

PROPERTY AND SUPPORT RIGHTS OF UNMARRIED COHABITANTS: A PROPOSAL FOR CREATING A NEW LEGAL STATUS

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INTRODUCTION

In the United States in the mid-1980's millions of couples, consisting of a man and a woman involved in a sexual relationship, live together although unmarried to each other.¹ At the termination of the cohabitation relationship—either by death or by simply the parting of ways—the courts are asked to declare what, if any, support, property, or contract rights one cohabitant has against the other (or the estate of a deceased cohabitant).

The problem of how cohabitants fit into the legal framework can also arise at a time when the relationship is ongoing and stable, not through claims of the cohabitants *inter se* but usually through disputes with third parties. For example, one of the cohabitants may seek recovery for loss of consortium from a tortfeasor who injured the other cohabitant.² A creditor of one of the pair may seek to recover from earnings of the other cohabitant during their relationship on the theory that it is the legal equivalent of community property.³

This article reviews critically American law's initial treatment of the cohabiting couple, the recognition of what can be called a negative status which, rather than create rights and obligations between the cohabitants, disabled them from making contracts with each other and in some jurisdictions barred certain types of donations by one to the other.

A majority of jurisdictions seem to have abandoned the negative status approach and have employed contract law to determine the property-related rights of cohabitants. This article notes the uncertainties of this contract-law approach and the difficulty of meshing into federal law of taxation and bankruptcy the position of domestic partners who lack a status relationship.

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1. See, e.g., Presnick, Who Gets the Apartment When Unmarried People Uncouple, 4 Fairshare No. 2, p. 9 (Feb. 1984); Weitzman, Changing Families, Changing Laws, 5 Fam. Advoc. 2 (Summer 1982); Note, The Rights of Unmarried Cohabiting Couples to Housing in New York, 11 Fordham Urb. L.J. 381, 383-84 (1982). See also authorities cited *infra* note 19.

2. See *infra* note 108.

3. See *Mintz & Mintz, Inc. v. Color*, 250 So. 2d 816 (La. App. 4th Cir. 1971); *Sims v. Matassa*, 200 So. 666 (La. App. 1st Cir. 1941); *Planck v. Hartung*, 98 Cal. App. 3d 838, 159 Cal. Rptr. 673 (1979), discussed in text accompanying notes 93-94 *infra*.

The article concludes that the negative-status approach must be rejected as based on outdated social mores and inaccurate notions as to the power of domestic relations law to alter contemporary lifestyles. While cohabitants certainly ought to be free to make express contracts with each other concerning property and support rights and obligations, contract law cannot provide adequate solutions to the problems raised by the large number of cohabiting couples.

It is recommended that these problems be approached primarily through status law. The common-law marriage doctrine should be revived in states that once recognized it but abolished it; it should be embraced for the first time in states like Louisiana where it never had a foothold. At the least the civil law's putative marriage doctrine should be expanded to cases where there was no civil or religious ceremony yet the cohabitants believed they were married under the rejected common-law marriage doctrine.

Finally, the major thrust of the article is the somewhat novel suggestion that legislation be enacted to create a new status—lawful cohabitation—with rules concerning support, property and associated rights and obligations corresponding to the expectations of typical cohabitants. It is proposed that cohabitants be able to formally enter this status by official recordation (or even a ceremony) but that, in addition, a doctrine which can be called common-law cohabitation be recognized where the acts of the couple in entering into the relationship can cause the status to attach.

It is hoped that the federal government will, in applying taxation, bankruptcy, and some aspects of social security law, accept the state-law theory that lawful cohabitation status is a new form of marriage. If this marriage theory is rejected, Congressional action recognizing the new status will be necessary to make the proposal wholly workable.

I. COHABITATION AS CREATING A NEGATIVE STATUS

American law initially responded to cohabitation by creating a status for the cohabitants.⁴ Although the status entered Louisiana law legislatively in the Civil Code of 1808 with a codal article restricting donations be-

4. See Lorio, *Concubinage and Its Alternatives: A Proposal for a More Perfect Union*, 26 Loy. L. Rev. 1, 5-6 (1980). She notes that the relationship is status because rules of law apply to it not through recognition of a civil contract between the parties but because their actions have brought them within the legal category of concubinage. This result, she notes, "deprives unwed cohabitators of the right to contract concerning some of their most personal effects." *Id.* at 11. See also Casad, *Unmarried Couples and Unjust Enrichment: From Status to Contract and Back Again?*, 77 Mich. L. Rev. 47, 47 (1978); Hunter, *An Essay on Contract and Status: Race, Marriage, and the Meretricious Spouse*, 64 Va. L. Rev. 1039, 1091 (1978).

tween cohabitants,⁵ in the great majority of jurisdictions this status was the product of common law, judge-made rules. Given various names—concubinage, meretricious relationship, illicit cohabitation—the status was unique in law. It initially conferred no rights at all on the parties (whom we shall refer to hereafter as CM for cohabiting man and CW for cohabiting woman). Rather, the rules of law attaching because of the status were negative, the primary one being an incapacity to make contracts with each other, contracts that in many states would have been permissible for persons living together in a nonsexual relationship.⁶ As noted, in at least one state, Louisiana, an additional disability attached to some cohabitants in that many donations by one to the other were prohibited.⁷

The reasons for this negative-status approach to cohabitation seem to be several. First, the courts felt it an appropriate judicial function to condemn and punish the cohabitants for their immorality in engaging in sexual relations without the benefit of marriage.⁸ Since in years past cohabitants were usually persons of lower socio-economic strata,⁹ the judicial attitude may reflect not only a moral smugness but a social and economic one as well. Certainly, that few “proper” people cohabited without marriage must have been a factor underlying the harsh judicial attitude. Condemnation through criminal law (*i.e.*, statutes making fornication a crime) might alter the parties’ conduct and may have also been part of the reasoning which lead to adoption of the negative status approach to cohabitation.¹⁰

A second policy factor that appears in some older cohabitation cases

5. See present article 1481 of the Civil Code. Lorio, *supra* note 4, has collected cases distinguishing *open* concubinage, to which the bar on some donations applies, from *clandestine* concubinage, as to which no code article restricts the right of a cohabitant to make donations to the other.

6. The kind of contract between cohabitants most frequently held invalid is a pooling of gains during the union, especially when only one of the pair is employed (or both have separate jobs and one makes considerably more than the other). See, e.g., Succession of Batiste, 446 So. 2d 487 (La. App. 4th Cir. 1984); Schwegmann v. Schwegmann, 441 So. 2d 316 (La. App. 5th Cir. 1983). While it would be unusual to find persons pooling gains not to be involved in a sexual arrangement, the writer can imagine no basis for invalidating a pooling of gains where, for example, three unmarried sisters live together with sporadic employment for each.

7. Article 1481 of the Louisiana Civil Code has since 1808 barred donations of immovables by one cohabitant to the other and limited donations of movables to 10% of the donor’s estate. Oddly, the disability attaches only if the cohabitation (concubinage) is “open.” Clandestine cohabitants can freely make gifts to each other.

8. See *Rochelle v. Hezeau*, 15 La. Ann. 306, 307 (1860) (stating that cohabitation is “repugnant to good morals”); Succession of Batiste, 145 So. 2d 668, 669 (La. App. 4th Cir. 1962) (condemning those who would “brazenly flout” the “moral fabric of society”).

9. See Skolnick, *The Social Contexts of Cohabitation*, 29 Am. J. Comp. L. 339, 341 (1981).

10. See *Texada v. Spence*, 166 La. 1020, 118 So. 120 (1928); Schwegmann v. Schwegmann, 441 So. 2d 316 (La. App. 5th Cir. 1983).

from southern states¹¹ is separation of the races. Since now-unconstitutional¹² miscegenation statutes prohibited racially mixed couples from marriage, a status law that made cohabitation unattractive was felt necessary to discourage evasion of the bar to lawful marriage by entry in a *de facto* marriage. The notion that negative-status would deter what was considered wrongful conduct was present also when the cohabitants were of the same race.¹³

Thirdly, the negative-status approach is defended on the ground that it is necessary to protect the institution of marriage.¹⁴ That is, to recognize any of the benefits of marriage as accruing to a mere cohabitant would denigrate the lawful status of marriage. When, as in a recent Louisiana decision,¹⁵ this explanation for the negative-status approach is invoked to incapacitate cohabitants from entering into a contract for the pooling of gains acquired during the union, the situation is somewhat ironic. Incapacity to contract *inter se* as to the marital rights and obligations of the parties was one of the historic attributes of lawful marital status in Louisiana¹⁶ as well as in many common law states that only recently has begun to fall into some disfavor.¹⁷ Thus, the way in which marriage is "protected" by holding cohabitants to lack capacity to contract *inter se* is preventing cohabitation from being an attractive alternative lifestyle to marriage because of greater freedom for the parties involved.

Criticism of the Negative-Status Approach

Under contemporary social conditions, none of the reasons given in support of the negative-status approach is sound. The arm of the law primarily concerned with meting out punishment to persons based on their illicit sexual conduct is the legislative branch, and the trend there is to repeal laws criminalizing sexual conduct between consenting adults of the opposite sex.¹⁸

11. See *Grant v. Butt*, 198 S.C. 298, 17 S.E.2d 689 (1941). Religious discrimination also appears in some cases taking the negative-status approach. See *Regina v. Coffin*, 19 Canadian Rptr. 22, 224 (Que. Q.B. 1954), where the judge said that to recognize a non-marital union as equivalent to marriage would be an "outrage against . . . Christian morality."

12. *Loving v. Virginia*, 388 U.S. 1 (1967).

13. See *Texada v. Spence*, 166 La. 1020, 118 So. 120 (1928); *Schwegmann v. Schwegmann*, 441 So. 2d 316 (La. App. 5th Cir. 1983).

14. See, e.g., *Schwegmann v. Schwegmann*, 441 So. 2d 316 (La. App. 5th Cir. 1983).

15. See *id.*

16. See La. Civ. Code art. 2446 (1972 Comp. Ed., in 17 West's La. Stat. Ann.—Civ. Code).

17. See *infra* note 26.

18. See *In re Lane*, 58 Cal. 2d 99, 22 Cal. Rptr. 857, 372 P.2d 897 (1967); *State v. Saunders*, 75 N.J. 200, 381 A.2d 333 (1977); Folberg & Buren, *Domestic Partnership: A Proposal for Dividing the Property of Unmarried Families*, 12 Willamette L.J. 453, 458 (1976); Glendon, *Marriage and the State: The Withering Away of Marriage*, 62 Va. L. Rev. 663, 685 n.91 (1976); see also Note, *Beyond Marvin: A Proposal for Quasi-Spousal Sup-*

Moreover, the civil law cannot punish one of the cohabitants by denying enforcement of at least an express agreement between the pair to pool gains during their period of living together without rewarding the other at the same time. In the reported cases it is usually CW, a stay-at-home serving in the role of wife (and mother if there are children of the union) who is "punished" under the negative-status approach. CM has had title to acquisitions taken in his name despite a pooling contract the parties had made; the law, in order to "punish" CW, permits CM to freely walk away from his contract, doubling the amount of gain he expected to have as his own if and when the parties split up.

In this circumstance, CW may be left impoverished and become a burden on local welfare rolls or local charities who would otherwise devote available funds to assist persons without any kind of resources. Especially in the situation where CM has the wealth to honor his contract, which would make CW self-sufficient, state interest is defeated by the attempt through the negative-status approach to punish cohabitants for their immorality.

The notion that the law should not give assistance to persons who are "not our kind of people" (*i.e.*, are of low socio-economic class) was never and could not now be openly stated as a reason for employing the negative-status approach to cohabitation. In any event, numerous studies have shown that in recent years cohabitation has become a popular lifestyle with middle and upper class persons¹⁹ (although these persons are not

port, 30 Stan. L. Rev. 359, 365-67 (1978) (contemporary law has no interest in punishing cohabitants).

The change in mores respecting sexual conduct is legally recognized in many other situations. See, e.g., Kathleen K. v. Robert B., 150 Cal. App. 3d 992, 198 Cal. Rptr. 273 (1984) (holding that a fornicating female who contracted venereal disease may recover in tort from male who assured her he did not have herpes when he knew he did); Barbara A. v. John G., 145 Cal. App. 3d 369, 193 Cal. Rptr. 422 (1983) (holding that a fornicating female who became pregnant can recover costs from male who falsely assured her he was sterile); Glendon, Marriage and the State: The Withering Away of Marriage, 62 Va. L. Rev. 663, 689 (1976) (analyzing cases where a custodial parent's entering into a cohabitation relationship was held not to be a basis for change of custody).

19. L. Weitzman, The Marriage Contract 361-63 (1981); Beech, The Case Against Legal Recognition of Cohabitation, in Marriage and Cohabitation in Contemporary Society (M. Eekelaar & S. Katz eds. 1980) [hereinafter cited as Marriage and Cohabitation]; Finlay, The Informal Marriage in Anglo-Australian Law, in Marriage and Cohabitation, *supra*, 156, 159; Lathrope, State-Defined Marital Status: Its Future as an Operative Tax Factor, 17 U.C.D. L. Rev. 257, 261-62 (1983); Lorio, *supra* note 4, at 3, 23; Shultz, Contractual Ordering of Marriage: A New Model for State Policy, 70 Calif. L. Rev. 204, 287 (1982); Skolnick, *supra* note 9, at 399, 443; Wand, The Relevance of Premarital Cohabitation to Property Division Awards in Divorce Proceedings: An Evaluation of Present Trends and a Proposal for Legislative Reform, 63 B.U.L. Rev. 105, 106 (1983); Weyrauch, Metamorphoses of Marriage: Formal and Informal Marriage in the United States, in Marriage and Cohabitation, *supra*, 165, 169; Comment, Putative Spousal Rights and the Federal Bankruptcy Act, 25 UCLA L. Rev. 96, 118 n.93 (1977).

yet, apparently, a majority of cohabitants). Of course, a notion that condemnation of cohabitation will assist in keeping black and white people from racially-mixed intimate association could not constitutionally serve as a policy basis for employing the negative-status approach to cohabitation after *Loving v. Virginia*.²⁰

Does judicial condemnation of cohabitation deter couples from engaging in this form of domestic union? The writer is aware of no studies comparing the rate of cohabitation in states that have rejected the negative-status approach (such as California²¹ and Oregon²²) with that in those that cling to it (e.g., Louisiana²³ and Illinois²⁴). Even before the much-discussed 1976 *Marvin*²⁵ decision, a large increase in the number of cohabiting couples had been detected in California,²⁶ yet at that time almost all American jurisdictions took the negative-status approach to cohabitation.

Moreover, although most persons with legal training or careers in social work and related fields may have heard of *Marvin*, surely the majority of couples who began cohabitation since 1976 have not. The maxim that all persons are deemed to know the law²⁷ is, of course, only a fiction. (If it were not, there would be no need for a specially trained bar.) The writer concludes that it is not credible that an appellate court decision overruling the negative-status caselaw would cause any measurable increase in the number of cohabiting couples.

The notion that the traditional approach actually deters cohabitation—that is, decreases the number of cohabitants—depends not only on the dubious assumption that persons considering cohabitation are aware of the negative status rules that the law attaches because of such a living arrangement, but also on the assumption that the couple may actually rely on that state of the law as a reason not to cohabit. That latter assumption also is not believable. Most couples who begin to cohabit probably do not even think about making the kind of contracts that the negative-status approach holds invalid.²⁸ The very few who are aware of the

20. 388 U.S. 1 (1967).

21. *Marvin v. Marvin*, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

22. *Latham v. Latham*, 274 Or. 421, 547 P.2d 144 (1976).

23. *Schwegmann v. Schwegmann*, 441 So. 2d 316 (La. App. 5th Cir. 1983).

24. *Hewitt v. Hewitt*, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979).

25. 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976).

26. See, e.g., Bruch, Property Rights of de facto Spouses Including Thoughts on the Value of a Homemaker's Services, 10 Fam. L.Q. 101, 103 (1976) (noting that judicial criticism of the relationship as "illicit" does not deter cohabitants); Clark, The New Marriage, 12 Willamette L.J. 441, 442 (1976); Folberg & Buren, *supra* note 18, at 456 (1976); Glendon, *supra* note 18, at 685.

27. See, e.g., *Groseth v. Ness*, 421 P.2d 624 (Alaska 1966); *Abercrombie v. State*, 91 Idaho 586, 428 P.2d 505 (1967); *Millweight v. Romer*, 322 N.W.2d 30 (Iowa 1982).

