2005

Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation

Marsha Garrison

IS CONSENT NECESSARY? AN EVALUATION OF THE EMERGING LAW OF COHABITANT OBLIGATION

Marsha Garrison*

In the United States today, unmarried cohabitants have no obligations to each other unless they have contracted to assume such obligations. "Conscriptive" rules that base the obligations of cohabitants on status instead of contract have been adopted in a number of other nations, and the American Law Institute has advocated adoption of the conscriptive approach in the United States. This Article analyzes the desirability of such a shift in legal standards and concludes that the evidence does not support the claim that marriage and cohabitation are functionally equivalent. Instead, the evidence shows that married and cohabiting couples tend to behave and view their relationships quite differently: Cohabitants are much less likely than married couples to share or pool resources; cohabitation usually functions as a substitute for being single, not for being married. Cohabitation thus does not imply marital commitment, the accepted basis of marital obligation. Nor, given its typically short duration and limited sharing, is it likely that cohabitation generally induces dependency or leads to unjust enrichment. Because of these differences, it would be unfair to impose marital obligations on cohabitants simply because a relationship has survived for a legislatively determined time period. Individualized inquiry into the nature of a couple's relationship is also undesirable as it is likely to produce uncertain and inconsistent results.

Conscriptive reforms are not needed to protect marital investments or avert unjust enrichment. The private commitments of cohabitants can be honored through a revivified common law marriage doctrine and some type of voluntary registration or marriage option for same-sex couples. Unjust enrichment can be averted through traditional equitable remedies. Conscription also entails serious public policy disadvantages; it would introduce discordant values into the law of relational obligation, diminish personal autonomy, and falsely signal that marriage and cohabitation are equivalent states. Because marriage is advantageous for both adults and children, legal standards should foster marital commitments; by diminishing their importance, the conscriptive approach risks harm to individual interests and the public good. For all of these reasons, policymakers should affirm the role of commitment in the imposition of marital obligation and reject proposed conscriptive reforms.

---

* Professor of Law, Brooklyn Law School. Research for this Article was supported by Brooklyn Law School's Faculty Research Fund.

INTRODUCTION

Marriage is based on mutual consent. The content of the marital agreement has varied widely from time to time and from place to place. But marital obligation has invariably been predicated on the voluntary assumption of rights and duties; marriage partners say "I do," or they have not entered the married state.

Marital commitment explains why married couples have legal obligations to each other when unmarried couples do not. Unmarried couples, like their married counterparts, may establish a home, family, and life together; they may be sexually faithful to each other and may share the expectation that their relationship will endure. But they have not publicly and mutually agreed to assume the legally binding obligations of marriage. Indeed, they have decided *not* to publicly assume those obligations.

It is possible, of course, for an unmarried couple to define their obligations to each other in an individually negotiated agreement. Courts traditionally refused to honor such agreements based on the perceived desirability of channeling both sex and sex-linked obligations into state-defined marital relationships. But as the incidence[1] and social prominence[2] of cohabitation have increased, the law of cohabitant obligations has shifted, too. Although some American courts have adhered to the traditional view that even explicit written contracts between unmarried cohabitants are unenforceable,[3] the majority now permit former cohabitants to recover based on both explicit promises made during the relationship and implicit agreements derived from

1. The incidence of cohabitation has increased dramatically over the past thirty years. Between 1970 and 2000, the number of unmarried-cohabitant households in the United States rose almost ten-fold, from 523,000 to 4,880,000. *See* JASON FIELDS & LYNNE M. CASPER, U.S. CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS 2000: POPULATION CHARACTERISTICS (Current Pop. Rpts. P20-537, 2001), *available at* http://www.census.gov/prod/2001pubs/p20-537.pdf. The number of individuals who have ever cohabited has also risen sharply. *See* R. Kelly Raley, *Recent Trends and Differentials in Marriage and Cohabitation: The United States*, *in* THE TIES THAT BIND: PERSPECTIVES ON MARRIAGE AND COHABITATION 19, 23 tbl.2.1 (Linda J. Waite ed., 2000) [hereinafter THE TIES THAT BIND] (among women born between 1950–1954, 24 percent cohabited before marriage; among women born between 1965–1969, 55 percent cohabited before marriage).

2. "[S]ince the 1970s, cohabitation outside of marriage, which had previously been confined to the poor, has become increasingly common and acceptable among the general population. It has emerged as an important part of the union formation process, often preceding first marriages and sometimes substituting for them." Andrew J. Cherlin, *Toward a New Home Socioeconomics of Union Formation*, *in* THE TIES THAT BIND, *supra* note 1, at 126, 127.

3. *See, e.g.*, Hewitt v. Hewitt, 394 N.E.2d 1204 (Ill. 1979); Thomas v. LaRosa, 400 S.E.2d 809 (W. Va. 1990).

conduct.[4] This shift reflects a sense that social mores have "changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations . . . apparently . . . abandoned by so many."[5] It has produced a new body of law under which cohabitants may assume enforceable obligations to each other if they choose to do so. Like marriage law, this new body of law assumes that obligation flows from commitment. Only when a cohabitant can show an express contract "or some other tacit understanding" may he recover.[6]

At the same time U.S. courts were developing a contractual approach to cohabitant obligations, courts and legislatures in a number of other industrialized nations were fashioning a "conscriptive" model that bases cohabitant obligation on status.[7] The conscriptive model imposes on the cohabiting couple that has chosen to avoid marriage some or all of the obligations the couple would have incurred had they chosen to marry. Several Canadian provinces, for example, now impose a support obligation on cohabitants who have lived together for periods ranging from one to three years.[8] All of the Australian

4. This approach was pioneered in *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976). It has since been adopted in a number of states. *See generally* J. THOMAS OLDHAM, DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY § 1.02 (2002) (listing decisions following *Marvin*); Joel E. Smith, Annotation, *Property Rights Arising From Relationship of Couple Cohabiting Without Marriage*, 3 A.L.R. 4th 13 (1979 & Supp.) (surveying states). Some states have accepted the *Marvin* court's contractual approach but limited the means by which an agreement may be established: Some permit recovery based on an express contract but not one implied from the parties' behavior. *See, e.g.*, Tapley v. Tapley, 449 A.2d 1218 (N.H. 1982); Morone v. Morone, 413 N.E.2d 1154 (N.Y. 1980). A few permit recovery based only on an express, written contract. *See* MINN. STAT. ANN. § 513.075 (West 2002); TEX. FAM. CODE ANN. § 1.108 (Vernon 1998); Posik v. Layton, 695 So. 2d 759, 762 (Fla. Dist. Ct. App. 1997); Kohler v. Flynn, 493 N.W.2d 647, 649 (N.D. 1992).

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

6. *Id.* at 110.

7. I have used the term "conscriptive" to emphasize the fact that the obligations imposed by laws of this type are both compulsory and involuntary. The Canadian Law Commission has referred to such laws as *ascriptive*, emphasizing the fact that they impute marital status to the unmarried. *See* LAW COMM'N OF CANADA, BEYOND CONJUGALITY: RECOGNIZING AND SUPPORTING CLOSE PERSONAL ADULT RELATIONSHIPS (2001), http://www.lcc.gc.ca/en/themes/pr/cpra/report.asp [hereinafter BEYOND CONJUGALITY].

8. *See* Nicholas Bala, *Controversy Over Couples in Canada: The Evolution of Marriage and Other Adult Interdependent Relationships*, 29 QUEEN'S L.J. 41, 45–53 (2003) (describing provincial support rules). The only exception is Quebec. *See id.* at 48–49. Canadian law was fueled by two important decisions of the Canada Supreme Court. In *Miron v. Trudel*, [1995] 2 S.C.R. 418, the Court ruled that the exclusion of a long-term, unmarried cohabitant from the statutory definition of "spouse" was, for purposes of an automobile insurance policy, discriminatory and contrary to section 15 of the *Canadian Charter of Rights and Freedoms*. In *M. v. H.*, [1999] 2 S.C.R. 3, the Supreme Court ruled, on the same basis, that any support right available to heterosexual couples must also be extended to homosexual couples. But in *Nova Scotia (Attorney General) v. Walsh*, [2002] 4 S.C.R. 325, the Court held that, with respect to property acquired during the relationship, it is not discriminatory to treat cohabitants differently from married couples as cohabitants have chosen to avoid the consequences of marriage. A cohabitant right to share property accrued during the relationship appears to be available only to couples in the Northwest Territories. *See* Family Law Act, R.O.N.W.T., ch. 18, §§ 1, 36 (1997).

states have adopted legislation that extends marital property rights to cohabitants who have a common child or have lived together for at least two years.[9] Italy and Norway are considering legislation that would grant some inheritance rights to surviving cohabitants, regardless of contrary provisions in the decedent cohabitant's will.[10] And New Zealand has extended *all* of the rights and obligations of marriage to couples who have been "de facto partners" for three years.[11]

Only one American high court has thus far adopted a conscriptive approach to cohabitant obligation,[12] but the American Law Institute (ALI) has recently urged the states to abandon contract in favor of the conscriptive alternative.[13] The ALI's position

> reflects a judgment that it is usually just to apply to [cohabitants] . . . the property and support rules applicable to divorcing spouses, that individualized inquiries are usually impractical or unduly burdensome, and that it therefore makes more sense to require parties to contract out of these property and support rules than to contract into them.[14]

Is the ALI's judgment sound? Undeniably, adoption of the conscriptive approach would represent a radical departure from traditional principles of family obligation. Such a dramatic change in legal standards—particularly

---

9. The provinces variously extend property rights to couples in "domestic" or "de facto" relationships. Some, but not all, of the provincial statutes apply to homosexual as well as heterosexual couples. Some require a minimum period of cohabitation. *See* DOROTHY KOVACS, DEFACTO PROPERTY PROCEEDINGS IN AUSTRALIA 10–11 (1998); Lindy Willmott et al., *De Facto Relationships Property Adjustment Law—A National Direction*, 17 AUST. J. FAM. L. 1, 2–5 (2003) (describing differences in state rules).

10. *See* Sarah Lyall, *In Europe, Lovers Now Propose: Marry Me, a Little*, N.Y. TIMES, Feb. 15, 2004, at A3. The Norwegian legislation would extend inheritance rights to cohabitants who have lived together for five years or have a common child and would permit a surviving partner to retain a shared residence regardless of a contrary disposition in the decedent partner's will; the Italian legislation would permit a surviving cohabitant to remain in a shared residence for a period equal to the length of the relationship.

11. Property (Relationships) Amendment Act, 2001 (N.Z.), *available at* http://www.legislation.govt.nz/. For descriptions of the legislation and its development, see Bill Atkin, *The Challenge of Unmarried Cohabitation—The New Zealand Response*, 37 FAM. L.Q. 303 (2003); Virginia Grainer, *What's Yours Is Mine: Reform of the Property Division Regime for Unmarried Couples in New Zealand*, 11 PAC. RIM L. & POL'Y J. 285 (2002).

12. *See* Connell v. Francisco, 898 P.2d 831 (Wash. 1995). An Oregon appellate court has also held that judges have "equitable powers" to reach a "fair result" at the end of a period of cohabitation. *See* Wilbur v. DeLapp, 850 P.2d 1151, 1153 (Or. App. 1993).

13. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS ch. 6 (2002) [hereinafter ALI PRINCIPLES].

14. *Id.* § 6.03 cmt. b.

one that runs counter to values permeating many related areas of law—requires a substantial justification. As Justice Cardozo put it:

> I am not to mar the symmetry of the legal structure by the introduction of inconsistencies and irrelevancies and artificial exceptions unless for some sufficient reason, which will commonly be some consideration of history or custom or policy or justice. Lacking such a reason, I must be logical, just as I must be impartial, and upon like grounds.[15]

Cardozo reminds us that, although changes in family form may fuel changes in family law, a shift in legal standards must also satisfy basic principles of justice: Like cases must receive like treatment; rules must uniformly reflect the relevant policy goals; and policy goals must express current perceptions of relational obligation.[16] Only a family law that meets these standards can accurately and adequately express contemporary family values.[17] Only a family law that meets these standards is capable of garnering broad public support and enduring allegiance.[18]

This Article investigates the extent to which adoption of a conscriptive approach to cohabitant obligation would "mar the symmetry of the legal structure" and examines those "considerations of history or custom or policy or justice" that might justify an asymmetrical law of family obligation. It explains why our law has relied on commitment as a determinant of marital obligation and evaluates possible justifications for the conscriptive approach. It concludes

15. BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 33 (1949).

16. I have previously argued that new issues in family law should be approached from an interpretive perspective that explicitly strives for coherence with the rules and principles applicable to related cases. This approach not only promotes consistency, but it comports "with the widely held view that the expression of contemporary beliefs and values is one of family law's most important functions . . . [and] embodies the notion, pervasive within our legal system, that 'the very concept of the rule of law' demands 'continuity over time' and 'respect for precedent.'" Marsha Garrison, *Law Making for Baby Making: An Interpretive Approach to the Determination of Legal Parentage*, 113 HARV. L. REV. 835, 842–43 (2000) (quoting Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992)); *see also* Marsha Garrison, *Autonomy or Community? An Evaluation of Two Models of Parental Obligation*, 86 CAL. L. REV. 41, 46–47 (1998) [hereinafter Garrison, *Autonomy or Community*] (arguing in favor of interpretive approach to child support policy).

17. A number of family law scholars have argued that this expressive role is one of family law's most important functions. *E.g.*, MILTON C. REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY 176–84 (1993); Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495 (1992); Carol Weisbrod, *On the Expressive Functions of Family Law*, 22 U.C. DAVIS L. REV. 991 (1989); Jennifer Wriggins, *Marriage Law and Family Law: Autonomy, Interdependence, and Couples of the Same Gender*, 41 B.C. L. REV 265, 293–301 (2000). *See generally* Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021 (1996).

18. *See* TOM R. TYLER, WHY PEOPLE OBEY THE LAW 178 (1990) (concluding, based on extensive empirical research, that "people . . . evaluate laws and the decisions of legal authorities in normative terms, obeying the law if it is legitimate and moral and accepting decisions if they are fairly arrived at"); Tom Tyler & Robyn M. Dawes, *Fairness in Groups*, *in* PSYCHOLOGICAL PERSPECTIVES ON JUSTICE 87, 89–90 (Barbara A. Mellers & Jonathan Baron eds., 1993) (summarizing research).

that those justifications are clearly inadequate to support conscriptive rules for cohabitants who do not have common children and that, while the case of cohabitants with common children is more complex, conscriptive rules would almost certainly work more harm than good even for this limited group. Finally, it sketches the legal reforms that seem most likely to serve the interests of cohabitants, their children, and the public.

Part I describes the traditional view of marital obligation. It also describes and evaluates other possible justifications for both private and public relational obligations. Part II describes various justifications that have been offered for the conscriptive approach, analyzes the evidence relevant to those justifications, and outlines some public policy disadvantages inherent in the conscriptive model. Part III describes and evaluates the intuitions about marriage and cohabitation that seem to underlie the movement in favor of conscription and that might offer additional justifications for it. Part IV describes and evaluates alternatives to conscription.

I. SOURCES OF RELATIONAL OBLIGATION

A. Marriage: Obligation From Commitment

Marital obligation is based on mutual consent.[19] The identities of the contracting parties have varied; the consent of brides, grooms, guardians, and even feudal lords has at one time or another been required.[20] The content of the marriage agreement has also varied widely across centuries and societies; marriage has accommodated polygamy as well as monogamy and suttee as well as no-fault divorce. But at all times marriage has been predicated on an explicit agreement to assume marital roles and obligations. A "de facto" marriage is

19. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES *434 ("[O]ur law considers marriage in no other light than as a civil contract"); JOHN LOCKE, TWO TREATISES OF CIVIL GOVERNMENT 319 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) ("[C]onjugal society is made by a voluntary Compact between Man and Woman"). One commentator has urged that,

> [i]n premodern English law, the use of the term contract was often synonymous with marriage, and it was from the law of spousals that many of the doctrines of modern contract law were first taken. In particular, rules relating to capacity, to duress, to consideration, to offer and acceptance in praesentia and in absentia, to present and future intent, and to the plea of non est factum have all developed out of the law of marriage.

Peter Goodrich, *Habermas and the Postal Rule*, 17 CARDOZO L. REV. 1457, 1470 (1996).

20. Anthropologists describe marriage as a "contract between kin groups . . . themselves . . . whereby a man acquires sexual and reproductive rights while his wife acquires some entitlement to his resources, for the support of herself and her children." Martin Daly & Margo I. Wilson, *The Evolutionary Psychology of Marriage and Divorce*, *in* THE TIES THAT BIND, *supra* note 1, at 91, 98–100 (summarizing anthropological sources).

thus an oxymoron. Unless marriage partners say "I do," they are not married and have assumed no marital obligations to each other.

The consensual nature of marriage holds constant even if the parties forgo a ceremonial marriage. Common law marriage traditionally depended not only on the fact of cohabitation and holding out a marital relationship to the community, but also on a marriage agreement.[21] Even a marriage agreement was insufficient if it did not manifest a present intention to marry, and some courts went so far as to require proof of intention by clear and convincing evidence.[22]

The consensual nature of marriage is also evident in the rules for exiting a marital relationship. The grounds for annulment—incapacity, based on mental state or age; fraud, based on a material misrepresentation or physical incapacity; duress, either physical or mental—are all contract defenses. A judgment that a marriage should be annulled thus represents a determination that the "meeting of minds" necessary for a valid marriage did not take place. Fault-based divorce requirements differ from annulment grounds in that they represent contract breaches rather than defenses, but the consensual conception of marriage is still central. Although modern no-fault divorce has expanded the content of the marriage agreement to include spousal compatibility in addition to the traditional elements, it has not altered the view of marriage as a legally binding contract that can neither be imposed without consent nor exited without risk of legal sanctions.

The contractual view of marriage is not unique to the common law tradition. Under the civil law, marriage is and was contractual.[23] Under Catholic, Jewish, and Islamic law, marriage is and was contractual.[24] Under Roman law, marriage was contractual.[25] Even the Babylonian Code of Hammurabi

21. *See* 55 C.J.S. *Marriage* § 10 (1998) ("[A]ll that is required is that there should be an actual and mutual agreement to enter into a matrimonial relation . . . between parties capable in law of making such a contract, consummated by their cohabitation as man and wife or their mutual assumption openly of marital duties and obligations.").

22. *See id.* § 6; HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 48 (2d ed. 1987).

23. *See* SAMUEL PUFENDORF, OF THE LAW OF NATURE AND NATIONS bk. 6, ch. 1, §§ 12, 14 (Basil Kennett trans., Oxford 1803) (1672) ("[C]onsenting and not Bedding, makes a Marriage."); *see also* Hans W. Baade, *Marriage Contracts in French and Spanish Louisiana: A Study in "Notarial" Jurisprudence*, 53 TUL. L. REV. 3 (1978); Rodolfo Batiza, *The Actual Sources of the Marriage Contract Provisions of the Louisiana Civil Code of 1808: The Textual Evidence*, 54 TUL. L. REV. 77 (1979).

24. *See* REUVEN P. BULKA, JEWISH MARRIAGE: A HALAKHIC ETHIC 23–24 (1986); DAWOUD SUDQI EL ALAMI & DOREEN HINCHCLIFFE, ISLAMIC MARRIAGE AND DIVORCE LAWS OF THE ARAB WORLD 5–6 (1996); JOHN WITTE, JR., FROM SACRAMENT TO CONTRACT: MARRIAGE, RELIGION AND LAW IN THE WESTERN TRADITION 25–26 (1997).

25. *See* Susan Treggiari, *Divorce Roman Style*, *in* MARRIAGE, DIVORCE, AND CHILDREN IN ANCIENT ROME 31 (Beryl Rawson ed., 1991); *see also* Batiza, *supra* note 23, at 14–15 (describing

provided that, "[i]f a man take a wife and does not arrange with her the proper contracts, that woman is not his legal wife."[26]

Despite the weight of history and tradition, advocates of conscriptive rules sometimes argue that marital obligation is not really based on contract or commitment after all. For example, the Canadian Law Commission urges that:

> Individuals in close personal relationships who are not married . . . may have many of the characteristics of *economic and emotional interdependency that ought to give rise to rights and responsibilities*. To fail to include these individuals may undermine the state's interests in recognizing and supporting the full range of committed, mutually supportive personal adult relationships.[27]

Ira Ellman, chief reporter for the ALI *Principles of the Law of Family Dissolution* (ALI Principles), also contrasts the "bargained-for exchange" between a restaurant and a patron with the "social reciprocity" that leads one friend to pick up the lunch tab today because the other did so yesterday. He argues that,

> while marriages (and domestic partnerships) are quite obviously more like friendships than hamburgers, they also give rise to legally enforceable obligations, which lead some people to forget the obvious and think they are like hamburgers after all. The error apparently arises from the mistaken assumption that the legal obligations arising from marriage must have their source in a bargained-for exchange. . . . But we must remain clear about the difference. Lunch with my friend may leave me with a sense of social debt that is real, but non-specific. Our debt to the restaurant . . . involves paying $23.37. Now. So legal obligations are well-defined in both time and nature, while the reciprocities expected in close social relationships are not.[28]

Of course, Ellman is right that the marital contract is much less precise than the typical commercial contract. Marital obligations have seldom been based on individual negotiation;[29] even the transfer of funds upon marriage,

---

Roman roots of civil law marriage concept); Goodrich, *supra* note 19, at 1470 (explaining that in medieval England "marriage was subject to the jurisdiction of ecclesiastical courts and judges trained in civil law, and it is that Roman inheritance which the common lawyers subsequently admitted into English law").

26. Babylonian Code of Hammurabi, *quoted in* HARRY E. KRAUSE ET AL., FAMILY LAW: CASES, COMMENTS, AND QUESTIONS 33 (5th ed. 2003).

27. BEYOND CONJUGALITY, *supra* note 7, ch. 3, pt. 1, § 4 (emphasis added).

28. Ira M. Ellman, *"Contract Thinking" Was* Marvin's *Fatal Flaw*, 76 NOTRE DAME L. REV. 1365, 1373–74 (2001).

29. Thus the *Restatement of Contracts* warns that "the marital relationship has not been regarded by the common law as contractual in the usual sense. Many terms of the relationship are seen as largely fixed by the state and beyond the power of the parties to modify." RESTATEMENT (SECOND) OF CONTRACTS § 190 (1981).

in the form of dowry or bride price, represented an exchange for entering marriage rather than an alteration of its terms and conditions.[30] For this reason, family law scholars have variously described marriage as a relational contract, status contract, partnership, or covenant.[31] Undeniably, marital commitment differs from a commercial transaction like the purchase of lunch.

Ellman and the Canadian Law Reform Commission are wrong, however, in suggesting that marriage partners have legal obligations to each other because they enjoy a close social or personal relationship. First, a close relationship does *not* imply legal obligations: Ellman was not legally obliged to buy Friend's lunch, even if Friend had purchased many meals for Ellman; Ellman would not owe anything to Friend if he terminated their relationship, even if the friendship was longstanding and intimate; Ellman would not owe anything to Friend even if he and Friend had been roommates who experienced "economic and emotional interdependency." We ascribe moral obligations to close personal relationships, but not legally binding obligations.

Second, marriage is not just a close personal relationship, nor does marital obligation arise either from relational intimacy or economic interdependency. Marriage is a public commitment. "In the marriage ceremony the public recognizes and supports the couple's reciprocal bond, and guarantees that [the couple's] . . . commitment . . . will be honored as something valuable not only to the pair but to the community at large."[32] The couple who exchange vows "agrees to be subject to a complex set of behavioral expectations defining the roles of spouse and parent, expectations that will restrict their freedom and guide their behavior in the relationship."[33] Entrance into marriage legally forecloses other marital opportunities; the role expectations attached to marital status also inhibit participation in other sexual and economic

30. *See* Daly & Wilson, *supra* note 20, at 97–99.

31. *See* MARGARET F. BRINIG, FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY 6 (2000) (arguing that "covenant is a preferable concept for describing families . . . for, in brief, the covenant implies unconditional love and permanence"); Sanford N. Katz, *Marriage as Partnership*, 73 NOTRE DAME L. REV. 1251, 1271–72 (1998) (urging that marriage is not just a contract but also a partnership); Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225 (1998) (urging that marriage is best described as a relational contract); Ariela R. Dubler, Note, *Governing Through Contract: Common Law Marriage in the Nineteenth Century*, 107 YALE L.J. 1885, 1907–08 (1998) (describing marriage as status contract).

32. NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 2 (2000). There is evidence that community expectations can play an important role in molding both social and business relationships. The public aspects of marriage thus reinforce internalized marital norms. *See* Scott & Scott, *supra* note 31, at 1292–93 (describing the impact of community expression of norms).

33. Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1907 (2000); *see also* Eric A. Posner, *Family Law and Social Norms*, *in* THE FALL AND RISE OF FREEDOM OF CONTRACT 256, 259–62 (F.H. Buckley ed., 1999) (describing influence of social norms on marital behavior); Scott & Scott, *supra* note 31, at 1288–92 (same).

relationships. Spousal role expectations represent consideration for the marital agreement.[34] They serve to induce detrimental reliance on continuation of the marital relationship.[35]

The pattern of relational obligation that arises from marital commitment is not unusual; virtually all other legally enforceable role responsibilities—guardian to ward, conservator to incompetent, trustee to beneficiary—arise, not by default, but from the voluntary assumption of a particular role in relation to a particular individual.[36] As with marriage, the role expectations attached to these various statuses inhibit other relational opportunities and induce detrimental reliance: Neither the beneficiary with a trustee nor the ward with a guardian can easily replace the individuals who have assumed fiduciary obligations toward them; the assumption of these statuses precludes their assumption by others and induces reliance on role performance.

While marriage law retains its emphasis on role-based commitment as a source of obligation, the marriage contract has become more variable. Marriage partners may now individually negotiate with respect to their property rights and, to a lesser but still significant extent, their support obligations.[37] A handful of jurisdictions have even empowered prospective marriage partners to vary the grounds for divorce.[38] These developments do not diminish marriage law's emphasis on commitment as a source of obligation but instead enhance it; today, one spouse's marital commitment may represent an exchange for the other's willingness to forgo the typical benefits of marriage or, conversely, to assume enhanced marital obligations.

---

34. Sociologist Guy Moors found that women who married between his first and second interviews with them valued autonomy in the first interviews to a slightly higher, although not significant, degree than women who entered cohabitation or decided not to marry during the same period, but that, by the second interview, the married women's "urge for 'autonomy' . . . drops considerably after gaining security in and through marriage." Guy Moors, *Values and Living Arrangements: A Recursive Relationship*, *in* THE TIES THAT BIND, *supra* note 1, at 212, 222–23 tbl.11.3.

35. *See* Michael J. Trebilcock, *Marriage as a Signal*, *in* THE FALL AND RISE OF FREEDOM OF CONTRACT, *supra* note 33, at 245, 248–55 (describing application of "market signaling theory" to norms of marriage).

