SHOULD COHABITATION MATTER IN FAMILY LAW?

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I. INTRODUCTION

The fact of whether a married or unmarried couple is cohabitating may have a significant impact on a number of family law doctrines.[1] Perhaps the best known of these doctrines involves the question of whether a party to non-marital cohabitating relationship is entitled to a share of property accumulated by the other party during the relationship upon its termination.[2] However, for married couples, whether or not they are cohabitating may have an impact on a number of important doctrines. For example, in California, if a child is born to a woman who is cohabitating with her husband, the child is "conclusively" presumed to be a child of the marriage.[3] However, if the couple is living apart at the time the child is born, the husband is merely the child's "presumed" father,[4] and must compete with others who qualify for presumed father status in order to be determined to be the child's legal father.[5] Historically, a husband could not be convicted of raping his wife.[6] However, the so-called marital exemption to the crime of rape did not apply in some jurisdictions if the couple was not cohabitating at the time of the offense.[7] Finally, in another well known family law doctrine, a court generally will not

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[1] For the most part, the law defines cohabitation as a relationship where an unmarried couple resides together while maintaining a sexual relationship. However, as will be demonstrated here, there are numerous doctrines in family law where the fact of whether a married couple resides together has legal significance. Thus, for purposes of this Article, the term cohabitation will include both married and unmarried couples that reside together and who maintain sexual relationships. Indeed, Black's Law Dictionary does not distinguish between married and unmarried couples in its definition of cohabitation. *See* BLACK'S LAW DICTIONARY 296 (9th ed. 2009) (cohabitation—"The fact or state of living together, especially as partners in life, usually with the suggestion of sexual relations."). Where relevant, this Article will distinguish between married and unmarried cohabitants.

[2] *See, e.g.,* Marvin v. Marvin, 557 P.2d 106,110 (Cal. 1976).

[3] *See, e.g.,* Michael H. v. Gerald D., 491 U.S. 110, 115 (1989); CAL. FAM. CODE § 7540 (2010). However, this "conclusive" presumption can be rebutted by scientific testing initiated within two years of the child's birth, by a narrow range of persons who have standing to request such testing. CAL. FAM. CODE § 7541 (a)-(b) (2010).

[4] CAL. FAM. CODE § 7611(a) (2010).

[5] *Id.* § 7612.

[6] *See* People v. Liberta, 474 N.E.2d 567, 573 (N.Y. 1984) (declaring the "marital rape exemption" to be unconstitutional).

[7] *Id.* at 570 (applying N.Y. law).

enforce one spouse's duty to support financially the other spouse if the married couple is cohabitating.[8]

The legal significance of cohabitation persists even after termination of a marital relationship. Thus, a former spouse may lose his or her entitlement to receive maintenance payments from the other former spouse based on the recipient's non-marital cohabitation with a new partner following dissolution of the marriage.[9]

In each of these areas, in at least some jurisdictions, the law considers the mere fact of cohabitation to be sufficient in and of itself to cause a sometimes significant alteration in the legal relationship between two parties. In some of these situations, the law treats cohabitation between unmarried partners essentially as being equivalent to marriage, thereby extending many of the same legal perquisites that come from marriage to such unmarried couples. On the other hand, for married couples, many jurisdictions seem to treat cohabitation as the "essence" of a true marriage, and strip some of the perquisites of a valid marriage from couples who are not residing together, even though their marriages have not legally been terminated.

Of course, what the law is trying to accomplish in these areas is to provide support and encouragement for certain committed relationships that public policy deems to be worthy of such support. There is substantial evidence that individuals benefit significantly from marriage,[10] and that society correspondingly benefits as well.[11] Hence the numerous legal benefits that are accorded to married couples.[12] To the extent certain non-marital cohabitating relationships are "marriage-like," perhaps it makes sense to extend the legal benefits of marriage to these relationships as well. In the case of unmarried cohabitants, the New Jersey Supreme Court has described such relationships as being "marital-type,"[13] and has identified their key features as follows:

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[8] *See* McGuire v. McGuire, 59 N.W.2d 336 (Neb. 1953).

[9] *See* UTAH CODE ANN. § 30-3-5(10) (2010) ("Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is cohabitating with another person."). The terms alimony, maintenance, and spousal support are all commonly used to refer to recurring payments made by one spouse to the other following dissolution of their marriage. These terms will be used interchangeably throughout this paper.

[10] *See, e.g.*, LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY (2000). There is disagreement however as to the varying degrees to which men and women benefit from marriage. *See, e.g.*, Margaret F. Brinig, *The Influence of* Marvin v. Marvin *on Housework During Marriage*, 76 NOTRE DAME L. REV. 1311, 1316–17 (2001).

[11] *See, e.g.*, Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 954 (Mass. 2003) (striking down Massachusetts' ban on same-sex marriage).

[12] *Id.* at 955–56.

[13] *In re* Estate of Roccamonte, 808 A.2d 838, 844 (N.J. 2002) (enforcing express promise to support the plaintiff for life against the defendant's estate).

> A marital-type relationship is . . . the undertaking of a way of life in which two people commit to each other, foregoing other liaisons and opportunities, doing for each other whatever each is capable of doing, providing companionship, and fulfilling each other's needs, financial, emotional, physical, and social, as best as they are able.[14]

Furthermore, if certain marital relationships lack these qualities, perhaps the law should similarly deny the legal perquisites of marriage to these relationships as well.

However, it would be unduly invasive, time-consuming, and expensive to analyze every individual marital and non-marital cohabitating relationship for the the features of a relationship worthy of legal recognition in order to determine the availability of the perquisites of a *bona fide* marriage to every couple. Thus, perhaps it makes sense to use the mere fact of marriage or cohabitation as a proxy for determining the presence of these factors. However, at least in the case of non-marital cohabitation, recent research reveals that the mere fact of cohabitation, in and of itself, is a poor predictor of whether a relationship actually involves the other indicia of commitment deemed to be worthy of marriage benefits.[15]

Put another way, the doctrines described above treat cohabitating relationships, both within and outside of marriage as being monolithic, and in all instances worthy of the same legal treatment as marriage. By contrast though, the studies that have been performed suggest that cohabitation is anything but monolithic. Instead, cohabitating relationships demonstrate a great deal of variability in terms of the degree to which they demonstrate the other factors of a "marital-type" relationship that the law considers important to defining a relationship that is worthy of support. Thus, it turns out that the fact of cohabitation is a poor proxy for the other factors which the law has deemed to characterize as a relationship that is worthy of legal support.

For example, rather than demonstrating a life-long commitment, cohabitation among unmarried couples frequently represents a "tryout" or "trial period" before the couple decides whether to enter into an actual marriage.[16] Moreover, particularly in the current economic climate, some unmarried couples cohabitate more for economic reasons than for providing each other with the kind of intangible support that is central to the understanding of "marital-type" relationships described above.[17] Additionally, researchers have recently identified a status described as "living apart together" (LAT), where couples share many of the emotional, social, and other commitments that are central to the above definition of a marital-type relationship, but do not cohabitate.[18]

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[14] *Id.*

[15] *See infra* Part III.

[16] *See infra* notes 169–71 and accompanying text.

[17] *See infra* note 181 and accompanying text.

[18] *See infra* notes 182–93 and accompanying text.

Moreover, cohabitation for couples prior to a first marriage often turns out to be very different in many cases from cohabitation by couples who do so after prior marriages have been terminated. Often, couples who cohabitate after each partner has already experienced a divorce deliberately keep their finances separate so as to preserve assets for children from the prior marriages.[19] Yet financial intertwinement is also often viewed as one of the key indicators of a "marital-type" relationship worthy of legal recognition.

Finally, it can no longer be said that cohabitation is the *sine qua non* of a *bona fide* marriage. Due to the rise in marriages where both spouses work, as well as technological advances in travel and communications, it is not uncommon for married partners to spend significant periods of time living apart.[20] Yet few would argue that parties to such "commuter marriages" should forfeit the legal perquisites of a valid marriage.

The following Article contends that the fact of cohabitation, in and of itself, should no longer be recognized as legally determinative in family law. Rather, cohabitation should be considered as one of many factors in determining which relationships are worthy of the legal perquisites that were traditionally afforded solely to married cohabitants. In order to make this argument, the Article explores three particular family law doctrines where some jurisdictions place legally significant weight on the mere fact of cohabitation. The first of these relates to the question of whether partners to a non-marital cohabitating relationship should be entitled to a share of property accumulated by either party during the period of cohabitation—the so-called *Marvin* doctrine.[21] The second relates to the duty of financial support between spouses, and the fact that courts will not intervene to enforce that duty while the married couple is cohabitating. The third relates to any obligation of one former spouse to make maintenance payments to the other former spouse, and the impact that subsequent non-marital cohabitation with a new partner has on any ongoing duty of the obligor spouse to continue to make payments.

These three doctrines were selected in part because they at least somewhat mirror the temporal aspect of when cohabitation may take place.[22] As stated above, many couples choose to cohabitate prior to a first marriage, or as an alternative to marriage, at a relatively young stage in their lives.[23] The *Marvin* doctrine often involves cohabitation during this phase of life.[24] The second doctrine relating to the spousal duty of support addresses cohabitation during marriage. Finally, the third

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[19] *See infra* notes 204–09.

[20] *See infra* note 194–200 and accompanying text.

[21] *See supra* note 2.

[22] In the interests of time and space, other doctrines which place legally determinative weight on the mere fact of cohabitation, including those mentioned above—parentage presumptions and the marital rape exception—will not be addressed in detail here. However, much of the following analysis would apply equally to those and other doctrines that treat the mere fact of cohabitation in a similar manner.

[23] *See supra* note 16.

[24] *See, e.g., In re* Marriage of Lindsey, 678 P.2d 328 (1984), discussed *infra* at notes 73–81.

doctrine, relating to the obligation to continue to pay spousal support following the recipient's cohabitation with a new, non-marital partner, involves cohabitation following termination of a prior marriage, which often occurs at a later stage in life. As suggested above, the empirical research done regarding cohabitation suggests that it has significantly different meaning to the parties to the relationship in each of the different situations described here, and at each different stage in life.[25] However, each of the doctrines that will be critiqued below essentially treats cohabitation as having the same meaning, regardless of the context and the stage in one's life it takes place during, and accords cohabitation the same legal significance in each instance. This Article will contend that the law should more thoroughly analyze the meaning of cohabitation at each stage in life, and in the context of each particular relationship, before determining its legal effect.

Following this introduction, this Article will review doctrines that treat cohabitation as a legally significant fact in and of itself.[26] It will begin with a discussion of the *Marvin* case, which, although it does not treat the fact of cohabitation in this manner, is foundational to understanding doctrines that emerged thereafter.[27] It will then review doctrines from other jurisdictions that do treat the fact of cohabitation as legally significant in determining whether property accumulated during a cohabitating relationship will be divided.[28] Part II will discuss the seminal case of *McGuire v. McGuire*,[29] and the doctrine that treats the fact of cohabitation as determinative as to whether the spousal duty of financial support will be enforced.[30] Also, Part II will review doctrines that place legally significant weight on the fact of cohabitation in reviewing maintenance payments following divorce.[31]

Part III of the Article will review the recent social science research that paints a picture of cohabitation that is much more multi-faceted than the previously described doctrines (which treat cohabitation in a monolithic fashion) would tend to suggest.[32] It begins with a discussion of research regarding general trends in cohabitation, including the steady increase in recent decades in the number of couples who cohabitate.[33] It goes on to discuss research regarding cohabitating relationships prior to marriage, primarily involving young people.[34] Next, this part reviews researcher's identification of a relatively new status, Living Apart Together, as an alternative to cohabitation.[35] Part III goes on to discuss research regarding "commuter marriages," where married partners live separately for

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[25] *See supra* notes 16–20.
[26] *See infra* Part II.
[27] *See infra* Part II.A.1.
[28] *See infra* Parts II.A.2 & 3.
[29] 59 N.W.2d 336 (Neb. 1953).
[30] *See infra* Part II.B.
[31] *See infra* Part II.C.
[32] *See infra* Part III.
[33] *See infra* Part III.A.
[34] *See infra* Part III.B.
[35] *See infra* Part III.C.

significant periods of time.[36] Finally, Part III reviews research regarding cohabitation following dissolution of a previous marriage.[37]

The fourth part will suggest changes to the doctrines described in the first part based upon the social science research discussed in Part III, important family law policies, and writings by scholars in the family law field.[38] The overall approach recommended will be to review cohabitating relationships based upon their facts and circumstances to determine the legal impact of the relationship on each of the doctrines here, rather than placing determinative weight on the fact of cohabitation itself. Part IV will also present examples from certain jurisdictions of doctrinal approaches that better approximate the treatment of cohabitation recommended here than the doctrines presented in Part II. Lastly, the Article will consider possible objections to the approach advocated here.[39]

A brief word is warranted about cohabitation involving same sex partners. Because few jurisdictions extend marriage rights to same sex couples, extending the legal perquisites of marriage to unmarried cohabitating couples may have particular significance for same sex couples that are otherwise denied certain fundamental legal protections. This Article does not specifically address research that has been done regarding cohabitating relationships among same sex couples.[40] However, there is no reason to believe that cohabitating relationships among same sex couples are any less diverse and multifaceted than cohabitating relationships among opposite sex couples. Indeed, there is reason to believe otherwise, as gay and lesbian couples have been forced to live outside the mainstream of American culture for the country's entire history. Thus, placing determinative legal effect on the mere fact of cohabitation makes no more sense in the context of same sex relationships than it does in the context of opposite sex ones. While the approach advocated here may thus leave same sex cohabitating couples without certain legal protections that might be available under some existing doctrines, this author contends that this result would best be addressed first, by extending marriage rights to all couples, regardless of their sexual orientation, or, at a minimum extending same sex couples the right to enter into legally recognized domestic partnerships or civil unions that would provide the same legal perquisites as marriage. However, adopting doctrines relating to cohabitation that are at odds with the underlying social science data is a poor way to compensate for the disadvantages same sex couples suffer as a result of the refusal to extend marriage rights to them.

