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Marriage Is on the Decline and Cohabitation Is on the Rise: At What Point, if Ever, Should Unmarried Partners Acquire Marital Rights?*

LAWRENCE W. WAGGONER**

I. Introduction

This article draws attention to the cultural shift in the formation of families that has been and is taking place in this country: Marriage is on the decline and cohabitation is on the rise.

Part II documents this cultural shift by using recent government data to trace the decline of marriage and the rise of cohabitation. Between 2000 and 2010, the population grew by 9.71%, but the husband-and-wife households only grew by 3.7%, while the unmarried-couple households grew by 41.4%. Because of the Supreme Court's decision in *Obergefell v. Hodges*,¹ marriage is now universally available to same-sex couples. Part II considers the impact of same-sex marriage on the marriage rate, then describes the benefits and obligations of marriage, and closes by noting the demographic characteristics of cohabiting couples. This article points out that cohabitation is a temporary or short-term state in most cases: The parties either break up or get married fairly quickly. Nevertheless, a small percentage of cohabiting couples continue to cohabit for much longer or for life. Because more of them are added every year, the longer-term cohabitations accumulate in the population.

* This article is an abridged, updated, and reconfigured version of Lawrence W. Waggoner, *With Marriage on the Decline and Cohabitation on the Rise, What About Marital Rights for Unmarried Partners?*, 41 ACTEC L.J. 49 (2015).

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1. 135 S. Ct. 2584 (2015).

Part III argues the case for treating cohabiting couples whose relationships show that they are (or were) deeply committed to one another as married in fact. The article finds that a consensus has quietly emerged in legislation to this effect that has been enacted in Australia, Canada, Ireland, New Zealand, and Scotland, and has been introduced in the United Kingdom for England and Wales. These countries—plus the United States—are known collectively as the Anglosphere. The United States, however, standing alone in the Anglosphere, has yet to move on marital rights. For convenience, this article refers to the statutes that have been enacted or introduced in all of these countries but the United States as the “Anglosphere marital-rights legislation.” To one degree or another, legislation has also been enacted in other developed countries, especially on the European continent, but this article focuses, for comparison, on the Anglosphere marital-rights legislation, because the Anglosphere statutes, being in English, are more accessible to readers of this *Journal*. In the United States, the American Law Institute (ALI) has proposed granting longer-term cohabitants rights similar to those for married couples upon dissolution of the relationship. Drawing on the Anglosphere marital-rights legislation, the ALI proposal and other resources, this article presents for discussion a draft Uniform De Facto Marriage Act (“the Draft Act”). The Draft Act, however, does not, and probably should not, provide a mechanism for automatically declaring a couple as married in fact. Couples who deliberately decline to marry should not have their decision overridden. Consequently, the Draft Act is not set up to be self-executing. A court judgment is required.

The article concludes by pointing out that a de facto marriage judgment would qualify a couple for all federal and state benefits and obligations of marriage.

II. Marriage and Cohabitation

A. *The Decline of Marriage*

Between 1867 and 1967, the annual marriage rate changed little: 0.96% of the population got married in 1867 and 0.97% got married in 1967.² In the intervening years, the rate dipped as low as 0.79% during the Great Depression in 1932 and spiked up to 1.46% when the troops came home after the end of World War II.³ The annual percentage during ninety of these years ranged between 0.85% and 1.14%.⁴

2. See U.S. DEP’T OF HEALTH, EDUC., & WELFARE, DHEW PUB. NO. (HRA) 74-1902, 100 YEARS OF MARRIAGE AND DIVORCE STATISTICS UNITED STATES, 1867–1967, at 7 (1973).

3. *Id.*

4. *Id.*

By 2000, the marriage rate had declined to 0.82%. As shown by Table 1, the rate continued to spiral downward, reaching an historic low of slightly less than 0.68% in 2009. From 2009 to 2014, the latest years for which marriage-rate data are available, the marriage rate remained below 0.70%:

Table 1⁵
Number of Marriages, Marriage and Unemployment Rates,
Gross Domestic Product: 2000–2014⁶

Year	Number of Marriages	Population	Percentage of the Population Getting Married	Unemployment Rate of Those Seeking Employment⁷	Gross Domestic Product in Billions of Chained 2009 Dollars⁸
2000	2,315,000	281,421,906	0.82261	4.0%	\$12,559.7
2001	2,326,000	284,968,955	0.81623	4.7%	\$12,682.2
2002	2,290,000	287,625,193	0.79618	5.8%	\$12,908.8
2003	2,245,000	290,107,933	0.77385	6.0%	\$13,271.1
2004	2,279,000	292,805,298	0.77833	5.5%	\$13,773.5
2005	2,249,000	295,516,599	0.76104	5.1%	\$14,234.2
2006	2,193,000 (excludes Louisiana)	294,077,247 (excludes Louisiana)	0.74572*	4.6%	\$14,613.8
2007	2,197,000	301,231,207	0.72934	4.6%	\$14,873.7
2008	2,157,000	304,093,966	0.70932	5.8%	\$14,830.4
2009	2,080,000	306,771,529	0.67803	9.3%	\$14,418.7
2010	2,096,000	308,745,538	0.67888	9.6%	\$14,738.8
2011	2,118,000	311,591,917	0.67974	8.9%	\$15,020.6
2012	2,131,000	313,914,040	0.67885	8.1%	\$15,354.6
2013	2,081,301 (excludes Georgia)	306,136,672 (excludes Georgia)	0.67986*	7.4%	\$15,612.2
2014	2,140,272 (excludes Georgia)	308,759,713 (excludes Georgia)	0.69318*	6.2%	\$15,982.3

Note: The asterisks adjacent to the 2006, 2013, and 2014 marriage-rate figures indicate that those figures give an inaccurate measure of the actual marriage rate for those years, because the Louisiana and Georgia marriages and populations did not make it into the final tallies. The Census Bureau estimated the resident population of Louisiana as of July 1, 2006, to be 4,287,768;⁹ the resident population of Georgia as of July 1, 2013, to be 9,994,759;¹⁰ and the resident population of Georgia as of July 1, 2014, to be 10,097,343.¹¹ Adding these estimates to the totals would bring the country’s population in 2006 to 298,365,015, in 2013 to 311,131,431, and in 2014 to 318,857,056. An Internet search for the official number of Louisiana marriages recorded in 2006 and of Georgia marriages recorded in 2013 and 2014 came up empty. Also, the higher number of marriages in 2014 as compared with 2012, even absent the 2014 Georgia marriages, does not necessarily signify an uptick in the actual marriage rate, because the unknown number of total marriages for those two years might have been outstripped by the growth of the total population for those years.

Although the marriage rate dipped substantially during the Great Depression of the 1930s, a counterintuitive finding is that the early twenty-first-century data in Table 1 show less dramatic correlation between the marriage rate and economic conditions. The marriage rate was declining long before the 2008–2009 recession and only declined at a slightly accelerated pace during the second year of that recession. Just as the 2009–2012 marriage rate stabilized, the unemployment rate spiked up from below 6.0% to over 9.0%, despite improvement in the gross domestic product.

The Table 1 data points do not mean that a dramatically improved economy sometime in the future might not correlate with a return of the 1867–1967 historical average marriage rate of close to 1%, or even to the low of 0.79% during the Great Depression of the 1930s, but that possibility cannot now be known. So far, current data show that the 2015 unemployment rate for those in the likely first-marriage ages—the

5. Table 1 documents the decline of marriage that has taken place, but what of the future? Demographic Intelligence, a consulting firm that claims that its demographic forecasts are 99% accurate, predicts that the marriage rate will continue to trend downward: “The United States marriage rate is at a century low and is poised to go lower” *U.S. Marriage Rate Lowest Ever Recorded, but Headed Down Slower*, PRWEB 1 (May 19, 2015), <http://www.prweb.com/pdfdownload/12729717.pdf> [hereinafter DEMOGRAPHIC INTELLIGENCE].

6. The first four columns are based on the 2000–2014 marriage-rate table in NAT’L CTR. FOR HEALTH STATISTIC, CTR. FOR DISEASE CONTROL & PREVENTION, NATIONAL MARRIAGE AND DIVORCE RATE TRENDS, http://www.cdc.gov/nchs/nvss/marriage_divorce_tables.htm (last visited Oct. 3, 2016). The unemployment rate would be higher if it accounted for the number of working-age individuals who are unemployed but not seeking employment. At the end of 2014, 37.3% of unemployed working-age individuals were not seeking employment. See *Labor Force Statistics from the Current Population Survey*, BUREAU OF LABOR STATISTICS (Sept. 15, 2016), <http://data.bls.gov/timeseries/LNS11300000>.

7. See BUREAU OF LABOR STATISTICS, U.S. DEP’T OF LABOR, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY, http://data.bls.gov/timeseries/LNU04000000?years_option=all_years&periods_option=specific_periods&periods=Annual+Data (last visited March 7, 2016). The unemployment rate would be higher if it accounted for the number of working-age individuals who are unemployed but not seeking employment. At the end of 2014, 37.3% of unemployed working-age individuals were not seeking employment. See *Labor Force Statistics from the Current Population Survey*, BUREAU OF LABOR STATISTICS, <http://data.bls.gov/timeseries/LNS11300000> (Sept. 15, 2016).

8. See BUREAU OF ECON. ANALYSIS, U.S. DEP’T OF COMMERCE, NATIONAL ECONOMIC ACCOUNTS: GROSS DOMESTIC PRODUCT (GDP), <http://bea.gov/national/index.htm#gdp> (last visited Sept. 27, 2016).

9. See POPULATION DIV., U.S. CENSUS BUREAU, ANNUAL ESTIMATES OF THE RESIDENT POPULATION OF THE UNITED STATES, REGIONS, STATES, AND PUERTO RICO: APRIL 1, 2000 TO JULY 1, 2006 (NST-EST2006-01), <http://www.census.gov/popest/data/state/totals/2014> (last visited Oct. 3, 2016).

10. See POPULATION DIV., U.S. CENSUS BUREAU, TBL. 1. ANNUAL ESTIMATES OF THE RESIDENT POPULATION OF THE UNITED STATES, REGIONS, STATES, AND PUERTO RICO: APRIL 1, 2010 TO JULY 1, 2014 (NST-EST 2014-01), <http://factfinder.census.gov/faces/tableservices/jsf/pages/productview.xhtml?src=bkmk> (last visited Oct. 3, 2016).

11. See *id.*

millennials (eighteen- to thirty-four-year-olds)—is down to 7.7%, but that has not led them to form more households than they did before the 2008–2009 recession began.¹²

Analyzing U.S. Census data, the Pew Research Center found that “[i]n 1960, 72% of all adults age 18 and older were married; [in 2010,] just 51% are.”¹³ The Center also found that “just 20% of adults ages 18 to 29 are married, compared with 59% in 1960 . . . , [though it] is not yet known whether today’s young adults are abandoning marriage or merely delaying it.”¹⁴ The Center also found that

[p]ublic opinion about marriage echoes the declining prevalence of marriage. In a 2010 Pew Research Center survey, about four-in-ten Americans (39%) said they agree that marriage as an institution is becoming obsolete.¹⁵ Back in the 70s, only 28% agreed with that premise. . . . However, attitudes toward the institution of marriage do not always match personal wishes about getting married. Asked whether they want to get married, 47% of unmarried adults who agree that marriage is becoming obsolete say that they would like to wed.¹⁶

B. The Rise of Cohabitation

As the marriage rate has declined, the cohabitation rate has risen.¹⁷

12. See Richard Fry, *For First Time in Modern Era, Living With Parents Edges Out Other Living Arrangements For 18- to 34-Year-Olds*, PEW RES. CTR. (2016), <http://www.pewsocialtrends.org/2016/05/24/for-first-time-in-modern-era-living-with-parents-edges-out-other-living-arrangements-for-18-to-34-year-olds/>; RICHARD FRY, *MORE MILLENNIALS LIVING WITH FAMILY DESPITE IMPROVED JOB MARKET*, PEW RES. CTR. (2015), http://www.pewsocialtrends.org/files/2015/07/2015-07-29_young-adult-living_FINAL.pdf.

