

# COHABITATION AND THE FUTURE OF MARRIAGE

*Lynne Marie Kohm\* and Karen M. Groen\*\**

## I. INTRODUCTION

The 2000 United States Census sent a signal about marriage on its short form data survey: marriage doesn't really matter enough to even ask about it.<sup>1</sup> In a culture where marriage doesn't matter enough to be counted by the federal bureaucracy, cohabitation may be equally unimportant – or is it? “Marriage may or may not be an ‘antiquated institution,’ but it is undeniable that non-marital cohabitation has increased dramatically.”<sup>2</sup> The correlation between cohabitation and marriage has received much attention in sociological studies.<sup>3</sup> Often considered an alternative family form, cohabitation is among several family structures that are increasing in frequency in American society.<sup>4</sup>

This article considers cohabitation, in light of the future of marriage, from a legal and cultural framework by examining the demographic context, legal structure, and future speculation on the issue of unmarried individuals living together. We submit that the cycle of legal protection for unmarried cohabitation could actually result in a renaissance of marriage.

Part II analyzes the impact of demographic trends nationally and internationally on the marriage (or non-marriage) culture. Part III reviews the case law and statutory schemes that have sought to deal with the issue of non-marital cohabitation as well as academic literature on cohabitation. Part IV considers the analysis from Part II in light of the legal rules outlined in Part III and examines why marriage is preferred legally over rights of cohabitants. Additionally, it evaluates the benefits and costs of cohabitation in light of the benefits and costs of

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\*\* Juris Doctor Candidate 2005, Regent University School of Law.

<sup>1</sup> Gene Edward Veith, *New Census Consensus? Marriage Doesn't Matter*, WORLD, Aug. 28, 1999, at 24.

<sup>2</sup> HARRY D. KRAUSE ET AL., FAMILY LAW: CASES, COMMENTS AND QUESTIONS 219 (4th ed. 1998).

<sup>3</sup> DAVID POPENOE & BARBARA DAFOE WHITEHEAD, SHOULD WE LIVE TOGETHER? WHAT YOUNG ADULTS NEED TO KNOW ABOUT COHABITATION BEFORE MARRIAGE: A COMPREHENSIVE REVIEW OF RECENT RESEARCH (2d ed. 2002), available at <http://marriage.rutgers.edu/Publications/swlt2.pdf> (last visited Mar. 31, 2004).

<sup>4</sup> See, e.g., Jay D. Teachman et al., *The Changing Demography of America's Families*, 62 J. MARRIAGE & FAM. 1234 (2000).

marriage. Finally, this article reflects upon the deepest marital desires of most single adults.

Cohabitation has been regulated to such an extent that, in many statutory circumstances, it looks much like marriage. Its own entangled web of regulation, however, reveals the weakness of threads spun by cohabitation as compared to the strength of those provided by marital bonds. The difference becomes clearer when the cultural phenomenon of cohabitation is stripped of the cobwebs of legal regulation, revealing that individuals authentically desire marriage even in the face of social and legal acceptance of non-marital status. Some legal scholars have attempted to accomplish the objective of treating all family forms equally by offering the most radical view: abolishing marriage as a sanctioned legal institution altogether.<sup>5</sup> Other scholars, however, “see too many problems with cohabitation defined as an alternative to marriage to believe that law and social policy should actively support this emerging family form.”<sup>6</sup>

This article contends that, although regulation has allowed cohabitation to come to look very much like marriage, marriage is still the preferred status – both statutorily and personally. It reveals that the differences between the two are more cultural than legal, and that the future of marriage appears even stronger, precisely because the law has made cohabitation look so much like marriage. In other words, attempts at regulation of unmarried cohabitation have not served to change people’s desires. A happy marriage—not a happy cohabitation—is still the American dream.

## II. DEMOGRAPHICS AND LEGAL TRENDS

In the United States, unmarried cohabitation has been on the rise since 1970. In 1996, there were 4 million cohabiting couples, an almost eight-fold increase from 1970.<sup>7</sup> “In 1970 there was one cohabiting couple for every one hundred married-couple households. Now there are eight couples living together for every one hundred married couples.”<sup>8</sup> These statistics “suggest the likelihood that a majority of people will be in an unmarried domestic relationship before marriage.”<sup>9</sup> Since at least one generation has passed between 1960 and 1995, the intergenerational

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<sup>5</sup> See MARTHA FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995); Martha M. Ertman, *Reconstructing Marriage: An InterSEXional Approach*, 75 DENV. U. L. REV. 1215 (1998).

<sup>6</sup> Margaret F. Brinig & Steven L. Nock, *Marry Me, Bill: Should Cohabitation Be the (Legal) Default Option?*, 64 LA. L. REV. 403, 406-07 (2004).

<sup>7</sup> Paige D Martin et al., *Adolescent Premarital Sexual Activity, Cohabitation, and Attitudes Toward Marriage*, 36 ADOLESCENCE 601, 601 (2001).

<sup>8</sup> LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE* 36 (2000).

