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The Social Good of Marriage and
Legal Responses to Non-Marital
Cohabitation

The premise of this conference is that many influences affect family law. Some of these are theoretical, some constitutional, and others are responses to demographic variables. One of the prime demographic shifts currently affecting family law is the growing acceptance and incidence of non-marital cohabitation.

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tion. In the United States and many other countries, the law must increasingly adjust to calls for recognition of, as well as disputes arising from, domestic arrangements outside of marriage.

One difficulty with this adjustment is that the default rules typically associated with marriage may not apply to non-marital cohabitants. In many cases, the parties to such an arrangement have eschewed marriage precisely to avoid the constraints and obligations associated with it. The challenge for family law is to respond appropriately to the realities of non-marital cohabitation. This Article will first survey the current knowledge about cohabitation arrangements from social science. Second, this Article will discuss how the law treats cohabitation in terms of both legal recognition and case law surrounding disputes between cohabitants. Lastly, this Article will discuss the implications of the foregoing research for legal policy.

I

THE REALITIES OF NON-MARITAL COHABITATION

Obviously, the realities of cohabitation are complex and varied. However, a growing body of social science literature is helping to provide an emerging picture of cohabiting relationships that has important implications for the legal response to this social reality. The research vindicates the characterization of cohabitation as "not 'just like marriage' but rather an emerging social lifestyle with a different set of social meanings, which generally serves different purposes."¹

A. Demographics

The first reality is that the incidence of cohabitation has increased drastically in past decades. One local study reported a fourfold increase in nonmarital cohabitation from 1970 to 1980.² A national survey noted that "[t]he proportion of first marriages that were preceded by cohabitation increased from 8% for marriages in the late 1960s to 49% among those in 1985-1986."³ A

¹ LINDA J. WAHLE & MARGIE GALT-ANDRE, *THE CASE FOR MARRIAGE* 37 (2000).

² Patricia A. Gwartney-Gibbs, *The Institutionalization of Pre-marital Cohabitation: Estimates from Marriage License Applications, 1970 and 1980*, 48 J. MARRIAGE & FAM. 423, 432 (1986).

³ Larry L. Bumpass, *What's Happening to the Family? Innovations Between Demographic and Institutional Change*, 27 DEMOGRAPHY 483, 486 (1990) (presidential address delivered to the Population Association of America).

1995 study found that "[b]y now about half the population under age 40 have lived with an unmarried partner."⁴ A Canadian study indicates there also has been a dramatic increase in cohabitation after divorce.⁵ In terms of figures, "[t]he number of unmarried-couple households surged from 1.3 million in 1978 to 3.0 million in 1988, and to 4.9 million in 1998."⁶ The 2000 Census enumerated 5.5 million unmarried couples with 4.9 million of the opposite sex and 594,000 of the same sex (301,000 male partners and 293,000 female partners).⁷ By 1988, 33.5% of women had cohabited with an unmarried partner.⁸ In 1999, one-fourth of unmarried women between the ages of twenty-five and thirty-nine were cohabiting.⁹

Among those age sixty and older, the number cohabiting increased from 10,000 in 1960 to 100,000 in 1980 to 400,000 in 1990.¹⁰ In 1988, 8.4% of women between 15-19 years old had cohabited, 32.4% between 20-24, 45.1% between 25-29, 44.9% between 30-34, 38.4% between 35-39 and 26.3% between 40-44.¹¹ In 1992, of women born before 1928 and 1967, "the average age at first cohabitation (before age 35) is in the early 20s."¹² A Canadian study noted that "compared with married women and men, cohabiters are much more likely to be in a union in which

⁴ LARRY L. BUMPASS & JAMES A. SWEET, *COHABITATION, MARRIAGE AND UNION STABILITY: PRELIMINARY FINDINGS FROM NSFH2* 8 (Ctr. for Demography & Ecology, Univ. of Wis., Madison, NSFH Working Paper No. 65, 1995).

⁵ Zheng Wu & T.R. Balakrishnan, *Cohabitation After Marital Disruption in Canada*, 56 J. MARRIAGE & FAM. 723, 728 (1994).

⁶ Suzanne M. Bianchi & Lynne M. Casper, *American Families: 55 POPULATION BULLETIN*, Dec. 2000, at 1, 4; see also Mary Parke, *Are Married Parents Really Better for Children?*, CLASP Policy Brief (Ctr. for L. & Soc. Pol'y, Washington, D.C.), May 2003, at 4.

⁷ Evin Simmons & Martin O'Connell, *Married-Couple and Unmarried-Partner Households: 2000*, CENSUS 2000 SPECIAL REPORTS (U.S. Census Bureau, U.S. Dept. Com., Washington, D.C.), Feb. 2003, at 1.

⁸ Kathryn A. London, *Cohabitation, Marriage, Marital Dissolution, and Remarriage: United States, 1988*, ADVANCE DATA (Nat'l Ctr. for Health Stat., U.S. Dept. Health & Hum. Services, Hyattsville, Md.), Jan. 4, 1991, at 2.

⁹ LARRY BUMPASS & HELEN HEN LU, *TRENDS IN COHABITATION AND IMPACTS TOSS FOR CHILDREN'S FAMILY CONTEXTS IN THE U.S.* 7 (Ctr. for Demography & Ecology, Univ. of Wis., Madison, CDE Working Paper No. 98-15, 1999).

¹⁰ Albert Chevan, *As Cheaply As One: Cohabitation in the Older Population*, 38 J. MARRIAGE & FAM. 656, 656, 659 & tbl2, 664 (1996).

¹¹ London, *supra* note 8, at 2 tbl1.

¹² Robert Schoen & Dawn Owens, *A Further Look at First Marriages and First Unions*, in *THE CHANGING AMERICAN FAMILY: SOCIOLOGICAL AND DEMOGRAPHIC PERSPECTIVES* 112 (Scott J. South & Stewart E. Tolnay eds., 1992).

either partner is significantly older."¹³

Possibly most significant is the prevalence of children living in cohabiting households. One scholar said: "Cohabiting unions with children present are arguably one of the fastest-growing family forms in the United States."¹⁴ In 1987, the U.S. Census reported 45% of cohabiting households included children.¹⁵ Currently, about 40% of cohabiting households include children.¹⁶ The most recent U.S. Census data puts the percentage at 46%.¹⁷ Of these, one-fourth have children ten years old or older.¹⁸ Very recent growth has been dramatic: "Between 1995 and 1998, the number of unmarried couples with children increased by 15%, from 1.3 million to 1.5 million."¹⁹ Further, "[s]ix out of 10 children in cohabiting-parent families live with an informal step-parent, while four out of 10 live with both biological parents."²⁰

These households contribute greatly to the diversity in children's living arrangements. One study indicated that "two-fifths of all children will spend some time in a cohabiting family before age 16."²¹ In the late 1990s, two researchers noted that "nearly 8% of children [in unmarried mother families] reside with their parent's cohabiting partner."²² "A majority of preschoolers entering stepfamilies do so after nonmarital birth and through their parent's cohabitation with a partner."²³

¹³ Zheng, Wu et al., *Age-Heterogeneity and Canadian Unions*, SOCIAL SCIENCE RESEARCH CENTER, FALL/WINTER 2000, at 277, 289-90.

¹⁴ Wendy D. Manning, *Childbearing in Cohabiting Unions: Racial and Ethnic Differences*, 33 *FAM. PRACT. PERSP.* 217 (2001).

¹⁵ Larry L. Bumpass & James A. Sweet, *Children's Experiences in Single-Parent Families: Implications of Cohabitation and Marital Transitions*, 21 *FAM. PRACT. PERSP.* 256, 258 (1989).

¹⁶ Larry L. Bumpass et al., *The Role of Cohabitation in Declining Rates of Marriage*, 53 *J. MARITAL & FAM. PSYCH.* 913, 919 (1991); Parke, *supra* note 6, at 4.

¹⁷ Simmons & O'Connell, *supra* note 7, at 10.

¹⁸ Bumpass et al., *supra* note 16, at 919.

¹⁹ Sarah Nelson et al., *Beyond the Two-Parent Family: How Fathers Fare in Cohabiting Couple and Blended Families*, NEW EDUCATIONAL TH. INST., WASHINGTON, D.C., May 2001, at 1.

²⁰ Parke, *supra* note 6, at 4.

²¹ Bumpass & Lu, *supra* note 9, at 15.

²² Wendy D. Manning & Pamela J. Smock, *Children's Living Arrangements in Unmarried-Mother Families*, 18 *J. FAM. ISSUES* 526, 533 (1997).

²³ Larry L. Bumpass et al., *The Changing Character of Stepfamilies: Implications of Cohabitation and Nonmarital Childbearing*, 32 *DEMOGRAPHY* 425, 430 (1995).

B. Characteristics

Social science data suggests that compared to marriages, cohabiting relationships have a shorter duration.²⁴ In the United States, cohabitation is "a short-term status . . . with about half lasting a year or less, only one-sixth lasting three years, and about a tenth lasting five years or longer."²⁵ A 1991 study indicated that "[o]nly about 1 out of 10 [cohabiting couples] remain cohabiting after five years."²⁶ Many still end with marriage,²⁷ but that may be in transition as now 54% of the relationships have ended by separation at five years.²⁸ The statistics in Canada are very similar.²⁹

Research indicates that cohabiting relationships are less healthy than marriages: "They have lower relationship quality, lower stability, and a higher level of disagreements."³⁰ One study specifies that cohabitators "experience disagreement with greater frequency than their married counterparts" and "report lower levels of fairness in and happiness with their relationships relative to marrieds."³¹

A survey of research states that "cohabitation promotes greater instability in family life."³² Two researchers have noted that "[f]or many cohabitators, the idea of relatively easy exit with no well-defined responsibilities constitutes cohabitation's biggest attraction."³³ The instability of the relationships has increased in recent years.³⁴ One study notes:

²⁴ Jan E. Steis, *The Link Between Past and Present Intimate Relationships*, 14 *J. FAM. ISSUES* 236, 248 (1993); Larry L. Bumpass & James A. Sweet, *National Estimates of Cohabitation*, 26 *DEMOGRAPHY* 615, 621 (1989). ("[U]nions begun by cohabitation are almost twice as likely to dissolve within 10 years, compared with all first marriages: 57 percent compared with 30 percent.")