13. *Barely Half of U.S. Adults Are Married—A Record Low*, PEW RES. CTR. 1 (Dec. 14, 2011), <http://www.pewsocialtrends.org/files/2011/12/Marriage-Decline.pdf> [hereinafter *Less Than Half Are Married*]. See also *The Decline of Marriage and Rise of New Families*, PEW RES. CTR. 1 (Nov. 18, 2010), <http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf> [hereinafter *The Decline of Marriage & Rise of New Families*] (“About half (52%) of all adults in this country were married in 2008; back in 1960, seven-in-ten (72%) were.”).

14. *Less Than Half Are Married*, *supra* note 13, at 2.

15. *Id.* at 10.

16. *Id.* at 10–11.

17. See *The State of Our Unions: Marriage in America 2012*, NAT’L MARRIAGE PROJECT 64 (2012), <http://stateofourunions.org/2012/SOOU2012.pdf> [hereinafter *Marriage in America*] (“The decline in marriage does not mean that people are giving up on living together with a sexual partner. On the contrary, with the incidence of unmarried cohabitation increasing rapidly, marriage is giving ground to unwed unions.”); see TAVIA SIMMONS & MARTIN O’CONNELL, U.S. CENSUS BUREAU, *CENSUS 2000 SPECIAL REPORTS: MARRIED-COUPLE AND UNMARRIED PARTNER HOUSEHOLDS: 2000*, at 1 (2003), <http://www.census.gov/prod/2003pubs/censf-5.pdf>; *The Decline of Marriage & Rise of New Families*, *supra* note 13, at 66–67; *id.* at 76 (“For many, cohabitation is a prelude to marriage, for others simply an alternative to living alone, and for a small but growing number it is considered an alternative to marriage.”); DEMOGRAPHIC INTELLIGENCE, *supra* note 5, at 1 (“Cohabitation has emerged as a competitor to marriage, insofar as it offers intimacy and the opportunity to have children without requiring the same level of commitment.”).

According to the latest U.S. Census Bureau report, “the unmarried partner population numbered 7.7 million in 2010 and grew 41% between 2000 and 2010.”¹⁸

Table 2
Households by Type: 2000 and 2010¹⁹

Household Type	2000		2010		Change in Numbers, 2000 to 2010	
	Number	Percent of All Households ²⁰	Number	Percent of All Households	Number	Percent Change
Husband-and-wife family households: ²¹	54,493,232	51.7	56,510,377	48.4	+2,017,145	3.7
With own children ²²	24,835,505	23.5	23,588,268	20.2	-1,247,237	-5.0
Without own children	29,657,727	28.1	32,922,109	28.2	+3,264,382	11.0
Unmarried-couple households:	5,475,768	5.2	7,744,711	6.6	+2,268,943	41.4
Opposite-sex partner	4,881,377	4.6	6,842,714	5.9	+1,961,337	40.2
Same-sex partner	594,391	0.6	901,997	0.8	+ 307,606	51.8

In 2000, husband-and-wife households represented 51.7% of all households and 75.9% of family households.²³ By 2010, though, the number of husband-and-wife households increased by only 3.7% and dropped to 48.4% of all households and 72.9% of family households.²⁴

Unmarried couple households represented 5.2% of all households in 2000 and increased to 6.6% of all households by 2010.²⁵ In 2000, opposite-sex-partner households represented 4.6% of all households and 89.1% of unmarried-couple households.²⁶ By 2010, opposite-sex-partner

18. See DAPHNE LOFQUIST ET AL., U.S. CENSUS BUREAU, HOUSEHOLDS AND FAMILIES: 2010, at 3 (Apr. 2012) [hereinafter HOUSEHOLDS AND FAMILIES], <http://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf>.

19. *Id.* at 5 tbl. 2.

20. The Census Bureau defines a “household” as consisting of “all of the people who occupy a housing unit.” *Id.* at 4.

21. The Census Bureau defines a “family” as a household that consists of “a householder and one or more other people living in the same household who are related to the householder by birth, marriage, or adoption.” *Id.*

22. The Census Bureau defines “own children” as consisting of “biological, adopted, and stepchildren of the householder who are under 18.” *Id.*

23. *See id.* at 5 tbl.2.

24. *Id.*

25. *Id.*

26. *Id.*

households rose by 40.2% in numbers and to 5.9% of all households but decreased to 88.4% of unmarried-couple households.²⁷ Same-sex-partner households represented 0.6% of all households and 10.9% of unmarried-partner households in 2000.²⁸ By 2010, same-sex-partner households rose by 51.8% in numbers and to 0.8% of all households and 11.6% of unmarried-partner households.²⁹

As illustrated by Figure 1, the population grew by 9.71% between 2000 and 2010. By contrast, the husband-and-wife households only grew by 3.7%, but the unmarried-couple households grew by 41.4%. The husband-and-wife households also declined as a percentage of all households and of family households.³⁰ Unmarried-couple households, opposite-sex-partner households, and same-sex-partner households rose in both numbers and percentages of all households.

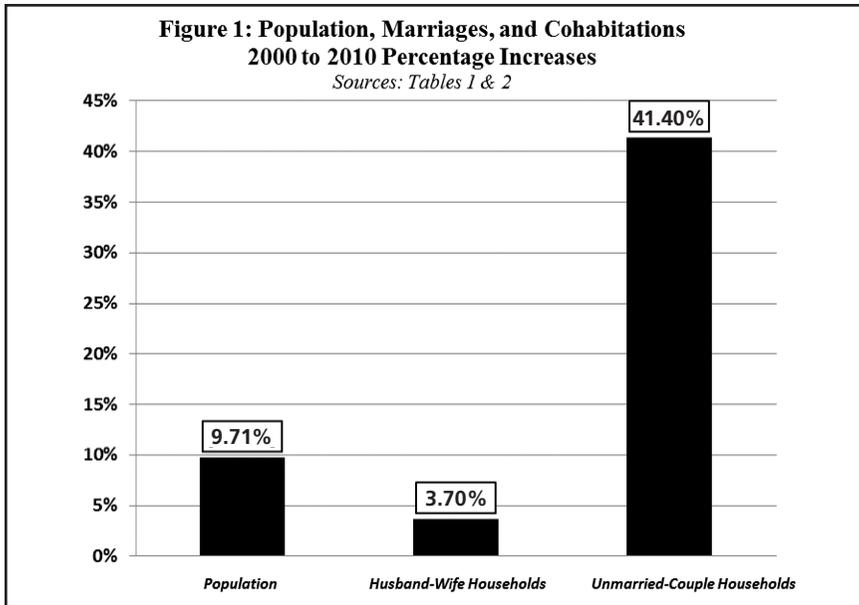


Figure 2 pictures the degree to which opposite-sex-partner households outnumber same-sex-partner households.³¹ Although the ratio dropped from 8.2 to 1 in 2000 to 7.6 to 1 in 2010, the ratio should widen as a certain percentage of same-sex couples shift to marriage.

27. *Id.*

28. *Id.*

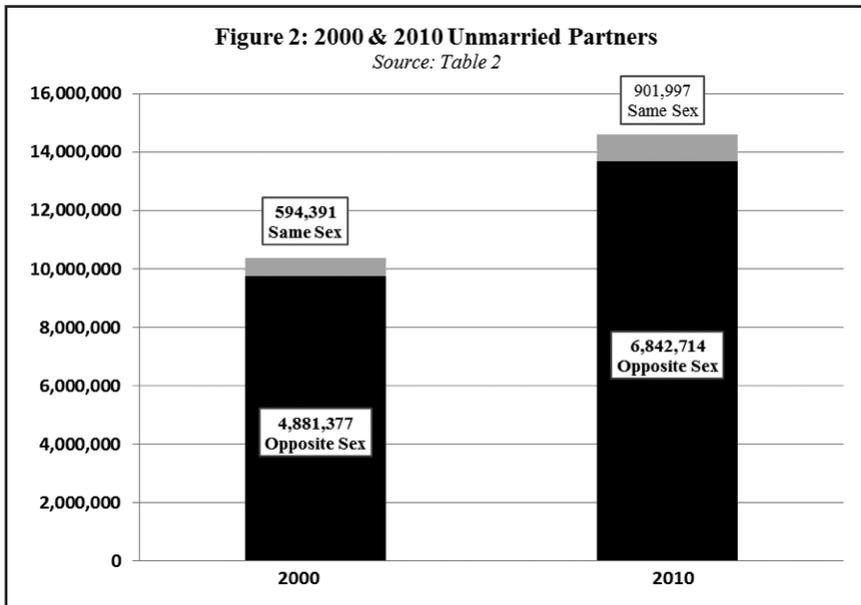
29. *Id.*

30. For the definitions of “household” and “family,” see *supra* notes 20 and 21.

31. For more data, see *Statistics, UNMARRIED EQUALITY*, <http://www.unmarried.org/>

Children are present in many unmarried-couple households. In a report by a group of family scholars, the authors noted:

In the latter half of the twentieth century, divorce posed the biggest threat to marriage in the United States. . . . No more. . . . Today, the rise of cohabiting households with children is the largest unrecognized threat to the quality and stability of children’s family lives. . . . Now, approximately 24 percent of the nation’s children are born to cohabiting couples, which means that more children are currently born to cohabiting couples than to single mothers.³²



statistics (last visited Sept. 27, 2016). Unmarried Equality, formerly known as the Alternatives to Marriage Project, is an advocacy group for rights of the unmarried. According to its mission statement, “Unmarried Equality (UE) advocates for equality and fairness for unmarried people, including people who are single, choose not to marry, cannot marry, or live together before marriage. . . . Unmarried Equality is not opposed to marriage. But we believe that unmarried relationships also deserve validation and support.” *Unmarried Equality Mission Statement*, UNMARRIED EQUALITY, <http://www.unmarried.org/about-us/> (last visited Sept. 27, 2016).

32. W. BRADFORD WILCOX ET AL., *WHY MARRIAGE MATTERS: THIRTY CONCLUSIONS FROM THE SOCIAL SCIENCES* 6 (Broadway Publishing, 3d ed. 2011). On the effect of cohabitation on the children, see CHARLES MURRAY, *COMING APART: THE STATE OF WHITE AMERICA, 1960–2010*, at 169 (Crown Forum 2012) (“If you are interested in the welfare of children, knowing that the child was born to a cohabitating woman instead of a lone unmarried woman should have little effect on your appraisal of the child’s chances in life.”); Wendy D. Manning, *Cohabitation and Child Wellbeing*, 25 *FUTURE CHILD* 51, 59 (2015), <http://www.princeton.edu/futureofchildren/publications/docs/Cohabitation.pdf> (“[S]table cohabiting two biological parent families seem to offer many of the same health, cognitive, and behavioral benefits that stable married biological parent families provide.”).

Of all households counted in the 2010 census, 5.9% were unmarried opposite-sex-couple households and 2.3% were unmarried opposite-sex-couple households with their own children.³³ Unmarried same-sex-couple households made up 0.6% of all households and made up 0.1% of those with their own children.³⁴ Stated another way, 39% of unmarried opposite-sex couple households had their own children present and 17% of unmarried same-sex couple households had their own children present.³⁵

C. The Impact of Same-Sex Marriage on the Marriage Rate

In *Obergefell v. Hodges*,³⁶ the Supreme Court settled the legality of same-sex marriage by holding that same-sex couples have a constitutional right to marry, saying:

[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. The Court now holds that same-sex couples may exercise the fundamental right to marry.³⁷

A Gallup Poll taken shortly before the Supreme Court decided *Obergefell* found that 60% of Americans support legalization of same-sex marriage; that figure is up from 55% in 2014 and is the highest approval that Gallup has found on the question.³⁸ One demographer found “no evidence that

33. HOUSEHOLDS AND FAMILIES, *supra* note 18, at 8.

34. *See id.*

35. *See U.S. Census Bureau, Current Population Survey, Annual Social and Economic Supplements 1996 to 2015*, Fig. UC-1, Unmarried Couples of the Opposite Sex, <http://www.census.gov/hhes/families/files/graphics/UC-1.pdf>. By another count, 19% of same-sex couples are raising biological, step, or adopted children. *See* GARY J. GATES, LGBT PARENTING IN THE UNITED STATES, THE WILLIAMS INST. (2013), <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Parenting.pdf>. For a vast literature on children of same-sex couples, *see also* Sam Castic, *The Irrationality of a Rational Basis: Denying Benefits to the Children of Same-Sex Couples*, 3 MOD. AM. 3, 3 (2007); Courtney G. Joslin, *Searching for Harm: Same-Sex Marriage and the Well-Being of Children*, 46 HARV. CIV. RTS.-CIV. LIBERTIES L. REV. 81, 87–88 (2011); Nancy D. Polikoff, *For the Sake of All Children: Opponents and Supporters of Same-Sex Marriage Both Miss the Mark*, 8 N.Y. CITY L. REV. 573, 573 (2005); Jennifer L. Rosato, *Children of Same-Sex Parents Deserve the Security Blanket of the Parentage Presumption*, 44 FAM. CT. REV. 74, 74 (2006); Lewis A. Silverman, *Suffer the Little Children: Justifying Same-Sex Marriage from the Perspective of a Child of the Union*, 102 W. VA. L. REV. 411, 424 (1999); Catherine Smith, *Equal Protection for Children of Same-Sex Parents*, 90 WASH. U. L. REV. 1589, 1590 (2013).

