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# From Wedding Bells to Working Women: Unmasking the Sexism Resulting from “Illicit Concubinage” in Louisiana’s Jurisprudence

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# From Wedding Bells to Working Women: Unmasking the Sexism Resulting from “Illicit Concubinage” in Louisiana’s Jurisprudence

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## INTRODUCTION

Cohabitation is the new normal.<sup>1</sup> Today’s normal, however, can be confusing to a generation that grew up with marriage as the only option for romantic couples. But to today’s couples, cohabitation is either an alternative to marriage or a stepping-stone to marriage. Contemporary studies have shown that the majority of those who get married today are wealthy white couples.<sup>2</sup> Meanwhile, women of lower socioeconomic status are less likely to get married.<sup>3</sup> Instead, these women push for cohabitation to protect their assets, and they have become the driving force behind the shift from marriage to cohabitation.<sup>4</sup>

Historically, Louisiana stigmatized women who chose cohabitation, referring to them as concubines and denying them legal rights.<sup>5</sup> Beginning in the 1970s, most states began to recognize and respond to the injustices that the stigmatization of cohabitation created.<sup>6</sup> For example, dissolution

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1. Pamela J. Smock, *Cohabitation in the United States: An Appraisal of Research Themes, Findings, and Implications*, 26 ANN. REV. SOC. 1, 4–5 (2000); see *infra* Part I.

2. See Smock, *supra* note 1, at 4–5; Marin Clarkberg, *The Price of Partnering: The Role of Economic Well-Being in Young Adults’ First Union Experiences*, 77 SOC. FORCES 945, 947 (1999).

3. Clarkberg, *supra* note 2, at 947; Smock, *supra* note 1, at 4.

4. See *infra* Part I.B.

5. For an explanation of Louisiana’s historical view of concubinage, see Succession of Bacot, 502 So. 2d 1118, 1129 (La. Ct. App. 1987) (citing Succession of Filhiol, 44 So. 843 (La. 1907)).

6. See, e.g., *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976) (en banc) (allowing a cohabiting woman to recover under contract theory to prevent inequity).

of a relationship by death or separation often left a woman destitute.<sup>7</sup> To correct this inequity, every other community property state in the United States now provides a remedy for cohabitants to claim property rights upon dissolution of the relationship.<sup>8</sup> Overall, 46 states have created some sort of contractual or status-based remedy for this inequity.<sup>9</sup> In the midst of the United States' movement to accept cohabiting couples that has gained traction and entrenched itself over the past 40 years, Louisiana's stubborn refusal to follow the rest of the country's example is puzzling.

This Comment offers a solution to that puzzle, arguing that Louisiana's refusal to provide property rights for unmarried cohabitants is the result of discrimination against some of the state's neediest citizens.<sup>10</sup> Louisiana's jurisprudence often provides unfair results to women, and when accompanied by statistics showing that women are the main advocates of cohabitation,<sup>11</sup> Louisiana's refusal to act appears motivated by a desire to discriminate. This failure to change the law is a thinly veiled attempt to retain the status quo of the past where marriage was the only path for women to be successful. To correct the situation, this Comment proposes a solution that is best aligned with Louisiana's needs—a presumption of an equal-sharing agreement between romantic partners upon dissolution.

Part I demonstrates that the significant number of cohabiting couples creates a need for the legislature to act, and also explores who engages in cohabitation and why the practice has become so popular. Part II describes the evolution of cohabitants' rights in the American courts and legislatures. This Part also surveys the various approaches in the United States, New Zealand, and France to afford rights to cohabitants. Part III explains Louisiana's archaic views regarding unmarried cohabitation and why the State chooses to cling to this reasoning. Part IV scrutinizes the sexist biases in Louisiana's jurisprudence and argues that Louisiana can no longer justify discriminating against cohabitants. This Part also proposes a solution that

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7. *See id.* at 109 (noting that the plaintiff agreed to stop working and be the defendant's housekeeper in return for his financial support).

8. Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 587 (2013).

9. *Id.*

10. Even though marriage as an institution offers concrete benefits and protections for many, the Louisiana Civil Code currently excludes from this category not only unmarried heterosexual cohabitants, but also homosexuals. LA. CIV. CODE art. 89 (2014). *See generally* Obergefell v. Hodges, No. 14–556 (U.S. 2015) (holding that the Fourteenth Amendment's Due Process and Equal Protection clauses require a state to license a marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed in another state).

11. *See infra* Part I.B.

will fix the frequent inequity in Louisiana and calls for the change women deserve—the ability to decide for themselves whether marriage is indeed the best option by which to transfer property rights.

### I. FIRST COMES LOVE, THEN COMES MARRIAGE?

The number of couples choosing cohabitation instead of marriage has grown exponentially over the years and it continues to rise.<sup>12</sup> Cohabitation is popular because of society's need for individualism, its changing values, and economic factors unique to modern culture.<sup>13</sup> Women of lower socioeconomic status<sup>14</sup> and working women have been the main proponents behind cohabitation's popularity.<sup>15</sup> Many women choose not to marry to protect their economic freedom. Cohabitation is more popular among poor women because marriage seems to represent a wealthy status symbol, and the housewife stigma associated with marriage troubles some career women.<sup>16</sup> Because of this desire, cohabitation has become an important family status in America.

#### A. *The Explosive Growth of Cohabitation and Its Clouded Origins*

Chabitation is the most common path to initiating family life.<sup>17</sup> In 1960, approximately 440,000 unmarried American couples were living together.<sup>18</sup> By 1990, the number had climbed to 2.85 million and continued climbing to 4.9 million in early 2000.<sup>19</sup> In 2010, the U.S. Census Bureau

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12. Clarkberg, *supra* note 2, at 946; *see also* Margaret M. Mahoney, *Forces Shaping the Law of Cohabitation for Opposite Sex Couples*, 7 J.L. & FAM. STUD. 135, 159–60 (2005).

13. Clarkberg, *supra* note 2, at 946.

14. Smock, *supra* note 1, at 4.

15. *Id.* at 5.

16. Clarkberg, *supra* note 2, at 957–58.

17. *See id.* at 945. This Comment considers the term “family life” to mean “the basic unit in society traditionally consisting of two parents rearing their children” and “any of various social units differing from but regarded as equivalent to the traditional family.” *Full Definition of Family*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/family> (last visited Mar. 14, 2015).

18. Mark Glover, *Evidentiary Privileges for Cohabiting Parents: Protecting Children Inside and Outside of Marriage*, 70 LA. L. REV. 751, 752 (2010).

19. *Id.* The number of unmarried couples who are cohabitating has expanded overall by 1,000%, from 500,000 in 1970 to over 5,000,000 in 2000. V. Michael Brigner, *Cohabitation*, in BALDWIN'S OHIO PRAC. DOMESTIC REL. L. § 2:66 (4th ed. 2014).

reported that for the first time in history, married couples made up less than half of all American households.<sup>20</sup> By 2011, 7.6 million opposite-sex couples were living together as unmarried cohabitants.<sup>21</sup> Further, the majority of marriages and remarriages begin as cohabiting relationships.<sup>22</sup>

Although cohabitation has grown in popularity exponentially, the reasons for this phenomenon are much less clear. Sociologists point to three factors that contribute to this change:<sup>23</sup> (1) the shifting values in modern society, (2) the American need for individual autonomy, and (3) a changing economic climate.<sup>24</sup> Historically, American values developed from “religious tradition, frontier experience, ceaseless change, vast opportunity, and fluid social structure.”<sup>25</sup> Core values shift over time among individuals in keeping with the American spirit of change.<sup>26</sup> These shifts in values and attitudes about gender roles have made cohabitation more popular.<sup>27</sup>

Cohabitation is appealing to young adults because of its consistency with individualism and secularism as compared to marriage.<sup>28</sup> Cohabitators tend to reject traditional gender roles while embracing the ideals of individualism, personal autonomy, and equity in each partner’s contribution to the household.<sup>29</sup> Those who choose to cohabit are generally more liberal, less religious, and more supportive of both egalitarian gender roles and nontraditional family roles.<sup>30</sup> Young adults’ attitudes toward

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20. Sabrina Tavernise, *Married Couples are No Longer a Majority*, *Census Finds*, N.Y. TIMES, May 26, 2011, at A22; *see also* Mark Mather & Diana Lavery, *In U.S., Proportion Married at Lowest Recorded Levels*, PRB (Sept. 2010), <http://www.prb.org/Articles/2010/usmarriage Decline.aspx>; *see also* Aloni, *supra* note 8, at 580.

21. Aloni, *supra* note 8, at 580; *see also* Mather & Lavery, *supra* note 20; *see also* Tavernise, *supra* note 20.

22. Smock, *supra* note 1, at 1.

23. *Id.* at 5; *see also* Clarkberg, *supra* note 2, at 946.

24. Smock, *supra* note 1, at 5; *see also* Clarkberg, *supra* note 2, at 946.

25. Elizabeth R. Carter, *New Life for the Death Tax Debate*, 90 DENV. U. L. REV. 175, 180 (2012) (quoting ROBIN M. WILLIAMS, JR., *AMERICAN SOCIETY: A SOCIOLOGICAL INTERPRETATION* 440, 458–59 (3d ed. 1970)).

26. *Id.* at 181.

27. Clarkberg, *supra* note 2, at 946.

28. Smock, *supra* note 1, at 5.

29. Jules Brine & Kara Joyner, *The Ties That Bind: Principles of Cohesion in Cohabitation and Marriage*, 64 AM. SOC. REV. 333, 351 (1999).

30. Smock, *supra* note 1, at 4.

divorce are also changing.<sup>31</sup> The very real threat of a failed marriage leads many couples to experiment with cohabitation as a type of trial period.<sup>32</sup>

Economic factors unique to modern culture have also increased the allure of cohabitation.<sup>33</sup> These factors include the rising rate of female participation in the labor force and the decline of wealth during young adulthood.<sup>34</sup> Financial obstacles provide one of the main reasons for why many couples choose cohabitation over marriage.<sup>35</sup> Those couples that cohabit are generally in worse financial shape than couples that get married, and long periods of unemployment, lower educational attainment, and lower joint incomes characterize their relationships.<sup>36</sup> For those uncertain about their financial prospects, living together and pooling resources in the short run can be a smarter strategy than simply living alone.<sup>37</sup> Therefore, economic instability pushes couples toward living together and away from getting married.

Meanwhile, marriage is now something of a status symbol for wealthy couples. Social norms dictate an “acceptable” standard of living for married couples, which puts pressure on adults to make a certain amount of money before getting married.<sup>38</sup> Many couples feel as if they lack the resources to receive the social sanctioning of their union through marriage.<sup>39</sup> Although sharing a house should, as a practical matter, be cheaper than living alone, social definitions of a suitable standard of living for a married couple make marriage the more expensive choice.<sup>40</sup> In contrast, cohabitation is a non-institutionalized type of union that carries minimal normative standards. The failure to meet a “suitable” level of income is not a barrier to cohabitation.<sup>41</sup> Thus, cohabitation is a viable option for couples in the midst of changing values and an uncertain financial outlook.