36. Scholars disagree on whether fiduciary duties are purely contractual. *Compare* Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 427 (1993) (urging that there is nothing special about fiduciary obligations and positing that fiduciary obligations arise from "contractual" (*and thus consensual*) relations) *and* John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 629 (1995) ("The rules of trust fiduciary law mean to capture the likely understanding of the parties to the trust deal . . . . "), *with* Victor Brudney, *Contract and Fiduciary Duty in Corporate Law*, 38 B.C. L. REV. 595, 597 (1997) ("[T]o say that a relationship is contractual 'only begins analysis; it gives direction to further analysis . . . .'"). They do not disagree that fiduciary obligations arise from a voluntary undertaking.

37. *See* KRAUSE ET AL., *supra* note 26, at 178–79 ("Today all states agree that a premarital agreement is enforceable if it meets certain requirements . . . .").

38. *See* ARIZ. REV. STAT. ANN. § 25-901 (West Supp. 2003); ARK. CODE ANN. §§ 9-11-803, 9-11-808 (Michie 2003); LA. REV. STAT. ANN. §§ 9:293, 9:307 (West 2004).

Modern marriage law thus shows no sign of abandoning the traditional view that marital obligation derives from marital commitment. More than ever, the law defines and limits spousal obligations by formal marriage agreements.

B. Dependency-Causation as an Alternative Source of Relational Obligation

1. The Basis of Parental Obligation

The law of parental obligation offers a notable exception to the general pattern of commitment-based obligations. Some societies have permitted contractual transfers of parental rights and obligations, and courts have sometimes held that an individual who tacitly or explicitly agrees to act as a parent may be estopped from denying parental status.[39] But initial determinations of parentage have flowed from consanguinity or status. The woman who gives birth to a child bears all the rights and obligations of parenthood whether she wants to or not; even rape, although it may provide a basis for obtaining an abortion, does not serve as a defense to the obligations of motherhood. Legal fatherhood, too, is based on consanguinity or marriage to the child's mother, not parental commitment.[40]

---

39. When a nonparent consents to act as a parent and the child's interests would be harmed by termination of the parental relationship, the nonparent is estopped from disclaiming the responsibilities he has assumed. *See, e.g.*, W. v. W., 779 A.2d 716 (Conn. 2001) (stepparent); Watts v. Watts, 337 A.2d 350 (N.H. 1975) (same). The estoppel principle has also been used against a same-sex partner. *See* L.S.K. v. H.A.N., 813 A.2d 872 (Pa. Super. Ct. 2002) (same-sex partner who encouraged mother to utilize artificial insemination to bear a child).

40. The common law presumption of legitimacy historically ensured that the husband of a married mother would be treated as her child's legal father whether or not he was its biological progenitor and whether or not he had consented either to the mother's extramarital affair or to provide support for her offspring. The presumption could be rebutted only by proof that the husband was incapable of procreation or had no access to his wife during the relevant period. *See* 1 BLACKSTONE, *supra* note 19, at *454–59. Under Lord Mansfield's Rule, first enunciated in *Goodright v. Moss*, 98 Eng. Rep. 1257 (K.B. 1777), neither spouse could testify to nonaccess by the husband. Both the presumption and its accompanying evidentiary restrictions appear to have stemmed from the desire to protect children from the stigma and legal disadvantages of illegitimacy, coupled with the hope of promoting marital harmony, "a goal that is obviously impaired by facilitating suits against husband and wife asserting that their children are illegitimate." 2 KENT'S COMMENTARIES *175 (1827), *quoted in* Michael H. v. Gerald D., 491 U.S. 110, 125 (1989).

All states retain some form of the legitimacy presumption. *See* ALI PRINCIPLES, *supra* note 13, § 3.02A cmt. d (listing states). Although the presumption is now rebuttable in a range of circumstances, this shift reflects the advent of highly accurate paternity tests, which mean that a successful contest by the mother's husband is highly likely to be coupled with an unsuccessful defense by the child's biological father. *See* Jeffrey W. Morris & David Gjertson, *The Scientific Status of Parentage Testing*, *in* MODERN SCIENTIFIC EVIDENCE § 19-2.0 (David Faigman et al. eds., 1997).

The nonconsensual nature of parental obligation is particularly evident in paternity law, which historically offered unmarried fathers few opportunities to establish their paternity even when they wished to do so.[41] Indeed, as late as 1972, Peter Stanley, an unmarried father who had lived with and supported his children since their birth, was forced to go all the way to the U.S. Supreme Court to obtain a ruling affirming his parental status.[42] Despite *Stanley*, many states continue to restrict unmarried fathers' opportunities to assert their paternity.[43] They also continue to impose parental responsibility without consent: Courts have uniformly imposed parental responsibilities on men who were legally incapable of consenting to sexual intercourse[44] and those who had been tricked into fathering a child;[45] they have refused to honor nonpaternity agreements whether made before or after the child's conception.[46]

41. During this period, "the law hardly considered the possibility that an unmarried father might seek to assert paternity rather than escape it, and procedures for such actions were often not available." IRA M. ELLMAN ET AL., FAMILY LAW: CASES, TEXT, PROBLEMS 1063 (3d. ed. 1998).

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

43. For example, the Uniform Parentage Act, adopted in more than a third of the states, grants standing to commence a paternity action only to the child, the mother, and her husband unless the putative father married or attempted to marry the mother or, during the child's minority, "receive[d] the child into his home and openly . . . [held] out the child as his natural child"; the opportunity to bring an action is also limited to "a reasonable time after obtaining knowledge of relevant facts." UNIF. PARENTAGE ACT §§ 4, 5(b), 6(a), 9B U.L.A. 299–312 (1987). The Uniform Parentage Act was revised in 2000 and 2002. Under the revised Act, a putative father can no longer gain a right to establish his paternity by "receiv[ing] the child into his home and openly hold[ing] out the child as his natural child" at any point during the child's minority. Instead, the putative father must, "*for the first two years of the child's life*, . . . reside[ ] in the same household with the child and openly [hold] out the child as his own." UNIF. PARENTAGE ACT § 204(a)(5) (amended 2002), 9B U.L.A. 16 (Supp. 2004) (emphasis added). State courts have upheld such restrictions against constitutional challenges. *See, e.g.*, *In re* Paternity of C.A.S., 468 N.W.2d 719, 727 (Wis. 1991) ("The best interests of the children are the ultimate and paramount considerations in this case, and reflect a strong public policy of this state."); A v. X Y & Z, 641 P.2d 1222, 1225 (Wyo. 1982) ("[A] child has a right to legitimacy and that right is one the State is bound to protect during minority."). In *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), a plurality of the Supreme Court held that the states may prefer the interests of the mother's husband to those of the biological father, even if the biological father has evidenced his commitment to his child by living with the mother and their child in a family unit.

44. *See, e.g.*, County of San Luis Obispo v. Nathaniel J., 57 Cal. Rptr. 2d 843 (Ct. App. 1996); Kansas *ex rel.* Hermesmann v. Seyer, 847 P.2d 1273 (Kan. 1993); Jevning v. Cichos, 499 N.W.2d 515 (Minn. Ct. App. 1993); *In re* R.A.S., 826 S.W.2d 397 (Mo. Ct. App. 1992).

45. The most frequently cited cases are *Stephen K. v. Roni L.*, 164 Cal. Rptr. 618 (Ct. App. 1980) and *Pamela P. v. Frank S.*, 59 N.Y.2d 1 (1983). *See generally* Anne M. Payne, Annotation, *Parent's Child Support Liability as Affected By Other Parent's Fraudulent Misrepresentation Regarding Sterility or Use of Birth Control, or Refusal to Abort Pregnancy*, 2 A.L.R. 5th 337 (2002); Anne M. Payne, Annotation, *Sexual Partner's Tort Liability to Other Partner for Fraudulent Misrepresentation Regarding Sterility or Use of Birth Control Resulting in Pregnancy*, 2 A.L.R. 5th 301 (2002); Diane H. Carlton, Note, *Fraud Between Sexual Partners Regarding the Use of Contraceptives*, 71 KY. L.J. 593 (1983).

46. *See* UNIF. PARENTAGE ACT § 6(d), 9B U.L.A. 287, 303 (1987) (declaring invalidity of agreements regarding paternity); Peregood v. Cosmides, 663 So. 2d 665 (Fla. Dist. Ct. App. 1995); Straub v. B.M.T., 645 N.E.2d 597, 598 (Ind. 1994) (holding that an agreement providing the father

Most scholars thus justify parental obligation on the basis of causation instead of consent. As Blackstone put it, "by begetting . . . [, parents] have entered into a voluntary obligation to endeavour, as far as in them lies, that the life which they have bestowed shall be supported and preserved."[47] Children are dependent on the care of others for many years; unless infants receive physical care they will die, and emotional and educational care is necessary if they are to grow into responsible and productive adults. The risks that children's dependence impose on both individuals and communities necessitate the identification of responsible caregivers, and parents are the obvious candidates because they—and they alone—caused the state of dependency that mandates care-giving.

2. Harmonizing Dependency-Causation and Commitment as Sources of Obligation

Although the conventional view is that marital obligation derives from commitment and parental obligation from dependency-causation, it is possible to describe parental obligation in terms of consent. Thus Judith Jarvis Thomson argues that, if "parents do not try to prevent pregnancy, do not obtain an abortion, and then at the time of birth of the child do not put it out for adoption . . . then they have *assumed responsibility* . . . and . . . cannot now withdraw support."[48] Conversely, marital obligation can be described in terms of dependency-causation. For example, Robert Goodin notes that marriage historically created wifely dependence and argues that "[i]t was this traditional dependency of women upon men for support that gave rise to the responsibilities that figure most centrally in the so-called marriage contract."[49] On this view,

---

would "not be held responsible financially or emotionally" for any child born as a result of the relationship with the mother was contrary to public policy and void); G.E.B. v. S.R.W., 661 N.E.2d 646, 650 (Mass. 1996) (holding that a child is not estopped from maintaining a paternity action even though her mother "acting on her own behalf and on behalf of a daughter born to her" and the defendant had eight years earlier signed a settlement agreement under which the defendant was to pay the mother $25,000 in exchange for the mother's assent to a stipulation stating that the defendant was not the child's father); Estes v. Albers, 504 N.W.2d 607 (S.D. 1993); State *ex rel.* TRL v. RLP, 772 P.2d 1054 (Wyo. 1989).

47. 1 BLACKSTONE, *supra* note 19, at *447. The unique bond between parent and child provides another reason for imposing care-giving obligations on parents instead of other community members; almost invariably, parents are the individuals who will be most highly motivated to fulfill those obligations and fulfill them well. Indeed, Blackstone held that the "insuperable degree of affection" between parent and child obviated the need for legal nonsupport sanctions. *See id.*

48. Judith Jarvis Thomson, *A Defense of Abortion*, 1 PHIL. & PUB. AFF. 47, 65 (1971) (emphasis added).

49. ROBERT E. GOODIN, PROTECTING THE VULNERABLE: A REANALYSIS OF OUR SOCIAL RESPONSIBILITIES 76 (1985).

it is the fact that marriage causes disadvantage to women that justifies the husband's traditional obligation of support, not the husband's commitment to his wife.[50] Goodin thus urges that "[t]he reason marriage partners owe each other what they do is not that they have made each other certain promises in the wedding ceremony. It is instead that they have placed themselves, emotionally and sometimes physically and economically as well, 'in another's power.'"[51] Seen in this light, commitment is but one species of dependency-causation.

Whether we view commitment as dependency-causation or dependency-causation as commitment, there is little controversy that either is adequate to produce obligation. Thus the common law, which imposed no general duty to come to the aid of another, makes an exception both for the defendant who voluntarily assumes a duty toward the plaintiff and the defendant who causes the plaintiff's peril.[52]

C. Should the Sources of Relational Obligation Be Expanded?

Should relational obligations be imposed without commitment or dependency-causation? Goodin urges that vulnerability alone should produce obligation. In his view, "[w]hat is crucial . . . is that others are depending upon us. They are particularly vulnerable to our actions and choices. That . . . is the true source of all the standard special responsibilities that we so readily acknowledge."[53]

Were obligations to arise simply from vulnerability, however, all of us would be responsible for every case of dependency. Acknowledging this difficulty with his thesis, Goodin argues that,

> [as] the connection between my actions or choices and their potential injuries becomes increasingly tenuous, my responsibilities in respect of them are also correspondingly attenuated. Thus, I have less responsibility for rescuing someone drowning on a distant shore than someone drowning at my feet. . . . I have no responsibility at all for rescuing someone drowning half a continent away. . . . "[54]

---

50. *Id.* at 91.

51. *Id.* at 79. Goodin nonetheless sees commitment as the source of "especially strong" obligations because "people ordinarily come to rely upon the promises and contracts of others." *Id.* at 205.

52. *See* RESTATEMENT (SECOND) OF TORTS §§ 322, 323 (1965).

53. GOODIN, *supra* note 49, at 11. Goodin reduces this perception to a moral principle and asserts that, "[i]f A's interests are vulnerable to B's actions and choices, B has a special responsibility to protect A's interests; the strength of this responsibility depends strictly upon the degree to which B can affect A's interests." *Id.* at 118.

54. *Id.* at 122.

Even with a proximity constraint, Goodin's vulnerability principle would produce far more extensive obligations than those the law has traditionally acknowledged. Every first-year law student knows that the common law imposes no duty to rescue even the swimmer drowning at one's feet. Instead, "[t]he expert swimmer . . . may sit on the dock, smoke his cigarette, and watch the man drown."[55] Unsurprisingly, this extreme stance has been subject to frequent criticism. Prosser and Keeton observe that "[s]ome of the decisions have been shocking in the extreme,"[56] and Mary Ann Glendon sees in the no-duty rule evidence for her claim that Americans tend to "stat[e] rights claims in a stark, simple, and absolute fashion" and neglect "responsibility talk."[57] Glendon also notes that the civil law nations typically impose criminal sanctions for a rescue failure even though they follow the common law with respect to tort liability.[58]

Some American jurisdictions have statutorily adopted a criminal-sanction approach, but such modifications of tort law's no-duty rule are extremely narrow. In Vermont, for example,

> [a] person who knows that another is exposed to grave physical harm shall, to the extent that the same can be rendered without danger or peril to himself or without interference with important duties owed to others, give reasonable assistance to the exposed person unless that assistance or care is being provided by others.[59]

Tort law does impose rescue obligations on those with a "special" relationship to the plaintiff. The first group of special-relationship cases concerns actors with special knowledge about the risks posed by a dangerous individual;[60] the second concerns business relationships, for example, that of landlord and tenant, hotel and guest, or university and student.[61] But nowhere does tort

55. WILLIAM A. PROSSER ET AL., PROSSER & KEETON ON THE LAW OF TORTS 375 (5th ed. 1984) ("[One is not] required to play the part of Florence Nightingale and bind up the wounds of a stranger . . . or even to cry a warning to one who is walking into the jaws of a dangerous machine.").

56. *Id.*

57. MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 107 (1991) ("The problem was seen in Europe[ ] . . . as one involving civic duties rather than private rights—and thus the natural solution seemed to be to establish criminal sanctions. . . . Maximum fines in the European statutes are set low enough to emphasize that the purpose of the legislation is chiefly hortatory.").

58. *Id.* at 84.

59. VT. STAT. ANN. tit. 12, § 519 (2004).

60. *See* RESTATEMENT (SECOND) OF TORTS § 315(a) (1965).

61. *See id.* § 315(b). "In these cases the defendant may be called upon to guard against various contingencies from the simple loss or destruction of property entrusted to its care, to the defective conditions of premises under its control, or today to the criminal act of a third party." RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 548 (7th ed. 2000).

law—or any area of law—recognize a duty to protect another based solely on friendship, intimacy, or economic interdependence.

Of course, the law could be changed: although Ellman and the Canadian Law Reform Commission are wrong in their claim that the law has recognized relational duties based on intimacy or interdependence, the law could be rewritten to recognize such obligations. But there are sound reasons why the law has not thus far taken this approach.

The first problem is definitional. Because closeness measures degrees of proximity, it is difficult to define categorically, and without a categorical definition, it would be extraordinarily hard to differentiate those who should be subject to a closeness duty from those who should not. Ellman and the Canadian Law Reform Commission seem to view cohabitation as the prototypical example of close relationship. But is the typical cohabiting relationship of, say, three years' duration really closer than the relationships of parents and their adult children? Of adult siblings? Of grandparents and grandchildren? Of lovers who have a long and durable relationship but do not live together? Of old and close friends? If closeness is the test, it is not obvious which of these relational types are close enough. Even if we could agree on the relational categories, the diversity of relationships within each category would militate against black-letter rules applicable to all cases. Economic interdependence—sharing resources or expenses—is easier to define and captures a smaller pool of potential obligors. But there are still definitional problems: Must the interdependent pair share all of their resources to trigger an obligation, or only some? If only some sharing is necessary, how much is required and over what period must it extend? Even if one demands both intimacy and sharing, the range of cases is still extremely diverse, including not just cohabitants, but parents and adult children, college roommates, young adult friends sharing a first apartment, and elderly friends sharing their final days. Sometimes such arrangements are mutually advantageous; sometimes the benefit runs in only one direction. Among this large and diverse set of cases, it is not obvious why one would single out cohabitants for special treatment or how one would define a larger category of sharing relationships that merit the imposition of legal obligations.

Interdependent relationships also provide important public benefits that might be lost or reduced were obligation based on past sharing. Sharing arrangements reduce the number of needy individuals who might otherwise require public aid; they contribute both to patterns of social cooperation and to individual self-help. But the risk of continuing obligation should significantly deter entrance into such individually and publicly beneficial

arrangements: Who would ask a needy friend to share one's home temporarily if such a good deed invited the risk of inescapable future obligations?

More fundamentally, it is hard to see why past sharing justifies an obligation to share in the future. In keeping with this perspective, both the common law and civil law systems have avoided the imposition of private obligations based on the fact of dependency, even if coupled with a close relationship or economic interdependence. Good Samaritanism has been required only in narrowly defined, typically life-threatening situations: even in such cases, duty has typically been cast as a public obligation, not privately enforceable; it has been limited to aid that can be rendered without peril or undue interference with other obligations and plans. Nowhere can we find evidence that the law has imposed private obligations based simply on the existence of a close relationship or state of mutual dependency. Nowhere can we find convincing reasons that it should.

D. Public Duties and Their Transformation Into Private Obligations

While private obligations are based on dependency-causation or commitment, public obligations arise purely from participation in civil society.[62] This distinction explains why the statutory rescue duties imposed in some U.S. states and civil law nations take the form of criminal sanctions instead of private rights. Indeed, in the public sector, status-based, conscriptive duties are the norm: The obligation to pay taxes, to serve on juries, and to comply with a military draft notice all arise, not from consent, but from membership in the body politic. Although conscriptive public obligations can be avoided by leaving the body that would impose them, individuals born into a particular society are not always able to leave it. Nor is advance notice of conscriptive rules typically available. "The liberal ideal of contract [thus] fails us here, for only by a wild leap of metaphor could one say that growing up in a country, failing to leave when one has the chance, constitutes a voluntary commitment to be faithful."[63]

Although public obligations do not derive from personal commitment, they may nonetheless be phrased in terms of private relationships. Thus the English Poor Laws authorized the state to seek support from a wide range of

62. *See* GEORGE P. FLETCHER, LOYALTY: AN ESSAY ON THE MORALITY OF RELATIONSHIPS 53 (1993) ("[M]arriage is a voluntary commitment. One expects fidelity from a spouse because he or she undertakes to be faithful. There is no comparable commitment, voluntarily contracted, that grounds the duty to be loyal to one's country.").

63. *Id.* at 55.

relatives if an individual became a public charge[64] and, even today, the relative-responsibility laws of some states impose support obligations on the grandparents or stepparents of welfare-eligible children[65] and on adults whose parents are destitute.[66] Federal rules governing college loan eligibility evidence a similar pattern. Although most states impose no private support obligation on stepparents, the federal rules nonetheless assume that the income of stepparents is available to support college education; to qualify for federal loans, college students must submit their custodial parents'—and stepparents'—tax returns.[67] In a similar vein, when the federal government guaranteed public assistance benefits to needy children, the law "deemed" the income of a stepparent to be available to a child resident in the stepparent's household and limited the child's eligibility accordingly.[68]

Public obligations may even be phrased as private duties. Until the nineteenth century, the common law held that husbands had a legal duty to support their wives and children, but granted neither type of dependent a private right to enforce that duty; only the state could enforce the husband's support obligation through the Poor Law. This enforcement pattern reflected the prevailing conception of the family as a unified entity in which the legal identities of wives and children were merged with that of the family patriarch.[69] As the patriarchal conception of the family lost ground, legislatures extended the reach of the Poor Law by giving wives and children the right to privately enforce the husband's support obligation.[70]

---

64. 43 Eliz. 1, c. 2, §§ I, V (1601). The manner and rate of reimbursement were determined by county Justices of the Peace; default resulted in a standard penalty of twenty shillings per month. *Id.* c. 2, VI. *See generally* SIDNEY WEBB & BEATRICE WEBB, ENGLISH POOR LAW HISTORY, PART I: THE OLD POOR LAW (1927); Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (pt. 1), 16 STAN. L. REV. 257–87 (1964).

65. *See, e.g.*, S.C. CODE ANN. § 20-7-936 (West 2004) (parents of unwed minor parents); N.Y. SOC. SERV. LAW § 101 (McKinney 2003) (stepparents).

66. In 2001, thirty states had filial responsibility laws. *See* Seymour Moskowitz, *Filial Responsibility Statutes: Legal and Policy Considerations*, 9 J.L. & POL'Y 709 (2001) (listing and categorizing statutes). But the laws on the books are rarely utilized. A recent survey found eleven states with laws that seemingly "have never been invoked." *See* Katie Wise, Note, *Caring for Our Parents in an Aging World: Sharing Public and Private Responsibility for the Elderly*, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 563, 574 (2001–2002). Filial responsibility laws appear to be in decline worldwide, and "[m]ost . . . industrialized countries have abolished their family responsibility laws altogether." *Id.* at 591.

67. 20 U.S.C. § 1087oo(f) (2000).

68. 42 U.S.C. § 602(a)(31), (a)(38), (a)(39) (1994) (repealed 1996).

69. *See* CLARK, *supra* note 22, at 287–88; Garrison, *Autonomy or Community*, *supra* note 16, at 49–50.

70. This new enforcement right retained the Poor Law's emphasis on dependence and worthiness; wives who had given their husbands grounds for divorce and children who refused to obey reasonable parental commands were no more entitled to parental support than were the able-bodied to public funds. But it also expanded the support obligation to require maintenance at the family's customary

Thus, while marital obligation has invariably required mutual consent, the marriage contract to which spouses assent contains state-defined terms that reflect contemporary patterns of family life and the public interest in ensuring protection of dependent persons: Women lost their property and even their legal identities under the common law marriage contract because they lived in a patriarchal society that viewed wifely subservience as a good thing; modern women retain their identities and property but assume support obligations to their husbands because they live in a more egalitarian society in which men and women are often economic equals.[71]

However, even when the *terms* of private relational obligations are imposed by the state, the *fact of obligation* has been derived from dependency-causation or commitment. Obligations arising purely from status are owed directly to the state; the Poor Laws and their modern counterparts have imposed on a wide range of relations public-reimbursement obligations, but not private obligations running directly in favor of the dependent relative.

II. THE CASE FOR CONSCRIPTIVE COHABITANT OBLIGATIONS

A. Justifications for the Conscriptive Approach

1. Traditional Justifications: Commitment and Dependency-Causation

Traditional justifications for relational obligation suggest two different arguments for the imposition of marital obligations on cohabitants. The first argument is based on cohabitation as an indicator of commitment: If the fact of cohabitation invariably, or even typically, represented an act of commitment in the nature of marriage vows, logic would support treating the two types of relationships as equivalent. This argument would claim that "those who live together without marriage are just as committed as those who are married."[72] It would represent cohabitation as a species of common law

living standard instead of a subsistence-based stipend. *See* CLARK, *supra* note 22, at 287–88, 496–98; Garrison, *Autonomy or Community*, *supra* note 16, at 49–52.

71. Statutory divorce laws and the Married Women's Property Acts emerged during the same period as the alimony and child support entitlement, evidencing the same shift away from the earlier view of the family as a unified legal entity. *See, e.g.*, CARL N. DEGLER, AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT (1980); MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA (1985); Richard H. Chused, *Married Women's Property Law: 1800–1850*, 71 GEO. L.J. 1359 (1983). *See generally* Roscoe Pound, *Individual Interests in the Domestic Relations*, 14 MICH. L. REV. 177, 196 (1916).

72. Milton C. Regan, Jr., *Unmarried Partners and the Legacy of* Marvin v. Marvin: *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 NOTRE DAME L. REV. 1435, 1437 (2001).

marriage, in which cohabiting couples eschew formal marriage because "they reject the baggage that goes along with that legal status . . . , [such as] the gender assumptions that have been so prominent a feature of marriage as a social institution."[73] The commitment argument would, of course, depend on a showing that most cohabitants view their relationships as marital and intend to assume marital obligations; without such a showing, marriage and cohabitation could not fairly be treated as equivalent.

The second argument is based on cohabitation as a relational form that causes dependency. Parental obligation arises because procreation produces infantile dependency, and marital obligation has at times been justified because marriage historically produced wifely dependency. If cohabitation typically produced dependency on the part of either or both partners, then a similar case could be made for the imposition of cohabitant obligations. Like the commitment argument, the dependency-causation argument is fact-based. If cohabitation usually produces dependency, then it would be fair to impose an obligation to relieve that dependency on the individual responsible for it; if cohabitation is not typically associated with dependency, then the dependency-causation argument fails.

It is also worth noting that the coresidential relationship of cohabitants could be used to justify consistent treatment of cohabitants and married couples with respect to particular public obligations and benefits. If the income of a stepparent or spouse is relevant to public assistance eligibility because shared living expenses will reduce overall household expenditure, then the income of a resident cohabitant who shares expenses with a partner should also be relevant.[74] If married couples' income is taxed at a higher rate because of the economies of scale that they obtain from sharing a home, then the income of cohabitants who share one, exclusive residence should be taxed at that same rate.[75] But the fact that the underlying purposes of some public laws demand similar treatment of married and cohabiting couples does not establish that

73. *Id.*

74. Because the evidence shows that cohabiting couples do not typically pool their resources, *see* sources cited *infra* note 99, the fact of cohabitation alone is not an adequate basis for assuming that a cohabitant's income is available to the public-benefit applicant, *see* Kurt J. Bauman, *Shifting Family Definitions: The Effect of Cohabitation and Other Nonfamily Household Relationships on Measures of Poverty*, 36 DEMOGRAPHY 315 (1999).