36. 135 S. Ct. 2584 (2015).

37. *Id.* at 2604–05.

38. *See* Justin McCarthy, *Record-High 60% of Americans Support Same-Sex Marriage*, GALLUP (May 19, 2015), http://www.gallup.com/poll/183272/record-high-americans-support-sexmarriage.aspx?utm_source=Social%20Issues&utm_medium=newsfeed&utm_campaign=title; *see also* Karlyn Bowman, *Public Opinion on Same-Sex Marriage: Anatomy of a Change*, AM. ENTERPRISE INST. (June 1, 2015, 4:43 PM), <http://www.aei.org/publication/>

allowing same-sex couples to marry reduces the opposite-sex marriage rates.”³⁹

Before *Obergefell*, same-sex marriage was legal in thirty-seven states and the District of Columbia.⁴⁰ The movement toward legalization started with the 2003 decision of the Supreme Judicial Court of Massachusetts in *Goodridge v. Department of Public Health*.⁴¹ Of those thirty-seven states where same-sex marriage was legalized, twenty-five did so by state or federal judicial decision,⁴² eleven, as well as the District of Columbia,

public-opinion-on-same-sex-marriage-anatomy-of-a-change. In a March 19, 2016, Apostolic Exhortation, the Catholic Church reiterated its long-standing opposition to same-sex marriage. Quoting the FINAL REPORT OF THE SYNOD OF BISHOPS TO THE HOLY FATHER, POPE FRANCIS ON THE VOCATION AND MISSION OF THE FAMILY IN THE CHURCH AND IN THE CONTEMPORARY WORLD, ¶ 76 (Oct. 24, 2015), the Exhortation said that “‘there are absolutely no grounds for considering homosexual unions to be in any similar or even remotely analogous to God’s plan for marriage and family.’” POST-SYNODAL APOSTOLIC EXHORTATION *AMORIS LAETITIA* OF OHE HOLY FATHER FRANCIS TO BISHOPS, PRIESTS AND DEACONS CONSECRATED PERSONS CHRISTIAN MARRIED COUPLES AND ALL THE LAY FAITHFUL ON LOVE IN THE FAMILY, ¶ 251 at 190 (Mar. 19, 2016), http://w2.vatican.va/content/dam/francesco/pdf/apost_exhortations/documents/papa-francesco_esortazione-ap_20160319_amoris-laetitia_en.pdf. A Pew Research Center survey conducted March 17–26, 2016, found that same-sex marriage is supported by 80% of those who are religiously unaffiliated, 40% of Protestants, and 58% of Catholics. See Hannah Fingerhut, *Support Steady for Same-Sex Marriage and Acceptance of Homosexuality*, PEW RES. CTR. (May 12, 2016), http://www.pewresearch.org/fact-tank/2016/05/12/support-steady-for-same-sex-marriage-and-acceptance-of-homosexuality/?utm_source=Pew+Research+Center&utm_campaign=1173200409-Weekly_May_12_2016&utm_medium=email&utm_term=0_3e953b9b70-1173200409-399818005.

39. Marcus Dillender, *The Death of Marriage? The Effects of New Forms of Legal Recognition on Marriage Rates in the United States*, 51 DEMOGRAPHY 563, 565 (2014).

40. See *Same Sex Marriage Laws*, NAT’L CONF. OF STATE LEG. (June 26, 2015), <http://www.ncsl.org/research/human-services/same-sex-marriage-laws.aspx>. Internationally, twenty countries have legalized same-sex marriage: Ireland (2015), Finland (2015), Luxembourg (2014), Scotland (2014), England and Wales (2013), Brazil (2013), France (2013), New Zealand (2013), Uruguay (2013), Denmark (2012), Argentina (2010), Portugal (2010), Iceland (2010), Sweden (2009), Norway (2009), South Africa (2006), Spain (2005), Canada (2005), Belgium (2003), and The Netherlands (2000). In Mexico, Mexico City (2009) and the states of Quintana Roo (2011) and Coahuila (2014) have legalized same-sex marriage. See also *Gay Marriage Around the World*, PEW RES. CTR. 2–8 (June 26, 2015), http://www.pewforum.org/2015/06/26/gay-marriage-around-the-world-2013/?utm_source=Pew+Research+Center&utm_campaign=1e18492f80-Same_sex_decision_newsletter_June_26-26_2015&utm_medium=email&utm_term=0_3e953b9b70-1e18492f80-399818005.

41. 798 N.E.2d 941 (Mass. 2003). For a detailed history of the struggle for marriage rights for same-sex couples in the United States, see *LOVE UNITES US: WINNING THE FREEDOM TO MARRY IN AMERICA* (Kevin M. Cathcart and Leslie J. Gabel-Brett eds., The New York Press, 2016).

42. Alaska, Alabama, Arizona, California, Colorado, Florida, Idaho, Indiana, Iowa, Kansas, Massachusetts, Montana, New Mexico, New Jersey, New York, Nevada, North Carolina, Oklahoma, Pennsylvania, South Carolina, Utah, Virginia, West Virginia, Wisconsin, and Wyoming. See *Same-Sex Marriage Laws*, *supra* note 40.

did so by legislation,⁴³ and one by state voter-approved ballot proposal.⁴⁴ Based on 2010 Census data, the Census Bureau initially estimated that 25.6% of same-sex partners were married, but later issued a lower revised estimate of 20%.⁴⁵ In terms of numbers, the Census Bureau initially estimated that there were 251,695 same-sex married couples in 2013, but later revised its estimate downward, finding the number to be 170,429.⁴⁶ The discrepancy was attributed to opposite-sex married couples checking the wrong gender box by mistake on the survey questionnaire.⁴⁷ Because these figures were compiled when same-sex marriage was becoming more available but not yet universally available (as it became on June 26, 2015), the figures might not be a reliable predictor of the long-term marriage or nonmarriage habits of same-sex partners.

D. The Benefits, Rights, and Obligations of Marriage

Marriage carries significant psychological,⁴⁸ health,⁴⁹ and financial⁵⁰ benefits. Marriage also creates federal and state rights, obligations,

43. Connecticut, Delaware, Hawaii, Illinois, Maryland, Minnesota, New Hampshire, New York, Rhode Island, Vermont, Washington. *See id.*

44. Maine. *See id.*

45. See U.S. CENSUS BUREAU, CENSUS BUREAU RELEASES ESTIMATES OF SAME-SEX MARRIED COUPLES (Sept. 27, 2011), http://www.census.gov/newsroom/releases/archives/2010_census/cb11-cn181.html.

46. See DAPHNE LOFQUIST, U.S. CENSUS BUREAU, USING NAMES TO IMPROVE MEASUREMENT OF SAME-SEX MARRIED COUPLES IN THE AMERICAN COMMUNITY SURVEY 1, 9, 15 (2015), <http://www.census.gov/content/dam/Census/library/working-papers/2015/demo/2015-Lofquist-01-Abstract.pdf>.

47. *See id.* at 9, 15 tbl.4; *see also* D'Vera Cohn, *How Many Same-Sex Married Couples in the U.S.? Maybe 170,000*, PEW RES. CTR. 1 (June 24, 2015), http://www.pewresearch.org/fact-tank/2015/06/24/how-many-same-sex-married-couples-in-the-u-s-maybe-170000/?utm_source=Pew+Research+Center&utm_campaign=6f9a4ee826-June_25_2015_Newsletter6_24_2015&utm_medium=email&utm_term=0_3e953b9b70-6f9a4ee826-399818005.

48. *See, e.g.*, The Heritage Found., *The Benefits of Marriage*, FAM. FACTS, <http://www.familyfacts.org/briefs/1/the-benefits-of-marriage.org> (last visited Sept. 27, 2016) [hereinafter *The Benefits of Marriage*].

49. *See, e.g.*, Michael S. Rendall et al., *The Protective Effect of Marriage for Survival: A Review and Update*, 48 DEMOGRAPHY 481, 481 (2011) (“[W]e find a consistent survival advantage for married over unmarried men and women, and an additional survival ‘premium’ for married men.”); Glenn T. Stanton, *The Health Benefits of Marriage*, FOCUS ON THE FAMILY (2012), <http://www.focusonthefamily.com/about/focus-findings/marriage/health-benefits-of-marriage/>; *The Benefits of Marriage*, *supra* note 48.

50. *See, e.g.*, Jonathan Vespa & Matthew A. Painter II, *Cohabitation History, Marriage, and Wealth Accumulation*, 48 DEMOGRAPHY 983, 983 (2011) (“Over time, marriage positively correlates with wealth accumulation.”); Lisen Stromberg, *What’s Love Got to Do with It? The Financial Benefits of Marriage*, MONEY UNDER 30 (Apr. 4, 2013), <http://www.moneyunder30.com/financial-benefits-of-marriage>.

and immunities⁵¹—including social security,⁵² taxation,⁵³ spousal-communication and testimonial privileges,⁵⁴ obligation of support,⁵⁵ the right to a property settlement and perhaps the possibility of alimony in divorce,⁵⁶ a large intestate share for a surviving spouse,⁵⁷ and protection against disinheritance via a right to elect a forced share.⁵⁸ In community property states, property acquired during marriage other than by gift or inheritance is community property and is owned fifty-fifty by each married partner. Under *Obergefell*, these benefits are now available in all states and in most and perhaps all U.S. territories⁵⁹ to same-sex couples who

51. In *Obergefell v. Hodges*, the Supreme Court listed the benefits and obligations of marriage as including

taxation; inheritance and property rights; rules of intestate succession; spousal privilege in the law of evidence; hospital access; medical decision making authority; adoption rights; the rights and benefits of survivors; birth and death certificates; professional ethics rules; campaign finance restrictions; workers' compensation benefits; health insurance; and child custody, support, and visitation rules.

135 S. Ct. 2584, 2601 (2015). Regarding adoption rights, the court in *Campaign for Southern Equality v. Mississippi Department of Human Services*, No. 3:15cv578-DPJ-FKB, 2016 WL 1306202 (S.D. Miss. Mar. 31, 2016), granted a motion for a preliminary injunction against enforcement of a Mississippi statute barring adoptions by couples of the same gender.

52. See SOC. SEC. ADMIN., SURVIVOR BENEFITS 5 (2015), <http://www.socialsecurity.gov/pubs/EN-05-10084.pdf>.

53. See I.R.C. § 1(a) (2014); I.R.C. §§ 2056, 2523 (1997). The income tax, however, also has marriage penalties. See CONG. BUDGET OFFICE, FOR BETTER OR WORSE: MARRIAGE AND THE FEDERAL INCOME TAX 1 (1997), <https://www.cbo.gov/sites/default/files/105th-congress-1997-1998/reports/marriage.pdf>. The Tax Policy Center offers a Marriage Tax Calculator. See *Marriage Bonus and Penalty Tax Calculator*, TAX POL'Y CTR., <http://taxpolicycenter.org/taxfacts/marriagepenaltycalculator.cfm> (last visited Sept. 28, 2016). Obtaining a divorce for the sole purpose of filing tax returns as unmarried individuals is forbidden if, at the time of the divorce, the divorced individuals intend to and do remarry in the next tax year. See *Your Federal Income Tax*, I.R.S. PUB. No. 17, at 44 (2015).

54. See, e.g., CAL. EVID. CODE §§ 970–71 (West 2015) (establishing the privilege not to testify against spouse and the privilege not to be called as a witness against spouse).

55. See, e.g., 750 ILL. COMP. STAT. 16/15 (2015).

56. See, e.g., MICH. COMP. LAWS §§ 552.101–.103 (2015). See generally Ira Mark Ellman, *The Theory of Alimony*, 77 CALIF. L. REV. 1 (1989).