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31. Clarkberg, *supra* note 2, at 946.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* at 947 (“[P]eople who cohabit differ economically from people who marry.”). Some have even dubbed cohabitation the “poor man’s marriage.” *Id.*

36. *Id.*

37. *Id.* at 963.

38. *Id.* at 949.

39. *Id.*

40. *Id.* at 950.

41. *Id.* at 951.

*B. Women's Push for Cohabitation*

Women are the driving force behind the increase in the rate of cohabitation. Women across the economic spectrum choose cohabitation to financially protect themselves. The practice of cohabitation is most common among two groups of women: working women and those of low socioeconomic status.<sup>42</sup> The line between employed women and poor women, however, is not a bright one. The reason is because women typically accumulate less wealth than men due to inequalities in labor force participation and earnings.<sup>43</sup> This result is particularly true in Louisiana, where a noticeably large pay gap between men and women persists.<sup>44</sup> Although employed, women who earn less than their male counterparts and women with low income and education have low marriage rates and usually cohabit, but more-advantaged women tend to get married.<sup>45</sup> Marriage is not as well suited for women in poverty as is cohabitation. Low-income women face many barriers to marriage, including: gender mistrust, abuse, infidelity, and financial strain.<sup>46</sup> Marriage can create dependencies on men, particularly in abusive relationships and other situations that are ultimately unhealthy for the women involved.<sup>47</sup> Marriage jeopardizes eligibility for welfare benefits, forcing poor couples to choose between being married without welfare or remaining unmarried with welfare.<sup>48</sup> As a result, cohabiting women who receive welfare are

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42. *See id.* at 956–57 (“In contrast to men, women with high earnings appear to be relatively more attracted to cohabitation than men.”); Smock, *supra* note 1, at 4.

43. Jonathan Vespa & Matthew A. Painter II, *Cohabitation History, Marriage, and Wealth Accumulation*, 48 *DEMOGRAPHY* 983, 985 (2011).

44. Janet McConnaughey, *Louisiana has Nation's Biggest Pay Gap Between Men and Women*, WWLTV.COM (Sept. 18, 2014, 2:05 PM), <http://www.wwltv.com/story/news/local/2014/09/18/pay-gap-louisiana/15834737/> (“Louisiana has the nation’s largest gender pay gap, with women paid about two thirds of what men are paid . . .”).

45. Vespa & Painter, *supra* note 43, at 998; *see also* Daniel T. Lichter, Zhenchao Qian & Leanna M. Mellott, *Marriage or Dissolution? Union Transitions Among Poor Cohabiting Women*, 43 *DEMOGRAPHY* 223, 237 (2006).

46. Lichter et al., *supra* note 45, at 225.

47. Deborah Roempke Graefe & Daniel T. Lichter, *Marriage Among Unwed Mothers: Whites, Blacks and Hispanics Compared*, 34 *PERSP. ON SEXUAL & REPROD. HEALTH* 286, 292 (2002) (“For some women, however, [marriage] may also create new dependencies on men that are ultimately unhealthy for everyone involved—for example, in the case of abusive relationships.”).

48. Lichter et al., *supra* note 45, at 226.



40% less likely to make the transition to marriage than those who do not receive welfare.<sup>49</sup>

Women in poverty are not the only group that prefers cohabitation; employed women also endorse cohabitation—albeit for a vastly different reason. Working women see cohabitation as a way to protect their economic assets. As more women have abandoned the traditional homemaker role to work in the labor market, their financial independence has increased.<sup>50</sup> Unlike their male counterparts, marriage can hinder women's efforts to build successful careers.<sup>51</sup> Although society has traditionally assumed that women desired marriage for economic stability, increased labor opportunities enable women to avoid marrying.<sup>52</sup> Domestic activity after marriage, particularly housework, typically increases for women and decreases for men, which is a factor in why career women decide either to not get married or to delay marriage.<sup>53</sup> Women who have high earnings are more attracted to cohabitation than marriage because of the stigma and social expectation that a wife completes all of the household labor.<sup>54</sup> Nonmarital unions, however, are attractive because cohabiters in these arrangements have greater equality than their marital counterparts who tend to adhere more often to gender role stereotypes.<sup>55</sup> Women in the labor force choose cohabitation as the rational economic choice to deal with a gender-specific hindrance to their careers that men do not have.

## II. OTHER JURISDICTIONS' RESPONSES TO COHABITATION

Before the 1970s, America traditionally gave cohabitants a negative status in the law and prohibited unmarried sexual partners from contracting with each other. This status, however, produced inequities where, upon dissolution, the male partner walked away with all of the assets while the woman was left without a way of earning income. As a

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49. *Id.* at 234.

50. *Id.* at 225.

51. Sharon Sassler & Robert Schoen, *The Effect of Attitudes and Economic Activity on Marriage*, 61 J. MARRIAGE & FAM. 147, 149 (1999).

52. *Id.* at 148 (“Women were traditionally assumed to desire marriage (due to economic dependency) more than men, but the increased economic opportunity enables women to avoid marrying.”).

53. *Id.* at 149 (“Despite the widespread acceptance of women's employment, marriage appears to be less compatible with women's efforts to build successful careers than with men's efforts. . . . Domestic activity after marriage, particularly the amount of housework done, increases more for women than for men.”).

54. Clarkberg, *supra* note 2, at 956–57.

55. *Id.* at 962.

result, America abandoned this negative view in the 1970s, and most states have since afforded some sort of mechanism for providing property rights for unmarried cohabitants.<sup>56</sup> Although the reasons for affording cohabitating couples relief has changed, as the role of women in the workforce has transformed, the problem of inequity still remains. Louisiana remains one of only four states that have refused to provide property rights for unmarried cohabitants, although other jurisdictions employ various avenues for affording these rights.<sup>57</sup> Other jurisdictions employ a status approach, contract approach, or a blend of the two approaches to provide property rights.<sup>58</sup>

### *A. The American View of Cohabitation: Before and After*

America originally viewed cohabitation negatively and did not allow property rights to unmarried cohabitants, which produced inequitable results.<sup>59</sup> Recognizing these results, the California Supreme Court decided the landmark case of *Marvin v. Marvin*, which allowed cohabitants the right to contract between each other regarding property.<sup>60</sup> After this decision, many states began to recognize the inequity of disallowing unmarried cohabitants' property rights.<sup>61</sup> Therefore, the *Marvin* decision led many states to completely change their view towards cohabitation and created a shift in attitudes, which ultimately led to the overall acceptance of cohabiting relationships throughout the country.<sup>62</sup>

#### *1. The Traditional Negative Status*

Historically, America attributed a negative legal status to unmarried cohabiting couples.<sup>63</sup> Most legal statuses come with rights and

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56. Glover, *supra* note 18, at 756; *see also* Aloni, *supra* note 8, at 587.

57. *See* Aloni, *supra* note 8, at 587 (“Only Illinois, Mississippi, Georgia, and Louisiana do not recognize cohabitants’ right to contract regarding their rights and responsibilities toward each other.”).

58. *See infra* Part II.C.

59. *See infra* Part II.A.2.

60. 557 P.2d 106, 110 (Cal. 1976) (en banc).

61. *See infra* Part II.A.2.

62. *Id.*

63. William A. Reppy, Jr., *Property and Support Rights of Unmarried Cohabitants: A Proposal for Creating a New Legal Status*, 44. LA. L. REV. 1677, 1677 (1984); 1 LLOYD T. KELSO, NORTH CAROLINA FAMILY LAW PRACTICE § 1:5, at 6 (2008) (“The term ‘legal status’ is used in the law to refer to a relationship between persons that, by virtue of its existence, entails legal consequences.”).

obligations,<sup>64</sup> but this unique negative status prevented unmarried cohabitants from contracting with each other.<sup>65</sup> Marriage was customarily the only option for romantic couples to transfer property rights and other benefits between one another.<sup>66</sup> The official purpose of marriage was to channel the sexual desire between a man and a woman into an acceptable institution that could provide a stable environment for any resulting children.<sup>67</sup> The government was interested in the purity of marriage because the institution was supposedly “the foundation of the family and of society.”<sup>68</sup> This positive view of marriage caused the courts to attach a negative stigma to cohabitation.<sup>69</sup> Society ostracized couples choosing cohabitation over wedlock for “living in sin” and classified those couples as deviants.<sup>70</sup> Courts viewed nonmarital cohabitation as “illicit” or “meretricious” until 1976.<sup>71</sup>

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64. Grace Ganz Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 NOTRE DAME L. REV. 1265, 1272 (2001) (“In marriage, rights and benefits accrue to parties during their relationship by virtue of their marital status.”).

65. Reppy, *supra* note 63, at 1677 (arguing that instead of creating rights and obligations between unmarried cohabitants like most legal statuses, the United States imposed a unique negative legal status that disabled couples from contracting with each other).

66. *Id.* at 1680.

67. See Katherine Shaw Spaht, *The Last One Hundred Years: The Incredible Retreat of Law from the Regulation of Marriage*, 63 LA. L. REV. 243, 250 (2003). Although this article speaks to Louisiana’s experience with marriage, the Louisiana experience illustrates what has happened throughout the rest of the United States. *Id.* at 244.

68. *Hurry v. Hurry*, 81 So. 378, 381 (La. 1919) (noting that marriage is an institution “in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society” (quoting *Maynard v. Hill*, 125 U.S. 190, 211 (1888))).

69. Reppy, *supra* note 63, at 1679 (“First, the courts felt it an appropriate judicial function to condemn and punish cohabitants for their immorality in engaging in sexual relations without the benefits of marriage.”).

70. Glover, *supra* note 18, at 751.

71. Brigner, *supra* note 19, § 2:66 (stating that “illicit” in this context means “prohibited” and “meretricious” means “pertaining to an unlawful sexual connection” and derives from the Latin word for prostitute); see also *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976) (en banc) (holding that contracts between unmarried partners are enforceable, unless they were explicitly founded on sexual services similar to that of prostitution, which would violate public policy). *Marvin* ignited the trend away from a qualified disapproval of unmarried cohabitation. *Id.*

*2. Inequity Caused by the Traditional View in America Transformed the Law*

The public deemed cohabitation sinful, and the traditional American view of unmarried cohabitants created inequitable results for partners upon dissolution of the relationship. Courts' decisions to follow precedent that rendered agreements between partners unenforceable because they were based upon the void consideration of sexual services produced "cruelly unfair results."<sup>72</sup> Courts did not give unmarried cohabitants a legally significant family status, which resulted in distinct hardships.<sup>73</sup> Specifically, inequities often arose where the male cohabitant produced all of the earnings and the female cohabitant produced none.<sup>74</sup> In these cases, the working partner, typically the man, would retain all of the family assets because unmarried cohabitants were not subject to community property laws.<sup>75</sup> The law left the female partner without a remedy for such a dire situation.