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[36] *See infra* Part III.D.

[37] *See infra* Part III.E.

[38] *See infra* Part IV.

[39] *See infra* Part V.

[40] *See, e.g.*, Voon Chin Phua & Gayle Kaufman, *Using the Census to Profile Same Sex Cohabitation: A Research Note*, 18 POPULATION RES. & POL'Y REV. 373 (1999).

II. COHABITATION AS LEGALLY SIGNIFICANT FACT

This part of the Article discusses three family law doctrines in which certain legal consequences flow from the mere fact of cohabitation. Under the first doctrine, cohabitation between unmarried partners may either preclude the partners from having a right to a share of property accumulated by the other partner during the period of cohabitation, or may entitle the partners to such property division. Under the second doctrine, married cohabitants are precluded from obtaining judicial enforcement of one spouse's legal duty to support the other spouse financially. Under the third doctrine, a divorced spouse's obligation to pay maintenance to his or her former spouse may terminate if the recipient cohabitates with a new partner.

A. Property Rights between Unmarried Cohabitants

One of the core components of a dissolution of marriage is the court's obligation to divide property accumulated by the couple during the marriage. However, for the most part, prior to the mid-1970s, property distribution was unavailable to unmarried cohabitants for property that was not titled in their name. This should not be surprising, given that up until the mid-1960s, most states criminalized non-marital cohabitation.[41] However, as a result of changing social and cultural mores, non-marital cohabitation expanded greatly throughout the 1970s,[42] and courts were compelled to reconsider the unavailability of rights to property division between unmarried cohabitants.[43]

1. Marvin – *Non-Marital Cohabitation Does Not Bar Recognized Claims*

In the landmark case of *Marvin v. Marvin*,[44] the California Supreme Court addressed the question of what rights, if any, unmarried cohabitating partners have to property division and/or ongoing financial support upon termination of the relationship. At the time, the case was as noted for the celebrity of its participants as it was for the novelty of the legal questions involved. The defendant, Lee Marvin, was an Academy Award-winning actor, and was at the height of his popularity in 1964 when he began cohabitating with plaintiff Michelle Triola Marvin.[45] Michelle contended that at that time, the couple had an express

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[41] Margaret M. Mahoney, *Forces Shaping the Law of Cohabitation for Opposite Sex Couples*, 7 J.L. & FAM. STUD. 135, 141 (2005).

[42] *See infra* Part II.A.

[43] Mahoney, *supra* note 41, at 136; Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309, 312–13 (2008).

[44] 557 P.2d at 106.

[45] Triola legally changed her last name to Marvin even though the two did not formally marry. Elaine Woo, *Obituary – Michelle Triola Marvin dies at 75: Her Legal Fight with Ex-Lover Lee Marvin Added "Palimony" to the Language*, L.A. TIMES (Oct. 31,

agreement that while living together, they "would combine their efforts and earnings and would share equally any and all property accumulated as a result of their efforts whether individual or combined."[46] She further alleged that they agreed to hold themselves out to the world as husband and wife, and that she would abandon her budding career as a singer in order to provide homemaking services to Lee.[47] During the six years that they lived together, Lee accumulated more than $1 million in assets as a result of his film career[48] and Lee continued to support Michelle for another year and a half. However, after they split up, he ceased financial support at that time.[49]

The California court began its opinion by noting the dramatic rise in the number of couples living together without marrying in the preceding fifteen years.[50] The court then went on to reject the argument that an express agreement between unmarried cohabitants is unenforceable merely because of the fact that the parties were cohabitating at the time the agreement was entered.[51] The court distinguished non-enforceable agreements, where one party's consideration solely consisted of "meretricious" sexual services,[52] from enforceable agreements, where the consideration provided consisted of a broader range of services, including companionship and homemaker services. For similar reasons, the court concluded that implied contracts could also be enforced between unmarried cohabitants,[53] and that a variety of equitable remedies might be available to cohabitants to enforce "tacit" understandings as to their respective rights to property upon termination of their relationship.[54] Among the equitable claims specifically mentioned by the court were constructive and resulting trusts, and claims for quantum meruit for the reasonable value of services provided in the context of the relationship.[55] While the court reiterated its support for the institution of marriage, it concluded that the mores of society regarding cohabitation had changed to the point that it no longer made sense to apply the law to disadvantage the parties who choose to enter into such relationships.[56]

Marvin was a tremendously influential decision in terms of its impact on other states' laws. A majority of states have followed at least some aspects of the decision.[57] However, some commentators have questioned the practical impact of

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2009), http://www.latimes.com/news/obituaries/la-me-michelle-triola-marvin31-2009oct31,0,2805574.story.

[46] *Marvin*, 557 P.2d at 110.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.* at 109.

[51] *Id.* at 113.

[52] *Id.*

[53] *Id.* at 122.

[54] *Id.*

[55] *Id.* at 122–23.

[56] *Id.* at 122.

[57] Garrison, *supra* note 43, at 315–16 & n.27 (citing cases).

Marvin on the lives of unmarried cohabitants.[58] First, they point to the fact that following the remand from the California Supreme Court, Michelle ultimately received none of the assets acquired during her relationship with Lee.[59] So-called *Marvin* claims have proven similarly difficult to win for subsequent plaintiffs.[60] First, it is rare for cohabitants expressly to agree as to the manner in which they will account for property accumulated during the relationship upon its termination. Second, it is often difficult to imply from cohabitants' conduct a specific understanding as to the precise disposition of property should the relationship end. And similarly, the equities arising from cohabitants' relationship are often too complicated to be able to clearly identify what the equitable remedies should be when the relationship terminates. Thus, few "palimony" plaintiffs receive significant recoveries from the courts.[61]

For present purposes though, *Marvin* is consistent with the view that the mere fact of cohabitation should not, in and of itself, trigger determinant legal consequences. Indeed, *Marvin* reversed prior law that treated non-marital cohabitation as automatically barring parties from asserting claims that would otherwise be available to parties that were not living together, including breach of implied contract and equitable claims.[62] Therefore, *Marvin* is consistent with the position advocated in this Article.

2. Hewitt, Lindsey, and the ALI Principles – Cohabitation Itself Bars or Invites Property Division

As stated above, the vast majority of other jurisdictions have followed *Marvin's* lead in refusing to treat the mere fact of cohabitation as conclusive with regard to the question of whether a party to a cohabitating relationship may assert a claim to share in property accumulated by the other party during the relationship.

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[58] *See, e.g.,* Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1383 (2001); Garrison, *supra* note 43, at 314–22; Mahoney, *supra* note 41, at 137.

[59] Estin, *supra* note 58, at 1382; Garrison, *supra* note 43, at 315–16. Following a highly publicized trial, the family court judge ordered Lee to pay Michelle $104,000 in "rehabilitative alimony." Marvin v. Marvin, 176 Cal. Rptr. 555, 556 (Cal. Ct. App. 1981). However, on appeal the California Court of Appeals ruled that the question of rehabilitative alimony had not been properly raised in the pleadings and that the factual findings of the lower court did not warrant a rehabilitative award. *Id.* at 559. Therefore, it vacated the trial court's award. *Id.*

[60] Estin, *supra* note 58, at 1398; Garrison, *supra* note 43, at 317.

[61] Michelle's attorney, Marvin Mitchelson, coined the term "palimony" to characterize claims such as Michelle's, by an unmarried cohabitant to property distribution and other financial support following termination of the relationship. Estin, *supra* note 58, at 1381.

[62] *See* Vallera v. Vallera, 134 P.2d 761, 763 (Cal. 1943) (no right of unmarried cohabitant to property division based upon implied contract or equitable theories); Keene v. Keene, 371 P.2d 329, 335 (Cal. 1962) (denying resulting trust on proceeds of sale of ranch based on services contributed by owner's unmarried cohabitant), *superceded by statute as recognized in* Marvin, 557 P.2d 106 (Cal. 1976).

However, a small number of courts have chosen to depart from *Marvin*'s core holdings.[63] These courts demonstrate a fundamentally different understanding of cohabiting relationships than that expressed in *Marvin.* Perhaps the best known amongst these is the Illinois Supreme Court's decision in *Hewitt v. Hewitt.*[64] There, the couple had lived together for fifteen years since they were college students.[65] They raised three children together, and held themselves out to the world as a married couple.[66] Victoria Hewitt borrowed money from her parents to help start Paul Hewitt's pedodontia practice, and she worked in that practice as an employee in addition to managing the family home.[67] The practice was successful, and Paul accumulated a significant number of properties, some owned individually and some owned jointly. The intermediate appellate court stated that they lived "a most conventional, respectable, and ordinary family life," save for the "single flaw" of a lack of a valid marriage.[68] Upon the termination of the couple's relationship, Victoria filed suit to enforce Paul's promise "to share his life, his future, his earnings, and his property" with her, made at the beginning of their period together.[69]

The Illinois court considered the California court's decision in *Marvin*, but was unpersuaded by its reasoning. In particular, the Illinois court questioned the *Marvin* court's view that it could recognize express and implied contracts between unmarried cohabitants, and adjudicate equitable claims between them, without conferring a legal "status" upon the cohabitants' relationship itself, that would provide an automatic right to property distribution upon dissolution of the relationship.[70] The Illinois court further contended that doing so would be tantamount to reviving the doctrine of common law marriage, which had previously been abolished in Illinois, and stated that it would be the province of the legislative, rather than the judicial branch of government to adopt such a sweeping public policy change.[71] Four other states have joined Illinois in refusing to recognize any claims for financial relief based on a cohabitating relationship.[72]

At least one other state has reached the exact opposite result from *Hewitt* in addressing the allocation of property between the members of a cohabiting relationship when the relationship ends. Washington State essentially treats

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[63] *See, e.g.,* Hewitt v. Hewitt, 394 N.E.2d 1204 (Ill. 1979) (no financial claims recognized between unmarried cohabitants); Davis v. Davis, 643 So. 2d 931 (Miss. 1994) (same); Long v. Marino, 441 S.E.2d 475 (Ga. Ct. App. 1994) (same); Schwegmann v. Schwegmann, 441 So. 2d 316 (La. Ct. App. 1983) (same); Carnes v. Sheldon, 311 N.W.2d 747 (Mich. Ct. App. 1981) (same).

[64] 394 N.E.2d at 1204.

[65] *Id.* at 1205.

[66] *Id.*

[67] *Id.*

[68] *Id.* at 1206 (quoting 380 N.E.2d 454, 457 (Ill. App. 1978)).

[69] *Id.* at 1205.

[70] *Id.* at 1207.

[71] *Id.* at 1208–09.