57. See, e.g., UNIF. PROBATE CODE § 2-102 (UNIF. LAW COMM'N 2010).

58. See, e.g., *id.* §§ 2-201 to 2-214.

59. See Omar Gonzalez-Pagan, *No Same-Sex Couple Left Behind: SCOTUS Ruling for the Freedom to Marry Would Apply with Equal Force to U.S. Territories*, LAMBDA LEGAL (Apr. 24, 2015), http://www.lambdalegal.org/blog/20150424_scotus-ruling-would-apply-to-us-territories. The five U.S. territories are Puerto Rico, the U.S. Virgin Islands, Guam, the Northern Mariana Islands, and American Samoa. Individuals born in American Samoa, unlike individuals born in the other four territories, are not U.S. citizens; they are U.S. nationals. See *id.* The equal protection and due process clause of the Fourteenth Amendment of the U.S. Constitution applies to “citizens of the United States.” U.S. CONST. amend. XIV, § 1. As such, it applies to Puerto Rico. See *Examining Bd. of Eng'rs, Architects & Surveyors v. Flores de Otero*, 426 U.S. 572, 600 (1976); *In re Condo Vidal*, 818 F.3d 765 (1st Cir. 2016) (per curiam).

decide to get married,⁶⁰ not just in the thirty-seven states in which same-sex marriage had previously been legalized.

Pre-*Obergefell*, several states in which same-sex marriage was prohibited provided mechanisms by which same-sex couples could gain most or all state but not federal marital benefits by registering as domestic partners or as reciprocal beneficiaries or by entering into civil unions.⁶¹ The Census Bureau estimated that, as of 2010, 169,205 same-sex couples had done so.⁶² Shortly after Connecticut, Delaware, New Hampshire, Rhode Island, and Washington legalized same-sex marriage, those states enacted legislation that automatically converts then-existing civil unions and domestic partnerships into marriages,⁶³ instantly entitling the parties to all federal and state marital benefits.⁶⁴

The overall marriage rate is certain to rise, because marriage has now become available to all same-sex couples and marriages in one state must now be recognized in all states and also because of the conversion of civil unions and domestic partnerships into marriages.⁶⁵ But how substantial the long-term boost will be is hard to predict.⁶⁶ The latest data on the overall marriage rate and the number of unmarried same-sex partners are for 2010.⁶⁷ Since same-sex marriage began to become available in

60. Regarding federal benefits, see Rev. Rul. 2013-17, 2013-38 I.R.B. 201; U.S. Dep't of Justice, *Attorney General Lynch Announces Federal Marriage Benefits Available to Same-Sex Couples Nationwide*, JUSTICE NEWS (July 9, 2015), <http://www.justice.gov/opa/pr/attorney-general-lynch-announces-federal-marriage-benefits-available-same-sex-couples>; *Supreme Court Decision Regarding Same-Sex Marriage*, SOC. SEC. ADMIN. (July 9, 2015), <http://blog.socialsecurity.gov/2015/07/09/supreme-court-decision-regarding-same-sex-marriage/>. Regarding state and federal benefits, see Tara Siegel Bernard, *What the Same-Sex Marriage Decision Means for Couples' Rights and Benefits*, N.Y. TIMES (June 14, 2015, updated June 26, 2015), http://www.nytimes.com/2015/06/15/your-money/the-same-sex-marriage-decision-whats-at-stake-for-couples.html?_r=0.

61. For a list of states, see *Civil Unions & Domestic Partnership Statutes*, NAT'L CONF. OF STATE LEG. (Nov. 18, 2014), <http://www.ncsl.org/research/human-services/civil-unions-and-domestic-partnership-statutes.aspx>. Some of the domestic-partner statutes allowed some or all opposite-sex couples to register as well. For federal tax purposes, civil unions, domestic partnerships, and other similar formal relationships are not marriages because state law does not "denominate [these relationships] as . . . marriage[s]." See Rev. Rul. 2013-17, 2013-38 I.R.B. 201, 204.

62. DAPHNE LOFQUIST, U.S. CENSUS BUREAU, SAME-SEX COUPLE HOUSEHOLDS: AMERICAN COMMUNITY SURVEY BRIEFS, at 3 (Sept. 2011), <http://www.census.gov/prod/2011pubs/acsbr10-03.pdf>.

63. See *Civil Unions & Domestic Partnership Statutes*, *supra* note 61, at 2-3.

64. See *supra* notes 48-58.

65. See *Civil Unions & Domestic Partnership Statutes*, *supra* note 61, at 2.

66. See Martha M. Ertman, *Marital Contracting in a Post-Windsor World*, 42 FLA. ST. U. L. REV. 479, 482 (2015) ("Heterosexual practices are likely to be the most accurate predictor of changes in marriage and the legal rules governing it.").

67. See *supra* tbls. 1 & 2. See also Hunter Schwarz, *Married Same-Sex Couples Make Up Less Than One Half of One Percent of All Married Couples in the U.S.*, WASH. POST

Massachusetts in 2003 and had become increasingly available even before *Obergefell*,⁶⁸ the number of marriages represented in Table 1 from 2003 forward included some same-sex marriages, but the exact numbers for each year are not known. If *all* of the unmarried same-sex partners could have and had gotten married in 2010—an unlikely event—the marriage rate would have risen sharply, from 0.67% to 0.97%.⁶⁹ It is predictable that *Obergefell* will unleash a degree of pent-up demand and that a percentage of unmarried partners will get married in the wake of the Supreme Court’s decision.⁷⁰ If so, the rise in the marriage rate would likely be a one- or maybe two-year phenomenon and then level off. Once the pent-up demand has been satisfied, the marriage habits of same-sex couples might, over time, turn out to be similar to the marriage habits of opposite-sex couples: If so, some will get married, some will break up, and some will continue to cohabit without getting married.⁷¹

E. Longer-Term Cohabitations

Longer-term cohabiting couples are far from homogeneous.⁷² No one-size-fits-all generalization explains why a certain percentage of cohabiting

(Sept. 22, 2014), <http://www.washingtonpost.com/blogs/govbeat/wp/2014/09/22/married-same-sex-couples-make-up-less-than-one-half-of-one-percent-of-all-married-couples-in-the-u-s/> (discussing the census difficulties in reaching an accurate number of married same-sex couples due to incomplete questionnaires).

68. See *Same Sex Marriage Laws*, *supra* note 40, at 3.

69. As shown in Table 2, there were 901,997 unmarried same-sex-partner households in 2010. If all the partners had gotten married, there would have been 2,997,997 marriages in a population of 308,745,538, instead of the actual number of marriages of 2,096,000. See *supra* tbls. 1 & 2.

70. See, e.g., Frank Bruni, *Gay Marriage’s Moment*, N.Y. TIMES: SUNDAY REV. (June 21, 2015), <http://www.nytimes.com/2015/06/21/opinion/sunday/frank-bruni-gay-marriages-moment.html>.

71. See, e.g., Curtis Sittenfeld, *Welcome, Everyone, to the Right to Marry*, N.Y. TIMES: SUNDAY REV. (June 26, 2015), <http://www.nytimes.com/2015/06/28/opinion/sunday/welcome-everyone-to-the-right-to-marry.html> (“Now that same-sex marriage is legal nationwide, plenty of gay people won’t get married just because they can, just as plenty of straight people don’t.”).

72. For demographic information on cohabiting couples, see CASEY E. COPEN ET AL., NAT’L HEALTH STATS. REPS., NO. 64, FIRST PREMARITAL COHABITATION IN THE UNITED STATES: 2006–2010 NATIONAL SURVEY OF FAMILY GROWTH (Apr. 4, 2013), <http://www.cdc.gov/nchs/data/nhsr/nhsr064.pdf>; Marcus Dillender, *The Death of Marriage? The Effects of New Forms of Legal Recognition on Marriage Rates in the United States*, 51 DEMOGRAPHY 563, 569–70 (2014); Catherine T. Kenney & Sara S. McLanahan, *Why Are Cohabiting Relationships More Violent Than Marriages?*, 43 DEMOGRAPHY 127, 128–29 (2006); Martin O’Connell & Sarah Feliz, *Same-Sex Couple Household Statistics from the 2010 Census* 6, 12 (Soc., Econ., & Housing Div., U.S. Bureau of the Census, Working Paper No. 2011-26, Sept. 27, 2011); Jonathon Vespa, *Union Formation in Later Life: Economic Determinants of Cohabitation and Remarriage Among Older Adults*, 49 DEMOGRAPHY 1103, 1113, 1120 (2012); Richard Fry & D’Vera Cohn, *Living Together: The Economics of Cohabitation*, PEW RES. CTR. (June 27, 2011), <http://www.pewsocialtrends.org/files/2011/06/pew-social-trends-cohabitation-06-2011.pdf>.

couples continue to cohabit without getting married.⁷³ In some cases, the couple has reached a joint decision not to marry, but in other cases, one person wants to get married but the other resists.⁷⁴ In still others, economic circumstances may dictate or influence the outcome.⁷⁵ Many other factors can play a role as well.⁷⁶ An unfortunate feature of some cohabiting couples is that they are at or below the poverty level:⁷⁷ “As compared with their married counterparts, unmarried parents are younger, lower income, less educated, disproportionately nonwhite, and more likely to have children from multiple partners.”⁷⁸ Many of them “have not selected their situation, they have settled for it.”⁷⁹ Regardless of the reason for the continuation of the cohabitation, the couple—as unmarried partners—lack marital status and hence the automatic rights granted to spouses and surviving spouses. As far as the law is concerned, the partners are complete strangers to each other.

The rapid rise in cohabitation rates is well documented. Table 2 shows the rise from 5.48 million in 2000 to 7.74 million in 2010. Earlier estimates by the Census Bureau put the number at about 1 million in 1977, 1.7 million in 1980, and 3 million in 1990.⁸⁰ In a survey conducted in 2010, the Pew Research Center found that public attitudes differ widely by age groups: “Most adults ages 65 and older are critical of these unmarried couples, whether they are same-sex or opposite-sex couples. Most young adults, ages 18 to 29, are not.”⁸¹ Although at the current time, only 9.1% of American women ages 15 to 44 are cohabiting,⁸² the percentage is higher for younger age groups. In the 20-to-24-age category, 15.7% are

73. See Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1386–91 (2001); Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 185–96 (2015); Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COLUM. L. REV. 293, 359–64 (2015).

74. See Estin, *supra* note 73, at 1387, 1394.

75. See *id.* at 1387–88.

76. See *id.* at 1386.

77. See *id.* at 1388; *Marriage in America*, *supra* note 17, at 76 (“Cohabitation is more common among those of lower educational and income levels.”).

78. Huntington, *supra* note 73, at 186–87.

79. Ira Mark Ellman, *Marital Roles and Declining Marriage Rates*, 41 FAM. L.Q. 455, 485 (2007).

80. Lynne M. Casper & Phillip N. Cohen, *How Does POSSLQ Measure Up? Historical Estimates of Cohabitation*, 37 DEMOGRAPHY 237, 239 tbl. 1 (2000).

81. *The Decline of Marriage & Rise of New Families*, *supra* note 13, at 64.

82. PAULA Y. GOODWIN, WILLIAM D. MOSHER & ANJANI CHANDRA, DEP’T OF HEALTH & HUM. SERVS., MARRIAGE AND COHABITATION IN THE UNITED STATES: A STATISTICAL PORTRAIT BASED ON CYCLE 6 (2002) OF THE NATIONAL SURVEY OF FAMILY GROWTH 17, tbl.1 (2010), http://www.cdc.gov/nchs/data/series/sr_23/sr23_028.pdf.

cohabiting, and in the 25-to-29-age category, the percentage is 12.9.⁸³ As might be expected, the rates are lower for middle-aged and older people: ages 30 to 34, 7.9%, ages 35 to 39, 6.7%, and ages 40 to 44, 6.6%.⁸⁴

The most important statistic for spousal-rights law is that for most people, cohabitation is a temporary or short-term state. The parties either break up or get married fairly quickly. After about one-and-a-half years, half the cohabiting couples have either married or broken up.⁸⁵ Only about 10% remain cohabiting after five years.⁸⁶ This does not mean, however, that at any point in time there are only a few longer-term cohabitations. The longer-term cohabitations tend to accumulate in the population. More are added every year.