28. See *infra* note 46.

negative-status law and still wish to make a pooling-type contract may often have sufficient faith in each other's commitment to the relationship to rely on nonlegal enforcement mechanisms, such as mediation or simply the dishonor among the cohabitants' peers of one who repudiates the legally unenforceable agreement.

There are probably also a small but significant number of cohabiting couples of the rebellious type who consider this lifestyle in part for the very reason that it is extra-legal.²⁹ The few of them who are aware that appellate decisions are labeling their unions illicit, meretricious or even sinful could thus be encouraged to forego marriage.

In Louisiana—where the judiciary seems most committed to the proposition that the traditional or negative-status approach is necessary to deter illicit conduct—legislation in 1982 seemed to accept the widespread practice of cohabitation. Article 160 of the Civil Code was amended to provide for termination of alimony when the recipient “enters into open concubinage.”³⁰

In sum, it is highly unlikely that judicial decisions (and a few statutes) adopting the negative-status approach to cohabitation have any significant impact on the decision of a couple to begin cohabiting. With respect to those who are aware of this legal approach in the state where they live, chances are as good that such a legal approach encourages rather than discourages the practice.

It is urged that, wholly apart from deterrence, the law's permitting mere cohabitants to obtain any of the benefits associated with legal marriage—such as a contractual arrangement similar to a community of acquets and gains—will demean and denigrate marriage.³¹ This argument is sound only if, as Justice Clark feared in his *Marvin* dissent,³² the rejection of the negative-status approach is accompanied by adoption of such a large bundle of remedies for cohabitants that comparison of marriage and cohabitation from the viewpoint of a domestic relations legal scholar reveals cohabitation to be the preferable mode of sexual union from a practical standpoint. (As noted above, the writer does not think conclusions drawn from such a technical examination will have measurable ef-

29. See Glendon, *supra* note 18, at 687 n.100.

30. La. Civ. Code art. 160, as amended by 1982 La. Acts, No. 580, § 1 (applied in *Thomas v. Thomas*, 440 So. 2d 879 (La. App. 2d Cir. 1983)). Many other states are grappling with the problem of whether entering into a cohabitation relationship should be a ground for terminating alimony. See, e.g., *In re marriage of Roofe*, 460 N.E.2d 784 (1984); *Gertrude L.Q. v. Stephen P.Q.*, 466 A.2d 1213 (Del. 1983).

31. See *supra* text accompanying notes 14-15.

32. 18 Cal. 3d at 685, 557 P.2d at 123, 134 Cal. Rptr. at 832. See also *Hewitt v. Hewitt*, 77 Ill. 2d 49, 62, 394 N.E.2d 1204, 1209 (1979) (criticizing *Marvin* for making cohabitation more attractive than lawful marriage *vis-à-vis* remedies at dissolution); Schultz, *supra* note 19, at 288 (expressing similar fears about rights of cohabitants under *Marvin*).

fect on the numbers of people who elect cohabitation over marriage, although it could over time as more persons learn about the actual governing law and as "moral" pressure to marry diminishes.)

The answer to this "denigration" argument is simply that the law must heed Justice Clark's warning and not confect rules that make cohabitation preferable to marriage. It should be noted that to adhere to this goal, changes can be made on both sides of the balance. As legal remedies are accorded to cohabitants, the law can, and should, remove some of the strictures historically placed on married couples³³ (such as the incapacity to contract in advance of a falling out how property and support claims will be handled in the event of divorce).

Note too, that even if one fears that recognition of the numerous contractually-based remedies for cohabitants mentioned in *Marvin* will denigrate marriage, that reservation probably cannot fairly be said about the recognition of a new status of lawful cohabitation as recommended in this article. The reciprocal rights and obligations arising out of this status will be narrower than those attached to marital status.

The proposed new status for most cohabiting couples will fill a different function than does marriage. It will provide a legally sanctioned mode of sexual union for those who have doubts about the life-long and greater commitment of persons who elect to marry.

Moreover, is not marriage more demeaned (than it would be by recognition of an additional and alternative status) by the law's attempting to force into it with a life-long commitment persons who desire a heterosexual, monogamous lifestyle yet are uncertain about making the

33. The call for a very broad freedom of contract between the lawfully married—including the right to make antenuptial agreements governing support obligations (if any) and division of property at divorce—is widespread in recent legal literature. See, e.g., L. Weitzman, *supra* note 19, at 227 & *passim* (1981); Fleischmann, *Marriage by Contract: Defining the Terms of Relationship*, 8 *Fam. L.Q.* 27, 45-46 (1974); Glendon, *Family Law Reform in the 1980's*, 44 *La. L. Rev.* 1553 (1984); Schultz, *supra* note 19, at 229 & *passim*.

There is a strong trend in the case law favoring increased freedom of contract. See, e.g., *Posner v. Posner*, 233 So. 2d 381 (Fla. 1970); *Osborne v. Osborne*, 81 Mass. App. Ct. Adv. Sh. 2216, 428 N.E.2d 810 (1981); *Frey v. Frey*, 471 A.2d 705, (1984); *Hafner v. Hafner*, 295 N.W.2d 567 (Minn. 1980).

However, the recently promulgated (July 1983) Uniform Premarital Agreement Act limits such freedom of contract by an "unconscionability" proviso (§ 6(a)), and a bar to waiving support will keep a divorcing spouse from the welfare rolls (§ 6(b)). A very wishy-washy provision (§ 7) says that if agreement is made in contemplation of marriage and the marriage turns out to be invalid (*i.e.*, the legal relationship was cohabitation), the contract is enforced only to the extent necessary "to avoid an inequitable result." The writer thinks the contractual arrangements for sharing of gains and the like should be presumptively binding whether or not the marriage was valid.

life-long commitment?³⁴ If, as the writer believes, the divorce rate would substantially drop were the law to create a new status of lawful cohabitation, surely the institution of marriage would be strengthened. Will not the question "will you marry me?" be more meaningful to a loved-one under a system of law where "let's be lawful cohabitants" is a sanctioned alternative?

Finally, the negative-status approach may be breeding contempt in general for the law by former cohabitants harmed by application of this theory. Almost every case of a cohabiting couple who agree to pool gains in ignorance of the illegality of the contract is a prime candidate for engendering such contempt. The pain of dashed expectations that the law would provide some relief also attends the breakup of a couple who assumed (erroneously) that something like a common-law marriage doctrine attached to at least a long-term cohabitation.

Where the law has little hope of advancing perceived morality by altering conduct, its best posture is to respond to typical expectations concerning the impact of law in a particular situation.³⁵ The writer does not think the negative-status theory reflects such expectations.

II. ABANDONMENT OF NEGATIVE-STATUS IN FAVOR OF A CONTRACT-LAW APPROACH

Most of the American jurisdictions adhering to the negative-status approach to cohabitation would enforce a contract on which CW sued CM or vice versa if it could be wholly severed from the illicit sexual arrangement.³⁶ This severance could most readily be found in situations where the contract was wholly commercial—*e.g.*, CW would work for CM for agreed on wages as a nurse or cook—and was made before sexual relationship began between the pair.³⁷ Especially in Louisiana, parties to a pooling-of-earnings contract have been unable to sever it from the illicit sexual union when the agreement was not commercial in nature.³⁸

34. See Schultz, *supra* note 19, at 252; Skolnick, *supra* note 9, at 356 (arguing that pluralism can be a positive value in the area of domestic relations).

35. See Glendon, *supra* note 18, at 692 (new forms of social conduct can and usually should lead to creation of new law).

36. See generally Lorio, *supra* note 4. In addition to obtaining relief by severing from this sexual relationship a contract by one cohabitant to perform services for the other, a cohabitant can establish ownership of a fractional share of a jointly operated business "if the concubine can furnish strict and conclusive proof that her capital and industry obtained independent of the concubinage contributed" the full share that she claims at termination of the relationship. *Broadway v. Broadway*, 417 So. 2d 1272, 1276 (La. App. 1st Cir.), cert. denied, 422 So. 2d 162 (La. 1982).

37. See *Succession of Pereuilhet*, 23 La. Ann. 294 (1871); *Delamour v. Roger*, 7 La. Ann. 152 (1852).

38. See *Sparrow v. Sparrow*, 231 La. 966, 93 So. 2d 232 (1957); *Simpson v. Normand*,

And even commercial-type agreements made after the cohabitation commenced have usually been tainted by the illicit living arrangement.³⁹

Marvin authorizes an express agreement for a sharing of gains similar to that under a community property regime, based on a pooling of efforts in the classic noncommercial situation where one of the pair (CW in *Marvin*, as in most such cases) was expected to give up work and be a stay-at-home wife-equivalent. A kind of severance is required. It is not fatal to such contracts that they are made after cohabitation begins; they are enforceable "unless they rest on an unlawful meretricious consideration."⁴⁰ An express agreement for support that would create contractual obligation similar to alimony would be similarly enforceable under the *Marvin* theory, as would a contract giving the surviving cohabitant upon termination of the arrangement by death a claim against the other's property similar to a nonbarrable share under common law statutory succession schemes (or a Louisiana widow's portion).⁴¹

Subject to the same required severance from illicit taint, an implied contract—at least for sharing of gains—would be recognized in jurisdictions adhering to *Marvin*, and a *quantum meruit* claim for services rendered nongratuitously could be asserted.⁴² As a remedial device under this contract approach, equitable remedies such as the resulting or constructive trust have been employed.

A number of jurisdictions have fully accepted *Marvin*,⁴³ while others

51 La. Ann. 1355, 26 So. 266 (1899); *Stringer v. Mathes*, 41 La. Ann. 985, 7 So. 229 (1889); *Guerin v. Bonaventure*, 212 So. 2d 459 (La. App. 1st Cir. 1968); *Foshee v. Simkin*, 174 So. 2d 915 (La. App. 1st Cir. 1965).

39. See, e.g., *Guerin v. Bonaventure*, 212 So. 2d 459 (La. App. 1st Cir. 1968).

40. 18 Cal. 3d at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831.

41. See La. Civ. Code art. 2432.

42. 18 Cal. 3d at 684, 557 P.2d at 122, 134 Cal. Rptr. at 831.

43. See the analysis in W. McClanahan, *Community Property Law in the United States* § 5.27 (Supp. 1983); Note, *Marvin v. Marvin: Five Years Later*, 65 Marq. L. Rev. 389 (1982); Cases include *Estate of Steffes*, 95 Wis. 2d 490, 290 N.W.2d 697 (1980) (contract may be express, implied-in-fact, or implied-in-law); *Kozlowski v. Kozlowski*, 80 N.J. 378, 403 A.2d 902 (1979); *Levar v. Elkins*, 604 P.2d 602 (Alaska 1980); *Carlson v. Olson*, 256 N.W.2d 249 (Minn. 1977); *Latham v. Latham*, 274 Or. 421, 547 P.2d 144 (1976); *Omer v. Omer*, 11 Wash. App. 386, 523 P.2d 957 (1974); *Knauer v. Knauer*, 470 A.2d 553 (Pa. Super. Ct. 1983) (express oral contract enforced in opinion generally favorable to *Marvin*); see also *Kinnison v. Kinnison*, 627 P.2d 594 (Wyo. 1981); H. Hahlo, *Nullity of Marriage in Canada, with a Sideways Glance at Concubinage* 50 (1979) (Ontario will enforce written pooling contracts); O'hski, *The Legal Recognition of Domestic Contracts: The Experience in Ontario, in Marriage and Cohabitation*, supra note 19, at 226, 228-30.

Wholly rejecting *Marvin* while adhering to the negative-status approach are *Rehak v. Mathis*, 239 Ga. 541, 238 S.E.2d 81 (1977); *Hewitt v. Hewitt*, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979); *Schwegmann v. Schwegmann*, 441 So. 2d 316 (La. App. 5th Cir. 1983); but see *Spafford v. Coats*, 118 Ill. App. 3d 566, 455 N.E.2d 241 (1983) (CW may invoke implied-in-law trust doctrine to trace her money contributions to property to which CM has title.).

allow suit on an express but not an implied-in-law contract.⁴⁴ In some states the implied-in-law (*quantum meruit*) contract remedy is recognized⁴⁵ while other aspects of *Marvin* remain undecided.

A. Criticism of the Marvin Approach

1. Express Contracts

Cohabitants of course should be able to contract freely between themselves concerning property and support rights both during and at the termination of their relationship. Unfortunately, few cohabiting couples make such express contracts.⁴⁶ Especially in states which limit the *Marvin* remedy to express agreements, this contract-law approach invites outright perjury concerning an oral understanding, or what might be called quasi-perjury, by which one of the cohabitants, after the breakup of the couple, "recalls" a conversation about their agreeing to share their lives together which he or she after-the-fact contorts (perhaps even in good faith) into a community-property type pooling contract.

The express contract will usually be oral,⁴⁷ and under *Marvin* will almost always present a litigable issue concerning the severance problem. Indeed, even a carefully drafted written agreement which says nothing about the sharing of sexual relations as part of the consideration might raise a severance question under the common-law doctrine that the Parol Evidence Rule is no barrier to proving the true consideration of a contract.⁴⁸

44. Compare *Merrill v. Davis*, 100 N.M. 552, 553, 673 P.2d 1285, 1286 (1983) ("We do not recognize an implied agreement. . . .") with *Dominguez v. Curz*, 95 N.M. 1, 617 P.2d 1322 (App. 1980) (express agreement enforceable); see *Morone v. Morone*, 50 N.Y.2d 481, 407 N.E.2d 438, 429 N.Y.S.2d 592 (1980).

45. See *Green v. Richmond*, 337 N.E.2d 691 (Mass. 1975); *Edgar v. Wagner*, 572 P.2d 405 (Utah 1977); *Huniston v. Bushnell*, 118 N.H. 759, 394 A.2d 844 (1978).

46. Numerous writers have observed that the typical cohabiting couple lacks the sophistication to enter into an express contract governing the relationship. See, e.g., Clark, *supra* note 26, at 451; Bruch, *supra* note 26, at 102, 135; Note, Property Rights Upon Termination of Unmarried Cohabitation, 90 Harv. L. Rev. 1708, 1718 (1977); Folberg & Buren, at 465; Casad, *supra* note 4, at 49.

It has also been observed that often there is no equal bargaining power between the male and female parties entering into a cohabitation relationship; if a contract is in fact made, CW may feel compelled to accept the terms dictated by CM. Blumberg, Cohabitation Without Marriage: A Different Perspective, 28 UCLA L. Rev. 1125, 1163 (1981).

47. Wand, *supra* note 19, at 115. The oral agreement seems to be a good candidate for bringing "fault" analysis back into the process of judicial supervision of the termination of a marital-type relationship despite the modern no-fault policy of contemporary divorce law concerning the lawfully married. Example: "I told her we'd share our gains only if she was faithful to me." Or: "A condition of my agreeing to support her was that there would be no nagging." See Weyrauch, *supra* note 19, at 274.

48. See *Aetna Life Ins. Co. v. May*, 217 Ark. 215, 229 S.W.2d 238 (1950); Weitzman, Legal Regulation of Marriage: Tradition and Change—A Proposal for Individual Contracts

At least in California, the entire contract is invalid even if sexual sharing is but one of many forms of consideration a live-in lover is to provide. In a case where one cohabitant had the candor to actually plead a contract of mixed consideration, the court so held at the demurrer stage.⁴⁹ (This contract involved a same-sex couple, a fact that had nothing to do with the court's handling of the issue of tainted consideration.)

Marvin will thus spawn many cases in which one cohabitant, say CW, alleges a contract as to which sex played no part of the consideration. In defense, CM can deny generally the existence of any such agreement but may ultimately at trial take the position that the couple did have a pooling agreement, but that each of them understood it was contingent on their sharing sexual favors. CM would argue that the moment either cohabitant demanded a "separate bedrooms" policy, the sharing of gains would end even if the pair, still friends, continued to share the same living quarters.

The writer joins commentators⁵⁰ and courts⁵¹ who find it inconceivable that a jury strictly following the instructions given them under *Marvin* concerning tainted consideration could believe CW's version of the alleged contract. But the jury will have considerable sympathy for CW and may consider the instruction to embody a foolish notion concerning immorality. Verdicts for CW will certainly be forthcoming in some cases, but most such verdicts will be the result of jury nullification. On the other hand, the jury's verdict in the trial of John Hinckley for attempted assassina-

and Contracts in Lieu of Marriage, 62 Calif. L. Rev. 1169, 1274 (1974); 30 Am. Jur. 2d Evidence § 1056 (1967). The rule is similar under Louisiana's civil law jurisprudence. See *Queensborough Land Co. v. Cazeaux*, 136 La. 724, 67 So. 641 (1915); *Consolidated Companies, Inc. v. Angelloz*, 170 So. 556 (La. App. 1st Cir. 1936); *Texas Co. v. Couvillon*, 160 So. 839 (La. App. Or. Cir. 1935). Only if a third party has relied to his detriment on the existence of the recited consideration does there arise an estoppel to show the actual consideration was different (or nonexistent). See *City Bank & Trust Co. v. Caneco Construction, Inc.*, 341 So. 2d 1331 (La. App. 3d Cir. 1977).

