *Equitable*

Tandem to express and implied agreements, a variety of equitable remedies that a petitioner may assert upon dissolution of the cohabitation exist. Both agreements and equitable remedies were contemplated by *Marvin v. Marvin*, the 1976 seminal decision permitting nonmarital cohabitation enforcement.[244] While modern courts first look to the existence of an agreement, its absence prompts courts to do equity, most often through equitable devices such as promissory estoppel, quantum meruit, or unjust enrichment. "Recent history elucidates the need for the flexible remedies in equity to meet modern and more complex circumstances."[245] Most often courts are tasked with solving the factual

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240 *Bumb*, 2015 WL 4642594, at *2.

241 W. States Constr. Inc. v. Michoff, 840 P.2d 1220, 1224 (Nev. 1992).

242 *Id*. *See also* Hofstad v. Christie, 240 P.3d 816 (Wyo. 2010) (holding that donative intent was established by birth of common children and cohabitation for a ten-year period).

243 *See infra* Part IV.

244 *See* Marvin v. Marvin, 557 P.2d 106, 123 (Cal. 1976) ("We add that in the absence of an express agreement, the courts may look to a variety of other remedies in order to protect the parties' lawful expectations.").

245 Wynkoop v. Stratthaus, 136 A.3d 1180, 1188 (Vt. 2016) ("[T]he overall rationale applicable to property division for unmarried partners in marriage-like relationships is that we must consider all relevant circumstances to ensure that complete justice is done . . . .").

dilemma of what the parties intended when the relationship dissolves, but sometimes petitions are made against the estate of a deceased cohabitant as we will discuss *infra*.[246]

Overall, the goal of the court is to prevent unjust enrichment. A decision by the Supreme Court of Vermont illustrates this:

> If two persons have formerly lived together in a relationship resembling marriage, and one of them owns a specific asset to which the other has made substantial, uncompensated contributions in the form of property or services, the person making such contributions has a claim in restitution against the owner as necessary to prevent unjust enrichment upon the dissolution of the relationship.[247]

Factual situations vary, but, overall, courts first look to the existence of any express or implied agreement between the parties. If none, then the court looks to whether "a measurable benefit had been conferred on [the defendant] under such circumstances that [the defendant's] retention of the benefit without payment would be unjust." [248] Factual elements comprise the essence of a claim of unjust enrichment. But the scenario most often involves a plaintiff who has rendered services to a defendant in circumstances like these:

> [Plaintiff] and [defendant] lived together for about ten years. During that time, [plaintiff] took care of their child and, at times, [defendant's] child from a previous relationship. In addition, [plaintiff] regularly maintained the home and contributed financially by performing one of [defendant's] daily newspaper delivery routes. While [plaintiff] took care of the children and the home, [defendant] had the time to develop his water softener business. From the income generated through [defendant's] employment, [defendant] purchased a home and furnishings [and titled it in defendant's name alone]. The parties referred to the property acquired during their cohabitation as "ours." Although it is true that [plaintiff] benefited from the resources and home provided her by [defendant], we also agree with the trial court that [defendant] substantially benefited from the services [plaintiff] provided and that [defendant] would be unjustly enriched if [plaintiff] were awarded no part

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246 *See infra* Part III.C.3.

247 *Wynkoop*, 136 A.3d at 1189 (citing RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 28(1) (AM. LAW INST. 2011)).

248 Turner v. Freed, 792 N.E.2d 947, 950 (Ind. Ct. App. 2003) (holding that the defendant was unjustly enriched at the expense of the plaintiff); *see also* McMahel v. Deaton, 61 N.E.3d 336 (Ind. Ct. App. 2016).

> of the value of the assets [defendant] acquired in his name alone during their cohabitation. Accordingly, we conclude there is evidence to support the trial court's finding that [defendant] had been unjustly enriched.[249]

Additional equitable remedies include actions for recovery under quantum meruit[250] and promissory estoppel. In an action under promissory estoppel a plaintiff alleges that an enforceable contract exists when none exists in fact.[251] In doing so the plaintiff must prove (1) that a clear and definite promise was made, (2) that the promisor intended to induce reliance and the promisee in fact relied to his or her detriment, and (3) that the promise must be enforced to prevent injustice.[252] Facts are essential to establishing these elements. In one decision a nonmarital couple lived together for four years and during that time had a child together. One of the parties bought a house and titled it in his name, but both parties lived there and both contributed money and labor to living expenses and improvements, and both regarded the house as theirs.[253] The court held that "no one factor is dispositive"[254] in making an equitable determination, then holding that "the trial court could reasonably infer from all of [the] facts that the parties intended to share equally in appreciation in the [house] that accrued during the cohabitation."[255]

The elusiveness of facts prompts the conclusion that a remedy by a nonmarital cohabitant on equitable grounds is tenuous at best. This is especially true when the plaintiff's contribution to the property registered in the name of the defendant consists of personal services, homemaking and personal caretaking. For example, in *Tompkins v. Jackson*,[256] a plaintiff petitioned for financial support upon dissolution, but the couple had no express agreement granting plaintiff that right. The couple had a child together and the plaintiff "cooked, cleaned, laundered the parties' clothing, and purchased groceries for defendant and

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249 *Turner*, 792 N.E.2d at 950-51.

250 *See, e.g.*, Schwegmann v. Schwegmann, 441 So. 2d 316 (La. Ct. App. 1983) (defining quantum meruit as when one benefits or is unjustly enriched from the labor of another, thus the law implies a promise to pay a reasonable amount for the labor even in the absence of a specific contract; holding that nonmarital cohabitant had no cause of action for quantum meruit because the labor was intertwined with sexual services).

251 *See* Grouse v. Grp. Health Plan, Inc., 306 N.W.2d 114, 116 (Minn. 1981).

252 Cohen v. Cowles Media Co., 479 N.W.2d 387, 391 (Minn. 1992).

253 *In re* Domestic P'ship of Staveland & Fisher, 433 P.3d 749, 751 (Or. Ct. App. 2018), *rev. granted* 440 P.3d 666 (Or. 2019).