Because of the frequency with which this inequity occurred, courts began to realize that lower-earning partners were in need of protection from partners with more money who might take advantage of them.<sup>76</sup> Before this realization, courts permitted the man to dishonor his equal-sharing contract—a contract where cohabitants worked together as an economic unit pursuant to an implied or express agreement concerning the nature of their earnings.<sup>77</sup> By dishonoring this contract, the man was allowed to double the amount of gain he expected to have as his own when the relationship ended.<sup>78</sup> That harsh treatment failed to provide at least one party in the relationship, usually the woman, with property rights as punishment for the couple's "illicit" relationship.<sup>79</sup> This inequity caused most of the country to develop a method of rectifying the problem, and to abandon the traditionally negative status given to unmarried cohabitants.<sup>80</sup>

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72. Brigner, *supra* note 19, § 2:66.

73. *Id.*

74. Charlotte K. Goldberg, *Opting In, Opting Out: Autonomy in the Community Property States*, 72 LA. L. REV. 1, 5–6 (2011).

75. *Id.*

76. Charlotte K. Goldberg, *Schemes of Adventuresses: The Abolition and Revival of Common-Law Marriage*, 13 WM. & MARY J. WOMEN & L. 483, 487 (2007).

77. Katherine Shaw Spaht, *Symposium: Family Law, Introduction*, 44 LA. L. REV. 1545, 1550 (1984).

78. Reppy, *supra* note 63, at 1681.

79. Goldberg, *supra* note 76, at 538.

80. Mahoney, *supra* note 12, at 159–60.

Nearly every state adopted an approach to honor agreements between cohabitants, with only Illinois, Mississippi, Georgia, and Louisiana maintaining the antiquated approach.<sup>81</sup>

### *B. Approaches Used by Multiple Jurisdictions*

Three predominant methods have emerged for dealing with unmarried cohabitants' property rights. The first is the legal status approach, which imposes legal consequences based simply on the existence of a relationship between two persons.<sup>82</sup> The American Law Institute has endorsed this approach.<sup>83</sup> Foreign jurisdictions such as New Zealand can provide further guidance on the legal status approach.<sup>84</sup> The second, more common, approach uses contract remedies to provide property rights upon dissolution of the relationship.<sup>85</sup> The third approach, which blends both the status and contract approaches, is the French PACS, an intermediate contract-based legal status that is not equivalent to marriage.<sup>86</sup>

#### *1. The Imposition of a Legal Status*

One way to afford cohabitants' property rights is to impose a legal status upon the parties if they meet certain requirements. There are multiple avenues to implement the legal status approach, including the use of the following: (1) common law marriage, (2) American Law Institute's Chapter 6 Principles, (3) Washington's "Committed Intimate Relationship" Status, and (4) New Zealand's domestic partnership status.

##### *a. The "Not-So-Common" Law Marriage Approach*

The status approach in the United States has its origins in the doctrine of common law marriage, which turns cohabitation into a lawful marriage if the parties agree between themselves to be married and live together for

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81. Glover, *supra* note 18, at 756; *see also* Aloni, *supra* note 8, at 587.

82. KELSO, *supra* note 63, § 1.5, at 6.

83. Eric L. Olsen, Note, *How Do Courts Divide Property Acquired During a Pseudomarital (Meretricious) Relationship?*, 28 IDAHO L. REV. 1091, 1092 (1992); Bill Atkin, *The Challenge of Unmarried Cohabitation—The New Zealand Response*, 37 FAM. L.Q. 303, 303 (2003); David Westfall, *Forcing Incidents of Marriage on Unmarried Cohabitants: The American Law Institute's Principles of Family Dissolution*, 76 NOTRE DAME L. REV. 1467, 1467 (2001).

84. *See infra* Part II.C.1.d.

85. Marvin v. Marvin, 557 P.2d 106 (Cal. 1976) (en banc).

86. *See infra* Part II.C.3.

a substantial period of time.<sup>87</sup> Throughout the United States, however, states have largely abolished this outdated practice.<sup>88</sup> Courts originally created common law marriage in the 1800s to legitimize cohabitation by a couple who sought to be married lawfully but lived so far from the county seat that travel by horseback to the courthouse to obtain a marriage license would not have been feasible.<sup>89</sup> Although Louisiana will recognize common law marriages from other states, the state has rejected this approach by first criminalizing cohabitation and then later refusing to affirmatively adopt common law marriage in its Civil Code.<sup>90</sup>

*b. The ALI's 2001 Chapter 6 Principles: A Revival of Common Law Marriage?*

In 2001, the American Law Institute (“ALI”) promulgated principles that suggested a new status similar to that of common law marriage.<sup>91</sup> The ALI principles presuppose that long-term stable cohabitation gives rise to the rights and responsibilities of marriage.<sup>92</sup> The purposes of the ALI’s Chapter 6 principles were to “enhance and safeguard the rights of . . . cohabitants” while “diminish[ing] the possibility that those rights may be reduced or eliminated by an agreement of the parties.”<sup>93</sup> Put simply, the promulgators of ALI’s principles believed that eligible unmarried couples should have the same economic rights as spouses at the time of relationship dissolution. This includes equitable distribution of property and debts acquired during the relationship and compensatory payments to replace alimony and spousal maintenance.<sup>94</sup> Although this solution was

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87. Reppy, *supra* note 63, at 1706. Common law marriage has four elements: (1) capacity to contract, (2) a present agreement to be married, (3) cohabitation for a period of time, and (4) holding out to the community as husband and wife. Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 712–13 (1996).

88. Bowman, *supra* note 87, at 715 (noting that only 11 states and the District of Columbia recognize common law marriage); *see also* Reppy, *supra* note 63, at 1705.

89. Reppy, *supra* note 63, at 1707.

90. *See infra* Part IV.B.

91. Westfall, *supra* note 83, at 1467.

92. Blumberg, *supra* note 64, at 1295.

93. Westfall, *supra* note 83, at 1468.

94. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 6.04 to 6.06, at 1043–50 (2002); *see also* KELSO, *supra* note 63, § 1:5, at 6.

unsuccessful, the ALI's Chapter 6 Principles established a need for the law to recognize unmarried cohabitation as an important family status.<sup>95</sup>

*c. Washington's Unique "Committed Intimate Relationship" Status*

Washington is the only community property state to have taken a status approach that views individuals involved in committed, intimate relationships as analogous to marital partners.<sup>96</sup> Washington recognizes unmarried cohabitation as a legal status, but only for the limited purpose of property distribution upon dissolution of the relationship.<sup>97</sup> The state's property distribution scheme for unmarried cohabitants is the same for married couples, except that the scheme only applies to property acquired during the relationship.<sup>98</sup> In *Olver v. Fowler*, the Washington Supreme Court created the concept of a "committed intimate relationship," which resembles common law marriage but adds the element of intertwined financial affairs.<sup>99</sup> Beginning with *In re Marriage of Lindsey*,<sup>100</sup> the Washington Supreme Court started blending its treatment of married couples and unmarried cohabitants by adopting a rule requiring the "just and equitable" disposition of cohabitants' property based on the nature of the relationship and property.<sup>101</sup> The court takes into consideration factors such as whether the cohabitation was continuous, the duration and purpose of the relationship, and the pooling of resources and services for joint projects.<sup>102</sup> The Washington method is an example of a creative solution to the inequity caused by disallowing property rights for unmarried cohabitants.

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95. AM. LAW INST., *supra* note 94, §§ 6.04 to 6.06, at 1043–50; *see also* KELSO, *supra* note 63, § 1:5, at 6.

96. *See* Olsen, *supra* note 83, at 1092–93.

97. Glover, *supra* note 18, at 757.

98. *Connell v. Francisco*, 898 P.2d 831, 836 (Wash. 1995) (en banc); *see also* Glover, *supra* note 18, at 757.

99. *Olver v. Fowler*, 126 P.3d 69, 72 (Wash. Ct. App. 2006); *see also* Goldberg, *supra* note 76, at 483.

100. 678 P.2d 328 (Wash. 1984) (en banc).

101. *Id.* at 331; *see also* Jennifer L. King, Comment, *First Comes Love, Then Comes Marriage? Applying Washington's Community Property Marriage Statutes to Cohabitation Relationships*, 20 SEATTLE U. L. REV. 543, 544–45 (1997).

102. *Foster v. Thilges*, 812 P.2d 523, 524–25 (Wash. Ct. App. 1991); *see also* Olsen, *supra* note 83, at 1092–93.

*d. New Zealand's Domestic Partnership Laws*

Other countries also employ a status approach to address property accrued during unmarried cohabitational relationships. In 2005, New Zealand created an institution of civil unions,<sup>103</sup> which granted cohabitants full property rights similar to those married couples enjoy by imposing a legal status upon those couples that live together.<sup>104</sup> The creation of this institution was prompted because one-fifth of all couples cohabiting in New Zealand were living in de facto marriages.<sup>105</sup> New Zealand created a statutory regime for unmarried cohabitants in de facto marriages by incorporating them into the Property (Relationships) Act of 1976.<sup>106</sup>

For a plaintiff to bring a claim, the de facto relationship must have lasted for at least three years.<sup>107</sup> If the relationship is shorter than the requisite three years, however, the plaintiff may still have a claim if (1) a child was born of the de facto relationship or the applicant has made a substantial contribution to the de facto relationship, and (2) the court is satisfied that failure to provide the order would result in serious injustice to one of the parties.<sup>108</sup> Upon separation, a de facto partner has three years to file an application for “divorce” with the court or his or her right to a claim expires.<sup>109</sup> Upon dissolution, the court first looks globally at all of the couple’s property and divides that property into “relationship” and “separate” property.<sup>110</sup> The court then divides the “relationship” property using the rules of equal property distribution.<sup>111</sup> New Zealand recognized an inequity was created where one party, typically the female partner, leaves the relationship in a greatly disadvantaged financial position in terms of both income and living standards.<sup>112</sup> As a solution to this problem, the New Zealand judiciary has the unique power to grant compensation in

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103. Aloni, *supra* note 8, at 600.

104. *Id.* at 605.

105. Atkin, *supra* note 83, at 303 n.1, 312 (noting that the Property (Relationships) Act of 1976 was formerly named the Marital Property Act).

106. *Id.* at 312.

107. Property (Relationships) Act 1976, § 2(E) (N.Z.); *see also* Aloni, *supra* note 8, at 602 n.147; Atkin, *supra* note 83, at 316.

108. Property (Relationships) Act 1976, § 14A(2) (N.Z.); *see also* Atkin, *supra* note 83, at 317.

109. Property (Relationships) Act 1976, § 24 (N.Z.); *see also* Atkin, *supra* note 73, at 319.

110. Atkin, *supra* note 83, at 320.

111. *Id.* at 320. The rules of equal property distribution in New Zealand are similar to that of Louisiana’s community property regime.

112. Property (Relationships) Act 1976, § 15 (N.Z.); *see also* Atkin, *supra* note 83, at 320.



cases of economic disparity.<sup>113</sup> New Zealand's imposition of a legal status shows that not only is the United States employing a status approach through common law marriage, the ALI's Chapter 6 Principles, and Washington's "committed intimate relationship," but also that other countries are seeing the same rise in cohabitation and responding to inequities caused through the use of a legal status.