75. For a similar view, see Harry D. Krause & David D. Meyer, *What Family for the 21st Century?*, 50 AM. J. COMP. L. 101, 109 (2002) (stating that "tax significance should be seen in the actuality of ability to pay that is increased by economies of scale or reduced by children"). Tax policy may even affect the decision to marry or cohabit. *See* Leslie A. Whittington & James Alm, *Tax Reductions, Tax Changes, and the Marriage Penalty*, 54 NAT'L TAX J. 455, 456 (2001); Eric P. Voight, Note, *Reconsidering the Mythical Advantages of Cohabitation: Why Marriage Is More Efficient Than Cohabitation*, 78 IND. L.J. 1069 (2003).

marriage and cohabitation are equivalent in terms of private support obligations; the law of private obligations has different purposes, and each body of law must serve those purposes for which it was enacted.

2. The Claims of Conscription's Advocates: Equity, Equivalence, and Practicality

So, what are the claims of conscription's advocates? Given that the extension of marital obligation to nonmarital cohabitation represents a significant break with both current law and legal tradition, one would expect the judicial opinions, legislative reports, and law reform commentary to provide a detailed justification. Surprisingly, they do not. The Washington Supreme Court adopted the view that marriage-like obligations attach to nonmarital cohabitation piecemeal and with almost no policy discussion.[76] Legislatures that have adopted conscriptive laws have also been disinclined to explain their reasoning. In New Zealand, for example, legislative reform was apparently based "on the assumption, largely untested by reference to factual data, that the property situations of persons in de facto relationships were identical to those in marriages."[77] Advocates of conscriptive reforms emphasized fairness, but fairness was simply "equated with the same treatment for both married and de facto couples,"[78] without explanation or justification.

Even the ALI is curiously uninformative on the justification question. Indeed, it notes that "society's interests in the orderly administration of justice and the stability of families are best served when the formalities of marriage are observed."[79] If order and stability favor marriage, then why treat cohabitation

76. In *In re Marriage of Lindsey*, 678 P.2d 328 (Wash. 1984), the Court held that property acquired *before* marriage was subject to equitable distribution at divorce if the property was "community in character." Mr. and Mrs. Lindsey had cohabited for approximately two years before their five-year marriage; in reaching the conclusion that property before marriage was subject to division, the *Lindsey* court relied primarily on a Washington statute permitting the division of premarital assets. The Washington statute relied on in *Lindsey* is representative of the so-called "hotchpot" approach to property distribution at divorce. Under this approach, the divorce court may take into account and distribute assets that would not be categorized as community property in order to effect a just and equitable asset distribution. Although the hotchpot approach to divorce distribution is a minority approach, it is followed by thirteen other states. In these other states—and indeed in *Lindsey* itself—the application of the approach is dependent on the establishment of a legal marriage. In *Connell v. Francisco*, 898 P.2d 831, 835–36 (Wash. 1995), the Washington Supreme Court—noting only that "[a] meretricious relationship is not the same as a marriage"—extended the *Lindsey* ruling to a couple that had never married, but limited their entitlements "to property that would have been characterized as community property had the parties been married."

77. Grainer, *supra* note 11, at 301.

78. *Id.* at 300.

79. ALI PRINCIPLES, *supra* note 13, § 6.02 cmt. a.

as equivalent to marriage? The ALI rests its case on the claim that "the absence of formal marriage may have little or no bearing on the character of the parties' domestic relationship and on the equitable considerations that underlie claims between lawful spouses at the dissolution of a marriage":

> This Chapter is premised on the familiar principle that legal rights and obligations may arise from the conduct of parties with respect to one another, even though they have created no formal document or agreement setting forth such an undertaking.[80]

Although this is a vague statement that fails to specify the forms of conduct that might give rise to obligations, the ALI is certainly right that legal obligations, even marital obligations, may arise without a "formal document or agreement." The common law marriage doctrine undeniably permits establishment of a marriage without a formal, or even a written, agreement. But it *does* require evidence of an agreement. The ALI approach does not. The ALI Principles clearly specify that they do

> not require, as a predicate to finding the existence of a domestic partnership, that the parties had an implied or express agreement, or even that the facts meet the standard requirements of a quantum meruit claim. It instead relies, as do the marriage laws, on a status classification: property claims and support obligations presumptively arise between persons who qualify as domestic partners, as they do between legal spouses, without inquiry into each couple's particular arrangement, except as the presumption is itself overcome by contract.[81]

Why not require evidence of an agreement? The ALI notes that few cohabitants seem to make them. More to the point, it argues that "[d]omestic relationships that satisfy [its] . . . criteria . . . *closely resemble marriages in function, and their termination therefore poses the same social and legal issues as does the dissolution of a marriage.*"[82] The ALI approach thus

> reflects a judgment that it is usually just to apply to separating cohabitants the property and support rules applicable to divorcing spouses, that individualized inquiries are usually impractical or unduly burdensome, and that it therefore makes more sense to require parties to contract out of these property and support rules than to contract into them.[83]

---

80. *Id.*

81. *Id.* § 6.03 cmt. b.

82. *Id.* § 6.02 cmt. a (emphasis added). In a similar vein, the ALI urges that "the absence of formal marriage may have little or no bearing on the character of the parties' domestic relationship and on the equitable considerations that underlie claims between lawful spouses at the dissolution of a marriage." *Id.*

83. *Id.* § 6.03 cmt. b.

Other advocates of the conscriptive approach make similar claims. Willmott et al., arguing that the Australian national government should extend the full range of marital rights and obligations to "de facto couples," contend that "individuals in de facto relationships possess interests identical to [those of] married couples" and urge that "sociological differences between the two relationships . . . do not merit denying redress to de facto individuals who need it."[84] The objection that "some de facto couples might not want the . . . law extended to them" is, in their view "easily accommodated" as "any de facto couple who want to determine their own distribution of property . . . [are] free to do so."[85] In a similar vein, New Zealand's conscription advocates argued that rules distinguishing married and cohabiting couples were inherently discriminatory. For example, in debating the new law, Associate Minister of Justice Margaret Wilson rhetorically demanded:

> Why should people in de facto or same-sex relationships be treated differently from married couples? They are a very large and important part of New Zealand society. They accrue assets during their relationships in the same manner as their married counterparts, and therefore have a right to the same legal protection. Fundamentally, they have a right to a fair deal, too.[86]

Picking up the fairness theme, Green Party MP Keith Locke argued that, "[j]ust because someone is in a de facto relationship . . . does not mean to say that person's rights . . . should be any less than those [of individuals] who are formally married."[87]

All of these claims are vague and conclusory. They specify neither commitment nor dependency-causation as a source of cohabitant obligations. They allege discrimination based on dissimilarity in the law's treatment of married and cohabiting couples without identifying any reasons why similarity of treatment is warranted. They allege that cohabitation and marriage are functionally equivalent without evidence of equivalence. They assert that "it makes more sense to require parties to contract out [of marital obligations] . . . rather than to contract in" without any analysis of the costs and benefits of these alternatives.

---

84. Willmott et al., *supra* note 9, at 9.

85. *Id.* at 10.

86. Property (Relationship) Amendment Bill: Third Reading (Mar. 29, 2001) (statement of Hon. M. Wilson, Associate Minister of Justice), *quoted in* Grainer, *supra* note 11, at 300 n.97.

87. Property (Relationship) Amendment Bill: Third Reading (Mar. 29, 2001) (statement of K. Locke), *quoted in* Grainer, *supra* note 11, at 301–02 n.97; *see also* Grainer, *supra* note 11, at 300–01 n.98 ("[I]t is time we stopped discriminating in our legislation against these de facto and same sex couples." (quoting Property (Relationship) Amendment Bill: Report of Select Committee (May 4, 2000) (statement of Hon. M. Wilson, Associate Minister of Justice))).

B. Equity, Equivalence, and Practicality: The Evidence

1. Are Cohabitation and Marriage Equivalent States?

The lack of evidentiary support for the claimed functional equivalence of marriage and cohabitation should not be interpreted to mean that evidence is unavailable. In fact, the increased incidence of cohabitation has spurred a wave of research on cohabitant characteristics and behavior. But none of the evidence produced by that body of research supports the equivalence claim. To the contrary, it shows that cohabitants typically behave and describe their relationships very differently than married couples. Even more importantly, it shows that cohabitants rarely make marital commitments or engage in sharing behavior that might induce dependency.

The first significant fact established by recent research is that cohabitation is typically brief or leads to marriage. Although the likelihood that cohabitation will lead to marriage is declining,[88] approximately 60 percent of all cohabitants and 70 percent of those in a first, premarital cohabitation marry within five years.[89] More tellingly, only about 10 percent of cohabitants who do not marry are still together five years later.[90] By contrast, 80 percent of first marriages survive at least five years and two-thirds survive for at least ten years.[91] Cohabitation thus tends to be a relatively short-lived state that, for most couples, represents a transitional stage on the way to either marriage or separation.[92]

Cohabitants and married couples also present different demographic profiles. Despite lower proportions of youthful cohabitants in recent years,[93]

88. *See* Larry L. Bumpass, *The Changing Significance of Marriage in the United States*, *in* THE CHANGING FAMILY IN COMPARATIVE PERSPECTIVE: ASIA AND THE UNITED STATES 63, 71 (K.O. Mason et al. eds., 1998) ("There is clear evidence now . . . that the probability of marrying following cohabitation is declining, as is the probability of marrying a cohabiting partner.").

89. *See* M.D. BRAMLETT & W.D. MOSHER, COHABITATION, MARRIAGE, DIVORCE, AND REMARRIAGE IN THE UNITED STATES 22 & tbl.9 (2002).

90. *See* Larry Bumpass & Hsien-Hen Lu, *Trends in Cohabitation and Implications for Children's Family Contexts in the United States*, 54 POPULATION STUD. 29, 33 (2000); *see also* BRAMLETT & MOSHER, *supra* note 89, at 22 & tbl.15 (stating that 49 percent of first premarital cohabitations, including those which lead to marriage, are disrupted within five years). *But see* Pamela J. Smock, *Cohabitation in the United States: An Appraisal of Research Themes, Findings, and Implications*, 26 ANN. REV. SOC. 1, 3 (2000) (stating that figure is 60 percent).

91. *See* BRAMLETT & MOSHER, *supra* note 89, at 55 & tbl.21.

92. Nor is the average duration of cohabitation increasing. *See* Bumpass & Lu, *supra* note 90, at 33 (reporting that "unions begun by cohabitation have become less stable: ignoring whether or not the couple married, the proportion who had separated by five years increased from 45 to 54 per cent" between mid-1980s and mid-1990s); Cherlin, *supra* note 2, at 135 (summarizing evidence).

93. *See* LYNNE M. CASPER & SUZANNE M. BIANCHI, CONTINUITY AND CHANGE IN THE AMERICAN FAMILY 44–45 (2002) (stating that in 1978, 35 percent of cohabiting women and 38.5

the median age of cohabitants is still considerably lower than that of marriage partners.[94] At least among men, cohabitants have less education and lower socioeconomic prospects than their married counterparts.[95] Indeed, income potential is an important predictor of whether a man will marry.[96]

Cohabitants and married couples also behave differently. Cohabitants are much less likely than married couples to have children[97] and to support their partners.[98] They more often split expenses instead of pooling funds.[99]

---

percent of cohabiting men were age 35 or higher; in 1998, 44 percent of cohabiting women and 48 percent of cohabiting men were). There is some evidence that the association between male income and marriage is declining, however. *See* Sharon Sassler & Frances Goldsheider, *Revisiting Jane Austen's Theory of Marriage Timing: Changes in Union Formation Among American Men in the Late 20th Century*, 25 J. FAM. ISSUES 139 (2004).

94. *See* BRAMLETT & MOSHER, *supra* note 89, at 11 tbl.C (stating that of women age 20–24, 11 percent were cohabiting and 27 percent were married; among women 40–44, less than 5 percent were cohabiting and 68 percent were married).

95. *See* CASPER & BIANCHI, *supra* note 93, at 52–53 tbl.2.3 (showing that white and black married men had significantly higher levels of college education and income than cohabiting men; Hispanic married men had higher income levels but not higher levels of college education); Steven L. Nock, *A Comparison of Marriages and Cohabiting Relationships*, 16 J. FAM. ISSUES 53, 66–67 tbl.1 (1995); *see also* Bumpass & Lu, *supra* note 90, at 32; Smock, *supra* note 90, at 4.

96. Obviously there is a strong association between youth and low income. However, there also appears to be a selection effect for men, whose marriage prospects are significantly associated with higher income potential. *See, e.g.*, Valerie K. Oppenheimer, *Cohabiting and Marriage During Young Men's Career-Development Process*, 40 DEMOGRAPHY 127 (2003) (finding that men with better long-run socioeconomic prospects were far more likely to marry from either a noncohabiting or cohabiting state, and that this was particularly true for blacks); Yu Xie et al., *Economic Potential and Entry into Marriage and Cohabitation*, 40 DEMOGRAPHY 351, 361 tbl.3 (2003) (finding significant association between men's income potential and their likelihood of marriage). Male income prospects also appears to affect the marriage expectations of cohabitants. *See* Wendy D. Manning & Pamela J. Smock, *First Comes Cohabitation and Then Comes Marriage?*, 23 J. FAM. ISSUES 1065, 1080 fig.1 (2003) (finding that, for all racial and ethnic groups, the probability that a cohabitant expects to marry varies significantly with the man's socioeconomic position).

97. *See* Judith A. Seltzer, *Families Formed Outside of Marriage*, 62 J. MARRIAGE & FAM. 1247, 1251 (2000) (summarizing research). The percentage of cohabitants who bear children together has increased substantially, however. *See* Bumpass & Lu, *supra* note 90, at 34 tbl.4 (cohabiting couples had 29 percent of unmarried births in the early 1980s and 39 percent a decade later).

98. *See* PHILIP BLUMSTEIN & PEPPER SCHWARTZ, AMERICAN COUPLES: MONEY, WORK, SEX 61–62 (1983) (reporting that "cohabitors believe strongly in each partner's contributing his or her *equal* share").

99. *See id.* at 94–101 figs.8–9 (among survey group, 37 percent of male and 44 percent of female cohabitants opposed income pooling, as compared to 12 percent of wives and 8 percent of husbands); Marin Clarkberg et al., *Attitudes, Values, and Entrance Into Cohabitational Versus Marital Unions*, 74 SOC. FORCES 609 (1995); Kristen R. Heimdal & Sharon K. Houseknecht, *Cohabiting and Married Couples' Income Organization: Approaches in Sweden and the United States*, 65 J. MARRIAGE & FAM. 525, 532 tbl.2 (2003) (stating that 17 percent of U.S. married and 46 percent of U.S. cohabiting couples report keeping their money separate); Anne E. Winkler, *Economic Decision-Making by Cohabitors: Findings Regarding Income Pooling*, 29 APPLIED ECON. 1079 (1997) (stating that most cohabitants, particularly those without children and in short-term relationships, do not pool their incomes).

They are less likely to demonstrate sexual fidelity.[100] They are more likely to be in a physically abusive relationship.[101]

These behavioral differences appear to reflect underlying attitudinal differences. Compared to married couples, cohabitants feel less security within their relationships.[102] They are more likely to value independence and less likely to value commitment or express commitment to their partners.[103]

---

100. *See* BLUMSTEIN & SCHWARTZ, *supra* note 98, at 274 fig.49 (stating that both male and female cohabitants were less likely to be sexually faithful than married men and women at all relationship-duration levels; the greatest gap was between long-duration married and cohabiting couples); Renata Forste & Koray Tanfer, *Sexual Exclusivity Among Dating, Cohabiting, and Married Women*, 58 J. MARRIAGE & FAM. 33, 38–39 tbl.1 (1996) (in 1991 National Survey of Women, 4 percent of married women and 20 percent of cohabiting women reported sexual infidelity); Judith Treas & Deidre Giesen, *Sexual Infidelity Among Married and Cohabiting Americans*, 62 J. MARRIAGE & FAM. 48, 58 (2000) (stating that even after controlling for permissive values about extramarital cohabitation, twice as many cohabitants as married individuals had engaged in recent infidelity); Linda J. Waite & Kara Joyner, *Emotional and Physical Satisfaction With Sex in Married, Cohabiting, and Dating Sexual Unions: Do Men and Women Differ?*, *in* SEX, LOVE, AND HEALTH IN AMERICA 239, 268–69 app. 6A (Edward O. Laumann & Robert T. Michael eds., 2001) (stating that in national sex survey, 4 percent of married men, 1 percent of married women, 16 percent of cohabiting men, and 8 percent of cohabiting women reported sexual infidelity during the past year).

101. *See, e.g.*, LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE 155 (2000). Based on analysis of National Survey of Families and Households data,

> married people are much less likely than cohabiting couples to say that arguments between them and their partners had become physical in the past year (4 percent of married people compared to 13 percent of the cohabiting). When it comes to hitting, shoving, and throwing things, cohabiting couples are more than three times more likely than the married to say things get that far out of hand.

Id.; *see also* Sonia Miner Salari & Bret M. Baldwin, *Verbal, Physical, and Injurious Aggression Among Intimate Couples Over Time*, 23 J. FAM. ISSUES 523, 535–36 tbl.1 (2002) (stating that 24 percent of cohabiting and 7.3 percent of married couples reported experiencing one of the two most serious forms of physical aggression); Todd K. Shackelford, *Cohabitation, Marriage and Murder: Woman-Killing by Male Romantic Partners*, 27 AGGRESSIVE BEHAVIOR 284, 284 (2001) (stating that Canadian and U.S. studies show that women in cohabiting relationships are about nine times more likely than married women to be killed by a partner); Jan E. Stets, *Cohabiting and Marital Aggression: The Role of Social Isolation*, 53 J. MARRIAGE & FAM. 669, 674 (1991) (nearly 14 percent of cohabitants and 5 percent of married individuals admitted to hitting, shoving or throwing things at their partner in the past year; difference remained even after controlling for factors as education, age, occupation and income).

102. *See* Larry L. Bumpass et al., *The Role of Cohabitation in Declining Rates of Marriage*, 53 J. MARRIAGE & FAM. 913, 923 (1991) (stating that compared with married respondents and adjusted for duration and age differences, "cohabitators are almost twice as likely to report that they have thought their relationship was in trouble over the past year"; "in three of every four cohabiting relationships, at least one partner reports having thought the relationship was in trouble"); *see also* Susan L. Brown & Alan Booth, *Cohabitation Versus Marriage: A Comparison of Relationship Quality*, 58 J. MARRIAGE & FAM. 668, 674 tbl.1 (1996) (finding that cohabitants report significantly more fights and less fairness in their relationships than married couples).

103. *See* BLUMSTEIN & SCHWARTZ, *supra* note 98, at 184 fig.26 (stating that 54 percent of male cohabitants and 67 percent of female cohabitants said that "private time away from one's partner" was "very important," as compared to 32 percent of husbands and 46 percent of wives); William G. Axinn & Arland Thornton, *The Relationship Between Cohabitation and Divorce: Selectivity or Causal Influence?*, 29 DEMOGRAPHY 357, 361 (1992) (stating that surveyed cohabitants tended to

The contrasting relational perspectives of cohabitants and married couples emerge in many ways, but attitudes toward money are particularly revealing. Blumstein and Schwartz, who conducted a pioneering survey of American couples, analyzed responses to a range of questions on sharing and concluded that "married couples unconsciously assume a commingling of money and . . . cohabitors assume separate finances."[104]. To explicate this attitudinal difference, Blumstein and Schwartz offer representative conversations in which couples "discuss[ed] how they would—together—spend six hundred dollars that they were to pretend [the researchers] would give them."[105] The married couple immediately focused on a shared goal:

> Caroline: I think we should spend it on ourselves.
> Chris: Okay, what do we need?
> Caroline: We have things we need. Let's spend it on something we both want, not just something one or the other wanted . . . I've been thinking of something like airline tickets to Hawaii. You've been wanting to go to Maui. I think it would be nice for us.
> Chris: Okay, that's perfect. Sold.

The cohabiting couple immediately focused on their individual wants:

> Susan: Split it fifty-fifty, right?
> Mark: Exactly.
> Susan: We're finished.
> Mark: Same as always.
> Susan: Fifty-fifty.
> Mark: I'll spend at least two hundred dollars on photographic equipment . . . and probably pay off something to Visa . . . .
> Susan: And I'll spend mine my way. Very simple.[106]

---

express a low opinion about the value of commitment); Marin Clarkberg et al., *Attitudes, Values, and Entrance Into Cohabitational Versus Marital Unions*, 74 SOC. FORCES 609, 621–24 (1995) (arguing that cohabitation is preferred to marriage by those who desire more flexible relationships and reject marital constraints); Nock, *supra* note 95, at 65–67 tbl.1, 73 (1995) (stating that cohabiting men and women reported lower levels of commitment and lower levels of commitment appeared to "foster poorer assessments of the relationship"); Scott M. Stanley, *Maybe I Do: Interpersonal Commitment and Premarital or Nonmarital Cohabitation*, 25 J. FAM. ISSUES 496 (2004) (stating that in a national random sample, premarital and nonmarital cohabitation were associated with lower levels of interpersonal commitment to partners); Elizabeth Thomson & Ugo Colella, *Cohabitation and Marital Stability: Quality or Commitment*, 54 J. MARRIAGE & FAM. 259, 266 (1992) (stating that wives who cohabitated before marriage were more likely to value individual freedom than those who had not cohabitated). Cohabitants with the lowest level of commitment are also the most likely to split up. *See* CASPER & BIANCHI, *supra* note 93, at 59 tbl.2.5 (stating that the relationship between commitment and relationship survival held even after age, race, education, income, employment status, relationship duration, and other variables were taken into account).

104. BLUMSTEIN & SCHWARTZ, *supra* note 98, at 98.
105. *Id.*
106. *Id.*

Blumstein and Schwartz conclude that "[c]ohabitors, striving to be independent . . . avoid the interdependence that pooling brings," while "[t]he marriage contract . . . allows [married couples] . . . to trust each other enough to work as a financial team."[107]

The contrasting behaviors and attitudes of cohabitants and married couples reflect the fact that cohabitation is usually seen, not as a substitute for marriage, but for being single.[108] In a cohabitant survey conducted during the late 1980s, only 10 percent of respondents reported that cohabitation was a "substitute for marriage," while 61 percent said that it was a precursor to or "trial" period to assess marital compatibility, and 29 percent described it as a form of coresidential dating.[109] Two recent surveys suggest that today's cohabitants are even less marriage-minded than those in earlier generations. In a small survey of New York City cohabitants, the primary reasons respondents gave for cohabitation were finances, convenience, and housing needs; only two of the 25 interviewees mentioned discussing marriage prior to moving in with their partners.[110] Those respondents who had talked about marriage typically had cohabited about two years before doing so, but the researchers also found "substantial variation in the tempo of relationship development."[111] In a larger 2002 survey, Wendy Manning and Pamela Smock found that *none* of the cohabitants they interviewed were deciding between marriage and cohabitation at the time they began living together. Decisionmaking instead focused on "whether to cohabit or to remain single, with marriage not seriously entering the picture." As a twenty-nine-year-old male stock clerk put it: "I wasn't ready, I mean to get . . . that close to somebody, and I mean I lived with her but we still had our freedom we still let each other do what we wanted to do so I had my space and she had her space."[112] For the men and women Manning and Smock interviewed, the fact of cohabitation simply could not be interpreted as an act of marital commitment.

Manning and Smock also found that the line between cohabitation and living alone was often "quite blurry, with the movement into cohabitation

107. *Id.* at 110.

108. Cohabitants also more closely resemble single individuals than they do married couples with respect to home ownership, childbearing intentions, and employment. *See generally* Ronald R. Rindfuss & Audrey VandenHeuvel, *Cohabitation: A Precursor to Marriage or an Alternative to Being Single?*, 16 POPULATION & DEV. REV. 703 (1990).

109. *See* CASPER & BIANCHI, *supra* note 93, at 59 tbl.2.5.

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

111. *Id.* at 502.

112. WENDY MANNING & PAMELA J. SMOCK, MEASURING AND MODELING COHABITATION: NEW PERSPECTIVES FROM QUALITATIVE DATA 26 (Bowling Green Working Paper 10-03, 2003), *available at* http://www.bgsu.edu/organizations/cfdr/research/pdf/2003/2003-10.pdf.

often described as a gradual or unfolding process that occurs over a week, or even months."[113] Thus a twenty-year-old Hispanic packaging technician reported that he generally stayed at his girlfriend's house three or four days a week, but

> [m]aybe sometimes I'll stay with her 2 weeks, and I won't even be at my house I'll just show up. I'm like, you'll never know when I pop back in my house. I pay rent and she's like, "you know, that's stupid. You pay 350 a month and your roommate pays 350 a month and you're not even there." I'm like, "I know, I could be using that 350 for a place for me and you."[114]

Many interviewees had difficulty defining when they started living together, and those who had broken up often had difficulty pinning down when their relationships ended. Manning and Smock thus conclude that "[t]he process of deciding to cohabit is not necessarily planned or deliberate and thus appears to differ in important ways from processes determining entry into marriage."[115] These conclusions are not novel; in a pioneering study of cohabiting college students conducted during the 1970s, sociologist Eleanor Macklin also found that the decision to cohabit was a "gradual, often unconscious, escalation of emotional and physical involvement"[116] that "was seldom the result of a considered decision, at least initially."[117]

The fact that cohabitants do not typically see their relationships as marital does not mean that they have rejected marriage. In a 1994 national survey, more than 90 percent of cohabiting respondents reported that they planned to marry at some point.[118] Although the percentage of cohabitants who report the belief that they will eventually marry their current partner has declined, about three-quarters say that they will do so.[119]

---

113. *Id.* at 14.

114. *Id.* at 17.

115. *Id.* at 26.

116. Eleanor D. Macklin, *Nonmarital Heterosexual Cohabitation*, MARRIAGE & FAM. REV., Mar./Apr. 1978, at 1, 6, *quoted in* MANNING & SMOCK, *supra* note 112, at 7.

117. Eleanor D. Macklin, *Heterosexual Cohabitation Among Unmarried College Students*, 21 FAM. COORDINATOR 463, 466 (1972), *quoted in* MANNING & SMOCK, *supra* note 112, at 29.

118. *See* John D. Cunningham & John K. Antill, *Cohabitation and Marriage: Retrospective and Predictive Comparisons*, 11 J. SOC. & PERSONAL RELATIONSHIPS 77, 77 (1994); *see also* Cherlin, *supra* note 2, at 135 ("The typically short durations in the United States, along with expressed preferences for marriage, suggest that marriage is still the goal for most young adults and cohabitation is still seen as an intermediate status.").

119. *See* Brown & Booth, *supra* note 102, at 673 (stating that 76 percent of surveyed cohabitants "report[ed] having plans to marry their partners"); Bumpass et al., *supra* note 102, at 922 tbl.10 (showing that 81 percent of never-married cohabitants and 63 percent of previously married cohabitants said that they had "definite plans" or "think . . . [they] will eventually marry" their current partner); Manning & Smock, *supra* note 96, at 1073 tbl.1.