²⁵ Bumpass & Lu, *supra* note 9, at 10; see also Schoen & Owens, *supra* note 12, at 112.

²⁶ Bumpass et al., *supra* note 16, at 919.

²⁷ Bumpass & Sweet, *supra* note 24, at 621.

²⁸ Bumpass & Lu, *supra* note 9, at 10.

²⁹ Zheng, Wu & T.R. Balakrishnan, *Dissolution of Prenatal Cohabitation in Canada*, 32 *DEMOGRAPHY* 521, 526, 529 (1995).

³⁰ Steis, *supra* note 24, at 521.

³¹ Susan L. Brown & Alan Booth, *Cohabitation Versus Marriage: A Comparison of Relationship Quality*, 88 *J. MARITAL & FAM. PSYCH.* 668, 674 (1996).

³² Pamela J. Smock & Sanjit Gupta, *Cohabitation in Contemporary North America* 6 (presented at the Population Research Institute 2000 Family Issues Symposium), reprinted in *JUST LIVING* TOFFETTER 53 (Alan Booth & Ann C. Crouter eds., 2002).

³³ Waite & Gallagher, *supra* note 1, at 38.

³⁴ Bumpass & Lu, *supra* note 9, at 10.

[C]ohabitors are not unaware of the potential shakiness of their relationship. Almost half say that they have thought that their relationship might be in trouble in the last year—and in three of every four cohabiting relationships, at least one partner reports having thought the relationship was in trouble. Clearly, there is a good deal of uncertainty among cohabitors about the potential stability of their union.³⁵

However, one study notes that cohabitors report relationship stability about 25% higher than for married couples.³⁶

An important study concludes that "[c]ommitment in short, is lower in cohabitation than in marriage."³⁷ One aspect of this lack of commitment is related to sexual fidelity. Linda Waite and Maggie Gallagher report that cohabitors "more often define their relationship, in principle, as sexually open."³⁸ A University of Chicago study reported in *Sex in America* indicated that 75% of cohabiting individuals reported only one sex partner in the past year, with 20% reporting two to four, and 5% reporting more than five.³⁹ This compares to 94% of married individuals reporting one partner, 4% reporting two to four, and 1% reporting more than five.⁴⁰ A later study indicated that "[m]arried women were 5 times less likely to have a secondary sex partner than cohabiting women."⁴¹ Compared to married men, cohabiting men were nearly twice as likely to have a sexual relationship with a non-partner.⁴² Despite similar expectations of fidelity for married and cohabiting persons, cohabitors are reported to be more likely "to engage in infidelity" even when nontraditional personal values of the respondents are controlled for.⁴³

Other research points to additional problematic issues in co-

³⁵ Bumpass et al., *supra* note 16, at 923.

³⁶ Susan L. Brown, *The Effect of Union Type on Psychological Well-Being: Depression Among Cohabitors Versus Marrieds*, 41 J. HEALTH & SOC. BEHAV. 241 (2000).

³⁷ Steven L. Nock, *A Comparison of Marriages and Cohabiting Relationships*, 16 J. FAM. ISSUES 53, 67 (1995).

³⁸ WAITE & GALLAGHER, *supra* note 1, at 39.

³⁹ ROBERT L. MICHAEL ET AL., SEX IN AMERICA: A DEFINITIVE SURVEY 102 (1995).

⁴⁰ *Id.*

⁴¹ Renata Forste & Korat Tamir, *Sexual Exclusion Among Dating, Cohabiting, and Married Women*, 58 J. MARriage & Fam. 33, 38 (1996).

⁴² Julie Pulerwitz, Jose-Antonio Izakola-Izaca & Steven L. Gottmacker, *Extramarital Sex Among Mexican Men and Their Partners: Risk of HIV and Other Sexually Transmitted Diseases*, 91 Am. J. Pub. Hlth 1650 (2001).

⁴³ Judith Treas & Debrae Giesen, *Sexual Inhibition Among Married and Cohabiting Americans*, 62 J. MARriage & Fam. 48 (2000).

habiting relationships. For instance, a study reports that compared to married couples, men and women in cohabiting relationships experience lower levels of emotional satisfaction with sexual relations.⁴⁴ Another study indicates that cohabiting women were at greater risk than married women for sexually transmitted diseases.⁴⁵

Research suggests that cohabitors are typically not likely to pool income.⁴⁶ Cohabiting couples also benefit less from economic specialization in their relationship.⁴⁷ A review of research on same-sex couples suggests they are less likely to divide the labor of the household.⁴⁸ As a prominent book notes, cohabitors "are committed to economic independence from their partners," "typically take steps to keep their time and money separate," and "keep separate bank accounts and split living expenses."⁴⁹

An unfortunate aspect of the social science research is the elevated level of violence in cohabiting relationships. One study notes that "cohabitors report more fights or violence than do marrieds."⁵⁰ Another notes, "about one fifth of both men and women [in cohabiting relationships] were reported to have been physically aggressive with their partner in the year preceding."⁵¹ In addition, "cohabiting couples report greater tension in their relationship" than married couples and the partners are more likely to experience violence than either single or married persons.⁵² The fact that physical aggression is more common among

⁴⁴ Linda J. Waite & Kara Joyner, *Emotional Satisfaction and Physical Pleasure in Sexual Unions: Time Horizon, Sexual Behavior and Sexual Exclusivity*, 63 J. MARriage & Fam. 247 (2001).

⁴⁵ Lawrence B. Finer et al., *Sexual Partnership Patterns as a Behavioral Risk Factor for Sexually Transmitted Diseases*, 31 Fam. Persp. 228, 232 (1999).

⁴⁶ Anne E. Winkler, *Economic Decision-Making by Cohabitors: Findings Regarding Income Pooling*, 29 Applied Econ. 1079, 1089 (1997).

⁴⁷ Julie Brines & Kara Joyner, *The Ties that Bind: Principles of Cohesion in Cohabitation and Marriage*, 64 Am. Soc. Rev. 333, 350-351 (1999).

⁴⁸ Lisa Giddings, *But ... Who Mows the Lawn?: The Division of Labor in Same-Sex Households*, in WOMEN, FAMILY, AND WORK: WRITINGS ON THE ECONOMICS OF GENDER (Karin S. Moé ed., 2003).

⁴⁹ WAITE & GALLAGHER, *supra* note 1, 39-40.

⁵⁰ Brown & Booth, *supra* note 31, at 674.

⁵¹ Alfred DeMaris, *The Influence of Intimate Violence on Transitions Out of Cohabitation*, 63 J. MARriage & Fam. 235 (2001).

⁵² Terry Huffman et al., *Gender Differences and Factors Related to the Disposition Toward Cohabitation*, 21 Fam. Therapy 171, 182 (1994). See also Lynn Magdol et al., *Hitting Without a License: Testing Explanations for Differences in Partner Abuse Between Young Adult Daters and Cohabitors*, 60 J. MARriage & Fam. 41, 51 (1998) ("[Y]oung adult cohabitors exceed daters in rates and levels of partner abuse").

cohabiting couples is not necessarily a function of social isolation, but rather a lack of social control or normative expectations and possibly lack of commitment.⁵³ Additionally, "[s]pouses revealed less severe violence than cohabitators regardless of whether parental violence was present during their childhood."⁵⁴ Violence also significantly increases during the duration of the relationship in contrast to married couples.⁵⁵

The difference in rates of violence between married and cohabiting couples is significant.⁵⁶ Never-married women were more likely than married women to be victimized by an intimate (7.1 per thousand females versus 1.5 per thousand females).⁵⁷ "Depending on which measure of violence we use, cohabitators are two to three times more likely than married couples to be in a relationship involving physical violence."⁵⁸ Another study found that "approximately 14% of those who cohabit admit to hitting, shoving, or throwing things at their spouse or partner during the past year, compared to 5% of married people."⁵⁹

The increased rates of violence include increased homicide. Two researchers point out that "the rate of spousal homicide victimization is substantially higher in de facto unions than in registered unions in Canada, in England and Wales, and in New South Wales" as well as in major U.S. cities.⁶⁰ Specifically,

Married women were murdered by their partners at a rate of 13.11 women per million married women per annum, whereas cohabiting women were murdered at a much higher rate of 116.06 women per million cohabiting women per annum. Thus, cohabiting women in the United States incurred about

⁵³ Jan E. Stets, *Cohabiting and Marital Aggression: The Role of Social Isolation*, 53 J. MARRIAGE & FAM. 669, 674, 676-77 (1991).

⁵⁴ Nicky Ali Jackson, *Observational Experiences of Interpersonal Conflict and Teenage Victimization: A Comparative Study Among Spouses and Cohabiters*, 11 J. FAM. VIOLENCE 191, 200 (1996).

⁵⁵ CATHERINE T. KENSNEY & SARAH S. McLANAHAN, *Are Cohabiting Relationships More Violent Than Marriage?* 11 CTR. FOR RESEARCH ON CHILD WELL-BEING, Princeton U., Working Paper No. 01-22, 2001.

⁵⁶ "Married subjects engaged in lower rates of physical abuse than cohabitators," Jackson, *supra* note 54, at 198. "Couples living together had higher rates of physical abuse than spouses." *Id.* at 199.

⁵⁷ RONET BAYMANN, U.S. DEPARTMENT OF JUSTICE, VIOLENCE AGAINST WOMEN 6 (1994).

⁵⁸ KENSNEY & McLANAHAN, *supra* note 55, at 10.

⁵⁹ Stets, *supra* note 53, at 674.

⁶⁰ Margo I. Wilson & Martin Daly, *Who Kills Whom in Spouse Killings? On the Exceptional Sex Ratio of Spousal Homicides in the United States*, 30 CRIMINOLOGY 189, 197-98 (1992).