## 2. *The Marvin Contractual Approach*

The second approach to finding property rights for unmarried cohabitants is the contract approach, which California pioneered and many other states have followed.<sup>114</sup> In 1976, the California Supreme Court decided the landmark case of *Marvin v. Marvin*, holding that express and implied contracts between cohabitants are valid.<sup>115</sup> In this case, the plaintiff quit her job to be a "homemaker" in return for the defendant's support.<sup>116</sup> The plaintiff alleged that she and the defendant had entered into an oral agreement to live together, combine their earnings, and share equally in any property accumulated during the relationship.<sup>117</sup> The California Supreme Court held that contracts between unmarried partners are enforceable unless those contracts are explicitly founded on sexual services similar to prostitution, which would violate public policy.<sup>118</sup>

In the absence of an express contract, the court can inquire into the parties' conduct to determine whether the court can find an implied contract or any other contractual remedy.<sup>119</sup> The *Marvin* court acknowledged that a couple living together should have the right to contract with each other regarding property to prevent the inequity that could arise where the female cohabitant was left destitute when the male cohabitant, who produced all the earnings, exited the relationship.<sup>120</sup> After *Marvin*, courts in other jurisdictions began to follow suit, using express or

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113. Property (Relationships) Act 1976, § 15 (N.Z.); see also Atkin, *supra* note 83, at 320.

114. Reppy, *supra* note 63, at 1686–87; see also *supra* Part II.A.1 (discussing why these express and implied contracts had been previously found unenforceable).

115. *Marvin v. Marvin*, 557 P.2d 106, 110 (Cal. 1976) (en banc).

116. *Id.*

117. *Id.*

118. *Id.* at 122–23.

119. *Id.* at 123.

120. Goldberg, *supra* note 74, at 5–6. This ruling only concerns the legal obligation one nonmarital partner may have against the other person at the dissolution of the relationship by death or separation, and does not concern claims against the public or the government. Blumberg, *supra* note 64, at 1273.

implied contract remedies to address financial disputes between unmarried cohabitants.<sup>121</sup> Most other American community property jurisdictions, such as Arizona, California, Nevada, New Mexico, and Wisconsin, use the *Marvin* approach to deal with the allocation of unmarried couples' property on a contractual basis.<sup>122</sup> Other than Washington, which employs the status approach, Louisiana is the only community property jurisdiction that prohibits contractual relationships between unmarried partners.<sup>123</sup>

### 3. France's Blending of the Intermediate Status and Contract Approach

France has chosen to blend both the status and contract approaches to create a compromise solution.<sup>124</sup> French cohabitants can register for a *Partie Civile de Solidarite*, or PACS, which is an intermediate status that "is neither a legal union nor a simple property contract. It is neither public nor private. It is neither for couples nor for pairs of friends. It is neither a legal recognition of . . . couples nor is it non-recognition."<sup>125</sup> Instead, PACS is popular because it is a status that allows for a simple form of partnership between two adults while providing the couple with a legal status.<sup>126</sup> French law defines cohabitation as "a de facto stable and continuous relationship between two persons of different sexes or of the same sex living together as a couple."<sup>127</sup> Although originally drafted to create domestic partnership laws for homosexuals, this legislation also allows for heterosexual unions<sup>128</sup> and has been widely successful among

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121. CHARLES P. KINDREGAN, JR., MAUREEN MCBRIEN & PATRICIA A. KINDREGAN, FAMILY LAW AND PRACTICE § 24:1, in 2 MASSACHUSETTS PRACTICE SERIES 1-4 (4th ed. 2013).

122. See, e.g., *Carroll v. Lee*, 712 P.2d 923 (Ariz. 1986) (en banc); *Marvin*, 557 P.2d 106; *Hay v. Hay*, 678 P.2d 672 (Nev. 1984); *Merrill v. Davis*, 673 P.2d 1285 (N.M. 1983); *Watts v. Watts*, 405 N.W.2d 303 (Wis. 1987); see also Olsen, *supra* note 83, at 1096.

123. See Olsen, *supra* note 83, at 1097.

124. Claude Martin & Irène Théry, *The PACS and Marriage and Cohabitation in France*, 15 INT'L J.L. POL'Y & FAM. 135, 150 (2001).

125. Aloni, *supra* note 8, at 634 (quoting Martin & Théry, *supra* note 124, at 150).

126. See Joëlle Godard, *PACS Seven Years On: Is It Moving Towards Marriage?*, 21 INT'L J.L. POL'Y & FAM. 310, 312 (2007); see also CODE CIVIL [C. CIV.] art. 515-1 (Fr.).

127. Godard, *supra* note 126, at 312 ("The civil pact of solidarity is a contract binding two adults of different sexes or of the same sex, in order to organize their common life."); see also C. CIV. art. 515-8 (Fr.).

128. Aloni, *supra* note 8, at 633-34 ("In France, the demand for legal recognition of same-sex partnerships was the catalyst for the enactment of the

the heterosexual population in France. So far, millions of couples have chosen to register for PACS.<sup>129</sup>

To form a PACS union, the couple registers in the presence of two witnesses at a city hall without any rituals,<sup>130</sup> and then the Clerk of the Court of First Instance records the union.<sup>131</sup> Contract law governs PACS unions, but the couple may convert a PACS union to marriage at any time.<sup>132</sup> The marriage of either partner, mutual agreement between the partners, or unilateral request of one party after three months will terminate the PACS union.<sup>133</sup> French law establishes mutual obligations to live together and provide assistance, but maintenance obligations are extinguished after dissolution.<sup>134</sup> Whether through status, contract, or France's unique blending of the two approaches, jurisdictions around the country and the globe have recognized the need to change outdated laws and provide unmarried cohabitants with property rights.

### III. PARAMOURS, CONCUBINES, AND "ILLICIT CONCUBINAGE" IN LOUISIANA

In the midst of a barrage of solutions that other jurisdictions from around the country and the world provide, Louisiana remains obstinate with antiquated laws. In 1983, the Louisiana Fifth Circuit Court of Appeals decided *Schwegmann v. Schwegmann*,<sup>135</sup> holding that contracts between unmarried cohabitants are against public policy, and this case remains Louisiana's unanimously cited authority regarding unmarried cohabitation.<sup>136</sup>

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PACS. . . . At the same time, the French legislature genuinely wished to respond to the . . . reality of cohabiting opposite sex couples.”)

129. *Id.* at 632–33.

130. *Id.* at 636.

131. Godard, *supra* note 126, at 313.

132. Aloni, *supra* note 8, at 636; *see also* Godard, *supra* note 126, at 313.

133. Aloni, *supra* note 8, at 636.

134. Godard, *supra* note 126, at 318; *see also* C. CIV. art. 515-4 (Fr.). These obligations are similar to the Louisiana provisions on spousal support. *See* LA. CIV. CODE art. 115 (2015).

135. *Schwegmann v. Schwegmann*, 441 So. 2d 316, 326 (La. Ct. App. 1983).

136. The Louisiana Supreme Court denied writ on the Fifth Circuit's decision in *Schwegmann* on January 6, 1984. *Id.* at 316. *Schwegmann*, however, remains Louisiana's authority regarding rights between unmarried cohabitants in intimate relationships. For the most recent cases citing *Schwegmann* regarding these couples' rights, *see In re Kinkade*, 707 F.3d 546, 549 (5th Cir. 2013) and *McCain v. Cassidy*, 68 So. 3d 631, 634 (La. Ct. App. 2011). Even without specifically citing *Schwegmann*, circuits will also frequently follow the prohibition of property

Louisiana retains a strict public policy that unmarried cohabitation is “concubinage,” which is immoral and should not be equal to the institution of marriage.<sup>137</sup> This public policy, however, is at odds with modern society’s acceptance of cohabitation.<sup>138</sup> Further, the policy of depriving cohabitants of property rights has not significantly furthered the state’s goal of promoting marriage. Therefore, Louisiana must change its archaic public policy regarding unmarried cohabitation.

#### *A. Louisiana’s Harsh Treatment of Cohabitation*

Although many other jurisdictions have provided viable solutions to the injustice caused by ignoring unmarried cohabitants, Louisiana has continued to ignore this inequity. Louisiana is the only community property state that does not recognize an avenue of recovery for property acquired during the time the couple lived together based on express or implied agreements.<sup>139</sup> The practice of denying rights to cohabitants is rooted in slavery,<sup>140</sup> as Louisiana refused to recognize relationships between whites and African Americans to discourage liaisons between white men and slaves.<sup>141</sup> This policy required all unions between slaves to be informal marriages,<sup>142</sup> and therefore the impact of not recognizing property rights of cohabitants fell heavily upon African-Americans.<sup>143</sup> As the law’s racist origin behind a law is no longer legally acceptable, other reasons emerged for invalidating cohabitants’ relationships, and these reasons are currently in use.

Louisiana courts reason that contracts resembling community property or a marriage between a man and a woman who live together are immoral and destructive to the lawful institution of marriage.<sup>144</sup> Although the rest of the country simply uses the term “unmarried cohabitation,” Louisiana

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rights for unmarried cohabitants. *See* Succession of Rhodes, 918 So. 2d 626, 627–28 (La. Ct. App. 2005).

137. *Schwegmann*, 441 So. 2d at 326.

138. *See supra* Part I.A.

139. *See* Olsen, *supra* note 83, at 1097; *see generally* *Schwegmann*, 441 So. 2d 316 (holding that an agreement with a concubine is meretricious).

140. Bowman, *supra* note 87, at 744–45; *see also* Reppy, *supra* note 63, at 1679–80; Catherine Augusta Mills, Comment, *Implications of the Repeal of Louisiana Civil Code Article 1481*, 48 LA. L. REV. 1201, 1216 (1988).

141. Bowman, *supra* note 87, at 744–45; *see also* Reppy, *supra* note 63, at 1679–80; Mills, *supra* note 140, at 1216.

142. Bowman, *supra* note 87, at 737–38.

143. *Id.* at 738.

144. *Schwegmann*, 441 So. 2d at 326.

uses the archaic term “concubinage.”<sup>145</sup> The Louisiana Supreme Court defines concubinage as “a relationship of sexual content in which man and woman live together as husband and wife in a state approximating marriage.”<sup>146</sup> Even though the legislature deleted the word “concubinage” from the Louisiana Civil Code in 1987, the courts still refer to cohabitation using this terminology.<sup>147</sup>

Louisiana’s courts have clearly established that express or implied contracts between sexual partners are null if incidental to the cohabitation.<sup>148</sup> Louisiana has refused, since the 1850s, to recognize agreements between couples that choose not to marry.<sup>149</sup> The Louisiana Supreme Court has reasoned that sanctioning concubinage would be “repugnant to good morals and social order,”<sup>150</sup> and that a taint from this type of illicit relationship would mortally affect the entire contract.<sup>151</sup> If the relationship, motive, and purpose of contracting parties are that of

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145. *Id.* at 320.

146. Succession of Bacot, 502 So. 2d 1118, 1129 (La. Ct. App. 1987) (citing Succession of Filhiol, 44 So. 843 (La. 1907)); *see also* Heatwole v. Stansbury, 33 So. 2d 196 (La. 1947) (holding that a man and woman living in concubinage were unable to establish a community of acquets and gains under Louisiana Civil Code article 2328).