Although much of the research evidence comes from the United States, foreign reports show fairly consistent patterns. Cohabitation in other countries also tends to be a short-lived state.[120] Like their American counterparts, cohabitants abroad are less likely than married couples to have children and to pool funds.[121] They have not typically rejected marriage, and often report that they are likely to marry their partners.[122]

Because of its relative rarity, long-term cohabitation has produced much less evidence, both in the United States and abroad. The available research does not show that long-term cohabitation is more marriage-like than short-term cohabitation, however: First, cohabitant surveys do not show that longer cohabitation periods are associated with more resource sharing. In Blumstein & Schwartz's survey, couples who had cohabited for a period between two and ten years were no more likely to pool funds than those whose relationships had endured less than two years;[123] a cross-national survey also revealed that Swedish cohabitants, whose relationships are typically longer than the

120. *See, e.g.*, JOHN ERMISCH & MARCO FRANCESCONI, COHABITATION IN GREAT BRITAIN: NOT FOR LONG, BUT HERE TO STAY 6 (Inst. for Soc. & Econ. Research, University of Essex, working paper, 1998) (stating that the median length of U.K. cohabiting relationships is under two years and only 4 percent of cohabiting relationships last more than ten years), *available at* http://www.iser.essex.ac.uk/pubs/workpaps/pdf/98-1rev.pdf; Kathleen Kiernan, *Cohabitation in Western Europe*, 96 POPULATION TRENDS 25, 29 tbl.6 (1999) (stating that the median duration of first-union cohabitations in ten western European countries was 26 months or less; Sweden had a 48-month median duration); Zheng Wu & T.R. Balakrishnan, *Dissolution of Premarital Cohabitation in Canada*, 32 DEMOGRAPHY 521, 526 tbl.1 (1995) (stating that in Canada, 28 percent of female respondents' and 25 percent of male respondents' cohabiting relationships that did not lead to marriage survived five years).

121. *See* Helen Glezer & Eva Mills, *Controlling the Purse Strings*, 29 FAM. MATTERS 35, 36 tbl.2 (1991) (showing that 27 percent of Australian cohabitants and 71 percent of married couples combined their incomes); Grainer, *supra* note 11, at 313 (stating that 1996 New Zealand census data showed that "49.0% of women in de facto relationships did not have children, compared to 12.1% of married women"); Heimdal & Houseknecht, *supra* note 99, at 534 (stating that Swedish cohabitants were not significantly more likely to pool income than U.S. cohabitants, despite longer duration of relationships); Clara H. Mulder, *The Effects of Singlehood and Cohabitation on the Transition to Parenthood in the Netherlands*, 24 J. FAM. ISSUES 291, 304 (2003) (stating that cohabitation was associated with a significantly smaller long-term likelihood of becoming a parent and positing higher dissolution rate of cohabitations as a reason); *see also* Supriya Singh & Jo Lindsay, *Money in Heterosexual Relationships*, 32 AUSTL. & N.Z. J. SOC. 57 (1996).

122. *See* Lixia Qu, *Expectations of Marriage Among Cohabiting Couples*, 64 FAM. MATTERS 35, 36 (2003) (stating that in survey of more than 1300 Australian cohabitants, 57 percent of men and 52 percent of men said that they were "likely" or "very likely" to marry their current partner, while roughly one-quarter felt marriage to be "unlikely" or "very unlikely"); Lyall, *supra* note 10 (describing attitudes of European cohabitants who chose to register their partnerships instead of marrying). *But see* Lynn Jamieson et al., *Cohabitation and Commitment: Partnership Plans of Young Men and Women*, 50 SOC. REV. 356, 362 tbl.2 (2002) (stating that 72 percent of never-married 20–29-year-old Scottish cohabitants said that they had "set[ ] up a home" because "I wanted to commit myself to our relationship").

123. *See* BLUMSTEIN & SCHWARTZ, *supra* note 98, at 95 fig.8.

American and European norm, were not more likely to pool resources than their American counterparts.[124] Second, researchers have found that longer cohabitation periods are negatively correlated with relationship stability and quality. Susan L. Brown employed data from the U.S. National Survey of Families and Households to compare the perceived quality of cohabiting and marital relationships and found that long-term marriage typically produced the perception of relationship stability while cohabitation that did not lead to marriage tended instead to produce a high level of perceived instability.[125] Brown and a coresearcher also report that the duration of a cohabiting relationship is significantly—and negatively—correlated with several variables related to relationship quality.[126]

In sum, the evidence fails to show that marriage and cohabitation are functionally equivalent or that the law inappropriately distinguishes between them: Married and cohabiting couples tend to behave and view their relationships differently. Cohabitants are much less likely than married couples to share or pool resources. Cohabitation usually functions, in the eyes of cohabitants themselves, as a substitute for being single, not for being married. Cohabitation thus does not imply marital commitment. Nor, given its typically short duration and limited sharing, is it likely that cohabitation generally induces dependency or leads to unjust enrichment.

This is not to say that cohabitation never resembles marriage. In describing reasons why couples fail to marry, the ALI notes that

> Some begin a casual relationship that develops slowly into a durable union, by which time *a formal marriage ceremony may seem awkward or even unnecessary*, for many Americans entertain the widespread, albeit

124. *See* Heimdal & Houseknecht, *supra* note 99, at 532–33. However, one economist who employed a labor-supply model to infer cohabitants' sharing behavior, does report that, using her model, "income sharing is not rejected" for cohabitants in "longer-term" relationships. Winkler, *supra* note 99, at 1079.

125. Susan L. Brown, *Relationship Quality Dynamics of Cohabiting Unions*, 24 J. FAM. ISSUES 583, 598 (2003). Brown also found that plans to marry were associated with lower levels of relationship instability in short relationships, but not in long ones. "This finding implies that cohabitors with marriage plans expect that their unions will be transformed quickly into marriages. When these expectations are not met, cohabitors perceive greater instability. In contrast, couples who do not desire marriage gain confidence over time that their relationships will remain intact." *Id.* at 595–96. Brown and Booth also found that plans to marry are an important factor in differentiating among cohabiting relationships. Although cohabitants, in general, reported lower-quality relationships than married couples, those cohabitants with plans to marry reported relationships of similar quality. Brown & Booth, *supra* note 102, at 675.

126. Brown & Booth, *supra* note 102, at 674; *see also* Bumpass et al., *supra* note 102, at 922 tbl.10 (showing a higher proportion of cohabitants whose relationships had lasted at least three years said that, during the past year, they had "thought that [their] . . . relationship might be in trouble" than cohabitants whose relationships had lasted less than one year).

> erroneous, belief that the mere passage of time transforms cohabitation into common-law marriage. Failure to marry may reflect *group mores*; some ethnic and social groups have a substantially lower incidence of marriage and a substantially higher incidence of informal domestic relationships than do others.[127]

Ira Ellman also offers the case of Terri and Eliot Friedman[128] as an example of marriage-like cohabitation.[129] The Friedmans' relationship endured for 25 years and produced two children. Terri and Eliot apparently "vowed to be husband and wife and to strive to be partners in all respects 'without any sanction by the State'";[130] they also took title to property as husband and wife, filed joint income tax returns, and "Mrs." Friedman assumed a marital name.[131]

The Friedmans and the more general examples offered by the ALI undeniably demonstrate marriage-like relationships. Indeed, in a state recognizing common law marriage, a court would likely find that some, if not all, of these couples *were* married. Certainly the Friedmans and the couple who feel that "a formal marriage ceremony . . . [is] awkward . . . [and] unnecessary" because their relationship has evolved into a common law marriage should be declared husband and wife.[132] The pair who failed to formally marry because they belong to an "ethnic or social group . . . [with] a substantially lower incidence of [formal] marriage" may also have entered into a common law marriage.[133] Conduct can evidence consent, and Homer Clark, reviewing the case law, reports that courts thus tend to rely on "the duration and character of the relationship" as a means of inferring whether there was a marital agreement and "making good the bona fide expectations of the parties."[134]

Conscriptive rules are unnecessary to vindicate the interests of couples who have made genuine marital commitments; either a revivified common law marriage doctrine or any of several, narrowly tailored equitable remedies would avert unjust enrichment in this small group of cases. I will evaluate these reform possibilities in Part IV. My point here is simply that the existence of

---

127. ALI PRINCIPLES, *supra* note 13, § 6.02 cmt. a (emphasis added).

128. Friedman v. Friedman, 24 Cal. Rptr. 2d 892 (Ct. App. 1993).

129. Ellman, *supra* note 28, at 1371. For comparable fact patterns, see, for example, *Morone v. Morone*, 413 N.E.2d 1154 (N.Y. 1980), and *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979).

130. *Friedman*, 24 Cal. Rptr. 2d at 902 (Poché, J., dissenting).

131. *Id.* at 901–02 (Poché, J., dissenting).

132. ALI PRINCIPLES, *supra* note 13, § 6.02, cmt. a.

133. *Id.* The ALI also offers the example of couples who "have been unhappy in prior marriages and therefore wish to *avoid the form of marriage* even as they enjoy its substance with a domestic partner." *Id.* (emphasis added). This example is less likely to represent a common law marriage given the parties' conscious choice to avoid marriage. The ALI fails to explain why the once-bitten couple's decision to avoid marriage should not be honored.

134. CLARK, *supra* note 22, at 50–51.

some, relatively rare cases of marriage-like cohabitation does not justify the imposition of conscriptive rules on the vast majority of cohabitants whose relationships are not marriage-like. Rules should be narrowly tailored to avoid wasteful litigation and ensure consistent results that reflect the relevant policy goals. Black-letter rules and presumptions should fit the typical case, not the atypical.

2. Does It Make More Sense to Require Cohabiting Couples to Contract Out or Contract In?

The evidence on equivalence establishes that it would be grossly unfair to treat all or even most cases of cohabitation like marriage: despite a small number of marriage-like relationships, cohabitants typically do not see their relationships as marital and do not behave like married couples; moreover, because most cohabitations are short-lived and involve relatively little sharing, unjust enrichment that might give rise to equitable claims should be relatively rare.

Perhaps because the evidence does not support the uniform imposition of marital obligation on cohabitants, both the New Zealand De Facto Relationships Act and the ALI Principles tend to rely on presumptions instead of black-letter rules. Except in the case of a couple who "have maintained a common household . . . with their common child . . . for a continuous period that equals or exceeds a duration . . . set in a rule of statewide application," the ALI Principles merely presume that a couple not related by blood or adoption are "domestic partners" when "they have maintained a common household" for a state-specified period.[135] The presumption is invariably "rebuttable by evidence that the parties did not share life together as a couple, as defined by Paragraph (7)."[136] And paragraph (7) lists thirteen different factors—all of which require individualized inquiry by the fact-finder—that might singly or in combination provide the basis for such a rebuttal.[137] The New Zealand statute

135. ALI PRINCIPLES, *supra* note 13, §§ 6.03(2)–(3).
136. *Id.* § 6.03(3).
137. Paragraph 7 lists the following factors:
(a) the oral or written statements or promises made to one another, or representations jointly made to third parties, regarding their relationship;
(b) the extent to which the parties intermingled their finances;
(c) the extent to which their relationship fostered the parties' economic interdependence, or the economic dependence of one party upon the other;
(d) the extent to which the parties engaged in conduct and assumed specialized or collaborative roles in furtherance of their life together;
(e) the extent to which the relationship wrought change in the life of either or both parties;

takes an even more individualized approach. In determining "whether two persons live together as a couple," the statute requires that "*all* the circumstances of the relationship are to be taken into account."[138] Although the statute contains a factor list,[139] "no finding in respect of any of the matters [described in the list] . . . , or in respect of any combination of them, is to be regarded as necessary."[140] The New Zealand and ALI approaches thus reinvent common law marriage, but redirect—and vastly expand—its focus.

This is an odd choice because common law marriage has fallen from favor in large part because of the evidentiary problems that individualized fact-finding entails. At one time, nearly two-thirds of the states recognized common law marriage; by 2002, only twelve did so,[141] and two of the twelve had adopted strict limitations on its establishment.[142]

(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;
(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;
(h) the emotional or physical intimacy of the parties' relationship;
(i) the parties' community reputation as a couple;
(j) the parties' participation in a commitment ceremony or registration as a domestic partnership;
(k) the parties' participation in a void or voidable marriage that, under applicable law, does not give rise to the economic incidents of marriage;
(l) the parties' procreation of, adoption of, or joint assumption of parental functions toward a child;
(m) the parties' maintenance of a common household, as defined by Paragraph (4).

Id. § 6.03(7).

138. Property (Relationships) Amendment Act, 2001 § 2D(2) (N.Z.) (emphasis added).

139. Judges are directed to take into account "any of the following matters that are relevant in a particular case:"

(a) the duration of the relationship:
(b) the nature and extent of common residence:
(c) whether or not a sexual relationship exists:
(d) the degree of financial dependence or interdependence, and any arrangements for financial support, between the parties:
(e) the ownership, use, and acquisition of property:
(f) the degree of mutual commitment to a shared life:
(g) the care and support of children:
(h) the performance of household duties:
(i) the reputation and public aspects of the relationship.

Id.

140. *Id.* § 2D(3)(a). Section 3(b) goes on to specify that "a Court is entitled to have regard to such matters, and to attach such weight to any matter, as may seem appropriate to the Court in the circumstances of the case." *Id.* § 3(b).

141. *See* KRAUSE ET AL., *supra* note 26, at 87.

142. *See* TEX. FAM. CODE ANN. § 2.402(b) (Vernon 1998) (requiring affirmation of the marriage in a state "declaration form"); UTAH CODE ANN. § 30-1-4.5(2) (1998) (requiring establishment of common law marriage within one year of its dissolution).

The decline of common law marriage reflects the sad fact that litigation-based determination of marital commitment "leads to fraud and uncertainty in the most important of human relationships."[143] Unsurprisingly, more complex formulations of the requirements for a common law marriage produce more fraud and uncertainty than simpler ones. Even a five-factor requirement list led appellate Judge Jackson of Utah to expostulate that, "[i]n litigation[,] each element becomes a source of dispute." Judge Jackson urged "a simpler scheme with fewer elements" if the legislature "wants to keep some form of common-law marriage,"[144] but his clear preference was abolition of the doctrine outright: "Most American states have already experimented with this doctrine. Based on their experience, all but ten have repealed common-law marriage. Utah should not recycle this great experiment."[145]

The common law marriage "experiment" demands factual inquiry into only two issues, whether there was a present agreement to be married and whether the couple publicly held themselves out as married. If these two facts are so hard to determine that the potential for fraud and uncertainty outweighs the benefit of the doctrine, then one must assume that the "anything relevant to life as a couple" approach of the De Facto Relationships Act or ALI Principles would produce even more fraud and uncertainty, with even less offsetting benefit.

Although the ALI Principles do attempt to reduce uncertainty by establishing a presumption in favor of a domestic partnership whenever a couple has maintained a common household for a statutory period,[146] they fail to specify what facts are adequate to rebut the partnership presumption. Instead, they direct the fact-finder to consider thirteen different factors that together encompass virtually every aspect of a relationship. Each of the thirteen factors is relevant; none is determinative. Most of the factors require an incremental assessment; none identifies a threshold level of significance.

Thus, under either the ALI Principles or New Zealand statute, many, if not most, cohabiting couples would be hard-pressed to accurately predict

143. CLARK, *supra* note 22, at 59; *see also* Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 731–50 (1996). Bowman reviewed historical data and concluded that the abolition of common law marriage reflected the elimination of the

> "frontier conditions" rationale for informal marriage; fears of fraud in the transmission of property; a desire to protect marriage and the family against alternative forms of sexual unions; racism and eugenics; the movement to maintain vital statistics and enforce various health-related requirements for marriage through the licensing process; and administrative and judicial efficiency.

Id.

144. Kelley v. Kelley, 9 P.3d 171, 184 (Utah Ct. App. 2000) (Jackson, J., dissenting).

145. *Id.* at 185 (Jackson, J. dissenting).

146. ALI PRINCIPLES, *supra* note 13, § 6.03(3).

whether their relationships had produced legal obligations or not. As a New Zealand family law expert rather tamely put it, "the notion of 'de facto relationship' is not always a certain one":

> There will be marginal cases where a court has to decide whether two people have lived together as a couple in accordance with the statutory formula. However, even if they have so lived, it will not always be clear when they started and when they ended a *de facto* relationship. It may be that there was an association of several years but it attracted the quality of "*de facto* relationship" only after a period of time. When it actually ended may be a matter of dispute as well, especially if the quality of the relationship slowly but inexorably declined. The precise facts of each case will of course have to be carefully weighed.[147]

Uncertainty is enhanced by the fact that cohabitants do not always agree about the nature of their relationships. Researchers have found that, 20 to 40 percent of the time, cohabitants express different views on whether they plan to marry each other.[148] Moreover, in one survey, about a third of the time, only one cohabitant felt that the couple spent a lot of time together; and in 26 percent of the cases, only one cohabitant reported a high degree of happiness with the relationship.[149]

Another source of uncertainty lies in the fact that, while marriage involves only one spouse, de facto relationships may be multiple:

> It is quite possible that a person may have a marriage and de facto relationship occurring at the same time, with the result that the married and unmarried partner compete for the same property. Likewise, there could be two de facto relationships. Do they share a third each? Or do the two competing partners split half of the property down the middle, getting a quarter each?[150]

A final source of uncertainty is the lack of prototypes. Neither the ALI Principles nor New Zealand's De Facto Relationships Act provide any models of relationships that should produce obligation and those that should not. Significantly—and despite the claim that cohabitation is a functional equivalent

147. Atkin, *supra* note 11, at 318; *see also* Grainer, *supra* note 11, at 303 (noting that "[t]he operative phrase 'living together as a couple' is hardly less vague than the term 'de facto relationship.' Nor is the matter significantly clarified by the enumerated factors. Taken together, they cover virtually every aspect of human interaction.").

148. *See* Susan L. Brown, *Union Transitions Among Cohabiters: The Significance of Relationship Assessments, and Expectations*, 62 J. MARRIAGE & FAM. 833, 838 (2000); Bumpass et al., *supra* note 102, at 923; Sharon Sassler & James McNally, *Cohabiting Couple's Economic Circumstances and Union Transitions: A Re-Examination Using Multiple Imputation Techniques*, 32 SOC. SCI. RES. 553, 568 (2004) (stating that 42 percent of surveyed cohabiting couples disagreed about the future of their relationship).

149. *See* Brown, *supra* note 148, at 838.

150. Atkin, *supra* note 11, at 321.

of marriage—neither statute so much as mentions the word marriage. We thus cannot assume that a relationship must be "marriage-like" for a court to find that it has produced marital obligations; indeed, we must assume the opposite. But neither statute says anything about how close to marriage—in commitment (to what?), sharing, and intimacy—a relationship must be in order to satisfy the statutory standard.

In sum, although the individualized approach offered by the ALI and New Zealand avoids the peril of rigid, counterfactual classification, it instead produces enormous uncertainty, vastly increases the likelihood that litigation alone will determine a couple's status, and creates a serious risk of inconsistent outcomes. This approach does not even tell us what sort of relationship it is intended to capture, let alone provide structured guidance on how to separate the right sort from the wrong sort.

Of course, it is possible to avoid individualized inquiry. The ALI has taken this approach for couples who share a "common child" and have cohabited for the requisite period.[151] Some of the Canadian provinces also utilize a pure passage-of-time-while-coresident rule in determining support obligations.[152] This passage-of-time approach avoids the uncertainty and litigation hazard of fact-based inquiry, but it greatly increases the likelihood that marital obligations will be imposed on those who do not, in fact, have a marriage-like relationship. Unless the fact of cohabitation itself provides strong evidence of commitment or another basis for the imposition of marital obligation—evidence that cannot be found in the research literature charting systematic differences between cohabitation and marriage—this approach risks the inappropriate classification of many cohabitants.

Both the ALI and New Zealand approaches do give cohabitants the right to opt out of conscription, but there are many reasons to doubt that this will solve the problems. First, few cohabiting couples currently enter into contracts even though they are legally empowered to do so.[153] Second,

151. ALI PRINCIPLES, *supra* note 13, § 6.03(2).

152. *See* Bala, *supra* note 8, at 42–53.

153. Ira Ellman notes:

> Real data on the frequency of contracting are scarce, but the basic claim is not in serious dispute. Certainly written agreements are rare among the reported cases . . . [and an experienced attorney] whose practice focuses on unmarried couples . . . told [the author] . . . that in his experience the proportion of such couples who enter written agreements is "miniscule."

Ellman, *supra* note 28, at 1367 n.17; *see also* Kirsti Strøm Bull, *Non-Marital Cohabitation in Norway*, 30 SCANDINAVIAN STUD. L. 29, 39 (1986) (stating that 5 percent of surveyed Danish and Norwegian cohabitants had entered into contracts). Ironically, contracts seem to be more frequently employed by couples with committed relationships. *See* Jennifer K. Robbennolt & Monica Kirkpatrick Johnson, *Legal Planning for Unmarried Committed Partners: Empirical Lessons for a Preventative and Therapeutic*

because cohabitation often develops over time, there is no obvious event that signals the need to contract out:

> Some couples, for whom it would be preferable to contract out, may not do so because of ignorance of the need or desirability to do so. Others may be unrealistically optimistic about the chances of the success of their relationship, or may be uncomfortable about raising and addressing issues about property with their partners.[154]

Still others will be inhibited by the time and high cost of entering into an agreement.

Even if all cohabitants who should opt out did so, the associated discomfort, expense, and inconvenience are large disadvantages of the conscriptive approach: Cohabitants in what may well be short-lived relationships will be required to spend time, money, and emotional energy to protect themselves against a lawsuit that might eventuate if their relationship doesn't lead to marriage but still lasts long enough to trigger a lawsuit upon its termination. Given the frequency of cohabitation and the relative youth and poverty of the typical cohabitant, these costs—and the potential inequity resulting from a failure to bear them—weigh heavily against the conscriptive alternative.

Of course, the harms associated with conscription would be reduced with standards that demand a lengthy relationship. Given that 90 percent of cohabitations end or result in marriage within five years,[155] a statute that required, say, a six-year cohabitation period would automatically eliminate the vast majority of those who might be affected.[156] A "long-relationship"

Approach, 41 ARIZ. L. REV. 417, 436 (1999) (stating that in a survey of 169 "committed" cohabiting couples, 29 percent had written agreements).

154. Grainer, *supra* note 11, at 315; *see also* Bala, *supra* note 8, at 54–55 ("People are generally not psychologically prepared to make contracts about their personal relationships, and the evolving roles and expectations of the partners in non-marital relationships in any event tend to make contracts problematic when dealing with familial rights and obligations.").

155. *See* sources cited *supra* notes 89–90.

156. Professor Elizabeth Scott has proposed revision of the ALI Principles along these lines. Under Scott's proposal, cohabitation for five years would establish a presumption of intent to undertake marital obligations. Scott's proposal thus improves on the ALI model by requiring the fact-finder to focus on marital commitment and sharply limiting the pool of potential cases. *See* Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225. Scott argues that a "period of five years or more, for example, supports a presumption that the relationship was marriage-like and discourages opportunistic and marginal claims. At that point, the party challenging the contractual obligation can fairly be required to demonstrate that the parties' intent was not to undertake marital obligations and that the union was of a different kind." *Id.* at 259. Scott's assumption that relational duration supports a presumption of marital intent is based on the claim that, "[f]or most parties in relationships of long duration, the presumption that the union is marriage-like probably represents accurately the parties' explicit or implicit understanding about property sharing and support, and thus the framework simply functions as a standard majoritarian default." *Id.*

approach is clearly preferable to current conscriptive rules. But this conscriptive approach does not resolve any of the problems I have identified; it merely confines them to a smaller group. Individuals who do not know how long their relationships will endure must still contract out of obligations in order to avoid the possibility of expensive, time-consuming litigation. Courts must still conduct individualized, fact-based inquiries. The potential for fraud, uncertainty, and inconsistency is still high. Most importantly, a long-relationship model still cannot ensure that cohabitation is associated with marital commitment or dependency-causation. The available evidence simply does not show that longer relationships are typically marital: Researchers have found that longer duration of a cohabiting relationship is *negatively* correlated with variables related to relationship quality;[157] couples who have cohabited for longer periods do not seem more inclined to pool their resources.[158]

The claim that conscriptive rules are practical thus appears to have no sounder basis than the claim that cohabitation and marriage are functional equivalents. Individualized inquiry into a couple's understandings and behavior produces highly uncertain obligations that can only be determined after time-consuming and expensive litigation. Status-based rules that infer marital obligation from easily ascertained facts such as a common child or the maintenance of a common residence for a defined period avoid the uncertainty and expense inherent in individualized inquiry, but create serious risks of misclassification.

C. Disadvantages of Conscriptive Rules: Discordant Values and the Devaluation of Marriage

Not only does the evidence fail to support the claims made on behalf of conscriptive rules, but conscription entails other, serious disadvantages.

1. Conscription Erodes the Integrity and Coherence of Our Law

First, because the evidence strongly suggests that marriage and cohabitation only rarely involve similar commitments, behaviors, and dependencies, conscriptive rules may erode the integrity and coherence both of family law

157. Brown & Booth, *supra* note 102, at 674; *see also* Bumpass et al., *supra* note 102, at 922 tbl.10 (stating that a higher proportion of cohabitants whose relationships had lasted at least three years said that, during the past year, they had "thought that [their] . . . relationship might be in trouble" than cohabitants whose relationships had lasted less than one year).

158. *See* BLUMSTEIN & SCHWARTZ, *supra* note 98, at 95 fig.8; Heimdal & Houseknecht, *supra* note 99, at 534 (stating that Swedish cohabitants were not significantly more likely to pool income than U.S. cohabitants, despite longer average duration of relationships).

and the larger law of relational obligations. As we have seen, both areas of law have consistently relied on commitment and dependency-causation as justifications for the imposition of private relational obligations. If private obligations may be imposed on cohabitants without such a showing, we risk introducing into our law discordant values that have been rejected in all other cases. This basic problem is exacerbated by the fact that conscriptive laws run counter to "the powerful contemporary movement to recognize the parties' freedom to contract about the terms of their relationship."[159] If marital obligations are based on commitment and individualized negotiation, it is undeniably inconsistent to base cohabitant obligations on a de facto relationship.

Why do we need consistency? Consistency serves to ensure the integrity of the law, and law lacks integrity when "it must endorse principles to justify part of what it has done that it must reject to justify the rest."[160] This kind of "checkerboard" lawmaking violates the ethical norm that like cases receive like treatment. It denies "what is often called 'equality before the law.'"[161]

Integrity does not demand individualized inquiry. Rules of thumb serve both efficiency and fairness goals: They save time and money; they provide clear notice of the applicable legal standard; they ensure that each case is analyzed in the same way. But integrity does demand classifications that are not markedly overinclusive or underinclusive in relation to the legislature's aims.[162]

At times, integrity thus demands similar treatment of married and cohabiting couples. For example, a domestic violence law limited to married couples "would lack coherence since exploitation of vulnerable people in relationships does not occur exclusively in marriages."[163] Indeed, as we have seen, domestic violence is *more* common among cohabitants than married couples. Given that domestic violence laws aim to protect the vulnerable, they should apply to all

159. David Westfall, *Forcing Incidents of Marriage on Unmarried Cohabitants: The American Law Institute's* Principles of Family Dissolution, 76 NOTRE DAME L. REV. 1467, 1479 (2001).