[72] *See* Garrison, *supra* note 43, at 316 & n.29 (citing cases).

cohabitating couples the same as married couples upon termination of the relationship. The case in which the Washington Supreme Court staked out this position was *In re Marriage of Lindsey.*[73] In *Lindsey,* the couple lived together for a little bit less than two years before marrying.[74] In their dissolution proceeding, the parties disputed how property acquired prior to their marriage but during their period of cohabitation should be treated.[75] Under prior Washington law, there was a judicial presumption that the parties intended to divide property acquired during a non-marital cohabitating relationship in the manner in which it was titled.[76] In *Lindsey*, during the period in which the parties cohabitated, they built a barn/shop on farmland owned by Carl Lindsey prior to the period of cohabitation.[77] The barn burned down during the marriage.[78] Based on the previously-mentioned presumption, the trial court treated the insurance proceeds as Carl's separate property, as the proceeds were traceable to property acquired prior to the marriage, namely the barn on Carl's land.[79]

On appeal, the Washington Supreme Court rejected the "*Creasman* presumption." In its place, the court adopted a rule that would essentially give lower courts the same authority to distribute equitably property acquired during non-marital cohabitation that such courts have to distribute property acquired during marriages.[80] Thus, the court remanded the case for a determination of what interest Lana Lindsey might have had in the barn/shop.[81] While subsequent case law has perhaps narrowed the scope of the holding in *Lindsey* somewhat,[82] Washington State still goes the farthest of any U.S. jurisdiction in treating cohabitating relationships similarly to marriages for purposes of distributing property acquired during the relationship.[83]

Though the Illinois and Washington approaches reach opposite results, they share the common feature of placing legally determinative weight on the mere fact of cohabitation. In Illinois, that fact is sufficient to bar claims by an unmarried cohabitant to share in property acquired by their partner during the period of cohabitation. In Washington, that fact is sufficient to allow a court to so distribute property acquired during the period of cohabitation.

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[73] *Lindsey,* 678 P.2d at 328.

[74] *Id.* at 329.

[75] *Id.*

[76] *Id.* (quoting Creasman v. Boyle, 196 P.2d 835 (1948)).

[77] *Id.* at 332.

[78] *Id.* at 329.

[79] *Id.*

[80] *Id.* at 331.

[81] *Id.* at 332.

[82] *See* Connell v. Francisco, 898 P.2d 831 (Wash. 1995). Particularly, while Washington law allows courts to distribute property acquired prior to the marriage as part of the equitable distribution process, courts may only distribute property acquired during, but not prior to a cohabitating relationship. *Id.*

[83] Garrison, *supra* note 43, at 319.

The American Law Institute's *Principles of the Law of Family Dissolution* (*Principles*) represent the culmination of a decade's worth of effort by that well-respected institution and numerous family law scholars to develop essentially a "best practices" guide for American jurisdictions to modify family law doctrine.[84] A detailed account of the history of the *Principles*' development lies beyond the scope of the present Article. However, in relation to the issue of property distribution as between unmarried cohabitants, the *Principles* adopted an approach closest to that of Washington State of the three approaches described above. Essentially, for unmarried cohabitants, the ALI *Principles* treat property division the same as for married couples upon dissolution, unless one of the cohabitants can prove that despite living together, the couple did not "share a life together as a couple."[85] Thus, the default rule is property distribution for unmarried cohabitants.

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[84] *See, e.g.,* Marygold S. Melli, *The American Law Institute Principles of Family Dissolution, The Approximation Rule and Shared-Parenting*, 25 N. ILL. U. L. REV. 347, 347–48 (2005).

[85] PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.04 (2002) [hereinafter ALI PRINCIPLES]. *Accord* Mahoney, *supra* note 41, at 160; David Westfall, *Forcing Incidents of Marriage on Unmarried Cohabitants: The American Law Institute's Principles of Family Dissolution,* 76 NOTRE DAME L. REV. 1467 (2001). The following factors are to be considered in determining whether the couple "shared a life together":

> (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;
> (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 . . . .

3. Bergen v. Wood – *Cohabitation Is a Necessary Predicate to a* Marvin *Claim*

An important sub-issue has arisen in jurisdictions that have adopted the *Marvin* doctrine that relates to matters under consideration here. It has to do with the question of whether proof of cohabitation is a necessary element to stating a so-called *Marvin* claim. Intermediate appellate courts in California, purporting to apply *Marvin*, have held that it is.[86] In perhaps the best known such case, Gordon Wood, an American businessman met Bridget Bergen, a German actress, when he was sixty-five and she was forty-five.[87] Though the two developed an intimate relationship, they never cohabitated.[88] Bergen maintained a residence in Germany, while Wood lived in Bel-Air, California.[89] When Bergen visited Wood in California, she stayed at a hotel.[90] Bergen traveled with Wood and accompanied him to social events in conjunction with his business.[91] The relationship ended after seven years.[92] At that time, Bergen sued Wood to enforce an alleged oral agreement pursuant to which she would be Wood's "companion, his confidante, homemaker and assist [him] with his business affairs by acting as a social hostess."[93] In exchange, Wood would provide financial support for Bergen in conformity with her needs and his ability to pay.[94]

Following a trial, the lower court found in Bergen's favor, and awarded her the sum of $3500 per month for forty-eight months.[95] However, the California Court of Appeals reversed the lower court's judgment.[96] The court found cohabitation to be a necessary element in order to state a claim under *Marvin*.[97] The court reasoned that without cohabitation, the provision of domestic services that constitute the lawful consideration for a *Marvin* type agreement would not be present.[98] The court further stated that if cohabitation were not considered an

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PRINCIPLES, § 6.03(7).

[86] *See, e.g.*, Bergen v. Wood, 18 Cal. Rptr. 2d. 75, 77 (Cal. Ct. App. 1993); Taylor v. Fields, 224 Cal. Rptr. 186, 191 (Cal. Ct. App. 1986).

[87] *Bergen*, 18 Cal. Rptr. 2d at 76.

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.* at 79.

[97] *Id.* at 77.

[98] *Id.* The court correspondingly ruled that because no services were provided for in the alleged agreement beyond the sexual relationship, the agreement was unenforceable under the express terms of *Marvin*. *Id.* at 78 (citing *Marvin,* 557 P.2d at 114). The court's reasoning was the same in *Taylor*, 224 Cal. Rptr. 186.

essential element of a *Marvin* claim, "every dating relationship would have the potential for giving rise to such claims, a result no one favors."[99]

B. The Marital Duty of Financial Support

Another area of family law in which the fact of cohabitation has significant doctrinal implications relates to the duty of spouses financially to support one another.[100] While this duty is well established, it is similarly well established that a court will not judicially enforce this duty of support so long as spouses are living together.[101] By contrast, once the parties have separated physically, i.e., reside in separate households, a court may, depending on the circumstances, order one spouse to provide financial support to the other.

The seminal case is *McGuire v. McGuire*.[102] The couple had resided together on the husband's farm for thirty-three years prior to the Nebraska Supreme Court's 1953 decision regarding the wife's suit for maintenance.[103] Both parties had previously been married, and the wife had two daughters from her previous marriage who resided with the couple until the daughters were grown.[104] Prior to the marriage, the husband "had a reputation for more than ordinary frugality."[105] The family lived under conditions that have to be considered sparse even by first half of the twentieth-century Nebraska farm life standards. The house had no indoor plumbing, though it did have electricity.[106] Up until three or four years prior to the suit, the wife had been able to pay for groceries and other necessities out of money she earned by raising chickens and selling their eggs.[107] However, at the age of sixty-six by the time the court issued its decision, the wife was no longer able to do so.[108] During the three or four years prior to the suit, the husband did pay for groceries, but provided the wife virtually no additional funds for necessaries such as household furnishings and repairs or clothing, let alone for what might be considered recreational pursuits or for travel to see her adult daughters.[109] At the time of the decision, the husband had assets worth more than $200,000, and an annual income in the $8–9000 range.[110] The wife had savings of approximately $6000.

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[99] *Bergen*, 18 Cal. Rptr. 2d. at 77.

[100] *See generally* Twila L. Perry, *The "Essentials of Marriage": Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1 (2003).

[101] *Id.* at 13.

[102] 59 N.W.2d at 336.

[103] *Id.* at 337.

[104] *Id.*

[105] *Id.*

[106] *Id.*

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.* at 338.

Though the court stated that little could be said on behalf of the husband in regard to his "attitude toward his wife, according to his wealth and circumstances,"[111] it nonetheless reiterated the principle that it would not enforce the duty of support as long as the parties continued to live together.[112] It went on to state that "[t]he living standards of a family are a matter of concern to the household, and not for the courts to determine[.]"[113] "As long as the home is maintained and the parties are living as husband and wife it may be said that the husband is legally supporting his wife and the purpose of the marriage relation is being carried out."[114]

One justice filed a dissenting opinion.[115] He saw little merit in a rule that forced wives to leave the marital home in order to enforce the duty of support owed to them by law.[116]

C. Spousal Support and Non-Marital Cohabitation

A frequently encountered issue in family law relates to the question of what impact post-divorce non-marital cohabitation by the recipient of spousal support with a new partner should have on the obligor's continuing duty to pay such support. Spousal support awards are generally modifiable based upon a showing of a material change in circumstances relevant to the determination of the amount of the award.[117] Should cohabitation automatically be deemed such a material change

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[111] *Id.* at 342.
[112] *Id.*
[113] *Id.*
[114] *Id.*
[115] *Id.* at 342 (Yeager, J., dissenting).
[116] *Id.* at 344–45.
[117] *See, e.g.*, UNIF. MARRIAGE AND DIVORCE ACT (UMDA) § 316 (1998). Unlike child support awards, which are based upon numerical guidelines in all fifty states. *See* Laura W. Morgan, *Child Support Fifty Years Later,* 42 FAMILY L.Q. 365, 368 & n.11 (2008) (citing federal Family Support Act of 1988). Whereas determination of spousal support awards often involves a relatively open-ended analysis of a multiplicity of factors. *See, e.g.,* Mary Kay Kisthardt, *Rethinking Alimony: The AAML's Considerations for Calculating Alimony, Spousal Support or Maintenance,* 21 J. AM. ACAD. MATRIM. LAW, 61, 64–65 (2008). For example, the Uniform Marriage and Divorce Act provides for consideration of the following factors in determining spousal support:

> 1) the financial resources of the party seeking maintenance . . . ;
> 2) the time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;
> 3) the standard of living established during the marriage;
> 4) the duration of the marriage;
> 5) the age and the physical and emotional condition of the spouse seeking maintenance; and
> 6) the ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

in circumstances triggering review of support? Also, the vast majority of states terminate spousal support based upon remarriage of the recipient, regardless of any impact of the new marriage on the economic circumstances of the recipient.[118] In such states there is perhaps an incentive for divorcees to cohabitate with, rather than to marry their new partners, in order to avoid the loss of support, unless such cohabitation will similarly trigger a loss of support. In response to what was viewed as this type of strategic behavior, some states have enacted legislation requiring the termination of spousal support upon proof of cohabitation, as well as remarriage. Yet other states, such as Massachusetts, have no express rule.[119]

Jurisdictions seem to fall into one of three categories regarding the impact post-divorce cohabitation will have on the obligation to pay spousal support. First, some states automatically terminate spousal support on proof of cohabitation.[120] Second, some states, as well as the ALI *Principles*, create a rebuttable presumption that cohabitation is a material change in circumstances warranting review of support.[121] Finally, a third set of jurisdictions will review cohabitation no differently than it would any other fact in determining whether there has been a material change in circumstances warranting modification of support.[122] The first two approaches will be reviewed here. The third approach will be discussed in Part IV.

First, by statute Utah treats cohabitation the same as remarriage for purposes of modifying spousal support, and therefore automatically terminates support upon a finding of cohabitation.[123] Cohabitation in turn, requires a finding of: 1) a

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UMDA § 308.

[118] *See, e.g.,* Keller v. O'Brien, 652 N.E.2d 589, 591 & n.6 (Mass. 1995) ("The majority of States have statutes providing that alimony payments automatically terminate on the recipient spouse's remarriage."). Other states, such as Massachusetts, have no express rule. *Id.* In *Keller,* the Massachusetts Supreme Judicial Court adopted a rule that remarriage creates a prima facie case for termination of spousal support, that shifts the burden to the recipient spouse to show extraordinary circumstances that warrant the continuation of payments. *Id.* at 826–27. *See also* Cynthia Lee Starnes, *One More Time: Alimony, Intuition, and the Remarriage Termination Rule*, 81 IND. L.J. 971 (2006).

[119] *Keller,* 652 N.E.2d at 593 (The Massachusetts Supreme Judicial Court adopted a rule that remarriage creates a prima facie case for termination of spousal support, that shifts the burden to the recipient spouse to show extraordinary circumstances that warrant the continuation of payments).

[120] *See, e.g.,* UTAH CODE ANN. § 30-3-5(10) (West 2010); GA. CODE ANN. § 19-6-19(b) (2010); ALA. CODE § 30-2-55 (2010); 750 ILL. COMP. STAT. § 5/510(c) (2010).