147. Mills, *supra* note 140, at 1202; State v. Davis, No. 2015-KA-0456, 2015 WL 5603601, at \*5 (La. Ct. App. Sept. 23, 2015) (discussing the concept of “open concubinage”).

148. *See* Spaht, *supra* note 77, at 1551; *but see* ANDREA CARROLL & RICHARD D. MORENO, MATRIMONIAL REGIMES § 8:3, *in* 16 LOUISIANA CIVIL LAW TREATISE 836 (4th ed. 2013) (“If there is a valid cause, such as a business purpose, for the partnership, the agreement will stand even though the partners are lovers.”); Mills, *supra* note 140, at 1201 n.4, n.6 (noting that although in theory, business contracts between unmarried sexual partners are allowed, the test the court developed precluded recovery in most cases and that concubinage is usually described as “illicit, immoral, or meretricious”); Goldberg, *supra* note 74, at 6 (noting that Louisiana retains the term concubinage and has strict requirements to establish a share in business property); Rochelle v. Hezeau, 15 La. Ann. 306 (1860); *Schwegmann*, 441 So. 2d at 325; *Broadway v. Broadway*, 417 So. 2d 1272, 1276 (La. Ct. App. 1982).

149. *Morgan v. Yarborough*, 5 La. Ann. 316, 319 (850).

150. *Rochelle*, 15 La. Ann. at 307.

151. *Simpson v. Normand*, 26 So. 266, 267 (La. 1899); *Foshee v. Simkin*, 174 So. 2d 915, 920 (La. Ct. App. 1965).

concubine<sup>152</sup> and paramour,<sup>153</sup> the court will not uphold the contract.<sup>154</sup> If a concubine renders services that are “intertwined with her illegal cohabitation,” the court will find these services are indistinguishable from the relationship and will not allow the concubine to seek recompense.<sup>155</sup>

Following this line of reasoning, the Fifth Circuit decided the seminal case regarding unmarried cohabitation in modern-day Louisiana. In *Schwegmann*,<sup>156</sup> the court held that because the parties created a legal partnership based on a sexual relationship, the alleged agreement was meretricious and therefore void.<sup>157</sup> The *Schwegmann* court ruled that because the oral agreement was between a paramour and a concubine engaged in sexual relations, the contract was invalid.<sup>158</sup> The plaintiff, Ms. Blackledge, had no rights to the property through express or implied contract, equitable liens, or quantum meruit.<sup>159</sup>

In *Schwegmann*, the Fifth Circuit reasoned that the parties had an opportunity to marry and gain the resulting property rights, but they chose not to marry.<sup>160</sup> The court reasoned that to find an implied contract between the couple would require characterizing an illicit relationship as a marriage.<sup>161</sup> The court refused plaintiff’s claim that society’s values had changed so drastically as to create a need to protect cohabitants’ property rights.<sup>162</sup> The court explained that Louisiana has a valid reason to discourage cohabitational relationships; these relationships erode the family, which the court asserted was the cornerstone of society.<sup>163</sup> The court reasoned that equating concubinage with marriage would encourage an illegitimate relationship over the legitimate institution of marriage.<sup>164</sup> Because the cohabitants voluntarily chose not to marry, the court reasoned, they should not have expected to receive the civil effects of marriage.<sup>165</sup>

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152. A concubine is a woman who “occupies the position, performs the duties, and assumes the responsibilities of a wife, without the title and privileges flowing from a legal marriage.” *Schwegmann*, 441 So. 2d at 323.

153. “Louisiana terminology for a man with whom a concubine lives is a ‘paramour.’” *Id.*

154. *Sparrow v. Sparrow*, 93 So. 2d 232, 234 (La. 1957).

155. *Guerin v. Bonaventure*, 212 So. 2d 459, 465 (La. Ct. App. 1968).

156. 441 So. 2d 316.

157. *Id.* at 322.

158. *Id.* at 323–26.

159. *Id.*

160. *Id.* at 322.

161. *Id.* at 323–24.

162. *Id.*

163. *Id.*

164. *Id.* at 326.

165. *Id.*

In 2005, the Louisiana Second Circuit Court of Appeals followed *Schwegmann* by holding that the contract in question was unenforceable, because its true cause was love, affection, and sex.<sup>166</sup> The most recent Louisiana appellate case citing *Schwegmann* reasoned that if the parties' intimate relationship was consideration for work performed, then the contract would be null.<sup>167</sup> Louisiana courts have continuously upheld the principle that providing any of the benefits of marriage to a "mere cohabitant" will depreciate the lawful institution of marriage.<sup>168</sup> In contrast to the modern American view that cohabitation is acceptable, under current Louisiana law, courts will not permit parties who make a pooling-of-earnings contract to separate the contract from the "illicit sexual union."<sup>169</sup> Louisiana's position has often led to unjust results concerning cohabitants' monetary and property rights at the end of such relationships.<sup>170</sup>

*B. The Eroded Rationale of Louisiana's Negative Status Approach*

Because Louisiana courts still retain a firm grip on the negative status approach, inequity persists throughout the state.<sup>171</sup> In Louisiana, cohabitation is seen as morally repugnant, and contracts between unmarried cohabitants—or concubine and paramour, as Louisiana refers to these couples—are void.<sup>172</sup> Therefore, marriage is the only option with which to confer property rights from one partner to the other.<sup>173</sup> Society's views have changed so dramatically, however, that Louisiana's public policy is now outdated, and penalizing cohabitants is not an effective means of promoting marriage.

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166. Succession of Rhodes, 918 So. 2d 626, 630 (La. Ct. App. 2005).

167. McCain v. Cassidy, 68 So. 3d 631, 634 (La. Ct. App. 2011).

168. Reppy, *supra* note 63, at 1680.

169. *Id.* at 1685.

170. Mills, *supra* note 140, at 1201–02.

171. After the gruesome murder of her husband, a wife was denied benefits because she was married six days less than the Veterans' Affairs' ("V.A.") requirement of one year. Entitlement to Recognition of the Appellant as the Surviving Spouse of the Veteran for the Purpose of Establishing Entitlement to (VA) Death Benefits, 2013 WL 2899095, at \*5 (Bd. Veterans App., Dep't Veterans' Affairs Apr. 2, 2013) [hereinafter V.A. Hearing]. The Board reasoned that if Louisiana would have recognized cohabitation as a lawful marriage, the widow may have been eligible to receive benefits. *Id.* In 2013, however, the V.A. cited *Schwegmann* in its denial of compensation to a Shreveport, Louisiana resident. *Id.* at \*3.

172. See, e.g., Sparrow v. Sparrow, 93 So. 2d 232, 234 (La. 1957).

173. Schwegmann v. Schwegmann, 441 So. 2d 316 (La. Ct. App. 1983).

1. *Public Policy: The Alleged Immorality of Concubinage*

Louisiana courts have established that most onerous contracts between unmarried cohabitants are against public policy because these contracts are immoral.<sup>174</sup> The Louisiana Civil Code forbids contracts if the cause of the agreement is contrary to public policy.<sup>175</sup> Therefore, establishing whether these contracts are actually against public policy is vital. Louisiana's law imposes, under the color of public policy, a sense of morality that not everyone shares.<sup>176</sup> The authority for the conclusion in *Schwegmann* that a contract between unmarried persons would violate the public policy of "good morals" is weak, at best.<sup>177</sup> The court implicitly compared cohabitation to prostitution, which is quite different from a modern couple living together and combining earnings.<sup>178</sup> In *Schwegmann*, the court rejected the plaintiff's suggestion to allow contracts for cohabitants based on the rising social acceptance of these types of relationships "at this time."<sup>179</sup> Because this case is now 30 years old and is still being applied in a vastly different moral atmosphere, the time has finally come for Louisiana to overturn this decision.

Even though Louisiana courts cite morality as the basis for their disdain of cohabitation, their reasoning is misguided and can cause more harm than good. From a general public policy perspective, the legislature should not base laws solely on morality considerations. This viewpoint is demonstrated in Justice O'Connor's concurrence in *Lawrence v. Texas*,<sup>180</sup> where she stated that under the Equal Protection Clause of the Fourteenth Amendment, moral considerations alone do not provide a rational basis for laws that discriminate between differing groups of people.<sup>181</sup> Further, for the courts to say that many of the state's citizens are immoral as a matter of law is problematic. Even if one finds morality to be a sufficient basis for a law, Louisiana's current law is discriminatory because this law places women at a disadvantage.<sup>182</sup> Most of

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174. Mills, *supra* note 140, at 1201.

175. LA. CIV. CODE art. 1968 (2015) ("The cause of an obligation is unlawful when the enforcement of the obligation would produce a result prohibited by law or against public policy."); *see also* CARROLL & MORENO, *supra* note 148, § 8:3, at 836.

176. Mills, *supra* note 140, at 1208.

177. CARROLL & MORENO, *supra* note 148, § 8:3, at 835.

178. *Id.*

179. *Schwegmann v. Schwegmann*, 441 So. 2d 316, 326 (La. Ct. App. 1983).

180. *Lawrence v. Texas*, 539 U.S. 558, 582 (2003) (O'Connor, J., concurring).

181. *Id.*

182. *See Rochelle v. Hezeau*, 15 La. Ann. 306, 306 (La. 1860) (holding that mother's heir could not recover undivided half of all property between mother and her paramour); *Simpson v. Normand*, 26 So. 266, 270 (La. 1899) (holding that because of her status as concubine, the plaintiff had no remedy); *Succession of*



the cohabitation cases involve a woman dependent upon a man for support.<sup>183</sup> Leaving these women destitute by allowing the man to renege on his promise to support and share property with her is unjust. Another unjust situation can arise when a working woman who has contributed financially to the property acquired during the relationship is left with diminished assets and no means of relief.<sup>184</sup>

Society's values have changed so considerably in the last 30 years that the public generally no longer views cohabitation as unequivocally illicit. Social acceptance of unmarried cohabitation continues to grow today,<sup>185</sup> and courts should not impose a standard based on morals that the public has largely abandoned.<sup>186</sup> The country has also undergone a sexual revolution, which has disintegrated the main grounds for the earlier disapproval of cohabitation and helped to remove the stigma attached to

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Filhiol, 44 So. 843, 847 (La. 1907) (noting that the bachelor's concubine could not recover); Sparrow v. Sparrow, 93 So. 2d 232, 234 (La. 1957) (holding that there could be no valid partnership between the decedent and plaintiff because of their concubinage); Foshee v. Simkin, 174 So. 2d 915, 919 (La. Ct. App. 1965) (noting that the woman could not recover from her partnership because it was one of concubinage); Guerin v. Bonaventure, 212 So. 2d 459, 461 (La. Ct. App. 1968) (holding that plaintiff's services in business were so intertwined with her cohabitation that she could not recover); Broadway v. Broadway, 417 So. 2d 1272, 1276 (La. Ct. App. 1982) (stating that a concubine will only be allowed to recover for her part of a business if she shows by strict and conclusive proof that her capital and industry were obtained independent of the concubinage); Schwegmann, 441 So. 2d at 325 (holding that plaintiff was not allowed to recover due to concubinage being unlawful); Succession of Rhodes, 918 So. 2d 626, 630 (La. Ct. App. 2005) (holding that the true cause of the contract was sex, so plaintiff could not recover); V.A. Hearing, *supra* note 171, at \*5 (noting that if Louisiana allowed common law marriage, the widow would have been able to recover after her husband was brutally murdered).