160. RONALD DWORKIN, LAW'S EMPIRE 183–84 (1986).

161. *Id.* at 185; *see also* JOSEPH RAZ, *Law and Value in Adjudication*, *in* THE AUTHORITY OF LAW 180, 201–06 (1979) (explaining reasoning from precedent in terms of shared features of new and precedent cases and arguing that it serves the purpose of ensuring that a "new rule is a conservative one, that it does not introduce new discordant and conflicting purposes or value into the law, that its purpose and the values it promotes are already served by existing rules"); CASS R. SUNSTEIN, LEGAL REASONING AND POLITICAL CONFLICT 96–100 (1996) (describing virtues of analogical reasoning).

162. For example, licensing statutes of all types exclude those who cannot meet the statutory standard even if they have the requisite skill; age-based prohibitions prevent some youths who could show the requisite maturity from engaging in the regulated activity; public benefit laws deny aid to the applicant who fails to meet the statutory standard, even if he could show special circumstances that make his need equal to that of a successful applicant; tax assessments are derived from standardized formulae that ignore an individual's underlying ability to pay.

163. BEYOND CONJUGALITY, *supra* note 7, ch. 2.

forms of relational violence, marital and nonmarital. It would be discriminatory to provide remedies to one group that are unavailable to the other.

Conversely, integrity demands dissimilar treatment of married and cohabiting couples when, in terms of the law's underlying purpose, the vast majority are not similarly situated. And the typical cohabitant, who has chosen not to marry because he or she "wasn't ready . . . to get . . . that close to somebody,"[164] is not—for purposes of relational obligation—in the same situation as a man or woman who has consciously and deliberately chosen to assume marital obligations.

2. Conscription Conflicts With the Ideal of Individual Autonomy

Conscriptive rules run counter to one of the most important values in modern liberal societies, the ideal of individual autonomy. The autonomy ideal presupposes that, absent some substantial basis for state interference, individuals should be free to make life choices based on their own goals and values. It also celebrates human diversity and posits individual choice as the best means of ensuring individual attainment and happiness:

> If a person possess any tolerable amount of common sense and experience, his own mode of laying out his existence is the best, not because it is the best in itself, but because it is his own mode. Human beings are not like sheep. . . . The same mode of life is a healthy excitement to one . . . while to another it is a distracting burden which suspends or crushes all internal life. Such are the differences among human beings in their sources of pleasure, their susceptibilities of pain, and the operation on them of different physical and moral agencies that, unless there is a corresponding diversity in their modes of life, they neither obtain their fair share of happiness, nor grow up to the mental, moral, and aesthetic stature of which their nature is capable.[165]

The autonomy ideal thus posits the rightful role of the state as preventing harm to others, not imposing majoritarian values on those who have chosen a different life course.[166]

In keeping with this view, the U.S. Supreme Court has ruled that decisionmaking about marriage, procreation, parenthood, and family relationships is included within the liberty protected under the Fourteenth Amendment:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and

164. MANNING & SMOCK, *supra* note 112, at 26.

165. JOHN STUART MILL, ON LIBERTY 82–83 (Currin V. Shields ed., Bobbs-Merrill 1956) (1859).

166. *See id.* at 13 (urging that "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection").

> autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning.... Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[167]

Conscriptive cohabitation laws do "define attributes of personhood... under the compulsion of the State"[168] by imposing obligations on those who have not chosen them. As the Canadian Law Reform Commission put it, conscription

> is a blunt policy tool in that it treats all conjugal relationships alike, irrespective of the level of emotional or economic interdependency that they may present[, and thus] infringes upon the value of autonomy. Although people may opt out of certain statutory provisions governing their relationships, they are not always aware of this possibility.[169]

Under conscriptive rules, individuals are no longer free to choose when, how, and whether to marry; instead, the state—after the fact—decides for them. Conscriptive rules thus represent a form of state paternalism that our legal system generally rejects and which ordinarily demands a showing of harm to others.

3. Conscription Sends the Wrong Message About Cohabitation and Marriage

The extension of marital obligations and rights to those who have not made marital commitments signals—inaccurately—that marriage and cohabitation are the same. Such a signal discourages marital commitment and investment. Such a signal also devalues marriage, a status of enormous symbolic importance to most citizens and one associated with greater health, wealth, happiness, and stability than cohabitation.

The symbolic importance of marriage is easily demonstrated by recent attempts to legalize same-sex marriage. The strong feelings of both those who oppose and those who favor same-sex marriage make it abundantly clear that marriage matters. Marriage remains the preferred—some would argue the only—method of signaling full relational commitment to a partner and the

---

167. Planned Parenthood v. Casey, 505 U.S. 833, 851 (1992); *see also* Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 637, 637 (1980) (arguing that "[i]t is the *choice* to form and maintain an intimate association that permits full realization of the associational values we cherish most").

168. *Casey*, 505 U.S. at 851.

169. BEYOND CONJUGALITY, *supra* note 7, ch. 4.

world.[170] Marriage vows both establish a new, publicly recognized family and unify the marriage partners' families of origin. For many, marriage vows represent not just a personal commitment, but an act imbued with profound religious significance. "Marriage is more than a bundle of rights and privileges. . . . It's a word that's sacred to many people, and because of its symbolic value, its customs and history, it has superior status."[171]

Young American adults believe that marriage confers a wide range of private and public benefits,[172] and the evidence supports their supposition. Those who are married live longer and are less likely to become disabled than the unmarried; they get more sleep, eat more regular meals, visit the doctor more regularly, and abuse addictive substances less frequently.[173] Even after controlling for age, married men earn more than either single men or cohabitants;[174] married couples also have a higher savings rate and thus accrue greater

170. *See* WILLIAM N. ESKRIDGE, JR., THE CASE FOR SAME-SEX MARRIAGE 71 (1996) ("Getting married signals a significantly higher level of commitment, in part because the law imposes much greater obligations on the couple and makes it much more of a bother and expense to break up. . . . Moreover, the duties and obligations of marriage directly contribute to interpersonal commitment.").

171. Tamar Lewin, *For Better or Worse: Marriage's Stormy Future*, N.Y. TIMES, Nov. 23, 2003, § 4, at 1 (quoting historian Nancy Cott). In a 2004 national survey, 28 percent of respondents said that marriage was "mostly a legal matter," 46 percent that it was "mostly a religious matter," and 22 percent that it was "both equally." Four percent reported no opinion. *See* Princeton Research Assocs. Int'l, Newsweek Poll (Mar. 9, 2004) (Question ID USPSRNEW.022104, R26).

172. *See* Raley, *supra* note 1, at 34 (stating that most young adults aged twenty to twenty-nine tend to believe that they would be happier, "more economically secure, have more emotional security, a better sex life, and a higher standard of living if they were married"); *see also* BARBARA DAFOE WHITEHEAD & DAVID POPENOE, NAT'L MARRIAGE PROJECT, CHANGES IN TEEN ATTITUDES TOWARD MARRIAGE, COHABITATION AND CHILDREN 1975–1995 (1999), *available at* http://marriage.rutgers.edu/Publications/pubteena.htm (finding that respondent teenagers overwhelmingly reported that they would marry and approximately three-quarters reported that a good marriage is "extremely important").

173. *See* WAITE & GALLAGHER, *supra* note 101, at 47–64 (summarizing research). However, the evidence is conflicting on whether the married rate their health more highly than the unmarried. *See* Linda J. Waite, *Trends in Men's and Women's Well-Being in Marriage*, *in* THE TIES THAT BIND, *supra* note 1, at 368, 375–79. *But see* Zheng Wu et al., *"In Sickness and in Health": Does Cohabitation Count?*, 24 J. FAM. ISSUES 811, 831 (2003) ("Once controls are added, health differences between the married and the cohabiting lose statistical significance."). Selection effects may also account for some of the reported differences between married and cohabiting couples. *Id.*

174. "[T]he general consensus in the literature is that controlling for other observable characteristics, married men are simply more productive than unmarried men." Jeffrey S. Gray & Michel J. Vanderhart, *On the Determination of Wages: Does Marriage Matter?*, *in* THE TIES THAT BIND, *supra* note 1, at 356, 356. They tend to work longer hours and to choose higher-paying jobs and professions. *See also* WAITE & GALLAGHER, *supra* note 101, at 99–105; Oppenheimer, *supra* note 96, at 146–47. The "marriage premium" has declined, however, for reasons that are poorly understood. *See generally* Philip N. Cohen, *Cohabitation and the Declining Marriage Premium for Men*, 29 WORK & OCCUPATIONS 346 (2002) (reviewing evidence).

wealth than the unmarried.[175] Married individuals rate their happiness and mental health more highly than the unmarried;[176] they experience less domestic violence and greater physical security.[177]

Some of the benefits associated with marriage undoubtedly result from "selection" effects rather than marriage itself; if those who marry are healthier, wealthier, and happier to begin with, they should maintain these advantages after marriage. Social scientists continue to debate the extent to which marital benefits derive from the preexisting attributes of those who marry or the married state. Although preexisting attributes are certainly important, the evidence also suggests that some portion of the marriage "premium" results from marriage itself.[178]

---

175. *See* Joseph P. Lupton & James P. Smith, *Marriage, Assets, and Savings*, *in* MARRIAGE AND THE ECONOMY 129, 143–51 (Shoshana A. Grossbard-Shechtman ed., 2003) (finding that because married couples have a significantly higher savings rate than any other type of household, they accumulate far more assets).

176. *See* Waite, *supra* note 173, at 373–75 tbl.19.2 (showing that reported happiness levels of married individuals exceeded those of the never-married, previously married, and cohabiting (which tended to be comparable) and concluding that "the happiness advantage of the married and the disadvantage of being unmarried are roughly similar in size for men and women. . . . [T]he situation has not changed over the past 35 years."); *see also* Susan L. Brown, *Moving From Cohabitation to Marriage: Effects on Relationship Quality*, 33 J. SOC. SCI. RES. 1, 16–17 (2004) (stating that in a national sample, cohabitants who married reported higher levels of relationship happiness as well as lower levels of relationship instability, disagreements, and violent conflict than those who remained cohabiting, net of time-1 relationship quality and sociodemographic controls); Russell P.D. Burton, *Global Integrative Meaning as a Mediating Factor in the Relationship Between Social Roles and Psychological Distress*, 39 J. HEALTH & SOC. BEHAV. 201, 212 (1998) (concluding that the sense of purpose associated with marriage was responsible for better psychological health of husbands and wives); Kathleen A. Lamb et al., *Union Formation and Depression: Selection and Relationship Effects*, 65 J. MARRIAGE & FAM. 953, 960 (2003) (reporting no evidence of selection of less depressed persons into either marriage or cohabitation, but a negative effect of entry into marriage on depression, particularly when marriage was not preceded by cohabitation); Nock, *supra* note 95, at 68–69 tbl.1 (finding that married individuals reported significantly higher levels of happiness than cohabitants).

177. *See* Waite, *supra* note 173, at 381 tbl.19.6, 382 (stating that cohabitants with no plans to marry are "substantially and significantly" more likely to report couple violence than either married or engaged couples); sources cited *supra* note 101.

178. *See, e.g.*, Gray & Vanderhart, *supra* note 174, at 365–66 (finding that higher divorce probabilities are significantly associated with lower marital wage premiums); Hyoun K. Kim & Patrick C. McKenry, *The Relationship Between Marriage and Psychological Well-Being: A Longitudinal Analysis*, 23 J. FAM. ISSUES 885, 885 (2002) (finding that data confirmed the strong effects of marital status on psychological well-being and showed that the transition to cohabiting did not have the same beneficial effects as marriage for psychological well-being, suggesting that the protective effects of marriage are greater than those of cohabiting relationships); Pamela J. Smock et al., *The Effect of Marriage and Divorce on Women's Economic Well-Being*, 64 AM. SOC. REV. 794, 809 (1999) (reviewing evidence and concluding that "the economic benefits of marriage are large, even above and beyond the characteristics of those who marry"); Ingrid Waldron et al., *Marriage Protection and Marriage Selection—Prospective Evidence for Reciprocal Effects of Marital-Status and Health*, 43 SOC. SCI. & MED. 113 (1996) (finding significant marriage-protection health effects for women based on a national sample, but only among women who were not employed).

Why would marriage produce health, wealth, and happiness benefits? First, "[t]he public commitment and the involvement of friends and relatives create an enforceable trust that is not present in cohabiting unions. It allows couples to have more confidence that their investments in the union will be recouped."[179] Even with today's high divorce rate, marital investments in sexual fidelity,[180] children, and capital goods such as a home are far more secure than the investments made by cohabitants.

Second, marriage still "signifies that the partners have successfully fulfilled their adult social roles":

> Marriage has long been seen as a mark of successful adulthood for women because of its association with childbearing. But it also is crucial for defining what it means to be an adult male in American society. . . . Marriage . . . leads to noticeable changes in their public behavior: married men spend more time with relatives or at religious services and events, and less time with friends and at bars or taverns, than they did before they married. It is the way that men in American society have taken on the culturally prescribed roles of wage earner, father, and public citizen.[181]

To be sure, higher divorce rates, rising rates of cohabitation, and later marriage have all weakened both the stability and status associated with marriage. But across nations and cultures, marriage is still associated with higher levels of subjective well-being.[182]

---

179. Cherlin, *supra* note 2, at 136–37.

180. Despite large increases in approval of *pre*marital sex, attitudes toward *extra*marital sex have remained consistently negative, and "if anything, there has been a movement toward less freedom for extramarital sex." Arland Thornton & Linda Young-DeMarco, *Four Decades of Trends in Attitudes Toward Family Issues in the United States: The 1960s Through the 1990s*, 63 J. MARRIAGE & FAM. 1009, 1027–28 (2001).

181. Cherlin, *supra* note 2, at 137.

182. *See* Ed Diener et al., *Similarity of the Relations Between Marital Status and Subjective Well-Being Across Cultures*, 31 J. CROSS-CULTURAL PSYCHOL. 419, 434 (2000) (concluding, based on a 42-nation survey, that the positive relationship "between marital status and subjective well-being" did not differ by gender and was "very similar" across the world); Steven Stack & J. Ross Eshleman, *Marital Status and Happiness: A 17-Nation Study*, 60 J. MARRIAGE & FAM. 527, 534 (1998) (finding that "married persons have a significantly higher level of happiness than persons who are not married. This effect was independent of financial and health-oriented protections offered by marriage and was also independent of other control variables, including ones for sociodemographic conditions and national character."). Although cohabitants had a higher level of happiness than single persons, their happiness level was still "less than one quarter of [that] . . . of married persons." *Id.* at 531; *see also* Arne Mastekaasa, *The Subjective Well-Being of the Previously Married: The Importance of Unmarried Cohabitation and Time Since Widowhood or Divorce*, 73 SOC. FORCES 665, 676, 682 (1994) (reporting that based on study of 100,000+ Norwegians "the married have the highest level of subjective well-being, followed by the widowed" and that "among those who . . . remained divorced for three years or more the level of well-being is much lower and very similar for the single and cohabiting").

Given the substantial benefits associated with marriage, family law should clearly signal that marital commitment matters and promote reliance on such commitment. Family law should not falsely signal that marriage and cohabitation are equivalent states.

4. Conscription May Harm Children's Interests

Family policy is increasingly child-centered. "Across the academy, the courts, classrooms, and election campaigns, the code of family responsibility is being rewritten in terms of the only ties left—the ones to children."[183]

> Child custody determinations have replaced fault as the most emotionally charged sources of family conflict and, for all but the wealthiest parents, the once-neglected issue of child support has become the most important of the financial determinations made at divorce. The most heated public debates on the family . . . involve rethinking family responsibility in terms of obligation toward children.[184]

There are good reasons for this policy trend. Children are the most vulnerable members of our society. They also represent our collective future.

Developing a child-centered family policy is a complex task,[185] but certainly such a policy would encourage childbearing and rearing within families that have the best chance of ensuring childhood well-being and adult success. The evidence unequivocally shows that marital families best meet these goals. Children born to married parents experience much greater stability than children born to unmarried parents.[186] Because of that stability, they are exposed to

183. JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW, at xiii–xiv (2000).

184. *Id.*

185. *See infra* Part IV.C.

186. *See* Bumpass & Lu, *supra* note 90, at 38 tbl.6 (finding that children born to married parents spend 84 percent of their childhood in two-parent families; children born to cohabiting parents "may spend about a quarter of their childhood years with a single parent, a quarter with a cohabiting parent, and less than half with married parents"); Deborah R. Graefe & Daniel T. Lichter, *Life Course Transitions of American Children: Parental Cohabitation, Marriage, and Single Motherhood*, 36 DEMOGRAPHY 205, 215 (1999) (finding that most children who are born into or ever live in a cohabiting family will experience a change in family structure within a few years); Patrick Heuveline et al., *Shifting Childrearing to Single Mothers: Results From 17 Western Countries*, 29 POPULATION & DEV. REV. 47 (2003) ("In most countries, children born to cohabiting parents are two to four times more likely to see their parents separate than are children of parents married at the time of birth"); Kiernan, *supra* note 120, at 31 (finding that within 5 years of the birth of a child, 8 percent of U.K. married couples have split up, compared to 52 percent of cohabitants and 25 percent of those who marry after the birth); Wendy Manning et al., *The Relative Stability of Cohabiting and Marital Unions for Children*, 23 POPULATION RES. & POL'Y REV. 135 (2004) (finding that children born to cohabiting parents experience higher levels of instability than children born to married parents).

fewer financial,[187] physical,[188] and educational risks.[189] Unsurprisingly, lower risks produce higher levels of well-being. Some of the benefits associated with marital childbearing undoubtedly derive from the fact that married couples tend to be older and have higher incomes than cohabitants;[190] both age and income promote relational and economic stability.[191] However, there is evidence that the advantages conferred by marital child-rearing transcend the specific benefits associated with greater economic resources and lower dissolution rates.[192] There is even evidence that the marital advantage extends to the next generation—researchers have reported that "any time spent in an alternative [i.e., nonmarital]

187. *See* CASPER & BIANCHI, *supra* note 93, at 111–12 fig.4.3 (finding that in 1998, the poverty rate of married-parent households was 6.9 percent and that of single-mother households was 38.7 percent). Noncustodial divorced and never-married parents are also less likely to pass wealth on to their adult children. *See* Frank F. Furstenberg, Jr. et al., *The Effect of Divorce on Intergenerational Transfers: New Evidence*, 32 DEMOGRAPHY 319, 325 tbl.2, 328 (1995) (finding that divorce during childhood years was associated with sharp decrease in transfers by fathers); Nadine F. Marks, *Midlife Marital Status Differences in Social Support Relationships With Adult Children and Psychological Well-Being*, 16 J. FAM. ISSUES 5, 22 (1995) (finding that remarried and single parents professed less belief in parental financial obligation and were less likely to provide support to adult children than first-marriage parents).

188. Rates of physical and sexual abuse are much higher when children live with an adult stepparent or cohabitant. *See* Robin Fretwell Wilson, *Children at Risk: The Sexual Exploitation of Female Children After Divorce*, 86 CORNELL L. REV. 251, 262–66 (2001) (surveying data on sexual abuse of female children); Martin Daly & Margo Wilson, *Child Abuse and Other Risks of Not Living With Both Parents*, 6 ETHOLOGY & SOCIOBIOLOGY 197 (1985); Leslie Margolin, *Child Abuse by Mothers' Boyfriends: Why the Overrepresentation?*, 16 CHILD ABUSE & NEGLECT 541 (1992).

189. *See* SARA MCLANAHAN & GARY SANDEFUR, GROWING UP WITH A SINGLE PARENT: WHAT HURTS, WHAT HELPS 39–63 (1994) (concluding that "[c]hildren who grow up apart from a parent are disadvantaged in many ways relative to children who grow up with both parents. They are less likely to graduate from high school and college, they are more likely to become teen mothers, and they are somewhat more likely to be idle in young adulthood."); *see also* sources cited *infra* note 257.

190. *See* sources cited *supra* notes 94–95.

191. *See* U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS SERIES P-70 NO. 23, FAMILY DISRUPTION AND ECONOMIC HARDSHIP: THE SHORT-RUN PICTURE FOR CHILDREN (1991) (reporting that 21 percent of children whose fathers left the home within a two-year period were already poor, a poverty rate double that of married-couple families with children); U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS SERIES P-23 NO. 179, WHEN HOUSEHOLDS CONTINUE, DISCONTINUE, AND FORM (1992) (stating that divorce is about twice is common among couples below the poverty line as in the general population); *see also* BRAMLETT & MOSHER, *supra* note 89 (relationship dissolution is significantly associated with income and age).

192. *See* Susan L. Brown, *Family Structure and Child Well-Being: The Significance of Parental Cohabitation*, 66 J. MARRIAGE & FAM. 351 (2004) ("Children living in two cohabiting biological-parent families experienced worse outcomes, on average, than those residing with two married biological parents, although among children age 6–11, economic and parental resources attenuated these differences. Among adolescents ages 12–17, parental cohabitation is negatively associated with well-being, regardless of the levels of these resources.").

family increases the likelihood that a woman [will herself] form[ ] a union with characteristics that decrease the likelihood of a successful union."[193]

This marital advantage appears to be universal. Even in the Scandinavian nations, which have the longest experience with cohabitation as a mainstream family form and a high level of support for single-parent families, demographers continue to find that marital childbearing is associated with greater childhood stability[194] and smaller risks to youthful and adult well-being.[195]

Family law thus should encourage childbearing within marital relationships, which have the best chance of providing children with income adequacy and family stability. But "[m]any parents are unaware that children who grow up with only one parent are more likely to have problems."[196] "The first step toward helping children . . . is [therefore] to make sure that parents understand the potential risks associated with divorce and nonmarital childbearing."[197]

---

193. Jay D. Teachman, *The Childhood Living Arrangements of Children and the Characteristics of Their Marriages*, 25 J. FAM. ISSUES 86, 86 (2004).

194. *See* An-Magritt Jensen & Sten-Erik Clausen, *Children and Family Dissolution in Norway: The Impact of Consensual Unions*, 10 CHILDHOOD 65 (2003) (finding that children of cohabiting parents run a much higher risk of dissolution compared to children in marital unions and that "this risk is not diminishing as cohabitation becomes more widespread").

195. *See* Gunilla Ringback Weitoft et al., *Mortality, Severe Morbidity, and Injury in Children Living With Single Parents in Sweden: A Population-Based Study*, 361 LANCET 289 (2003) (stating that based on analysis of national register data in almost a million cases, Swedish children in single-parent households showed significantly increased risks of psychiatric disease, suicide or suicide attempt, injury and addiction, and even after controlling for socioeconomic status and confounding factors such as parental addiction or mental disorder, children in single-parent families still exhibited "significant increases in risk" for all adverse outcomes); Jan O. Jonsson & Michael Gahler, *Family Dissolution, Family Reconstitution, and Children's Educational Careers: Recent Evidence for Sweden*, 34 DEMOGRAPHY 277, 287 (1997) (stating that even after controlling for all independent variables, children of divorced and separated parents and children living in reconstituted families have low school-continuation propensities compared to children living with both biological parents); Helen Hansagi et al., *Parental Divorce: Psychosocial Well-Being, Mental Health and Mortality During Youth and Young Adulthood: A Longitudinal Study of Swedish Conscripts*, 10 EUR. J. PUB. HEALTH 335 (2000) (stating that in a group of Swedish conscripts, several indicators of low levels of well-being and mental illness, including alcoholism, were significantly correlated with parental divorce even after adjustment for antecedents and other factors); *see also* Taru H. Makikyro et al., *Hospital-Treated Psychiatric Disorders in Adults With a Single-Parent and Two-Parent Family Background: A 28-Year Follow-Up of the 1966 Northern Finland Cohort*, 37 FAM. PROCESS 335 (1998).

196. MCLANAHAN & SANDEFUR, *supra* note 189, at 144; *see also* Paul R. Amato, *Good Enough Marriages: Parental Discord, Divorce, and Children's Well-Being*, 9 VA. J. SOC. POL'Y & L. 71, 94 (2001). Amato states:

> Parents in . . . "good enough" marriages should stay together for the sake of the children, . . . [but r]econciliation is only likely to occur . . . if parents are aware that by divorcing, they place their children at risk, if parents remain willing to make a commitment to salvage the relationship, and have access to supportive resources in the community. We should think about ways to implement these conditions, if only to help parents make better decisions—the tough decisions—that dramatically affect their children's lives.

Id.

197. MCLANAHAN & SANDEFUR, *supra* note 189, at 144.

Conscription cannot serve this tutelary function because it falsely signals that cohabitation and marriage are equivalent. Worse, by suggesting the equivalence of cohabitation and marriage, a conscriptive regime may actually encourage childbearing within uncommitted, cohabitational relationships. Conscription thus risks harm to the interests of children, arguably our most important public resource.

III. THE "ROOT AND NERVE" OF THE CONSCRIPTIVE MOVEMENT

With all of these negatives and no evidence to support the claims of equity, equivalence, and practicality, it would be justifiable to dismiss the conscriptive alternative out of hand. But we cannot dismiss the fact that legislatures in three different English-speaking nations have adopted conscriptive rules, nor can we dismiss the growing number of academics and policymakers who favor them.[198] Those who support conscription cannot have been persuaded by the evidence; we must suppose that they have found the claims of equivalence, equity, and practicality to be *intuitively* appealing. As Justice Holmes long ago reminded us, it is "often an inarticulate and unconscious judgment . . . [that forms] the very root and nerve of the whole proceeding."[199]

What unarticulated judgments form the "root and nerve" of the movement in favor of conscription? Do these judgments offer a convincing basis—grounded in commitment, dependency-causation, or some other important public policy goal—that might support the introduction of conscriptive standards?

In reviewing the literature, I find two very different unarticulated judgments that seem to be important sources of support for conscription. The first judgment derives from what we might, following Terry Kogan, call the "Equality Position."[200] The Equality Position's central claim is that the state should honor a range of relational choices, but this central idea is often linked with two different, typically unstated assumptions. One is that marital

198. *See, e.g.*, BEYOND CONJUGALITY, *supra* note 7; Bala, *supra* note 8; Grace Ganz Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 NOTRE DAME L. REV. 1265 (2001); Ellman, *supra* note 28; Martha M. Ertman, *The ALI Principles' Approach to Domestic Partnership*, 8 DUKE J. GENDER L. & POL'Y 107 (2001); Winifred Holland, *Intimate Relationships in the New Millennium: The Assimilation of Marriage and Cohabitation?*, 17 CAN. J. FAM. L. 114 (2000); Nancy D. Polikoff, *Making Marriage Matter Less: The ALI Domestic Partnership Principles Are a Step in the Right Direction*, 2004 U. CHI. LEGAL F. 353; Mark Strasser, *A Small Step Forward: The ALI Domestic Partners Recommendation*, 2001 BYU L. REV. 1135; Willmott et al., *supra* note 9.

199. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897).