[121] CAL. FAM. CODE § 4323; ALI PRINCIPLES, *supra* note 85 § 5.09.

[122] *See, e.g.,* Miller v. Miller, 892 A.2d 175 (Vt. 2005); Gilman v. Gilman, 956 P.2d 761 (Nev. 1998); Marriage of Chew, 888 P.2d 248 (Mont. 1995); Gayet v. Gayet, 456 A.2d 102 (N.J. 1983).

[123] UTAH CODE ANN. § 30-3-5(10) (West 2010) ("Any order of the court that a party pay alimony to a former spouse terminates upon establishment by the party paying alimony that the former spouse is cohabitating with another person.").

common residency; and 2) sexual contact evidencing a conjugal association.[124] In *Pendelton v. Pendelton*,[125] there was no dispute that the former wife Joyce had entered into a sexual relationship with a third party, Bill. The only question was whether they had established a common residence.[126] The appellate court reversed the trial court's finding that they had not.[127] The appellate court found that while Bill traveled a lot on business, he spent about 90% of his time while in town staying with Joyce.[128] Though Bill did lease a separate apartment for a period of time, the court rejected the notion that it was Bill's residence, given the fact that he rented the apartment only a day prior to the former husband's filing of his petition to terminate support, and Bill spent little time at the apartment.[129] Also of significance to the court was the fact that Bill had a key to Joyce's apartment, and entered it frequently even when she was not home.[130] The court also found that Bill and Joyce ate most meals together, and that Bill kept a variety of personal items at Joyce's apartment.[131] Importantly, the court did not find it to be dispositive that Bill did not appear to contribute financially to the costs of maintaining the home.[132] While sharing living expenses can be a factor that contributes to a finding of common residency, the court did not view it as a necessary prerequisite to such a finding.[133] Thus, the court terminated the former husband's obligation to pay support.[134]

In contrast to the Utah statute, which mandates the termination of support on a finding of cohabitation, the Georgia statute mandates a finding of changed circumstances on a finding of cohabitation, but not necessarily termination or reduction of the support order.[135] Moreover, Georgia's courts have interpreted the statute not to require proof that the former spouse received an economic benefit from the cohabitation.[136] The fact of a sexual relationship while sharing a dwelling is itself enough to invoke the statutory effect.[137]

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[124] Haddow v. Haddow, 707 P.2d 669, 672 (Utah 1985).

[125] 918 P.2d 159 (Utah Ct. App. 1996).

[126] *Id.* at 160.

[127] *Id.* at 161.

[128] *Id.*

[129] *Id.* at n.2.

[130] *Id.* These facts were considered to be important in *Haddow*, 888 P.2d at 673.

[131] *Pendelton*, 918 P.2d at 161.

[132] *Id.*

[133] *Id.* (citing *Haddow*, 707 P.2d at 673).

[134] *Id.*

[135] GA. CODE ANN. §19-6-19(b) (2011) ("Subsequent to a final judgment of divorce awarding periodic payment of alimony for the support of a spouse, the voluntary cohabitation of such former spouse with a third party in a meretricious relationship shall also be grounds to modify provisions made for periodic payments of permanent alimony for the support of the former spouse."). *See also* Berman v. Berman, 319 S.E.2d 846, 848 (Ga. 1984) (trial court erred in instructing jury that it had to terminate or reduce support on finding of cohabitation).

[136] Hathcock v. Hathcock, 287 S.E.2d 19, 22 (Ga. 1982).

[137] *Id.*

The California approach places somewhat less weight on the fact of cohabitation. Pursuant to California Family Code section 4323(a)(1) cohabitation creates a rebuttable presumption that the support recipient has a reduced need for continuing support.[138] Thus, the support recipient can introduce evidence of a continuing need for support that can rebut the statutory presumption. This was the case in *In re Marriage of Leib*,[139] which was the first appellate opinion to interpret the statute in its current form.[140] Prior to its amendment effective January 1, 1977, the relevant California provision had, like the Utah statute discussed above, provided for mandatory termination of spousal support in the event the spouse receiving support had been living with a person of the opposite sex and held him or herself out as the spouse of that person for a period of greater than thirty days.[141]

In *Leib*, former wife June began cohabitating with Leonard prior to entry of judgment of her divorce from Arnold.[142] Arnold had moved unsuccessfully under the prior statute to have his support payments terminated,[143] and he filed a new motion to terminate his support payments shortly after the new statute was enacted.[144] Because cohabitation was not contested, the only issue was whether June was able to rebut the presumption of a decreased need for spousal support.[145] Though the trial court ruled in June's favor, the appellate court reversed.[146] Although June submitted evidence that her monthly expenses exceeded her income (including Arnold's support payment), the court focused on the financial assistance provided to June by Leonard in the form of a home to live in (though June paid Leonard $300 per month in rent), a Ferrari to drive (including payment by Leonard of maintenance and insurance), and payment for a six-week trip to Europe.[147] The court further noted that while it respected June's decision to provide homemaker services to Leonard rather than to seek paid employment, it opined that Arnold should not have to bear the economic consequences of such a decision.[148]

The approach taken to modification of spousal support in light of cohabitation by the ALI *Principles* represents something of a hybrid between the Utah approach and that of California. First, support payments are terminated upon a showing that

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[138] CAL. FAM. CODE § 4323(a)(1) (West 2010) ("Except as otherwise agreed to by the parties in writing, there is a rebuttable presumption, affecting the burden of proof, of decreased need for spousal support if the supported party is cohabiting with a person of the opposite sex.").

[139] 145 Cal. Rptr. 763 (Cal. Ct. App. 1978).

[140] *Id.* at 766.

[141] *Id.* at 765 (quoting CAL. CIV. CODE § 4801.5 (1976)).

[142] *Id.* at 764–65.

[143] *Id.* at 765.

[144] *Id.*

[145] *Id.* at 766.

[146] *Id.*

[147] *Id.* at 768–70. The court seemed to weigh the imprecision of the testimony provided by June and Leonard regarding their finances against June in ruling on the motion. *Id.* at 768 n.8.

[148] *Id.* at 770.

the recipient of such payments has formed a "domestic partner relationship,"[149] unless a court makes written findings that terminating the award would create a "substantial injustice."[150] Further, a domestic partner relationship is presumed merely upon a showing that the support recipient has shared a common household with a third party for a durational period set by the jurisdiction adopting the model provision,[151] though the recipient can rebut the presumption by proving that the recipient and the third party "did not share life together as a couple."[152] The recipient can prove the lack of a shared life together as a couple by presenting evidence along the lines of a variety of factors set forth in the rule, including any express or implied promises between the two, commingled finances, emotional and/or physical intimacy, and reputation in the community as a couple.[153]

What the Utah, Georgia, California, and ALI approaches all share in common is the fact that a finding of cohabitation triggers automatic consequences in terms of the continuation of spousal support payments. An approach where cohabitation does not trigger such an automatic response is considered in Part IV.

III. RECENT RESEARCH

The aforementioned doctrines treat non-marital cohabitation as being monolithic. Such relationships are "marriage like," and therefore warrant the same legal treatment as marriages. Similarly, doctrines relating to marital cohabitation treat such cohabitation as essential to a bona fide marriage, and do not accord the traditional legal perquisites of marriage where married couples are not cohabitating. However, recent research suggests that cohabitation, both within and outside of marriage, is anything but monolithic. Instead, cohabitating relationships mean all sorts of different things to different people and in different contexts. In many situations, partners to a non-marital cohabitating relationship deliberately choose such a state in order to avoid certain features of a legal marriage. To treat such relationships the same as marriages for legal purposes frustrates the objectives of the parties to the relationship, without good reasons for overriding the autonomy of the participants to the relationship.[154] Similarly, to strip the perquisites of marriage from married couples who do not cohabitate fails to recognize societal changes that sometimes compel such a situation despite the strength of the marriage in other respects.

The following sections will review empirical research that is at odds with the treatment of cohabitation in the legal doctrines discussed in Part II. Because

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[149] ALI PRINCIPLES, *supra* note 85, § 5.09(1).

[150] *Id.* § 5.09(1)(b).

[151] *Id.* § 5.09(2)(c).

[152] *Id.* § 6.03(3).

[153] *Id.* § 6.03(7). See ALI PRINCIPLES, *supra* note 85 for a complete listing of the factors considered in determining whether a cohabitating couple has "shared a life together as a couple."

[154] *See, e.g.*, Elizabeth Scott, *Marriage Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 262–63; Westfall, *supra* note 85, at 1467.

previous writings on the legal treatment of cohabitation have addressed earlier studies relating to the issue,[155] the focus here will be on more recent research, in addition to studies relating to particular issues discussed herein.

A. Non-Marital Cohabitation – General Trends

In February 2010, the United States Department of Health and Human Services Centers for Disease Control and Prevention's National Center for Health Statistics released its report *Marriage and Cohabitation in the United States: A Statistical Portrait Based on Cycle 6 (2002) of the National Survey of Family Growth*.[156] This represents the most recent and comprehensive set of data regarding cohabitation and its relation to marriage formation and dissolution in America that is currently available.[157] As such, it provides a unique opportunity to test assumptions about cohabiting relationships that in turn support legal doctrines related to cohabitation.

First, the data from the National Survey are consistent with a decades' long trend in the direction of increased percentages of people who cohabitate.[158] Among survey respondents, half of the women and nearly half of the men reported having cohabitated at some point in their lives.[159] Among women and men between the ages of twenty-five and forty-four, the percentage that had ever cohabitated topped 60%.[160]

Second, the data tends to suggest that cohabiting relationships are shorter term and more ephemeral than previously assumed. The probability of a woman remaining in a cohabiting relationship for three years or more was only 31%.[161] For men it was only 24%.[162] The probabilities that a cohabiting relationship would

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[155] *See, e.g.,* Estin, *supra* note 58, at 1384; Garrison, *supra* note 43, at 313–14.

[156] U.S. DEPT. OF HEALTH AND HUMAN SERVICES, NAT'L CTR FOR HEALTH STATISTICS, MARRIAGE AND COHABITATION IN THE UNITED STATES: A STATISTICAL PORTRAIT BASED ON CYCLE 6 (2002) OF THE NATIONAL SURVEY OF FAMILY GROWTH (2010), *available at* http://www.cdc.gov/nchs/data/series/sr_23/sr23_028.pdf [hereinafter MARRIAGE AND COHABITATION IN THE UNITED STATES].

[157] *Id.* at 6 (the results are based on 12,571 survey responses from persons (7,643 women and 4,928 men) between the ages of fifteen and forty-four).

[158] Prior research had shown that the percentage of women between the ages of thirty-five and thirty-nine who had ever cohabitated jumped from 30% in 1987 to 61% in 2002. *Id.* at 4 (citing G. M. Martinez, A. Chandra, J. C. Abma, et al., U.S. DEPT OF HEALTH AND HUMAN SERVICES, NAT'L CTR FOR HEALTH STATISTICS, FERTILITY, CONTRACEPTION AND FATHERHOOD: DATA ON MEN AND WOMEN from CYCLE 6 (2002) OF THE NATIONAL SURVEY OF FAMILY GROWTH 23, 25 (2005)); L. Bumpass & Hsien-Hen Lu, *Trends in Cohabitation and Implications for Children's Family Contexts in the United States*, 54 POPULATION STUDIES 29 (2000)).

[159] MARRIAGE AND COHABITATION IN THE UNITED STATES, *supra* note 156, at 27–28, tbls.11–12. The figure was exactly 50% for women, and 48.8% for men. *Id.*

[160] *Id.*

[161] *Id.* at 13.

[162] *Id.*

remain intact for five years were significantly lower—16% for women and 13% for men. Other recent studies also support the notion that cohabiting relationships are shorter and less likely to lead to marriage than previously believed.[163]

It should be noted that there were significant differences in the survey's findings among different racial and ethnic groups.[164] Similarly, results were impacted by factors such as the level of educational attainment, the economic status, and the importance of religion to the survey participants, as well as their family backgrounds.[165] These facts are consistent with previous studies regarding cohabitating relationships.[166] However, these differences go beyond the scope of the present discussion, and do not appear to undermine the conclusions to be drawn from the aggregate data discussed above.