183. See *Rochelle*, 15 La. Ann. at 306; *Simpson*, 26 So. at 270; *Succession of Filhiol*, 44 So. at 847; *Sparrow*, 93 So. 2d at 234; *Foshee*, 174 So. 2d at 919; *Guerin*, 212 So. 2d at 461; *Broadway*, 417 So. 2d at 1276; *Schwegmann*, 441 So. 2d at 325; *Succession of Rhodes*, 918 So. 2d at 630; V.A. Hearing, *supra* note 171, at \*5.

184. *Vespa & Painter*, *supra* note 43, at 986.

185. *KELSO*, *supra* note 63, § 1:5, at 6.

186. *Marvin v. Marvin*, 557 P.2d 106, 123 (Cal. 1976) (en banc). The social view of unmarried partners is drastically and continuously losing its moral disapproval. In 1980, the New York Appellate Court refused to call unmarried cohabitation "meretricious" because to do so would equate this sort of relationship with prostitution, which did not make sense as it was too judgmental and did not appropriately define cohabitation. *Brigner*, *supra* note 19, § 2:66 (quoting *Morone v. Morone*, 50 N.Y.2d 481, 486 n.2 (1980)).

cohabitation.<sup>187</sup> As cohabitation's worldwide social acceptance continues to increase to the point where over 7.6 million romantic couples are cohabiting, Louisiana's reasoning that condemns individuals' choices to cohabit grows more dubious.<sup>188</sup> Louisiana's civil law was born out of the spirit of mutual respect and cooperation for the common good.<sup>189</sup> Louisiana ought to transform the law and continue this heritage of acting for the common good by protecting the person in the weaker bargaining position. The legislature should respond to the expectations of society and revoke the outdated laws condemning concubinage.<sup>190</sup> Overall, Louisiana's public policy is at odds with the rising number of cohabitants today and society's transformed set of values.

## 2. *Guardians of the Sanctity of Marriage*

Louisiana justifies forbidding contracts and property rights for unmarried cohabitants because the protection of the institution of marriage is a significant state interest. The state fears that allowing cohabitants rights similar to the rights that arise under marriage would degrade the institution altogether.<sup>191</sup> This notion of marriage as a "state interest" is peculiar when one considers the history of the institution of marriage, which started as a private custom between families, rather than one involving the state.<sup>192</sup> The marriage contract used to only consist of an agreement between parties, cohabitation, and community recognition of their status.<sup>193</sup> The requirement of a formal marriage is relatively recent in Anglo-American law.<sup>194</sup> Therefore, this requirement casts doubt on this basis on which Louisiana continues to disallow contracts between cohabitants.

Further, refusal to acknowledge these relationships does not fulfill the state's purpose of furthering the institution of marriage.<sup>195</sup> Louisiana's public policy of discouraging concubinage to promote the institution of marriage is the primary obstacle to allowing property rights for unmarried

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187. Smock, *supra* note 1, at 5.

188. Blumberg, *supra* note 64, at 1296; *see also* Aloni, *supra* note 8, at 580; Mather & Lavery, *supra* note 20; Tavernise, *supra* note 20, A22.

189. Robert Anthony Pascal, *Of the Civil Code and Us*, 59 LA. L. REV. 301, 310 (1998).

190. Reppy, *supra* note 63, at 1685.

191. *Schwegmann v. Schwegmann*, 441 So. 2d 316, 326 (La. Ct. App. 1983).

192. Bowman, *supra* note 87, at 718.

193. *Id.*

194. *Id.* at 719 (noting that informal marriage existed in England until 1753).

195. Mills, *supra* note 140, at 1218.

cohabitants.<sup>196</sup> A slight shift in public policy away from the condemnation of concubinage and towards the promotion of marriage, however, makes this impediment unreasonable.<sup>197</sup> In fact, cohabitation can actually help fulfill the state's goal of promoting marriage. Cohabitation assists marriage by "laying the groundwork" for future wealth accumulation through the experience of managing a household budget.<sup>198</sup> Studies show that those couples who cohabit before marrying are likely to experience a wealth premium that is twice as large as those who choose to marry without cohabiting first.<sup>199</sup>

The state asserts it has an interest in promoting marriage and purports to protect this interest by denying sharing agreements in unstable relationships like cohabitation.<sup>200</sup> Penalizing cohabitants by dismissing their contract claims has not resulted in a decrease in cohabiting couples or an increase in the number of marriages.<sup>201</sup> The state justifies this agenda with the argument that stable relationships produce children and people who are less likely to be dependent on state aid.<sup>202</sup> For the state to coerce heterosexual cohabitants into marriage, however, is no longer rational.<sup>203</sup> Marriage has transformed from a long-term relationship to a short-term one, usually coupled with separate bank accounts, which makes past marital ideals increasingly irrelevant.<sup>204</sup>

Historical notions of marriage involved antiquated gender roles—men as the breadwinners and women as homemakers.<sup>205</sup> Marriage used to be necessary for women because the institution symbolized the traditional view of family life, legitimized children, and was sanctioned by religion.<sup>206</sup> In contrast, the public conventionally viewed unmarried cohabitation as sinful.<sup>207</sup> The increase in cohabitation, however, fails to detract from marriage, and cohabitation's widespread acceptance makes viewing the partners' choice not to marry as an attack on the institution itself implausible.<sup>208</sup> Rather,

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196. *Id.*

197. *Id.* at 1211.

198. Vespa & Painter, *supra* note 43, at 998.

199. *Id.*

200. CARROLL & MORENO, *supra* note 148, § 8:3, at 839.

201. Mills, *supra* note 140, at 1218; *see also* Kathryn Venturatos Lorio, *Concubinage and Its Alternatives: A Proposal for a More Perfect Union*, 26 LOY. L. REV. 1, 27 (1980).

202. CARROLL & MORENO, *supra* note 148, § 8:3, at 839.

203. Mills, *supra* note 140, at 1211–12.

204. Goldberg, *supra* note 76, at 538.

205. Lichter et al., *supra* note 45, at 224.

206. King, *supra* note 101, at 555.

207. *Id.*; *see supra* Part II.A.

208. Blumberg, *supra* note 64, at 1296.

couples can choose cohabitation, at least in the short term, without consciously denying marriage as either an alternative or likely outcome.<sup>209</sup>

Many fear rights for cohabitants would weaken the state's positive message about marriage in its laws and cause its citizens to view cohabitation as a more attractive choice than marriage.<sup>210</sup> A surprising finding, however, is that although marriage rates have declined, desire to marry has not.<sup>211</sup> Instead, most cohabitants express a desire to marry, but they cannot marry because they face obstacles to marriage, such as poverty and fear of conforming to stereotypical gender roles.<sup>212</sup> Therefore, the state's current public policy is not actually supported by results and should be changed.

#### IV. UNMASKING THE SEXIST EFFECTS OF LOUISIANA'S LAWS REGARDING CONCUBINAGE

In spite of Louisiana's purported reasoning, the true reason for the state's prohibition of property rights between unmarried romantic partners must be addressed. Clearly, a solution is warranted because the bases for Louisiana's refusal to acknowledge contracts between cohabitants are antiquated, lack foundation in today's society, and do not further the state's goal of promoting marriage. Louisiana's actions over the years and its refusal to change seem suspiciously at odds with modern values. Further, these actions are in opposition to changes to the Civil Code over the years and jurisprudence regarding issues other than property rights that involve unmarried cohabitants. A contract-based solution is the best fit for the state through a legislative contravention of *Schwegmann*. This new legislation would include a presumption of an equal sharing agreement between couples to aid the courts in unraveling property disputes.

##### A. *The Effects of Louisiana's Laws Regarding Concubinage*

No justifiable reason appears to exist for Louisiana's clinging to *Schwegmann*'s prohibition on unmarried cohabitants' contracts. Most of Louisiana's purported reasoning for its continued prohibitions is misguided and results in disproportionately sexist effects.<sup>213</sup> One can see these effects in Louisiana's jurisprudence, which involves courts denying women property rights and therefore leaving these women in a poorer economic position. One can also see sexist effects that result from the use

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209. Clarkberg, *supra* note 2, at 963.  
210. Mahoney, *supra* note 12, at 174–75.  
211. Clarkberg, *supra* note 2, at 946–47.  
212. *Id.* at 947; *see supra* Part I.B.  
213. *See supra* Part III.B.

of the word “concubine” in jurisprudence that is still used to refer to women.<sup>214</sup> These actions provide a vehicle for Louisiana to discriminate against women across the economic spectrum by refusing to afford protection. As discrimination and actions with sexist effects are certainly not valid bases for a law, Louisiana must change its law on cohabitation and so called “concubinage.”

Defunct reasoning in the jurisprudence surrounding cohabitation leaves much room for speculation as to why Louisiana continues to refuse change. One possible reason the legislature has not changed the law is that the courts and the legislature want to avoid the difficult issues involved in the division of cohabitants’ property.<sup>215</sup> Often contracts between cohabitants are oral, uncertain, and hard to prove without the benefits of the community property regime’s rules and presumptions to guide the partition of property.<sup>216</sup> But this reason for denying reform is unfounded because legislative action would provide the needed certainty for the courts to untangle cohabitants’ assets.<sup>217</sup>

The Louisiana Legislature and judiciary are causing sexist and discriminatory effects, which is perpetuated by Louisiana’s constant refusal to change. In the past, while the rest of the country allowed common law marriages, Louisiana called women concubines and punished them by depriving them of any property rights.<sup>218</sup> Then, when the states that had repealed common law marriage decided to allow contractual remedies, Louisiana still chose to punish women and continues to do so today.

Implications of sexism are apparent in the case law, which often involves a woman who is left in a worse condition financially upon dissolution of the relationship.<sup>219</sup> Interestingly, a man has rarely brought a

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214. See *Rochelle v. Hezeau*, 15 La. Ann. 306, 307 (1860); *Simpson v. Normand*, 26 So. 266, 1362 (La. 1899); *Succession of Filhiol*, 44 So. 843, 846 (La. 1907); *Sparrow v. Sparrow*, 93 So. 2d 232, 234 (La. 1957); *Foshee v. Simkin*, 174 So. 2d 915, 918 (La. Ct. App. 1965); *Guerin v. Bonaventure*, 212 So. 2d 459, 464 (La. Ct. App. 1968); *Broadway v. Broadway*, 417 So. 2d 1272, 1276 (La. Ct. App. 1982) (explaining that a concubine must prove by “strict and conclusive” proof that she is not prohibited from co-ownership); *Schwegmann v. Schwegmann*, 441 So. 2d 316, 325 (La. Ct. App. 1983); *Succession of Bacot*, 502 So. 2d 1118, 1130 (La. Ct. App. 1987) (finding that a homosexual man cannot be a concubine and only a woman may be considered a concubine); *Succession of Rhodes*, 918 So. 2d 626, 629 (La. Ct. App. 2005).