III. A Uniform De Facto Marriage Act?

Part II drew attention to the cultural shift in the formation of families that has been and is taking place in this country. In fact, the same cultural shift is taking place throughout the developed world.⁸⁷ To be sure, now that same-sex marriage is legal in all American jurisdictions, many same-sex couples who were previously cohabiting will enter into a formal marriage. But some will continue to cohabit without marrying, just as many opposite-sex couples continue to cohabit without marrying. The time may now be ripe to start thinking about the rights, if any, of unmarried cohabiters. I addressed this matter long ago, in my Joseph Trachtman Lecture at the 1992

83. *Id.*

84. *Id.*

85. *Id.* at 3, 5, 11.

86. COPEN ET AL., *supra* note 72, at 5–6; GOODWIN, *supra* note 82, at 35; see MATTHEW D. BRAMLETT & WILLIAM D. MOSHER, DEP'T OF HEALTH & HUM. SERVS., COHABITATION, MARRIAGE, DIVORCE, AND REMARRIAGE IN THE UNITED STATES 67, tbl.29 (2002), http://www.cdc.gov/nchs/data/series/sr_23/sr23_022.pdf.

87. See EUROPEAN FAMILY LAW IN ACTION: VOLUME V—INFORMAL RELATIONSHIPS, 331–350 (Katharina Boele-Woelki, Charlotte Mol & Emma van Gelder eds., 2015) (reporting on the rise of cohabitation in 28 European countries); Charlotte Mol, *Reasons for Regulating Informal Relationships: A Comparison of nine European jurisdictions*, 12 UTRECHT L. REV. 98, 98 (2016) (“The statistics of twenty-eight European countries show an increase in the number of cohabitants. In some countries the number has even doubled in 20 years.”); Patrick Parkinson, *Forty Years of Family Law: A Retrospective*, 46 VICTORIA U. WELLINGTON L. REV. 611, 613–14 (2015) (“Marriage remains the most common form of couple relationship within western Europe, but the gap between marriage and cohabitation as a family form is narrowing. . . . [I]ncreasingly, cohabitation is a context for childrearing.”); Jona Schellekens & David Glikberg, *The Decline in Marriage in Israel, 1960–2007: Period or Cohort Effect?*, EUR. J. POPULATION (forthcoming 2016) (Hebrew Univ. of Jerusalem Legal Studies Research Paper No. 16-32), <http://ssrn.com/abstract=2806885>; Anna Stepień-Sporek & Margaret Ryznar, *Cohabitation: Social Changes and the Protection of the Vulnerable Party*, at 1 (Ind. Univ. Robert H. McKinney School of Law Research Paper No. 2015-48), <http://ssrn.com/abstract=2693467> (“The increasing number of unmarried couples living together is a worldwide trend, made possible by changes in social attitudes toward cohabitation.”).

annual meeting of the American College of Trust and Estate Counsel.⁸⁸ Other scholars have more recently raised the matter.⁸⁹

The longer-term cohabitations have already found their way into the legal system. Lawsuits have been brought upon disinheritance at death or, more commonly, upon the deliberate decision of one of the parties to terminate the relationship. These suits are sometimes grounded on a contract claim, but that claim is not always successful: Contracts are unenforceable in some jurisdictions and, even if they are, the plaintiff cannot always prove the existence of a contract.⁹⁰ Sometimes the suits are based on a common-law marriage claim, but that claim is unavailable in states that do not recognize common-law marriages.⁹¹ There is also a smattering of case law holding that committed cohabitation relationships have the same force and effect as a legal marriage. In *Goode v. Goode*,⁹² for example, a West Virginia court held that “a court may order a division of property acquired by a man and a woman who are unmarried cohabitants. . . . Factors to be considered . . . may include: the purpose, duration, and stability of the relationship and the expectation of the parties.”⁹³ And in *Warden v. Warden*,⁹⁴ a Washington court held that the parties “lived together and established a relationship which is tantamount to a marital family except for a legal marriage.”⁹⁵ But in *In re Estate of Alexander*,⁹⁶ a Mississippi court held that, if a remedy is to be given, “the Legislature

88. See Lawrence W. Waggoner, *Marital Property Rights in Transition*, 18 THE PROB. LAW. 1, 47–66 (1992) [hereinafter *Marital Property Rights*].

89. See Huntington, *supra* note 73, at 223; Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185 (2016); Scott & Scott, *supra* note 73, at 313–14, 363 (arguing that “[t]he fact that the law confers deference and societal resources on marriage does not mean that the privileged status of this traditional family form should be *exclusive*” and noting that “legal benefits are sometimes extended to adult *de facto* relationships on the basis of their similarity to marriage” and that “[s]ome cohabiting couples are clearly in family relationships, and regulators may be able to employ a few straightforward proxies to minimize verifiability problems”); Deborah A. Widiss, *Non-Marital Families and (or After?) Marriage Equality*, 42 FLA. ST. U. L. REV. 547, 557, 559, 562, 564 (2015).

90. The most celebrated of these contract-based cases, sometimes called “palimony” suits, is *Marvin v. Marvin*, 557 P.2d. 106 (Cal. 1976), in which the court held that the plaintiff’s complaint stated a cause of action. But on remand, the plaintiff could not prove the alleged contract. See *Marvin v. Marvin*, 176 Cal. Rptr. 555 (Cal. Ct. App. 1981). *Marvin*, other contract-based cases, and statutes requiring a written contract are discussed in Lawrence W. Waggoner, *With Marriage on the Decline and Cohabitation on the Rise, What About Marital Rights for Unmarried Partners?*, 41 ACTEC L.J. 49, 65–73 (2015).

91. The common-law marriage jurisdictions are Alabama, Colorado, District of Columbia, Iowa, Kansas, Montana, Rhode Island, South Carolina, Texas, Utah, and perhaps Oklahoma. See Waggoner, *supra* note 90, at 73–76.

92. 396 S.E.2d 430 (W. Va. 1990).

93. *Id.* at 438.

94. 676 P.2d 1037 (Wash. Ct. App. 1984).

95. *Id.* at 1039.

96. 445 So. 2d 836 (Miss. 1984).

should provide the remedy.”⁹⁷

The questions the case law leaves us with are these: Can—and should—we replace case-by-case, hit-or-miss adjudication with legislation—a de facto marriage act—that adopts criteria for determining which cohabiting couples have marital rights and which do not? Other English-speaking jurisdictions have already enacted or introduced legislation granting marital rights to cohabiting couples *if* their relationship meets specific criteria. Except for the United States, legislation recognizing marital rights has been enacted or introduced throughout the Anglosphere: enacted in Australia,⁹⁸ Canada,⁹⁹ Ireland,¹⁰⁰ New Zealand,¹⁰¹ and Scotland¹⁰² and

97. *Id.* at 840. For another case to the same effect, see *Carnes v. Sheldon*, 311 N.W.2d 747, 753 (Mich. Ct. App. 1981) (“[J]udicial restraint requires that the Legislature, rather than the judiciary, is the appropriate forum for addressing the question raised by plaintiff.”). For other cases rejecting recovery in the absence of an enforceable contract, see *Boland v. Catalano*, 521 A.2d 142, 146 (Conn. 1987) (“The rights and obligations that attend a valid marriage simply do not arise where the parties choose to cohabit outside the marital relationship.”); *Morone v. Morone*, 413 N.E.2d 1154, 1157 (N.Y. 1980) (“[C]ohabitation without marriage does not give rise to the property and financial rights which normally attend the marital relation”); *Aehegna v. Aehegna*, 797 P.2d 74, 79 (Haw. Ct. App. 1990) (“A person who is not legally married does not qualify for the positive legal consequences of marriage.”).

98. Family Law Act 1975 (Cth) s 4AA (Austl.); Property (Relationships) Act 1984 (NSW) s 4 (Austl.); De Facto Relationships Act 1991 (N. Terr.) pt 1 s 3A, pt 2 div 2 s 10, pt 2 div 5 ss 24, 28, pt 4 s 52 (Austl.); Commonwealth Powers (De Facto Relationships) Act 2003 (Qld) (Austl.); Succession Act 1981 (Qld) pt 1 s 5AA (Austl.); Acts Interpretation Act 1954 (Qld) pt 8 s 32DA (Austl.).

99. Family Law Act, R.S.A. 2003, c F-4.5, §§ 56–63 (Can.); Adult Interdependent Relationships Act, R.S.A. 2002, c A-4.5, § 3(1) (Can.); Family Law Act, S.B.C. 2011, c 25, § 3(1) (Can.); Family Relations Act, R.S.B.C. 1996, c 128, § 1(1) (Can.); Nunavut Act, R.S.C. 1993, c 28, § 29 (Can.) (providing that the law of the Northwest Territories applies in Nunavut); Family Maintenance Act, R.S.M. 2015, c F-20, § 1 (Can.); Common Law Partners’ Property & Related Amendments Act, R.S.M. 2002, c 48 (Can.); Family Services Act, R.S.N.B. 1980, c F-2.2, § 1 (Can.); Family Law Act, R.S.N.W.T. 1990, c 18, § 1(1) (Can.); Maintenance & Custody Act, R.S.N.S. 1989, c 160, § 2(aa) (Can.); Family Law Act, R.S.O. 1990, c F.3, § 29 (Can.); Family Law Act, R.S.P.E.I. 1988, c F-2.1, § 29(1)(b) (Can.); Family Property Act, R.S.S. 1997, c F-6.3, § 2 (Can.); Family Maintenance Act, R.S.S. 1990–91, c F-6.2, § 2 (Can.).

Unlike nearly all of the other provinces and territories, the Province of Quebec does not recognize marital rights for unmarried partners. In *Attorney General of Quebec v. A.*, [2013] 1 S.C.R. 61 (Can.), a sharply divided Supreme Court of Canada upheld the constitutionality of the province’s denial of such rights under the equality provision of the Canadian Constitution (Canadian Charter of Rights & Freedoms, § 15(1), Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 (U.K.)). I thank Professor Emeritus Ejan Mackaay of the University of Montreal for bringing this case to my attention.

100. Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 § 172 (Ir.).

101. Property (Relationships) Act 1976, ss 2A–2E (N.Z.). For a report on the New Zealand Act in operation, see Bill Atkin, *The Legal World of Unmarried Couples: Reflections on “De Facto” Relationships in Recent New Zealand Legislation* (6 Victoria Univ. of Wellington Legal Res. Paper No. 11/ 2016), <http://ssrn.com/abstract=2535129>, updating 39 VICTORIA U. WELLINGTON L. REV. 793, 793 (2008) (“While there will inevitably be borderline situations, most are likely to fall easily within or outside the definition.”).

102. Family Law (Scot.) Act 2006, §§ 25–31. The Justice Committee of the Scottish

introduced in the United Kingdom for England and Wales.¹⁰³ To one degree or another, legislation has also been enacted in other developed countries, especially on the European continent,¹⁰⁴ but this article focuses on the Anglosphere marital-rights legislation, because the Anglosphere statutes, being in English, are more accessible to readers of this *Journal*.

In this country, the American Law Institute (ALI) has recognized that longer-term cohabitants have rights similar to married couples upon dissolution of the relationship.¹⁰⁵ Because the ALI put forward its project as what it calls “Principles of the Law,” which the ALI says are “primarily addressed to legislatures,”¹⁰⁶ I refer to that project as the “ALI Unmarried Partner Statute.” The ALI, however, is known for its “Restatements of the Law,” which are directed to courts, not legislatures.¹⁰⁷ Although the ALI Unmarried Partner Statute has not been transformed into a bill and introduced in any state legislature, the explanation for this may lie elsewhere than on the merits of the proposal. The ALI is not organized to take any post-publication action to promote enactment of its Principles Statutes. Moreover, the sections dealing with unmarried partners are a small part of a much larger project dealing principally with dissolution of formal marriages—allocation of custodial and decision-making responsibility for children, child support, division of property upon dissolution, compensatory spousal payments, and premarital, marital, and

Parliament recommends a review and updating of the Act. *See* Justice Comm., Post-Legislative Scrutiny of the Family Law (Scotland) Act 2006, SP Paper 963, 6th Report, 2016 (Sess. 4) (17th March 2016), ¶¶ 7–39, http://www.scottish.parliament.uk/S4_JusticeCommittee/Reports/JS042016R06.pdf.