254 *Id.* at 754. *See, e.g.*, *In re* Domestic P'ship of Joling, 443 P.3d 724 (Or. Ct. App. 2019) (holding that recitation of marital vows when no marriage resulted was not dispositive proof of a promise to share all accumulated property equally).

255 *In re Staveland*, 433 P.3d at 755.

256 No. 104745/2008, 2009 WL 513858 (N.Y. Sup. Ct. Feb. 3, 2009).

their son."[257] Also, she "slept on a chair by defendant's side while he was hospitalized for 18 days."[258] At the end of their twelve year cohabitation the court rejected the plaintiff's claims of unjust enrichment and the imposition of a constructive trust.[259] The court held that the supportive services provided by the plaintiff for more than a decade were part of the "give and take" ordinarily associated with persons cohabiting with one another and it cannot be said that equity and good conscience cry out for fiscal adjustment."[260]

Plaintiff's recovery would have been assured had the couple been married throughout the period of cohabitation.

3. *Procedure at Death*

At the death of one of the cohabiting partners the enforceability of legal or equitable remedies is even less certain. If the couple executed a valid inter vivos agreement an enforceable claim could be made against the estate of the decedent, regardless of marital status.[261] The plaintiff would be a creditor of the estate of the decedent. Similarly, testamentary dispositions, such as in a valid last will and testament, would be valid. Third, any payable-upon-death arrangements would be valid in accordance with the terms of the executed contracts, including life insurance policies and retirements plans.[262] In the event none of these remedies are available, the issue is whether courts are willing to apply equitable principles at death of one of the parties when such principles would contradict relevant testate and intestate statutes.

In one notable decision from the Supreme Court of Washington in 2007,[263] two nonmarital cohabitants shared the same home for more than fourteen years before they died together in an automobile accident, survived by one of their two children. All the couple's assets of slightly more than one-million dollars were titled in the name of one of the cohabitants. The couple celebrated a private religious marriage ceremony but never obtained a state marriage license. They consistently and con-

257 *Id.* at *2.

258 *Id.*

259 *Id.* at *16-18.

260 *Id.* at *18.

261 *See, e.g.*, Byrne v. Laura, 60 Cal. Rptr. 2d 908 (1997) (holding that an agreement between the cohabitants was proven by clear and convincing evidence upon which the plaintiff relied and permits enforcement through promissory estoppel).

262 *But see* Raymond C. O'Brien, *Equitable Relief for ERISA Benefit Plan Designation Mistakes*, 67 CATH. U. L. REV. 433 (2018) (describing federal supremacy over plan designated beneficiaries of federal programs such as ERISA plans).

263 Olver v. Fowler, 168 P.3d 348 (Wash. 2007) (holding that the state's law of committed intimate relationships can be applied to divide assets between committed partners' estates where both partners are deceased).

tinuously held themselves out as husband and wife although they did not meet the state's requirements for marriage.[264] When the parties died, each had a valid will in which they bequeathed everything each owned to the other party but did not provide for an alternate taker. Thus, since the couple died simultaneously, each party's property must pass according to the state's intestate statute.[265]

The administrator of estate of the untitled party sued the estate of the other party—the one in whose name their holdings were titled. Plaintiff's cause of action was to recover one-half of what was acquired during the cohabitation. The basis for the claim was in equity, asserting joint ownership even though title was held in the name of only one of the parties.[266]

In its opinion, the court acknowledged that to date no state court had addressed enforcement of equitable claims between nonmarital cohabitants at death,[267] but also acknowledged that the perception of committed nonmarital relationships has evolved over the past 90 years.[268] As a result, and in accordance with an evolution of cases involving inter vivos dissolutions of committed nonmarital relationships, the court held that equitable principles can apply at the death of one of the parties so as to permit the division of property jointly acquired during the committed relationship.[269]

There was a strong dissent in the Washington decision. It argued that the equitable principles applicable to committed partnerships should only apply at the dissolution of an inter vivos relationship, not at death. Instead, at death, only the laws pertaining to testate (Last Will and Testament) and intestate succession should apply,[270] together with any valid will substitutes, such as life insurance contracts. The dissent argued that if courts permit enforcement of equitable claims at the death of a nonmarital cohabitant this would result in the application of a putative spouse status, which clearly does not apply.[271]

In 2019 the Supreme Court of Alaska faced an issue similar to the Washington court when it ruled on a case involving committed partners

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264 *Id.* at 350.

265 *Id.* at 356-57. The intestate heir of both parties was their surviving child, a result the parties would have desired. But the court nonetheless considered the issue of the equitable rights of the parties necessary to resolve.

266 *Id.*

267 *Id.* at 353.

268 *Id.* at 355; *see In re* Lindsey, 678 P.2d 328, 330-31 (Wash. 1984) (listing necessary factors for a committed relationship).

269 *Olver*, 168 P.3d at 355.

270 *Id.* at 358 (Sanders, J., dissenting).

271 *Id.* at 359 (Sanders, J., dissenting).

of twenty years.[272] When one of the partners died he named his partner the beneficiary of his individual retirement account (IRA), but died intestate to the remainder of his estate.[273] The IRA was significant in the context of his entire estate. Nonetheless the surviving partner petitioned the court for a share in the remainder. Alaska's intestate statutes do not list committed partners as heirs; hence the decedent's heirs were his two children from a prior relationship.[274] The case thus involved the rights of a committed partner vis-à-vis the decedent's heirs under the state's intestate statutes.

Throughout their relationship the cohabiting parties had two joint credit cards, but each maintained all other assets separately. There was conflicting evidence as to whether the decedent contemplated marriage and what oral promises were made between the partners, but the trial court sided with the estate of the decedent and held that there was no enforceable lifetime agreement or contract between the partners.[275] The plaintiff then appealed, arguing that the nonmarital couple was a committed partnership, which, she argued, would enable her to share equitably in the estate of the decedent.[276] This provided the Alaska court an opportunity to discuss the distribution of jointly acquired property at the death of one of the committed partners.[277]

The Supreme Court of Alaska distinguishes between property divisions following a lifetime dissolution from division of partnership property at death. Taking a different approach from the court in Washington, the Alaska court held that "if a relationship ends at the death of one member, Alaska's probate code comprehensively governs the rights of both surviving spouses and domestic partners."[278] Thus, rather than enforce a surviving partner's equitable claim, the court relied on the state's statutes and barred recovery. Specifically, the court explained:

> A surviving domestic partner . . . inherits none of a deceased partner's estate under the probate code. And, unlike in the case of an inter vivos separation, the probate code has provisions disposing of all of a deceased partner's estate, whether the partner died testate or intestate. There is no "gap" to fill with a common law scheme that would distribute the deceased

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272 *In re* Estate of Hatten, 440 P.3d 256, 258-59 (Alaska 2019).