215. CARROLL & MORENO, *supra* note 148, § 8:3, at 838–39.

216. *Id.*

217. *Id.*

218. Bowman, *supra* note 87, at 724; see *infra* Part IV.B.

219. See *Rochelle*, 15 La. Ann. at 307; *Simpson*, 26 So. at 1362; *Succession of Filhiol*, 44 So. at 846; *Sparrow*, 93 So. 2d at 234; *Foshee*, 174 So. 2d at 918; *Guerin*, 212 So. 2d at 464; *Broadway*, 417 So. 2d at 1276; *Schwegmann*, 441 So. 2d at 325; *Succession of Rhodes*, 918 So. 2d at 629; V.A. Hearing, *supra* note 171,

claim seeking financial help after dissolution of the relationship,<sup>220</sup> which is indicative of the real-life inequities that frequently occur.<sup>221</sup> Women are generally the parties who seek spousal and child support, although men often lack the desire to pay for that support.<sup>222</sup> Women are more frequently economically dependent upon men than men are on women.<sup>223</sup> Property is more often titled in the man's name.<sup>224</sup> In other states, the few men who have brought cases in this area of the law have been criminal defendants alleging common law marriage to either strike the incriminating testimony of his "wife" or provide a defense in statutory rape cases.<sup>225</sup> Ironically, even though under current Louisiana law courts award no benefits to cohabiting women, cohabitation is taken into account when the effect is punitive to women.<sup>226</sup> Although women cannot win a successful claim for alimony for cohabiting "in the manner of married persons," they can lose alimony for the very same practice.<sup>227</sup>

The archaic language used to describe women in the jurisprudence further demonstrates sexism. The effect of the degrading description of women who choose cohabitation over marriage as "concubines" might possibly be negated if the cohabiting man had a similar title, but instead the courts describe him as a "paramour."<sup>228</sup> Evidence of unequal treatment of the sexes is seen in the court opinions that discuss and condemn the wrongdoing of the "concubine" but pay little attention to the actions of the "paramour."

Another illustration of sexism in Louisiana's law regarding unmarried cohabitants is evident in sociological research. Data shows that women are the ones pushing for cohabitation, and by forcing marriage as the only avenue to confer property rights between partners, the law is

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at \*5; *but see Succession of Bacot*, 502 So. 2d at 1130 (finding that a homosexual man cannot be a concubine and only a woman may be considered a concubine).

220. Bowman, *supra* note 87, at 711.

221. *Id.* at 755.

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.* at 754–55.

226. *See infra* Part IV.B; *see also* Bowman, *supra* note 87, at 760 (noting that the effects of common law marriage are similar to that of Louisiana concubinage).

227. LA. CIV. CODE art. 115 (2015); *see infra* Part IV.B (arguing that the legislature changed the terminology, but the substance and effect of the article is still the same); Bowman, *supra* note 87, at 760.

228. Schwegmann v. Schwegmann, 441 So. 2d 316, 323 (La. Ct. App. 1983) ("Louisiana terminology for the man with whom a concubine lives is 'paramour.'"). Although there is a history of cases built around the term "concubinage" focusing on the fault of the "concubine," the definition of paramour in this context is simply the man who the woman lives with, thereby placing the blame on the "concubine."

discriminating against those who prefer cohabitation—poor women and career women.<sup>229</sup> This discriminatory effect has even been pointed out to the courts.<sup>230</sup> One appellant noted that the courts should dissipate the stigma of “concubine” due to the absurd results created.<sup>231</sup> This appellant also reasoned that such rulings under Louisiana law would be unfair to single, working women.<sup>232</sup> A related issue is that even though 90% of cohabiting women expect to and want to marry,<sup>233</sup> poor or disadvantaged couples face significant barriers or obstacles to marriage.<sup>234</sup> Refusing to provide protection for unmarried cohabitants causes the law to discriminate against those who cannot, or do not, get married.

Women also need protection under Louisiana’s laws because of the threat of unequal bargaining power. Money is power in a relationship, and shared power is often the crux of successful intimate relationships.<sup>235</sup> This fact is supported by findings that a woman’s income will matter less than a man’s income if she does not spend her money on resources that translate into power.<sup>236</sup> Women benefit more than men from spending money on household items that are often associated with “woman’s work.”<sup>237</sup> Women are more likely than men to spend money on resources that will benefit the family and children, in stark contrast to men, who spend more money on indulgence items.<sup>238</sup> One study found that women are responsible for almost all payments for consumables, such as clothing, food, child care, school-related costs, and medical and dental expenditures.<sup>239</sup> Meanwhile, men are more likely to spend most of their

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229. *See supra* Part I.B.

230. Reply Brief of Judy Harrison, Intervenor/Appellant at 3, Succession of Rhodes, 918 So. 2d 626 (La. Ct. App. 2005) (No. 40,469).

231. *Id.*

232. *Id.* at 3–4.

233. Lichter et al., *supra* note 45, at 224.

234. Clarkberg, *supra* note 2, at 958.

235. Elizabeth R. Carter, *The Illusion of Equality: The Failure of the Community Property Reform to Achieve Management Equality*, 48 IND. L. REV. 853, 858 (2015).

236. Judith Treas & Esther de Ruijter, *Earnings and Expenditures on Household Services in Married and Cohabiting Unions*, 70 J. MARRIAGE & FAM. 796, 797 (2008).

237. *Id.*

238. Nancy Burns et al., *The Public Consequences of Private Inequality: Family Life and Citizen Participation*, 91 AM. POL. SCI. REV. 373, 377 (1997); Charlott Nyman, *Gender Equality in “the Most Equal Country in the World”?* *Money and Marriage in Sweden*, 47 SOC. REV. 767, 787 (1999); *see also* Carter, *supra* note 235, at 859.

239. Burns et al., *supra* note 238, at 377; Nyman, *supra* note 238, at 787; *see also* Carter, *supra* note 235, at 859.

money on alcohol, motor vehicles, vacations, and gambling.<sup>240</sup> Therefore, women's expenditures may be less consequential to household bargaining, or power.<sup>241</sup> Women's income may be discounted more in cohabitations if their bargaining power, undercut by societal gender inequalities, is further undermined by other factors. These factors include lesser commitment and lower exit costs for unmarried unions and a lack of legal protection for the partner with lower income, usually the woman, when the cohabitation ends.<sup>242</sup> Thus, the state should provide some sort of legal scheme to protect these women in cohabiting relationships.

*B. Lack of Legal Grounds for the State's Purported "Public Policy" Condemning Cohabitation*

Another basis for a belief that the legislature's actions, which disproportionately affect women, are unfounded and need to be changed are the shifts in the Louisiana Civil Code and in other areas of the state's jurisprudence that do not support the courts' harsh treatment of unmarried cohabitants. Over time, Louisiana courts have relaxed restraints on certain arrangements between unmarried persons, although this process has occurred slowly.<sup>243</sup> For example, in the jurisprudence, cohabitant women have been able to recover for worker's compensation and as beneficiaries of life insurance policies.<sup>244</sup> In a worker's compensation case, the Louisiana Supreme Court stated that it was unable to find a general legislative policy signifying a need to punish cohabitants by depriving them of all benefits or rights whatsoever based on their status as cohabitants.<sup>245</sup>

Changes to the Louisiana Civil Code also indicate a shift away from the legislature's harsh treatment of unmarried cohabitants. For example, the legislature repealed Louisiana Civil Code article 161, which prohibited marriage between adulterer and mistress, allowing these partners to legalize

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240. Burns et al., *supra* note 238, at 377; Nyman, *supra* note 238, at 787; see also Carter, *supra* note 235, at 859.

241. Treas & de Ruijter, *supra* note 236, at 797.

242. *Id.* at 798.

243. CARROLL & MORENO, *supra* note 148, § 8:3, at 833.

244. N.Y. Life Ins. Co. v. Neal, 38 So. 485, 487 (La. 1905); Henderson v. Travelers Ins. Co., 354 So. 2d 1031, 1034 (La. 1978); see also Mills, *supra* note 140, at 1209.

245. Henderson, 354 So. 2d at 1034 ("Further, we are unable to find any general legislative policy indicating a desire to punish a concubine by depriving her of all benefits or rights whatsoever because of her status."); see also CARROLL & MORENO, *supra* note 148, § 8:3, at 837.



their relationship.<sup>246</sup> The legislature also repealed section 79.1 of the Criminal Code, which formerly criminalized “common law marriages,”<sup>247</sup> thereby making concubinage no longer a crime in Louisiana.<sup>248</sup> Though limited in effect, the legislature repealed Louisiana Civil Code article 1481, which restricted donations of movables and immovables between those couples who lived together without marrying.<sup>249</sup> Equating concubinage with remarriage, the legislature also made cohabitation a further basis for terminating spousal support in addition to remarriage.<sup>250</sup> Further, the legislature changed the wording of this article from “open concubinage” to “cohabited with another person of either sex in the manner of married persons.”<sup>251</sup> This change effectively took the terminology of “concubinage” out of the Civil Code.<sup>252</sup> Taken together, all of these changes coalesce into one idea—in modern society, cohabitants should be able to contract between themselves. The trend has moved away from a qualified disapproval of concubinage toward recognition that the legislature should afford unmarried cohabitants certain rights and benefits under the law.<sup>253</sup>

### *C. Previous Failed Solutions to the Inequity in Louisiana’s Law*

Despite the changes in the law relaxing a strict condemnation of unmarried cohabitation, Louisiana’s decision to retain its strict policy against providing property rights for unmarried cohabitants is certainly curious. In fact, many have noticed the inequities this lack of rights can cause and have proposed dozens of solutions.<sup>254</sup> Louisiana, however, continues to ignore these proposals. Louisiana rejected California’s *Marvin* approach<sup>255</sup> as well as a proposed Civil Code article that would

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246. CARROLL & MORENO, *supra* note 148, § 8:3, at 838.

247. *Id.*

248. Louisiana Revised Statutes section 14:79.1 (1971), which criminalized common law marriage, was repealed by Act No. 638 of the 1975 Regular Session of the Louisiana Legislature. *See* Aetna Cas. & Sur. Co. v. British Petroleum, No. 90-4594, 1991 WL 148140, at \*1 (E.D. La. July 30, 1991).

249. Mills, *supra* note 140, at 1211–12; *see supra* Part III.

250. CARROLL & MORENO, *supra* note 148, § 8:3, at 838.

251. *Id.* at 838 n.27; LA. CIV. CODE art. 115 (2015).

252. Louisiana courts still use this term despite its legislative suppression. *See supra* Part III.

253. Mills, *supra* note 140, at 1206.

254. *See infra* Part IV.C.3.

255. Schwegmann v. Schwegmann, 441 So. 2d 316, 326 (La. Ct. App. 1983).

have allowed contracts between unmarried cohabitants.<sup>256</sup> The state has also ignored numerous legal scholars' solutions to the unfair treatment of cohabitants.<sup>257</sup> Finally, in 2004, Louisiana passed the Defense of Marriage amendment to the Louisiana Constitution, which refused to allow any marriage-like status to cohabitants.<sup>258</sup> These examples of the refusal of Louisiana courts, legislature, and constituents to change an antiquated law to adapt to the expectations of modern society are antithetical to what the state should do—give women equality and freedom regarding their property.