8.9 times the risk of murder by a partner than did married women.⁶¹

In Canada, the rate of "spousal homicide" was 61.4 per million per annum (husband killing wife) and 28.5 (wife killing husband) for "de facto unions" compared to 7.3 and 1.9 respectively for "registered unions."⁶² Thus, "[t]he uxoricide rate was elevated by a factor of 8.4 in de facto unions as compared to registered unions, and the rate of wives killing husbands was elevated by a factor of 15."⁶³

Cohabitation also has an effect on the likelihood cohabitators will marry. One study indicates that "women who cohabit are less likely to marry than women who do not cohabit."⁶⁴ Less than half of cohabitators plan to marry their partners.⁶⁵ Another study from Canada indicates that "cohabitational experiences delay the timing of first marriage by 26% for women and 19% for men."⁶⁶ Additionally, "the probability of marrying following cohabitation is declining, as is the probability of marrying a cohabiting partner."⁶⁷ In fact, an eighteen-month study of 117 married and 96 cohabiting couples showed only 30% of the cohabitators married.⁶⁸ A wider study indicated that while 60% of white cohabitators married, only 40% of black cohabitators did.⁶⁹

Research also indicates that there is "no . . . positive effect of cohabitation on marital stability."⁷⁰ In fact, cohabitation is asso-

⁶¹ Todd K. Shackelford, *Cohabitation, Marriage and Murder: Woman-Killing by Male Romantic Partners*, 27 AGGRESSIVE BEHAV. 284, 285 (2001).

⁶² Margo Wilson et al., *Uxoricide in Canada: Demographic Risk Patterns*, 35 CAN. J. CRIMINOLOGY 263, 273 (tbl.3) (1993).

⁶³ *Id.* at 272.

⁶⁴ Schoen & Owens, *supra* note 12, at 115.

⁶⁵ Bumpass et al., *supra* note 16, at 922.

⁶⁶ Zheng Ou, *Prenatal Cohabitation and the Timing of First Marriage*, 36 CAN. REV. SOC. & ANTHROPOLOGY 109 (1999).

⁶⁷ Larry L. Bumpass, *The Changing Significance of Marriage in the United States, in THE CHANGING FAMILY IN COMPARATIVE PERSPECTIVE: ASIA AND THE UNITED STATES* 62, 71 (Karen Oppenheim Mason et al. eds. 1998).

⁶⁸ John D. Cunningham & John K. Antill, *Cohabitation and Marriage: Retrospective and Predictive Comparisons*, 11 J. SOC. & PERS. RELATIONSHIPS 77, 77, 86 (1994).

⁶⁹ Wendy D. Manning & Pamela J. Smock, *Why Marry? Race and the Transition to Marriage Among Cohabiters*, 32 DEMOGRAPHY 509, 513 (1995).

⁷⁰ Lee A. Lillard, Michael J. Brien & Linda J. Waite, *Prenatal Cohabitation and Subsequent Marital Dissolution: A Matter of Self-Selection?*, 32 DEMOGRAPHY 437, 455 (1995).

dated with more instability.⁷¹ For couples who cohabit and then marry, divorce is more likely.⁷² This phenomenon is also evident in Sweden and Canada.⁷³ A Canadian study indicates that "[t]he average duration of first marriage is significantly shorter for cohabitants than for noncohabitants."⁷⁴ A survey of Canadian women concluded that women who cohabit have a 33% greater risk of divorce.⁷⁵ Also, cohabiting prior to first marriage is associated with cohabitation after divorce.⁷⁶ One study concludes that this higher likelihood of divorce is not related to self-selection.⁷⁷

The research on infidelity discussed previously extends to post-cohabitation marriage experience.⁷⁸ One study showed that pre-marital cohabitation raised the odds of marital infidelity by 39%.⁷⁹

Finally, research suggests that cohabitation before marriage is associated with "lower quality marriages and lower commitment to the institution of marriage."⁸⁰ For instance, one study found "that premarital cohabitation was related to poorer marital communication."⁸¹

A crucial question concerns the effect of parental cohabitation on children. The research here is stark: "[C]ohabiting women

enter motherhood later than married women"⁸² and have less children on average.⁸³ However, children in cohabiting households receive lower levels of support from their mothers and fathers.⁸⁴

It seems clear that children living in cohabiting households are more likely to be in poverty than children in married households and to receive public assistance.⁸⁵ One study estimates that "one in five children living in cohabiting families is poor."⁸⁶ Another study shows that "[p]overty rates of cohabiting couple parents are double those of married parents" and that 30% of cohabiting couples "stated that sometime in the past year they did not meet their essential expenses," a level "twice the 15 percent rate experienced by married parents."⁸⁷

These households are also associated with "substantial instability" in family life.⁸⁸ As one study noted, "virtually all children in cohabiting-couple families will experience rapid subsequent changes in family status."⁸⁹ One study notes that "15% of children born into cohabiting unions experience the end of their parents' union by age 1, half by age 5, and two-thirds by age 10," as compared to 4% of children born to married parents who experience parental breakup by age one and 15% by age five.⁹⁰ An-

⁷¹ Robert Schoen, *First Unions and the Stability of First Marriages*, 54 J. MAR. & FAM. 281, 283-84 (1992).

⁷² Alfred DeMaris & K. Vannabha Rao, *Premarital Cohabitation and Subsequent Marital Stability in the United States: A Reassessment*, 54 J. MAR. & FAM. 178, 187, 189 (1992); Smock & Gupta, *supra* note 32, at 7; Jay D. Teachman, *Childhood Living Arrangements and the Intergenerational Transmission of Divorce*, 64 J. MAR. & FAM. 717 (2002); Jay D. Teachman & Karen A. Polonko, *Cohabitation and Marital Stability in the United States*, 69 Soc. Forces 207, 217 (1990).

⁷³ Neil G. Bennett et al., *Commitment and the Modern Union: Assessing the Link Between Premarital Cohabitation and Subsequent Marital Stability*, 53 Am. Soc. Rev. 127, 132 (1988).

⁷⁴ Zheng Wu, *Premarital Cohabitation and Postmarital Cohabiting Union Formation*, 16 J. Fam. Issues 212, 221 (1995).

⁷⁵ David R. Hall, *Marriage as a Pure Relationship: Exploring the Link Between Premarital Cohabitation and Divorce in Canada*, 27 J. Comp. Fam. Stud. 1 (1996).

⁷⁶ Wu, *supra* note 74, at 223.

⁷⁷ David R. Hall & John Z. Zhao, *Cohabitation and Divorce in Canada: Testing the Selectivity Hypothesis*, 57 J. Marriage & Fam. 421, 428 (1995).

⁷⁸ Forste & Tinter, *supra* note 41, at 45.

⁷⁹ Treas & Giesen, *supra* note 43.

⁸⁰ Elizabeth Thomson & I go Colella, *Cohabitation and Marital Stability: Qualitative or Commitment?*, 54 J. Marriage & Fam. 259, 266 (1992).

⁸¹ Catherine L. Cohan & Stacey Klenhansu, *Toward a Greater Understanding of the Cohabitation Effect: Premarital Cohabitation and Marital Communication*, 64 J. Marriage & Fam. 180, 189 (2002).

⁸² Wendy D. Manning, *Cohabitation, Marriage, and Entry into Motherhood*, 57 J. Marriage & Fam. 191, 198 (1995).

⁸³ ROBERT I. LERMAN, URBAN INST., IMPACTS OF MARITAL STATUS AND PARENTAL PRESENCE ON THE MATERNAL HARSHNESS OF FAMILIES WITH CHILDREN 13 (2002).

⁸⁴ Elizabeth Thomson et al., *Family Structure and Child Well-Being: Economic Resources vs. Parental Behavior*, 73 Soc. Forces 221, 237 (1994).

⁸⁵ Peter D. Brandon & Larry Bumpass, *Children's Living Arrangements, Coreidence of Unmarried Fathers and Welfare Receipt*, 22 J. Fam. Issues 3, 13-14 (2001).

⁸⁶ Gregory Acs & Sami Nelson, *The Kids Are Alright? Children's Well-Being and the Rise in Cohabitation*, New Federalism (Urban Inst., Washington, D.C.), July 2002, at 2.

⁸⁷ ROBERT I. LERMAN, URBAN INST., HOW DO MARRIAGE, COHABITATION, AND SINGLE PARENTHOOD AFFECT THE MATERNAL HARSHNESS OF FAMILIES WITH CHILDREN? 20 (2002).

⁸⁸ R. KELLY RALEY & ELIZABETH WILDSMITH, UNIV. OF TEX., COHABITATION AND CHILDREN'S FAMILY INSTABILITY 14, reprinted in R. Kelly Raley & Elizabeth Wildsmith, *Cohabitation and Children's Family Instability*, J. Marriage & Fam. 210 (2004); see also Smock & Gupta, *supra* note 32, at 7.

⁸⁹ Deborah Roemke Graetz & Daniel T. Lichter, *Life Course Transitions of American Children: Parental Cohabitation, Marriage, and Single Motherhood*, 36 DEMOGRAPHY 205 (1999).