49. *Jones v. Daly*, 122 Cal. App. 3d 500, 501, 176 Cal. Rptr. 130, 131 (1981). The plaintiff alleged a contract under which plaintiff would render his services "as a lover, companion, homemaker, traveling companion, housekeeper, and cook" to his cohabitant. The court held that this form of agreement made sex a nonseverable component of the consideration. See also Note, *supra* note 18, at 381 (problem of severing sexual consideration from balance of contract means express contract remedy is "limited severely").

50. See Simitian, *Property Rights and the Unmarried Homemaker: Marvin v. Marvin and the California Experience*, 5 Com. Prop. J. 3, 7 (1978): "It would seem clear that, typically, the cohabitation of the parties is an essential condition of the relationship"

51. See *Hewitt v. Hewitt*, 77 Ill. 2d 49, 394 N.E.2d 1204 (1979). "[I]t would seem more candid to acknowledge the return of varying forms of common law marriage than to continue displaying the naivete we believe involved in the assertion that there are involved in these relationships contracts separate and independent from the sexual activity, and the assumption that those contracts would have been entered into or would continue without that activity." *Id.* at 60, 394 N.E.2d at 1209.

tion of President Reagan signals CM that triers of fact cannot be counted on to indulge in nullification. This situation—where there is great uncertainty as to what a trier of fact will do despite a general agreement on the facts—could increase the amount of litigation in this area of law and decrease settlements. In any event, a doctrine of “freedom of contract” that generally depends on jury nullification before a contract can exist seems an intolerable response to the issues of property and support rights of cohabitants.

One solution to the reliance under *Marvin* on nullification is to change the law’s handling of the severance issue. The Oregon Supreme Court did so in the case of an alleged express oral agreement for pooling by a couple living in a *de facto* marriage, concluding that it would be “unduly harsh” to invalidate the agreement simply because sharing of sex outside of marriage was implicit in it: “We are not validating an agreement in which the only or primary consideration is sexual intercourse. The agreement here contemplated all the burdens and amenities of married life.”⁵² As will be pointed out below, however, even in Oregon the express contract remedy may be inadequate for the few cohabitants that make express contracts because of the inhospitable impact of federal tax, bankruptcy, and entitlement laws.

2. Implied Contracts

In *Marvin* jurisdictions recognizing such a remedy, the implied-in-fact contract remedy is available to a cohabitant who is honest enough to concede the absence of an express oral contract or who alleges the implied contract as an alternative theory in the event the jury finds no express contract. Whether to imply a contract from cohabitation probably will be the chief issue in most cases litigated under *Marvin*.

The outcome of litigation under the implied contract theory usually will be impossible to prognosticate. One uncertainty, in California at least, is whether, if the trier of fact finds there was an implied contract, it will also find that sexual sharing was not part of the consideration. As previously indicated, if a jury scrupulously follows instructions based on *Marvin*, it ought to find sexual sharing to be part of the consideration, but jury nullification out of sympathy is quite possible.

The uncertainty on the initial question of implied contract *vel non* is based not on possible nullification but rather on what inferences the trier of fact will or will not draw. It seems, therefore, that in the overwhelming majority of cases no basis for appeal will exist (if instructions or findings are not erroneous). Thus in *Marvin* itself on remand, the trial court declined to find an implied contract between Lee Marvin and Michele

52. Latham v. Latham, 274 Or. 421, 427, 547 P.2d 144, 147 (1976).

Triolo.⁵³ Surely, however, it would not have been reversed had it chosen to imply a pooling agreement from the couple's lifestyle.

Even in the strongest case for an implied pooling contract it seems that the trier of fact could reject the inferences favoring the existence of such a contract.⁵⁴ Imagine a case where for ten years CM—cohabiting with CW in a community property state—deposited his pay-check into a bank account taken out in the names of both cohabitants. During the ten years CW sometimes worked for pay and sometimes remained at home performing domestic services. All of CW's paychecks went into the same account, except on one occasion when she endorsed her check over to an antique dealer to buy a Chinese vase for \$400, receiving a sales slip naming CW as purchaser. In litigation arising after the couple split up, it was learned the vase is actually worth \$40,000.

Some triers of fact might infer from the almost uniform practice concerning deposit of paychecks that the couple had a pooling agreement with terms similar to the state's community property regime. But the inference that the joint account was merely for convenience could be drawn as well, especially in light of CW's major purchase made in her own name. The implied contract might be that each cohabitant had the option to place earnings into a pooled account subject to the sharing agreement or to withhold the earnings for separate investment.

The writer would find that the vase is co-owned under an implied-in-fact contract, but, if he were an appellate court judge, could not reverse a judgment based on a verdict or findings of a trier of fact that declined to infer such an agreement.

Suppose that while CM was seeking half ownership of the vase under

53. *Marvin v. Marvin*, 122 Cal. App. 3d 871, 176 Cal. Rptr. 555 (1981).

54. See generally Note, *supra* note 46, at 1717. The effect of a system under which the judge, approaching each cohabitation case on an *ad hoc* basis with numerous judge-made doctrines such as implied contract, resulting trust, etc., which the court can adopt or reject as it wishes, is described in Finaly, *The Informal Marriage in Anglo-Australian Law*, in *The Informal Marriage in Anglo-Australian Law* 156 (M. Eekelaar & S. Katz eds. 1980):

The problem with judicial lawmaking [of this type] . . . is uncertainty. If the availability of the remedy is to depend simply on the idiosyncrasy of the judge acting in accordance with his or her perception of a need to ameliorate a situation involving an injustice, and who does so without the certainty of enacted prescription, then unless judges come to act in such a way as a matter of predictable habit and thereby charting new law, the injustice cannot be said to have been removed.

See also J. O'Donnell & D. Jones, *The Law of Marriage and Marital Alternatives* 190 (1982) (written agreement needed because courts are fickle); Casad, *supra* note 4, at 49 (implied agreement "unreliable" theory); Deech, *supra* note 19, at 309 (results under implied contract theory will be "arbitrary"); Weyrauch, *supra* note 19, at 273 (uncertainty of legal effect of cohabitation under *Marvin* "may 'chill' the established and maintenance of intimate relationships").

implied contract law, CW responded that if there were such a contract, it should be viewed as a contract by each cohabitant to undertake to the extent possible under the law all of the support and property obligations attaching to a lawful marriage, and that she was thus entitled to an alimony-type award of periodic payments because of CM's contractual obligation to support her for life.

Even though the writer accepted the inference CM urged considering the sharing of all paychecks received during the cohabitation, he would not infer from the living and banking arrangements a promise by CM to support CW. That the couple chose not to marry is inconsistent with a life-long undertaking of support. Thus the writer would infer only a contract terminable at the will of either party,⁵⁵ with each party entitled at termination to an accounting based on implied promises to share net gains on hand plus those already earned by labor but not yet received (such as a contingent fee in lawyer CM's lawsuit which he won and is defending on appeal).

On the other hand, another trier of fact might infer from the ten-year cohabitation, during which CW worked only sporadically and hence effectively scuttled career opportunities, that CM may have acted in a manner that led CW reasonably to believe she would be entitled to such support, a fairly strong basis for implying the contract she urged in seeking an alimony-type award. As an appellate court judge, the writer could not reverse a judgment rendered after the trier of fact drew such an inference.

In sum, a huge cloud of uncertainty looms over the implied contract remedy. In contrast, a status approach to the above hypothetical would, if the facts were agreed on, result in a directed verdict. Under the old negative-status approach, CW's title to the vase is conclusive and she is not entitled to support. Under the positive-status approach proposed below in this article, CM and CW would clearly be lawful cohabitants, giving CM a half interest in the vase and CW support rights for a short period of time only.

3. *Quantum Meruit*

Although a *quantum meruit* recovery theoretically is one under implied-in-law rather than implied-in-fact contract, the remedy should not be available if the trier of fact concludes that the parties had an express contract for pooling of gains (or, more unlikely, for payment for services rendered without regard to overall gain). Likewise, *quantum meruit* should not be available if the trier of fact finds an implied contract. The express or implied-in-fact contractual remedy should be held to be exclusive, just

55. Accord Simitian, *supra* note 50, at 5 (proposing that any contract must be a "hiring at will").

as the status law (or alternatively created contract-based) remedies are exclusive at termination of a lawful marriage, barring a lawful wife from claiming the value of her services under *quantum meruit*.

The *quantum meruit* claim is likely to be asserted at termination of the relationship by a cohabitant—usually CW, especially if she was a stay-at-home cohabitant not working for pay—not only when it is believed that the trier of fact would find no express or implied agreement, but also when such a pooling agreement could be found but there are no or little net gains to divide.

The *quantum meruit* claim is as uncertain as the implied contract. First, *Marvin* declares that the *quantum meruit* recovery can be given only if the trier of fact finds that the services were rendered not gratuitously but with expectation of payment.⁵⁶ A trier of fact is probably free in almost all cohabitation cases to draw the inference either way.

In most situations where CW relies on *quantum meruit*, there will be little net gain during cohabitation to divide under pooling contract theories, but CM will have other wealth (e.g., a house he owned before CW moved in) that could be seized if not exempt to pay damages awarded under CW's *quantum meruit* theory. Thus CM may make the perhaps surprising defense to the *quantum meruit* claim that in fact the agreed-on compensation for services was the pooling of gains earned by labor during the cohabitation.

CM also has the defense, likely to be meritorious in most cases where *quantum meruit* could be asserted, that the benefits such as housing, food, and recreation, which he provided CW during their cohabitation are of greater value than the services she provided.⁵⁷ (This defense would very likely be valid if one concluded that CW could recover not for one hundred percent of domestic services but only for the excess domestic work she had to do because two persons rather than one lived in the shared abode.) Indeed, as one commentator has noted,⁵⁸ since CW is treating the arrangement with CM as commercial by suing for the value of services rendered, he may have a tenable claim for restitution based on the theory that benefits he provided overpaid CW.

56. 18 Cal. 3d at 684, 557 P.2d at 122-23, 134 Cal. Rptr. at 832. See also *Slocum v. Hammond*, 10 Fam. L. Rptr. 1323 (Iowa S. Ct. March 14, 1984) (no recovery because CW held to have gratuitously rendered services to CM).

Simitian, *supra* note 50, suggests that such services are probably not rendered gratuitously but rather are rendered with the expectation by W that CM will provide the very food, housing, etc. that he did in fact provide, but without any additional monetary payment. *Id.* at 5.

57. See Simitian, *supra* note 50, at 5-6. See also Deech, *supra* note 19, at 304; Note, *supra* note 46, at 1717 (court must value quality of food, housing, etc. provided to reduce or offset *quantum meruit* recovery). Casad, *supra* note 4, at 53, 55.

58. Simitian, *supra* note 50, at 5-6.

Thus a claim by CW in *quantum meruit* not only is fraught with the possibilities of being defeated or reduced to a pittance, but also characterizing the arrangement with CM as commercial risks adverse consequences to CW.

4. *Implied-in-Law Trust*

A smattering of cases employ implied-in-law trust remedies to sort out the property claims of cohabitants upon termination of their relationship. These cases use the trust device as a remedy to carry out the intention of the cohabitants, and hence are properly viewed as types of cases using the *Marvin* contract rationale. For example, in a Washington decision⁵⁹ the appellate court found an implied pooling contract between CM and CW, who both worked at a successful business. Title to various gains had been placed in CM's name. To avoid inequity to CW, the court held the constructive trust remedy was available. This remedy would place CW in a better position with respect to those assets than creditors of CM who had not taken a security interest.

When one cohabitant, say, CW, has contributed her funds towards acquisition of property with title taken in CM's name, the purchase money resulting trust remedy may be available. Treating CM and CW as strangers to each other, there would not be a presumption that the contribution was a gift by CW to CM;⁶⁰ instead, a purchase money resulting trust would be presumed. However, since the pair have somewhat the same intimate relationship as a lawfully married couple, courts of equity could reasonably apply to cohabitants the presumption of gift that arises when a lawful spouse makes such a contribution.⁶¹ Either way, whether or not the resulting trust will be imposed depends on the intent of the party contributing the money to make a gift or buy a share of ownership.

One problem facing a cohabitant seeking an implied-in-trust remedy is the unclean hands defense in equity. Presumably, the mere fact of cohabitation will not bar equitable relief, since a predicate of availability of the remedy at all is rejection of the negative-status approach to handling cohabitants' property rights, indicating that the presence of "immoral" conduct will not stay the hand of the court. However, "fault" conduct by the cohabitant seeking relief—such as a secret affair which caused the breakup of the relationship with the other cohabitant—might constitute unclean hands, barring relief by way of implied-in-law trust.⁶²

59. *Omer v. Omer*, 11 Wash. App. 386, 523 P.2d 957 (1974).

60. See Restatement (Second) Trusts § 440 (1957).

61. See Restatement (Second) Trusts § 442 (1957).

62. See Deech, *supra* note 19 at 304; Weyrauch, *supra* note 19, at 271. But see *Omer*, 11 Wash. App. 386, 523 P.2d 957 (1974), where the cohabitants set up their relationship as part of an immigration fraud on the federal government and the appellate court had no hesitation in finding the constructive trust remedy available for CW.

B. *Interaction With Federal Law*

1. Federal Taxation

A property-rights contract between cohabitants having no status relationship will not achieve the income tax, gift tax, or estate tax benefits accorded by federal law to the married. Instead, there may be very detrimental income or gift tax consequences. In many instances, the treatment accorded the cohabitants by federal law would extend to any state taxes similar in nature.

Even though the cohabitants may reside in a community property state and contract for a sharing of gains under provisions identical to the local community property law, splitting of income on tax returns will not be allowed.⁶³ For this purpose, it is irrelevant whether the contract is self-executing so that CW is the immediate owner of half of CM's earnings without his having to do anything by way of assignment, delivery, or transfer of title, in order to implement the pooling contract. In *Commissioner v. Harmon*,⁶⁴ in which an Oklahoma couple had opted by agreement to come under a legal community regime that was an alternative to the automatic separation of property regime, the United States Supreme Court found that the husband had assigned half his income to the wife. Under the principles of *Lucas v. Earl*,⁶⁵ he was taxable on all of the in-

63. See Blumberg, *supra* note 46, at 1157-59.

64. 323 U.S. 44 (1944). See L. Bartke, *Marital Sharing—Why Not Do It By Contract?* 1138-41, 1183 (1979).

Although it is clear that cohabitants are not lawfully entitled to income splitting, many of them in fact file joint returns, representing to the Internal Revenue Service that they are married. This fact—filing of joint returns as married persons—is often listed among the items of evidence showing that the pair had a *Marvin*-type contractual arrangement, see, e.g., *Butcher v. Superior Court*, 139 Cal. App. 3d 58, 188 Cal. Rptr. 503 (1983), or such a stable relationship that rules of law for dividing property at divorce among the lawfully married should be applied to the cohabitants, see *Marriage of Cary*, 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973).

Some of the staunchest supporters of the contract model of sharing of gains for cohabitants simply ignore the tax (as well as bankruptcy) problems this approach creates and have proposed contract forms that almost seem to invite tax fraud. See, e.g., Weitzman, *supra* note 48, at 1286 (providing a form contract for homosexual couples that provides that after its execution the earnings of each "will become community property"); L. Weitzman, *supra* note 19, at 326-27. This intended result is impossible not only from a taxation standpoint, but also under state marital property law. At most a form of tenancy in common can result, and unless greater care is taken to spell out the consideration for tax purposes, there is almost certain to be a finding of assignment of income.

65. 281 U.S. 111 (1930). See Wenig, *Marital Status and Taxes*, in *Unmarried Couples and the Law* 189, 247-48 (G. Douthwaite ed. 1979) [hereinafter cited as *Unmarried Couples*].

Incoming splitting is available if the cohabitants establish a *bona fide* business partnership. Both must either actually labor at the business or make capital contributions; the mere agreement to share income is insufficient. See *Giles v. Vette*, 263 U.S. 553 (1924); *Payton v. United States*, 425 F.2d 1324 (5th Cir. 1970). See also *United States v. Ramas*, 393 F.2d 618 (9th Cir. 1968), cert. denied, 400 U.S. 957 (1970) (Alleged family partnership

come. The case of a conventional regime of sharing of gains between unmarried persons is obviously a much weaker case for income splitting than was *Harmon*.