### 1. *Rejection of Marvin*

First, through the *Schwegmann* decision in 1983, Louisiana rejected the use of *Marvin's* contractual remedies to provide relief for the lower earning partner after dissolution of a cohabiting relationship.<sup>259</sup> The Fifth Circuit examined *Marvin* but dismissed the rationale of the case, saying that the social acceptance of non-marital sexual relationships was not a justifiable ground to abandon the “Louisiana concept of the unlawfulness of a concubinage relationship.”<sup>260</sup> Although courts continue to cite to *Schwegmann's* reasoning, the social and moral climate of the state has changed so drastically in the last 30 years that this answer is no longer acceptable.<sup>261</sup>

### 2. *The Rejection of Proposed Article 101 in the Wake of the Repeal of Article 1481*

In the wake of *Schwegmann's* ban on contracts between unmarried cohabitants, the Persons Committee of the Louisiana Law Institute proposed a new Civil Code article 101 to allow sharing agreements between

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256. H.B. 1139, 1987 Reg. Sess. (La. 1987) (“An otherwise valid contract is not rendered unenforceable solely because the parties, neither of whom was married, were cohabitants at the time of contracting, but such a contract must be in writing.”); see also Spaht, *supra* note 67, at 297–98.

257. See *infra* Part IV.C.3.

258. LA. CONST. art. XII, § 15.

259. *Schwegmann*, 441 So. 2d at 326 (“Paramount in the review of the petition is the recognition it was molded in conformity with the distinctions drawn by the Supreme Court of the State of California in *Marvin v. Marvin*. . . . Furthermore, we do not believe the prevalence and social acceptance of non-marital sexual relationship at this time is justifiable grounds to abandon the Louisiana concept of the unlawfulness of a concubinage relationship.”(citation omitted)).

260. *Id.*

261. See *supra* Part II.B.

unmarried persons, regardless of gender, so long as the agreements are in writing.<sup>262</sup> The Committee considered many options, ranging from a positive statement that contracts between unmarried cohabitants were unenforceable to the adoption of common law marriage, before finally deciding to propose article 101.<sup>263</sup> This article would have preserved the uniqueness of marriage while satisfying the reasonable expectations of cohabitants who intended and agreed that their relationship should have legal consequences.<sup>264</sup>

Proposed article 101 was defeated in the Senate.<sup>265</sup> Strangely enough, the legislature was willing to repeal a Civil Code article prohibiting gratuitous contracts of donation between unmarried cohabitants—article 1481.<sup>266</sup> The pivotal question revolved around “whether onerous contracts between unmarried cohabitants, when not independent of the sexual relationship, [would] remain contrary to public policy and null under article 1968.”<sup>267</sup> From the repeal of article 1481, courts could have inferred that some contracts, specifically donations between cohabitants, were no longer against public policy and no longer subject to invalidation under article 1968.<sup>268</sup> In repealing article 1481, the legislature seemingly intended to make a broader statement about the public policy concerning cohabitation in general.<sup>269</sup> When viewed in connection with the rejection of enforceable contracts between unmarried cohabitants, however, the repeal of article 1481 suggested a less expansive legislative intent.<sup>270</sup>

The legislature, by refusing to adopt a provision on cohabitation, apparently intended to allow the jurisprudence surrounding article 1481 to continue in effect.<sup>271</sup> The rejection of article 101 confirmed that the law still favors marriage over cohabitation.<sup>272</sup> Therefore, cohabitants’ contracts remained subject to antiquated notions of public policy that evolved from religious beliefs and opposition to interracial relationships.<sup>273</sup> The rejection

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262. CARROLL & MORENO, *supra* note 148, § 8:3, at 839; Mills, *supra* note 140, at 1204–05.

263. Mills, *supra* note 140, at 1204.

264. *Id.*; see also LA. CIV. CODE art. 2045 (2015) (“Interpretation of a contract is the determination of the common intent of the parties.”).

265. CARROLL & MORENO, *supra* note 148, § 8:3, at 839.

266. *Id.*

267. Mills, *supra* note 140, at 1203.

268. LA. CIV. CODE art. 1968 (“The cause of an obligation is unlawful when the enforcement of the obligation would produce a result prohibited by law or against public policy.”); see also Mills, *supra* note 140, at 1203.

269. Mills, *supra* note 140, at 1204.

270. *Id.*

271. *Id.* at 1204–05.

272. *Id.* at 1204, 1206.

273. *Id.* at 1205.

of article 101 suggests that the legislature did not wish to extend to cohabitants the option of entering into a relationship similar to marriage but governed by contract law rather than family law.<sup>274</sup> This rejection made clear that courts will not enforce all contracts between cohabitants but did not preclude otherwise enforceable contracts as long as they do not violate public policy.<sup>275</sup>

### 3. *Commentary Calling for Change*

Several commentators have written law review articles both recognizing this inequity and proposing a solution, but the legislature has ignored these attempts and refuses to provide any sort of remedy for cohabitants. For example, shortly after *Marvin*, Duke University Professor William A. Reppy, Jr. proposed an intermediate status approach for Louisiana cohabitants.<sup>276</sup> Immediately following the rejection of article 101, Catherine Mills, a law student, proposed a “sliding scale” for contracts that should no longer be against public policy.<sup>277</sup> As recently as 2013, Erez Aloni, a Fellow at Columbia Law School, proposed a registered relationship status for unmarried cohabitants similar to the French PACS.<sup>278</sup> Louisiana’s inflexible will and failure to consider any of these viable solutions show evidence of discriminatory effects.<sup>279</sup>

### 4. *Louisiana’s 2004 Defense of Marriage Amendment*

The most recent legislative expression regarding unmarried cohabitants’ property rights was the 2004 Defense of Marriage Amendment (“DOMA”) to the Louisiana Constitution.<sup>280</sup> DOMA does not expressly prevent unmarried persons from using partnership laws or the general obligations provisions of the Louisiana Civil Code to contract a regime similar to the legal community.<sup>281</sup> DOMA, however, does provide in relevant part, “[a] legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized.”<sup>282</sup> Therefore, the Louisiana

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274. *Id.* at 1206.

275. *Id.* at 1227.

276. Reppy, *supra* note 63, at 1716–22.

277. Mills, *supra* note 140, at 1217–20.

278. Aloni, *supra* note 8, at 644–48.

279. *See supra* Part IV.A.

280. LA. CONST. art. XII, § 15; *see also* CARROLL & MORENO, *supra* note 148, § 8:3, at 833.

281. CARROLL & MORENO, *supra* note 148, § 8:3, at 833.

282. *Id.* Although the United States Supreme Court’s decision in *Obergefell v. Hodges*, No. 14–556 (U.S. 2015) (slip opinion), rendered most of Louisiana’s DOMA unconstitutional, it is likely that this is the one portion that will still be

Constitution removes all options of a status-based solution, unless the public repeals or further amends DOMA. The only remaining remedy is grounded in contract law, but Louisiana has thus far refused to overrule *Schwegmann* and its progeny.

*D. The Solution: A Presumption of Equality*

When searching for a solution to this discrimination problem, one must remember that cohabiting relationships are varied in nature, so no one approach is perfectly suited.<sup>283</sup> But the legislature should not force couples choosing a cohabiting relationship into the ill-fitting laws of marriage, thereby ruling out a status approach.<sup>284</sup> Coupled with DOMA's implied prohibition of a status approach, the only remaining remedy is to employ a contract approach. Louisiana Civil Code article 2801, which allows contracts "between two or more persons to combine their efforts or resources in determined proportions and to collaborate at mutual risk for their common profit or commercial benefit,"<sup>285</sup> would justify this approach.

The legislature should enact a new Civil Code article that would allow unmarried cohabitants to expressly contract between each other, thereby legislatively overruling *Schwegmann*.<sup>286</sup> The contract would need to be express but would not have to be in writing, as practicality and the jurisprudence indicates that most couples do not write out these agreements.<sup>287</sup> Further, Louisiana should create a presumption of an agreement between unmarried cohabitants to split property accumulated during the relationship equally. This presumption would solve the inequity

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constitutional, as it is the only portion not prohibiting homosexuals the right to marry.

283. King, *supra* note 101, at 570–71.

284. *Id.*

285. LA. CIV. CODE art. 2801 (2015).

286. This Comment does propose a solution because the proposal is not the main focus of this Comment. Several scholars have proposed solutions, *see supra* Part IV.C.3, but thus far, the courts have refused to adopt any changes to the law. The focus of this Comment is instead to determine why Louisiana has chosen to cling to the outdated, discriminatory laws prohibiting cohabiting partners' property rights.

287. *See generally* Rochelle v. Hezeau, 15 La. Ann. 306 (La. 1860); Simpson v. Normand, 26 So. 266 (La. 1899); Succession of Filhiol, 44 So. 843 (La. 1907); Sparrow v. Sparrow, 93 So. 2d 232 (La. 1957); Foshee v. Simkin, 174 So. 2d 915 (La. Ct. App. 1965); Guerin v. Bonaventure, 212 So. 2d 459 (La. Ct. App. 1968); Broadway v. Broadway, 417 So. 2d 1272 (La. Ct. App. 1982); Schwegmann v. Schwegmann, 441 So. 2d 316 (La. Ct. App. 1983); Succession of Bacot, 502 So. 2d 1118 (La. Ct. App. 1987); Succession of Rhodes, 918 So. 2d 626 (La. Ct. App. 2d 2005); V.A. Hearing, *supra* note 171, at \*5.

between partners by shifting the burden to the party claiming that the partners did not have such an agreement. Almost every other jurisdiction in the United States has provided property rights for unmarried cohabitants. With this in mind, Louisiana must provide a remedy for cohabiting women. If the legislature fails to adopt this change, both the legislature and the courts should consider all other options to provide women some remedy. Both branches of Louisiana's government have plenty of options and models to follow, so no excuse exists for Louisiana to refuse protection for unmarried cohabiting women any longer.

#### CONCLUSION

This Comment has demonstrated the various methods with which to fix a lack of property rights for unmarried cohabitants. Louisiana can no longer fail to provide the rights by hiding behind antiquated reasoning. A public policy at odds with modern society's values is a dangerous cycle that provides a pathway for the state to disproportionately affect women in what appears to be a discriminatory manner. Contracts between cohabitants are no longer against public policy and therefore Louisiana Civil Code article 1968 should not subject these contracts to invalidation. This state of affairs cannot stand, and the legislature should enact a new Civil Code article with a presumption of an equal sharing agreement. In 1983, the *Schwegmann* court disagreed with the plaintiff's argument that society's values had changed enough "at this time" to demonstrate a need to protect unmarried cohabitants' property.<sup>288</sup> Over 30 years later, is it time yet, Louisiana?

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288. *Schwegmann*, 441 So. 2d at 326 ("Furthermore, we do not believe the prevalence and social acceptance of non-marital sexual relationships at this time is justifiable grounds to abandon the Louisiana concept of the unlawfulness of a concubinage relationship."); see *supra* Part III.A.

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