200. Terry S. Kogan, *Competing Approaches to Same-Sex Versus Opposite-Sex, Unmarried Couples in Domestic Partnership Laws and Ordinances*, 2001 BYU L. REV. 1023, 1031–36.

obligation is an appropriate tool for regulating relational problems that do not derive from marital commitment; the other is that conscriptive rules advance the interests of same-sex couples who cannot marry. The second judgment I have called the Welfare-Function Position. Its central idea is that cohabitation disadvantages women and the children in their care. This judgment is often linked with an intuition that conscriptive rules can reduce the public costs associated with nonmarital childbearing. This part explains, evaluates, and ultimately rejects arguments that the Equality and Welfare-Function Position offer in favor of conscription.

A. The Equality Position

1. Should We Reject Marriage as a Legal Category, but Embrace It as a Legal Remedy?

Discrimination is about sameness and difference. The law discriminates when it treats individuals with similar interests differently; it also discriminates when it treats individuals with different interests the same way. Conscription's advocates seem curiously uninterested in whether cohabitation is the same as marriage or different. For example, Lindy Willmott et al., urging that the Australian national government should adopt conscriptive legislation, recognize that there are "sociological differences between the two relationships [marriage and cohabitation]," but nonetheless conclude that those differences "do not merit denying redress to de facto individuals who need it."[201] In a similar vein, New Zealand MP Chris Carter argues that the De Facto Relationships Act "does not say anything about the nature of relationships . . . . [I]t is about fairness; it is about looking after people's rights."[202]

How could anyone imagine that a De Facto *Relationships* Act is not about relationships? Or that fairness is served by ignoring meaningful relational differences?

The views of Carter and Willmott et al. seem to derive from the Equality Position, which asserts that "[a]ny relationship between two unrelated, loving adults is as worthy as any other such relationship, irrespective of the sex of the partners":[203]

> [U]nderlying the Equality Position is a belief that it is wrong for the State in general to dictate how couples should structure their private relationships. . . . [T]he Equality Position believes that those who choose to

201. *See* Willmott et al., *supra* note 9, at 9–10.
202. Grainer, *supra* note 11, at 300 n.97 (quoting statement of C. Carter).
203. Kogan, *supra* note 200, at 1032.

> structure their relationships in a way other than marriage are still entitled to have those relationships supported with respect to certain essentials . . . .[204]

Based on this view, Equality Position advocates argue that "the State should be willing to support the needs of all nontraditional families through alternative domestic partnership schemes, irrespective of the genders of the partners at the head of such households."[205] The Equality Position thus begins with the relatively uncontroversial proposition that the state should not dictate private relational choices and builds on that position by claiming that the state should adopt laws supporting such choices.

Whether or not one agrees that relational choice mandates relational affirmative action, the Equality Position does state a clear and cogent argument in favor of elective partnership schemes like the various "marriage-lite" registration options that many European nations now offer.[206] Such schemes confer a wider menu of legally recognized relational options; they enable couples who are not ready to make marital commitments to choose another status that provides for a limited number of rights and obligations.

Even after stating the Equality Position, however, it is not obvious why anyone would imagine that it supports conscription, which offers no choices at all. Conscription "dictate[s] how couples should structure their private relationships" by forcing those who are unprepared to make marital commitments to shoulder the very responsibilities that they have avoided. Conscription thus burdens couples who wish to live outside of traditional family forms; it forces relationships of many contours into a one-size-fits-all relational mold.

One simply cannot get from the Equality Position to conscription without two additional—and internally inconsistent—assumptions. The first assumption is that marital obligation is irrelevant to the state's legitimate concerns. The second is that marital obligation is the ideal remedy for whatever legitimate relational concern the state might address. The Canadian Law Reform Commission succinctly states the first, marriage-is-irrelevant assumption:

> More often [than not], . . . Parliament's goal is to achieve some other outcome—like the support of children, the recognition of economic interdependence, the prevention of exploitation—that is connected to, but not exactly congruent with, the marriage relationship. When

204. *Id.* at 1033.

205. *Id.*

206. *See* Caroline Forder, *European Models of Domestic Partnership Laws: The Field of Choice*, 17 CAN. J. FAM. L. 371 (2000) (surveying regimes); Lyall, *supra* note 10 (summarizing registry options).

> Parliament uses terms like "spouse" as a proxy for identifying the kinds of close personal relationships between adults to which such laws apply, problems of coherence arise.[207]

We have already seen that marital obligation rightfully springs, not from interdependence or relationship or exploitation, but from the plain fact of marital commitment.[208] Even were we to accept the Commission's view, however, conscriptive rules like the ALI Principles or the New Zealand De Facto Relationships Act still make no sense unless we also assume that the best way to achieve the larger legislative goals "connected to, but not exactly congruent with, the marriage relationship"[209] is through a legislative scheme that provides only one remedy, marital obligation, to only one relational group, cohabitants.

Although a cohabitants-are-the-right-group, marriage-is-the-right-remedy assumption is implicit in much of the literature espousing conscription, I could find no statement in which it was clearly expressed. This is not surprising; once the assumption is described, its illogicality is apparent. Surely, if the goal is to prevent exploitation, then the legislature's classification should apply only to claims of exploitation; or, if the goal is to recognize economic interdependence or close social relationships, then any and all such states should be recognized. Whatever the goal, legislative rules should strive to capture all or most of the cases to which the goal applies. But literally *none* of the conscriptive schemes that have been enacted applies to anyone other than cohabitants.[210] *None* rewrites marriage law to require a showing of either exploitation or economic interdependence for the imposition of obligations on married couples. Indeed, *none* requires such a showing for the imposition of marital obligation on cohabitants.

The logic of marital obligation as a remedy for the various legitimate legislative goals posited is equally unclear. There are traditional remedies for exploitation; they include constructive trust, restitution, and quantum meruit recovery,[211] but certainly not marital obligation. There is also a traditional

---

207. BEYOND CONJUGALITY, *supra* note 7, ch. 2.

208. *See supra* Part I.A.

209. BEYOND CONJUGALITY, *supra* note 7, ch. 2.

210. The Canadian Law Reform Commission seems to have comprehended this problem. It has proposed that "[g]overnments should review all of their laws and policies that employ relational criteria to ensure that they are pursuing objectives that respond to contemporary social realities in a manner consistent with fundamental values," and urged broader use of self-designation as "an approach that allows for the recognition of the relationships that are of primary importance to the sponsor—which will sometimes include close personal relationships beyond marriage, conjugal or blood ties." BEYOND CONJUGALITY, *supra* note 7, ch. 3, pt. 1.

211. *See infra* notes 321–329 and accompanying text.

"remedy" for economic interdependence or a close social relationships; it is nothing at all.[212] Why aren't the law's traditional responses appropriate for the various relational problems posited by Equality Position advocates? Why is a post-hoc shotgun marriage for cohabitants the right remedy?

Equality Position advocates do not answer, or even address, these questions because the linkage they posit between relational freedom and conscriptive rules is not logical, but emotional. As a logical claim, it is absurd to declare that the state must support choice and then urge rules that allow no choice whatsoever. It is equally absurd to declare marriage an irrelevance and then demand, in essence, that cohabitants marry. The emotional appeal of these illogical propositions is real, however, and lies in their capacity to bind relational freedom to marriage, the archetype of relational commitment.

Equality Position advocates may overtly deny that marriage is relevant to legitimate legislative goals, but by employing marital obligation as a universal remedy for relational dysfunction, they covertly posit marriage as the normative model for all intimate relationships. The Equality Position's illogical propositions thus reveal the extent to which "[h]istory and tradition cement the hold of marriage on individual desires and social ideals":[213]

> Turning men and women into husbands and wives, marriage has designated the ways both sexes act in the world and the reciprocal relation between them. It has done so probably more emphatically than any other single institution or social force. The unmarried as well as the married bear the ideological, ethical, and practical impress of the marital institution, which is difficult or impossible to escape.[214]

Even those who deny its relevance seem unable to escape the impress of marriage: Equality Position reformers who favor conscription have reflexively turned to marital obligation as the end-point of laws regulating intimate relationships just as the writer of romance novels concludes each volume with an engagement ring.

Although the Equality Position does not state a logical argument in favor of conscription, it is nonetheless important as an indicator of the powerful hold that marriage retains on the popular and reformist imagination. The Equality Position is also important as a rhetorical mask: equality talk disguises an extremely conservative legislative agenda—a one-size-fits-all, retroactive marital obligation—by cloaking it in liberal principles of relational choice;[215]

212. *See supra* notes 30–35, 54–66 and accompanying text.

213. COTT, *supra* note 32, at 225.

214. *Id.* at 3.

215. There are undoubtedly historical antecedents within family law of a conservative agenda hiding behind liberal principles. For example, Ariela Dubler argues that, in developing the common

by weaving the rhetoric of choice with the powerful symbolism of the marital ideal, the Equality Position also produces a soothing and seductive mix that obscures the oddity of the combination.

The murkiness of equality talk explains why an advocate of conscription like New Zealand Green Party MP Keith Locke could trumpet the claim that he and his partner of twenty years had failed to marry because "[w]e want our relationship to be purely governed by love and concern for each other *without the interference of legal processes* and formal ceremonies," and, in the very next paragraph, proclaim, as *"a matter of principle,"* that the state should retroactively give him all the legal rights he had sought to avoid.[216] It explains the curious indifference of conscription's advocates to the factual differences between marriage and cohabitation. It explains why both the ALI Principles and the New Zealand De Facto Relationships Act avoid any mention of marriage even as they search for marital equivalents.

But neither the rhetoric of choice nor the relational ideal of marital obligation offers a justification—grounded in history or logic or public policy—to support the imposition of marital obligation on couples who have not chosen marriage. We can profit from understanding the Equality Position, but it fails to state a case for conscriptive cohabitant obligations.

2. Does Conscription Advance the Interests of Same-Sex Couples?

There is one case—that of same-sex partners who cannot marry—in which the Equality Position's claim that current law unfairly discriminates between the married and unmarried is not illogical. The divisive issue of same-sex marriage is well beyond the scope of this Article. But certainly those judges, legislators, and citizens who feel that same-sex couples should have the opportunity to make binding marital commitments would agree with the Hon. Keith Locke that, as a "matter of principle," same-sex couples who cannot formally express their marital commitments should have access to marital rights and obligations.

The ALI notes the case of "domestic partners who are not allowed to marry each other under state law because they are of the same sex, although they are otherwise eligible to marry and would marry one another if the law

---

law marriage doctrine, nineteenth-century courts employed "the language of contract [that] . . . masked a conservative agenda inherent in the preservation of marriage as a status." Dubler, *supra* note 31, at 1912.

216. Keith Locke, Speech in Parliament on the Matrimonial Property Amendment Bill (May 4, 2000), http://www.greens.org.nz/searchdocs/speech2917.html (emphasis added) (website contains preliminary speech notes).

allowed them to do so,"[217] as one reason why couples fail to marry and need conscription. Of course, the same-sex partners that the ALI describes do not actually want conscription; they "would marry" if allowed to do so.[218] The logical link between conscription and the interests of same-sex couples is weak.

The evidence suggests that the perceived interests of same-sex couples have nonetheless been important in building academic and legislative support for the conscriptive alternative. Indeed, Grace Ganz Blumberg, one of the reporters responsible for the ALI Principles, has argued that "same-sex couples have been the dominant force in the movement to regularize nonmarital cohabitation."[219]

For those who see heterosexual marriage law as discriminatory, conscription offers the chance to provide same-sex couples with equal access to marital rights and obligations. Conscription does this in a "back-door" manner; it provides no access to marriage, but instead makes marriage irrelevant.

To the extent that same-sex marriage remains the ultimate goal, conscription also provides important tactical advantages. Conscriptive cohabitation rules erode the privileged status of marriage and thus ineluctably diminish the disadvantages of a marriage bar. A fuzzier conception of marital rights and obligations may even produce a climate in which the definition of marriage is more malleable. Because of these tactical advantages, conscriptive cohabitation rules might play an important role in a same-sex marriage agenda even though they do not provide the ultimate goal, same-sex marriage.[220]

We cannot precisely estimate the extent to which the perceived interests of same-sex couples have influenced the popularity and adoption of conscriptive reforms, but the impact of this factor has probably been substantial. In New Zealand, for example, where "same-sex couples have long agitated for a position in law that recognises their basic human rights,"[221] the "decision to place unmarried couples on the same basis as married ones was passed by a very narrow margin. . . . However, when it then came to the inclusion of same-sex couples within the notion of a de facto relationship, the margin was far

217. ALI PRINCIPLES, *supra* note 13, 6.02 cmt. a.

218. Public survey evidence suggests that this stance is common among same-sex couples. *See* Michael S. Wald, *Same-Sex Couple Marriage: A Family Policy Perspective*, 9 VA. J. SOC. POL'Y & L. 291, 313 (2001).

219. Blumberg, *supra* note 198, at 1268–69; *see also* Kogan, *supra* note 200, at 1031 (urging that the "Equality Position" adopted by the ALI Principles "is most defensible in terms . . . of equality and fairness, and, finally, in terms of the long-term interests of gay and lesbian people").

220. *Cf.* Kogan, *supra* note 200, at 1027 ("ALI Principles[ ] must be seen as [a] second-best solution[ ], as but a way station on the road to full marriage rights for gay and lesbian people.").

221. Editorial, *Whose Property?*, THE PRESS, July 22, 2000, at 10 (N.Z.).

greater."[222] New Zealand's conscriptive law also extended to gay couples the important symbolic status of next-of-kin and the same property rights—at death as well as separation—available to married heterosexual couples. Indeed, the initial draft legislation went so far as to abandon the terms husband, wife, and marriage in favor of the universal term "partner."[223] In Canada, too, the legal transformation of heterosexual cohabitation has been closely linked with the legal transformation of same-sex cohabitation.[224]

Perhaps the best example of how the perceived interests of same-sex couples might influence cohabitation law comes not from a foreign parliament enacting conscriptive cohabitation rules, but from California, which in 2000 adopted legislation that permits all same-sex couples and heterosexual couples in which one partner is over the age of sixty-two to register as "domestic partners" and obtain certain rights.[225] Puzzling over the oddity of a statutory regime applicable to all same-sex couples and only a small subset of heterosexual couples, Megan Callan, who had searched in vain through the law's legislative history for the logic behind this strange coupling, ultimately pondered the possibility that "supporters of gay and lesbian rights [had] . . . use[d] opposite-sex inclusion . . . as a fig leaf . . . to shield the . . . legislation from . . . criticism."[226] She found confirmation of her hypothesis in a phone call to the office of the sponsoring legislator, one of whose aides confirmed that extension of the domestic partnership concept to those over age sixty-two was made "as a direct response to . . . criticism . . . [of] efforts to create a statutory recognition of gay and lesbian couples."[227] Callan thus concluded that the inclusion of heterosexual couples in the legislation represented little more than "a shield to prevent criticism . . . [and] improve the acceptance of the legislation."[228]

There is nothing peculiar here. Politics has always made strange bedfellows, and the attempt to garner support for legal reforms has often led to

---

222. Bill Atkin, *From Parental Relocation, Rights and Responsibilities to 'Relationship' Property*, in INTERNATIONAL SURVEY OF FAMILY LAW 323, 333 (Andrew Bainham ed., 2003); *see also* Grainer, *supra* note 11, at 300–01 n.97 ("It is great that the bill proposes the same advantages for same-sex couples as married and de facto couples . . . ." (quoting *Matrimonial Property Amendment Bill: Report of Select Committee* (May 4, 2000) (statement of K. Locke))).

223. *See* Atkin, *supra* note 222, at 334.

224. *See* sources cited *supra* note 8.

225. CAL. FAM. CODE § 297(b)(5) (West Supp. 2004).

226. Megan E. Callan, Comment, *The More, the Not Marry-Er: In Search of a Policy Behind Eligibility for California Domestic Partnerships*, 40 SAN DIEGO L. REV. 427, 453 (2003).

227. *Id.* at 454.

228. *Id.*; *see also* Kiernan, *supra* note 120, at 56 (reporting that French domestic partnership legislation was "originally conceived as meeting the demands of gay organizations for a form of legally recognized marriage ceremony. However, to avoid homophobic attacks from the right wing the government broadened the idea to include heterosexuals.").

legislative compromises that would make a logician shudder. My point is not that those who wish to obtain legal recognition of same-sex relationships have done anything wrong or even unusual. It is that the movement in favor of same-sex marriage has illogically enhanced the appeal of conscriptive rules.

A second, perhaps more important, point is that the conscriptive alternative is an ultimately unsatisfactory means of advancing the interests of same-sex couples who want to marry or obtain legal recognition of their relationships. An initial problem is that conscriptive rules do not provide legal recognition except retrospectively; gay cohabitants, like all other cohabitants, cannot be confident of their status until it has been tested in court. Moreover, as in the case of heterosexual couples, a conscriptive regime devalues the commitments that the same-sex couple seeking recognition of their relationship would like to make. The fact that same-sex marriage is the ultimate goal should make it abundantly clear that public, legally recognized commitments are extraordinarily meaningful to those who make them. Conscriptive rules thus risk no less harm to the interests of same-sex couples than those of opposite-sex couples.

A third important point is that conscriptive rules represent an underhanded method of advancing the interests of a very small group whose needs and interests could be advanced directly. The evidence suggests that no more than 5 percent of cohabiting couples are gay,[229] and not all of this small group want to have their relationships recognized; same-sex couples test the strength of a relationship through cohabitation just like their heterosexual counterparts.

Much as one may sympathize with same-sex couples who want to make marital commitments, it makes no sense to sweep the overwhelming majority of cohabitants who do not want to make such commitments into a conscriptive regime in order provide a third-rate solution for the few same-sex cohabitants who do. The interests of same-sex couples certainly help to explain the sense that marriage law discriminates. These interests represent an important source of enthusiasm for conscriptive cohabitation rules. But the interests of a small group who want to make marital commitments cannot justify the imposition of marital commitments on a large group who are not so inclined.

229. *See* CASPER & BIANCHI, *supra* note 93, at 65 (noting "that about four percent of cohabiting couples are in same-sex relationships"); Wald, *supra* note 218, at 313 (about 3 percent).

B. The Welfare-Function Position

1. Does Cohabitation Exploit Women and Children?

The ALI argues that "[f]ailure to marry may . . . reflect strong *social or economic inequality* between the partners, which allows the stronger partner to resist the weaker partner's preference for marriage."[230] Although the ALI Principles do not identify the source of relational inequality, more than twenty years ago, one of the ALI reporters urged that contract was the wrong approach to cohabitation because women had less power in such relationships than men:

> [T]he essence of a cohabitation or marriage contract between heterosexual cohabitants is that the man gives up wealth that would otherwise accrue to him in order to insure the woman some semblance of economic dignity. Self-interest would lead the man to give up as little as possible. The woman has scant leverage with which to persuade him otherwise. She lacks economic power. She needs a stable relationship more than he does: it is vital to the comfortable exercise of her reproductive potential, and it is a means of enhancing her wealth and standard of living. . . . Thus, the cohabitants' unequal bargaining power leads to unjust results under contract theory.[231]

While the ALI makes the claim that cohabitation disadvantages women only indirectly, similar claims have cropped up in other nations during debates over conscriptive cohabitation laws. For example, the Ontario Attorney General, responding to concerns about proposed legislation extending support obligations to cohabitants, argued that the legislation was necessary to protect "exploited" cohabitants who had been "induced to enter relationships and to stay at home and rear children." After dissolution of such a relationship, he argued, "they have nowhere to turn but to the welfare authorities for support. . . . [T]he government of Ontario has paid out family benefits to over 13,000 unmarried mothers and their 26,000 dependent children."[232] In New Zealand, one commentator asserted that "[t]he focus of debate on the property provisions of the [New Zealand] Property Relationships Bill was essentially on the situation of women in existing relationships."[233]

---

230. ALI PRINCIPLES, *supra* note 13, § 6.02 cmt. a (emphasis added).

231. Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1163 (1981).

232. Holland, *supra* note 198, at 128 (quoting Ontario Legislative Assembly, Debates, at 4973 (June 9, 1994)).

233. Stuart Birks, LEANZ Seminar on the Property Relationships Amendment Act, Wellington, N.Z. (Aug. 6, 2001), http://www.massey.ac.nz/~kbirks/gender/econ/pra.htm.

The Canadian Law Reform Commission has also noted that conscriptive laws are "generally heralded as a way for governments to prevent the risks of exploitation inherent in a contractual model."[234] The assumption that cohabiting relationships are exploitive of women and the children in their care thus seems to have been important in fueling support for conscriptive rules.

If women are typically exploited and disadvantaged when they cohabit, there would certainly be a dependency-causation claim that the men responsible for such disadvantage should have an obligation to meet the needs of their dependent partners. Arguably, the extremely high poverty rate of single mothers and litany of associated public costs[235] might also justify a conscriptive approach.

But are women really "induced [by men] to enter relationships and stay at home to rear children"? Do women have "scant bargaining leverage" as compared to men? And is cohabitation a state in which men prosper while women do not? These are complex questions on which we have incomplete data. But momentarily putting aside the case of women who have children with a cohabitant, it is not obvious why cohabitation would systematically exploit either women or men.

First, cohabitation produces economic advantages that will almost invariably benefit both individuals who make a home together. Given the economies of scale achieved by sharing a residence, both cohabitants should have more disposable income. This income advantage is not negligible; the federal poverty-level income for a family of two is approximately 50 percent less than that of two one-person families.[236] Admittedly, because cohabitants are less inclined than married couples to pool resources,[237] they will accrue smaller income advantages. But if they engage in any form of expense-sharing, their overall expenditure on shared goods like rent and household utilities should decline.

Second, cohabitation reduces the total labor necessary to maintain a home: there is only one bed to make, one meal to prepare, one kitchen to clean, and one refrigerator to fill. With less labor required for household

234. BEYOND CONJUGALITY, *supra* note 7, ch. 4; *see also* Nicholas Bala, *Alternatives for Extending Spousal Status in Canada*, 17 CAN. J. FAM. L. 169, 193 (2000). Bala suggests that:

> Canadian courts have rejected the argument that since there was a "choice" not to marry (or contract), there should be *no* rights or obligations [because t]here is too much potential for one party (usually the wealthier or more powerful partner i.e. often the man) to want the benefits of the relationship, and then if it ends, to want to deny any responsibility for dependencies that may have arisen.

Id.

235. *See* sources cited *infra* notes 253–257.

236. *See* U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES 2000, at 476 tbl.756 (2001) [hereinafter STATISTICAL ABSTRACT].

237. *See* sources cited *supra* notes 99, 104–107.

chores, both men and women should gain time. Cohabiting women may even gain more time than their married counterparts as the evidence suggests that they do less housework.[238] Although women do more housework than men in both cohabiting and marital relationships,[239] sharing should still produce a time advantage. And even if cohabiting men do *no* housework, the women with whom they are living should not expend significantly more time on household chores than they would have spent living alone.

Third, cohabitation should only rarely induce either a man or a woman to forgo employment or professional opportunities. As noted in Part II, the commitments and sharing that typically lead married couples to rely on each other for continued support seldom take place in cohabiting relationships. The relatively short duration and limited resource pooling that characterize cohabiting relationships should also inhibit the growth of dependency. Moreover, even married women typically engage in paid employment.[240] If a cohabiting woman pursues her usual occupation, it is hard to see how or why she would be economically disadvantaged by the fact of cohabitation.

Finally, the evidence does not suggest that cohabiting women fail to marry because men resist the married state. Researchers have found that cohabiting couples in which the male partner is economically secure are more likely to marry than those in which he is insecure.[241] Marriage expectations are also highly correlated with socioeconomic status; better-off cohabitants are more likely to expect to marry, and to marry their current partners, than are worse-off cohabitants.[242] These patterns help to explain why cohabitants as a group have lower incomes and educational credentials than married couples [243] and to support the claim that male economic instability breeds cohabitation,[244] but they do not demonstrate that men who cohabit are more reluctant to marry than women. We thus have no evidence that women are

238. *See* Jeanne A. Batalova & Philip N. Cohen, *Premarital Cohabitation and Housework: Couples in Cross-National Perspective*, 64 J. MARRIAGE & FAM. 743 (2002) (finding that, across 22 nations, women do more routine housework than men in both marital and cohabitational relationships); Beth Ann Shelton, *Understanding the Distribution of Housework Between Husbands and Wives*, *in* THE TIES THAT BIND, *supra* note 1, at 343 (reviewing data).

239. *See* Batalova & Cohen, *supra* note 238, at 753; Shelton, *supra* note 238, at 345.

240. In the United States in 1999, 61 percent of all married women and 70 percent of married mothers with a child under age eighteen were in the paid labor force. *See* STATISTICAL ABSTRACT, *supra* note 236, at 408–09 tbls.651, 653.

241. *See* sources cited *supra* note 96.

242. *See* Pamela J. Smock & Wendy D. Manning, *Cohabiting Partners' Economic Circumstances and Marriage*, 34 DEMOGRAPHY 331, 332 (1997).

243. *See* Seltzer, *supra* note 97, at 1250 (summarizing research data).

244. *See* Valerie Kincade Oppenheimer, *The Continuing Importance of Men's Economic Position in Marriage Formation*, *in* THE TIES THAT BIND, *supra* note 1, at 283 (reviewing research data).

typically, or even disproportionately, cohabiting with men they want to marry who won't marry them. Nor is there an obvious reason why women would be less inclined than men to move on when faced with a partner's diffidence.[245] Indeed, sociologist Andrew Cherlin has argued that the rising tide of cohabitation is in part due to improvements in women's bargaining position:

> The bargaining position of women has improved in part because of their greater earning potential, compared to men. . . . The bargaining position of women also has improved because of better birth control technology . . . and the availability of abortion. These technological advances have allowed women to have intimate relationships and residential partnerships with men without fear of pregnancy. They can therefore extend their search process to include trial relationships and partnerships prior to marriage.[246]

Cherlin concludes that women are "incorporating premarital cohabitation into the search and bargaining processes because cohabitation provides a better opportunity to observe men's skills and preferences for home production."[247]

Despite their enhanced bargaining position, cohabiting women do, on average, earn less than cohabiting men.[248] As a result of this discrepancy, they may be comparatively disadvantaged when their relationships end if there has been resource pooling.[249] But a woman would suffer the same kind of financial disadvantage if she lost a roommate with whom she split the rent. It is not

245. Susan Brown reports that, when the female cohabiting partner is not happy in a cohabiting relationship but the male partner is, the relationship tends to dissolve. By contrast, when it is the male partner who is unhappy, the relationship is likely to continue, but the couple is less likely to marry than if both partners are happy. *See* Brown, *supra* note 148, at 841. Married women also appear to be less reluctant to end a relationship than married men; women are the plaintiffs in a disproportionate number of divorce actions. *See, e.g.*, Lawrence M. Friedman & Robert V. Percival, *Who Sues for Divorce? From Fault Through Fiction to Freedom*, 5 J. LEGAL STUD. 61, 69 tbl.1, 75 tbl.2 (1976); Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 646 n.105 & tbl.2 (1991) (wives were plaintiffs in about two-thirds of surveyed divorce cases). Although this disproportion might reflect social convention, in a 1990's national poll of divorced men and women, "more than half of divorced women [said that] it was their idea to separate, [as] compared with only 44 percent of men." *See* Paula Mergenhagen DeWitt, *Breaking Up Is Hard to Do*, AM. DEMOGRAPHICS, Oct. 1992, at 52, 53; *see also* Sanford L. Braver et al., *Who Divorced Whom? Methodological and Theoretical Issues*, 20 J. DIVORCE & REMARRIAGE 1 (1993).