<sup>9</sup> Martin et al., *supra* note 7, at 601.

effects of cohabitation are worth considering. Children whose parents cohabit after a divorce are more likely to accept cohabitation “as an alternative to marriage” themselves.<sup>10</sup> “[T]he continued presence of a married father in the home strongly predicts the happy marriage of the child.”<sup>11</sup> However, children spend significantly less time with their father figure if he is a stepfather or a cohabiting father figure rather than a married biological father.<sup>12</sup>

Despite the statistical reality of a rise in cohabitation, women and men, regardless of whether they cohabit, still say that marriage is most important to them. Eighty percent of women and seventy percent of men “believe that a good marriage is ‘extremely important,’” and an even higher percentage of men “believe that marriage is for a lifetime.”<sup>13</sup>

Social science studies have consistently found a positive correlation between cohabitation before marriage and divorce.<sup>14</sup> The two main interpretations of this correlation are that cohabitation actually changes people’s attitudes and encourages divorce, or that those who choose cohabitation are more susceptible to choosing divorce to begin with.<sup>15</sup> Regardless of which interpretation is correct, non-marital cohabitation is “one of the most robust predictors of marital dissolution that has appeared in the literature.”<sup>16</sup>

Social science studies have also consistently found a positive correlation between cohabitation and child abuse. “Linda Waite’s review of the National Survey of Families and Households data revealed that when cohabiting couples argue they are more than three times as likely to resort to physical violence than are married couples.”<sup>17</sup> There are also “far higher levels of child abuse” in cohabiting families than in marital

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<sup>10</sup> *Id.* at 602.

<sup>11</sup> Sandra L Hofferth & Kermyt G. Anderson, *Are All Dad’s Equal? Biology Versus Marriage as a Basis for Paternal Involvement*, 65 J. MARRIAGE & FAM. 213, 223 (2003) (“children spend significantly more time with a married biological father than with a non-biological father, either stepfather or mother’s partner.”).

<sup>12</sup> *Id.*

<sup>13</sup> Helen M. Alvare, *Saying “Yes” Before Saying “I Do”: Premarital Sex and Cohabitation as a Piece of the Divorce Puzzle*, 18 NOTRE DAME J.L. ETHICS & PUB. POL’Y 7, 13 n.25 (2004) (quoting Arland Thornton & Linda Young-DeMarco, *Four Decades of Trends in Attitudes Toward Family Issues in the United States: The 1960s Through the 1990s*, 63 J. MARRIAGE & FAM. 1009, 1020 (2001)).

<sup>14</sup> Renata Forste, *Prelude to Marriage or Alternative to Marriage? A Social Demographic Look at Cohabitation in the U.S.*, 4 J.L. FAM. STUD. 91, 93 (2002).

<sup>15</sup> *Id.*

<sup>16</sup> Alvare, *supra* note 13, at 28-29 (quoting Jay Teachman, *Premarital Sex, Cohabitation, and the Risk of Subsequent Marital Dissolution Among Women*, 65 J. MARRIAGE & FAM. 444, 445 (2003)).

<sup>17</sup> Lynn D. Wardle, *Deconstructing Family: A Critique of the American Law Institute’s “Domestic Partners” Proposal*, 2001 BYU L. REV. 1189, 1225.

families.<sup>18</sup> “Children whose biological parent or parents are only cohabiting rather than married” have higher rates of sexual abuse as well.<sup>19</sup> In 1996, the poverty rate for children of cohabiting parents was more than five times greater than for children of married parents.<sup>20</sup> Additionally, “[t]hree quarters of children born to cohabiting parents will see their parents split up before they reach age sixteen, whereas only about a third of children born to married parents face a similar fate.”<sup>21</sup>

In many Western societies, the stigma once associated with unmarried cohabitation has virtually vanished. A dramatic increase in cohabitation has occurred particularly throughout Scandinavian nations.<sup>22</sup> These rising rates of cohabitation have also given rise to higher rates of out-of-wedlock births, all of which in turn “stand as proxy for rising rates of family dissolution.”<sup>23</sup> “The rise of fragile families based on cohabitation and out-of-wedlock childbearing means that during the nineties, the total rate of family dissolution in Scandinavia significantly increased.”<sup>24</sup>

Reforms in Sweden provide a reference point for developments elsewhere. A comprehensive secularization of family law occurred in the early 1970s, and in 1973 the Swedish Parliament endorsed the proposition that “from society’s point of view, cohabitation between two persons of the same sex is a perfectly acceptable form of family life.”<sup>25</sup> “Swedes themselves link the decline in marriage with secularism. . . . [S]tudies confirm . . . religiosity is associated with . . . strong marriages, while heightened secularism is correlated with [weak marriages].”<sup>26</sup> The work of a Danish sociologist confirms that there is an “increased risk of family dissolution to children of unmarried parents.”<sup>27</sup> A recent study by a Swedish social scientist “found that children of single parents in

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<sup>18</sup> *Id.*; see also William C. Duncan, *Domestic Partnership Law in the United States: A Review and Critique*, 2001 BYU L. REV. 961, 991-92 (“[L]iving together outside of marriage increases the risk of domestic violence for women, and the risk of physical and sexual abuse for children.”).

<sup>19</sup> Wardle, *supra* note 17, at 1225. In 1996, 6% of children in marital families were below the poverty line while that number was 31% for children in cohabiting households. *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> Stanley Kurtz, *The End of Marriage in Scandinavia*, THE WKLY. STANDARD, Feb. 2, 2004, at 27.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> David Bradley, *A Family Law for Europe? Sovereignty, Political Economy and Legitimation*, 4 GLOBAL JURIST FRONTIERS 7 (2003) (quoting Hans Ytterberg, *From Society’s Point of View*, in ROBERT WINTEMUTE & MADSEN ANDENAES, LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS 427, 428 (2001)).

<sup>26</sup> Kurtz, *supra* note 22, at 28.