103. Cohabitation Rights Bill, 2016–17, HL Bill [47], cl. 1, 2, 27 (U.K.) (applicable to England and Wales), <http://www.publications.parliament.uk/pa/bills/lbill/2016-2017/0047/17047.pdf> (pro forma first reading June 13, 2016; debate on merits not yet scheduled). 2015–16, HL Bill [29] cls. 1, 2 (U.K.), <http://services.parliament.uk/bills/2015-16/cohabitationrights.html> (1st reading June 4, 2015).

104. *See, e.g.*, Charlotte Mol, *Reasons for Regulating Informal Relationships: A Comparison of nine European jurisdictions*, *supra* note 87 (reporting on legislation in Sweden, Hungary, Slovenia, Croatia, Catalonia, Portugal, Scotland, Ireland, and Finland); Mathew Fawcett, *Taking the Middle Path: Recent Swedish Legislation Grants Minimal Property Rights to Unmarried Cohabitants*, 24 *FAM. L.Q.* 179, 183–84 (1990) (reporting on Swedish legislation); Anna Stepien-Sporek & Margaret Ryznar, *The Consequences of Cohabitation*, 50 *U.S.F. L. REV.* 75, 87–98 (2016) (canvassing legal treatment of cohabiting couples in European countries); Anna Stepien-Sporek & Margaret Ryznar, *The Legal Treatment of Cohabitation in Poland and the United States*, 79 *UMKC L. REV.* 373, 379–86 (2010).

105. AM. LAW INST., *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* §§ 6.01–6.06, app. II, § 5.09 (2001) [hereinafter *ALI UNMARRIED PARTNER STATUTE*].

106. *See How Do Principles of the Law Differ from Restatements of the Law?*, AM. LAW INST., <https://www.ali.org/publications/frequently-asked-questions/#differ> (last visited Oct. 2, 2016).

107. Full disclosure: I have been a Restatement Reporter: *RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS* (AM. LAW INST. 1999, 2003, 2011).

separation agreements.

The Uniform Law Commission (ULC) is the law-reform organization whose sole purpose is drafting and promoting its legislation. That makes the ULC the logical organization for studying the problem of marital rights for cohabiting couples.¹⁰⁸ The question for study is whether a de facto marriage act could and should be enacted here.¹⁰⁹ In studying the problem, the ULC will find helpful the Anglosphere marital-rights legislation, the ALI Unmarried Partner Statute, and other sources.¹¹⁰

A de facto marriage act would codify the principle that unmarried partners can gain marital rights and would codify the criteria for qualifying for such rights. In the case of married partners, the marriage license, the wedding ceremony, and the marriage certificate signify intent to acquire the rights of marriage. More accurately, the marriage laws attribute that intent to married partners, because it is unlikely that many married partners actually formed that intent with full knowledge of what those rights are. Cohabiting couples have none of these official indicia of intent. On what basis, then, should the law ever declare that cohabiting couples have become married in fact, i.e., have a de facto marriage? For them, a de facto marriage act would treat committed behavior occurring over

108. Full disclosure: I have drafted legislation for the ULC and have been Chief Reporter and Director of Research for the Joint Editorial Board for Uniform Trust and Estate Acts. I served as Reporter for the Uniform Probate Code Article II Revisions (promulgated 1990, 1993, 2008, and 2009), the Revised Uniform Testamentary Additions to Trusts Act (promulgated 1991), the Revised Uniform Simultaneous Death Act (promulgated 1991), and the Uniform Statutory Rule Against Perpetuities (promulgated 1986).

109. After reviewing an earlier draft of this article that was posted on SSRN, the Joint Editorial Board for Uniform Trust and Estate Acts (JEB-UTEA) and the Joint Editorial Board for Family Law (JEB-UFL) voted to urge the ULC to appoint a study committee to determine whether to draft a Uniform De Facto Marriage Act. For the scope of a ULC study committee, see <http://www.uniformlaws.org/Narrative.aspx?title=Types%20of%20Committees>. (“ULC Study Committees review an assigned area of law in light of defined criteria and recommend whether ULC should proceed with a draft on that subject.”) Earlier, however, and before the earlier draft of this article was posted, the ULC Executive Committee, by a 4-to-3 vote, rejected a request from the Committee on Scope and Program to appoint a Study Committee on this subject. See Minutes of Executive Committee at 10 (Jan. 23, 2016), http://www.uniformlaws.org/shared/docs/executive/2016jan23_EC_Minutes_MY%20Mtg.pdf. Hopefully, the joint effort of the JEB-UTEA and the JEB-UFL will persuade the Executive Committee to reverse its earlier decision and approve the appointment of a Study Committee.

110. In addition to the Anglosphere marital-rights legislation and the ALI Unmarried Partner Statute, there are numerous Law Revision Commission Reports that support the idea of de facto marriage. See, e.g., LAW COMM’N, *INTESTACY & FAMILY PROVISIONS CLAIMS ON DEATH*, No. 331, at 24 ¶ 1.99, 152–85 ¶¶ 8.1–.166, 232–33 ¶¶ B.1–B.8 (2011) (U.K.), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/247168/1674.pdf; LAW COMM’N, *COHABITATION: THE FINANCIAL CONSEQUENCE OF RELATIONSHIP BREAKDOWN*, No. 179 (2006) (U.K.), http://www.lawcom.gov.uk/wp-content/uploads/2015/03/cp179_Cohabitation_Consultation.pdf; QUEENSLAND LAW REFORM COMM’N, *INTESTACY RULES*, No. 42, at 17 § 2.2.1 (1993) (Austl.), http://www.qclr.qld.gov.au/__data/assets/pdf_file/0020/372521/r42.pdf.

time as signifying (again, by attribution) intent to acquire the rights of formal marriage. If a relationship that has been edging toward de facto marriage continues to progress along that continuum, the relationship will likely, at some point, cross the line between cohabitation and marriage in fact. That would be the tipping point—the time when a court of competent jurisdiction could justifiably declare the couple’s relationship as having reached marital status.

How should a de facto marriage act be crafted? On this, the Anglosphere marital-rights legislation and the case law supporting marital rights have reached a general consensus. The act would codify an overriding standard for determining whether a de facto marriage has occurred and then list factors for a court to take into account in determining whether that standard has been satisfied.

The starting point is that the couple must not be married to anyone else¹¹¹ and must not be prohibited from marrying one another. Although some of the Anglosphere statutory standards are more detailed than others, and different statutes formulate the standard differently, they are all aiming at the same general requirement: The partners’ behavior must demonstrate enough of a commitment toward one another to justify declaring that they have become married in fact.

Some of the Anglosphere marital-rights statutes use the term “marriage-like,”¹¹² but that term is not apt for de facto marriages. An apt term would be “ideal-marriage-like.” Formal marriages need not, and many would not, meet the standard for de facto marriages. In addition, some same-sex cohabitants’ rights advocates object to the “marriage-like” term.¹¹³ Most of the Anglosphere marital-rights statutes avoid the term. Some use language such as “living together as a couple on a genuine domestic basis” or just “living together as a couple.”¹¹⁴ Others use language such

111. The ALI Unmarried Partner Statute departs from this requirement. See ALI UNMARRIED PARTNER STATUTE, *supra* note 105, § 6.01(5) cmt. c.

112. See Commonwealth Powers (De Facto Relationships) Act 2003 (Qld) s 3 (Austl.); Family Law Act, R.S.B.C. 2011, c 25, § 3(1)(b) (Can.); Family Relations Act, R.S.B.C. 1996, c 128, § 1(1) (Can.). See also Family Property Act, R.S.S. 1997, c F-6.3, § 2 (Can.) (“cohabited . . . as spouses”); Family Maintenance Act, R.S.S. 1990–91, c F-6.2, § 2 (Can.) (“cohabited . . . as spouses”); Family Law (Scot.) Act 2006, § 25 (“a man and a woman who are (or were) living together as if they were husband and wife” or “two persons of the same sex who are (or were) living together as if they were civil partners”).

113. See, e.g., Mary Louise Fellows et al., *Committed Partners and Inheritance: An Empirical Study*, 16 L. & INEQ. 1, 27 (1998); Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87, 114–25, 154–60 (2014); E. Gary Spitko, *An Accrual/Multi-Factor Approach to Intestate Inheritance Rights for Unmarried Committed Partners*, 81 OR. L. REV. 255, 327–28 (2002).

114. See Family Law Act 1975 (Cth) s 4AA(1) (Austl.); Property (Relationships) Act 1984 (NSW) s 4(1) (Austl.); Acts Interpretation Act 1954 (Qld) pt 8 s 32DA(1) (Austl.); Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 s 172(1) (Ir.); Property

as “a relationship of some permanence, if they are the natural or adoptive parents of a child.”¹¹⁵ Still others refer to living together in a “conjugal relationship.”¹¹⁶ Some of the statutes require the couple to have lived together for a certain period of time, such as two or more years¹¹⁷ or for a lesser period if they have children together.¹¹⁸ The ALI standard is that the couple must “for a significant period of time share a primary residence and a life together as a couple.”¹¹⁹

In determining whether the standard has been satisfied, the Australian, Irish, New Zealand, and Scottish statutes and the ALI Unmarried Partner Statute then provide a list of factors to be taken into account. The Australian, Irish, and New Zealand statutory lists are not restrictive, meaning that factors not on the list can be taken into account, and are not conjunctive, meaning that not all of the factors have to be present. The Scottish statutory list, however, is restrictive and conjunctive.¹²⁰ Although the Irish, Scottish, and most of the Australian and New Zealand statutes

(Relationships) Act 1976 s 2D(1)(b) (N.Z.); Cohabitation Rights Bill 2016-17, HL Bill [47], cls. 1, 2(1)(a) (U.K.), <http://www.publications.parliament.uk/pa/bills/lbill/2016-2017/0047/17047.pdf> (pro forma first reading June 13, 2016; debate on merits not yet scheduled).

115. Adult Interdependent Relationships Act, R.S.A. 2002, c A-4.5, § 3(1) (Can.); Family Law Act, R.S.N.W.T. 1990, c 18, § 1(1) (Can.); Family Law Act, R.S.O. 1990, c F.3, § 29 (Can.); Family Law Act, R.S.P.E.I. 1988, c F-2.1, § 29(1)(b) (Can.); Family Maintenance Act, R.S.S. 1990-91, c F-6.2, § 2 (Can.).

116. Family Services Act, R.S.N.B. 1980, c F-2.2, § 1 (Can.); Maintenance & Custody Act, R.S.N.S. 1989, c 160, § 2(aa) (Can.); Family Law Act, R.S.P.E.I. 1988, c F-2.1, § 29(1)(b) (Can.).

117. See Succession Act 1981 (Qld) pt 1 s 5AA(2)(b)(ii) (Austl.) (“for a continuous period of at least 2 years ending on the decedent’s death”); Adult Interdependent Relationships Act, R.S.A. 2002, c A-4.5, § 3 (Can.) (“for a continuous period of at least 3 years”); Family Law Act, R.S.B.C. 2011, c 25, § 3(1)(b) (Can.) (“for a continuous period of at least 2 years”); Family Relations Act, R.S.B.C. 1996, c 128, § 1(1) (Can.) (“for a period of at least 2 years”); Family Maintenance Act, R.S.M. 2015, c F-20, § 1 (Can.) (“for a period of at least three years”); Family Law Act, R.S.N.W.T. 1990, c 18, § 1(1) (Can.) (“for a period of at least two years”); Maintenance & Custody Act, R.S.N.S. 1989, c 160, § 2(aa) (Can.) (“for a period of at least two years”); Family Law Act, R.S.P.E.I. 1988, c F-2.1, § 29(1)(b) (Can.) (“continuously for a period of at least three years”); Family Law Act, R.S.O. 1990, c F.3, § 29(a) (Can.) (“continuously for a period of not less than three years”); Family Property Act, R.S.S. 1997, c F-6.3, § 2 (Can.) (“continuously for a period of not less than two years”); Family Maintenance Act, R.S.S. 1990-91, c F-6.2, § 2 (Can.) (“continuously for a period of not less than two years”); Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 § 172(5)(a) (Ir.) (to be a “qualified” cohabitant, “5 years or more”); U.K. Cohabitation Rights Bill (U.K.) 2016-17, HL Bill [47], cls. 1, 2(2) (d) (U.K.), <http://www.publications.parliament.uk/pa/bills/lbill/2016-2017/0047/17047.pdf> (pro forma first reading June 13, 2016; debate on merits not yet scheduled) (“for a continuous period of three years or more”).