⁹⁰ WENDY D. MANNING ET AL., THE RELATIVE STABILITY OF COHABITING AND MARITAL UNIONS FOR CHILDREN 15-16 (Ctr. for Family & Demographic Research, Bowling Green State Univ., Working Paper Series 02-18, 2002).

other study suggests that three-quarters of children born into cohabiting unions will see their parents' relationship end by age sixteen.⁹¹ In addition, "[c]hildren born to cohabiting parents have 122% (2.22-1.00) higher odds of separation than children born to married parents."⁹² Of children born to cohabitants who eventually marry, 56% will experience their parent's divorce which compares to 31% for children born to married parents.⁹³ Thus, children who are born into a cohabiting household "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."⁹⁴

Research shows that "[c]hildren living with cohabiting mothers had the lowest academic ratings and highest school behavior problems."⁹⁵ For adolescents, cohabiting mothers are associated with "higher odds of having low grades than teens living with single mothers."⁹⁶ Parental cohabitation was also associated with lower math scores for white children.⁹⁷ Children in these households "are more likely to be read to infrequently."⁹⁸ A very recent study found that cohabiting fathers spend less time with their children than do married parents and are less warm in their activities.⁹⁹

One study indicates that adolescents living with their married parents "are far less likely to exhibit behavioral problems than are those living with cohabitants."¹⁰⁰ Also, "for African American children, time spent in a cohabiting family was associated with increased delinquency."¹⁰¹

⁹¹ BIRMASS & LE, *supra* note 9, at 18.
⁹² Manning et al., *supra* note 90, at 16.
⁹³ Bumpass & Sweet, *supra* note 15, at 258-59.
⁹⁴ BIRMASS & LE, *supra* note 9, at 20.
⁹⁵ Thomson et al., *supra* note 84, at 227.
⁹⁶ WENDY D. MASSINGO & KATHLEEN LAMB, PARENTING COHABITATION AND ADOLESCENT WELL-BEING (Ctr. for Family & Demographic Research, Bowling Green State Univ., Working Paper Series 02-04, 2002), reprinted in WENDY D. MASSINGO & KATHLEEN LAMB, *Adolescent Well-Being in Cohabiting, Married, and Single Parent Families*, 65 J. MARRIAGE & FAM. 876 (2003).
⁹⁷ Rachel Dunifon & Lori Kowaleski-Jones, *Who's In the House? Race Differences in Cohabitation, Single Parenthood, and Child Development*, 75 CHILD DEV. 1249, 1260 (2002).
⁹⁸ Acs & Nelson, *supra* note 86, at 3.
⁹⁹ Sandra L. Hoferth & Kermit G. Anderson, *Are All Dads Equal? Biology Versus Marriage as a Basis for Paternal Investment*, 65 J. MARRIAGE & FAM. 213, 224-225 (2003).
¹⁰⁰ Nelson et al., *supra* note 19, at 4.
¹⁰¹ Dunifon & Kowaleski-Jones, *supra* note 97, at 1258.

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Lastly and sadly, the research shows that "although mothers' boyfriends perform comparatively little child care, they are responsible for more child abuse than any other nonparental caregivers."¹⁰²

C. Attitudes

The studies indicate that cohabitants desire significantly fewer children than married couples.¹⁰³ They are also more accepting of divorce and negative about marriage. These negative attitudes increase with the duration of the relationship.¹⁰⁴ Not surprisingly, young people who cohabit are more accepting of cohabitation.¹⁰⁵ A 1986 survey indicated that those who rank (1) marriage and family life, (2) living close to relatives, and (3) success and steady work as important are less likely to cohabit. Older men who rank money as important, women who rank career success and money highly, men who rank leisure highly and those with non-traditional views of sex roles, are more likely to cohabit.¹⁰⁷

D. Other Attributes

On a series of other factors, cohabitants differ from married couples. Cohabitants suffer from depression at higher levels than married persons, a fact which the study attributes to the "poorer relationship quality" of cohabitation.¹⁰⁸ An Australian study suggested non-marital cohabitants are more susceptible to sui-

¹⁰² Leslie Margolin, *Child Abuse by Mothers' Boyfriends: Why the Overrepresentation?*, 16 CHILD ABUSE & NEGLECT 541, 548 (1992).

¹⁰³ William G. Axinn & Jennifer S. Barber, *Living Arrangements and Family Formation Attitudes in Early Adulthood*, 59 J. MARRIAGE & FAM. 595, 605 (1997); Manning, *supra* note 14, at 217; Nock, *supra* note 37, at 69; Ronald R. Rindfuss & Audrey VandenHeuvel, *Cohabitation: A Precursor to Marriage or an Alternative to Being Single?*, 16 POPULATION & DEV. REV. 703, 717 (1990).

¹⁰⁴ Axinn & Barber, *supra* note 103, at 605.
¹⁰⁵ William G. Axinn & Ariand Thornton, *Mothers, Children and Cohabitation: The Intergenerational Effects of Attitudes and Behavior*, 58 AM. SOC. REV. 233, 243 (1993).

¹⁰⁶ Martin Clarkberg, Ross M. Stolzenberg & Linda J. Waite, *Attitudes, Values and Entrance into Cohabital and Versus Marital Unions*, 74 SOC. FORCES 609 (1995), 107 *Id.*

¹⁰⁸ Brown, *supra* note 36, at 253; see also PSYCHIATRIC DISORDERS IN AMERICA, 72-73 Lee N. Robins & Darrel A. Regier eds., 1991 (noting major depression is higher for cohabitants than all but twice-divorced individuals); Colin W. Pritchard, *Depression and Smoking in Pregnancy in Scotland*, 48 J. EPIDEMIOLOGY & COMMUNITY HEALTH 377, 379 (1994) (noting that pregnant women who were unmarried but cohabitating had higher rates of "prolonged depression").

cide than married men and women.¹⁰⁹ Cohabitors suffer from more alcohol problems¹¹⁰ and cocaine use than married persons.¹¹¹ Also, studies indicate that cohabitators are less happy than married persons.¹¹²

Married couples, on average, have higher incomes than cohabitators.¹¹³ Thus, living standards are two-fold for married couples versus cohabitants.¹¹⁴ Another study notes that cohabitators have less wealth and less family economic support.¹¹⁵ Cohabitors are less likely to own a home than married couples.¹¹⁶

Compared to marriage, cohabitation decreases religiosity.¹¹⁷ Activists associated with "self-oriented" political causes are more likely to cohabit.¹¹⁸ Cohabitants choose partners based on different criteria than married persons.¹¹⁹ Similarly, cohabitation experience also affects an individual's preferences for a marriage partner.¹²⁰ Steven L. Nock reports that "[c]ohabiting individuals report poorer relationships with both mothers and fathers than married individuals."¹²¹

¹⁰⁹ I.H. Bambley, *Socioeconomic and Spatial Differentials in Mortality and Years of Compensating Surplus in New South Wales, Australia, 1985-91*, 41 *Soc. Sci. & Med.* 695-96 (1995).

¹¹⁰ Allan V. Horwitz & Helene Ruskin White, *The Relationship of Cohabitation and Mental Health: A Study of a Young Adult Cohort*, 60 *J. MARRIAGE & FAM.* 505-509 (1998).

¹¹¹ Barbara L. Braun et al., *Cocaine Use and Characteristics of Young Adult Users from 1987 to 1992: The CARDIA Study*, 86 *Am. J. Pub. Health* 1736-1739 (1996).
¹¹² Nock, *supra* note 37, at 69; Steven Stack & J. Ross Eshleman, *Marital Status and Happiness: A 17-Nation Study*, 60 *J. MARRIAGE & FAM.* 527-531, 524-25 (1998).

¹¹³ ROBERT L. LEBMAN, TERESA INSTE, MARRIAGE AND ECONOMIC WELL-BEING OF FAMILIES WITH CHILDREN: A REVIEW OF THE LITERATURE 10 (2002).

¹¹⁴ ROBERT L. LEBMAN, TERESA INSTE, MARRIAGE AND ECONOMIC WELL-BEING OF FAMILIES WITH CHILDREN: A REVIEW OF THE LITERATURE 10 (2002).

¹¹⁵ Lingxin Hao, *Family Structure, Private Transfers and the Economic Well-Being of Families With Children*, 75 *Soc. Forces* 269 (1996). However, another study indicates that cohabitators are more likely to be dependent on their parents. Rindfuss & Vandenhuevel, *supra* note 103, at 717.

¹¹⁶ Rindfuss & Vandenhuevel, *supra* note 103, at 716.
¹¹⁷ Ariand Thornton et al., *Reciprocal Effects of Religiosity, Cohabitation and Marriage*, 98 *Am. J. Soc.* 628 (1992).

¹¹⁸ Brenda Wilhelm, *Changes in Cohabitation Across Cohorts: The Influence of Political Activism*, 77 *Soc. Forces* 289, 303, 304 (1998).

¹¹⁹ Robert Schoen & Robin M. Weisick, *Partner Choice in Marriage and Cohabitation*, 55 *J. MARRIAGE & FAM.* 408, 413 (1993).

¹²⁰ Steven L. Nock, *Spouse Preferences of Never-Married, Divorced and Cohabiting Americans*, 22 *J. Divorce & Remarriage* 91 (1995).

¹²¹ Nock, *supra* note 37, at 67.

E. Objections to the Studies

Clearly, these findings are not without some controversy. Or, more accurately, cohabitation is not without its defenders, the most prominent of which, the Alternatives to Marriage Project, has attacked negative assessments of the practice based on the foregoing and other similar research. The Project makes four main points: (1) the research may reflect self-selection into cohabitation so that the negatives associated with cohabitation may be attributable to the type of people who cohabit rather than the nature of the relationship;¹²² (2) since many cohabitators will marry, the comparison between cohabitation and marriage is mistaken;¹²³ (3) cohabitators act just like married couples;¹²⁴ and (4) the research only gives us an average picture of cohabitants and not an accurate view of individual couples who may provide an exception.¹²⁵

The first concern is very reasonable. It is difficult, if not impossible, for the research to establish causation, so we must generally settle for association. There is, however, some evidence that suggests causation may actually be a factor in the negative outcomes associated with cohabitation. For instance, one study which concluded that there was "selectivity of those least committed to marriage and most accepting of divorce into nonmarital cohabitation," also noted that "cohabitation experience increases the acceptance of divorce."¹²⁶ Even if it were impossible to establish causation, though, the association of cohabitation with certain attributes or outcomes is still very important in determining how the law ought to treat it. For instance, in determining

¹²² Alternatives to Marriage Project, *What You Should Know About the CDC's New Study on Marriage and Cohabitation*, at <http://www.unmarried.org/edc2002.html> (copyright 2004) ("[M]ost or all of this link [between cohabitation and divorce] is explained by differences between the kinds of people who cohabit and those who don't.")