273 *Id.* at 259. The IRA's value was close to $200,000; the house in which they lived was worth an equal amount.

274 *Id.* at 260.

275 *Id.*

276 *See* Tomal v. Anderson, 426 P.3d 915, 922-24 (Alaska 2018) (defining the parameters of what constitutes committed partners in Alaska).

277 *Hatten*, 440 P.3d at 262-64.

278 *Id.* at 262.

> partner's property according to the partners' shared intent. If the deceased partner did not provide for the surviving partner through a will, the surviving partner will not inherit the deceased's property as a testamentary matter.[279]

The Alaska court distinguishes the Washington decision in *Olver*, holding that Alaska is not a community property state like Washington. As such, in *Olver*, each of the committed partners acquired an interest in jointly acquired property *during lifetime*.[280] In Alaska, on the other hand, "their interests vest only at an inter vivos separation. If that separation never occurs during the spouses' or partners' lifetimes, the property interest never vests."[281] Thus, without vesting during lifetime or the existence of an enforceable inter vivos agreement between the parties that can be enforced against the decedent's estate, the decedent's property passes according to the state's law of testate and intestate succession. And to further complicate matters, a previous decision from the Court of Appeals of Washington holds that if an agreement of a committed partner is to be enforceable at death, it must be established within three years of any inter vivos dissolution under the state's statute of limitations.[282]

Overall, equitable enforcement of claims by a nonmarital cohabitant after the death of the other is murky. A valid written agreement establishing precise terms is optimal, both during lifetime upon dissolution and then enforceable at death. But "the problem is that most nonmarital partners do not engage in these formalities."[283] Instead, nonmarital cohabitants rely upon the confidence of love, projecting that everything will work out for the betterment of both parties. Such reliance is also present in marriage, but by entering into state sanctioned marriage, the married couple is "buttressed by government policies that allow and inspire people to have confidence in it."[284] Also marriage "*does* bring with it—for better or worse—all the presumptions that a cohabiting arrangement has to prove, in court or out."[285] Undoubtedly, if the couple is married, at the death of either of the parties the survivor would be entitled to take under state intestate and testate statutes, plus

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279 *Id.* at 263.

280 *Id*. "It follows then that, at the death of one partner in Washington, the surviving partner is entitled to retain the property interests properly acquired during the parties' lifetimes—even if that property is titled in the deceased partner's name alone." *Id*. at 263-64.

281 *Id.* at 264.

282 *In re* Kelly & Moesslang, 287 P.3d 12, 19 (Wash. Ct. App. 2012) (citing WASH. REV. CODE § 4.16.080 (2011)).

283 Matsumura, *supra* note 121, at 1018.

284 COTT, *supra* note 2, at 224.

285 *Id.*

have the right of elective share against any property passing to another heir, plus all of the incidents attendant upon marriage.

Again, as discussed *supra*,[286] the question then arises as to whether there should be a point at which a nonmarital couple is entitled to the presumptions associated with marriage. Should there be a "point" other than the objective requirements of marriage? There are those states that firmly reject any point other than marriage, the naysayers. Some commentators struggle with the daunting regulatory challenges posed by seeking an alternate point than marriage. How to define a committed relationship?[287] For these commentators, a device like common law marriage is warranted when a couple, based on objective factors, demonstrates all of the incidents of marriage but fails to meet the state's objective criteria.

D. Naysayers

Following the decision of the Supreme Court of California permitting enforcement of written and oral agreements between persons in nonmarital cohabitation through law and equity,[288] other states began enforcement. But a few states refused enforcement, the basis for which varies. It is important to consider the objections of the few states refusing to enforce nonmarital agreements.

1. *Devalues Marriage*

In 1979, a few years after *Marvin* was decided in 1976, the Supreme Court of Illinois addressed a claim by a plaintiff who cohabited with the defendant for fifteen years, amassing property, some of which was titled in both their names, and sharing in three children.[289] They held themselves out as married, but never statutorily married and Illinois had abolished common law marriage. When their relationship dissolved during their lifetimes the plaintiff petitioned the court for an equal share in the profits and property acquired during their cohabitation.[290]

The state's highest court rejected plaintiff's claim but admitted that there was an increase in the number of nonmarital cohabitants, and that other states took a different approach. In rejecting plaintiff's claim, the court relied on the state's legislative enactment of the Marriage and Dis-

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286 *See supra* Part III.A.

287 *See* Matsumura, *supra* note 121, at 1019 ("Imperfectly calibrated entrance requirements to relationship-based statuses will sweep too broadly, dragging in people who had no intention of assuming legal obligations, or too narrowly, thereby excluding people who stood to benefit from those protections.").

288 *See* Marvin v. Marvin, 557 P.2d 106, 110-11 (Cal. 1976).