Since sharing of gains by contract, unlike a rule of status automatically attaching without affirmative action by the parties, does not create a community property for income taxation of salary, the same should be true with respect to taxation of capital gains. Thus, even if the cohabitants have the type of contract that attempts to follow as closely as possible community property law, on the death of one the survivor will not get a stepped-up basis under section 1041(b)(6) of the Internal Revenue Code as he would if the co-owned property were actually community.⁶⁶

If the cohabitants' agreement provides for a support obligation so that, for example, CW can obtain an award of periodic payments,

set up in an attempt to spread income found to be a sham because contributions were not needed or used.); *Pogetto v. United States*, 306 F.2d 76 (9th Cir. 1962).

Apparently the only reported case where cohabitants have succeeded in splitting income on a business partnership theory is *Ryza v. Commissioner*, 36 T.C.M. (CCH) 269 (1977). Among other projects, CM worked as an illegal abortionist, and the Tax Court observed that CW "worked with him, dividing the labors and sharing the profits." *Id.* at 271. See also *Nichols v. Commissioner*, 32 T.C. 1322 (1959) (Married couple established a business partnership enabling them to use partnership fiscal year for income.). Cf. *Teitelbaum v. Commissioner*, 346 F.2d 266 (7th Cir. 1965) (insufficient evidence of labor contributed to alleged partnership by ex-wife of taxpayer).

66. 26 U.S.C. § 1014(b)(6) (1983). Many other provisions of the federal income tax law provide special benefits to couples living under a legal regime of community property which will undoubtedly be unavailable to unmarried cohabitants who simply contract for a community. See, e.g., *Berry & Craige, Estate Planning for Qualified Retirement Plan and IRA Distributions—Community Property Considerations*, 5 C.E.B. Estate Planning and California Probate Reporter 85 (Feb. 1984).

Many other tax benefits of marriage apply in common-law as well as community-property states. Thus, if a couple coowns property in any form and one of them is over age 55, upon sale \$100,000 worth of gain can be deferred under § 121 of the Internal Revenue Code even if half of it results from sale of the interest of the party under age 55, provided they are married. If the pair were cohabitants the seller aged 55 could defer only gain attributable to his interest. See *Wenig*, *supra* note 65, at 207-08.

If the couple is married, one can deduct from his income medical expenses paid for the other, but often this deduction cannot be taken if the pair are simply cohabitants. See *Cox v. Commissioner*, 36 T.C.M. 1435 (1977); *Stark v. United States*, 351 F.2d 160 (6th Cir. 1965), cert. denied, 384 U.S. 939 (1966).

It is difficult for one cohabitant to claim the other as his dependent for income tax purposes. If the relationship involves sexual activity illegal under local law, he may not do so. 26 U.S.C. § 152(b)(5) (1983); *Turnipseed v. Commissioner*, 27 T.C. 758 (1957) (cohabitation involved "illicit intimacy"). Some cases have misapplied § 152(b)(5) to disallow the dependency claim simply because the union is considered immoral even when it is not in violation of criminal laws concerning sexual conduct. *Wenig*, *supra* note 65, at 238.

If the cohabitants have a *Marvin*-type pooling contract, express or implied, the I.R.S. takes the position that stay-at-home CW who performs domestic services is not in fact dependent but is one earning her own support by performing services. *Wenig*, *supra* note 65, at 238, 253.

cohabitants in common-law as well as in community property states will suffer the absence of tax benefits accorded persons lawfully married. Since a needy CW will surely be in a lower tax bracket than the CM ordered—after their falling apart—to pay support under their cohabitation agreement, there is a net tax benefit if CM can deduct his payments as alimony⁶⁷ and the recipient reports them as income to her. The net savings due to the alimony deduction and the lower tax rate for the ex-CW could be a basis for larger payments. However, it seems clear that because the couple were not lawfully married, an alimony deduction is not available.⁶⁸ It is probable, however, that the support payments the ex-CW receives can be characterized by the Internal Revenue Service as a return for services previously rendered so that the payments are still taxable to her.⁶⁹

The above are examples of special benefits for lawful spouses that are not available to cohabitants. The *detriments* of a fifty-fifty pooling contract between cohabitants have been ably canvassed by Professor Mary M. Wenig.⁷⁰ In the situation of a stay-at-home CW, at least part of the consideration for the sharing of CM's gains will often be CW's rendition of services of a type for which remuneration is paid. Examples are cooking, house-cleaning, and caring for CM during illness. The portion of benefits accruing to CW under the contract for these services rendered usually will not be apportionable from consideration she gives of the type that is not likely to be viewed as earning remuneration for services rendered (e.g., giving love and moral support to CM). Accordingly the Internal Revenue Service can fairly assert that CM is taxable on one hundred percent of his gain and CW is taxable on fifty percent of it, which passes to her by assignment because she earned it by performing services.⁷¹ Seldom

67. 16 U.S.C. § 2503 (1983).

68. See M. Wenig, *supra* note 65, at 201.

69. Wenig, *supra* note 54, at 198.

If the periodic payments or even a lump sum is awarded to CW at the breakup of the relationship as a means of "doing equity," see *Omer v. Omer*, 11 Wash. App. 386, 523 P.2d 957 (1974), as, for example, recompense to her for sacrificing a career to act as a spouse-substitute, see *Marvin v. Marvin*, 122 Cal. App. 3d 871, 176 Cal. Rptr. 555 (1981) (reversing such an award for lack of proof of contractual relationship as a foundation for it), then the Internal Revenue Service could claim CW is receiving ordinary income as forbearance from employment. Wenig, *supra* note 65, at 201. Note that on just about any theory that makes the payment to CW ordinary income to her, she will owe not just income taxes but either self-employment taxes as well or an employee's share of FICA taxes. See 26 U.S.C. §§ 1503-1509 (1983).

70. See Wenig, *supra* note 65.

71. Wenig, *supra* note 65, at 195-96. See also *Jones v. Commissioner*, 36 T.C.M. (CCH) 1323 (1977), where the IRS successfully contended that money a lover gave his mistress was income for providing sexual services. Wenig, *supra* note 65, notes that if CW is taxable on what she obtains under the pooling contract with CM on the theory that she has earned it by providing *domestic* household services, CW should be able to exclude the value of food and lodging provided by CM on the ground that she had to be on the premises at all hours for her "employer's" convenience.

will CM be able to take any deduction, although he could in part if CW were performing business-related services such as doing the account books for CM's retail shop.⁷² If CM had children, possibly a child-care credit could be squeezed out of part of what the law views as CM's assignment over to CW for services.

To the extent that the Internal Revenue Service should view the benefit coming to CW from CM as being paid in consideration for her love and moral support or other services incapable of monetary value, the transfer is a taxable gift.⁷³ Since the couple is not married, the unlimited marital deduction⁷⁴ is not available. Tax liability can be avoided to a considerable degree by applying the \$10,000 annual exclusion,⁷⁵ but for cases where CM has a large income, avoidance of payment of a gift tax will require CM's using up the unified credit applicable to both federal gift and federal estate tax.⁷⁶ When the unified credit is gone, gift taxes will have to be paid; even if the credit is not used up during the relationship, the loss of part of the credit will likely have adverse inheritance-tax consequences at CM's death.

If both CW and CM have income-producing jobs or investments, the pooling agreement will have less disastrous results. With respect to earned income, no contract between the cohabitants can create a marital status; thus they are not in danger of incurring the marriage penalty⁷⁷ of federal income tax law which, despite some recent relief by way of credits,⁷⁸ still burdens the lawfully married when both have substantial incomes from labor.⁷⁹ Additionally, it seems that whether or not the sharing is viewed as based on an exchange of services or on reciprocal gifts, an offset is available so that the income or gift tax falls only on the net gain. Thus, if CW earns a net \$50,000 per year and CM a net \$30,000, the agreement in effect operates only on the excess \$20,000 income made by CW. CM

72. See Note, 6 Calif. Fam. L. Rptr. 2310 (1983) (IRS accepted allocation of portion of funds passing from CM to CW as payment for business services but major portion was treated as coming to her under a *Marvin*-type arrangement and was thus not deductible by CM).

73. Wenig, *supra* note 65, at 197, 201. The theory is that CW's vague undertaking to act as a quasi-wife is not an obligation that can be valued in "money's worth." 26 U.S.C. § 2514 (1983).

74. 26 U.S.C. § 2516 (1983).

75. 26 U.S.C. § 2512 (1983).

76. 26 U.S.C. § 2514 (1983).

77. See Wenig, *supra* note 65, at 203. Another tax-law benefit of cohabiting rather than marrying is that an unmarried person with dependent children can claim head-of-household status and consequently lower federal income tax rates; that status is lost if the person marries someone with equivalent income. Wenig, *supra* note 65, at 209. Benefits under § 151(e) of the Code accorded to a widow or widower with children during the first two years of such status will be lost upon marriage but not upon nonmarital cohabitation.

78. 26 U.S.C. § 2315 (1983).

79. See Lathrope, *supra* note 19, at 271; Note, *supra* note 1, at 384-85 n.18.

receives either a \$10,000 gift which can be shielded by the annual exclusion or \$10,000 in income for services rendered. Obviously, the couple should attempt to structure the agreement so that what CM obtains is in consideration of love and affection and not services rendered. The benefit to CM would be more clearly a gift if the contract provided for a sharing of gains to the extent of the income of the cohabitant earning the lesser amount, which would be invested to the extent possible in co-owned real estate, securities, etc. This would mean, in the hypothetical case above, that CW would separately own the additional \$20,000 of her net income; she would spend it on upkeep of the couple's household, but not under compulsion of the contract. Since CW would incur many household expenditures if living alone, the amount of her gift to CM by providing basic maintenance should be much less than \$10,000. Thus the suggested semi-sharing contract will be especially useful when one cohabitant's earnings are more than \$20,000 above the other cohabitant's earnings.

A few cohabitants may desire a pooling-of-gains contract with an arrangement whereby one of them works for a year while the other takes care of the home and then they switch roles for the next year. To avoid possible unfortunate tax consequences, the cohabitants should make very sure that their tax year is not the same as their "work year." For example, if they pay federal income taxes on a calendar year basis, the work year should begin July 1. This choice would allow an offset of the earnings by one, say CW, from January to June, against the earnings of CM from July through December. Such an offset would not be allowed if CW worked the entire calendar year of 1985 and attempted to reduce gift tax liability by treating as consideration half of CM's 1984 earnings (during which year CW was the stay-at-home cohabitant).⁸⁰ The problem could be avoided if the agreement provided that no interest of CW in CM's 1984 earnings would vest in her until January 1, 1985, but this non-self-executing feature of the sharing arrangement raises other problems to be discussed below.

Viewing the pooling agreement as exchanges based on services rendered rather than as gifts raises the slight chance of an offset, even though the calendar year and the work year are the same and the agreement is self executing, so that in year 1984 when CM works, CW automatically

80. See Wenig, *supra* note 65, at 151. Rev. Rul. 77-359, 1977-2 C.B. 24. These lawfully married spouses contracted to live in universal community (which meant, of course, that as each acquired separate property (*e.g.*, an inheritance) it would automatically be transmuted into community property). The ruling declaring a gift tax to be owing indicates that if Husband inherited a \$200,000 ranch in one year and the next year Wife inherited \$200,000 in stocks, neither could avoid gift tax liability by claiming an offset. The ruling was rendered before Congress enacted the unlimited marital deduction in 1981. The no-offset theory applied there in a gift tax context could be applicable if the IRS asserted that transfers between cohabitants were not gifts but payments for service.

becomes owner of half of his earnings. CM, of course, must pay tax on one hundred percent of his gain. It is CW who argues that she has no gain in 1984 because as a share of CM's income vested in her it was offset by her obligation to him to be fulfilled in 1985. CW's argument probably could prevail only if her 1985 obligation to CM was of a fixed amount (e.g., they are both lawyers at a firm where they fill a single associate's slot at known annual pay) and was binding on her or her estate if for some reason she was unable to work in 1985.

2. Bankruptcy law

Support rights of a divorced person formerly lawfully married are not discharged by the obligor's bankruptcy.⁸¹ Property rights—including obligations under a property settlement agreement at divorce to pay sums of money as part of an equitable or equal distribution—can be⁸² and have been discharged.⁸³ If a cohabitant, through express or implied contract, becomes liable to pay periodic payments for the purposes of support of the other cohabitant after their falling apart, the writer predicts that the contract basis of the obligation will be controlling in bankruptcy. The obligation thus can be discharged.

What of the effect of bankruptcy of a cohabitant, say CM, on claims under a pooling-of-gains agreement by CW? Is she just a general creditor?⁸⁴

81. See 11 U.S.C. § 523(a)(5) (1983) (barring discharge of a debt "to a spouse, former spouse, or child of the debtor, for alimony to, maintenance for, or support of such spouse or child, in connection with a separation agreement, divorce decree, or property settlement . . ."). The statute also expressly states that the mere label "alimony" or "child support" attached by a state judge to an order is not conclusive, but that the debt is nevertheless dischargeable "unless such liability is actually in the nature of alimony, maintenance, or support." 11 U.S.C. § 523(a)(5)(B) (1983). Unless otherwise noted, all references to sections of the bankruptcy act are to the "new" act of 1978. See generally Note, The Bankruptcy Reform Act of 1978: Dischargeability of Obligations Incurred Under Property Settlements, Separation Agreements, and Divorce Decrees, 12 U. Balt. L. Rev. 520 (1983).

82. Ultimately, the bankruptcy courts employ a federal standard to distinguish property from support awards. See *In re Williams*, 703 F.2d 1055 (8th Cir. 1983); *In re Renzulli*, 28 B.R. 41 (Bankr. N.D. Ill. 1982); *Jones v. Tyson*, 518 F.2d 678 (9th Cir. 1975) (characterizing attorney's fee award as nondischargeable alimony). However, in applying the standard, the courts are strongly guided by state law. Whether a state court judge intended an award to serve a support function because of need or to serve as remuneration for contributions to the marriage that helped make it possible for the other spouse to acquire property is often controlling. E.g., *In re Calhoun*, 715 F.2d 1103 (6th Cir. 1983). The reference to state law seems similar to that made in the income tax context to determine whether a periodic payment labeled alimony actually is alimony so that it may be deductible by the payor. See *Boucher v. Commissioner*, 710 F.2d 507 (9th Cir. 1983).

83. *Nichols v. Hensler*, 528 F.2d 304 (7th Cir. 1976); *In re Ramsey*, 612 F.2d 1220 (9th Cir. 1980) (part of community property division resulting in unequal division contrary to state court's intention). See also *In re Tilmon*, 9 B.R. 979 (Bankr. N.D. Ill. 1981) (would have discharged a divorce court award remunerating wife for services rendered, but found to be in the nature of alimony).

84. If the *Marvin* agreement is not self-executing, CW's position as a judgment creditor

Consider the case where CM is deeply in debt and has purchased nonexempt items (e.g., a yacht) from his earnings during the cohabitation, having taken title in his own name. If the couple lived in a community property state and their agreement was to adopt as much of the community property law as they could, it is possible that CW has a half interest in the asset that creditors cannot reach. In a community property state, title (here in CM's name alone) is not conclusive of ownership,⁸⁵ and in some community property states a wife's half interest is not liable for the husband's "separate debts."⁸⁶ (Under state law his half interest also is not liable but Congress can if it wishes pre-empt this form of exemption under its power to enact bankruptcy laws.⁸⁷)

Under a community property regime, however, the lawful wife automatically becomes half owner of the husband's onerous acquisitions during marriage because of her status.⁸⁸ The cohabiting CW is in a similar posture only if her pooling agreement is intended to be and can be self-executing—i.e., no act of CM, such as writing out an assignment, delivering an asset to CW, or taking title in the pair's joint names—is necessary to carry out the promise he has made to share ownership of gains.

Even if they have made an express contract, the parties probably have not thought about whether the provision to share gains is self executing; the law will have to "fill in the blank," as it obviously must if the pooling agreement is implied in fact. If, however, the express agreement was to incorporate as much of community property law as legally possible, the intention is that the agreement be self-executing, and the issue becomes whether it lawfully can be.

against CM to recover the value of half his earnings during their union may be, wholly apart from bankruptcy law, of little value because CM can shield his property through laws providing exemptions for judgment debtors. In California, for example, the generous exemption statutes protect \$30,000 of equity in a home, Cal. Code Civ. Proc. § 704.730(a) (West Supp. 1984), \$1200 equity in an automobile, \$2500 in tools of trade, all ordinarily-used household furnishings, unlimited amounts of most kinds of tort recoveries, etc. *Id.* §§ 704.010-704.200.