<sup>27</sup> *Id.*

Sweden have more than double the rates of mortality, severe morbidity, and injury than do children in two parent married households.”<sup>28</sup>

Without formal legal trappings, these relationships often gain many pseudonyms. New Zealanders tend to use terms like *de facto* relationships, or *de facto* marriage to distinguish cohabitation from *de jure* marriage or legal marriage.<sup>29</sup>

[W]ith the passage of a package of legislative reforms that place married and unmarried couples (heterosexual and homosexual) on much the same basis for property and succession matters[, it] is suggested that these reforms come close to creating a new status, the incidents of which are very similar to the status of marriage.<sup>30</sup>

The more liberal the regulations are, the more *de facto* relationships will tend to look like marriage. Since the rules are applicable to all sorts of associations, problems also arise when determining what rules to apply to which relationship and when to do so.<sup>31</sup> Lawmakers in New Zealand have attempted to solve these problems with a list of factors meant to determine which non-marital relationships deserve marriage-like protection.<sup>32</sup> This list resembles a list of factors for judicial determination of spousal support, or standards for equitable distribution.<sup>33</sup>

Other global frontiers examining cohabitation protections generally do so in the context of same-sex relationship recognition. While Spain and Italy have moved in that direction with certainty, Ireland’s attempts at enhancing same-sex cohabitation are “unpromising.”<sup>34</sup> Even though Britain has moved toward greater protection of unmarried cohabitation both for heterosexual and homosexual couples, “marriage is still the surest foundation for raising children and remains the choice of the majority of people in Britain.”<sup>35</sup> That nation’s Labour Party itself has stated in policy form: “We want to strengthen the institution of marriage.”<sup>36</sup>

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<sup>28</sup> *Id.* (citing Gunilla Ringback Weitoft et al., *Mortality, Severe Morbidity, and Injury in Children Living with Single Parents in Sweden: A Population-Based Study*, 361 LANCET 289 (Jan. 2003)).

<sup>29</sup> Bill Atkin, *The Challenge of Unmarried Cohabitation: The New Zealand Response*, 37 FAM. L. Q. 303, 304 (2003).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 312.

<sup>32</sup> *Id.* at 314-15.

<sup>33</sup> *Id.*

<sup>34</sup> Bradley, *supra* note 25, at 28.

<sup>35</sup> *Id.* (quoting HOME OFFICE, SUPPORTING FAMILIES: A CONSULTATION DOCUMENT 5 (1998)).

<sup>36</sup> *Id.*

Throughout western Europe, cohabitation without marriage was the least stable arrangement of the options for human pair bonding.<sup>37</sup> Cohabitation as an alternative to marriage is not a sound strategy for stability, longevity, mate selection or a mechanism to test marriage.<sup>38</sup> In fact, much of the law on cohabitation is built around judicial decisions and the politics of domestic partner legislation without regard for aggregate social detriment or long-term personal or societal consequence.

### III. CASE LAW, STATUTORY SCHEMES, AND A REVIEW OF THE LITERATURE

#### A. *Judicial Awards of Cohabitation Rights*

“The doctrine of common law marriage<sup>39</sup> . . . increased the percentage of couples considered legally married who were unmarried and living together.”<sup>40</sup> Equitable remedies for cohabitants increased through the use of constructive trusts imposed by courts that saw a detrimental reliance on the part of one of the parties to the cohabitation. *Marvin v. Marvin* is the landmark case in this regard; it arose in California, a state that had abolished the doctrine of common law marriage.<sup>41</sup> That court concluded that family law regulations did not govern the distribution of assets acquired during a non-marital relationship, but that living together under an oral agreement created an implied contract where the plaintiff’s expectations of payment were reasonable.<sup>42</sup> Many states followed this example,<sup>43</sup> while others stated their outright disdain for such a contractual concept applied to non-legal and non-marital relationships.

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<sup>37</sup> Kathleen Kiernan, *Cohabitation in Western Europe: Trends, Issues, and Implications*, in JUST LIVING TOGETHER: IMPLICATIONS OF COHABITATION ON FAMILIES, CHILDREN AND SOCIAL POLICY (Alan Booth & Ann C. Crouter eds., 2002).

<sup>38</sup> See discussion *infra* Part IV.

<sup>39</sup> The doctrine of common law marriage is the concept that a man and a woman agree to live together exclusive of all others and hold themselves out as married, though without the legal, formal or religious solemnization of a marriage. They are thereby treated by the law as married for all state and federal purposes. See HOMER CLARK, DOMESTIC RELATIONS 48, 50 (2d ed. 1988).

<sup>40</sup> KRAUSE, *supra* note 2, at 220.

<sup>41</sup> *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

<sup>42</sup> *Id.* at 122-23.

<sup>43</sup> Included among the states which have followed the *Marvin* approach are Minnesota (*Carlson v. Olson*, 256 N.W.2d 249 (1977)) and New Jersey (*Koslowski v. Koslowski*, 403 A.2d 902 (1979)). Other states have accepted some, but not all of the grounds for recovery sanctioned by *Marvin*. See, e.g., *Marone v. Marone*, 50 N.Y.2d 481 (1980); *Tapley v. Tapley*, 122 N.H. 727 (1982). Some states follow minimal aspects of *Marvin*. See, e.g., MINN. STAT. § 513.075 (2004); TEX. FAM. CODE ANN. § 1.108 (Vernon 1998).

Opposing *Marvin* was the Illinois case of *Hewitt v. Hewitt*.<sup>44</sup> In *Hewitt*, an unmarried family-like relationship that did include an element of detrimental reliance did not constitute a contract for purposes of property distribution or the payment of spousal support.<sup>45</sup> States that follow the *Hewitt* approach refuse to grant legal status to a private relationship that substitutes itself for the state-sanctioned institution of marriage.<sup>46</sup> Although such rulings are criticized because cohabitation may disadvantage one of the parties, states adhere to this logic because they do not wish to sanction unmarried cohabitation in any way. Frankly, allowing domestic partnerships to be treated as if they were equal to marriage encourages people to cohabit rather than marry.<sup>47</sup> Without domestic partnerships, however, we find two extremes: cohabitants have little or no rights, or they have duties imposed upon and imputed to them as if they are married, when they have chosen not to marry.<sup>48</sup> From this perspective, cohabitation appears to be a lose-lose situation. Even in the face of such evidence, cohabitation is increasingly being proposed as a functional substitute for marriage, as opposed to a testing ground for marriage.<sup>49</sup>

### B. Domestic Partner Legislation

Domestic partner legislation has made great strides in conferring legal status to cohabitation. This trend, however, has weakened both marriage and cohabitation by adding marriage-like duties without the benefits of marriage.