118. Family Maintenance Act, R.S.M. 2015, c F-20, § 1 (Can.) (for a period of at least one year [if] they are together the parents of a child”); Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 § 172(5)(b) (Ir.) (to be a “qualified” cohabitant, “2 or more years, in the case where they are the parents of one or more dependent children”).

119. ALI UNMARRIED PARTNER STATUTE, *supra* note 105, § 6.03(1).

120. See Family Law (Scot.) Act 2006 § 25(2).

do not *require* cohabitation for a certain period of time, they do list the duration of the cohabitation as a factor to be considered.¹²¹ Most of these statutes list intermingling of finances and formalizing legal obligations and responsibilities as factors, for example, whether the couple had a joint checking or other types of accounts or owned property in joint tenancy, whether one named the other or both named each other as a beneficiary of life insurance or pension benefit plans, and so on.¹²² Many of the statutes list having children as a factor.¹²³ One of the statutes references a sexual relationship¹²⁴ and others take account of the couple's "reputation and public aspects of the relationship."¹²⁵ Some of the statutes list a miscellany of other factors, such as the performance of household tasks,¹²⁶ but the foregoing are the main ones.

In one way or another, all of the statutes are aiming at the same requirement: whether or not the couples' behavior demonstrates enough of a commitment to one another to declare that they have acquired marital rights. Intermingling finances, formalizing legal obligations, and having children together are important factors, not only because they show that

121. See Family Law Act 1975 (Cth) s 4AA(2)(a) (Austl.); Property (Relationships) Act 1984 (NSW) s 4(2)(a) (Austl.); De Facto Relationships Act 1991 (N. Terr.) pt 1 s 3A(2)(a) (Austl.); Acts Interpretation Act 1954 (Qld) pt 8 s 32DA(2)(b) (Austl.); Property (Relationships) Act 1976 S 2D(2)(a) (N.Z.); Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 § 172(2)(a) (Ir.); Family Law (Scot.) Act 2006, § 25(2)(a); ALI UNMARRIED PARTNER STATUTE, *supra* note 105, § 6.03(3).

122. See Family Law Act 1975 (Cth) s 4AA(2)(d) (Austl.); Property (Relationships) Act 1984 (NSW) s 4(2)(d)–(e) (Austl.); De Facto Relationships Act 1991 (N. Terr.) pt 1 s 3A(2)(d)–(e) (Austl.); Acts Interpretation Act 1954 (Qld) pt 8 s 32DA(2)(d)–(e) (Austl.); Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 § 172(2)(c), (d) (Ir.); Property (Relationships) Act 1976 s 2D(2)(d)–(e) (N.Z.); Family Law (Scot.) Act 2006, § 25(2)(c); ALI UNMARRIED PARTNER STATUTE, *supra* note 105, § 6.03(7)(b).

123. See Family Law Act 1975 (Cth) s 4AA(2)(h) (Austl.); Property (Relationships) Act 1984 (NSW) s 4(2)(g) (Austl.); De Facto Relationships Act 1991 (N. Terr.) pt 1 s 3A(2)(g) (Austl.); Acts Interpretation Act 1954 (Qld) pt 8 s 32DA(2)(g) (Austl.); Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 § 172(2)(e), (f) (Ir.); Property (Relationships) Act 1976 s 2D(2)(g) (N.Z.); ALI UNMARRIED PARTNER STATUTE, *supra* note 105, § 6.03(7)(l). *Cf.* Family Law Act, R.S.B.C. 2011 c 25, § 3(1)(b)(ii) (Can.) ("A person is a spouse . . . if the person . . . has a child with the other person."); Family Law (Scot.) Act 2006 § 28 (in determining financial rights, if cohabitation ends other than by death, economic impact on a child "of whom the cohabitants are the parents" or "who is or was accepted by the cohabitants as a child of the family" is to be considered).

124. See Family Law Act 1975 (Cth) s 4AA(2)(c) (Austl.) ("whether a sexual relationship exists").

125. See Family Law Act 1975 (Cth) s 4AA(2)(i) (Austl.); Property (Relationships) Act 1984 (NSW) s 4(2)(i) (Austl.); De Facto Relationships Act 1991 (N. Terr.) pt 1 s 3A(2)(i) (Austl.); Acts Interpretation Act 1954 (Qld) pt 8 s 32DA(2)(i) (Austl.); Civil Partnership and Certain Rights and Obligations of Cohabitants Act 2010 § 172(2)(b), (g) (Ir.); Property (Relationships) Act 1976, s 2D(2)(i) (N.Z.); Family Law (Scot.) Act 2006, § 25(2)(b); ALI UNMARRIED PARTNER STATUTE, *supra* note 105, § 6.03(7)(i).

126. See, e.g., Acts Interpretation Act 1954 (Qld) pt 8 s 32DA(2)(h) (Austl.).

the couple had a strong commitment to one another, but also because they are subject to objective evidence.¹²⁷ These factors serve another function as well: They protect older widows and widowers who began cohabiting later in life, especially those who have adult children by prior marriages, from being caught up in a de facto marriage against their wishes. Older cohabiting couples will not have children together and are more likely to keep their finances separate.¹²⁸ As explained later, cohabitating couples, including older widows and widowers, would also be free to enter into a nonmarital cohabitation agreement that states an intent not to be treated as married.¹²⁹

Drawing on the Anglosphere marital-rights legislation and the ALI statute, the case law supporting marital rights, and other sources,¹³⁰ I would like to put forward for discussion a draft Uniform De Facto Marriage Act:

Draft Uniform De Facto Marriage Act¹³¹

Section 1. Short Title. This [act] may be cited as the Uniform De Facto Marriage Act.

Section 2. De Facto Marriage; De Facto Spouses; Consequences. For purposes of all statutes in this state, two individuals are married in fact to one another if their relationship meets the requirements of this [act]. If so, their marriage is a de facto marriage and they are de facto spouses. A de facto marriage has the same status as a formal marriage. The parties to a de facto marriage are spouses. If one of them dies, the survivor is the decedent's surviving spouse.

Section 3. De Facto Marriage; Requirements. To be married de facto, the individuals must (i) be unmarried adults; (ii) not be prohibited from marrying each other under the law of this state by reason of a

127. “[C]ohabiting couples pool their funds and share expenses just as married couples do.” D’Vera Cohn, *Cohabiting Couples and Their Money*, PEW RES. CTR. (Nov. 22, 2011), <http://www.pewsocialtrends.org/2011/11/22/cohabiting-couples-and-their-money/>.

128. See, e.g., Sheri Stritof, *Tips for Cohabiting Seniors*, ABOUT.COM, http://marriage.about.com/cs/cohabitation/a/cohabseniors_2.htm (last visited Oct. 2, 2016) (“Do not combine your assets. Keep your bank accounts, brokerage accounts, etc., separate.”).

129. See *infra* note 136 and accompanying text. Sample nonmarital cohabitation agreement forms are readily available on the Internet. One example states: “The joint residency of the parties shall in no way render the parties married, by operation of common law or any other operation of law.” Nonmarital Cohabitation/Living Together Agreement, *available at* <https://www.ilrg.com/forms/cohab-agreement.html> (last visited Nov. 11, 2016).

130. See Law Revision Commission Reports, *supra* note 110.

131. The Draft De Facto Marriage Act is adapted from an intestacy statute I proposed long ago in *Marital Property Rights*, *supra* note 88, at 79–80. Other scholars subsequently built upon that intestacy proposal. See T.P. Gallanis, *Inheritance Rights for Domestic Partners*, 79 TUL. L. REV. 55, 87–91 (2004); Spitko, *supra* note 113, at 345–49.

blood relationship; and (iii) must be or have been sharing a common household in a committed relationship.

Section 4. Common Household. For purposes of sections 3 and 6, “sharing a common household” or “shared a common household” means that the individuals shared the same place to live, whether or not one or both had other places to live and whether or not one or both were physically residing somewhere else at the time in question. The right to occupy the common household need not have been in both of their names.

Section 5. Committed Relationship; Factors. For purposes of section 3, a “committed relationship” is a relationship in which two individuals have chosen to share one another’s lives in a long-term and intimate relationship of mutual caring. Although no single factor or set of factors determines whether a relationship qualifies as committed, the following factors are among those to be considered:

- (1) the purpose, duration, constancy, and degree of exclusivity of the relationship;
- (2) the degree to which the individuals intermingled their finances, such as by maintaining joint checking, credit card, or other types of accounts, sharing loan obligations, sharing a mortgage or lease on the household in which they lived or on other property, or titling the household in which they lived in joint tenancy;
- (3) the degree to which the individuals formalized legal obligations, intentions, and responsibilities to one another, such as one or both naming the other as primary beneficiary of life insurance or employee benefit plans, as agent to make health care decisions, or as a significant beneficiary of a will or trust;
- (4) whether the couple shared in parenting a child and the degree of joint caring and support given the child; and
- (5) the degree to which the individuals held themselves out to others as married or the degree to which the individuals held themselves out to others as emotionally and financially committed to one another on a permanent basis.

Section 6. Presumption. Two individuals are presumed to be or have been in a committed relationship if they shared a common household with their minor child for a continuous period totaling [four] or more years. A child is “their child” if the child is treated as their child under the law of this state. The presumption can only be rebutted by clear and convincing evidence.

The Draft Act is a comprehensive de facto marriage act, not restricted to dissolution, succession, or any other purpose. Without an obvious limiting principle that would justify a narrower scope, the Draft Act proceeds on the basis that committed partners who are married in fact for one purpose are married in fact for all purposes.¹³²

For its overarching criterion, the Draft Act uses the term “committed relationship” instead of “marriage-like relationship.” If that overarching criterion is satisfied, however, the Act—by necessity—denominates the couple’s relationship as a “de facto marriage.” The Act defines a “de facto marriage” as having the same status as a formal marriage and provides that the parties to a de facto marriage are “spouses.” If one of them dies, the survivor is the decedent’s “surviving spouse.” Any other denomination would fail to gain federal tax benefits of marriage. Under Treasury Regulations, “the terms ‘spouse,’ ‘husband,’ and ‘wife’ mean an individual lawfully married to another individual. . . . The term ‘marriage’ does not include registered domestic partnerships, civil unions, or other similar relationships recognized under state law that are not denominated as a marriage under that state’s law. . . .”¹³³

A “de facto marriage” denomination is not only essential for qualifying for federal tax benefits but for a wide variety of other federal as well as state benefits. Numerous federal and state statutes, forming a vast patchwork of laws, grant benefits and impose obligations in cases of “marriage.” As of 2004, federal law alone had 1,138 statutory provisions that condition benefits, rights, and privileges on “marriage.”¹³⁴ It would be a near-impossible task to persuade the federal and state legislatures to amend all of those statutes to say “marriage or committed relationship.” Another possibility would be to propose a general statute providing that wherever a statute uses the term “marriage” or “spouses,” the term includes committed relationships as defined in the statute.¹³⁵ While enacting such a statute at the state level might be possible, persuading Congress to move on such a statute would be very difficult. For now, my conclusion is that, if a couple in a committed relationship is to acquire the benefits of marriage

132. *Accord* Acts Interpretation Act 1954 (Qld) pt 8 s 32DA (Austl.); Cohabitation Rights Bill, 2015–16, HL Bill [29] (U.K.).

133. Treas. Reg. § 301.7701–18 (added by T.D. 9785, 81 Fed. Reg. 171) (as amended Sept. 2, 2016).

134. See Letter from Dayna K. Shah, Gen. Accounting Office, to Senator Bill Frist (Jan. 23, 2004), <http://www.gao.gov/new.items/d04353r.pdf>. An earlier report found 1,049 such statutory provisions. See Letter from Barry R. Bedrick, GAO, to Rep. Henry Hyde 1–2 (Jan. 31, 1997), <http://www.gao.gov/archive/1997/og97016.pdf>. Attached to both letters are lists of the statutory provisions by section numbers and topics.

135. Although that is the approach in Queensland, see Acts Interpretation Act 1954 (Qld) pt 8 s 32DA(6) (Austl.), enacting that approach would be far more difficult in the federal and state systems of the United States.

under both state and federal law, the statute has to deem the couple to be “married.”