Earlier research suggested that cohabitation correlated negatively with marital satisfaction in contrast to couples that had not cohabitated prior to marriage.[167] However, more recent research points in the opposite direction. Thus, more recent research suggests that at least some subsets of the population that cohabitates are no more likely to experience marital dissolution than those who do not cohabitate.[168]

B. Cohabitation Before Marriage

The Cycle 6 data also support the well entrenched idea that cohabiting relationships are often a precursor to a formal marriage. Thus, for women, a year long cohabiting relationship had a 24% chance of resulting in a marriage; a three year long cohabiting relationship had a 51% chance of "ripening" into a marriage, and a five year cohabiting relationship had a 65% chance of transitioning into a marriage.[169] The results were virtually identical for men.[170] Factors such as ethnicity and economic status seem to have an impact on the likelihood of cohabitations "ripening" into marriages.[171]

Additional research further demonstrates that cohabitation is particularly prevalent among people in their twenties. In another recent study,[172] 20% of the

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[163] *See, e.g.,* Pamela Smock, Lynne Casper & Jessica Wyse, *Nonmarital Cohabitation: Current Knowledge and Future Directions for Research 10*, UNIV. MICHIGAN, POPULATION STUDIES CTR (July 2008).

[164] MARRIAGE AND COHABITATION IN THE UNITED STATES, *supra* note 156, at 9–10.

[165] *Id.* at 10.

[166] *See, e.g.,* Smock, Casper & Wyse, *supra* note 163, at 5–10, 19–20.

[167] *Id.* at 12–13.

[168] *Id.* at 13.

[169] MARRIAGE AND COHABITATION IN THE UNITED STATES, *supra* note 156, at 36, tbl.20.

[170] *Id.* at 37, tbl.21.

[171] Smock, Casper, & Wyse, *supra* note 163, at 10.

[172] *See* Mindy E. Scott, Erin Schelar, Jennifer Manlove & Carol Cui, *Young Adult Attitudes About Relationships and Marriage: Times May Have Changed, But Expectations*

respondents who were between the ages of twenty and twenty-four were cohabitating,[173] a rate more than double that in the population between ages fifteen and forty-four.[174] Moreover, only about a quarter of the respondents between the ages of twenty and twenty-four think that non-marital cohabitation is wrong.[175]

These findings are consistent with other trends regarding persons in their twenties. In general, such persons are not only marrying later,[176] but are often delaying completing higher education and putting off career decisions until later in their lives.[177] It is increasingly common for such persons to return to live with their parents after college.[178] Sociologist Jeffrey Arnett has coined the phrase "emerging adulthood" to describe this stage of life.[179] Young people are increasingly engaging in a period of discovery and exploration before they settle into their "adult" roles, which include marriage, procreation, and stability in residences, careers, etc. The trend toward increased cohabiting relationships within this group can be seen as part of this broader trend to a phase of exploration and discovery during the decade of one's twenties.[180] There is also evidence that economic factors play a significant role in young people's decisions to cohabitate.[181] Young people with limited resources may save significantly by sharing living expenses with a cohabitating partner.

C. Living Apart Together

Demographers and other social scientists have also identified a relatively new category of relationship that warrants consideration—Living Apart Together, or LAT. This category includes "committed, long-term intimate relationships in which couples do not share a home but rather maintain separate residences."[182] While the concept of LAT evolved from research in Europe, American researchers have begun to study the topic.[183] According to a recent study, 7% of U.S. women

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Remain High 2 (Child Trends 2009) (discussing results from Wave III of the National Longitudinal Study of Adolescent Health).

[173] *Id.* at 2 fig.1.

[174] MARRIAGE AND COHABITATION IN THE UNITED STATES, *supra* note 156, at 17–18 tbls.1 & 2.

[175] Scott et al., *supra* note 172, at 3 fig.3.

[176] *Id.* at 1; Jeffrey J. Arnett, *Emerging Adulthood: A Theory of Development from the Late Teens Through the Early Twenties*, 55 AM. PSYCHOLOGIST 469, 469 (2000) [hereinafter Arnett, *A Theory of Development*].

[177] *Id.* at 474.

[178] *Id.* at 471.

[179] *Id.* at 469. *See also* JEFFERY J. ARNETT, EMERGING ADULTHOOD: THE WINDING ROAD FROM LATE TEENS THROUGH THE TWENTIES (2004).

[180] Arnett, *A Theory of Development, supra* note 176, at 473.

[181] *See, e.g.*, Smock, Casper, & Wise, *supra* note 163, at 8.

[182] WENDY D. MANNING & SUSAN L. BROWN, THE DEMOGRAPHY OF UNIONS AMONG OLDER AMERICANS: 1980–PRESENT, NAT'L CTR. FAM. & MARRIAGE RES., WORKING PAPER SERIES WP-09-14, 14 (Dec. 2009).

[183] *Id.*

and 6% of U.S. men report that they are in LAT relationships.[184] These are significantly higher figures than the numbers who report that they are cohabitating according to the same study.[185]

The rise of LAT relationships is consistent with broader trends toward increased sexual relationships outside of marriage, increases in non-marital cohabitation, and high divorce rates.[186] These trends suggest that while persons' desire for intimate relationships has not decreased over time, the forms in which such relationships are conducted have broadened considerably from the formerly dominant adult life-long marriage.[187] LAT relationships are more prevalent among younger, rather than older persons,[188] and may in many cases represent an earlier step along the continuum to cohabitation and then to marriage.[189] On the other hand, there is evidence that many LAT relationships may represent an alternative way of being in a committed relationship, rather than being a phase on a continuum to cohabitation and/or marriage.[190] Thus, LAT may be particularly appropriate for older Americans who wish to enjoy the benefits of an intimate relationship while at the same time enjoying a measure of independence.[191] Persons in LAT relationships seem to enjoy a high level of emotional support from their partners, though perhaps a lower level than cohabitants and spouses enjoy from one another.[192] Recognition of LAT relationships serves further to demonstrate the breadth and diversity of intimate couple relationships.[193]

D. Commuter Marriages

Traditionally, co-residence in marriage was viewed as the norm in adult couple relationships, and living apart from one's spouse was viewed as abnormal, and understandable only in response to unusual employment situations.[194] An example might be a male service member, forced to live apart from his wife due to military assignment. However, a number of factors contributed to an increase in this phenomenon beginning in the 1970s. First, the movement toward gender equality empowered some wives to refuse to relocate along with their spouses in

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[184] Charles Q. Strohm, Judith A. Seltzer, Susan D. Cochran, & Vickie M. Mays, *"Living Apart Together" Relationships in the United States*, 21 DEMOGRAPHIC RES. 177, 190 (2009).

[185] Four percent of women and 5% of men reported cohabitating. *Id.* at 179.

[186] *Id.*

[187] *Id.*

[188] *Id.* at 191.

[189] *Id.* at 180.

[190] Simon Duncan & Miranda Phillips, *People Who Live Apart Together (LATs) – How Different Are They?*, 58 THE SOCIOLOGICAL REV. 112, 113 (2010).

[191] Strohm, Seltzer, Cochran & Mays, *supra* note 184, at 181; Manning & Brown, *supra* note 182, at 14–15.

[192] Strohm, Seltzer, Cochran & Mays, *supra* note 184, at 199 tbl.5.

[193] *Id.* at 200.

[194] Duncan & Phillips, *supra* note 190, at 114.

response to work assignments.[195] The movement toward gender equality, along with stagnating wages and other economic factors caused a vast increase in the numbers of women entering the workforce during this period as well.[196] Then, the pull of employment opportunities in different locations for each spouse led to a further increase in spouses living apart.[197] By the mid-1980s researchers had coined the phrase "commuter marriages" to refer to such relationships.[198] These trends have only increased in recent decades. Further, improvements in transportation and communications have made it much more feasible to maintain "long-distance" intimate relationships of all kinds. Thus, it makes sense that the number of commuter marriages would continue to rise. Indeed, by one recent estimate, 3% of married couples now live apart for significant periods of time.[199] This represented more than 3.5 million Americans as of 2005.[200]

E. Cohabitation After Divorce [?]

Though the above-described research demonstrates that non-marital cohabitation remains most prevalent among younger Americans, cohabitation is also increasing among older adults. Baby boomers were the first generation to cohabitate in large numbers in their younger years, so it is not surprising that as this group enters its more advanced years, more older Americans are cohabitating than ever before.[201] One study estimated that more than 1.2 million persons over the age of fifty were cohabitating.[202] A more recent study estimated that for

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[195] *See, e.g.,* Marjolijn van der Klis & Clara H. Mulder, *Beyond the Trailing Spouse: The Commuter Partnership as an Alternative to Family Migration*, 23 J. HOUS. & THE BUILT ENV'T 1, 12–13 (2008).

[196] *See generally* Kingsley Davis, *Wives and Work: The Sex Role Revolution and Its Consequences,* 10 POPULATION DEV. REV. 397 (1984).

[197] *See* van der Klis & Mulder, *supra* note 195, at 14 (describing these as "dual career commuter partnerships").

[198] *See generally* N. GERSTEL & H. GROSS, COMMUTER MARRIAGE: A STUDY OF WORK AND FAMILY (1984); F. WINFIELD, COMMUTER MARRIAGES: LIVING TOGETHER APART (1985). Later, the term "commuter partnerships" was coined to include non-married cohabitants who live apart at least part-time. *See* van der Klis & Mulder, *supra* note 195, at 2.

[199] Strohm, Seltzer, Cochran & Mays, *supra* note 184, at 182.

[200] TINA B. TESSINA, THE COMMUTER MARRIAGE: KEEP YOUR RELATIONSHIP CLOSE WHILE YOU'RE FAR APART 2 (2008).

[201] SUSAN L. BROWN, GARY R. LEE, & JENNIFER ROEBUCK BULANDA, COHABITATION AMONG OLDER ADULTS: A NATIONAL PORTRAIT 4 (CENTER FOR FAMILY AND DEMOGRAPHIC RES. 2005) [hereinafter COHABITATION AMONG OLDER ADULTS].

[202] Susan Brown, Jennifer Roebuck Bulanda & Gary R. Lee, *The Significance of Nonmarital Cohabitation: Marital Status and Mental Health Benefits Among Middle-Aged and Older Adults*, 60B J. GERONTOLOGY: SOC. SCI. S21 (2005).

unmarried persons between the ages of fifty-one to fifty-nine, 8.5% were involved in cohabitating relationships.[203]

There is reason to believe that older cohabitants experience their relationships differently than younger ones.[204] First, many older Americans forming new partnerships may have already been through divorces. According to Brown, Lee and Bulanda, based on data from the 2000 U.S. Census, 71% of cohabitants over the age of fifty were separated from their spouses or divorced.[205] These numbers are slightly higher when based upon data from the 1998 Health and Retirement Study.[206] Because such persons may be reluctant to remarry due to the failure of their prior marriages, they seem less likely to view cohabitation as a precursor to marriage than younger cohabitants who have never been married.[207] Also, the financial circumstances of older Americans are likely to be more complicated than those of younger persons, and may provide another disincentive to remarry, as opposed to cohabitating.[208] Many older cohabitants wish to preserve their assets for children from a prior relationship, rather than sharing those assets with a new cohabitant. Older cohabitants may also avoid remarriage fearing its impact on the substance of their relationships with adult children.[209]

F. Conclusion

Overall, the above-described research points to a variety and diversity within intimate relationships that belies the monolithic view of cohabitation expressed in the cases and doctrines described in Part II. Indeed, the majority of non-marital cohabitating relationships are not "marriage-like," as that term is used in these doctrines, in the sense that they mimic all aspects of the traditional understandings of a marriage. Similarly, the research demonstrates that large numbers of married persons do not cohabitate for significant periods of time, yet do not lose the "marriage like" qualities of their relationships. In the next part, the implications of the above-described research for improved family law doctrines will be explored.

IV. IMPROVED FAMILY LAW DOCTRINE

Family law doctrine involving questions of cohabitation would be improved if it was rendered more consistent with the research described in Part III of this

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[203] BROWN, LEE, & BULANDA, COHABITATION AMONG OLDER ADULTS, *supra* note 201, at 14.

[204] Smock, Casper, and Wyse, *supra* note 163, at 16.

[205] BROWN, LEE, & BULANDA, COHABITATION AMONG OLDER ADULTS, *supra* note 201, at 14. Another 18% were widowed, and the remaining 11% had never been married. *Id.*

[206] *Id.*

[207] *Id.* at 5.

[208] *Id.*; Manning & Brown, *supra* note 182.

[209] BROWN, LEE, & BULANDA, COHABITATION AMONG OLDER ADULTS, *supra* note 201, at 10.

paper. Each of the following subsections will compare the understandings of cohabitating relationships set forth in the doctrines discussed in Part II with the research described in Part III. Reference with then be made to proposed doctrines that are more consistent with the research set forth in Part III.