Some domestic partnership statutes set up cohabitants' rights based on status. Status-based regimes exist, either by statute or judicial order, in six jurisdictions: Washington (meretricious relationships);<sup>50</sup> Vermont (civil unions);<sup>51</sup> Massachusetts (same-sex marriage);<sup>52</sup> and in Hawaii,<sup>53</sup>

<sup>44</sup> *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979).

<sup>45</sup> *Id.* at 1205, 1211.

<sup>46</sup> *Id.* at 1211.

<sup>47</sup> Linda J. Waite, Foreword, *Marriage Myths and Revitalizing Marriage*, in REVITALIZING THE INSTITUTION OF MARRIAGE FOR THE TWENTY-FIRST CENTURY ix (Alan J. Hawkins et al. eds., 2002). "Cohabiting couples get most of the same economies of scale as married couples. But cohabiting couples almost always marry or split up within a few years, economies of scale notwithstanding." *Id.*

<sup>48</sup> See generally Cynthia Grant Bowman, *Legal Treatment of Cohabitation in the United States*, 26 L. & POLY 119 (2004).

<sup>49</sup> Brinig & Nock, *supra* note 6, at 407. "The trend in family law and scholarship in Europe and Canada is to treat married and cohabiting couples similarly, or even identically." *Id.* at 403.

<sup>50</sup> In *Connell v. Francisco*, 898 P.2d 831, 834 (Wash. 1995), the term "meretricious relationship" was defined as "a stable, marital-like relationship where both parties cohabit with knowledge that a lawful marriage between them does not exist."

<sup>51</sup> VT. STAT. ANN. tit. 15, §§ 1201-1207 (Supp. 2000).

<sup>52</sup> *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

New Jersey,<sup>54</sup> and California<sup>55</sup> as pure domestic partnerships.<sup>56</sup> Other domestic partnership legislation varies by county, city, and state, but none confers any particular status upon partners. Private contracts for benefits between cohabitants is another method for conferring benefits upon partners, though without state sanction.

The result of all this activity is a rather confusing legal situation, in which cohabitants' rights are based upon a mixture of remedies that not only vary from state to state, but also result in intrastate legal regimes based on different legal theories and offering a patchwork of remedies from a variety of sources. An additional result is that same-sex couples are better protected in many areas than are heterosexual cohabitants.

The system as it now exists is clearly unstable.<sup>57</sup>

The different approaches to cohabitants' rights go from the extreme of cohabitants having essentially no rights, to cohabitants being treated as though they were married. There has been no federalization of this area of law. The result is that cohabitation laws begin to look very much like marriage when imposed statewide. A review of the literature makes it apparent that legal academics, rather than sociologists or family policy makers, have provided much of the impetus for encouraging laws that set cohabitation on a par with marriage.

### C. A Review of the Literature

Cohabitation has been the subject of scholarly writing over the years, especially since *Marvin*<sup>58</sup> and *Hewitt*<sup>59</sup> were decided. At the time of this writing, twenty-seven law review articles contain some derivative of "cohabit" in their title.<sup>60</sup> Of these twenty-seven, fifteen favor

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<sup>53</sup> Reciprocal Beneficiaries Act, HAW. REV. STAT. §§ 572C-1-C-7 (Supp. 2003).

<sup>54</sup> The New Jersey Domestic Partnership Act, N.J. AB 3743 (2004) (codified at N.J. STAT. ANN. § 2A:34-2 (West 2000)).

<sup>55</sup> Domestic Partner Registration Act, CAL. FAM. CODE § 297 (West 2000). The Domestic Partner Rights and Responsibilities Act [AB 205] is effective January 2005, but still under judicial review at the time of this publication.

<sup>56</sup> Bowman, *supra* note 48, at 129.

<sup>57</sup> *Id.* at 146.

<sup>58</sup> *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

<sup>59</sup> *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979).

<sup>60</sup> See Alvare, *supra* note 13; Frank S. Berall, *Tax Consequences Of Unmarried Cohabitation*, 23 QUINNIPIAC L. REV. 395 (2004); Grace Ganz Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 NOTRE DAME L. REV. 1265 (2001); Katharina Boele-Woelki, *Private International Law Aspects of Registered Partnerships and Other Forms of Non-Marital Cohabitation in Europe*, 60 LA. L. REV. 1053 (2000); Brinig & Nock, *supra* note 6; G. Garcia Cantero, *Spain: Cohabitation in the Courts*, 33 U. LOUISVILLE J. FAM. L. 507 (1995); Craig W. Christensen, *If Not Marriage? On Securing Gay and Lesbian Family Values by a "Simulacrum of Marriage"*, 66 FORDHAM L. REV. 1699 (1998); David S. Caudill, *Legal Recognition of Unmarried Cohabitation: A Proposal to Update and Reconsider Common-*

cohabitation, or more generally take the view that marriage is inadequate, and offer as a solution either to abolish or lessen the significance of marriage, or to create alternatives to marriage such as cohabitation or partner registration.<sup>61</sup> The topics of these articles range