289 Hewitt v. Hewitt, 394 N.E.2d 1204, 1204 (Ill. 1979).

290 *Id.* at 1205.

solution of Marriage Act and also the state's abolition of common law marriage, both evidencing a clear intent of the legislature to support the unique status of statutory marriage. "The policy of the Act gives the State a strong continuing interest in the institution of marriage and prevents the marriage relation from becoming in effect a private contract terminable at will."[291] If any change is to occur, permitting the enforcement of monetary claims between nonmarital cohabitants, such action must result in legislative action and not from the courts.[292]

Significant societal changes have occurred since *Hewitt* was decided, including the significant increase in the percentages of couples living in nonmarital cohabitation, same-sex marriage, and heightened awareness of individual liberty. Nonetheless, the Supreme Court of Illinois affirmed its holding in *Hewitt* in 2016, stating that when "considering the property rights of unmarried cohabitants, our view of *Hewitt*'s holding has not changed."[293] The court then added, "As in *Hewitt*, the issue before this court cannot appropriately be characterized solely in terms of contract law, nor is it limited to considerations of equity or fairness as between the parties in such marriage-like relationships."[294] Therefore, the court concluded, "we can presume that the legislature has acquiesced in *Hewitt*'s judicial interpretation of the statute prohibiting marriage-like rights to those outside of marriage."[295]

The strong pro-marriage public policy illustrated in *Hewitt* and *Blumenthal* does not foreclose to nonmarital cohabitants all forms of redress. In its 2016 decision addressing this issue, the court wrote that, "individuals can enter into an intimate relationship, but the relationship itself cannot form the basis to bring common-law claims."[296] The court continued, "*Hewitt*'s holding does not prevent or penalize unmarried partners from entering into intimate relationships. Rather, it acknowledges the legislative intent to provide certain rights and benefits to those who participate in the institution of marriage."[297] Thus, at any inter vivos or testamentary dissolution, sufficiently evidenced agreements between the cohabitant would be enforced in accordance with their terms.

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291 *Id*. at 1210; *see also* Davis v. Davis, 643 So. 2d 931, 935 (Miss. 1994) (holding nonmarital cohabitant was refused equitable division of property because state legislature abolished common law marriage). *But see* Cates v. Swain, 215 So. 3d 492, 493 (Miss. 2013) (holding nonmarital cohabitant could recover under theory of unjust enrichment).

292 *Hewitt*, 394 N.E.2d at 1211. For a discussion of the implications for *Hewitt* and nonmarital cohabitants see Antognini, *supra* note 86, at 56-57.

293 Blumenthal v. Brewer, 69 N.E.3d 834, 853 (Ill. 2016); for changes see *id*. at 856-57.

294 *Id*. at 853.

295 *Id*. at 857.

296 *Id.* at 859.

297 *Id.* For contractual rights for cohabitants see Ryznar & Stepien-Sporek, *supra* note 30, at 307.

But the presumptions associated with marriage, such as title to property, support, or inheritance would not be available because doing so would devalue marriage.

2. *Public Morals*

Courts appear willing to enforce agreements between nonmarital cohabitants if they meet the requirements of state law. For example, the agreement must be in writing, provide for proper consideration, and be signed by the parties. Nonetheless, in the absence of a valid agreement a few courts are unwilling to apply equitable remedies to avoid unjust enrichment of one party benefiting from cohabitation to the detriment of the other. The court's rejection rests on public morals.

For example, a Louisiana appellate court found an oral agreement allegedly made between two nonmarital cohabitants to be invalid because it was not in writing.[298] The plaintiff then appealed alleging that after twelve years of cohabitation the court should assume there was an agreement and that she should benefit from the imposition of a constructive trust upon one half of the property accumulated by the couple.[299] But the court rejected plaintiff's argument that societal change necessitates a change in the court's view of nonmarital cohabitation. The argument put forth by the plaintiff was that times have changed sufficiently so that today nonmarital cohabitants could be in a fiduciary relationship with one another in a manner similar to married couples without violating public morals.[300] Rejecting her argument, the court holds that the "State has valid reason to discourage relationships which serve to erode the cornerstone of society, i.e., the family."[301] Taking note of plaintiff's argument that times have changed, the court wrote:

> Under present Louisiana law, unmarried cohabitation does not give rise to property rights analogous to or similar to those of married couples. Concubines have no implied contract or equitable liens that afford them any rights in the property of their paramours. Moreover, in our view, although Victorian, the values sought to be protected by the formulation of those legal concepts are imperative if we are to maintain our civilized society.[302]

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298 Schwegmann v. Schwegmann, 441 So. 2d 316, 322 (La. Ct. App. 1983).

299 *Id.*

300 *Id.* at 323.

301 *Id.* at 323-24.

302 *Id.* at 324.

Other courts have rejected similar claims made by nonmarital cohabitants based on public morals. In *Thomas v. LaRosa*,[303] Chief Justice Neely of the Supreme Court of West Virginia authored the court's majority opinion, which addressed whether an oral agreement between two nonmarital cohabitants is enforceable when it provided that, in consideration of the valuable services and obligations undertaken and performed by plaintiff, defendant promised and agreed to provide financial security for appellant for her lifetime and to educate appellant's children.[304] At the time that the defendant allegedly made this promise he was currently married to another woman and this marriage continued during the time of his relationship with plaintiff. Admittedly the facts are unique in this situation; both parties are in an adulterous situation because one party remains married to a third party.

Common law marriage is unavailable in West Virginia,[305] and even if it were available, defendant remained married to another woman throughout and hence could not enter into a common law marriage. Plaintiff worked for the defendant at the same place of employment and was paid for her service there. Hence the services for which the plaintiff asserts she is entitled to support for herself and her children are services associated with marriage: services such as homemaking, entertainment, and social support.[306] The court held that to enforce an agreement based on these homemaking services alone would be tantamount to a "contract of common-law marriage which is not valid in this State."[307] Furthermore, a person cannot be married to two persons at the same time.

The Supreme Court of West Virginia acknowledged the changes in society, the rise of nonmarital cohabitation, and the rulings from other states that accommodate these societal changes. But the decision illustrates the public support for marriage itself: "Marriage is a central secular institution in this society,"[308] so to permit plaintiff to share in the benefits associated with marriage would violate public policy. "Inevitably if a man attempts to support more than one wife or more than one family at a time the living standard of the lawful wife must suffer as a matter of law."[309] Enforcement of plaintiff's claim would contradict the public morals.

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303 400 S.E.2d 809 (W.Va. 1990).

304 *Id.* at 810.

305 *Id.* at 811-12.

306 *Id.* at 814.

307 *Id.*

308 *Id.*

309 *Id.* at 815.