A. Property Rights between Non-Married Cohabitants

Each of the primary decisions discussed in Part II.A presents an image of cohabitating relationships that is at odds with the research described in Part III. First, *Marvin*, *Hewitt*, and *Lindsey* all seem to equate cohabitating relationships with marital relationships. Perhaps, to a certain extent, this impression was driven by the particular facts of each case. For example, Michele and Lee Marvin lived together for six years, and divided up responsibilities according to the typical division of labor between spouses at the time—with Lee serving as breadwinner and Michele attending to the couple's domestic tasks.[210] Similarly, Victoria and Paul Hewitt lived together for fifteen years.[211] They had and raised three children together, and Victoria borrowed money from her family to invest in Paul's business.[212] Indeed, the intermediate Illinois Court pointed out that the Hewitts' relationship was indistinguishable from that of most married couples save for one fact, the lack of a legally valid marriage.[213]

However, as pointed out in Part III.A, such long-term relationships are not the norm among cohabitating couples. Indeed, the probability of a cohabitating relationship lasting for more than five years is only 13% for women and 16% for men.[214] Thus, *Marvin* and *Hewitt* may serve as examples of Holmes' famous statement that hard cases make bad law.[215] By contrast, the cohabitating relationship in *Lindsey* is much more consistent with the research described in Part III. The Lindseys cohabitated for a period of less than two years before marrying.[216] Their treatment of their cohabitating relationship as a trial period, or perhaps a precursor to a formal marriage, is quite consistent with the data discussed above. For example, a cohabitating relationship lasting two years has between a 25% and 50% change of "ripening" into a marriage.[217] However, this fact makes the *Lindsey* court's decision to treat the couple's two year cohabitating period the same as its formal marriage for property division purposes all the more perplexing.

The Lindseys made an express decision not to get married, but rather to test their relationship by cohabitating. To treat them as married for purposes of

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[210] *Marvin*, 557 P.2d at 110.

[211] *Hewitt*, 394 N.E.2d at 1205.

[212] *Id.*

[213] *Id.* at 1206.

[214] *See* MARRIAGE AND COHABITATION IN THE UNITED STATES, *supra* note 156, at 13.

[215] N. Sec. Co. v. U.S., 193 U.S. 197, 364 (1904) (Holmes, J., dissenting).

[216] *Lindsey*, 678 P.2d at 331.

[217] *See* MARRIAGE AND COHABITATION IN THE UNITED STATES, *supra* note 156, at 36 tbl.20.

property division would defeat the very purpose of their decision to cohabitate.[218] Because social policy no longer disfavors cohabitation, there is no reason for courts to deny individuals the autonomy to choose to enter into such relationships without imposing the obligations of joint property ownership on them unwillingly.[219]

The results of the *Lindsey* decision are likely to be particularly onerous to the increasingly large number of couples who choose to cohabitate later in life. As discussed in Part III.E.,[220] many couples who cohabitate later in life do so expressly to avoid the imposition of joint property arrangements that might interfere with desires to provide for children from prior relationships or simply to avoid upsetting financial plans established at the dissolution of such relationships. Again, the rule in *Lindsey* would seem to defeat that express purpose. Although the ALI approach is slightly more favorable to such couples who choose to cohabitate rather than to marry, because it allows them to rebut the presumption in favor of shared property,[221] it is also misguided because it adopts a presumption that is at odds with the data that shows that most cohabitating couples do so consciously as an alternative to marriage, rather than in an effort to enjoy the legal effects of marriage without satisfying its formal requirements.

Marvin, *Hewitt*, and *Lindsey* are consistent with the data in Part III in at least one respect, each court recognized the continuing decades long trend toward increased numbers of cohabitating relationships.[222] However, each of the courts reacted in a surprisingly different manner to the same basic data. First, the *Hewitt* court seemed to treat the trend toward increased cohabitating relationships as a fact to bemoan, and tailored its doctrine to defeating and reversing that trend. Thus, *Hewitt* treats cohabitation almost punitively, denying any economic relief to parties who have cohabitated in virtually all circumstances. The *Hewitt* court also expressed concerns about the potentially deleterious effects an increase in cohabitation might have on the institution of marriage and on society as a whole, and seemed to view it as a proper role of the court to try to combat that increase. Yet despite the court's stance, as we know, cohabitation rates continued to escalate dramatically in the decades following *Hewitt*, including in Illinois, despite the court's hopes that its decision might have a contrary effect. Further, the *Hewitt* court's institutional competence argument has not been followed by other states. Indeed, in only a couple of states have legislatures weighed in regarding the property rights of cohabitants.[223] At least twenty-six states have addressed this

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[218] *See* Margaret P. Brinig, *Domestic Partnership: Missing the Target?*, 4 J.L. & FAM. STUD. 19, 21–22 (2002).

[219] *See id.*

[220] *See* BROWN, LEE & BULANDA, *supra* notes 201–02 and accompanying text.

[221] *See* ALI PRINCIPLES *supra* note 85.

[222] *See Lindsey*, 678 P.2d at 330–31; *Marvin*, 557 P.2d at 109; *Hewitt,* 394 N.E.2d at 1206.

[223] *See, e.g.,* MINN. STAT. § 513.075 (2008) (not allowing property division among cohabitants based on implied contracts); TEX. FAM. CODE ANN. § 1.108 (West 2007) (same).

question by judicial decision.[224] Finally, the result of *Hewitt* seems to leave cohabitating parties vulnerable to gravely unjust outcomes. For example, in the case of *Ayala v. Fox,*[225] the plaintiff took out a mortgage on property to construct a house in which the unmarried couple would reside. Plaintiff made half the mortgage payments for most of the ten-year period over which the parties resided together in the house and all of the mortgage payments during a three-year period in which the defendant was unemployed.[226] Defendant reneged on his express promise to plaintiff that he would title the property jointly.[227] Yet despite plaintiff's economic contributions to the acquisition of the property and defendant's subterfuge, the Illinois appellate court, relying on *Hewitt*, refused to award plaintiff any interest in the property at all.[228]

The *Marvin* court, by contrast, seemed to take a fatalistic approach to the data demonstrating a trend toward increased non-marital cohabitation. The court did not see it as its role to try to counter the social trend,[229] and therefore did not take the extreme measures of the *Hewitt* court in denying cohabitating couples the same types of claims that are available to all persons, merely by virtue of the fact that they are in a cohabitating relationship.[230] On the other hand, the Court did not go so far as the *Lindsey* court to embrace cohabitating relationships to the point of treating them essentially the same as marriages for purposes of property division.

Indeed, the result in *Marvin* seems the most consistent of the three positions discussed here with the current research regarding cohabitation. First, *Marvin* does not exact a judicial penalty against parties who choose to cohabitate,[231] a position that seems necessary in light of the vast numbers of people who choose to cohabitate, and widespread societal acceptance of the legitimacy of such arrangements. On the other hand, *Marvin* does not compel a conclusion that cohabitating parties intended to share property, when such a conclusion is inconsistent with the reasons why many couples choose to cohabitate in the first place.[232] Instead, *Marvin* grants cohabitating couples the same rights as all other persons, to establish whether by word or by deed, whether there was a promise to share property accumulated during the period of cohabitation, and to have courts apply traditional principles of equity to determine whether a refusal to share property accumulated during cohabitation would be unjust.[233] A more bright line rule based upon the mere fact of cohabitation fails to account for the broad diversity in reasons why people cohabitate and the similar diversity in their desires

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[224] *See* Garrison, *supra* note 43, at 316 n.27.
[225] 564 N.E.2d 920 (Ill. App. Ct. 1990).
[226] *Id.* at 920.
[227] *Id.*
[228] *Id.* at 922.
[229] *Marvin*, 557 P.2d at 122.
[230] *Id.* at 113.
[231] *Id.*
[232] *Id.* at 120.
[233] *Id.* at 122–23.

and expectations for the treatment of property accumulated during the relationship as discussed above.

However, given the mixed messages sent by the *Marvin* court regarding non-marital cohabitation, and the middle-ground approach taken, it is not surprising that some courts seem to have misread the decision. Indeed, that is what appears to have happened in the case of Bergen v. Wood.[234] In *Bergen*, the court barred Birget's claim for property division because she and Duane had never cohabitated.[235] The court found that because the couple had never cohabitated, the homemaker services that formed an essential part of the consideration recognized by the court in *Marvin*, were absent in *Bergen*. All that was left, in the court's opinion, were the "meretricious" sexual services that the *Marvin* Court had held could not alone provide the consideration for a palimony contract. Though the *Bergen* court recognized that Birget served as Duane's travel companion, as well as social host for his business related social functions, the court found that these services "are not normally compensated," and had no value independent of the sexual services provided by Birget to Duane.[236]

The *Bergen* court took too narrow a view of the consideration the *Marvin* court would have deemed adequate to support a palimony claim. While the *Marvin* court was clear that sexual services alone will not support a palimony claim, the court was equally clear that a sexual relationship would not bar a palimony claim when combined with other valuable consideration.[237] Despite the *Bergen* court's dismissive view of the non-sexual services provided by Birget to Duane, these services were clearly valued by Duane, and without doubt the services of an effective social hostess can greatly enhance the value of a business person's career. The *Marvin* court said nothing that would restrict the consideration that can support a palimony claim to the cooking, cleaning, and clothes washing that were the traditional services provided by home makers.

Modern observers might characterize Bergen and Wood's relationship as LAT, as discussed in Part III.C above. As with many LAT couples, Bergen and Wood clearly shared bonds of affection and support that were as strong and long lasting as in many cohabitating relationships or marriages. It seems unduly formalistic to conclude that Duane's promises to support Birgit for life should be rendered unenforceable merely because the couple never resided together.

An approach that is more consistent with contemporary understandings of LAT and other committed relationships is represented by the New Jersey Supreme Court's decision in *Devaney v. L'Esperence*.[238] Helen Devaney and Francis L'Esperance began a twenty year intimate relationship when the former began to work as a receptionist in the latter's ophthalmology practice.[239] Although the

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[234] *See Bergen*, 18 Cal. Rptr. 2d at 75.
[235] *Id.* at 76.
[236] *Id.* at 79.
[237] *Marvin*, 557 P.2d at 113.
[238] 949 A.2d 743 (N.J. 2008).
[239] *Id.* at 744.

parties dined together frequently and went on vacations together, they never actually shared the same residence.[240] In fact, L'Esperance remained married to another woman throughout the entire period, and he spent most nights with his wife.[241] Devaney testified at trial that L'Esperance repeatedly promised her that he would divorce his wife and marry Devaney.[242] After Devaney left L'Esperance's employ, he provided her with financial assistance, paid for her undergraduate and graduate education, and eventually bought a condominium that Devaney lived in.[243] Though Devaney left the state of New Jersey for a few years during the middle of the relationship, she continued to communicate with L'Esperence, to receive occasional visits from him, and also to receive regular financial support.[244] Eventually, Devaney returned to New Jersey on renewed assurances from L'Esperence that he would divorce his wife and marry and have a child with Devaney.[245] L'Esperence finally terminated the relationship without fulfilling either of these promises.[246] Devaney filed her palimony claim a short time later.[247]

Following a trial, the lower court ruled against Devaney.[248] First, while the court found that L'Esperence had made certain vague promises to Devaney, it found that he had never expressly promised to provide her lifetime support.[249] The trial court further concluded that no implied agreement for support arose because the parties' relationship was not sufficiently "marriage like" to support such a finding.[250] On appeal, the intermediate appellate court affirmed, solely on grounds that cohabitation is an essential element to a palimony claim, and because the couple never cohabitated, Devaney failed to satisfy that requirement.[251]

On further review, the N.J. Supreme Court rejected the appellate court's conclusion that cohabitation is an essential element to a palimony claim.[252] Rather, the court found that a promise to support, whether express or implied, and a "marital-type relationship" are the essential elements of a palimony claim.[253] The court cited to the language from *In re Roccamonte*, quoted in Part I of this Article,[254] in defining a "a martial-type relationship." While the court suggested that in most cases, a marital-type relationship would likely involve cohabitation,

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[240] *Id.*
[241] *Id.*
[242] *Id.*
[243] *Id.* at 744–45.
[244] *Id.* at 744.
[245] *Id.*
[246] *Id.* at 745.
[247] *Id.*
[248] *Id.*
[249] *Id.*
[250] *Id.*
[251] *Id.* (citing Devaney v. L'Esperence, 918 A.2d 684 (N.J. Super. Ct. App. Div. 2007)).
[252] Devaney, 949 A.2d at 751.
[253] *Id.*
[254] *Id.* at 748; *see also supra* note 13 and accompanying text.

the court went on to state that this would not necessarily be the case, and that there might well be cases in which the aforementioned aspects of a marital-type relationship might exist in the absence of cohabitation.[255]

Despite the Supreme Court's resolution of the legal issue in her favor, the court ultimately affirmed the trial court's entry of judgment against Devaney.[256] The court deferred to the trial judge's findings that Devaney and L'Esperence did not enjoy a marriage-type relationship as described above, and that there was neither an express nor an implied promise of lifetime support offered in exchange for such a relationship.[257]

The *Devaney* court's resolution of the question of whether cohabitation is an essential element of a palimony claim seems more consistent with current understandings of non-marital relationships than the *Bergan* court's contrasting conclusion. First, the research described above relating to LAT relationships suggests that many such relationships may involve emotional and other bonds that are as significant as those involved in cohabitating relationships.[258] In such cases, it would seem arbitrary to preclude the parties from judicial enforcement of express or implied agreements regarding property merely because the parties did not share a residence. On the other hand, the research discussed above suggests many cohabitating partners do not intend to form permanent bonds of this type, and cohabitate, as opposed to marrying, precisely to avoid the joint property rights that follow from marriage. Thus, to treat cohabitation as the *sine qua non* of a palimony claim fails to account for the variability of cohabitating relationships, both before marriage and after marriage dissolutions.