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*Law Marriage*, 49 TENN. L. REV. 537 (1982); Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381 (2001); Forste, *supra* note 14; Winifred Holland, *Intimate Relationships in the New Millennium: The Assimilation of Marriage and Cohabitation?*, 17 CAN. J. FAM. L. 114 (2000); Delia B. Inigo, *Argentina: Cohabitation and Assisted Human Fertilization*, 33 U. LOUISVILLE J. FAM. L. 267 (1995); Ellen Kandoian, *Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life*, 75 GEO. L.J. 1829 (1987); Brooke Oliver, *Contracting For Cohabitation: Adapting the California Statutory Marital Contract to Life Partnership Agreements Between Lesbian, Gay or Unmarried Heterosexual Couples*, 23 GOLDEN GATE U. L. REV. 899 (1993); Harry G. Prince, *Public Policy Limitations on Cohabitation Agreements: Unruly Horse or Circus Pony?*, 70 MINN. L. REV. 163 (1985); Milton C. Regan, Jr., *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 NOTRE DAME L. REV. 1435 (2001); Carol Smart, *Stories of Marital Life: Cohabitation, Marriage and Social Change*, 17 CAN. J. FAM. L. 20 (2000); Eric P. Voigt, *Reconsidering the Mythical Advantages of Cohabitation: Why Marriage Is More Efficient Than Cohabitation*, 78 IND. L.J. 1069 (2003); Barbara Freedman Wand, *The Relevance of Premarital Cohabitation to Property Division Awards in Divorce Proceedings: An Evaluation of Present Trends and a Proposal for Legislative Reform*, 63 B.U. L. REV. 105 (1983); Brandon Campbell, Comment, *Cohabitation Agreements in Massachusetts: Wilcox v. Trautz Changes the Rules but Not the Results*, 34 NEW ENG. L. REV. 485 (2000); Barbara Endoy, Note, *Irreconcilable Cohabitation Statutes and Statutory Proscriptions Against Marital Status Discrimination: McCready v. Hoffius and the Unworkable Status-Conduct Distinction*, 44 WAYNE L. REV. 1809 (1999); Katherine C. Gordon, Note, *The Necessity and Enforcement of Cohabitation Agreements: When Strings Will Attach and How to Prevent Them—A State Survey*, 37 BRANDEIS L.J. 245 (1998-99); Irma S. Jurado, Note, *Anderson v. Edwards: Can Two Live More Cheaply Than One? The Effect of Cohabitation on AFDC Grants*, 26 GOLDEN GATE U. L. REV. 301 (1996); Philip M. Longmeyer, Note, *Look on the Bright Side: The Prospect of Modifying or Terminating Maintenance Obligations Upon the Homosexual Cohabitation of Your Former Spouse*, 36 J. FAM. L. 53 (1997-98); Jennifer Mara, Note, *Living with the Consequences: The New Jersey Supreme Court Finds Cohabitation Provisions Enforceable*, 30 SETON HALL L. REV. 1255 (2000); Carolyn Sievers Reed, Note, *Alimony Modification and Cohabitation in North Carolina*, 63 N.C. L. REV. 794 (1985); Rebecca A. Wistner, Note, *Cohabitation, Fornication and the Free Exercise of Religion: Landlords Seeking Religious Exemption from Fair Housing Laws*, 46 CASE W. RES. L. REV. 1071 (1996). The purpose of grouping these articles together as to their positions on marriage is not to minimize the unique perspective that each offers, but rather to get a “forest” rather than a “tree” picture of the cohabitation literature landscape.

<sup>61</sup> See Boele-Woelki, *supra* note 60 (arguing for an international harmonization of cohabitation law in Europe); Caudill, *supra* note 60 (proposing a reintroduction of common law marriage); Christensen, *supra* note 60 (arguing that same-sex marriage should be sought rather than a civil union type alternative); Estin, *supra* note 60; Holland, *supra* note 60, at 20 (arguing for an extension of spousal status to cohabitants); Kandoian, *supra* note 60, at 1870-72 (advocating a move toward a partnership theory of marriage defined as “An association of two persons to carry on a shared life”); Oliver, *supra* note 60 (advocating life partnership contracts); Prince, *supra* note 60 (arguing against application of public policy exception to enforcement of cohabitation agreements); Regan, *supra* note 60; Smart, *supra* note 60; Wand, *supra* note 60, at 107-08 (arguing that property allocation in divorce proceedings should take premarital cohabitation into consideration); Campbell, *supra* note 60 (arguing in favor of offering contractual and equitable remedies to cohabiting couples); Endoy, *supra* note 60 (arguing that landlords should not be able to discriminate between

from whether landlords should be able to deny rental housing to cohabiting couples based on the landlord's religious beliefs<sup>62</sup> to the inequities that result when cohabiting partners rely to their detriment on each other.<sup>63</sup> These articles take a micro perspective to cohabitation, reasoning from specific instances that inequity will result on a broader societal level if cohabitation is not favored.<sup>64</sup> They often do so by using specific cases and stories of cohabiting couples who were disadvantaged because they were not given rights as married couples.<sup>65</sup>

Eight articles of the twenty-seven are neutral or objective toward cohabitation, limiting themselves to reporting the law as it is.<sup>66</sup> Just four of the twenty-seven articles take the position that marriage is preferable to cohabitation or that laws should be designed to strengthen marriage and disincentivize cohabitation.<sup>67</sup> These articles examine cohabitation from a macro perspective, focusing on the broader policy

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married and cohabiting couples because of their religious beliefs); Gordon, *supra* note 60, at 246 (asserting that cohabitation agreements are both valid and necessary); Wistner, *supra* note 60, at 1073-74 (arguing that, under RFRA, "landlords should not be granted religious exemptions from fair housing laws in order to discriminate against unmarried couples").

<sup>62</sup> Endoy, *supra* note 60; Wistner, *supra* note 60.

<sup>63</sup> Prince, *supra* note 60 (arguing for enforcement of cohabitation agreements); Wand, *supra* note 60 (arguing that property allocation in divorce proceedings should take premarital cohabitation into consideration); Campbell, *supra* note 60 (arguing in favor of contractual and equitable remedies for cohabiting couples upon separation).