¹²³ Alternatives to Marriage Project, *What The Case for Marriage Doesn't Want You to Know*, at <http://www.unmarried.org/case.html> (2004) ("Most cohabitators get married, usually after a fairly short period of living together.")

¹²⁴ *Id.* ("Many cohabitators are more like married couples than different from them.")

¹²⁵ *Id.* ("Just because one group looks better or worse on average tells an individual nothing about what is best for him or her.")

¹²⁶ William G. Axinn & Ariand Thornton, *The Relationship Between Cohabitation and Divorce: Selection or Casual Inference?*, 29 *Demography* 357, 368 (1992); see also Judith A. Selzer, *Families Formed Outside of Marriage*, 62 *J. MARRIAGE & FAM.* 1247 (2000) ("On balance, both the 'people who cohabit are different' and 'cohabitation changes people' interpretations are supported by recent studies.")

whether to extend domestic violence protection to unmarried couples living together, it is not important to know whether the act of living together without marriage causes violence, but rather that violence exists in these types of relationships.

In response to the second concern, it is true that many cohabiting couples marry. The question, though, is whether there are significant differences between the two statuses that justify differing legal treatment. A related concern is that couples who cohabit intending to marry may act differently than couples without the intention to marry.¹²⁷ While this may be relevant for those providing advice to couples, the subjective intent of the parties is hardly a valid basis for making legal policy, especially where there is evidence that among some cohabiting couples the parties involved may have a different understanding about the future of the relationship.¹²⁸

The third and fourth concerns are related. They rely on anecdotal information about successful cohabiting couples. The law, though, is an imperfect tool and must rely on valid generalizations. In addition, the premise of the argument that married couples and cohabiting couples are precisely the same relies on an imprecise understanding of sameness. In a strictly formal sense, cohabiting couples are unlike married couples because one group is married and the other not. It is not clear then, what is meant by saying that cohabiting couples are no different from married couples. Does it mean they act the same? This would seem to be contradicted by the evidence. Does it mean that they have the same aspirations? How could this be established and what would the ramifications of this fact be?

It seems that the real objection is not to the research but to the proposed policy responses to nonmarried cohabitation. This will be discussed in more detail below.

¹²⁷ Alternatives to Marriage Project, *What's Wrong with the Work of the National Marriage Project*, at <http://www.unmarried.org/Inprohibits.html> (copyright 2004) ("Among cohabiters who plan to marry, there is no difference in terms of relationship quality when compared to married people." (emphasis added)).

¹²⁸ Bumpass et al., *supra* note 16, at 925 ("[T]here is disagreement over whether marriage is expected in about one-fifth of the couples in which at least one partner expects marriage.").

II

LEGAL RECOGNITION OF COHABITATION

Much has been written related to the legal recognition of unmarried cohabiting couples. Thus, this Article will not attempt a comprehensive survey of all state laws and decisions related to unmarried couples. Instead, it will describe in general terms the law's interaction with nonmarital cohabitation.

A. Formal Recognition

Legal recognition of nonmarital cohabitation, as such, is still somewhat uncommon, although that may be changing.¹²⁹ One state, Vermont, has a comprehensive status, "civil unions," which applies only to same-sex couples.¹³⁰ It provides all the benefits of marriage to couples who register and solemnize their partnership.¹³¹

California allows for registration of domestic partnerships, although this status is only available for same-sex couples and opposite-sex couples over sixty-two.¹³² When the status was created, it had limited practical ramifications, providing only hospital visitation and the right to appoint a partner as an insurance beneficiary.¹³³ Since that time, the law has incrementally provided new benefits to registering couples.¹³⁴

In Hawaii, any couple not eligible to marry may register as reciprocal beneficiaries.¹³⁵ This status provides some benefits such as family leave,¹³⁶ hospital visitation,¹³⁷ health insurance

¹²⁹ There is also some indication that the private sector is increasing its recognition of unmarried couples. See Rachel Emma Silverman, *As More People Live Together, Rash of New Laws Boosts Their Rights and Perks*, WALL ST. J., Mar. 5, 2003, at D1.

¹³⁰ VT. STAT. ANN. tit. 15, § 1201-02 (West 2004).

¹³¹ *Id.* § 1204.

¹³² CAL. FAM. CODE § 297 (West 2004).

¹³³ CAL. HEALTH & SAFETY CODE § 1261 (West 2004); CAL. INS. CODE § 10121.7 (West 2004).

¹³⁴ See CAL. CIV. CODE § 1714.01 (West 2004) (standing to sue for negligent infliction of emotional distress); CAL. FAM. CODE § 9000 (West 2004) (joint adoption); CAL. GOV'T. CODE § 22867 (West 2004) (health insurance coverage for public employees); CAL. GOV'T. CODE § 31780.2 (West 2004) (retirement benefits for some county employees); CAL. LAW. CODE § 233 (West 2004) (sick leave); CAL. REV. & TAX CODE § 77021.7 (West 2004) (tax treatment as spouses); CAL. PROB. CODE § 4716 (West 2004) (medical decision making); CAL. PROB. CODE § 6401 (West 2004) (community property).

¹³⁵ HAW. REV. STAT. §§ 572C-1, 572C-3 (West 2004).

¹³⁶ *Id.* § 398-3.

coverage,¹⁴⁸ and an elective share of the partner's estate.¹⁴⁹ A similar status is also available in Vermont.¹⁵⁰

On the local level there has been a burgeoning of municipalities recognizing domestic partnerships.¹⁵¹ The laws of these municipalities tend to allow for registration by same and opposite-sex couples.¹⁵² However, their effects tend to be largely symbolic with few practical benefits associated with the status, which likely reflects the reality that marital benefits are governed by state law.¹⁵³

Recently, the American Law Institute (ALI) entered the fray, endorsing a domestic partnership status with legal implications for the end of the relationship.¹⁴¹ In the ALI's *Principles of Family Dissolution*, domestic partners are defined as "two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple."¹⁴⁵ Also, the ALI would explicitly recognize municipal or state domestic partnership status.¹⁴⁶ Those who qualify as domestic partners could claim many of the benefits associated with marriage if the relationship dissolves.¹⁴⁷ Interestingly, the ALI proposals might have an effect that would seem to be unintended by their proponents—they could provide an incentive to marry, since they would apply the relevant default rules of divorce to unmarried couples. Why not get the benefits of marriage if unmarried couples, after living together long enough, will be treated as if they had meant to marry? If adopted, the ALI regime may also put a cap on the duration of cohabitations as partners scramble to avoid liability by moving out before the length of the relationship triggers the provisions.

¹⁴¹ *Id.* § 323-2.

¹⁴⁸ *Id.* § 431:10A-601.

¹⁴⁹ *Id.* § 560:2-102.

¹⁴⁰ VT. STATE ASS. tit. 15, § 1301 (West 2004).

¹⁴¹ See William C. Duncan, *Domestic Partnership Laws in the United States: A Review and Critique*, 2001 BYT L. REV. 961 (2001).

¹⁴² *Id.* at 972.

¹⁴³ *Id.* at 974-75; see also *Arlington County v. White*, 528 S.E.2d 706 (Va. 2000), 144 PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATION, ch. 6 (2000).

¹⁴⁴ *Id.* § 6.01.

¹⁴⁵ *Id.* §§ 6.01, 6.03.

¹⁴⁶ *Id.* § 6.01.

¹⁴⁷ *Id.* § 6.01.

B. Contractual Recognition

The seminal case in this area is, of course, *Marvin v. Marvin*.¹⁴⁸ The California Supreme Court recognized a contract between parties to a cohabiting relationship for purposes of property distribution at the termination of the relationship.¹⁴⁹ The court noted the increase in couples living together without marriage and suggested that common fairness required recognition of contractual agreements between cohabiting parties.¹⁵⁰

A useful article on this topic classifies states based on their recognition of contracts between cohabiting couples.¹⁵¹ The article notes that seventeen states have court decisions that provide some recognition of express or implied contracts between unmarried cohabitants or other kinds of equitable doctrines.¹⁵² Five states recognize only express and implied agreements, and nine only express agreements.¹⁵³ Three states recognize no agreements between unmarried couples.¹⁵⁴

The state courts that have rejected contract claims between unmarried partners have relied on public policy grounds for their decisions. The Illinois Supreme Court, in rejecting the claim of an unmarried partner of fifteen years, cited public policy "disturbing" private contractual alternatives to marriage.¹⁵⁵ In Louisiana, such claims were rejected based on the state's interest in discouraging "relationships which serve to erode the cornerstone of society, i.e., the family."¹⁵⁶ In one case, the Louisiana Court of Appeals concluded:

To equate the non-marital relationship of concubinage to a marital relationship is to do violence to the very structure of our civilized society. Without the family, the State cannot exist and without marriage the family cannot exist. Thus, aside

¹⁴⁸ 557 P.2d 106 (Cal. 1976).

¹⁴⁹ *Id.* at 110.

¹⁵⁰ *Id.* at 109, 122.

¹⁵¹ Katherine C. Gordon, *The Necessity and Enforcement of Cohabitation Agreements: When Springs Will Attach and How to Prevent Them—A State Survey*, 37 BRASSERIS L.J. 245 (1998).

¹⁵² *Id.* at 248 (listing Arizona, California, Connecticut, Florida, Hawaii, Indiana, Iowa, Kansas, Missouri, Nevada, New Jersey, North Carolina, Pennsylvania, Vermont, Washington, West Virginia, and Wisconsin).

¹⁵³ *Id.* at 249-250 (listing Alaska, Maryland, Nebraska, Oregon, and Wyoming for express and implied listing Minnesota, Kentucky, Michigan, Mississippi, New Hampshire, New Mexico, New York, North Dakota, and Ohio for express only).

¹⁵⁴ *Id.* at 253 (listing Georgia, Illinois, and Louisiana).

¹⁵⁵ *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1210 (Ill. 1979).