The Supreme Court of Georgia adds further illustration. In the 1977 decision of *Rehak v. Mathis*,[310] plaintiff and defendant cohabited for eighteen years; the plaintiff providing domestic services such as cooking, cleaning and comfort; and the defendant contributed one-half of the monthly expenses on the home they shared throughout their relationship, which was titled in his name alone.[311] The defendant terminated their relationship and ordered plaintiff to vacate the home, whereupon the plaintiff filed a complaint alleging that the defendant promised to support her for the rest of her life and alleging that one-half of the house belonged to her.[312]

The trial court dismissed plaintiff's petition and the Supreme Court of Georgia affirmed, holding that "it is well settled that neither a court of law nor a court of equity will lend its aid to either party to a contract founded upon an illegal or immoral consideration."[313] The nonmarital relationship between the two unmarried cohabitants was sufficiently immoral and "not recoverable because contrary to the public policy of this State."[314]

IV. Legislative Proposals

Because of the concern that existing contractual and equitable remedies are inadequate to prevent inequities resulting from inter vivos and testamentary dissolutions, legislative models have been proposed that would provide marital presumptions and entitlements if certain parameters are met. Admittedly, states like Nevada and Washington have judicially adopted their own approaches to apply marital presumptions to certain identifiable nonmarital cohabitants. Legislative proposals seek to provide more uniform criteria, serving as model legislation for states wishing to adopt it. But drafting a legislative model is elusive. On the one hand, "most nonmarital relationships develop organically with questions about legal ramifications arising *after* the partners have intertwined their lives in various respects."[315] Looking back after dissolution to fathom intentionalities is slippery. And crafting an objective point at which a marital presumption would apply is fraught with difficulty because nonmarital cohabitation is, at its core, an expression of individuality, choice, and the parameters of private ordering emphasized in the latter part of the twentieth century. For example, as has been discussed

310 238 S.E.2d 81 (Ga. 1977).
311 *Id.*
312 *Id.*
313 *Id.* at 82.
314 *Id.*
315 Matsumura, *supra* note 121, at 1019.

supra,[316] birth control, abortion, divorce, employment opportunities, media, and population migrations all emphasize individual choice, liberty, and privacy.

Currently, nonmarital cohabitants' equities are protected through a "case-by-case, hit-or-miss adjudication"[317] that often fails to encompass property ownership and duties allegedly due.[318] The argument of those offering legislative proposals is that by legislating a point at which nonmarital couples may acquire property rights the state could better promote equities among its citizens. Thus the argument is made that, in spite of a person's intentional rejection of marriage, equity demands that the state find a point for "treating cohabiting couples whose relationships show that they are (or were) deeply committed to one another as married in fact."[319] Once this point is met, the nonmarital couple would be entitled to all of the presumptions—and benefits—reserved to married couples. Such an approach would avoid litigation over express and implied contracts and sorting through equitable remedies.

But how does one define that point? One commentator suggests that "consent is an analytic tool well suited to interrogating when intimate relationships should trigger legal consequences."[320] The argument is that, similar to contract law, the trigger point would "flow from objectively manifested consent to key commitments . . . , objective acts sufficient to authorize or waive an objection to the imposition of particular rights or obligations that relate to those acts."[321] Furthermore, when identifying these objective acts "the law can and should see those obligations as something less than a marriage-like whole,"[322] thus permitting a nonmarital couple to consent to some but not all of the entitlements of marriage, what may be called "disaggregation."[323] This element of disaggregation differentiates this model of consent from the traditional un-

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316 *See supra* Part II.B.

317 Waggoner, *supra* note 23, at 233. Professor Hafen refers to watching the Court "weave and bob" through the bewildering thickets of interpersonal relations. Hafen, *supra* note 9, at 489.

318 This is like disputes over ownership of marital property at death of one of the spouses and the surviving spouse seeks to elect against property transferred by the decedent to a third party. *See* Raymond C. O'Brien, *Integrating Marital Property into a Spouse's Elective Share*, 59 CATH. U. L. REV. 617, 632 (2010).

319 Waggoner, *supra* note 23, at 216.

320 Matsumura, *supra* note 121, at 1013. "Consent is not a totemic concept that one must either accept or reject wholesale, but rather a conclusion about the nexus between subjective will, conduct, and consequence." *Id*. at 1021.

321 *Id.* at 1063.

322 *Id.* at 1071.

323 *Id.* at 1064. "[W]hen seeking to impose legal obligations on people in nonmarital relationships, the law can and should see those obligations as something less than a marriage-like whole. With these obligations more precisely identified, courts can inquire

derstanding of common law marriage, which serves as an all-or-nothing status.

If consent is to provide a meaningful tool to cohabitants and courts in assessing legal rights and obligations, a "consent framework" is suggested that both recognizes the individuality of each of the parties and protects their individual expectations.[324] Examples of objective acts that support a consent framework are affirmatively seeking common benefits, the length of the relationship, domicile cohabitation, the presence of a dependent child or children, and shared economic resources.[325] No one element is dispositive; rather each is taken as part of a level of consent.

A few courts already employ elements of the consent framework when enforcing agreements or allocating equities between nonmarital cohabitants.[326] Specifically, these courts look to the continuity of the cohabitation, the duration of the entire relationship, the purpose of the relationship, the economic interdependence, and any expressed intent of the parties.[327] Apparently, those relationships most like marriage provide the best consent framework warranting protection. But at the same time, even though the marriage-like relationships appear best suited to obtain marriage-like benefits, elements of marriage such as homemaking services are least likely to warrant economic value in enforcing agreements or equities. This distinction is illustrated in the one observation that, "one very clear trend emerges: the individual seeking property, who in nearly all cases is a woman, has a difficult time receiving anything outside of marriage."[328] In other words, if a plaintiff were married he or she would be compensated for homemaking services upon divorce; but at dissolution of nonmarital cohabitation homemaking services are considered gratuitous even though these very services operate as objective factors for establishing the existence of an enforceable agreement.

Arguably, inviting consideration of a person's consent, or the amalgamation of a consent framework, involves the courts in a relationship that is meant to be private. "The prospect of evaluating the variables in each relationship is so discouraging that no relationship would be likely to receive very broad legal protection, thereby undercutting both the

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whether the parties objectively manifested their desire to perform the key aspects of those obligations." *Id*. at 1071.