<sup>64</sup> Lynn D. Wardle, *Parental Infidelity and the "No-Harm" Rule in Custody Litigation*, 52 CATH. U. L. REV. 81, 124 (2002) (citing JUDITH S. WALLERSTEIN & JOAN B. KELLY, SURVIVING THE BREAKUP: HOW CHILDREN AND PARENTS COPE WITH DIVORCE (1980)); see generally JUDITH S. WALLERSTEIN & SANDRA BLAKESLEE, SECOND CHANCES: MEN, WOMEN, AND CHILDREN A DECADE AFTER DIVORCE (1989) (arguing that many adults are angry many years after their divorce and children of divorced parents often suffer socially and personally as a result of the trauma of divorce).

<sup>65</sup> *Id.*

<sup>66</sup> Berral, *supra* note 60 (survey of tax law implications of *Goodridge v. Massachusetts*); Blumberg, *supra* note 60; Cantero, *supra* note 60 (review of the history of the legal treatment of cohabitation in Spain); Inigo, *supra* note 60 (history and current status of cohabitation law in Argentina as it relates to assisted human fertilization); Jurado, *supra* note 60 (arguing for an AFDC rule that treats non-siblings living together as if they were siblings); Longmeyer, *supra* note 60 (arguing in favor of recognizing homosexual cohabitation as grounds to terminate spousal support payments); Mara, *supra* note 60 (arguing that cohabitation should create rebuttable presumption that spousal support is no longer needed); Reed, *supra* note 60 (arguing that cohabitation should terminate spousal support for supported spouse as re-marriage does).

<sup>67</sup> Alvare, *supra* note 13 (analyzing statistics indicating that premarital sex and cohabitation are positive indicators of divorce); Brinig & Nock, *supra* note 6 (arguing that the law should distinguish between cohabitation as an alternative to marriage and as a trial or prelude to marriage, favoring the latter because there are fewer negative consequences); Forste, *supra* note 14 (presenting cohabitation as a prelude and an alternative to marriage and describing consequences as negative); Voight, *supra* note 60 (advocating that State legislatures take into consideration that marriage is more efficient than cohabitation for purposes of AFDC and TANF legislation).

behind cohabitation and its possible result both across society and over several generations.

This survey of the literature shows that a focus on the equity of particular situations can lead to an acceptance of cohabitation and a desire to regulate it like marriage. However, a global consideration of the statistics reflecting how marriage is a good, how most people desire marriage, and how cohabitation and premarital sex sabotage marriage, should prompt an effort to strengthen marriage. Divorce has been a large-scale social experiment based in part upon particular heart-wrenching situations where a denial of no-fault divorce appeared cruel and unfair. On a macro scale, however, divorce has produced devastating results for adults and children alike.<sup>68</sup> To build a cohabitation policy around the narrow focus of the inequities of particular relationships is likely to produce the same devastating result. Perhaps the “hard facts make bad law” cliché rings true in the policy arena as well.

This article fits into the spectrum of cohabitation literature by taking a step back to observe the relationship between cohabitation and marriage on a societal level. Its purpose is to raise concerns regarding cohabitation that are generally not analyzed by looking beyond legal regimes and focusing on differences between cohabitation and marriage. We believe that this analysis demonstrates very clearly that marriage (and not cohabitation) is a social, legal and personal good. While opposing the idea that cohabitation should be treated like marriage, we submit that efforts toward raising cohabitation to the level of marriage will actually serve to bolster a renaissance of marriage.

#### IV. ACTUAL (AND LEGAL) ADVANTAGES OF MARRIAGE OVER COHABITATION

##### A. *The Paradox*

A paradox exists in our culture which reveals that, even though unmarried cohabitation offers marriage-like protections, marriage remains very important to American adults. The paradox is that, while people want to be married, and the likelihood of marital success is negatively correlated with cohabitation, people still cohabit. The work of researcher and sociologist Norval Glenn has caused him to surmise that, “[t]his paradox can be resolved by assuming that the decline in the probability of marital success has resulted from forces external to values, attitudes, and feelings concerning marriage.”<sup>69</sup> There has been a steady decline in the commitment to marriage accompanied by a steady rise in

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<sup>68</sup> See *supra* note 64.

<sup>69</sup> Norval D. Glenn, *Values, Attitudes and the State of American Marriage*, in *PROMISES TO KEEP: DECLINE AND RENEWAL OF MARRIAGE IN AMERICA* (David Popenoe et al. eds., 1996), reprinted in MARGARET F. BRINIG ET AL., *FAMILY LAW IN ACTION: A READER* 11 (1999).

the expectations of marriage. Glenn says, “[h]aving a good marriage could remain a salient goal while the values and norms conducive to attainment of that goal become weaker. People could want and expect more from marriage while they become less willing to make the sacrifices and ‘investments’ needed for marital success.”<sup>70</sup>

So it appears that the paradox is actually rather consistent. Marriage is preferred over cohabitants’ rights, but people cohabit because they fear failure of a marriage, or they fear the work that marriage requires. Indeed, marriage is a relationship that in some ways surrenders self to seek a greater good, while cohabitation is a relationship that serves individuals alone who may indeed fear the surrender of self. Marriage is based on concepts of selflessness. It is also based on the security that a lifelong relationship provides. The freedom and safety for full self-giving is found in the context of marriage alone. So our paradox can actually result in a sort of twisted self-sabotage. The marriage bargain stands in contrast to the cohabitation bargain, not only in rights and duties, but in investment and return.

#### *B. Costs of Cohabitation*

In their book, *The Case for Marriage*, Linda Waite and Maggie Gallagher spend an entire chapter discussing what they term “The Cohabitation Deal.”<sup>71</sup> They suggest that there is a sharp distinction between marriage and cohabitation,<sup>72</sup> that the lines are not as blurred as legislation may seem to indicate, and that the costs of cohabitation are surprisingly similar to those of divorce.