¹⁵⁶ *Schwegmann v. Schwegmann*, 441 So. 2d 316, 324 (La. Ct. App. 1983).

from religious or moralistic values, the State is justified in encouraging the legitimate (marriage) over the illegitimate (cohabitation), for to do otherwise is to spread the seeds of destruction of the civilized society.¹⁵⁷

The Georgia Court of Appeals also cited public policy concerns in rejecting an implied contract claim between unmarried couples. The court stated: "Meretricious sexual relationships are by nature repugnant to social stability, and our courts have on sound public policy declined to reward them by allowing a money recovery therefor."¹⁵⁸

A recent Washington state case addressed the implications of these doctrines for same-sex couples.¹⁵⁹ In its decision, the Washington Supreme Court held that "[e]quitable claims are not dependent on the 'legality' of the relationship between the parties, nor are they limited by the gender or sexual orientation of the parties."¹⁶⁰ Thereafter, the court ordered a trial to determine the share of community property to which the decedent's same-sex partner might be entitled.¹⁶¹

C. Parenting Recognition

1. Custody and Visitation

Although some states still have valid laws that indicate that a parent's visitation might be restricted based on their sexual relationship with a person to whom they are not married, the trend is in the opposite direction.¹⁶² However, a recent Arkansas case upheld a finding of contempt where a mother violated a condition of custody that required that she not cohabit with her partner.¹⁶³ Though the case law on the issue is sparse, some courts have granted custody to a parent's cohabiting partner when the partner is not the child's father.¹⁶⁴ In a California case, the court

of appeals recognized the domestic partner of a child's mother as a joint parent, even though the child was not related to the partner, because of an express contract between the parties.¹⁶⁵

There has been more case law involving same-sex couples.¹⁶⁶ A review of the cases before 2001 indicated twelve states with reported decisions allowing for custody or visitation by a same-sex partner of a child's parent.¹⁶⁷ Since that time, these states have issued a number of similar decisions.¹⁶⁸ In addition, Delaware and Connecticut have joined the trend, as did the Ohio Supreme Court, where a lower court had previously decided against such a claim.¹⁶⁹

2. Adoption

The case law related to adoption by unmarried couples (what little there is) indicates that nonmarital cohabitation is not a bar to a joint adoption. A Maryland appeals court case held that a child could be adopted by his mother's fiancé, reversing the trial court's decision that the couple must be married one year before the adoption could be granted.¹⁷⁰ Also, a recent New York case found that cohabiting couples had standing to jointly adopt a child biologically unrelated to both.¹⁷¹

Same-sex couples have been granted the right to jointly adopt children through court decisions in at least nine states.¹⁷² However, Nebraska rejected these second-parent adoptions in

¹⁶⁵ *Dunkin v. Boskey*, 82 Cal. App. 4th 171 (2000).

¹⁶⁶ The potential complexity of these cases is illustrated by a recent case granting parental rights to the sperm donor of a child being raised by a same-sex couple.

¹⁶⁷ *Tripp v. Hincley*, 736 N.Y.S.2d 506 (N.Y. App. Div. 2002).

¹⁶⁸ William C. Duncan, "Don't Ever Take a Fence Down": The "Functional" Definition of Family—Displacing Marriage in Family Law, 3 J.L. & Fam. Stud. 57, 65-74 (2001).

¹⁶⁹ See *A.F. v. D.L.P.*, 771 A.2d 692 (N.J. Super. Ct. App. Div. 2001); *Janis C. v. Christine T.*, 742 N.Y.S.2d 381 (N.Y. App. Div. 2002); *L.S.K. v. H.A.N.*, 813 A.2d 872 (Pa. Super. Ct. 2002).

¹⁷⁰ *Lavoie v. Machivrye*, No. FA010343228, 2002 WL 31829964 (Conn. Super. Ct. Nov. 26, 2002) (granting a same-sex partner visitation of child born to partner through artificial insemination); *Chambers v. Chambers*, No. CN00-09493, 2002 WL 1940145 (Del. Fam. Ct. Feb. 5, 2002) (concluding that a same-sex partner is a "parent" of a child born to a partner through in vitro fertilization); *In re Bonfield*, 780 N.E.2d 241 (Ohio 2002) (concluding that while partner was not "parent," the juvenile court could allow shared custody if in best interest of the child).

¹⁷¹ *In re Adoption No. 90072022/CAD*, 590 A.2d 1094 (Md. Ct. Spec. App. 1991).

¹⁷² See *In re Hart*, 806 A.2d 1179 (Del. Fam. Ct. 2001); *In re Adoption of R.B.F.*, 803 A.2d 1195 (Pa. 2002); Duncan, *supra* note 167, at 62-65.

¹⁵⁷ *Id.* at 326.

¹⁵⁸ *Long v. Martino*, 441 S.E.2d 475, 476 (Ga. Ct. App. 1994).

¹⁵⁹ *Vasquez v. Hawthorne*, 33 P.3d 735 (Wash. 2001).

¹⁶⁰ *Id.* at 737.

¹⁶¹ *Id.* at 737-38.

¹⁶² Robin Cheryl Miller, Annotation, *Resolutions on Parent's Child Visitation Rights Based on Parent's Sexual Conduct*, 99 A.L.R.5th 475 (2004).

¹⁶³ *Taylor v. Taylor*, 47 S.W.3d 222 (Ark. 2001).

¹⁶⁴ *McKinley v. McKinley*, 631 So. 2d 45 (La. Ct. App. 1994); *In re Custody of Dombrowski*, 705 P.2d 1218 (Wash. Ct. App. 1985); *Lloyd v. Lloyd*, 415 N.E.2d 1105 (Ill. App. Ct. 1980). *But see In re Nelson*, 825 A.2d 501 (N.H. 2003) (concluding that under state constitution, a parent's rights would be violated if a court were to grant custody to an unrelated cohabiting partner of the parent over the objection of the parent).

2002.¹⁷³

Recently, some statutes have addressed joint adoption by unmarried couples. Massachusetts, Vermont, and Connecticut specifically provide for joint adoptions by unmarried couples.¹⁷⁴ Utah specifically prohibits such adoptions.¹⁷⁵ Mississippi prohibits adoptions by same-sex couples.¹⁷⁶

D. Specific Recognition

There are also a number of ways in which state laws recognize cohabiting couples for specific purposes. Among the most common is the provision of domestic violence restraining orders pertaining to unmarried couples.¹⁷⁷ New York is the only state that is not clear on this point.¹⁷⁸ The few courts that have addressed

¹⁷³ *In re* Adoption of Luke, 640 N.W.2d 374 (Neb., 2002). The California Court of Appeals reached a similar conclusion, but the state supreme court reversed in 2002. Sharon S. v. Superior Court, 95 Cal. App. 4th 215 (2001), *rev'd*, 73 P.3d 554 (Cal., 2003).

¹⁷⁴ Conn. GEN. STAT. § 45b-724 (West 2004); Mass. GEN. LAWS, ANN. ch. 210, § 1 (Westlaw 2004); Vt. STAT. ANN. tit. 15, § 1-102 (West 2004).

¹⁷⁵ UTAH CODE ANN. § 78-504 (West 2004).

¹⁷⁶ MISS. CODE ANN. § 92-173 (West 2004).

¹⁷⁷ Ala. CODE § 30-5-1 (West 2004); Alaska STAT. § 1866.100 (West 2004); ARIZ. REV. STAT. § 15-2602, 15-2624 (West 2004); ARK. CODE ANN. § 9-15-201 (West 2004); CAL. FAMIL. CODE §§ 6200, 6300 (Code); CALIF. REV. STAT. § 14-4101(a) (West 2004); CONN. GEN. STAT. ANN. § 46b-58 (West 2004); DEL. CODE ANN. tit. 10, § 1045 (West 2004); D.C. CODE ANN. § 16-1005 (West 2004); FLA. STAT. ANN. § 741.30 (West 2004); GA. CODE ANN. § 19-134 (West 2004); Haw. REV. STAT. ANN. § 58-5863 (West 2004); ILLINOIS CODE § 396.804 (West 2004); IOWA REV. STAT. § 5112-A14 (West 2004); IOWA CODE § 26-26.51-26.21 (West 2004); IOWA CODE ANN. § 26-4 (West 2004); KAN. STAT. ANN. § 60-3105 (West 2004); KY. REV. STAT. ANN. § 403.75 (West 2004); LA. REV. STAT. ANN. § 46:2131 (West 2004); ME. REV. STAT. ANN. tit. 19-A, § 4901 (West 2004); MD. CODE ANN. FAMIL. LAW § 4-201 (Mass. GEN. LAWS ch. 209A, § 3 (West 2004); MICH. COMP. LAWS § 600.2950(1) (West 2004); MISS. STAT. ANN. § 315B.01 (West 2004); MISS. CODE ANN. § 92-21-1 (West 2004); MINN. STAT. ANN. § 455.010 (West 2004); MINN. CODE ANN. § 40-15-102 (West 2004); N.H. REV. STAT. § 42:92A (West 2004); N.Y. REV. STAT. ANN. § 53-017 (West 2004); N.H. REV. STAT. ANN. § 175:184 (West 2004); N.J. STAT. ANN. § 20:25-28 (West 2004); N.M. STAT. ANN. § 40-13-5 (West 2004); N.C. GEN. STAT. ANN. § 50B-2 (West 2004); N.D. CONST. CODE § 14-07-1-02 (West 2004); OHIO CODE ANN. § 2019-26, 3113-31 (West 2004); OKLA. STAT. ANN. tit. 22, § 602 (West 2004); OR. REV. STAT. § 107.710 (West 2004); 23 PA. COMP. STAT. ANN. § 6108 (West 2004); R.I. GEN. LAWS § 8-61-5 & 15-1-53 (West 2004); S.C. CODE ANN. § 16-25-10 (West 2004); S.D. CODIFIED LAWS § 25-10-3 (West 2004); TENN. CODE ANN. § 36-3-606 (West 2004); TENN. FAMIL. CODE ANN. § 85-022 (West 2004); TEX. CODE ANN. § 30-6-2 (West 2004); Vt. STAT. ANN. tit. 15, § 110B; VA. CODE ANN. §§ 16-1-2531, 16-1-279-1 (West 2004); WASH. REV. CODE ANN. §§ 26-50-060, 26-50-070, 10-99-040 & 10-99-050 (West 2004); W. VA. CODE § 48-27-204 (West 2004); WIS. STAT. § 813.12 (West 2004); WYO. STAT. ANN. §§ 35-21-103 (West 2004).