The Draft Act does not force de facto marriage on a couple who wish to cohabit without marriage. Before or during cohabitation, such a couple can avoid de facto marriage as well as common-law marriage by entering into a nonmarital cohabitation agreement that states that they are cohabiting or intend to cohabit but do not intend to be treated as married by any statute or by the common law. A nonmarital cohabitation agreement should be valid and enforceable so long as its execution meets the informed consent and other safeguards of a premarital or marital agreement.¹³⁶

What about couples who want to cohabit without marriage but for one reason or another have not entered into a nonmarital cohabitation agreement? I noted earlier that the time may come when a couple’s behavior reaches a tipping point—the time when a court of competent jurisdiction *could* justifiably declare the couple’s relationship as having reached committed status. The Draft Act, however, along with the ALI Unmarried Partner Statute, does not, and probably should not, provide a mechanism for *automatically* declaring the couple as married in fact right then. Even without a nonmarital cohabitation agreement, a cohabitating couple who deliberately decline to marry should not have their decision overridden. Consequently, the Draft Act is not set up to be self-executing. A court judgment is required.¹³⁷ Even though a court judgment would probably be obtainable at the tipping point, a cohabiting couple in a harmonious committed relationship would not likely seek one. If such a couple decided that they want to qualify for all federal as well as state benefits and obligations of marriage, they would just get married.

The Draft Act, as it currently stands, is silent regarding whether a de facto marriage becomes effective on the date of the judgment or on an earlier date.¹³⁸ Whether the Draft Act should expressly allow or prohibit a retroactive judgment or should leave the question to the discretion of the court is debatable. A couple who had reached the tipping point before

136. At a minimum, the law should require evidence of informed consent. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 9.4 cmt. f (AM. LAW INST. 2003); UNIF. PREMARITAL & MARITAL AGREEMENT ACT § 9 (UNIF. LAW COMM’N 2012).

137. In *Estate of Bosch*, the Supreme Court held that the Internal Revenue Service must honor judgments of a state’s highest court, but it need only give “proper regard” to judgments of lower state courts. *Comm’r Internal Revenue v. Estate of Bosch*, 387 U.S. 456, 465 (1967).

138. In comparison, the British Columbia Family Law Act provides: “A relationship . . . begins on the date on which they begin to live together in a marriage-like relationship.” Family Law Act, R.S.B.C. 2011, c 25, § 3(3) (Can.). Cf. Peter Nicolas, *Backdating Marriage*, 104 CAL. L. REV. (forthcoming 2016) (arguing that same-sex couples who enter into formal or common-law marriages should have their marriages “backdated to the date they would have married but for a legal barrier for doing so”).

the date of the judgment might benefit from a judgment that they were married *ex ante* so that, for example, previous gifts from one to the other qualified for the federal gift tax marital deduction¹³⁹ or previous filings of joint income tax returns¹⁴⁰ were lawful. Failing to file a gift tax return or filing a false income tax return could expose the couple to civil or criminal penalties.¹⁴¹ Whether a retroactive *de facto* marriage judgment would be a defense is not clear. In a decades-old revenue ruling regarding common-law marriages, which, so far as it goes, should be equally applicable to *de facto* marriages, the Internal Revenue Service was frustratingly imprecise regarding whether a judgment is even required.¹⁴² Surely, in the case of a *de facto* marriage claim, the Service would not take the couple's word for it or make its own independent determination regarding such a matter on a case-by-case basis. Here is what the Service said about common-law marriages:

The marital status of individuals as determined under state law is recognized in the administration of the Federal income tax laws. Therefore, if applicable state law recognizes common-law marriages, the status of individuals living in such relationship that the state would treat them as husband and wife is, for Federal income tax purposes, that of husband and wife.

The foregoing position of the Internal Revenue Service with respect to a common-law marriage is equally applicable in the case of taxpayers who enter into a common-law marriage in a state which recognizes such relationship and who later move into a state in which a ceremony is required to initiate the marital relationship. . . . Also, for the purpose of filing a joint income tax return under section 6013(a) of the Code, a common-law wife in a state which recognizes such marriages will be considered to be the taxpayer's spouse.¹⁴³

139. *See* I.R.C. § 2523.

140. *See id.* §§ 1(a), 6013–15. The Internal Revenue Service does not require proof of marriage from couples filing joint income tax returns.

141. *See id.* §§ 6672, 6702, 7203, 7206.

142. Rev. Rul. 58-66, 1958-1 C.B. 60–61. The ruling is unusual because the analysis was not based on a statement of facts. A statement of facts would presumably have indicated whether the couple had obtained a common-law marriage judgment. In a later ruling recognizing same-sex marriages for federal tax purposes, Rev. Rul. 2013-17, 2013-38 I.R.B. 201, 204, the Service reaffirmed the 1958 ruling on common-law marriages. The 2013 ruling, however, was as imprecise as the 1958 ruling regarding whether a common-law marriage judgment is required. The Service offered only the conclusory description of couples who had “entered into” or “established” common-law marriages. Anecdotally, a couple of messages on file with the author posted on the American College of Trust and Estate Counsel (ACTEC) listserv dated October 21, 2015, from practitioners in a common-law marriage state (Texas) indicate that the IRS did not question a federal estate-tax marital deduction claimed on the decedent's estate tax return when the return was accompanied by a statement explaining the facts supporting their marriage at common law.

143. Rev. Rul. 58-66, 1958-1 C.B. 60–61.

Just as a high percentage of formal marriages eventually dissolve,¹⁴⁴ a similar or higher percentage of nonmarital committed relationships will also eventually dissolve. A couple who amicably break up after cohabiting in a relationship that could be deemed by a court to be a de facto marriage would not have a divorce remedy imposed on them. They would be free to disentangle their relationship without interference from a court under a de facto marriage act. But if one partner deprives the other of marital rights to which the other feels entitled, a de facto marriage act would provide a remedy. If they break up, the plaintiff would be able to seek alimony¹⁴⁵ and a property settlement¹⁴⁶ under the divorce laws.¹⁴⁷ If one of them dies, the plaintiff would be able to seek an intestate or forced share under state law and an estate tax marital deduction¹⁴⁸ under federal law. The plaintiff would have the burden of persuasion in these cases, except that the presumption in section 6 of the Draft Act would reverse that burden regarding the existence of a committed relationship. To benefit from the presumption, the plaintiff would first have to prove the set of facts that the statute requires as a precondition: that the couple continuously shared a common household with their minor child for the requisite number of years. Living together with their child in a common household for a continuous period is a strong indication that the couple has crossed the line into de facto marriage.¹⁴⁹ The Draft Act defines “their child” as a

144. See *Marriage in America*, *supra* note 17, at 67 (“The American divorce rate today is about twice that of 1960, but has declined since hitting its highest point in our history in the early 1980s. For the average couple marrying for the first time in recent years, the lifetime probability of divorce or separation now falls between 40 and 50 percent.”).

145. For federal income tax purposes, alimony is ordinary income taxable to the recipient, I.R.C. § 61(a)(8), and deductible by the payor, I.R.C. § 215.

146. For federal income tax purposes, no gain or loss is recognized on a transfer of property incident to a divorce, but the transferee takes the transferor’s adjusted basis. See I.R.C. § 1041(a)–(b).

147. In refining the Draft Act, consideration should be given to possible differences in divorce laws and to the handling and possible recharacterization of separate property as marital property between equitable distribution states and community property states. See, e.g., ALI UNMARRIED PARTNER STATUTE, *supra* note 105, § 6.04(3), cmt. b.

148. See I.R.C. § 2056.

149. In *A Parent-Partner Status for American Family Law* by Merle H. Weiner, the author proposes that state law recognize a new “parent-partner” status for married and unmarried couples that automatically begins upon birth of a common child and terminates when the child reaches the age of majority. The “parent-partner” status would legally obligate each parent, whether or not cohabiting with the other parent (1) “to render reasonable assistance if the other parent’s life is endangered”; (2) “not to physically or psychologically abuse the other parent”; (3) “to engage in ‘relationship work’ at the transition to parenthood and at the demise of the romantic relationship”; (4) “to act honestly and fairly when contracting with each other about an aspect of their family relationship”; and (5) “to ‘give or share,’ so that neither parent would perform an unfairly disproportionate amount of caregiving for the couple’s child.” MERLE H. WEINER, *A PARENT-PARTNER STATUS FOR AMERICAN FAMILY LAW* 133, 135 (2015). I thank Professor Weiner for drawing my attention to her book.

child who is treated as their child by applicable state law. That could be a genetic or adopted child or a child resulting from assisted reproduction or a surrogacy arrangement.¹⁵⁰ There could be and often would be more than one such child, of course,¹⁵¹ but one is all the statute requires to trigger the presumption.

A divorced de facto spouse and a surviving de facto spouse could also apply for Social Security benefits. A divorced spouse who is unmarried and age 62 or older is entitled to benefits, but only if the marriage lasted ten years or longer,¹⁵² raising in another context the question of a retroactive de facto marriage judgment. A surviving spouse is entitled to retirement benefits as early as age 60 if the deceased spouse worked long enough under Social Security to have received retirement benefits.¹⁵³ For near- or below-poverty-level couples,¹⁵⁴ Social Security benefits might be the main asset worth fighting for.

There is no danger that de facto marriages would replace or discourage formal marriages, any more than recognition of common-law marriages has discouraged formal marriage.¹⁵⁵ In the case of formal marriage, the marriage certificate automatically grants full marital rights to the married partners. Legislation granting that same status to unmarried partners would still require case-by-case adjudication to determine whether the criteria have been satisfied.

IV. Conclusion

If the marriage and cohabitation trends continue—downward for marriage, upward for cohabitation—or even if the trends stabilize at the current rates or reverse somewhat due to same-sex marriages or a dramatically improved economy,¹⁵⁶ the lack of marital rights for committed

150. See, e.g., UNIF. PROBATE CODE §§ 2-115 to 2-122 (UNIF. LAW COMM'N 2010).

151. See *supra* notes 32–35 and accompanying text.

152. See *Retirement Planner: If You Are Divorced*, SOC. SEC. ADMIN., <http://www.ssa.gov/planners/retire/divspouse.html> (last visited Oct. 3, 2016).

153. See *Survivors Planner: If You Are the Worker's Widow or Widower*, SOC. SEC. ADMIN., <http://www.socialsecurity.gov/planners/survivors/ifyou2.html> (last visited Oct. 3, 2016).

154. See *supra* notes 77–79 and accompanying text.

155. See Waggoner, *supra* note 90, at 74–75 nn.129–31, tbl3.

156. Data on the current state of the economy are mixed. Gross domestic product in chained 2009 dollars is estimated to have increased at an annual rate of 2.9% in the third quarter of 2016, which is a substantial improvement from the increase of only 1.4% in the second quarter. See *Gross Domestic Product: Third Quarter 2016 (Advanced Estimate)*, U.S. DEP'T OF COMM., BUREAU OF ECONOMIC ANALYSIS, http://bea.gov/newsreleases/national/gdp/2016/pdf/gdp3q16_adv.pdf (Oct. 28, 2016). By contrast, per capita disposal personal income in chained 2009 dollars increased in 2015 by a paltry 0.89% and, as of the close of the third quarter of 2016, by only 0.67%, an increase that puts 2016 on about the same pace as 2015. See *Personal Income and Outlays: September 2016*, tbl. 2, line 48, U.S. DEP'T OF COMM., BUREAU OF ECONOMIC

partners will persist as a problem until a solution is found. Pressure could grow for a legislative blueprint for gaining those rights, especially as more and more aggrieved partners seek a remedy when they break up or when one dies without benefitting the survivor. Australia, Canada, Ireland, New Zealand, and Scotland have already moved on the subject¹⁵⁷ and the UK Parliament has it under consideration for England and Wales.¹⁵⁸ In this country, the ALI has put its prestige behind a remedy for the break-up cases,¹⁵⁹ and scholars are now taking notice of the problem.¹⁶⁰ A Uniform De Facto Marriage Act that grants de facto marriages the same status as formal marriages would entitle de facto spouses to all marital rights and obligations under both federal and state laws.¹⁶¹

ANALYSIS, <http://bea.gov/newsreleases/national/pi/2016/pdf/pi0916.pdf> (Oct. 31, 2016). As of September 2016, 37.1% of unemployed working-age individuals were not seeking employment. See *The Unemployment Situation—October 2016* at 2, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/news.release/pdf/empst.pdf> (Nov. 4, 2016).

157. See *supra* notes 98–102.

158. See *supra* note 103.

159. See *supra* notes 105–06 and accompanying text.

160. See *supra* note 89.

161. See *supra* text accompanying notes 48–58.