The prime difference between marriage and cohabitation in contemporary American culture has to do with time horizons and commitment. What makes marriage unique among emotional and financial relationships is the vow of permanence. With marriage, partners publicly promise each other that neither one will be alone any longer: Whatever else happens in life, someone will care about and take care of you. Even spouses who choose divorce hang on, with surprising persistence, to the ideal of marital permanence, preferring to see their own marriages as “a lie” rather than to reimagine marriage as a less-than-permanent union. Eighty-one percent of divorced and separated Americans still believe marriage should be for life.

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<sup>70</sup> *Id.*

<sup>71</sup> LINDA J. WAITE & MAGGIE GALLAGHER, *supra* note 8, at 36-46 (discussing the myths of the cohabitation bargain).

<sup>72</sup> *Id.* at 37. “Cohabitation is not ‘just like marriage’ but rather an emerging social lifestyle with a different set of social meanings, which generally serves different purposes. Contemporary cohabitations do not take on the protective coloration of marriage but flaunt their differences.” *Id.*

Cohabitation, by contrast, is seen by partners and society as a temporary arrangement. The majority of cohabitators either break up or marry within two years.<sup>73</sup>

Cohabitation and domestic partnerships tend to eliminate sexual mores and legal responsibility,<sup>74</sup> which is what people find attractive about the cohabitation bargain. “For many cohabitators, the idea of relatively easy exit with no well-defined responsibilities constitutes cohabitation’s biggest attraction . . . . Even when Cohabitators have been together for long periods of time, they do not feel obligated to remain with this partner forever.”<sup>75</sup> This concept of lesser commitment extends to all aspects of the lives of cohabitants, particularly in the area of sexual fidelity, where research shows that cohabitants are less faithful to their partners; even when sexual faithfulness is kept, there is less of a commitment to the idea of sexual fidelity.<sup>76</sup> Whether motivated by the fear of fidelity or the principle of sexual openness, liberty to be free to be faithful or unfaithful is never satisfactorily grasped.

Couples who cohabit may enjoy short term benefits, but those benefits come at a high price.<sup>77</sup> Perhaps most importantly, however, is that the greatest cost of cohabitation can be found in the diminution of the potential for a good marriage in the future.<sup>78</sup> When couples use cohabitation as a sort of marriage search, or even a form of courtship, “engagement occurs when the expected utility from getting married outweighs the expected utility of remaining single and continuing the search.”<sup>79</sup> Even when cohabitation is used as a method of searching for a mate, it is a poor substitute for marriage, not because of its lack of legally binding ties, but because partners can never fully know each other until the freedom of complete commitment allows them to do so.

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<sup>73</sup> *Id.* at 37-38.

<sup>74</sup> *Id.* at 116.

<sup>75</sup> *Id.* at 38.

<sup>76</sup> *Id.* at 39. “Even if they are currently monogamous, many cohabitators say they are unwilling to say their partner will be the only person they ever sleep with for the rest of their lives.” *Id.* Waite and Gallagher offer the example of one man:

Stewart, for example, has no plans to have sex with any other woman but his live-in partner. “I don’t think it is a good idea if I were to get sexually involved with another woman.” And yet he has told his live-in lover, “I’m not going to tell you that I’m not going to be sexually involved with anyone [else] because of our relationship . . . I want to make that decision because of how I feel – not because of how you feel . . . .”

*Id.* His statement reveals the sharp contrast between being self-centered and other-centered.

<sup>77</sup> *Id.* at 46.

<sup>78</sup> See Brinig & Nock, *supra* note 6, at 417-18.

<sup>79</sup> *Id.* at 412 (citing Gary S. Becker, *A Theory of Marriage*, in *ECONOMICS OF THE FAMILY: MARRIAGE, CHILDREN AND HUMAN CAPITAL* (Theodore W. Schultz ed., 1974) and GARY S. BECKER, *A TREATISE ON THE FAMILY* 324-27 (2d ed. 1991)).

“[E]ven when the couple becomes engaged, there are ‘secrets’ that can only, if ever, be revealed after marriage.”<sup>80</sup> When those “secrets” make staying in the marriage less desirable than resuming the single state, divorce occurs.<sup>81</sup> Expecting all those secrets to be revealed during cohabitation is unrealistic because cohabitation does not mimic marriage in all its trappings.

Professors Brinig and Nock have thoroughly analyzed the current empirical evidence available on the subject of cohabitation, theoretically and practically, and its rates of success and failure.<sup>82</sup> They discuss in depth the costs of a failed search for marriage made through cohabitation and discern the consequences for not only that failed relationship, but for all future relationships thereafter, whether cohabitation or marriage.

Like a divorce, a “failed cohabitation” increases the risk of future relationship failure. For the next relationship, the partner who came from the failed cohabitation would already have cohabited prior to marriage even if this new relationship proceeded directly to marriage. The marriage would therefore have a lower rather than a higher chance of success. To our knowledge, this pattern has not been studied in the West European context. However, in repeated studies in the United States, a history of cohabitation (with another person or persons) that did *not conclude* in marriage is associated with higher rates of divorce.<sup>83</sup>

The data they discuss suggests there are indeed more longitudinal consequences that scan the relationship spectrum that have not been analyzed and considered by the law in policy making.

Conversely, “good family life . . . encourages self-sacrificing love” to those who are different from you, and discourages “rampant individualism.”<sup>84</sup> As Helen Alvare states:

Marriage brings ever-changing mutual dependencies—physically, emotionally, and financially—requiring each spouse to learn to give and to take, to sacrifice, and to receive sacrificial gifts. Lived according to social hopes and ideals, therefore, marriage is an important source of, and witness to, virtues widely desired in American society and beyond.<sup>85</sup>

When cohabiting partners make decisions that affect only themselves or affect only the cohabitation bargain, one set of issues is presented. Those decisions, however, quickly begin to affect other family members.