B. The Marital Duty of Financial Support

The *McGuire* doctrine is also out of step with the research regarding cohabitation discussed earlier in this Article. *McGuire* treats cohabitation as the *sine qua non* of marriage. However, as pointed out above, many happily married couples spend significant periods of time living apart.[259] To treat the latter marriages as more appropriate for judicial intervention than "traditional" marriage fails to account for modern employment, transportation, and communication advances, as well as for contemporary understandings of what is truly important in a successful marriage.

The *McGuire* doctrine is also incompatible with evolving notions of marital privacy. The *McGuire* court clearly believed that it was inappropriate for a court to intervene in decisions by spouses regarding how the couple's resources should be allocated. But at the time it was decided, McGuire was part of a broad web of family law doctrines that similarly discouraged judicial, and hence state

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[255] *Id.* at 751.
[256] *Id.*
[257] *Id.*
[258] *See supra* Part III.D.
[259] *See also* Perry, *supra* note 100, at 40.

intervention into various aspects of the marital relationship. For example, as of 1953, most jurisdictions still employed the doctrine of inter-spousal immunity, which barred adjudication of tort claims between spouses.[260] The doctrine of inter-spousal immunity was sometimes justified on similar grounds of marital privacy.[261]

Marital rape was not considered a crime in most jurisdictions.[262] Again, the concept of marital privacy provided support for this doctrinal exception to general criminal provisions.[263] Note that while the *McGuire* doctrine allows for enforcement of the duty of support between married partners in the event that they are living apart, the marital exception to the crime of rape was similarly unavailable in some jurisdictions where the couple was living apart at the time of the offense.[264]

The treatment of domestic violence issues as of the mid-point of the twentieth century is also emblematic of courts' views regarding marital privacy at that time. Though serious acts of violence by one spouse against the other would be punishable under general criminal law, there existed no particularized statutes addressing issues of domestic violence, either in the criminal law or similar to current civil protective order provisions.[265] Domestic violence was also largely considered a private family matter immune from judicial intervention.[266]

Developments in each of these areas have resulted in significant changes in legal doctrine, and have made serious inroads against the concept of marital privacy articulated in *McGuire*, even though the rule in *McGuire* itself has remained stubbornly resistant to change. Thus, the doctrine of inter-spousal immunity has been abolished at least in part in all American jurisdictions save

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[260] *See* Bozeman v. Bozeman, 830 A.2d 450, 459 n.8 (Md. 2003) (identifying only one state that had partially abrogated the doctrine by 1953).

[261] *See, e.g.*, Sarah M. Buel, *Access to Meaningful Remedy: Overcoming Doctrinal Obstacles in Tort Litigation Against Domestic Violence Offenders*, 83 OR. L. REV. 945, 976 (2004). Or, more specifically, the preservation of marital harmony. *See* Bobitz v. Bobitz, 462 A.2d 506, 513 (Md. 1983) (citing cases). *See also* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2166–67 (1996).

[262] *See, e.g.*, Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Family Life*, 94 IOWA L. REV. 1253, 1261–62 (2009); Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1375–76 (2000).

[263] Murray, *supra* note 262, at 1262. *See also* Suzanne A. Kim, *Reconstructing Family Privacy*, 57 HASTINGS L.J. 557, 574–75 (2006); Wayne A. Logan, *Criminal Law Sanctuaries*, 38 HARV. C.R.-C.L. L. REV. 321, 342 (2003).

[264] *See, e.g., Liberta*, 474 N.E.2d at 570; Hasday, *supra* note 262, at 1484 & n.480.

[265] *See generally* Elizabeth M. Schneider, *The Violence of Privacy*, 23 CONN. L. REV. 973 (1991). *See also* Elizabeth M. Schneider, *Domestic Violence Law Reform in the Twenty-First Century: Looking Back and Looking Forward*, 42 FAM. L.Q. 353, 354 (2008) [hereinafter Schneider, *Domestic Violence Law Reform*].

[266] Schneider, *Domestic Violence Law Reform, supra* note 265, at 358; Murray, *supra* note 262, at 1260–61.

one.[267] The marital exception to rape convictions has similarly been greatly narrowed.[268] Extensive regimes of criminal penalties and civil protective orders have been established to protect spouses against domestic violence.[269] In each instance, public policies in favor of providing protection to spouses from violence and other injuries from the hands of spouses have taken precedence over competing interests favoring marital privacy. Indeed, one can question whether enough remains of the concept of marital privacy to support the *McGuire* doctrine.[270]

Developments in the area of domestic violence prevention are particularly salient in considering the viability of *McGuire*. Many scholars would consider the severe economic deprivation visited by Mr. McGuire on his wife to be a form of domestic violence.[271] At a minimum, depriving a spouse of the resources needed to achieve a measure of independence correlates strongly with an increased risk of domestic violence.[272] First, evidence suggests that the risk of domestic increases proportionately to the degree of economic dependence the victim has on the perpetrator of domestic violence.[273] Second, lack of access to economic resources is a great impediment to victims of domestic violence's ability to leave the abusive relationship.[274] Because of the strong connection between a lack of economic independence and domestic violence, overturning *McGuire* should be seen as an extension of the enhancement of legal protections against domestic violence that have characterized the last half century.

This is not to say that there is no longer any value whatsoever to the concept of marital privacy. A common law privilege properly protects confidential marital

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[267] Bozeman v. Bozeman, 830 A.2d 450, 471, Appendix A (Md. 2003). The lone holdout is Georgia. *See* GA.CODE ANN. § 19-3-8 (2010).

[268] Murray, *supra* note 262, at 1262–63 (citing Michelle J. Anderson, *Marital Immunity, Intimate Relationships, and Improper Inferences: A New Law on Sexual Offenses by Intimates*, 54 Hastings L.J. 1465, 1485 (2003)).

[269] *Id.* at 1263 (citing Ruth Colker, *Marriage Mimicry: The Law of Domestic Violence*, 47 WM. & MARY L. REV. 1841, 1857 (2006)).

[270] Of course, general notions of privacy are undergoing a radical transformation in light of technological developments that make intrusions into what were formerly considered private realms relatively easy. *See, e.g.*, DANIEL J. SOLOVE, THE DIGITAL PERSON: TECHNOLOGY AND PRIVACY IN THE DIGITAL AGE (2004).

[271] *See, e.g.*, Margaret E. Johnson, *Redefining Harm, Reimagining Remedies, and Reclaiming Domestic Violence Law*, 42 U.C. DAVIS L. REV. 1107, 1141 (2009); Schneider, *Domestic Violence Law Reform, supra* note 265, at 356; Pami Vyas, *Reconceptualizing Domestic Violence in India: Economic Abuse and the Need for Broad Statutory Interpretation to Promote Women's Fundamental Rights*, 13 MICH. J. GENDER & L. 177, 179 (2006).

[272] *See, e.g.*, Sarah M. Buel, *Fifty Obstacles to Leaving, a.k.a., Why Abuse Victims Stay*, 28 THE COLO. LAWYER, OCTOBER 1999 20, 24 (1999) [hereinafter Buel, *Fifty Obstacles*].

[273] LENORE WALKER, THE BATTERED WOMAN 127 (1979).

[274] *Id.* at 47, *See also* Buel, *Fifty Obstacles, supra* note 272, at 20; Gretchen P. Mullins, *The Battered Woman and Homelessness*, 3 J.L. & POL'Y 237, 243 (1994).

communications from evidentiary admissibility.[275] And, of course the consensual sexual and reproductive choices of married couples are considered beyond the scope of government to regulate.[276] But where the parties disagree about whether to seek assistance of the state in resolving a serious conflict within the marriage, the marital harmony that the concept of marital privacy seeks to protect has already been lost.[277] Thus, the arguments against state intervention to protect vulnerable citizens in such circumstances seem particularly weak.

Though *McGuire* itself remains the law in most jurisdictions, certain doctrinal inroads have been made that have narrowed its scope in some of these jurisdictions. For example, in some jurisdictions, parties can demonstrate that they are in fact "living apart," while still residing under the same roof, for purposes of enforcing the marital duty of financial support. Thus, in the case of *Lutz v. Lutz*,[278] the D.C. appellate court found that the wife stated a proper claim for maintenance despite the fact that the couple was still residing in the same apartment.[279] The court found that the couple occupied separate bedrooms, and due to the tension and friction between them essentially maintained separate lives.[280] In the circumstances, the court declined to apply the *McGuire* doctrine. Other jurisdictions should take this analysis a step further, and abolish the living apart requirement in order to enforce the duty of support entirely.

C. Spousal Support and Cohabitation

In Part II, this Article discussed two alternative approaches to modification of spousal support, each of which places dispositive weight on the mere fact of cohabitation. The first approach automatically terminates spousal support upon a finding that the recipient is cohabitating. The second approach creates a rebuttable presumption that support should terminate upon a finding of cohabitation. However, a number of other jurisdictions have taken an alternative approach that does not place any special emphasis on the fact of cohabitation in determining whether the material change in circumstances test has been satisfied for purposes of modification of support. Rather, cohabitation will be considered only to the extent that it in turn impacts on traditional considerations of need and ability to pay that are the typical touchstones of the determination of support.

An example of such an approach appears in the Nevada case of *Gilman v. Gilman*.[281] The *Gilman* opinion actually addresses two companion cases in which two ex-husbands moved to terminate their spousal support based on the fact that

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[275] *See, e.g.*, Trammel v. United States, 445 U.S. 40, 51 (1980).

[276] Griswold v. Connecticut, 381 U.S. 479, 484–85 (1965).

[277] *Cf. Trammel*, 445 U.S. at 52 (applying same argument to one spouse's decision to testify against the other spouse).

[278] 166 A.2d 489 (D.C. 1961).

[279] *Id.* at 490.

[280] *Id.*

[281] 956 P.2d 761 (Nev. 1998).

their ex-wives were currently cohabitating with new partners.[282] In the case of the Gilmans, their divorce decree contained an express provision that "the court will consider spousal support in the event of co-habitation by wife with an adult male who significantly contributes to her support."[283] In the case of the Callahans, their divorce decree did not contain a specific provision addressing the impact of cohabitation on spousal support payments.[284] The applicable Nevada statute provided for modification of support based upon a showing of changed circumstances generally,[285] but did not address the issue of cohabitation in particular.