324 *Id.* at 1081.

325 *See, e.g.*, *id.* at 1073-81.

326 *See, e.g*., W. States Constr., Inc. v. Michoff, 840 P.2d 1220, 1224 (Nev. 1992); *In re* Marriage of Pennington, 14 P.3d 764, 770-71 (Wash. 2000); Connell v. Francisco, 898 P.2d 831, 834-37 (Wash. 1995).

327 *In re Pennington*, 14 P.3d at 770-71.

328 Antognini, *supra* note 86, at 2.

individual and the social interest in a constitutional 'right to marry.'" [329] This is the risk of doing equity in hindsight: good intentions upon dissolution will involve the courts in the private lives of citizens. So perhaps more formal, more objective, indices might make this incursion more palatable.

A. Domestic Proposals

1. *American Law Institute*

Throughout the 1990s the American Law Institute [330] met to discuss and then draft a "legal framework that can accommodate the different choices people make and the different expectations they bring to their family relationships."[331] The Principles were the product of those discussions, drafted by the Institute to be more than a restatement of the current law. Rather, in the context of family dissolutions, the goal of the Principles is to be "sensitive to both the traditional value systems within which most families are formed and the nontraditional realities and expectations of other families."[332]

Chapter 6 of the Principles addresses nonmarital cohabitation and the fair distribution of the economic gains and losses incident to dissolution of a relationship referenced in the ALI as between "domestic partners."[333] Admitting that nonmarital couples may enter into valid contractual agreements affecting their property, the rules provided by the ALI may be understood "as a set of default rules that apply to domestic partners who do not provide explicitly for a different set of rules."[334] All this occurs with an eye towards a just resolution of the economic claims of the parties when the couple has not been explicit enough to permit enforcement.

The Principles provide parameters for qualifying as domestic partners: (1) for a significant period of time the couple maintained a com-

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329 Hafen, *supra* note 9, at 487.

330 "The American Law Institute . . . is known for its 'Restatements of the Law,' which are directed to the courts, not legislatures." Waggoner*, supra* note 23, at 234.

331 ALI PRINCIPLES, *supra* note 34, at xiv.

332 *Id.*

333 *Id.* § 6.03(1) ("which are two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple.") The ALI's use of the term "domestic partners" is not synonymous with the same term used as an alternative to marriage. *See* Raymond C. O'Brien, *Domestic Partnership: Recognition and Responsibility*, 32 SAN DIEGO L. REV. 163, 177-85 (1995).

334 ALI PRINCIPLES, *supra* note 34, § 6.02 cmt. a.

mon household,[335] with their (2) common child,[336] for a (3) continuous period that equals or exceeds a cohabitation parenting period set in a rule of statewide application.[337] These factors, if established, create a *presumption* of domestic partnership that may be rebutted by a contestant proving the couple did not share a life together as a couple.[338] To rebut the presumption the ALI provides thirteen circumstances, including statements by the couple and others, facts of intermingled finances, mutual conduct, presence of emotional and physical intimacy, and community reputation.[339]

If the presumption of the domestic partnership prevails the ALI provides that the appropriate remedy upon dissolution is to apply, as in marriage, a status classification resulting in property claims and compensation (support) obligations between the domestic partners as with spouses.[340] Thus, unless two parties purposely contract themselves out of the presumption of domestic partnership or there is a successful rebuttal through the thirteen factors, the rules applicable to divorcing spouses apply regardless of the subsequent individual assertions of either of the parties.

The period of the domestic partnership commences when the parties begin sharing a primary residence unless either party proves that they did not intend to begin sharing a life together until a later date.[341] During this period of domestic partnership any property accumulated by the domestic partners is to be considered as if it were marital property.[342] Additionally, separate property of either of the parties is not to be reclassified as marital property if the partnership is of long duration.[343] Separate property remains separate property. But as to the "marital property" the Principles specifically provide that "domestic-partnership property should be divided according to the principles set

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335 *Id.* § 6.03(4) ("Persons *maintain a common household* when they share a primary residence only with each other and family members; or when, if they share a household with other unrelated persons, they act jointly, rather than as individuals, with respect to management of the household."). Furthermore, the primary residence must be the primary abode of both parties, thereby excluding occasional relationships and extramarital relationships. *Id.* at cmt. c.

336 *Id.* § 6.03(5) ("Persons have a *common child* when each is either the child's legal parent or parent by estoppel, as defined by § 2.03.").

337 *Id.* § 6.03(2).

338 *Id.* § 6.03(3).

339 *Id.* § 6.03(7) (reproduced *supra* text accompanying note 132).

340 *See id.* at cmt. b.

341 *Id.* § 6.04(2) ("Parties who are the biological parents of a common child began sharing a life together as a couple no later than the date on which their common child was conceived.").

342 *Id.* § 6.04(1).

343 *See id.* § 604(3) (citing *Id*. § 4.12).

forth for the division of marital property [in the Principles]." [344] In addition, domestic partners are entitled to compensatory payments—support—on the same basis as a spouse, including the various kinds of compensatory awards provided in Chapter Five of the Principles. [345]

The rebuttable presumptive status of domestic partnership is useful because it lessens inquiry into the private intentionalities of the cohabitants. Also, providing property and support in a manner identical to married spouses would provide state courts with guidelines familiar to those historically used. And finally, the Principles offer, like marriage, comprehendible times for commencing and ending the nonmarital cohabitations. It is understandable why others would borrow from the Principles in suggesting a Uniform De Facto Marriage Act, the discussion of which follows.

2. *Uniform De Facto Marriage Act*

To address the issue of entitlements for certain nonmarital couples Professor Lawrence W. Waggoner proposes a Uniform De Facto Marriage Act [Act].[346] Unique about his proposals is that Professor Waggoner requires a judgement of a court before a de facto marriage takes place. "Couples who deliberately decline to marry should not have their decision overridden."[347] Instead, a court must make a determination and once the court rules there is a de facto marriage, the couple would qualify for all federal and state benefits and obligations of marriage. [348] "If a couple in a committed relationship is to acquire the benefits of marriage under both state and federal law, the statute has to deem the couple to be 'married.'"[349] Professor Waggoner includes a reference to federal law because federal statutes often make federal benefits contingent on a person's compliance with state law. [350]

To enter into a de facto marriage the Act requires that a couple must be unmarried and not be barred from marriage because of incest,

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344 *Id.* § 6.05.