85. See, e.g., W. de Funiak & M. Vaughn, *Principles of Community Property* § 60, at 119 (2d ed. 1971).

86. See, e.g., *McDonald v. Senn*, 53 N.M. 198, 204 P.2d 990 (1949); *deElche v. Jacobsen*, 95 Wash. 2d 237, 622 P.2d 835 (1980); N. Mex. Stat. Ann. § 40-3-10 (1983).

87. See, e.g., *In re Ackerman*, 424 F.2d 1148 (9th Cir. 1970); *United States v. Overman*, 424 F.2d 1142 (9th Cir. 1970); see also *Babb v. Schmidt*, 456 F.2d 957 (9th Cir. 1974).

88. See, e.g., *Poe v. Seaborn*, 282 U.S. 101 (1930); Cal. Civ. Code § 5105 (West 1983); La. Civ. Code art. 2336.

89. *Estate of Fincher*, 119 Cal. App. 3d 343, 174 Cal. Rptr. 18 (1981). The terms of a written or oral agreement may or may not reveal that the parties considered the matter of how a stay-at-home cohabitant would become co-owner of the other's acquisitions. Compare *Watkins v. Watkins*, 143 Cal. App. 3d 651, 655, 192 Cal. Rptr. 54, 56 (1983) ("Buster assured Judy that she would be financially compensated . . ."—surely ambiguous) with *Hierholzer v. Sardy*, 128 Mich. App. 259, 340 N.W. 2d 91 (1983) (CW pleads promise of CM as to make future conveyance).

It is unclear what the law will presume concerning self-execution of CW's property rights under a pooling agreement which is silent on the matter. One California case⁸⁹ indicates the court assumed that such an agreement was not self-executing, although the briefs⁹⁰ and court opinion show that neither counsel nor the court actually addressed the issue in such terms. The ex-CW asserted *Marvin*-based claims against the estate of her former CM, who raised a statute of limitations defense. The court held the applicable statute was that concerning breach of an oral agreement, and that the two years began to run when the couple split up.⁹¹

This conclusion assumed the *Marvin* agreement was not self-executing. If it had been, CM would not have breached the contract since the law would have automatically made CW half owner of his acquisitions during the cohabitation. Co-ownership, probably in tenancy in common, would, after their splitting up, have remained even though CM kept possession of assets traceable to his earnings. The applicable statute of limitation would have been that governing suits to recover possession of personal and/or real property (whatever the ex-CW could trace to). The prescriptive period would not have begun to run until the former CM had repudiated any interest in his ex-CW cotenant.⁹²

On the other hand, another California decision⁹³—once again in which

90. CW's brief was vague and inconsistent. She had alleged and the jury found via a special verdict that "any asset or liability thereafter acquired or incurred by either party would be equally owned by the two of them." Estate of Fincher, Calif. Dist. Ct. App. 2d Civ. No. 57194, at 4. That finding is consistent with the agreement's being self-executing. But the brief also says that "the deceased (CM) held Appellant's interest there in trust," id. at 19, and that "the implied agreement . . . created a debt and a duty on the deceased to account for partnership assets. A partner who receives and keeps the proceeds from a partnership business is indebted to the partnership for the amount so retained by him." Id. at 19. CW's brief also said the issue on appeal was whether she had "waived her rights to enforce the implied agreement . . .", also inconsistent with its being self-executing. In her petition for hearing in the Supreme Court, CW said, "Based on their mutual promises and assurances, Appellant had the reasonable expectation that there would be an equal division of the *Marvin* assets . . . at the time of [CM's] death." Petition for Hearing in California Supreme Court 5.

91. See also *Nelson v. Nevel*, 201 Cal. Rptr. 93 (1984). CW sought relief under an implied sharing contract under *Marvin*, urging she should be awarded a half interest in property to which CM had taken title. Assuming CW sought to enforce an oral agreement, the court found her suit barred by the two-year California statute of limitations applicable to actions to enforce oral agreements. The appellate court reversed on the theory that CW's cause of action could be viewed as one in equity seeking to impose a constructive trust and thus subject to a four-year limitations period. No one suggested that CW was actually an owner of a half interest who could bring an action to partition unless she had lost her ownership due to adverse possession by her cotenant.

92. See, e.g., C. Cribbet, *Principles of the Law of Property* 305 (2d ed. 1975) (realty); 4 H. Tiffany, *Real Property* § 1185 (3d ed. 1939) (real property); 20 Am. Jur. 2d *Cotenancy and Joint Ownership* § 106 (1965).

93. *Planck v. Hartung*, 98 Cal. App. 3d 838, 159 Cal. Rptr. 673 (1979).

the briefs⁹⁴ and court opinion disclose no discussion of the issue of self-execution of the pooling contract—is at least consistent with a theory that the contract is, indeed, self executing. CM's tort victim sued both the cohabitants, although CM alone was negligent. The claim against CW was based on the allegation that the pair had a *Marvin*-type agreement. Suit against CW was dismissed on the ground that "*Marvin* dealt only with the determination of rights inter se between the parties"⁹⁵ This statement seems to assume that the agreement is self-executing, so that plaintiff can levy on a half interest in CW's earnings during the cohabitation on a judgment running solely against CM, without making CW a party. However, another explanation could be that the agreement was not self executing, but the proper procedure for the tort victim was, after obtaining judgment against CM, to garnish his cause of action against CW to assign over to him his right to half her earnings.

Only one case clearly treats a *Marvin*-type pooling agreement as self-executing.⁹⁶ During the pair's union as cohabitants, title to unimproved land was acquired in CW's name. On the security of the property she then borrowed funds for construction of a house on the lot. The court said the nature of the express, oral *Marvin* agreement was that the pair would "pool and share their resources and be equal owners of property acquired" and also found that the lot was purchased "with the understanding that they both owned it"⁹⁷ The California court went on to say, the unimproved property was "community" in the sense that the parties owned it equally. The court then proceeded to apply the law of community property applicable to married couples to the proceeds of CW's loan proceeds. They, too, were coowned under the California rule tracing such proceeds to the security relied on by the lender.⁹⁸

An express self-execution clause in the cohabitators' pooling contract should not be enforceable against third parties who are unaware of the agreement and who rely to their detriment on the fact that the unmarried person with whom they deal, say CM, either has title to an asset or was the party earning it. This protection should extend not only to purchasers

94. The plaintiff argued that persons who are cohabiting under a pooling agreement "must accept the consequences of such a venture along with its benefits." *Planck v. Hartung*, Appellant's Opening Brief 9, Calif. Dist. Ct. App. 3d Civ., No. 18154. From that point the brief proceeds to ask for greater liability of CW than would be imposed on a lawful wife. The latter's separate property would not be liable for her spouse's tort; only her share in the community would be. Cal. Civ. Code § 5122. But the plaintiff in *Planck* tried to impute CM's negligence to CW to make all her property liable. Appellant's Opening Brief at 12.

95. 98 Cal. App. 3d at 842, 159 Cal. Rptr. at 675.

96. *In re Marriage of Stitt*, 147 Cal. App. 3d 579, 195 Cal. Rptr. 172 (1983).

97. *Id.* at 184-85, 195 Cal. Rptr. at 175.

98. 147 Cal. App. 3d at 185, 195 Cal. Rptr. at 175. See also W. Reppy, *Community Property in California* 97-101 (1980).

for value and persons acquiring a security interest for value, but also to CM's unsecured creditors who can convince a court that they actually relied on his being the apparent sole owner of an asset or assets.⁹⁹

With respect to other third parties, the writer sees no reason why a self-execution clause in a cohabitant's pooling agreement should not be effective in community property states. That is, such a contract should operate in this regard like a business partnership agreement. For example, if CW and CM set up a law partnership and CM's client pays him a fee, no assignment by CM to CW is necessary to vest in her a proprietary interest.¹⁰⁰ Nevertheless, since the cohabitants' pooling agreement is quite different from a commercial partnership, one cannot be confident that a self-execution clause will be enforceable. Even less clear is whether such a provision will be implied into a pooling agreement in which, of course, the cohabitants did not think about the matter. As to implied contracts, the writer has suggested above that the law should only infer a contract having terms corresponding to the reasonable expectations of the cohabitants. It is likely that many, perhaps a majority, of stay-at-home CWs who do have expectations about how the law responds to their relationship with a CM think only about their needs at the termination of the cohabitation by CM's death or the pair's separation; they do not have notions about presently owning any portion of CM's earnings. Certainly a CW would not be likely to have such expectations in a common-law state where even the lawfully married do not automatically become equal owners of the acquisitions of each by labor during the union.

Additionally, in common-law states where legal coownership is supposed to appear in the title, courts would be more likely to hold invalid an attempt to create through a self-execution clause in a pooling agreement automatic legal ownership of CW in CM's earnings. It seems highly unlikely that such a provision, even if valid, would ever be presumed or

99. See, e.g., *In re Perry's Estate*, 121 Mont. 280, 192 P.2d 532, 536 (1948) (creditor can rely on record title to land which is inconsistent with actual partnership ownership); *Jeffers v. Martinez*, 93 N.M. 508, 601 P.2d 1204 (App. 1979) (Buyer under executory contract who relied on title of seller in making contract can enforce it despite interest of non-joining husband even though buyer had not parted with any funds.) However, where the third party does not rely on title when he becomes a creditor, holders of unrecorded equities inconsistent with the title of the debtor can successfully resist a levy of execution on a judgment obtained by the creditor. See *Breeze v. Brooks*, 97 Cal. 72, 31 P. 742 (1892) (Debtor's brother defeated levying creditor by asserting purchase-money resulting trust.); 5 A. Scott, *Trusts* § 462.5 (3d ed. 1967). There is a split of authority as to whether, in this situation, the equity inconsistent with title is lost if not asserted before the judgment creditor acquires title to the debtor's property by foreclosing on a judgment lien. See, e.g., *Rexburg Lumber Co. v. Purrington*, 62 Idaho 461, 113 P.2d 511 (1941).

100. See *Unif. Partnership Act* § 8, 6 U.L.A. 115 (1969). Some cases hold that the proprietary interest of a partner is equitable rather than legal when the acquiring partner has title placed in his name. See *Cyrus v. Cyrus*, 242 Minn. 180, 64 N.W.2d 538 (1954); *Killebrew v. Ray*, 181 S.W.2d 334 (1944).

inferred to be part of such an agreement when the spouses neglected to deal with the matter or when the agreement as a whole is implied in fact.

If CM's obligation under a *Marvin* agreement to share ownership of gains is wholly executory, it can unquestionably be discharged in bankruptcy. On the other hand, it is possible that state law, while not automatically vesting legal title in CW as to a half interest, gives her some equitable interest as *cestui* of an implied in law trust or as holder of an equitable lien to secure performance of CM's obligation. These kinds of latent equities generally yield as a matter of state law to the rights of bona fide purchasers for value and persons obtaining for value a security interest in the asset,¹⁰¹ although not to unsecured creditors, even those holding unforeclosed judgment liens.¹⁰²

The Bankruptcy Act, however, declares that a trustee obtains the rights of a bona fide purchaser;¹⁰³ this provision could mean¹⁰⁴ that even equitable interests automatically created by law under a pooling agreement may be defeated, converting the claimant cohabitant into a general, unsecured creditor. Thus, there is a risk that an equitable interest created automatically by law in favor of one cohabitant at the time the other cohabitant under a pooling agreement acquires an asset will not be recognized in bankruptcy as a claim superior to those of general creditors.

101. See *supra* note 77. Note that if one cohabitant, say CM, places title in CW's name to assets purchased with his earnings, he is in a position to invoke this doctrine against her creditors if it is found that CW had no contractual right to any share of the property. In such a case the legal issue becomes whether CM made a gift to CW of the property or whether he is the *cestui* of a purchase-money resulting trust. Bogert says the majority of cases presume the resulting trust rather than gift when the parties are cohabitants. G. Bogert, *Trusts and Trustees* §§ 454, 459 (1977). See *Bohaker v. Koudelka*, 333 Mass. 139, 128 N.E.2d 769 (1955); *Wosche v. Kraning*, 353 Pa. 481, 46 A.2d 220 (1946).

102. See *supra* note 99.

103. 11 U.S.C. § 544(a) (1983).

104. Whether the higher federal courts will construe § 544(a)(3)'s treatment of the bankruptcy trustee as a purchaser for value remains to be seen. Under the old bankruptcy act, there was no such provision and the courts applied state law of creditors' rights under which the beneficiary of resulting or constructive trust in property to which the debtor had title would prevail over general creditors. E.g., *In re Smith*, 348 F. Supp. 1290 (E.D. Va. 1972). Two decisions under the new act have held that reference to the trustee as having rights of a purchaser for value does not mean he can prevail on behalf of creditors over the beneficiaries of constructive and resulting trusts. *In re Fieldcrest Homes, Inc.*, 18 B.R. 678 (Bkrtcy. Ct. N.D. Ill. 1982) (relying on a passage in *Collier* not addressing the problem of what "purchaser" in section 544(a) means); *Lancaster v. Key*, 24 B.R. 897 (Bankr. E.D. Tenn. 1982) (relying on *Smith*, 348 F. Supp. 1290 (E.D. Va. 1972), decided under the old bankruptcy act). Little faith can be placed in these two holdings from the lowest level of courts that will be construing section 544(a).

Note that if state law says CW has an equitable interest in CM's acquisitions as a result of their pooling contract and secures it by a lien on the property, this would seem not to be the purely judicial kind of lien that creditors can avoid in some circumstances under the new Act. See *In re Thomas*, 32 B.R. 11 (Bankr. D. Or. 1983).

C. Federal Entitlement Programs

A contract between cohabitants to have the same property and support rights and obligations of persons lawfully married would not entitle either party to benefits accorded to spouses under major federal entitlement programs.¹⁰⁵ Under the Social Security Act, putative marriage is recognized as conferring spousal status under a provision defining *wife*, *husband*, *widow* and *widower*. It provides that if the couple at issue are not under state law "validly married," a cohabitant

shall nevertheless be deemed to be the wife, husband, widow, or widower, as the case may be . . . if such applicant would, under the laws applied . . . in determining the devolution of intestate personal property have the same status with respect to the taking of such property as a wife, husband, widow or widower of such insured individual.¹⁰⁶

If a cohabitant were to acquire under his contract the personal property of a deceased cohabitant, it would not be because of "status," and there would be no "devolution" of the property. The law applied to pass the property to the survivor would be contract law, not succession law.

That this passage of the Social Security Act relates to putative marriage and not contract-based cohabitation is also clear from the subsection immediately following. It allows a putative spouse, in states not qualifying him to take personalty by intestate succession, to obtain spousal benefits under a federal law of putative marriage on a showing that the applicant "in good faith went through a marriage ceremony with" the insured and then cohabited with the insured.¹⁰⁷

III. CREATING A POSITIVE STATUS

A. Common-Law Marriage Should Be Adopted in States Not Recognizing This Institution

Fourteen American jurisdictions continue to recognize common-law marriage.¹⁰⁸ This doctrine makes a lawful marriage (with all of the rights

105. See *Chambers v. Harris*, 687 F.2d 332 (10th Cir. 1982) (CW, mother of deceased insured CM's child, denied Social Security Act mother's benefits because *Marvin* type arrangement did not create status of heir.).

Lathrope, *supra* note 19, at 291-92, notes the few passages of the Social Security Act that recognize a common-law marriage (based on a holding out by the couple as having marital status) for purposes of entitlement to benefits even though applicable state law does not recognize common law marriage. See 42 U.S.C. §§ 416(h)(1)(B), 1382(c)(d)(1)(2) (1983).

106. 42 U.S.C. § 416(h)(1)(A) (1983).

107. *Id.* § 416(h)(1)(B).