246. Cherlin, *supra* note 2, at 131–32.

247. *Id.* at 131.

248. *See* CASPER & BIANCHI, *supra* note 93, at 53 tbl.2.3.

249. Because spending power within either a marital or cohabiting relationship is typically correlated with monetary contribution, cohabiting women also likely have, on average, less control over recreational and "big-ticket" spending than men. *See* BLUMSTEIN & SCHWARTZ, *supra* note 98, at 53–59, 309 (reporting that, three-quarters of the time, monetary contribution was correlated with the balance of power over income); *see also* JAN PAHL, MONEY AND MARRIAGE (1989).

reasonable to view either loss as the result of exploitation: neither the roommate nor the cohabitant has made any commitment to engage in continued sharing on which the woman might have relied; nor is the woman, in any obvious way, in a worse position than she was before the relationship or rent-sharing arrangement began.

In sum, it is extraordinarily hard to see why cohabitation, without children, would exploit women or even comparatively disadvantage them. Some women may neglect their own careers during a period of cohabitation in the expectation of continued sharing, but we have no reason to believe that such cases are common or that they arise from male exploitation.[250]

2. Nonmarital Childbearing: Can Conscription Reduce Its Private and Public Costs?

Cohabitation that leads to childbearing is a different case. Childbearing clearly burdens women, who provide a disproportionate share of child care and sometimes forgo labor-market opportunities because of child-care responsibilities.[251] If a woman bore a child with a cohabiting partner in the reasonable expectation that her relationship and its advantages would survive, she would be comparatively disadvantaged if it ended. To the extent that her partner encouraged her expectations and pregnancy, we might even say that she was exploited.

Close to 90 percent of unmarried women's pregnancies are unintended,[252] but it is difficult to estimate the number of the cohabiting women who decide to continue a pregnancy in the expectation that their relationships will endure, and even harder to ascertain the extent to which cohabiting mothers' expectations of relationship survival are encouraged by their male partners.

---

250. Although the Canadian Law Reform Commission argues that conscription "may serve the particular purpose of preventing exploitation," it cautions readers that conscription is also "a tool that must be used sparingly, where there is evidence of exploitation." BEYOND CONJUGALITY, *supra* note 7, ch. 4.

251. *See* Michelle J. Budig & Paula England, *The Wage Penalty for Motherhood*, 66 AM. SOC. REV. 204 (2001); Jane Waldfogel, *The Effect of Children on Women's Wages*, 62 AM. SOC. REV. 209 (1997).

252. *See* COMM. ON UNINTENDED PREGNANCY, NAT'L ACAD. OF SCI., THE BEST INTENTIONS: UNINTENDED PREGNANCY AND THE WELL-BEING OF CHILDREN AND FAMILIES 31–32 tbl.2-2 (Sarah S. Brown & Leon Eisenberg eds., 1995) (stating that 88.2 percent of never-married and 68.5 percent of previously-married women's pregnancies are unplanned); Wendy D. Manning, *Childbearing in Cohabiting Unions: Racial and Ethnic Differences*, 33 FAM. PLANNING PERSP. 217, 221 tbl.5 (2001) (stating that 18 percent of married, 44 percent of cohabiting, 61 percent of single, noncohabiting women said that their first birth was unintended).

However, there can be no doubt that the growing number of nonmarital births is a serious public problem:

> Never-married mothers are less well educated and less often fully employed than are divorced mothers. The family income of children who reside with never-married mothers is only 23 percent of that of children in two-parent families, the lowest of any group of children living with single mothers. Almost three of every five children who live with never-married mothers reside in poverty. Child support receipt is also much lower for never-married than for other single mothers. Whereas 60 percent of divorced mothers with custody of children under age 21 receive some child support from their children's fathers, less than 20 percent of never-married mothers report receiving such support . . . .[253]

Even when their children are born within a cohabiting union,[254] the children of unmarried mothers are disproportionately likely to suffer from poverty,[255] family disruption,[256] and associated adverse consequences. This combination of economic deprivation and residential instability poses a serious threat to children's current and future life prospects. Researchers have repeatedly found that children in single-parent households are more likely to experience poor health, behavioral problems, delinquency, and low educational attainment than are their peers in intact families; as adults they have higher rates of poverty, early childbearing, and divorce.[257] Economic deprivation and residential instability are prime factors in explaining these differences.[258]

---

253. CASPER & BIANCHI, *supra* note 93, at 115–16.

254. The proportion of never-married mothers who are cohabiting has increased substantially over the past twenty years, from 4.7 percent in 1978 to 12.7 percent in 1998. White unmarried mothers, both in 1978 and in 1998, were most likely to cohabit. *See id.* at 104 tbl.4.2.

255. *See id.* at 115.

256. *See* sources cited *supra* note 186.

257. *See* PAUL R. AMATO & ALAN BOOTH, A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL (1997); MCLANAHAN & SANDEFUR, *supra* note 189, at 61 (concluding that "children who grow up apart from a parent are disadvantaged in many ways relative to children who grow up with both parents. They are less likely to graduate from high school and college, they are more likely to become teen mothers, and they are somewhat more likely to be idle in young adulthood."); Bumpass & Lu, *supra* note 90, at 29–30 (summarizing research data and noting that "[c]hildren from single-parent families are more likely to experience poverty, to do less well in school, to enter sexual activity earlier and have premarital births, to cohabit, and to marry early and experience the disruption of their own marriages"); *see also* WENDY D. MANNING & RONALD E. BULANDA, PARENTAL COHABITATION EXPERIENCE AND ADOLESCENT BEHAVIORAL OUTCOMES 19, 39 & tbl.3 (2003) (Bowling Green Working Paper 03-03, 2003) (noting that "[c]hildren born to cohabiting parents [had] significantly higher odds of . . . a teen birth"), *available at* http://www.bgsu.edu/organizations/cfdr/research/pdf/2003/2003_03.pdf; Wendy D. Manning & Kathleen A. Lamb, *Adolescent Well-Being in Cohabiting, Married, and Single-Parent Families*, 65 J. MARRIAGE & FAM. 876, 877–78, 890 (2003) (reporting that neither parental cohabitation nor marriage to a partner or spouse who is not related to the child is associated with uniform advantage in terms of behavior or academic indicators to

Nonmarital childbearing is also a powerful determinant of a mother's long-term marriage and economic prospects:

> Unwed childbearing may restrict marital search activities and diminish the willingness of potential marital partners to assume the co-parental role. These men also bear any additional economic and emotional costs associated with sharing their wives' time and affection with other men's children. Indeed, recent studies show that early unwed childbearing significantly reduces the probability of subsequent marriage. Teen unwed mothers are more than twice as likely as other women . . . to be never married by age 35.[259]

Only 41 percent of women with a nonmarital first birth are currently married, as compared to 82 percent of women with a marital first birth; unmarried mothers, regardless of whether they ultimately marry, also experience substantially higher rates of poverty than other women.[260]

Rational legislators would certainly seek ways to reduce the private and public costs of nonmarital childbearing. Grace Ganz Blumberg, explaining the movement in favor of conscription, also notes that countries with conscriptive reforms have all faced "growing economic pressure on their . . . welfare services."[261] Blumberg suggests that these nations have responded to pressure on the public purse with a "robust private law of rights and responsibilities at divorce and at the termination of nonmarital cohabitation":

> [T]he trend has been to substitute private obligations for public obligations, that is, to substitute property division and family support obligations for public social security. In such cases, the substitutionary role of private law ultimately paved the way for uniform inclusion of all cohabiting couples, whether formally married or not.[262]

If Blumberg is right, an important source of the movement in favor of conscription is its potential utility in curbing the costs associated with

---

teenagers living in single-mother families); Teachman, *supra* note 193, at 86 ("With the exception of parental death, any time spent in an alternative [i.e., nonmarital] family increases the likelihood that a woman forms a union with characteristics that decrease the likelihood of a successful union.").

258. *See* Bumpass & Lu, *supra* note 90, at 30 (summarizing research and reporting that "all of the transformations are inversely related to socioeconomic status"); Smock, *supra* note 90, at 11–12 (summarizing research and reporting that "the *number* of changes in family structure is particularly important. The fewer the changes, the better for children. While children in cohabiting households may in fact be living with two biological parents . . . they are quite likely to experience future family transitions . . . ."); *see also* MCLANAHAN & SANDEFUR, *supra* note 189, at 79–94 (explaining impact of poverty); *id.* at 95–133 (explaining impact of family and residential instability).

259. Daniel T. Lichter et al., *Is Marriage a Panacea? Union Formation Among Economically Disadvantaged Unwed Mothers*, 50 SOC. PROBS. 60, 63 (2003) (citations omitted).

260. *See id.* at 70, 73.

261. Blumberg, *supra* note 198, at 1307.

262. *Id.* at 1307–08.

nonmarital childbearing. Certainly, it would not be surprising if the Ontario Attorney General's support for conscriptive rules was motivated more by the fact that the provincial government had "paid out family benefits to over 13,000 unmarried mothers and their 26,000 dependent children" than by the hypothesis that these mothers had been "exploited" and "induced to stay home and have children." It is altogether understandable that public officials would hope that conscription might defray some of the public and private costs associated with nonmarital childbearing. Those costs are large, and "legislators have long imagined that marriage serves the critical social and political function of attaching dependent women to provider men, thereby creating 'the mechanism through which we can avoid assuming collective (or state-assumed) responsibility for dependent members of our society.'"[263] Indeed, there is evidence that nineteenth-century courts used the common law marriage doctrine to "privatize[ ] the dependencies of women and children . . . thereby shielding the state from financial responsibility."[264]

However, the same facts that cast doubt on the "cohabitation exploits women" theory also work to reduce the likelihood that conscription can either reduce public welfare expenditures or improve the economic circumstances of never-married women and their children.

First, a wide range of measures to ensure that unmarried fathers support their children are already in place. These measures were adopted, many at the federal level, in direct response to the rising rate of nonmarital birth and associated public expenses.[265] Taken together, these reforms have revolutionized the establishment, calculation, modification, and enforcement of child support.[266] Their effectiveness is inhibited both by the unwillingness of many unmarried mothers to seek support from their children's fathers[267] and by the economic insecurity of unmarried fathers, who are much more likely than

263. Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1659 (2003) (quoting Jeffrey Evans Stake et al., *Roundtable: Opportunities for and Limitations of Private Ordering in Family Law*, 73 IND. L.J. 535, 541–42 (1998) (statement of Martha L. Fineman)).

264. Dubler, *supra* note 31, at 1920.

265. *See* Garrison, *supra* note 16, at 53–54.

266. *See* KRAUSE ET AL., *supra* note 26, at 886–87, 1041–43 (describing innovations in support calculation, collection, and enforcement); Paul K. Legler, *The Impact of Welfare Reform on the Child Support Enforcement System*, *in* CHILD SUPPORT: THE NEXT FRONTIER 46 (J. Thomas Oldham & Marygold S. Melli eds., 2000) (describing innovations in paternity establishment and support collection).

267. More than 40 percent of mothers eligible for support—and 75 percent of those never-married—fail to obtain support awards. *See* U.S. CENSUS BUREAU, CHILD SUPPORT FOR CUSTODIAL MOTHERS AND FATHERS: 1991, at 11–12 tbl.F (1995) (stating that 34.6 percent of custodial mothers who had not been awarded child support reported that they "did not pursue a child support award," 13.9 percent reported that they "did not want child support" and 20.5 percent reported that the "other parent [was] unable to pay").

married fathers to be poor, ill-educated, and unemployed.[268] But these innovations in paternity and child support law already offer an extensive arsenal of weapons to ensure that unmarried fathers contribute as much as they can to their nonmarital children.

Second, the same factors that diminish the success of recent child support initiatives would also dramatically diminish any chance that conscription could provide meaningful benefits to nonmarital children, their mothers, or the public. Conscription would not enlarge child support obligations; current law already imposes on unmarried fathers obligations identical to those of their married counterparts. Conscription would, theoretically, expand unmarried fathers' obligations to include "spousal" support and the sharing of relationship property. But even among better-off divorcing couples, it is the exceptional case in which a woman obtains spousal support and significant assets: only 10–20 percent of women, mostly low-wage women married for a long time to high-wage men, obtain spousal support;[269] the median value of property subject to division is probably no more than $30,000–$40,000.[270] Cohabitants are younger and poorer than divorcing couples:[271] How likely is it that unmarried fathers—many of whom can barely make required child support payments—will have the capacity to make additional payments?[272] How likely is it that they will have accrued significant assets during their (likely brief) relationships with the children's mothers?

Third, conscriptive cohabitation laws will not apply to most nonmarital births. The majority of U.S. nonmarital births occur outside a cohabiting

---

268. *See* CASPER & BIANCHI, *supra* note 93, at 133–35 tbl.5.3 (stating that never-married fathers are younger than divorced fathers, more likely to be unemployed, and three times less likely to be college graduates); Elizabeth Phillips & Irwin Garfinkel, *Income Growth Among Nonresident Fathers: Evidence From Wisconsin*, 30 DEMOGRAPHY 227, 234 tbl.2 (1993) (noting that 41 percent of never-married fathers were poor in the year before a support action was filed, as compared to 19 percent of divorced fathers).

269. *See* KRAUSE ET AL., *supra* note 26, at 819 (citing Census Bureau data showing that less than 15–17 percent of divorced women reported receiving alimony during the 1970s and 1980s, as compared to 9.5 percent at the turn of the century); Garrison, *supra* note 245, at 699–705 (showing significant correlations between the award of alimony and marital duration, employment status, and proportion of family income earned); Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401, 467–86 (1996) (same).

270. *See* Garrison, *supra* note 245, at 660 tbl.9 (surveying research reports).

271. *See* sources cited *supra* notes 94–95.

272. When Australia introduced a new child support system aimed at reducing the level of government expenditure, the government "was hopelessly optimistic about the level of resources available to noncustodial fathers and about the cost of collecting small amounts of money from large numbers of very reluctant payers." Mavis Maclean & Andrea Warman, *A Comparative Approach to Child Support Systems: Legal Rules and Social Policies*, *in* CHILD SUPPORT: THE NEXT FRONTIER, *supra* note 266, at 166, 176.

relationship;[273] conscriptive laws cannot have any impact in these cases. For those nonmarital births that occur within cohabiting relationships, the relative instability of cohabitation ensures that many relationships will dissolve before the statutory period that gives rise to obligations has passed.[274] As a result of these impediments, the vast majority of cohabiting couples with children should escape the reach of conscriptive rules altogether.

Fourth, experts report that post-relationship income transfers have very limited potential to curb the poverty of children and their custodial parents:

> Although the earnings of low-income fathers may rise substantially over time, divorce and nonmarital childbearing are both significantly linked with low socioeconomic status. Divorce is approximately twice as likely for couples below the poverty line as it is for the general pool of married couples, and nonmarital parenting is even more highly correlated with low income. Many children in poor single-parent homes would thus remain poor even if their parents were (re)united. . . . [No] support policy can raise the income of a[n] . . . obligor or recreate the economies of scale available to an intact household.[275]

Because of these various limitations, experts estimate that, even if the percentage of children living in mother-only households could be brought back to its 1959 low, childhood poverty would decline by no more than 10 to 20 percent.[276]

Stable family relationships thus hold the most promise of promoting the welfare of nonmarital children and reducing associated public costs.[277] Marriage, undeniably, is more stable than cohabitation.[278] Marriage also appears to reduce the economic disadvantage associated with nonmarital childbearing.[279]

---

273. *See* Bumpass & Lu, *supra* note 90, at 34–35 tbl.4 (finding that 39 percent of first births to unmarried women occurred within a cohabiting relationship). The U.S. pattern contrasts sharply with that in Western Europe, where most nonmarital births are to cohabiting couples. *See* Seltzer, *supra* note 97, at 1257 (summarizing evidence).

274. In 1998, only 12.7 percent of unmarried mothers living with minor children were cohabiting; this percentage includes mothers cohabiting with a partner unrelated to their children. *See* CASPER & BIANCHI, *supra* note 93, at 104 tbl.4.2.

275. Marsha Garrison, *The Goals and Limits of Child Support Policy*, *in* CHILD SUPPORT: THE NEXT FRONTIER, *supra* note 266, at 16, 23–24.

276. *See id.* at 22 (summarizing research).

277. *See* MCLANAHAN & SANDEFUR, *supra* note 189, at 38 ("If we were asked to design a system for making sure that children's basic needs were met, we would probably come up with something quite similar to the two-parent family ideal.").

278. *See supra* notes 89–92.

279. *See* Lichter et al., *supra* note 259, at 74 (reporting that "[t]he odds of living in poverty when disadvantaged women marry are similar to odds experienced by low-risk women who marry and are lower than the odds for low-risk women who remain single. Th[e] evidence supports the 'marriage as a panacea' view."). By contrast, the data suggest that "unmarried unions are not associated with improved economic prospects for children over the longer term compared with those whose mothers

Could conscription induce marriage? A cynic might conclude that this is the real purpose of conscriptive rules, which significantly erode any perceived advantage in remaining single.[280] Indeed, the ALI argues that its conscriptive approach "reduces the incentive to avoid marriage because it diminishes the effectiveness of that strategy."[281] But if lawmakers intended to induce marriage through conscription, there is no evidence that they are succeeding. The marriage rate has not gone up in Australia, Canada, or New Zealand since the adoption of conscriptive reforms.[282] Recent reforms of the U.S. welfare system, which their advocates hoped would increase marriage among poor, welfare-recipient mothers, also failed to achieve this goal.[283]

There are many psychological reasons why conscription would be unlikely to foster marriage. First, as the relative rarity of both premarital and cohabitation contracts attests, couples do not tend to think ahead to the possible dissolution of their relationships.[284] Second, because of the uncer-

---

remained single." Donna Ruane Morrison & Amy Ritualo, *Routes to Children's Economic Recovery After Divorce: Are Cohabitation and Remarriage Equivalent?*, 65 AM. SOC. REV. 560, 576 (2000).

280. *See* Strasser, *supra* note 198, at 1170 (arguing that adoption of the ALI Principles "might induce some to marry who otherwise would not").

281. ALI PRINCIPLES, *supra* note 13, § 6.02 cmt. b.

282. *See* AUSTL. BUREAU OF STATISTICS, 3310.0 MARRIAGES AND DIVORCES, AUSTRALIA (2003), http://www.abs.gov.au/ (reporting that the Australian marriage rate has been declining since at least 1981; Australian 2001 marriage rate and New Zealand 1998 marriage rate was 5.3 per 1000 population); Statistics Canada, *Marriages*, DAILY, Nov. 20, 2003, *at* http://www.statcan.ca/Daily/English/031120/d031120c.htm (reporting that in 2001, the Canadian "crude marriage rate [sank] to a record low of 4.7 marriages for every 1,000 people after holding steady at 5.1 for four years"). The low reflects a long-term decline in the marriage rate and a rise in the age at first marriage. "In 1950, during the marriage boom that followed the Second World War, about half of women aged 20 to 24 were married. By 1991, that proportion had fallen to about 20%. Similarly, 75% of men in their early twenties were single in 1951, compared with 90% forty years later." Statistics Canada, *The People: Marriage*, CAN. E-BOOK, *at* http://142.206.72.67/02/02d/02d_001a_e.htm. There is no marriage data for New Zealand since the 2001 enactment of the De Facto Relationships Act, but the marriage rate had, to 2001, declined "fairly steadily" since 1971. STATISTICS NEW ZEALAND, DEMOGRAPHIC TRENDS 2002, at 67 (2003), *available at* http://unpan1.un.org/intradoc/groups/public/documents/APCITY/UNPAN011140.pdf. Conscriptive case law in the State of Washington has also failed to raise the marriage rate. *See* STATISTICAL ABSTRACT, *supra* note 236, at 104 tbl.150 (reporting that the marriage rate in Washington was 9.5 per 1000 population in 1990 and 7.2 per 1000 in 1998).

283. *See* ANDREW J. CHERLIN ET AL., WHAT WELFARE RECIPIENTS KNOW ABOUT THE NEW RULES AND WHAT THEY HAVE TO SAY ABOUT THEM (2000) (reporting that less than 1 percent of surveyed welfare recipients said that they had married because of the welfare reform rules). J.M. Fitzgerald & David C. Ridar, *Welfare Reform and Female Headship*, 41 DEMOGRAPHY 189 (2004) (finding "little evidence" that welfare reforms had any impact on women's decisions to become unmarried heads of families); LISA A. GENNETIAN & VIRGINIA KNOX, STAYING SINGLE: THE EFFECTS OF WELFARE REFORM POLICIES ON MARRIAGE AND COHABITATION (Next Generation, Working Paper No. 13, 2003) (finding that welfare reform policies had no impact on cohabitation and marriage decisions), *available at* http://www.mdrc.org/publications/373/full.pdf.

284. The classic account of this tendency is contained in Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*,

tainty inherent in the individualized-inquiry approach, cohabiting couples may not know that they have already "assumed" marital obligations.[285] Third, there is more reason to suppose that conscription would discourage formal marriage than induce it: As we have seen, conscription transforms marriage into a private choice without legal consequences; conscription also impliedly devalues marriage by signaling that it is not significantly different from cohabitation.[286] For all these reasons, it would be foolish to expect that conscription has the capacity to push unmarried parents into formal marital relationships. Quite the reverse—there are serious risks that it would enhance the appeal of nonmarital childbearing.

In sum, there is no evidence to support the claim that cohabitation per se exploits women or even that it comparatively disadvantages them. Nonmarital childbearing, whether within or without a cohabiting relationship, does comparatively disadvantage women, who disproportionately make labor-market sacrifices in order to provide care to their children. Nonmarital childbearing also disadvantages children, who are placed at risk both by the low socioeconomic status and the instability associated with nonmarital parenting. But these disadvantages do not result from cohabitation—nonmarital childbearing occurs outside cohabiting relationships just as it occurs within them—nor is there any evidence that conscription promises a cure.

The Welfare-Function Position thus hints at an immensely important public problem linked with the increased incidence of nonmarital cohabitation. But it fails to offer a justification, grounded in history or logic or public policy, to support conscriptive cohabitation standards.

IV. HOW SHOULD FAMILY LAW RESPOND TO NONMARITAL COHABITATION?

If conscription is the wrong response to the rising tide of nonmarital cohabitation, what is the right one? To answer this question, we must identify those cases in which family law's failure to assign private rights or obligations to cohabitants is out of step with the larger law of relational obligations. The available evidence suggests that, for the typical cohabiting couple, current law works well: this couple has made no commitments to each other; the fact of cohabitation has not induced dependency or worked any unjust enrichment; and, to the extent that the couple has made a private agreement that might

17 LAW & HUM. BEHAV. 439, 443 (1993), stating that despite awareness of a 50 percent divorce rate, virtually no surveyed applicants for marriage licenses expected their relationships to dissolve.

285. *See* text *supra* notes 137–150.

286. *See supra* Part II.C.3.

require enforcement, it will be honored under *Marvin*[287] and its progeny. However, there are cases[288] in which cohabitants have expressly or impliedly made marriage-like commitments. These private commitments deserve to be honored just like those of ceremonially married couples. There are also cases in which reliance on continuation of a relationship has led one party to make investments which, if uncompensated, would leave the other unjustly enriched. In these cases, the law of cohabitant obligations should provide appropriate remedies to the party who has relied to his or her detriment.

A. Honoring Private Marital Commitments

1. A Revivified Common Law Marriage Doctrine

There will always be couples who express marital commitments privately, without benefit of a formal marriage ceremony. They may choose to do so because of social or ethnic norms,[289] the desire to maintain a public or private benefit contingent on marital status,[290] or simply because they prefer private vows to public acts.

One obvious way to recognize private marital commitments is through a revivified common law marriage doctrine; couples who make private marital commitments have, after all, entered into common law marriages. A revivified common law marriage rule would also be more certain, more logical, and more consistent with the law of marital obligation than conscriptive alternatives like that proposed by the ALI and enacted in New Zealand. But common law marriage has been fading away for a reason; because the common law marriage doctrine requires the plaintiff to show a present agreement to be married, litigation may devolve into conflicting accounts of "who said what to whom" with little opportunity for either "spouse" to corroborate his or her claims.

---

287. Marvin v. Marvin, 557 P.2d 106 (Cal. 1976); *see supra* note 4.

288. Examples include the couple who have foregone ceremonial marriage because they belong to an ethnic or social group that typically relies on informal marriage, the same-sex couple who cannot legally marry but want to make marital commitments, and couples like the Friedmans, who lived as a married couple for twenty-five years and raised three children together. Friedman v. Friedman, 24 Cal. Rptr. 2d 892 (Ct. App. 1993); *see supra* notes 128, 130–131 and accompanying text.

289. *See, e.g.*, Teresa Castro Martin, *Consensual Unions in Latin America: Persistence of a Dual Nuptiality System*, 33 J. COMP. FAM. STUD. 35, 35 (2002) (arguing that nonmarital cohabitations "in Latin America are best described as surrogate marriages").

290. California's domestic partnership law is drafted with such a couple in mind. In order to form a domestic partnership, one of the partners must be at least 62 years old and "meet the eligibility criteria under Title II of the Social Security Act as defined in 42 U.S.C. Section 402(a) for old-age insurance benefits or Title XVI of the Social Security Act as defined in 42 U.S.C. Section 1381 for aged individuals." CAL. FAM. CODE § 297(b)(6)(B) (West Supp. 2004).

One way to avoid some of the evidentiary problems associated with common law marriage is to adopt a short statute of limitations.[291] Such a simple expedient would prevent litigants from relying on stale evidence and shaky recollections or waiting to bring a claim until the defendant cohabitant is dead and unable to speak for himself.[292]

Another useful reform would recast common law marriage in terms of the equitable estoppel doctrine. The estoppel principle holds that, "[w]henever a party has, by his own statement or conduct, intentionally and deliberately led another to believe a particular thing true and to act upon such belief, he is not, in any litigation arising out of such statement or conduct, permitted to contradict it."[293] Family law has long applied the estoppel doctrine to parentage determinations; a man who has acted as a parent and induced detrimental reliance on his continued willingness to do so is universally estopped from denying his paternity and may be required to pay support.[294] Most typically applied to stepparents who discouraged a relationship with the child's biological parent, the estoppel doctrine has in recent years been applied both to same-sex partners who encouraged the birth of a child or supported it for a substantial period and men who agreed to act as father to a child born through the use of artificial reproductive technology.[295] Courts have also applied the estoppel doctrine in custody contests, holding that a biological parent who represents her spouse as a parent is estopped from denying his paternity.[296] They have also utilized it in the context of divorce.[297]

There is no logical reason why the estoppel concept could not also be applied to common law marriage.[298] Applied in this way, the estoppel doctrine would require that, when a couple act as if they are married and thus "intentionally and deliberately" lead the world and each other to act on such

291. *Cf.* UTAH CODE ANN. § 30-1-4.5(2) (2003) (stating that an action must be brought within one year following the termination of the relationship).