In determining the proper approach to take regarding termination or modification of support in the event of cohabitation, the court considered, but rejected, the automatic termination approach applied in *Pendelton*,[286] and also declined to adopt the rebuttable presumption approach applied in *Lieb*.[287] Instead, the court adopted what it described as the "economic needs" test, pursuant to which, modification would be considered based upon the impact, if any, of cohabitation on the economic needs of the recipient of support.[288] The court stated this approach best balanced the rights of payor and recipient spouses by allowing for modification where economic circumstances warrant it.[289] However, the court contended that a rule that automatically terminates spousal support on cohabitation unduly inhibits the recipient spouse's right to choose to cohabitate.[290] The court further stated that such a rule would leave cohabitating former spouses particularly vulnerable because for the most part, they would be left without support rights in the event the cohabitating relationship did not last.[291] Third, the court opined that the rule it adopted adequately protected the interests of payor spouses by allowing for modification in situations where the support recipient does in fact receive significant financial benefit from subsequent cohabitation.[292]

Applying the economic needs test to the Callahans' situation, the court declined to modify support.[293] The court found that the ex-wife was often unable to meet her agreed upon payment regarding her share of the expenses with her new partner, and that the new partner failed to provide significant financial assistance to

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[282] *Id.* at 762–63.
[283] *Id.* at 763.
[284] *Id.* at 762.
[285] NEV. REV. STAT. ANN. § 125.150 (West 1998).
[286] *Gilman*, 956 P.2d at 765.
[287] *Id.* at 770 (Springer, J. concurring in part, dissenting in part) (Justice Springer would have adopted the *Leib* test by which cohabitation creates a rebuttable presumption of changed circumstances for purposes of support modification).
[288] *Id.* at 764–66.
[289] *Id.* at 765.
[290] *Id.*
[291] *Id.*
[292] *Id.*
[293] *Id.* at 766.

the ex-wife.[294] In the case of the Gillmans, the court found that the express provision of their divorce judgment would govern, rather than the economic needs test. Pursuant to that language, because there was insufficient evidence that the ex-wife's partner "significantly contributed" to the ex-wife's support, modification of support was rejected in that case too.[295]

Of the three positions described regarding modification of spousal support, the Nevada approach is most consistent with the research regarding cohabitation discussed in Part III. As pointed out above, many who cohabitate after going through a divorce deliberately choose not to integrate their finances with those of their new partner, for a variety of reasons.[296] Thus, an approach that automatically terminates spousal support upon cohabitation incorrectly assumes that all cohabitants benefit economically from the relationship. Even the alternative position that presumes a material change in economic circumstances following cohabitation assumes a uniformity in the circumstances of post-divorce cohabitations that the research findings do not support. Only the economic needs tests, which looks at the unique economic circumstances of each post-divorce cohabitating relationship gives full accord to the diversity among cohabitating relationships that the recent research demonstrates.

V. POSSIBLE OBJECTIONS

A number of possible objections might be raised to the doctrinal changes proposed in this paper. Among the most salient of these is the fact that eliminating doctrines that attach determinate legal consequences to the mere fact of cohabitation will result in additional litigation regarding the particular facts and circumstances of individual cohabitating relationships. Of course, such increased litigation will increase the costs of resolving such disputes for the individual litigants and judicial systems alike. On the other hand, those who are favorably disposed to the changes proposed here might ask why stop with the issue of cohabitation? Why not similarly eliminate the determinative legal consequences of marriage in addition to those of cohabitation? Each of these objections will be addressed in turn.

Under the changes proposed here, the mere fact of cohabitation would neither cause in itself, nor prevent, division of property accumulated during a cohabitating relationship. Rather, the relationship would need to be examined for any express promises to divide property, or for any conduct, such as commingling of property, that would imply such an agreement. Such conduct would also need to be examined to determine whether equitable principles would compel any remedies relating to property affected by such conduct. With regard to married couples, the changes recommended here would apply the multi-factored analysis that goes into determining spousal support regardless of whether the parties are cohabitating.

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[294] *Id.*
[295] *Id.*
[296] *See supra* Part III.E.

And, in the case of post-dissolution cohabitation, courts would similarly be required to evaluate the need for continuing support based on the material change in circumstances standard and the factors generally considered in determining spousal support, rather than terminating support based solely on the fact of post-dissolution cohabitation.

Each of these determinations is highly fact and context-specific, and may entail costly litigation in the event the parties cannot reach an agreement. The result may be an increase in litigation costs for the parties and for court systems over what would have been the case with more determinate rules. Of course, such costly, fact-specific determinations are perhaps more the rule, rather than the exception in the family law area.[297] Perhaps the best known example is the best interests of the child standard that governs child custody determinations in all fifty states.[298] While the costliness of such open ended standards is well known, it is often thought that the fact specificity of each custody challenge makes anything other than a full blown inquiry based on the specific facts and context of each family's situation inadequate.[299]

It is true that there has been some movement toward more determinate rules in family law in recent years.[300] The ALI *Principles* represents an example of that movement,[301] as does the move to determinate child support guidelines.[302] However, the ALI *Principles* have had little impact on the laws actually in effect in most jurisdictions.[303] Perhaps this is an acknowledgement of the stubborn persistence of the need for highly fact-specific determinations in family law.

In any event, the fact is that presumptions, determinate rules, and other time and cost saving devices in law are only worthwhile when they are consistent with the underlying reality that these shortcuts are meant to reflect.[304] For example, a

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[297] *See generally* Carl E. Schneider, *Discretion, Rules and Law: Child Custody and the UMDA's Best Interests Standard*, 89 MICH. L. REV. 2215, 2218 (1991) ("family law tries to regulate people in the most complex, most emotional, most mysterious, most individual, most personal, most idiosyncratic of realms. It is absurdly difficult to write rules of conduct for such an area that are clear, just and effective").

[298] Naomi R. Cahn, *Reforming Child Custody Decisionmaking*, 58 OHIO ST. L.J. 1, 9 (1997).

[299] Schneider, *Discretion, Rules and Law, supra* note 297, at 2264.

[300] *Id.* at 2219.

[301] "The central goal of the ALI's Family Dissolution Project was to develop standards that provide surer, quicker, more certain results when families break up." Katharine T. Bartlett, *Preference, Presumption, Predisposition and Common Sense: From Traditional Custody Doctrines to the American Law Institute's Family Dissolution Project,* 36 FAM. L.Q. 11, 12 (2002).

[302] *See* Mahoney, *supra* note 41, at 183; Morgan, *Child Support 50 Years Later*, *supra* note 117, at 368; Schneider, *Discretion, Rules and Law, supra* note 297, at 2229.

[303] Michael R. Clisham & Robin Fretwell Wilson, *American Law Institute's Principles of the Law of Family Dissolution, Eight Years After Adoption: Guiding Principles or Obligatory Footnote?*, 42 FAM. L.Q. 573, 576 (2008).

[304] *Cf.* Margaret F. Brinig, *Chapter 6 and Default Rules,* University of Iowa Legal Studies Research Paper No. 05-02 3 (2005), *available at* http://papers.ssrn.com/sol3/

rule that granted custody of all children to their mothers in divorce cases might be justified if there was clear evidence that children were better off with their mothers in virtually all cases. However, in the case of the doctrines discussed above, the rules discussed here result in outcomes that are at odds with the reality that the research discussed in Part III portrays. For example, a rule that requires property accumulated during a cohabitating relationship to be divided between the parties is contrary to both the short term, and ephemeral nature of most pre-marital cohabitations, as well as the intentions of the parties in many post-divorce cohabitating relationships.[305] Similarly, a rule that presumes that all marriages are "intact" when the parties cohabitate, but are not "intact" when they don't, is at odds with what we know about commuter marriages, as well as the economics of modern housing markets. Finally, a rule that terminates spousal support on cohabitation presumes an economic benefit to the parties in all cohabitating relationships, when in fact numerous cohabitating relationships do not involve such economic integration at all. The cost savings that might come from such determinate rules cannot outweigh the need for legal rules to engender results that are consistent with underlying social reality. In short, getting it done cheaply is not a substitute for getting it done right.

Parties are also free to contract around default rules if such rules are not in line with the situations of those particular parties. Thus, agreements to divide property between cohabitants remain enforceable under the doctrines advocated here. And parties can make agreements regarding the treatment of spousal support, both during and after the marriage, which can include the effect of cohabitation on the continuing duty of support.[306] However, it is important to choose default rules that are consistent with the circumstances of the largest number of people who will be governed by such rules in the event there is no formal agreement.[307]

Particular objections might be raised to the prospects of litigation between spouses regarding allocation of the duty of financial support between them. Won't such litigation mean the death knell of these marriages? Perhaps, but as pointed out above,[308] it is likely that by the time spouses sue each other, the marriage is beyond repair anyway. And, in numerous areas of the law, it has been determined that granting parties access to the judicial system outweighs any corresponding corrosion of the marital relationship.[309] Further, the prospects of large numbers of lawsuits between spouses over nit-picky matters of household economics seem minute. The costs of litigation, both in terms of economic and non-economic resources are simply too high for parties to casually resort to the courts. And judges can craft rules in this area that will discourage litigation over trivial matters.

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papers.cfm?abstract_id=650886 (last viewed Aug. 19, 2010) (describing scholars' identification of default rules as reflecting either what most people would want or what most people would agree to if they thought about the situation in advance).

[305] Brinig, *Domestic Partnerships, supra* note 218, at 20.

[306] *See, e.g., Gillman*, 956 P.2d at 763.

[307] *See supra* note 304 and accompanying text.

[308] *See supra* note 277 and accompanying text.

[309] *See supra* notes 260–77and accompanying text.

In short, it seems likely that only egregious cases, such as *McGuire*, will result in judicial enforcement of the duty of financial support between cohabitating spouses.

However, if it is the case that such fact specific, and context based determinations are the correct approach to adjusting disputes involving cohabitating relationships, why stop there? Why not engage in a similar approach to legal doctrines that place determinative weight on the fact of marriage?[310] Isn't it true that marital relationships can be just as diverse and fact specific as cohabitating relationships? While logically it might make sense to extend the same approach advocated for here to doctrines relating to marriage, reasons of tradition and expedience argue against it. While doctrines turning on the fact of cohabitation are perhaps decades old, such doctrines relating to marriage may be centuries old. It would be simply too radical of a change to eliminate the determinative legal effect of marriage. Moreover, given the greater numbers of married couples, as opposed to cohabitants, the impact in terms of raising the costs of dispute resolution would be much greater in eliminating the determinative legal effect of marriage than it would for cohabitation. Finally, nothing in the above analysis suggests that the default rules that govern the legal effect of marriage are out of step with the research regarding the underlying social reality of most marriages, as the above discussed research does regarding cohabitation. While such data might or might not be available,[311] that fact goes beyond the scope of the present analysis.

VI. CONCLUSION

Numerous doctrines in family law place determinative weight upon the fact of whether a married our unmarried couple is cohabitating. In the case of unmarried couples, some jurisdictions provide for division of property accumulated during the cohabitating relationship, and some jurisdictions provide for termination or review of spousal support when the recipient of such support cohabitates after dissolution of the prior marriage. In the case of married couples, all jurisdictions refuse to enforce the marital duty of financial support if the couple is cohabitating.

The foregoing Article contends that these doctrines conflict with recent empirical research regarding cohabitating relationships. For unmarried cohabitants, cohabitation is often unlike marriage, contrary to the presumption of the doctrines mentioned above. Indeed many cohabitating relationships before marriage are short lived, and the parties plainly do not intend to share property accumulated

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[310] Indeed, a number of scholars have advocated for just such an approach. *See, e.g.*, NANCY POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE (2008).

[311] As to the most basic issue involved here, the duration and stability of relationships, the most recent evidence suggests that first marriages in general last significantly longer than non-marital cohabitating relationships. According to the Cycle 6 data, approximately 2/3 of first marriages survive to the ten year mark. MARRIAGE AND COHABITATION IN THE UNITED STATES, *supra* note 156, at 12. Yet the probability of a non-marital cohabitating relationship lasting even half that long (five years) was only 16% for women and 13% for men. *Id.* at tbls.18–19.

during that time. Further, many couples who cohabitate following dissolution of a prior marriage deliberately avoid the economic commingling that is inherent in most marriages.

Additionally, it is no longer the case that cohabitation is the essence of a marital relationship. Developments in gender equality, employment, economics, transportation, and communication have given rise to "commuter marriages," where spouses live apart for significant periods of time. Yet such marriages are no less likely to share the other indicia of a long-term, committed relationship that the law endeavors to support than non-commuter marriages. Also, evolving notions of family privacy suggests that courts' reluctance to intervene in the financial circumstances of married cohabitants is dated, particularly where there is evidence of economic coercion or abuse in the relationship.

Because of these facts, this Article contends that legal doctrines in family law should no longer place dispositive weight on the mere fact of a cohabitating relationship. Rather, non-marital cohabitating relationships should be examined in their particularity, to determine whether they reflect the indicia of a "marriage-type" relationship that the law wishes to support, and thus whether division of property accumulated during the relationship should be available. Courts should also continue to enforce agreements and apply equitable doctrines to non-married cohabitants to the same degree they would to any other parties. Similarly, courts should evaluate requests to modify or terminate spousal support based upon subsequent cohabitation based upon the actual economic circumstances of the parties, rather than on bright line rules which make unsupported assumptions about the economic arrangements of post-dissolution cohabitating couples. Finally, courts should enforce the marital duty of financial support in all circumstances in which it is being violated, regardless of whether the couple is cohabitating.