108. F. Kuchler, *Law of Engagement and Marriage* 3 (2d ed. 1978), lists the following as accepting the doctrine: Alabama, Colorado, District of Columbia, Georgia, Idaho, Iowa, Kansas, Montana, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, and Texas.

and obligations attached to a marriage created by formal and licensed ceremony) out of cohabitation if the parties agree between themselves to be married, hold themselves out to the community as married, and live together some substantial period of time.¹⁰⁹ It is generally held that the agreement between the couple to marry can be inferred from their conduct.¹¹⁰

Although now recognized in a minority of jurisdictions, common-law marriage formerly had widespread acceptance.¹¹¹ The move toward legislative abolition of common-law marriage in the early part of this century reflected two primary considerations.¹¹² First, the doctrine was thought to generate litigation and encourage perjured testimony¹¹³ about an agree-

109. See, e.g., *Freiburghaus v. Freiburghaus*, 103 Idaho 679, 651 P.2d 944 (App. 1982); *In re Foster*, 77 Idaho 26, 287 P.2d 282 (1955); *Estate of Stinchcomb*, 674 P.2d 26 (Okla. 1983) (clear and convincing evidence needed); *Hightower v. State*, 629 S.W.2d 920 (Tex. Crim. App. 1982) (evidence is "closely scrutinized"). Mere temporary visitors in a state recognizing the doctrine are unable to effectuate a common-law marriage under local law. See *Kennedy v. Damron*, 268 S.W.2d 22 (Ky. 1954). See generally Note, *Common Law Marriage: What It Is and How to Prove It*, 12 S.C.L.Q. 355 (1960).

110. See *Metropolitan Life Ins. Co. v. Johnson*, 103 Idaho 122, 645 P.2d 356 (1982).

111. Most early decisions followed acceptance of the doctrine in New York in *Fenton v. Reed*, 4 Johns 52 (1809). The Supreme Court in *Meister v. Moore*, 96 U.S. 76 (1878) (enactment of licensing scheme did not impliedly abrogate common-law marriage doctrine) declared the doctrine to be favored by public policy.

112. See generally H. Clark, *The Law of Domestic Relations in the United States* § 2.4 (1968); National College of the State Judiciary, *Family Law* 10-13 (1972); Stein, *Common Law Marriage: Its History and Certain Contemporary Problems*, 9 J. Fam. L. 271 (1970). See also O. Koegel, *Common Law Marriage and Its Development in the United States* (1922).

Statutes abolishing the doctrine, with date of original enactment, include: Alaska Stat. § 25.05.011 (1917); Ariz. Rev. Stat. § 25-111 (1913); Ark. Stat. § 55-201 (1875); Cal. Civ. Code § 4100 (1895); Conn. Gen. Stat. § 46-3 (1902); Fla. Stat. Ann. § 741.211 (1968); Haw. Laws § 572-1 (1872); Burns' Ind. Stat. § 44-111 (1958); Ky. Rev. Stat. § 402.020 (1892); La. Digest of 1808 bk. I, tit. II, art. 88; Mich. Comp. Laws Ann. § 551.2 (1957); Minn. Stat. Ann. § 517.01 (1941); Miss. Code § 93-1-15 (1956); Vernon's Mo. Stat. Ann. § 451.040 (1939); Neb. Rev. Stat. § 42-104 (1922); Nev. Rev. Stat. § 122.010 (1943); N.J. Stat. Ann. § 34:1-10 (1939); N.M. Stats. § 40-1-1 (1862); N.C. Gen. Stat. § 51.1 (1871); N.D. Cent. Code § 14-03-01 (1890); Ore. Rev. Stat. § 106.041 (1965); S.D. Code § 14.0101 (1959); Tenn. Code Ann. § 36-420 (1937); Utah Code Ann. § 30-1-2 (1898); Va. Code § 20-13 (1919); Wash. Rev. Code Ann. §§ 26.04.070 (1881), 26.04.140 (1939); W. Va. Code § 48-1-5 (1849).

In some instances the statute confirmed a common-law rejection of the doctrine by the courts. See *In re Gabaldon's Estate*, 38 N.M. 392, 34 P.2d 672 (1934).

Case law rejection of the doctrine is illustrated by *Owens v. Bentley*, 40 Del. 512, 14 A.2d 391 (1940); *Henderson v. Henderson*, 199 Md. 449, 87 A.2d 403 (1952); *Dunbarton v. Franklin*, 19 N.H. 257 (1848); *Morrill v. Palmer*, 68 Vt. 1, 33 A. 829 (1895); *In re Roberts' Estate*, 58 Wyo. 438, 133 P.2d 492 (1943). See also 1943-1944 Me. Att'y Gen. Ann. Rep. 105.

113. See *In re Wagner's Estate*, 398 Pa. 531, 195 A.2d 495, 497 (1960). See also Comment, *Common-Law Marriage in Oklahoma*, 14 Okla. L. Rev. 291 (1961); Kirkpatrick, *Common-Law Marriages: Their Common Law Basis and Present Need*, 6 St. Louis L.J.

ment to marry by a cohabitant seeking the benefits of lawful marriage at the termination (either by death of the other cohabitant or by the couple's parting) of the relationship. Secondly, it was urged that the need for the doctrine had disappeared.¹¹⁴ Its purpose was to legitimate cohabitation by a couple seeking to marry lawfully who lived so far from the county seat that travel by horseback to the courthouse to obtain a license would be long and difficult and perhaps at some times of year even impossible due to road and weather conditions.¹¹⁵

The contemporary need for recognizing common-law marriage is quite different. It has been shown that a contract by cohabitants to establish between themselves property and support rights and obligations similar to those of married persons either is void (under the negative-status approach to cohabitation) or fails to achieve the benefits accorded the lawfully married under federal taxation, bankruptcy, and welfare law. Nevertheless, there will be some couples who are unaware of the invalidity of the contract or of the unfavorable treatment given to contractual cohabitants by federal law. Their expectations would be realized if the common-law marriage doctrine were recognized.

Fear that revival of the common-law marriage doctrine will encourage litigation and even perjury is a pertinent policy consideration only in states using the negative-status approach, for in other states the cohabitant who would assert common-law marriage can and will assert the same agreement upon which common-law marriage is founded as a *Marvin*-style claim.¹¹⁶ Actually, the enticement to give perjured testimony would be *decreased* in most *Marvin* states by the recognition of common-law marriage, since under that doctrine the cohabitant does not have to try to convince the trier of fact that sharing of sexual favors was not part of

30 (1960-61); Note, Common-Law Marriage: A Legal Anachronism, 32 Ind. L.J. 99 (1956); *Atkins v. Heckler*, 574 F. Supp. 634 (E.D. Pa. 1983) (regretting need for further evidentiary proceedings in claim made as common-law wife for Social Security Act widow's benefits after hearing officer misunderstood state law).

An interesting case where protracted litigation involved using the doctrine *against* a common-law spouse is *United States v. Seay*, 718 F.2d 1279 (4th Cir. 1983). The defendant was convicted of fraudulently obtaining federal welfare benefits by claiming the status of widow of a deceased husband despite having remarried through the common-law marriage doctrine. If there was perjury here, it was the defendant's assertion that she and her cohabitant had not agreed to be married.

114. See generally Madison, Marital and Nonmarital Relationships: The Right to Alternative Lifestyles, 11 Colum. Hum. Rts. L. Rev. 189, 195-98 (1979-80); Note, Common-Law Marriage and Unmarried Cohabitation: An Old Solution to a New Problem, 39 U. Pitt. L. Rev. 579 (1978).

115. See Douthwaite, Introduction to Unmarried Couples, *supra* note 65, at 3, 10.

116. See Glendon, *supra* note 18, at 688 (Popular acceptance of cohabitation as a lifestyle greatly increases amount of litigation concerning rights of cohabitants since the parties are unashamed to publicize their relationship.).

the consideration for the contract. Under common-law marriage sex is *supposed* to be at the heart of the consideration.

In times past undoubtedly some couples who were cohabiting and did not intend to be married nevertheless held themselves out to the public as married persons.¹¹⁷ They did so undoubtedly to avoid the stigma and social disapproval cast on cohabitants. It seems likely that such a holding out resulted sometimes in a judgment decreeing a common-law marriage that fastened life-long support and other obligations on a cohabitant who had not in fact agreed to them.

This problem—legal overkill by fastening the common-law marriage doctrine on persons outside its scope according to their own understanding—should be minimal today. Cohabitation has become acceptable in most parts of the country. CM and CW often will have no reason to hold themselves out as married when they are not. This acceptance will not always be the case, the writer concedes. Some potential employers will not hire a cohabitant; some landlords will not rent to cohabitants; and hence cohabitants who have not agreed to undertake the property and support obligations of the lawfully married will make representations of marital status.

On the other hand, if the law adopts the suggestion of this article to create a new status of lawful cohabitation for persons who agree to support and property obligations less demanding than those arising out of lawful marriage, the stigma that may presently lead to false representations of marital status should largely vanish. Moreover, laws in many jurisdictions prohibit discrimination in employment and sometimes in renting of property based on marital status. Since the proposed new status is to be a form of marriage, such anti-discrimination laws should be applicable to lawful cohabitants.

Of course, common-law marriage is under federal law of taxation, bankruptcy, and entitlements the equivalent of formal, ceremonial marriage. Thus revival of the doctrine will create benefits that contract law cannot now achieve. In sum, there is good reason to revive common-law marriage, and only in states presently employing the negative-status approach to cohabitation—an unacceptable alternative in this writer's view—will doing so increase litigation and invite perjured claims.

B. *The Putative Marriage Doctrine Should Be Fully Accepted*

A number of states apply the civil effects of the status of lawful mar-

117. See *Succession of Lannes*, 187 La. 17, 37, 174 So. 94, 102 (1936) (dissenting opinion) (asserting that it was at that time inconceivable that a male cohabitant would ever introduce his female partner to a friend or relative as his concubine, claiming that he would instead hold her out to be his wife).

riage to a cohabitant who believed in good faith that she was married when in fact an impediment rendered the anticipated marriage void.¹¹⁸ If one of the parties to the putative marriage has a lawful spouse living at the same time of cohabitation in putative marriage, it may be impossible to accord all of the civil effects of marriage to a putative spouse. Both the lawful and the putative spouse of CM may not, for example, be able to have full inheritance rights of a lawful spouse. In community property states both lawful spouse and putative spouse cannot claim own half the earnings of their common husband or wife without stripping him or her of any interest in such earnings, an unfair result if the common spouse attempted to remarry in good faith belief that the prior marriage had terminated. In these cases of multiple spouses, the law of putative marriage does the best it can to do equity.¹¹⁹

In some states, such as Louisiana,¹²⁰ the putative marriage doctrine applies only if the couple obtained a license and went through a formal ceremony. The writer suspects this limitation could be traced back to continental civil law jurisdictions where the Roman Catholic Church had greater influence on marriage law than any religion presently has in the United States. In this country, a majority of states at one time recognized common-law marriage and, as noted, fourteen jurisdictions still do. It is not unreasonable, then, for a couple living in Louisiana to believe that common-law marriage is recognized and attempt to contract for a common-law marriage. The nonrecognition of that doctrine logically could be the impediment to lawful marriage that would confer putative spouse status on both parties. Concededly, this would be an indirect way for the judicial branch to adopt the common-law marriage doctrine for a small

118. See La. Civ. Code arts. 117-118. In other states the doctrine emerges from a piecing together of various statutes and cases in a jurisdiction dealing issue by issue with putative marriage. See generally Comment, *supra* note 19, at 98-99. For example, see *Williams v. Fireman's Fund Ins. Co.*, 670 P.2d 453 (Colo. App. 1983) (putative spouse recovers worker compensation benefits, applying Colo. Rev. Stat. § 14-2-110).

If both parties to the invalid marriage are aware of the invalidity, both will have to turn to the *Marvin* doctrine or some other approach than putative marriage for relief. But see *In re Marriage of Recknor*, 138 Cal. App. 3d 539, 187 Cal. Rptr. 887 (1982), where CM, aware that CW was married to someone else, asked her to go through a ceremony with him; not wanting to do so, she finally yielded to his importuning. The court held that he was estopped to deny the validity of the marriage. (Whether she, too, was so estopped was not decided.) This was certainly not estoppel *in pais*, for CW had as full knowledge of the facts and law as did CM and also suffered no detriment by going through the ceremony. It is clear on the face of the opinion that CW was not "ignorant of the truth" 138 Cal. App. 3d at 546, 187 Cal. Rptr. at 892 as the *Recknor* court conceded she should be for a true estoppel to arise.

119. See, e.g., *Estate of Vargas*, 36 Cal. App. 3d 714, 111 Cal. Rptr. 779 (1974); *Prince v. Hopson*, 230 La. 575, 89 So. 2d 128 (1956); *Routh v. Routh*, 57 Tex. 589, 602 (1882) (concurring opinion).

120. *Succession of Donohue*, 389 So. 2d 879 (La. App. 4th Cir. 1980) (citing *Succession of Marinoni*, 183 La. 770, 164 So. 797 (1935)).

number of couples, but it is logically sound and is accepted in some states.¹²¹

Parties to a putative marriage (even if one of them is not in good faith) have almost certainly made an express contract to undertake the support and property obligations *inter se* of those lawfully married. Where such an express agreement cannot be found, surely one must be implied-in-fact from the attempt to marry. Express or implied, the contract can be enforced in *Marvin* jurisdictions even by a cohabitant who was not in good faith (*i.e.*, he knew a prior marriage had not been dissolved).

As has been seen, however, under federal law, recognition of these rights by way of status rather than contract law is much more favorable to the parties. As indicated, the Social Security Act recognizes a putative spouse as having a marital status.¹²² The Tax Court has held that support payments ordered by a court annulling an invalid marriage are alimony for purposes of deduction by the payor and taxability for the recipient.¹²³ This view necessarily recognizes that at least for tax purposes, marital status is not necessarily dependent on a lawful marriage and that judge-made rules creating an equivalent status can serve as the foundation for the status required for the favorable treatment given married persons under federal law.

Some states apply only a portion of the civil effects of lawful marriage in favor of a good faith putative spouse. In California, for example, sharing of gains similar to that under community property laws can be asserted,¹²⁴ but the putative spouse cannot inherit purely separate prop-

121. *Wagner v. County of Imperial*, 145 Cal. App. 3d 980, 193 Cal. Rptr. 820 (1983) (allowing putative wife under common law marriage theory to sue for wrongful death of "husband"); *Sancha v. Arnold*, 114 Cal. App. 2d 272, 251 P.2d 67 (1952).

122. See *supra* note 106. The undefined terms *spouse* and *widow* in the provision of the federal Civil Service Act providing for annuity death benefits to a surviving spouse have been construed to include a putative spouse where state law recognized such status. *Brown v. Devine*, 574 F. Supp. 790 (N.D. Cal. 1983). However, a few federal courts have not been so charitable in dealing with equally vague references to spouses and widows under some other acts of Congress. Sometimes putative spouses have not fared so well, usually because of courts' imputing to Congress an intent to exclude them from benefits notwithstanding a status created by state law that closely resembles that arising out of lawful marriage. See *Lawson v. United States*, 192 F.2d 479 (2d Cir. 1951) (no benefits for putative spouse under Death on High Seas Act). Contra *E.W. Coslett & Sons, Inc. v. Bowman*, 354 F. Supp. 330 (E.D. Pa. 1973), *aff'd mem.*, 487 F.2d 1394 (3d Cir. 1973) (allowed recovery under Longshoremen's and Harbor Workers' Compensation Act, relying on state law to determine validity of the marriage).

123. *Newburger v. Commissioner*, 61 T.C. 457, 460 (1974) (holding that "under New York law the putative marriage between Andrew and Barbara was recognized for purposes of creating a legal obligation upon Andrew to support his wife"). The "marriage" was bigamous and wholly void under New York law relating to actual marriage. Apparently both parties did not realize that the *ex parte* Nevada divorce Barbara's first husband had obtained was invalid; thus, they had the good faith requisite for putative spouse status.

124. See Cal. Civ. Code § 4452 (West 1983).

erty of a deceased cohabitant as a lawful spouse could.¹²⁵ And it has been said in dictum that a putative spouse lacks the status of a lawful spouse under an insurance policy extending coverage to a named insured's husband or wife.¹²⁶

California's refusal to treat a putative marriage like a lawful marriage for several purposes is the only logical explanation of a decision by the United States Court of Appeals for the Ninth Circuit holding that support ordered to be paid by a putative spouse at annulment was dischargeable in bankruptcy.¹²⁷ The court's declaration that only a lawful marriage¹²⁸ could create a nondischargeable support obligation seems overly broad and certainly cannot be squared with the Tax Court's acceptance of a tax deduction for the payor of alimony ordered by a court granting annulment.

On the other hand, California's denial of inheritance rights to a putative wife supports an argument that the status cast by California law on the putative wife is so far removed from marriage that it should not be considered marriage for bankruptcy law purposes. (The same conclusion should logically extend to tax law.)

The writer sees no reason for mere partial acceptance of the putative marriage doctrine. A question arises, however, whether it should be extended so that, if only one "spouse" has the good faith necessary for putative status, the other party to the union—the one without the good faith—nevertheless obtains the benefits of the putative marriage doctrine.