345 *Id.* § 6.06(1)(a).

346 *See* Waggoner, *supra* note 23, at 216.

347 *Id.*

348 *Id.* "A de facto marriage act would codify the principle that unmarried partners can gain marital rights and would codify the criteria for qualifying for such rights." *Id.* at 235. Indeed, "[a] de facto marriage has the same status as a formal marriage." *Id.* at 239. Likewise, parties to a de facto marriage are "spouses" and if one of them dies, the survivor is the surviving spouse for any benefits bestowed as such. *Id.* at 241.

349 *Id.* at 241-42.

350 *See, e.g.*, Raymond C. O'Brien, *The Momentum of Posthumous Conception: A Model Act*, 25 J. CONTEMP. HEALTH L. & POL'Y. 332, 358-59 (2009) (noting that a dependent of a person eligible for Social Security cannot receive the parent's benefits unless that dependent is able to take under state's intestate statute).

plus they "must be or have been sharing a common household in a committed relationship."[351] This is defined as sharing the same place to live, even though one or both may have another house or were residing elsewhere at the time.[352] A committed relationship is elusive, but the statute defines this as a relationship in which "two individuals have chosen to share one another's lives in a long-term and intimate relationship of mutual caring."[353] To provide further clarity, Professor Waggoner offers objective criteria similar to what is found in the Principles. Nonetheless, unlike the Principles, a presumption of a committed relationship only occurs if the couple shares a common household with their minor child for a continuous period of at least four years.[354]

Going beyond the ALI Principles, the Act contemplates dissolution of the partnership both during the lifetime of the partners, and also at death. During lifetime, if the couple dissolves amicably nothing more needs to be done. But if dissolution occurs during lifetime and one of the parties concludes there is a disparity in property or support which would have been actionable under the state's divorce laws had the couple been married, the Principles intercede.[355] At death, if one of the parties dies, the surviving partner would be able to seek an intestate or forced share under state law and an estate tax deduction under federal law, similar to the benefits to which a married couple would be entitled.[356]

B. Foreign Proposals

Both the American Law Institute's Principles and Professor Waggoner's De Facto Marriage Act are influenced by foreign government enactments of legislation including cohabitants within the status of married spouses for purposes of establishing division of property and support obligation. The American Law Institute, when it considered the Principles, included references to Canada, Australia, and to New Zealand, some of whose legislation specifically referenced same-sex couples.[357] For example, the Canadian province of Ontario already had legislation in place at the time of adoption of the ALI Principles. This legislation included cohabitants as well as lawfully married persons in its statutory definition of "spouse" for purposes of spousal support obliga-

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351 Waggoner, *supra* note 23, at 240.
352 *Id.*
353 *Id.*
354 *Id.*
355 *Id.* at 244.
356 *Id.*
357 ALI PRINCIPLES, *supra* note 34, § 6.03 cmt. a.

tions.[358] The objective qualifying factors included in the Canadian legislation provide that the partners must cohabitate continuously for a period of not less than three years or, as an alternative, be in a relationship of some permanence as a result of being the natural or adoptive parents of a child.[359]

Also, when suggesting adoption of a Uniform De Facto Marriage Act, Professor Waggoner acknowledges what he describes as a consensus quietly emerging in Australia, Canada, Ireland, New Zealand, and Scotland, to include proposed legislation in the United Kingdom and Wales.[360] He suggests a similar currently-developing consensus in non-English-speaking European countries too,[361] but not as quickly or as universally as would match the percentage of couples in nonmarital cohabitation. The reason for the foreign reluctance may be similar to the naysayers in the United States. "Although the number of cohabitations is increasing, the pro-family policy of the law continues to aim to protect marriage as a basic structure of family."[362]

In those foreign countries identified by Professor Waggoner as leaning toward allowing nonmarital couples to achieve marital benefits, there is debate over objectivity, just as in the United States. Some foreign legislation concludes that the status has been achieved when the partners' behavior demonstrates enough of a commitment toward one another to justify declaring that they are "married in fact."[363] In determining whether they are "married in fact" counties such as Australia, Ireland, New Zealand, and Scotland provide a list of factors to consider as evincing intent.[364] Among these factors are the intermingling of finances and legal designations, joint children, a sexual relationship, reputation in the community, and mutual commitment to each other.[365] Again, as with the American proposals, the same uncertainty over establishing a consensus of the factors matters. And also, the more marriage-like the couple is, the more likely will they be recognized as qualified for entitlements.

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358 *Id.* (citing Ontario Family Law Reform Act of 1986, §§ 29 and 30, codified at R.S.O. 1990, c. F. 3, s.29, and s. 30).

359 *Id.*

360 Waggoner, *supra* note 23, at 216.

361 *Id.* at 234; *see also* Ryznar & Stepien-Sporek, *supra* note 30, at 315-16 (commenting on developments in Poland).

362 Ryznar & Stepien-Sporek, *supra* note 30, at 325 ("Cohabitation contracts setting the terms of a separation remain the primary way that cohabitants can protect themselves.").

363 Waggoner, *supra* note 23, at 236.

364 *Id.* at 237-38. The Principles also provide a list of factors to consider. *See* ALI PRINCIPLES, *supra* note 34, § 6.03(7) (using the factors as rebuttal to the presumption of domestic partners established at ALI § 6.03(3)).