292. For an example of these problems, see *In re* Estate of Keimig, 528 P.2d 1228 (Kan. 1974).

293. CAL. EVID. CODE § 623 (West 1995).

294. *See* sources cited *supra* note 46.

295. *See In re* Marriage of Buzzanca, 72 Cal. Rptr. 2d 280 (Ct. App. 1998) (husband who had, with wife, contracted with a gestational surrogate who agreed to be implanted with an embryo created from donated egg and sperm); L.S.K. v. H.A.N., 813 A.2d 872 (Pa. Super. Ct. 2002) (same-sex partner who encouraged mother to utilize artificial insemination to bear a child).

296. *See, e.g., In re* Marriage of Sechrest, 560 N.E.2d 1212 (Ill. App. Ct. 1990); Jean Maby H. v. Joseph H., 676 N.Y.S.2d 677 (App. Div. 1998); J.C. v. C.T., 711 N.Y.S.2d 295 (Fam. Ct. 2000); *In re* Marriage of Hodge, 733 P.2d 458 (Or. Ct. App. 1987). *See generally* Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459, 491–502 (1990).

297. *See* Kazin v. Kazin, 405 A.2d 360 (N.J. 1979); KRAUSE ET AL., *supra* note 26, at 591.

298. Indeed, the state of Tennessee has done so. *See* Bowman, *supra* note 143, at 771–72 (reviewing case law).

representations, they are precluded from later denying the existence of a marital agreement. The advantage of the estoppel approach over the traditional common law marriage doctrine is that it would focus, not on a subjective "meeting of the minds," but instead on objective, concrete actions—filing joint tax returns, taking title to property as husband and wife, using marital names, holding a commitment ceremony at which marriage-like vows are exchanged—that would justifiably lead each partner to assume a marital agreement and rely upon it.

Applied to a case like *Friedman*, the estoppel approach would permit "Mrs." Friedman to establish a marriage without proving that she and Mr. Friedman had mutually vowed to be husband and wife. Instead, proof that she had consistently used a marital name and that she and Mr. Friedman, over a lengthy period, had "consistently held themselves out as husband and wife to the Internal Revenue Service, to their insurers, their bankers, and in numerous real estate transactions" would suffice.[299] By minimizing the use of personal recollections as evidence, the estoppel approach would make the determination of common law marriage much more fraud-resistant and predictable.

Courts would, of course, confront cases far more difficult than *Friedman*. For example, a couple may inconsistently hold themselves out as husband and wife, making one type of representation to the Internal Revenue Service and another to the bank and insurance agency. In such cases, the court's task would be to determine whether there are sufficient indicia of a marital agreement that a cohabitant would be justified in relying upon it. An occasional entry in a hotel guest register describing the couple as "Mr. and Mrs." should not suffice;[300] consistent representations to a government authority or financial institution should invariably be enough.[301] Between these two extremes, courts would be required to exercise their judgment in evaluating the number, consistency, and types of representations made.

Even when modified by estoppel principles and coupled with a short statute of limitations, common law marriage will be less certain than formal, ceremonial marriage. However, the modified doctrine would avoid many of the evidentiary problems posed by the traditional rules. As compared to conscriptive standards like those proposed by the ALI or enacted in New Zealand, it would offer many more safeguards against fraud and a very high level of predictability.[302]

---

299. Friedman v. Friedman, 24 Cal. Rptr. 2d 892, 902 (Ct. App. 1993) (Poché, J., dissenting).

300. *See* CLARK, *supra* note 22, at 57 (urging that proof of marital cohabitation should require "a stay of some duration in the nondomicilary state before evidence of the requisite kind and amount could become available").

301. *See id.* at 51 (summarizing case law).

302. *See supra* notes 146–151.

These litigation advantages are linked to a more reliable notice function. The modified common law marriage doctrine would provide, in a nutshell, that if you act married, you will be married. Compared to the "anything relevant" approach of the ALI and New Zealand rules, this principle is clear and simple. It would thus provide much more meaningful guidance to cohabitants about actions that will alter their relational status.

Because estoppel is an equitable remedy, it is not available to a plaintiff who comes before the court with unclean hands.[303] The modified common law marriage doctrine would therefore enable courts to deny relief to an individual who deliberately avoided formal marriage to preserve a benefit[304] and to grant relief to the individual who relied on mutual representations of marriage to his or her detriment.[305]

Whether or not the common law marriage doctrine is modified by estoppel principles, this approach to cohabitant obligations has the large advantage of establishing a full marital relationship, with all its rights and benefits. By contrast, conscription does not establish a marriage, but imposes whatever rights and obligations the legislature has chosen to attach to "de facto" relationships. Although New Zealand has attached all marital rights and benefits, the Canadian provinces and Australian states have not.[306] The ALI's scheme also provides only for private rights and obligations;[307] the "domestic partners" on whom it would impose marital obligations and rights are not married and thus cannot claim statutory benefits such as the right to file a wrongful death action or obtain Social Security survivor's benefits. Conscription, like *Marvin* and its progeny, thus provides a remedy "tailored primarily to the middle class"[308] and fails to capture all of the rights and benefits of marriage.[309]

303. *See, e.g.*, Rubano v. DiCenzo, 759 A.2d 959, 968 (R.I. 2000) (noting that "generally speaking, the estoppel doctrine acts as a legal shield rather than a sword").

304. For example, Social Security benefits for a divorced wife are lost when the wife remarries. *See* 42 U.S.C. § 402(b)(1) (2000).

305. The *Friedman* appellate court rejected the plaintiff's attempt to employ equitable estoppel principles to establish a spousal support obligation on the theory that Terri knew that she and Eliot were not married. If Terri knew that California had abolished common law marriage, this conclusion is reasonable and would suffice to deny a plaintiff relief. But in a state that accepts either the traditional common law marriage doctrine or an estoppel-modified doctrine, a plaintiff who attempted to establish a marriage based on public representations of marriage could not be denied relief based on such "knowledge."

306. *See* BEYOND CONJUGALITY, *supra* note 7, ch. 4 (describing various statutory benefits and obligations not affected by provincial rules).

307. ALI PRINCIPLES, *supra* note 13, § 6.01.

308. Bowman, *supra* note 143 at 774.

309. *Cf.* CLARK, *supra* note 22, at 61. Clark notes that the *Marvin* approach does not confer marital status and urges that

> [t]here is a multitude of legal questions which depend upon the existence of marriage for their answer. Rights to support, alimony, division of property, inheritance, to sue for wrongful

Another advantage of common law marriage is the fact that it makes use of a widely understood relational form. Cohabitation is an "incomplete institution" that lacks a consistent meaning both for those within such a relationship and those outside it.[310] Cohabitation lacks a nomenclature: "There is no common term in use for referring to one's nonmarital live-in lover, whereas the terms *spouse*, *husband*, and *wife* are institutionalized."[311] More important, cohabitation lacks "social blueprint[s]":

> Marriage is . . . a social institution that rests upon common values and shared expectations for appropriate behavior within the partnership. Society upholds and enforces appropriate behavior both formally and informally. In contrast, there is no widely recognized social blueprint or script for the appropriate behavior of cohabitors, or for the behavior of the friends, families, and other individuals and institutions with whom they interact.[312]

The multifactor, anything-possibly-relevant approach to cohabitant obligations of the ALI Principles and the New Zealand De Facto Relationships Act reflects the wide divergence among cohabiting couples and lack of public consensus on whether, when, and how relational commitments and dependencies worthy of state enforcement arise within such relationships. But there is no doubt—for those within a marriage and those who interact with a married couple—about what marriage means.

Finally, a revivified common law marriage doctrine is fully compatible with traditional principles of family law and the larger law of relational obligations. By relying on commitment as a source of obligation, we maintain a consistent approach to relational rights and duties instead of introducing dissonant principles that are found nowhere else in our law.

> death, to claim workmen's compensation, social security, to immigrate into the United States, to file joint tax returns and many others have traditionally been dependent upon the proof of marriage.

Id.

310. Nock, *supra* note 95, at 74 ("[C]ohabitation is an incomplete institution. No matter how widespread the practice, nonmarital unions are not yet governed by strong consensual norms or formal laws."); *see also* STEVEN L. NOCK, MARRIAGE IN MEN'S LIVES (1998).

311. CASPER & BIANCHI, *supra* note 93, at 40.

312. *Id.* (citations omitted). Thus one couple recently profiled in the *New York Times* wedding pages who had been together for seventeen years decided to marry, in part, because of their ambiguous social status. As the husband put it, "I felt the ambiguity was not worth the price of having to explain to other people what was going on. . . . Iconoclastic rebellion didn't seem important any more." When he proposed, his intended's initial answer was "Yes, but why bother?" She put the ring on her right hand, in "avoidance of convention." But "[o]ver the ensuing weeks, her feelings changed. 'I thought I would never care about it, but I kind of like my $8 ring,' she admitted." Eric V. Copage, *Weddings/Celebrations/Vows: Madeline Schwartzman and Jeffrey Miles*, N.Y. TIMES, Feb. 2, 2003, § 9, at 9.

2. A Commitment Alternative for Same-Sex Couples

The common law marriage doctrine can capture most of the cases that conscription's proponents point to when arguing that couples who fail to marry need conscription. But whether or not modified by estoppel principles, common law marriage cannot be utilized to affirm the marital commitments of same-sex couples because, at least for now, all American states except Massachusetts define marriage as the union of a man and a woman. The evidence suggests that the proportion of same-sex couples who would like to express marital commitments is not insignificant. In surveys of gay and lesbian individuals,

> 70% or more of respondents [report that they] prefer being in long-term monogamous relationships [and] would like to . . . be able to marry. Moreover, among gays and lesbians who identify themselves as living with partners, the vast majority (close to 90%) have made a long-term commitment to the relationship.[313]

In states that follow *Marvin*, same-sex couples can establish private rights and obligations, like those that would be produced under the ALI Principles, through a private agreement.[314] But some states have not adopted the *Marvin* doctrine.[315] Like their heterosexual counterparts, many same-sex couples will also fail to utilize the contract option.[316]

The logical reform is a state-sanctioned mechanism by which same-sex couples can register marital vows. Legislators could provide such a mechanism either by expanding the definition of marriage[317] or creating an alternate status, like that provided under Vermont's civil union law[318] and various European domestic-partnership registry options,[319] for same-sex couples. Once such a mechanism was in place, whatever common law marriage rule

313. Wald, *supra* note 218, at 313–14 (summarizing data).

314. Courts in a number of states have recognized *Marvin* claims between same-sex partners. *See, e.g.*, Whorton v. Dillingham, 248 Cal. Rptr. 405 (Ct. App. 1988); Posik v. Layton, 695 So. 2d 759 (Fla. Dist. Ct. App. 1997); Silver v. Starrett, 674 N.Y.S.2d 915 (Sup. Ct. 1998); Vasquez v. Hawthorne, 33 P.3d 735 (Wash. 2001).

315. *See* cases cited *supra* note 4.

316. *See* sources cited *supra* notes 153–154.

317. The Netherlands and Belgium have both adopted this alternative. *See Developments in the Law: The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2004 (2003). Canada may soon follow suit. *See* Clifford Krauss, *A Wedding in Canada: Gay Couples Follow a Trail North Blazed by Slaves and War Resisters*, N.Y. TIMES, Nov. 23, 2003, § 4, at 7 (reporting that Ontario and British Columbia currently allow same-sex marriages and that the Canadian Parliament is expected to make same-sex marriage legal everywhere in 2004).

318. VT. STAT. ANN. tit. 15, §§ 1201–1207 (2002).

319. *See Developments in the Law: The Law of Marriage and Family*, *supra* note 317, at 2007–08 (surveying European developments).

the state has chosen to adopt should be written so as to apply to same-sex as well as heterosexual relationships.

B. Avoiding Unjust Enrichment

The vast majority of cohabiting couples have neither made marital commitments nor sent to a partner false signals that they have done so.[320] Because these cases do not involve marital commitments that would induce reliance and resulting dependency, the law should impose no rights or obligations based purely on the fact of the relationship. Instead, courts should utilize equitable doctrines—constructive trust,[321] purchase money resulting trust,[322] or quantum meruit[323]—to avoid unjust enrichment.

As an example of how these equitable doctrines might be applied, reconsider *Friedman*. According to the record, Terri and Eliot moved to Alaska some four years after their relationship began. In Alaska, "they set about

320. *See supra* Part II.B.1.

321. As Professors Dukeminier and Johanson explain:

> [C]onstructive trust is the name given a flexible remedy imposed in a wide variety of situations to prevent unjust enrichment. When property has been acquired in such circumstances that the holder of the legal title may not in good conscience retain the beneficial interest, equity converts him into a trustee. A constructive trustee is under a duty to convey the property to another on the ground that retention of the property would be wrongful. The usual requirements for imposition of a constructive trust are: 1) a confidential or fiduciary relationship; 2) a promise, express or implied, by the transferee; 3) a transfer of property in reliance on the promise; and 4) unjust enrichment of the transferee. But the constructive trust remedy is not limited to these circumstances . . . [and] may be imposed in situations where . . . the court is moved simply by the desire to prevent unjust enrichment.

JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 585 (6th ed. 2000); *see also* 5 AUSTIN WAKEMAN SCOTT, THE LAW OF TRUSTS §§ 461–552 (William F. Fratcher ed., 4th ed. 1987). A number of courts have endorsed the use of constructive trust principles in cases involving unmarried cohabitants. *See, e.g.*, Bright v. Kuehl, 650 N.E.2d 311 (Ind. Ct. App. 1995); Watts v. Watts, 405 N.W.2d 303 (Wis. 1987).

322. A purchase money resulting trust arises when one person pays the purchase price for property and causes title to the property to be taken in the name of another person. *See* RESTATEMENT (THIRD) OF TRUSTS §§ 7–9 (2003).

323. "[C]ourts use *quantum meruit* to compensate a person for services rendered in the absence of a contract. . . . [The doctrine] lacks readily ascertainable rules for the determination of the proper amount of compensation. The technique used to determine recovery varies according to the circumstances of each case." Jeffrey L. Oakes, Comment, *Article 2298, the Codification of the Principle Forbidding Unjust Enrichment, and the Elimination of Quantum Meruit as a Basis for Recovery in Louisiana*, 56 LA. L. REV. 873, 874–75 (1996). *See generally* Judy Beckner Sloan, Quantum Meruit: *Residual Equity in Law*, 42 DEPAUL L. REV. 399 (1992) (surveying history and usage of quantum meruit doctrine). A number of courts have endorsed the use of quantum meruit principles in cases involving unmarried cohabitants. *See, e.g.*, Maglica v. Maglica, 78 Cal. Rptr. 2d 101 (Ct. App. 1998); Mason v. Rostad, 476 A.2d 662 (D.C. 1984).

homesteading, and built a cabin some twelve miles from the nearest town."[324] Both Eliot and Terri contributed to the homesteading enterprise. In Eliot's words: "'We grew our own food, built our own cabin, had no modern utilities, and scraped a living from the land as best we could.'"[325] After seven years, Eliot wanted to return to the Bay Area to attend law school:

> [Terri] was reluctant to leave the now developed homestead, [but] . . . did so on the understanding that she too would return to school. While defendant attended law school plaintiff renovated and decorated a "fixer-upper" home that they purchased from their Alaskan savings. The couple had a second child whose poor health precluded plaintiff from returning to college. Defendant completed law school and went into practice. Plaintiff began to suffer from back problems . . . .[326]

If Terri abandoned an agreed-upon plan that she return to school after Eliot finished in order to devote herself to an ill child, then she should be entitled to quantum meruit compensation for her sacrifice and the mutual benefit that sacrifice produced. Had Eliot taken title to the Alaska homestead as sole owner, Terri's contribution to its establishment and improvement would justify the imposition of a constructive trust upon the property. Had Eliot taken title to the "fixer-upper" as sole owner, Terri's renovation and decoration would also justify the imposition of a constructive trust. If the fair market value of these properties was inadequate to compensate Terri for her efforts, she should be awarded quantum meruit relief for the uncompensated portion of her work in renovating, decorating, and building the cabin, and in establishing the homestead. In sum, even without indicia of a marital agreement, a cohabitant may undertake efforts that benefit both. When those efforts are not compensated through the division of jointly held property, they should be compensated with a monetary award.

Because the aim of equitable remedies is to avoid unjust enrichment, not every unpaid effort justifies compensation. When both cohabitants make relatively equal unpaid contributions to the household, there is no unjust enrichment. When one cohabitant makes disproportionate unpaid contributions to the household but those contributions do not significantly exceed those he would have made to his own, single-person household, there is no unjust enrichment. When one cohabitant makes disproportionate contributions but those contributions fail to produce either a significant economic

324. Friedman v. Friedman, 24 Cal. Rptr. 2d 892, 901 (Ct. App. 1993).
325. *Id.*
326. *Id.* at 901–02.

benefit to the noncontributing cohabitant or a significant economic detriment to the contributing cohabitant, there is no unjust enrichment. Only when one or the other cohabitant gains a significant, unearned benefit or suffers a significant, uncompensated loss should equitable relief be available.[327]

Courts in a number of states already apply these principles in the cohabitation context. In general, they have held that compensation for unpaid services is appropriate "in those situations where it would be reasonable to expect compensation"[328] and when compensation during the relationship was inadequate.[329]

One type of case—the long-term homemaker or companion—deserves special mention. Within a familial context, homemaking services and companionship are not normally compensated. For this reason, courts have sometimes refused to grant a monetary award to the cohabitant whose contributions are of this type.[330] At times this reluctance is justifiable. Consider the case of cohabitants Impoverished and Wealthy and imagine that Wealthy urges Impoverished to give up his poorly paid employment as a sales clerk in order to enjoy, full-time, the life of Riley with her. Imagine further that Impoverished and Wealthy live the life of Riley together for three years and that Impoverished thereafter goes back to work as a sales clerk. Unless Impoverished has lost seniority or pension benefits, it is not obvious what economic loss his three-year holiday would produce. Nor is it obvious what economic gain Wealthy would have obtained from Impoverished's companionship. But if Impoverished and Wealthy remained together for, say, twenty years, it is likely that Impoverished would have great difficulty returning to the wage labor market. Worse, he would have lost many years in which a

327. *See* Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1400 (2001) ("The case law of cohabitation makes it clear that courts will not order compensation for services performed by one partner that can be characterized as part of the ordinary give-and-take of a shared life.").

328. KRAUSE ET AL., *supra* note 26, at 229. For examples of cases applying this principle, see Whorton v. Dillingham, 248 Cal. Rptr. 405 (Ct. App. 1988) (finding that services as a bodyguard, secretary, and real estate counselor are compensable); Tapley v. Tapley, 449 A.2d 1218 (N.H. 1982) (limiting recovery to business services).

329. *See, e.g.*, Tarry v. Stewart, 649 N.E.2d 1 (Ohio Ct. App. 1994) (refusing cohabitant's reimbursement claim for improvements made to house due to benefit received from living in house during relationship).

330. *See* Jones v. Daly, 176 Cal. Rptr. 130 (Ct. App. 1981); *Tapley*, 449 A.2d 1218; *see also* Robert C. Casad, *Unmarried Couples and Unjust Enrichment: From Status to Contract and Back Again?*, 77 MICH. L. REV. 47, 55 (1978) (arguing that, in cohabitation, "the parties . . . probably contemplated that the benefits they would receive . . . would offset the burdens they undertook. Neither party anticipated paying for the material benefits received from the other except by contributing to the relationship. . . . Under those assumptions, neither party's contributions could unjustly enrich the other.").

wage earner normally makes advantageous career moves, obtains further training, and accrues seniority and benefits. Impoverished's lost opportunities were induced both by Wealthy's original offer to provide support and her later failure to encourage Impoverished's reentry into the labor market. Because Impoverished's state of dependency was thus, in a very real way, caused by Wealthy, it would be fair to require Wealthy to compensate Impoverished for his lost labor-market opportunities even though Wealthy has obtained no economic benefit from Impoverished's loss.

A full set of equitable remedies for cohabitants thus should not preclude compensation for homemaking or companionship simply because these services are often uncompensated. Within a familial setting, even professional services like financial management and carpentry typically go uncompensated; outside such a setting, homemaking and full-time, on-call companionship are not obtained without pay.

A full set of equitable remedies for cohabitants has the capacity to avert unjust enrichment in cases where a cohabitant has made significant uncompensated contributions or has been induced to rely on continuation of the relationship to his or her detriment. Accordingly, we do not need conscription to avoid exploitation within cohabiting relationships or other close social relationships. Use of existing equitable remedies to remedy problems of cohabitant exploitation would also maintain a consistent approach to relational obligation and compensation.

C. The Need for a Child-Centered Cohabitation Policy

A revivified common law marriage doctrine, a method by which same-sex couples can publicly make binding commitments, a robust set of equitable remedies, and the enforcement of cohabitation contracts are adequate to ensure that the relational commitments of cohabitants are honored and that cohabitants are protected against exploitation and unjust enrichment. This package of remedies avoids obligations that do not arise from commitment or dependency-causation; it creates obligations that are firmly rooted in accepted principles of relational obligation.

This package is also consistent with the interests of children. Unlike the conscriptive alternative, there is no reason to suppose that it will encourage nonmarital childbearing; it instead signals, clearly, that marital commitment matters.

The reform package that I have outlined is only one component of a child-centered cohabitation policy, however. It cannot protect children

against either the instability associated with nonmarital childbearing[331] or the risks associated with that instability.[332]

Innovations in child support and paternity law undertaken over the past two decades represent additional useful components of such a policy, although both support and paternity law can still be improved. Despite the lower educational attainments of children in single-parent households, many states do not yet have rules permitting courts to order college support;[333] despite the proven risks associated with residential instability, few states have rules that permit a court to issue an order permitting an unmarried mother and her children to remain in a residence owned by a cohabiting father; and despite the proven risks associated with child poverty, virtually none have rules securing the child support obligation against parental death or disability.[334] Paternity establishment rates vary widely.[335] So do required levels of support.[336]

Beyond straightforward improvements in parental-obligation law, policymakers need to work toward a cohabitation policy that encourages childbearing in stable relationships but does not penalize children born in unstable relationships. This is no easy task; even the outlines of such a policy are well beyond the scope of this Article. But certainly public education about the risks of nonmarital childbearing is an important component,[337] as are income support for both single and two-parent families[338] and a child-centered focus on rules governing adult relationships.[339]

---

331. *See* sources cited *supra* notes 186, 194.

332. *See* sources cited *supra* notes 187–189, 191–193.

333. In 2002, sixteen state child support laws explicitly authorized college support orders. *See* Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: State Courts React to* Troxel, 35 FAM. L.Q. 577, 619 chart 3 (2002). Even without explicit statutory authorization, some courts have interpreted child support laws as authorizing such support. *See, e.g.*, Childers v. Childers, 575 P.2d 201 (Wash. 1978).

334. *See* KRAUSE ET AL., *supra* note 26, at 882–83.

335. *See id.* at 1044–45 (surveying reports).

336. *See* DIANE DODSON & JOAN ENTMACHER, REPORT CARD ON STATE CHILD SUPPORT GUIDELINES 25, 28–31 (1994); Laura W. Morgan & Mark C. Lino, *A Comparison of Child Support Awards Calculated Under States' Child Support Guidelines With Expenditures on Children Calculated by the U.S. Department of Agriculture*, 33 FAM. L.Q. 191, 215–18 (1999).

337. *See supra* notes 196–197.

338. There is no doubt that "affluence is good for the stability of marriages and cohabitations; poverty is not." BRAMLETT & MOSHER, *supra* note 89, at 30; *see also* Morrison & Ritualo, *supra* note 279, at 569–70 (finding that children whose mothers later cohabit were more likely to be poor prior to the initial marital disruption; 38 percent of children who later experienced unstable cohabitation had family incomes that fell below the poverty line before their parents separated or divorced, and that children whose mothers cohabited had the largest reliance on AFDC prior to disruption—21.6 percent, compared with 9.2 percent and 14.4 percent for those in the married and single-mother groups).

339. For example, in evaluating legal innovations like the various "marriage-lite" registration options now popular in Europe, *see supra* note 206, policymakers should place primary emphasis on

Adults can make conscious choices about whether and when to cohabit, marry, and bear children. Family law should honor and respect those choices. But because children, our collective future, cannot participate in the choices that may determine their childhood well-being and adult prospects, the law governing cohabitation—like paternity law, child support law, marriage law—should foster adult choices that are most likely to serve children's interests.

CONCLUSION

When the law distinguishes marriage from cohabitation, it neither condemns those who choose cohabitation nor discriminates against them. It instead recognizes and honors the individual choices that cohabitants and married couples have made. Married couples have chosen obligation; cohabitants have chosen independence. The law recognizes and honors both choices. "The ability to choose at the individual level . . . does not mean that all choices will or should have the same standing in the public sphere."[340]

The day may come when cohabitation implies marital commitment. If and when that day arrives, cohabitation should give rise to marital obligations. But that day is not here: Married and cohabiting couples tend to behave and view their relationships quite differently. Cohabitants are much less likely than married couples to share or pool resources. Cohabitation usually functions as a substitute for being single, not for being married. Cohabitation thus does not imply marital commitment. Nor, given its typically short duration and limited sharing, is it likely that cohabitation generally induces dependency or leads to unjust enrichment.

Because cohabitation neither implies commitment nor induces dependency, conscriptive cohabitation standards cannot rely on any traditional source of relational obligation. Such standards thus would introduce discordant values into our law. They would also diminish personal autonomy in relational choices and falsely signal that marriage and cohabitation are equivalent states. Because marriage is an advantageous state both for adults and for children, legal standards should foster marital commitments; by diminishing their importance, conscriptive standards fail to do so.

Conscription serves no obvious purpose grounded in history or logic or public policy. Despite rhetoric linking conscription with liberal principles of

---

the potential risks to children that might arise from legal recognition of nonmarital relationships, not the interests of adult cohabitants.

340. Seltzer, *supra* note 97, at 1263.

relational equality, conscription does not expand choice but diminishes it. Despite the tactical appeal of conscription as a means of enforcing the relational commitments of same-sex couples, conscription devalues the commitments of same-sex couples just as it devalues those of heterosexual couples. Despite the obvious link between cohabitation and nonmarital childbearing, there is no evidence that conscription could reduce either the incidence of nonmarital childbearing or its private and public costs.

Conscription is not needed to protect marital investments or avert unjust enrichment. The private commitments of cohabitants can be honored through a revivified common law marriage doctrine that narrowly targets those couples whose relationships are genuinely committed and marriage-like. Unjust enrichment can be averted through traditional equitable remedies.

For all of these reasons, policymakers should affirm the role of commitment in the imposition of marital obligation. Consent is necessary. Conscription is not.

***