125. *Estate of Levie*, 50 Cal. App. 3d 572, 123 Cal. Rptr. 445 (1975). However, under *In re Krone's Estate*, 83 Cal. App. 2d 766, 189 P.2d 741 (1948), the putative spouse can inherit intestate all of what would have been community property in a lawful marriage, including the half that would have been owned by the other party to the union. *Levie* and *Krone* are logically irreconcilable.

126. *Menchaca v. Hiatt*, 59 Cal. App. 3d 117, 127, 130 Cal. Rptr. 607, 613 (1976). On a majority of issues, however, California does treat a putative spouse the same as a lawfully married person. See Cal. Code Civ. Proc. § 377 (West Supp. 1984) (putative spouse can sue for wrongful death of other party); *Brennfleck v. Workmen's Comp. App. Bd.*, 3 Cal. App. 3d 666, 84 Cal. Rptr. 50 (1970) (Putative spouse gets worker compensation benefits at least if no lawful spouse exists.); *Adduddell v. Board of Administration*, 8 Cal. App. 3d 243, 87 Cal. Rptr. 268 (1970) (Putative spouse is "widow" who receives death benefits under statutory pension plan at least if no lawful spouse exists.).

127. *Norris v. Norris*, 324 F.2d 826 (9th Cir. 1963) (criticized in Comment, Putative Spousal Support Rights and the Federal Bankruptcy Act, 25 UCLA L. Rev. 96, 105 & passim (1977)). In *Norris*, a California annulment court had ordered the "husband" in a bigamous marriage to pay \$2408.00 at \$35 per week to the "wife" to settle property rights. The court did not rest its holding of nondischargeability squarely on the apparent purpose of the state court order: not to provide support but to divide property.

128. The court said that the support obligation had to be founded on a "natural and legal duty." But the status created by California law was "natural and legal"—it simply did not extend to the putative wife as many benefits as did the state's law concerning actual marriage. *Norris*, 324 F.2d at 828.

With respect to property rights at annulment, one California decision has reached this result as a matter of statutory interpretation.¹²⁹ The writer disagrees with that court's construction of the statute at issue;¹³⁰ he also sees no need for both parties to the relationship to have the same status. One obvious purpose of the putative marriage doctrine is to extend to the good faith spouse the benefits she reasonably expected from the relationship (as well as the burdens¹³¹). The party without good faith belief in the marriage should not reasonably expect all of the benefits of a lawful marriage, but he could obtain the status of lawful cohabitant while the party with good faith belief in the marriage obtained the status of putative spouse.

C. Total Assimilation Should Be Rejected

Recent decisions in two states apparently have in effect attached the status of lawful marriage to cohabiting couples having a long-term, stable relationship.¹³² At least at an *inter vivos* termination of the relationship

129. In re Marriage of Cary, 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973), overruled on other grounds, Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976). The Marvin court said it "need not now resolve" the question of the correctness of this aspect of the Cary holding. 18 Cal. 3d at 681 n.18, 557 P.2d at 120 n.18, 134 Cal. Rptr. at 829 n.18.

130. California Civil Code § 4452 states that if the "court finds that either party or both parties believed in good faith that the marriage was valid, the court should declare such party or parties to have the status of a putative spouse, and . . . shall divide, in accordance with Section 4800, i.e., 50-50] that property acquired during the union" Cal. Civ. Code § 4452 (West 1983) (emphasis added). Cary emphasized the Civil Code section 4800 directive to divide 50-50, coupled with the absence of any disclaimer of the applicability of that approach when the property at issue was acquired by the good faith spouse and a bad faith party would take half on the division. The writer's view is that the legislature would not by way of the language emphasized above acknowledge that only one spouse might have putative status if both were in all instances to be treated the same way under the statute. Accord Kay & Amyx, Marvin v. Marvin: Preserving the Options, 65 Calif. L. Rev. 937, 947-52 (1977).

131. See Barkley v. Dumke, 99 Tex. 150, 87 S.W. 1147 (1905) (Putative wife could not disaffirm contract due to her minority as she could have had she had no type of marital status at time of contracting.); In re Koonce, 380 So. 2d 140 (La. App. 1st Cir. 1980) (Putative husband after annulment could not disaffirm adoption of "wife's" children during the relationship even though done under special proceedings available only to "spouse" of adopting child's parent.).

132. See In re Marriage of Lindsey, 101 Wash. 2d 299, 678 P.2d 328 (1984); Warden v. Warden, 10 Fam. L. Rptr. 1259 (Wash. Ct. App. Feb. 21, 1984); Eaton v. Johnston, 9 Kan. App. 2d 63, 672 P.2d 10 (1983). California at one time also employed this approach. See In re Marriage of Cary, 34 Cal. App. 3d 345, 109 Cal. Rptr. 862 (1973), overruled, Marvin v. Marvin, 18 Cal. 3d 660, 557 P.2d 106, 134 Cal. Rptr. 815 (1976). See also Finlay, *supra* note 54, at 156, 157 (Australia is close to using a total assimilation approach.).

A strong advocate of what comes close to total assimilation for cohabitants under a status law approach is Blumberg, *supra* note 46. For most purposes, Professor Blumberg would treat cohabitants in a stable relationship the same as the lawfully married, see, e.g., id.

(quasi-divorce), this approach achieves a total assimilation of cohabitants into the law governing the lawfully married. The logic of the decisions should extend to issues arising at termination of the relationship by death and, probably, to issues arising while the relationship is on going. This total assimilation approach goes far beyond the common-law marriage doctrine, for it recognizes the marriage status without a contract to be married and, apparently, without the holding out of the couple to the public as being married. The writer finds this total assimilation approach unacceptable from a public policy standpoint.

When the cohabitants have taken care not to represent to each other or to the public that they have the status of the lawfully married, their expectations concerning the benefits and burdens arising out of the relationship should be different from those attached to the lawful marriage status. Most likely one or both of the parties who are cohabiting without a holding out of marital status declines to assume the primary burden of marriage—a life-long support obligation. Probably, too, one or both of such cohabitants is purposefully avoiding a legal status that can be terminated only through adversary legal proceedings (divorce) that are often quite costly (with the husband often ending up having to pay not only his own attorney's fees but those of his wife as well).¹³³

When only one of the cohabitants has such objections, the other must be aware at least in general that her mate is declining to accept the status of marriage. She has no reasonable expectations to be dashed when the law in response does not fix the status of lawfully married on the couple.

The law could take the position that those who want a sexual relationship have to pay for it, and that the cost is a life-long support obligation plus entanglement in costly divorce proceedings. But what is to be gained? The writer cannot see how morality is advanced by the law's telling a couple that it will treat them as married even though they do not want to be. The fact remains that this type of cohabiting couple is known in the community to have a sexual relationship while deliberately refusing to marry. Whatever affront to marriage results surely cannot be even substantially eliminated by a rule of law that treats them as married anyway. To foist on the couple the status of marriage as a punishment for their lifestyle is itself a greater affront to formal marriage.

at 1167 (inheritance rights at dissolution of cohabitation relationship by death), although for some purposes she would want proof of a two-year union or birth of a child (see, e.g., *id.* at 1158-59) (treating cohabitants the same as the lawfully married for income tax purposes).

133. The unfairness of saddling one or both cohabitants with all of the burdens of lawful marriage when he or they deliberately declined to marry in order to avoid such burdens has been often noted. See, e.g., M. Freeman & C. Lyon, *Cohabitation Without Marriage* 51-54, 183-85 (1983); Clark, *supra* note 26; Casad, *supra* note 4, at 55; Finlay, *supra* note 54, at 159-60; Hunter, *supra* note 4, at 1094; Schultz, *supra* note 19, at 287; Simitian, *supra* note 50, at 7, 10; Weyrauch, *supra* note 19, at 266; Note, *supra* note 18, at 370.

The total assimilation approach is thus unacceptable. It is as wrong to impose the *status* of lawfully married on a couple seeking to avoid marriage as to imply in such a case a *contract* under which the pair agree to all of the benefits and burdens of lawful marriage.

D. *Ad Hoc Extension of Particular Benefits and Burdens of Marriage Is an Insufficient Remedy*

A number of jurisdictions have judicially or legislatively¹³⁴ picked out certain aspects of the status of lawful marriage and affixed them as a matter of status, not contract law, to certain types of cohabitants. Thus, a cause of action for loss of consortium has been held in two cases (with many others to the contrary) to be available to one cohabitant when the other has been injured.¹³⁵ A right to recover statutory death benefits under a worker's compensation scheme has also twice been extended to a cohabitant.¹³⁶ The right to receive alimony¹³⁷ or to inherit property at death¹³⁸ is affixed to some cohabitation relationships by a small number of statutes. With respect to most issues, however, the courts refuse to treat cohabitation as creating a status similar to marriage.¹³⁹ To date, so

134. Many of the legislative examples are surveyed in *Unmarried Couples*, supra note 115, ch. 6.

135. See *Butcher v. Superior Court*, 139 Cal. App. 3d 58, 188 Cal. Rptr. 503 (1983) (recovery allowed if relationship is "stable and significant"); *Bulloch v. United States*, 487 F. Supp. 1078 (D.N.J. 1980) (repudiated subsequently by state court decisions cited below). *Contra Tong v. Jolson*, 76 Cal. App. 3d 603, 142 Cal. Rptr. 726 (1977); *Lieding v. Commercial Diving Center*, 143 Cal. App. 3d 72, 191 Cal. Rptr. 559 (1983); *Etienne v. DKM Enterprises, Inc.*, 136 Cal. App. 487, 186 Cal. Rptr. 321 (1982); *Hendrix v. General Motors*, 146 Cal. App. 3d 296, 193 Cal. Rptr. 922 (1983) (hearing granted, appeal dismissed); *Curry v. Caterpillar Tractor Co.*, 577 F. Supp. 991 (E.D. Pa. 1984); *Felch v. Air Florida*, 562 F. Supp. 383 (D.D.C. 1983) (applying Florida law); *Leonardis v. Morton Chemical Co.*, 184 N.J. Super. 10, 445 A.2d 45 (1982).

136. See *infra* note 140 for cases from California and Louisiana.

137. N.S. Rev. Stat. ch. 341, § 1 (right to reasonable support after one year of cohabitation); B.C. Rev. Stat. ch. 121 §§ 1, 74 (right arises after two years); Ont. Rev. Stat. ch. 152, §§ 1, 14, 52 (after five years or birth of child in relationship of "some permanence").

138. See H. Hahlo, supra note 43, at 50 (discussing Ont. Rev. Stat. ch. 488, § 57, succession rights based on need for certain categories of cohabitants); M. Freeman & C. Lyon, supra note 133, at 79-80 (discussing English law's provision for a lump sum family allowance at death for a dependent surviving cohabitant).

139. The benefits of a married person were denied to a cohabitant in the following situations:

Emotional distress recovery: *Drew v. Drake*, 110 Cal. App. 3d 555, 168 Cal. Rptr. 65 (1980) (CW is stranger to CM, unable to recover in tort as could a lawful wife observing him killed).

Prison visitation: *In re Cummings*, 30 Cal. 3d 870, 640 P.2d 1104, 180 Cal. Rptr. 826 (1982) (cohabitant not member of prisoner's "immediate family" entitled to visit).

Spousal privilege of evidence law: *People v. Delph*, 94 Cal. App. 3d 411, 156 Cal. Rptr. 422 (1979); *In re Ms. X*, 562 F. Supp. 486 (N.D. Cal. 1983) (CW subpoenaed to testify before grand jury investigating CM).

Taxation: *Estate of Edgett*, 111 Cal. App. 3d 230, 168 Cal. Rptr. 686 (1980) (for in-

far as the writer knows, no jurisdiction has extended more than one benefit of lawful marriage to cohabitants as a matter of status law.¹⁴⁰

By using status rather than contract law, this *ad hoc* assimilation approach has the benefit of more certainty. If a long-term cohabitation can be shown, the benefits and burdens attach automatically without concern about a taint of sexual consideration or what inferences concerning intention of the parties are to be drawn from their conduct. Presumably, only an express contract between the pair to avoid the aspect of lawful marriage which the jurisdiction attaches to cohabitants would be effective to avoid that result.

The primary difficulty with this approach to sorting out the legal rights of cohabitants is its crudeness. With respect to each issue, the law's choice—at least if the *ad hoc* assimilation is judicial—is “all or nothing.” The court either leaves the cohabiting couple with respect to the matter at issue (e.g., loss of consortium) under the “no rights” posture of the traditional negative-status approach, or it applies to the couple all of the law concerning the issue drawn from the status of lawful marriage. (While legislatures have the power to take a “middle ground” approach while dealing with the rights of cohabitants on an issue-by-issue basis, they seldom have done so.)

Yet another problem with the *ad hoc* assimilation approach is that it may take decades for the courts of a jurisdiction (with or without help

heritance tax purposes CW was class “C” stranger, not class “A” spouse, substantially increasing the tax liability).

Wrongful death recovery: *Garcia v. Douglas Aircraft*, 133 Cal. App. 3d 890, 184 Cal. Rptr. 390 (1982); *Harrod v. Pacific Southwest Airlines*, 118 Cal. App. 3d 155, 173 Cal. Rptr. 68 (1981); *Nieto v. City of Los Angeles*, 138 Cal. App. 3d 464, 188 Cal. Rptr. 31 (1982).

Unemployment Benefits: *Norman v. Unemployment Ins. Appeals Bd.*, 34 Cal. 3d 1, 663 P.2d 904, 192 Cal. Rptr. 134, (1983) (CW's quitting work to follow CM's move out of state not “good cause” as it would have been were the pair married).

140. The closest case for multiple benefits is in Louisiana, where a cohabitant because of her status can recover workers' compensation benefits. *Henderson v. Travelers Ins. Co.*, 354 So. 2d 1031 (La. 1978). It was recently held that a cohabitant also should be treated as an insured's “spouse” under a group life insurance policy, see *Jackson v. Continental Cas. Co.*, 412 So. 2d 1364 (La. 1982). In *dictum* the court said it could see no basis for distinguishing for insurance status purposes a concubine from a lawful wife. The narrow holding rested on an incontestability clause in the policy, however.

In California the status of cohabitant qualifies a party (even in a same-sex union) for worker compensation benefits under a statutory scheme. *Donovan v. Workers' Comp. App. Bd.*, 138 Cal. App. 3d 323, 187 Cal. Rptr. 869 (1982); *Department of Indus. Relations v. Workers' Comp. App. Bd.*, 7 Cal. Fam. L. Rptr. 2144 (1st Dist. June 14, 1979).

As noted above, in California there is a split of authority concerning recovery for loss of consortium with the “no's” having a big edge, see *supra* note 108. See also *Hess v. Fair Empl. & Housing Comm'n*, 138 Cal. App. 3d 232, 187 Cal. Rptr. 712 (1982) (A cohabiting couple recovered damages when a potential landlord refused to rent to them because they were not married. But that they were cohabiting in a sexual relationship did not advance their recovery, which was based on a statute barring discrimination against all persons on the basis of their not being married.).

from the legislature) to provide the answer with respect to each of scores of legal issues that may arise (such as availability of the marital privilege of evidence law, applicability of the "necessaries" doctrine of contract law, and method for determining the domicile of *CW*).¹⁴¹ Meanwhile, as the jurisdiction attaches to cohabitants more and more of the benefits and burdens of lawful marriage, the cohabitants' posture under federal law of taxation, bankruptcy and welfare will become murky. Much litigation will be necessary to determine whether a sufficient number of rules of lawful marriage have been affixed to cohabitation so that federal law should view the couple as married.

E. *The Legislature Should Enact a Comprehensive Bill Creating a New Status of Lawful Cohabitation*

1. The New Status Should Be Denominated a Form of Marriage

If contract law, total assimilation, and *ad hoc* assimilation are ineffective remedies for dealing with the rights and obligations of cohabitants, only one course appears to remain: recognition of a new status. Avoidance of the *ad hoc* approach requires that this result be achieved legislatively. What is needed is a thorough study culminating in a bill that covers all, or at least all significant, legal issues that can arise with respect to the rights of the cohabitants *inter se* and in interaction with third parties. With each issue the legislature has three choices: (1) create no rights; (2) borrow fully from the law applicable to the lawfully married; and (3) create a new rule tailored for the new status (usually imposing a lesser obligation than that arising under the status of lawfully married).

It is important that the legislation specifically declare the new status to be a form of marriage, since so much of the federal law conditions the granting of benefits on the existence of such a status. Of course, the mere declaration by the legislature that the new status is a form of marriage will not be binding on the federal government in administering tax,¹⁴² bankruptcy and welfare laws; however, the state law reform will extend a considerable amount of the law applicable to the lawfully married to cohabitants, and the writer believes the intention of the legislature that the new law be treated as matter of marriage law reform would carry weight with federal courts and agencies.