365 Waggoner, *supra* note 23, at 238.

Reflecting on the legislation regulating de facto relationships in New Zealand, Professor Bill Atkin at the Victoria University of Wellington, New Zealand, summarized the difficulty he finds in New Zealand legislation when seeking to protect the equities—or inequities—of nonmarital cohabitation. The problem is that each relationship is an expression of a private understanding that evolves as each of the individuals evolves. He writes that "given the volatile condition of human affairs, it is a forlorn task to try and come up with a black and white definition of a de facto relationship."[366] Not surprisingly, this was the conclusion of Oscar Wilde, quoted at the beginning of this Article, commenting that the "only thing that one really knows about human nature is that it changes."[367] Seemingly, this leaves us where we started, but the fact remains—the percentage of nonmarital cohabitants continues to rise and with this so will the number of inequities that result. This issue is not going to go away.

V. Conclusion

There is no dispositive answer to the question of whether nonmarital couples should have access to the entitlements reserved to married couples. Why? First, uniformity among the states can only be achieved in rare circumstances. Either the federal government mandates uniformity of application through the Supremacy Clause of the Constitution of the United States or the Supreme Court of the United States commands uniformity in conformity with the Constitution. The Court's decision in *Obergefell* mandating that states permit same-sex marriage is an example. Currently there are no circumstances indicating that either Congress or the Court will act to extend entitlements to nonmarital cohabitants, thereby leaving this to the discretion of the states.

Second, there is scant uniformity among the states. Express and implied agreements between nonmarital cohabitants do permit those parties entering them to have a modicum of protection for their expectations, but the facts and conclusions again lack uniformity. And in the absence of an enforceable agreement, some courts are willing to apply equitable principles to curb unjust enrichment, but these too lack uniformity of approach, especially in reference to homemaker services. Undoubtedly, we are left with the conclusion that enforceable agreements and equitable redress cannot match the presumptions associated with marriage. Furthermore, no private agreement can ever precipitate the host of federal entitlements that accompany the status of spouse.

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366 Bill Atkin, *The Legal World of Unmarried Couples: Reflections on "De Facto Relationships" in Recent New Zealand Legislation*, 39 Vict. U. Wellington L. Rev. 793, 811 (2008).

367 Wilde, *supra* note 1, at 51.

Among these entitlements are tax benefits, ERISA status, Social Security, and many others. But then too, nonmarital cohabitation is not marriage. It is a product of personal choice and lacks the commitment structure of marriage.

Third, for one reason or another couples have chosen not to be married, and in doing so they have chosen to foreclose a status easily accessed by opposite-sex and same-sex couples. Choice goes to the essence of the liberty ensconced in the Fifth and Fourteenth Amendments, reflected in a progression of judicial opinions beginning in the 1960s and continuing with marriage entitlement for same-sex couples. Limiting the liberty of the individual when choosing to create a family structure is contrary to the evolution of liberty over the last two centuries. A question for the future is whether decisions like *Lawrence* and *Obergefell* may create an argument that governments may not restrict marital status entitlements to those only married, that restricting a person's liberty to marriage must be supported by a compelling state interest. Is the commitment structure of marriage a compelling reason?

Fourth, although the percentage of nonmarital cohabiting couples continues to rise, the sheer variety of reasons for cohabitation argues against any attempt to mandate objective factors warranting marriage-like entitlements. Most cohabiting couples do so while anticipating marriage in the future; only a small percentage remain in nonmarital cohabitation for a significant period. For some of these who did not utilize joint ownership, enter into enforceable contracts, or establish a pattern of reliance sufficient to generate concerns over unjust enrichment, disappointment results. When balanced against the commitment structure generated by the status chosen by marital couples, it may appear that the disappointment was foreseeable. And yet, equity is the pivotal consideration. Essential to public policy is the responsibility to provide for the welfare of citizens, for families in all permutations, and to disavow usury in all its forms. But the state cannot protect citizens from themselves at the cost of extending to some the benefits purposefully chosen by others.

Why then should the status of marriage uniquely warrant federal and state entitlements? As this Article briefly explains marriage is a "workhorse institution." This means that the political authorities view marriage as performing several state functions. Among these functions are creating a presumptive status for parentage of children, support and custody for those children, support for the homemaking services of the spouse who forgoes a career to raise those children, and the transmission of wealth from one generation to the next. Traditionally marriage is meant to moderate the lustful tendencies of citizens. These functions are so important to public policy that the state took over marriage, gradually eliminating common law marriage or self-marriage, and prescribed

rules of entry and departure for eligible couples. And what did the state demand of marriage? At its essence each of the parties entering into marriage had to agree to a "commitment structure" that bound two people to each other, their children, and to the extended family that resulted because of their commitment. Even if today marriage is called upon to do fewer of the functions it has previously performed, it remains a preeminent basis for social structure.

Religion is incidental. Love is incidental. Personal commitment is incidental. What makes marriage distinctive and worthy of entitlements is the state-sponsored commitment structure that begins and continues through it. The witness authority of the state provides durability, enforcement, and context.

Fifth, there are some couples, illustrated throughout this Article, that evidence marriage-like commitment through relationship longevity, intermingling of finances, intimacies, children, and human compassion. It is to these couples that reference is made when courts struggle to find enforceable agreements, to do equity, and to include them within designated spousal entitlements. Likewise, it is to these couples that legislation is proposed by the ALI Principles or the De Facto Marriage Act. Similarly, it is to these couples that foreign governments make reference by including them as spouses in any existing marital benefit. The legislative proposals made domestically and adopted internationally are means to benefit these couples, singular because of their personal commitment to each other but lacking in state recognition. Redress begins with the struggle to establish objective criteria defining them. Once found, marital presumptions follow, purportedly extending community property and common law property rules pertaining to division of property and support.

Rather than start from scratch in objectifying the commitment of nonmarital couples, why not utilize a status that worked in the past but became moribund with the state's greater need for clarity? This is common law marriage. A vote by the expanding population of nonmarital cohabitants in favor of restoration of common law marriage, perhaps coupled with a defined time period of holding one another out as committed, rather than married, would meet the needs of equity. There was a time when couples would be included in marital benefits simply by holding each other out as married for a sufficient period of time in a community that recognized them as such. This was common law marriage and while it flourished in an emerging America, it now it wanes in a country with far greater citizen mobility and governmental control. And yet, if common law commitment were revived as a status it would accommodate the small percentage of nonmarital cohabitants within the panoply of marital entitlements.