¹⁷⁸ N.Y. FAMIL. CT. § 853.

the issue have concluded that these laws cover same-sex couples.¹⁷⁹

A number of states recognize cohabitants for a few discrete benefits. One of the more important court decisions on the matter, *Braschi v. Stahl Associates*, held that a same-sex partner of a decedent should be able to avoid eviction from a rent-controlled apartment.¹⁸⁰ A few states allow domestic partners to make anatomical gifts for a decedent partner or to control the disposition of remains.¹⁸¹ Others allow partners to make health care decisions¹⁸² or get insurance coverage for the other partner.¹⁸³ The District of Columbia allows family leave to domestic partners,¹⁸⁴ and Vermont allows crime victim compensation.¹⁸⁵

Other areas of the law are more mixed. Courts have routinely rejected assertions that cohabiting couples should be able to invoke the testimonial privilege afforded married couples.¹⁸⁶ Although a large majority of decisions considering the issue have held that unmarried cohabitants cannot establish claims for loss of consortium, a handful of cases have allowed cohabitants to recover.¹⁸⁷

E. Liability Recognition

Not all legal recognition of cohabitants is positive, though. A few states still outlaw cohabitation per se,¹⁸⁸ through fornication

¹⁷⁹ See *Glatzer v. Fahnstich*, 625 N.E.2d 96 (Ill. App. Ct. 1993); *Ireland v. Davis*, 957 S.W.2d 310 (Ky. Ct. App. 1997); *State v. Yaden*, 692 N.E.2d 1097 (Ohio Ct. App. 1997); *State v. Hadinger*, 573 N.E.2d 1191 (Ohio Ct. App. 1991); *State v. Linner*, 665 N.E.2d 1180 (Ohio Mun. Ct. 1996).

¹⁸⁰ *Braschi v. Stahl Assoc.*, 544 N.Y.S.2d 784 (N.Y. 1989); see also *N.Y. Rent Stabilization Code* § 2520-6.

¹⁸¹ ARIZ. REV. STAT. § 36-843 (West 2004); D.C. CODE ANN. § 3-413 (West 2004).

¹⁸² ARIZ. REV. STAT. § 36-3231 (West 2004); MISS. STAT. ANN. § 145C-03 (West 2004).

¹⁸³ ME. REV. STAT. ANN. tit. 24, § 2319-A (West 2004); R.I. GEN. LAWS § 36-12-1 (West 2004).

¹⁸⁴ D.C. CODE ANN. § 32-705 (West 2004).

¹⁸⁵ Vt. STAT. ANN. tit. 13, § 5351.

¹⁸⁶ Annotation, *Communication Between Unmarried Couple Living Together as Privileged*, 4 A.L.R.4th 422 (2004).

¹⁸⁷ See *Songta A. Soehnel*, Annotation, *Action for Loss of Consortium Based on Nonmarital Cohabitation*, 40 A.L.R.4th 553 (2004); see also *Lozoya v. Sanchez*, 66 P.2d 948 (N.M. 2003).

¹⁸⁸ FLA. STAT. ch. 798.02 (Westlaw 2004); MICH. COMP. LAWS § 750.335 (Westlaw 2004); MISS. CODE ANN. § 97-29-1 (Westlaw 2004); N.C. GEN. STAT. § 14-184 (Westlaw 2004); N.D. CONST. CODE § 12-1-20-10 (Westlaw 2004); S.C. CODE ANN. § 16-15-60 (Westlaw 2004); VA. CODE ANN. § 182-345 (Westlaw 2004); W. VA. CODE § 61-8-4 (Westlaw 2004).

laws,¹⁸⁹ or until recently, sodomy laws.¹⁹⁰ Additionally (although this may arguably not be a liability), cohabitation may cause the termination or reduction of alimony. One student author pointed out that fifteen states specifically allow for modification or termination of alimony awards if the former spouse cohabits.¹⁹¹

III

IMPLICATIONS OF RESEARCH FOR LEGAL POLICY

Having surveyed both relevant social science evidence and the general legal trends the question remains: What are the ramifications of what we know on what we ought to propose?

A. *Specific Implications*

In terms of recognition of express or implied contracts between cohabitants, the research would seem to have mixed implications. While the absence of formal boundaries on the relationships involved might make express contracts necessary, the problematic nature of many of the relationships would counsel caution in which specific agreements are enforced. The traditional unwillingness to enforce a contract based on the consideration of sexual relations continues to be appropriate. However, the research does not indicate any reason that express agreements could not settle thorny questions involving joint ownership of property. On the other hand, the relative independence of the parties in financial matters, combined with the relatively short duration of the relationships, would seem to advise against a system of implied contract recognition since it is not clear that

¹⁸⁹ D.C. CODE ANN. § 22-1602 (West 2004); GA. CODE ANN. § 16-6-18 (West 2004); Idaho Code § 18-6603 (West 2004); 730 Ill. COMP. STAT. § 11-18 (West 2004); Mass. GEN. LAWS ch. 272, § 18 (West 2004); MISS. STAT. § 609.24 (West 2004); OREG. STAT. tit. 21, § 1120 (West 2004); TIAH CODE ANN. § 76-7-104 (West 2004); VA. CODE ANN. § 182-244 (West 2004); W. VA. CODE § 61-8-3 (West 2004); 1999 ALA. CODE § 13A-6-05 (West 2004); FLA. STAT. ch. 800.05 (West 2004); IOWA CODE § 18-6605 (West 2004); KAN. STAT. ANN. § 21-3505 (West 2004); LA. REV. STAT. ANN. § 14:89 (West 2004); MISS. CODE ANN. § 97-20-59 (West 2004); Mo. REV. STAT. § 566.090 (West 2004); N.C. GEN. STAT. § 14-177 (West 2004); OHA. STAT. tit. 21, § 886 (West 2004); S.C. CODE ANN. § 16-15-120 (West 2004); TENN. PENAL CODE ANN. § 21-06 (West 2004); TIAH CODE ANN. § 76-5-403 (West 2004); VA. CODE ANN. § 182-261 (West 2004). *But see* Lawrence v. Texas, 123 S. Ct. 2472 (2003) (invalidating Texas' sodomy law).

¹⁹⁰ Philip M. Legumeyer, *Look on the Bright Side: The Prospect of Modifying or Terminating Maintenance Obligations Upon the Homosexual Cohabitation of Your Former Spouse*, 36 BRANDENBURG L. ENV. L.J. 53, 56-58 (1997-1998).

the couples intend to establish any kind of formal relationships and may in fact have different intentions regarding their decision to cohabit. A domestic relationship based solely on economic or sexual convenience would surely entail different expectations than a couple's decision to live together during a period of engagement.

When a cohabiting couple parents a child, the respective legal responsibilities of each are probably addressed through legal presumptions that have nothing to do with their living arrangement. However, the questions are more difficult regarding the legal rights and responsibilities of a non-parent partner of a child's biological or adoptive parent. The social science evidence suggesting increased potential for harm to children living in these arrangements would tend to provide an argument for disfavoring the grant of legal rights to a non-parent. The law's policy of favoring the rights of parents to the exclusion of others would seem to counsel the same result.¹⁹² Adoption by unmarried couples would also seem to be appropriately treated as somewhat suspect, based on concerns for the child's well-being and development.

The negatives associated with non-marital cohabitation provide a good reason to disfavor the practice. However, it seems unlikely that laws prohibiting cohabitation can or should be strenuously enforced. While states may elect to keep such laws on the books in order to send a signal regarding the state's policy of favoring marital relations, this area of legal recognition is not likely to be a significant one in the future.¹⁹³

The general field of specific recognition of cohabitation may be most justified by the research findings summarized above. For instance, it seems clear that domestic violence protection is wholly appropriate when there seems to be a correlation between cohabitation and higher risks of violence. As a general matter, it seems to be reasonable to allow cohabiting couples to argue that the specific and unique nature of their cohabiting relationship may justify state legislatures in taking cognizance of it. However, in many circumstances, the legal defaults that would be

¹⁹² See *Froxel v. Granville*, 530 U.S. 57 (2000).

¹⁹³ Recognition for purposes of decreasing alimony may be another matter. While the instability of cohabiting relationships make it unwise to assume that those relationships will be fulfilling the same function as remarriage for alimony purposes, it hardly seems fair to allow an ex-spouse to avoid the consequences of remarriage by choosing to live with someone rather than marrying them.

established to respond to cohabitation could be more appropriately handled by recognizing explicit agreements between the parties (for example, giving a partner power-of-attorney for health care decision-making) when the intent of the parties may vary widely from couple to couple.¹⁹⁴

Most political effort has been directed to securing formal recognition of cohabitation through creation of some kind of legal status. This approach is least justified by the social science evidence. The variety, instability, and liabilities of cohabitation make it unwise for a state to favor the practice by giving it a status that would make it competitive to marriage, which is clearly a very different thing. Although the states may not be able to prevent an abandonment of marriage as the social ideal by individuals, it need not become official state policy that marriage and cohabitation are equivalent.

B. *Argument for Granting Status*

Obviously, the most controversial policy prescription is to withhold formal recognition of cohabiting couples as domestic partners or through some other kind of status. Advocates of legal recognition (particularly of a formal status) advance three major arguments in favor of recognition.

1. *Recognize Reality*

First, they point to the increasing prevalence of cohabitation and argue that the law should reflect this social reality. A newspaper report describes the authors of the *ALI Principles* as saying "they are just reflecting reality."¹⁹⁵ In an ad hominem attack on opponents of legal recognition of unmarried partnerships, Melanie Heath and Judith Stacey said, "Perhaps discomfort with our society's exceptional degree of racial, ethnic, and cultural diversity undergirds the enduring appeal of our relentless campaigns for everlasting family conformity."¹⁹⁶ Thus, the opposition is characterized, to Drs. Heath and Stacey, by its unwillingness to embrace the current reality of "family diversity."