141. Concerning such delay, see Finlay, *supra* note 54, at 166.

142. See Lathrope, *supra* note 19. Until very recently the IRS routinely deferred to the state law of marital status in applying the tax code, see, e.g., *id.* at 272, 278. When couples began obtaining year-end divorces (followed by quick remarriages) in order to avoid the marriage penalty, the IRS asserted that the divorces were shams as a matter of federal tax law without regard to whether the parties' domiciliary state would recognize the divorce as temporarily ending marital status. See *id.* at 278 & *passim*; see also Bruch, *supra* note 26, at 129 (noting that the IRS may not follow state's characterization of nature of relief given to spouse at dissolution).

The assumption here is that the legislature will agree with the writer that, to the extent the law imposes support obligations under the new status, it is wise social policy not to have them dischargeable in bankruptcy, and that, to the extent the cohabitants because of their status share in a community of gains, the full tax-law benefits of such sharing, as well as other tax benefits accorded the lawfully married, should be available.¹⁴³ Meshing federal welfare law with the new status will not be so easy but can be done. For example, a lawful CW should not be able to obtain social security benefits as a divorced wife for any period longer than CM's support obligation exists (a maximum two years under this proposal, as explained later in this article).

It may be of interest that the most difficult problem the writer has faced in preparing this article is what to call the new status. He has opted for "lawful cohabitation" as a temporary measure and hopes that someone else will succeed where he has failed in the matter of nomenclature.

Although the reform bill must for federal law purposes declare the new status to be an aspect of marriage law, use of a term including the word *marriage* (the writer had considered demi-marriage) probably has to be rejected if the legislation has accepted the proposal to revive or enact common-law marriage. The cohabitants must not call each other husband and wife nor refer to themselves as married, or else they will probably end up being married under this scheme.

The ideal nomenclature would accommodate formal invitations to attend a ceremony creating the status and society page announcements as well as introductions ("I'd like you to meet Joe, my lawful cohabitant" simply will not do.).¹⁴⁴

2. Both Formalized and Common-Law Forms of the New Status Should be Recognized

A couple who wish to enter into the new status should be able to do so immediately by filing a formal document of union that would be recorded like a certificate of lawful marriage. Probably the same restrictions on lawful marriage would have to be carried over to the new status, i.e., the rules on age of consent, permissible degree of consanguinity, and mental capacity should not be different for persons seeking to become

143. But see the Virgin Islands Vesper Marriage Act of 1981, V.I. Code Ann. tit. 16, §§ 81-86 (Supp. 1982-1983). This unique form of marriage is limited to persons aged 60 and older. It is an "easy out" type marriage in that during the first year of the status either party can terminate the relationship by simply filing a notice with the local court clerk and, after such year, by a notice of termination executed by both spouses. *Id.* at § 85. The act provides that "[f]or purpose of taxation and the receipt of pension benefits, parties to a vesper marriage shall be considered and treated as single persons as though they had not entered into the marriage contract." *Id.* at § 84(c).

144. See Lorio, *supra* note 4, at 1; Folberg & Buren, *supra* note 18, at 353 n.2.

lawful cohabitants rather than husband and wife. With respect to at least one present requirement of marriage law—that the union be heterosexual—closer legislative scrutiny is called for.¹⁴⁵ Since child-bearing may not be intended by many cohabitants, blood tests required of marrying couples for the purpose of detecting procreation problems rather than disease might be dispensed with.

No matter how easy the law makes it formally to enter the new status, many couples will simply begin living together and, at some point, should be governed by the new status law. Thus the reform legislation should include a “common-law” form of lawful cohabitation under which the status automatically attaches. This status could attach in a brief period of time if the couple contracted to be lawful cohabitants and held themselves out publicly as such. In other situations, the relationship could be converted from a non-status sexual sharing to lawful cohabitation after a period of time—six months, one year, two years¹⁴⁶—specified in the statute and applicable to relationships where no contract was made and/or no holding out occurred.

The cohabitants should be free to avoid entering into the status and to continue a non-status living arrangement beyond the specified period. Since one of the main reasons for moving from the reliance on contract-based remedies under *Marvin* to status law is avoidance of uncertainty, only an express contract to avoid lawful cohabitation status should be effective; *i.e.*, if the statutory period was one year and the sexual cohabitation extended beyond a year, a party to the union should not be able to avoid the obligations of the status by urging a contrary implied-in-fact agreement between the couple.

The legislature should consider making the status—at least for some purposes—retroactive to the date when cohabitation began. Such retroactivity may be especially appropriate for determining acquisitions falling into the community of gains that in some states will be an aspect of the new status. For couples who do not contract to be lawful cohabitants while holding themselves out as such, the law withholds attaching the status for a year (or other period) because of uncertainty as to the nature of the relationship. The passage of time removes the uncertainty and makes it at least not unreasonable for the law to say with certainty that this was from the outset a status-based cohabitation and not just a non-status sexual arrangement.

145. See the final paragraphs of this article.

146. See Finlay, *supra* note 54, at 163, noting that in countries other than the United States, statutes dealing on an *ad hoc* (*i.e.*, limited issue) basis with cohabitants have fixed the status based on cohabitations of “one year, two years, three years, five years . . . more or less.”

3. Dissolution of the Status Should Be Quick and Should Avoid Costly Procedures

The writer has noted that one of the main reasons that persons choose to cohabit rather than marry is that one or both of the couple objects to the costs in money, time, and emotions of divorce proceedings necessary to dissolve a lawful marriage.¹⁴⁷ The new status of lawful cohabitation will not satisfy a contemporary need unless the status can be terminated efficiently. No more should be required than filing of a certificate of dissolution signed by both spouses, indicating that their cohabitation has ended and that they have agreed on terms for division of property and for support payments. (Birth of a child to lawful cohabitants should convert their union to a lawful marriage, since concern for a child's welfare after dissolution warrants supervision by a court over the termination of the status.)¹⁴⁸

If the couple filed such a document without making agreements concerning property and support, the law should supply a contract for them. The writer would recommend the waiver of support (alimony) rights and a confirmation of property under which the form of title controls. Ownership of assets having no title should go to the ex-cohabitant peaceably taking possession, and in all other instances the couple should remain coowners until they work out an exchange or are forced to resort to partition actions.

If one cohabitant alone files a certificate of dissolution, that filing should end the status.¹⁴⁹ If the pair are unable to work out property and support claims, either CM or CW should be able to seek the aid of mediation, arbitration, or an informal court proceeding.¹⁵⁰ These procedures should be structured to keep the involvement of attorneys at a minimum.

If one cohabitant, notified that the other has filed a certificate of dissolution, does not begin the mediation, arbitration or informal court proceedings within a set period of time (e.g., six months), title should vest in the property at issue according to the approach outlined above based on title and possession.

When, as will happen not infrequently, the couple splits up with

147. Many commentators accept the notion that one important reason why one or both cohabitants in a relationship declines to formally marry is a desire to have an "easy out" if and when the relationship fails. See, e.g., L. Weitzman, *supra* note 19, at 245; Casad, *supra* note 4, at 56; M. Freeman & C. Lyon, *supra* note 133, at 190 (citing *Helby v. Rafferty*, 3 All. Eng. Rpt. 1016 (1978)); Lorio, *supra* note 4, at 22.

148. See Glendon, *supra* note 33 *passim* (arguing that birth of a child is a basis for total assimilation of the cohabiting couple).

149. See note 143 (Virgin Island Vesper Marriage Act).

150. See Rigby, *Alternate Dispute Resolution*, 44 La. L. Rev. 1325 (1984).

neither filing a certificate of dissolution, the status of lawful cohabitation should terminate after a short period, such as 120 days. The legislature should consider making the termination retroactive to the date of separation¹⁵¹ for purposes of determining what acquisitions are coowned under a community of gains regime.

When the status terminates by passage of time, so should property rights—*e.g.*, if no claims are made within the next 120 days following 120 days of separation—according to the suggested rules based on title and possession. Support rights would be waived if not timely asserted.

4. In Community Property States Lawful Cohabitants Should Be Subject to a Community of Gains

It is more probable than not that a couple that comes under the status of lawful cohabitants would want to share ownership of gains by both during their union.¹⁵² Thus the law should make a community of gains an aspect of this new status. An express contract to the contrary—*e.g.*, to live separate in property—should be necessary to avoid this benefit-burden of lawful cohabitation. At present the writer can think of only one reason that a community property state might not want to extend its community property law in full force to the new status. An important feature of the new status is the “easy out” termination. The states of Louisiana, Texas, and Idaho and New Mexico, Arizona, and Nevada—which do not have a living-apart doctrine applicable to communities of gains in lawful marriages¹⁵³—may want to borrow this feature of California and Washington¹⁵⁴ community property law for lawful cohabitants. On the other hand, the benefits of doing so will be slight if the new legislation provides for a quick termination of the status after the couple splits up (*e.g.*, the 120-day period suggested above) together with a subsequent automatic vesting of title to property based on possession and title. Ex-

151. That is, something like the living-apart doctrine of some community property states should be adopted. See Reppy, *Some suggested Revisions for a Basically Sound Uniform Act*, Houston L. Rev. (forthcoming) (1984).

152. See L. Weitzman, *supra* note 19, at 427 (empirical study showed 88% of cohabitants making formal contract opted for sharing of gains by analogy to community of property); Blumberg, *supra* note 46, at 1136-37 (most couples who cohabit desire the sharing of a community of gains).

153. See W. Reppy & C. Samuel, *Community Property in the United States* 289-90 (2d ed. 1982); W. McClanahan, *Community Property Law in the United States* § 6.19 (1982). In Arizona a form of the living-apart doctrine was accepted in *Pendleton v. Brown*, 24 Ariz. 604, 221 P. 213 (1923) (implied renunciation); *In re Marriage of Fong*, 112 Ariz. 298, 589 P.2d 1330 (App. 1978) (when “mutual will to union ceases”); but flatly rejected in several other decisions, including *Flowers v. Flowers*, 118 Ariz. 577, 578 P.2d 1006 (App. 1978); *Estate of Messer*, 118 Ariz. 291, 576 P.2d 150 (App. 1978).

154. See Cal. Civ. Code § 5118 (West 1983); Wash. Rev. Code § 26.16.140 (West Supp. 1984-1985).

cept in rare cases, assets earned during the 120-day period after separation will be either titled in the acquiring party or in his possession.

5. The Support Obligation of a Lawful Cohabitant Should Be Strictly Limited

Since the life-long support obligation is probably the burden of lawful marriage most likely to cause a cohabitant to reject marriage for an alternative living arrangement,¹⁵⁵ the new status of lawful cohabitation should handle the support obligation differently. Certainly the cohabitants should be free to contract expressly against any support obligation, even though the statute might impose a limited duty.¹⁵⁶ A legislative determination that the basic rule would be no support obligation at all (unless agreed to by contract) should not be faulted,¹⁵⁷ but there will be situations of such sacrifice of career opportunities by a cohabitant assuming the role of the stay-at-home domestic that placing a limited support obligation on the other cohabitant could be an acceptable compromise between the no-support and the life-long-support positions.

A substantial case of equities should exist before any support obligation is engrafted on the new status. For example, the law might provide that no cohabitant is entitled to support unless he can show at least five years of career sacrifice because of the role played as cohabitant. Since under this proposal the birth of a child should convert the lawful cohabitation into a lawful marriage, the occasion for CW to assume a stay-at-home domestic role as a cohabitant will not often arise.

Under no circumstances should the support obligation exceed a short, fixed period of time such as two years. The policy here is not to make lawful cohabitation so similar to marriage as to discourage marriage as an institution. A further restriction, such as one based on a percentage of net income of the obligor cohabitant, should be considered as well.

155. See L. Weitzman, *supra* note 19, at 365; Douthwaite, *supra* note 115, at 9.

156. Even for lawfully married spouses, alimony has become an unusual remedy at divorce. It is seldom awarded, and difficulties in collecting on an award are well known. See generally Weitzman, *The Economics of Divorce: Social and Economic Consequences of Property, Alimony and Child Support Awards*, 28 UCLA L. Rev. 1181 (1981); see also M. Glendon, *The New Family and the New Property* 54-57 (1982) (alimony rarely granted); Fineman, *Implementing Equality: Ideology, Contradiction and Social Change—A Study of Rhetoric and Results in the Regulation of the Consequences of Divorce*, 1983 Wis. L. Rev. 795, 798, 826; Glendon, *supra* note 4, at 706; Skolnick, *supra* note 9, at 352.

157. Professor Weitzman's empirical study of the terms of express contracts made by cohabitants showed an average duration for the relationship (when such term appeared in the contract) of only three years. L. Weitzman, *supra* note 19, at 424. Apparently such term was intended to mark the outer limit of a period of support obligation if the relationship in fact terminated sooner. In other contracts that Weitzman examined, a support obligation extending beyond any termination of the relationship was waived.

6. Other Rules of Law Attached to the New Status Should Be Molded Based on Reasonable Wishes and Expectations of the Cohabitants and Third Parties

Time and space do not permit examination in this article of the appropriate treatment in the case of cohabitants of the multitude of issues that can arise.¹⁵⁸ In each legislature creating the new status should take into account what the typical cohabiting couple would want the law to provide, what their reasonable expectations might be, and what expectations third parties interacting with the cohabitants might have.

For example, with respect to intestate succession where one cohabitant dies during the existence of the lawful cohabitation status (or at least before the pair separates), the writer's notion is that the decedent would have the same wishes concerning property rights of his cohabitant as would a lawful husband concerning his wife's claim to property. If the sole policy of intestate succession statutes is to effectuate the type of testamentary scheme the typical decedent would voluntarily adopt, the legislature could simply borrow for cohabitants the rules of succession applicable to couples lawfully married.¹⁵⁹

On the strength of the *moral* claim by a survivor against the estate of the decedent, however, a surviving cohabitant, who opted for a relationship from which he was effectively free to walk away with ease, could be seen as entitled to much less than a surviving lawful spouse—perhaps to no more than a sum equal to two years' support needs. The handling of the right to sue for wrongful death would likely follow the approach taken to the intestacy claim.

A lawful cohabitant, in the writer's opinion, should have no cause of action for loss of consortium because of the "I-can-get-out-at-any-time" nature of the relationship, but many critics may disagree with this assessment.

CONCLUSION

The negative-status approach to cohabitation is achieving no social policies and is needlessly frustrating freedom of choice. It should be abandoned.

Contract law is an inadequate substitute because of uncertainty, because of the need in many cases to litigate to determine rights of the

158. A useful survey of many of them is found in *Unmarried Couples*, *supra* note 65, ch. 2.

159. It is to be recalled that rules concerning eligibility to become lawful cohabitants will be the same as those for lawful marriage. Thus the lawful cohabitation relationship cannot be bigamous and there will be no lawful widow or widower making inheritance claims in competition with the surviving lawful cohabitant.

parties, and because cohabitants governed by contract-based rights lose the benefits of federal tax, bankruptcy, and welfare laws.

Some experts in domestic relations law with whom the writer has discussed this article have said there is no need to create a new status to solve the problem; instead, the parties to a marriage should be allowed to freely contract to alter the legal aspects of lawful marriage, such as by eliminating or restricting the support obligation, or by providing for dissolution by filing of an agreement. But this "solution" would apply in only a few cases of couples sophisticated enough to realize that the law of marriage can be molded contractually to meet their needs. Moreover, there is no assurance that federal law will respect the agreement.

Under this "solution," large numbers of couples will still engage in long-term cohabitation relationships, and the law will have only the negative-status and contract-based approaches to draw on for dealing with them. If a positive-status approach is believed to be superior, legislation adopting that theory can only advance the law.

The final note of this Article is about same-sex cohabiting couples. In jurisdictions where their sexual conduct is not criminal, the negative-status approach is just as ineffectual and inappropriate for them as for heterosexual cohabitants, and the contract remedies just as uncertain. The legislature should consider creating for same-sex couples a form of status they could adopt to obtain a community of gains, intestate inheritance rights, and the like. It would be best, however, to create this status by separate legislation employing terminology other than that used in the reform directed at heterosexual couples. The reason is a fear that, if the new status extends to same-sex couples, federal courts and agencies administering tax, bankruptcy and welfare law will conclude that, because it can attach to same-sex couples, the new status is not a form of marriage even though the legislature purports to say it is. The importance of ensuring that the new status for heterosexual couples fits into these areas of federal law as lawful marriage makes the risk of damage to the proposal by including same-sex couples too great.