¹⁹⁴ For instance, a young couple may feel more comfortable having their parents make significant medical decisions on their behalf, rather than a partner they are not sure they will live with for long.

¹⁹⁵ Karen S. Paterson, *Love and the Law: A Realist's Check*, USA TODAY, Dec. 4, 2002, at D8.

¹⁹⁶ Melanie Heath & Judith Stacey, *Transatlantic Family Transit*, 108 Am. J. Soc. 658, 667 (2002).

Similarly, the 2001 president of the Pacific Sociological Association referred to critics of cohabitation-friendly legal policies as "nostalgic."¹⁹⁷ Some even believe that legal recognition would assuage the negatives currently associated with non-marital cohabitation.

This line of thinking ignores the justification for treating marriage as a preferred status in the law. As Professor Bruce C. Halen noted:

[T]he commitments inherent in formal families do increase the likelihood of stability and continuity for children. Those factors are so essential to child development that they alone may justify the legal incentives and preferences traditionally given to permanent kinship units based on marriage. The same factors can justify the denial of legal protection to unstable social patterns that threaten children's developmental environment.¹⁹⁸

The preference for marriage comes not so much from an ignorance of current behavioral practices as from a recognition of the reality that society benefits when the people who bear children, or who may bear children, are committed to those children and to each other in such a way that the probability that family stability will be realized for those children is greatly enhanced.

On a practical level, proposing that all existing relationships be granted some kind of recognition is to create a category without limitation. Would this category be limited to couples, for instance?¹⁹⁹ It could also prompt a massive influx of new controversies into the legal system. It may also defeat the expectations of the parties who deliberately chose not to marry precisely to escape the legal regulation that decision would entail.

2. *Just the Same*

Second, advocates of legal recognition of cohabiting couples argue that unmarried couples and married couples are fundamentally similar. Thus, unequal treatment is not justified. A re-

¹⁹⁷ Scott Coltrane, *Marketing the Marriage "Solution": Misplaced Simplicity in the Politics of Fatherhood*, 44 Soc. Persp. 387 (2001).

¹⁹⁸ Bruce C. Halen, *The Constitutional Status of Marriage, Kinship and Sexual Privacy: Balancing the Individual and Social Interests*, 81 Mich. L. Rev. 463, 475-76 (1983).

¹⁹⁹ Heath & Stacey, *supra* note 196, at 664 (noting research which counters "an overemphasis on partnering and parenting" with the study of relationships anchored "not in the dyad, but in more fluid, extended relations of reciprocity and care" including "nonheterosexuals" who are "coupled, uncoupled or polyamorous.").

cent article reporting census data on unmarried couple households included the claim by an activist that same-sex couples "are 'a mirror image of the majority of families in the country' who should have the same benefits and protections."²⁹⁰ Of course, this kind of claim is completely unsupported on its face since the majority of families (even if that term is defined to include unmarried couples) are made up of opposite-sex partners. Even opposite-sex cohabiting couples are not a "mirror image" to married couples since they are not legally bound together in a union that will require state intervention to dissolve.

This "sameness," then, must exist on some level of abstraction. For instance, another advocate of increased legal recognition of unmarried couples wrote: "In truth, most cohabitators describe themselves as happy, and many support each other through school and medical crises, attend family dinners and celebrate family birthdays and anniversaries together, and have clear expectations for a long future together. . . ."²⁹¹ The same author wrote: "Many cohabitators are more like married couples than different from them—we eat dinner together every night, enjoy the company of our pets, in many cases parent children together, pay the bills, and put out the recycling."²⁹² Thus, it would appear that the relevant "sameness" involves similarities in meal sharing, pet ownership, joint participation in events, etc.

While much of this is obviously just rhetorical flourish, the weakness of the comparison is evident. For instance, contrary to the characterization of the Alternatives to Marriage Project, married couples do not merely have "clear expectations for a long future together."²⁹³ In fact, rather than an "expectation," they have a legally binding commitment to a lifelong relationship that can only end with a formal divorce. Even if a divorce is easily obtained, it is still a significant barrier to dissolution. Cohabiting couples may want to stay together a long time, but there are no barriers to the exit of the parties from the relationship. As Maggie Gallagher noted: "[M]arriage's existence signals to cohabitators the limitations of their own, as well as their partner's

commitment."²⁹⁴ Similarly, while cohabiting couples may have children in their home, they must rely on state intervention to formalize their joint relationship to the child. The difference for same-sex couples is even more stark since they must rely on reproductive technology or the participation of a third party to have a child become part of the relationship.

Most importantly, the argument of sameness is forcefully rebutted by the relevant social science evidence that indicates significant differences between married couples and cohabitators in the duration of the relationships, level of commitment, tendency to experience violence, and the effect on children. Put simply, the failure to get a marriage license was likely not an inadvertent one. The tendency of many cohabitators to eventually marry underscores the fact that they understand a difference between the statuses.

3. *Functional Families*

Finally (and closely related to the "just the same" argument), advocates argue that the quality of relationships, not their form, are important. Therefore, there is no justified distinction based on family structure. This is evident in the quotes noted above. These quotes could be paraphrased to say, "Why shouldn't we favor any relationship where the parties share meals, commit to each other, and are generally mutually supportive?" This argument may even cede some differences, but would assert that these are not necessarily bad. As long as the participants are fulfilling the nebulous functions we associate with families, they should be considered families even if not all of the legal prerequisites are met. This line of thinking is illustrated in a recent legal survey that described a perceived gap between "the family in casebooks and the family in action."²⁹⁵

However, as Professor Hafen pointed out, "Impermanent rela-

²⁹⁰ Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 *LA. L. REV.* 773, 790 (2002).

²⁹¹ *Developments in the Law—The Law of Marriage and Family*, 116 *HARV. L. REV.* 1996, 2000 (2003). Although the veracity of this characterization may be challenged since casebooks seem to be increasingly sensitive to issues of family diversity, see PETER N. SWINER ET AL., *FAMILY LAW: CASES, MATERIALS AND PROBLEMS* 33, 208 (1990) (chapters on nonmarital agreements (with *Martin* featured) and same-sex marriage); WALTER WADLINGTON, *CASES AND OTHER MATERIALS ON DOMESTIC RELATIONS* 1 (1990) (a section, "Shifting Notions of Marriage and the Family," and *Martin*); WALLER O. WEYRAUCH ET AL., *CASES AND MATERIALS ON FAMILY LAW* 213, 537 (1994) (sections on non-marital cohabitation and same-sex

²⁹⁰ *Census Data Shows Same-Sex Couples*, AP ONLINE, May 13, 2003, available at 2003 WL 55771261.

²⁹¹ Alternatives to Marriage Project, *What The Case for Marriage Does Not Want You to Know*, at <http://www.unmarried.org/case.html> (2004).

²⁹² *Id.*

²⁹³ *Id.*

tionships that perform some intimate or associational functions cannot claim the same position as marriage and kinship in ensuring a political structure that limits government, stabilizes social patterns, and protects pluralistic liberty through the power of its own relational permanency.²⁰⁶ The differences in cohabitation and marriage point to significant effects of family structure on family outcomes. While the attributes identified by proponents of the functional understanding of the family (such as commitment, caring, and a shared life) are certainly necessary to a family deserving of state recognition, they are clearly not sufficient. The foundational element of marriage between a man and a woman cannot be disregarded. This element is the source of a legally binding commitment between spouses and towards the children they beget. It makes it possible for children born to the union to have a significant relationship with their mother and father.

To take an analogy from genetics, it has been noted that "the DNA of human beings and chimpanzees is 98 to 99 percent identical."²⁰⁷ While the technical difference may be slight, the implications of that difference are vast. Similarly, marriage and unmarried cohabitation may look very similar, but the differences are profound.

One of the troubling practical implications of ignoring that difference is that, to the degree the default rules for understanding the family are abandoned, increased government intervention becomes necessary to sort out family questions. A marital preference simplifies the establishment of paternity and maternity, for instance. On the other hand, nonmarital childbearing can greatly increase the complexity of determining parental rights. Similarly, the focus on the parties' intent in disputes between cohabitants is much more fact-sensitive than the standards governing marriage dissolution.

married). LESLIE J. HARVILL, *11 N.W. FAMILY LAW* 139 (1996) (a section, "Common Law Marriage and the Rights of Unmarried Cohabitants").

²⁰⁶ Haken, *supra* note 198, at 482.

²⁰⁷ James E. Crow, *Unequal By Nature: A Geneticist's Perspective on Human Differences*, DAEDALUS 82 (Winter 2002); see also Roy J. Britten, *Divergence Between Samples of Chimpanzee and Human DNA Sequences is 5%*, *Comparative Biochem. Physiol.* 99 (1980); Proceedings of the National Academy of Sciences of the United States of America 13653 (Oct. 15, 2002) (noting the correct amount of shared DNA is probably 95%).

CONCLUSION

The challenge of nonmarital cohabitation to family law is not primarily in its potential to lure marriageable persons away from marriage, though legal recognition of cohabitation clearly provides an incentive to forego marriage for some couples. Its challenge is in the abandonment of the social ideal of marriage that will be required to accord non-marital cohabitation legal status.²⁰⁸ The research on cohabitation provides strong evidence that marriage (as the bona fide social good. While for some this abandonment of marriage is the point, or at least a happy by-product, what we know about the different attributes and outcomes of non-marital cohabitation should counsel caution and hesitancy before treating all personal choices as equally deserving of legal approbation. Otherwise, we run the risk of endorsing a social evil.

²⁰⁸ Cf. GILBERT K. CHESTERON, *WHAT'S WRONG WITH THE WORLD* 6 (1910)

("The only way to discuss the social evil is to get at once to the social ideal.")