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<sup>80</sup> Brinig & Nock, *supra* note 6, at 418.

<sup>81</sup> See Gary Becker et al., *An Economic Analysis of Marital Instability*, 85 J. POL. ECON. 1141 (1977).

<sup>82</sup> See generally Brinig & Nock, *supra* note 6.

<sup>83</sup> *Id.* at 422.

<sup>84</sup> Alvare, *supra* note 13, at 16.

<sup>85</sup> *Id.* at 17.

“People who cohabit not only tend to value marriage less, they are more likely to value all familial relationships less.”<sup>86</sup> This concept becomes critical when considered in light of the best interests of children.

### C. *The Effects of Cohabitation on Children*

Many studies have been done over the past thirty years evaluating the consequences of marriage for children. “Given the increasing presence of social science evidence in a variety of legal debates, the current state of evidence on family structure and child well-being is important.”<sup>87</sup>

Twelve of the nation’s leading family scholars have summarized the research literature with one statement: “Marriage is an important social good associated with an impressively broad array of positive outcomes for children and adults alike . . . .”<sup>88</sup> These scholars arrived at some important conclusions. Cohabitation is not the functional equivalent of marriage.<sup>89</sup> Children raised by married parents are healthier, on average, than children in other family forms,<sup>90</sup> and have sharply lower rates of substance abuse.<sup>91</sup> Children raised outside a marital home are more likely to divorce, become unwed parents themselves,<sup>92</sup> and experience significantly elevated risks of child abuse.<sup>93</sup> “In recent years, this scholarly consensus on the importance of marriage for child well-being has broadened and deepened, extending across ideological lines to become the conventional wisdom among mainstream child welfare organizations.”<sup>94</sup>

The statistics, however, show that many children are not born and raised in intact marital families. Births to cohabiting women now account for 39% of all births to unmarried women.<sup>95</sup> This means that from birth more than one in every three children born to an unmarried

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<sup>86</sup> WAITE & GALLAGHER, *supra* note 8, at 42 (citing Martin Clarkberg et al., *Attitudes, Values and Entrance into Cohabitation Versus Marital Unions*, 74 SOC. FORCES 623 (1995)).

<sup>87</sup> Maggie Gallagher & Joshua K. Baker, *Do Moms and Dads Matter?*, 4 MARGINS 161, 171 (2004).

<sup>88</sup> WILLIAM J. DOUGHERTY ET AL., *WHY MARRIAGE MATTERS: TWENTY-ONE CONCLUSIONS FROM THE SOCIAL SCIENCES* 6 (2002).

<sup>89</sup> *Id.* at 7-8.

<sup>90</sup> *Id.* at 11-12.

<sup>91</sup> *Id.* at 12-13. Marriage also reduces child poverty, and boys from intact married homes are less likely to commit crimes. *Id.* at 9, 15-16.

<sup>92</sup> *Id.* at 8.

<sup>93</sup> *Id.* at 17.

<sup>94</sup> Gallagher & Baker, *supra* note 87, at 173.

<sup>95</sup> Brinig & Nock, *supra* note 6, at 404 (citing Larry L. Bumpass & Hsien-Hen Lu, *Trends in Cohabitation and Implications for Children’s Family Contacts in the United States*, 54 POPULATION STUD. 29 (2000)).

mother is likely to be raised in a cohabiting household. That fact presents a significant measure of instability for the children from the outset. Children of divorce more readily move toward cohabitation. "They are two to three times as likely to cohabit and to cohabit earlier."<sup>96</sup> "The less happiness there is in their parents' marriage, the earlier children leave their parents' home to move out on their own, cohabit, or get married."<sup>97</sup>

Children are generally negatively affected by their parents' cohabitation.<sup>98</sup> While cohabitation decreases the time that children spend in single-parent households, it also "increases the number of family disruptions experience[d] by children."<sup>99</sup> The "better vs. best" problem can be seen here: it may be better for children to be raised by an unmarried parent living with a cohabiting partner rather than being raised in a single-parent home. However, given that marriage is the ultimate best for a child, and given the negative correlation between cohabitation and marital success, a parent's cohabitation, while maybe providing a small benefit, is the very thing that is sabotaging the child's ultimate best for the long run: being raised in a married family.

#### *D. Authentic Desires*

"[A]ll the relevant data over the past thirty or so years shows that adults of all ages say that having a 'happy marriage' is one of their most important goals in life."<sup>100</sup> This data is clearly inconsistent with the anecdotal hypothesis that there has been a psychological retreat from marriage. Despite this desire for "happy marriage," cohabitation, which sabotages marriage, is on the rise. If the hope for a happy marriage is genuine, then what would cause people to settle for cohabitation when that very thing destroys their chances of realizing their hope? The complete self-sacrifice required to make marriage successful runs counter to the American culture of autonomy and self-conscious individualism. Some may perceive that the stakes are too high, and that to sacrifice themselves for the good of another with no guarantee of return is too great a risk to take. Yet the truth remains that, without this risk, there is no possibility of winning. Although there are no guarantees in life, the great risk of putting another before yourself, of truly loving another, gives the only possibility of achieving even a glimpse of that for which most adults long.

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<sup>96</sup> Fagan & Rector, *supra* note 10, at 25.

<sup>97</sup> *Id.* at 24.

<sup>98</sup> Forste, *supra* note 14, at 94.

<sup>99</sup> *Id.*

<sup>100</sup> Glenn, *supra* note 69, at 13.

This evidence leads to the greatest paradox of all in the discussion of why marriage is still so important: “The very importance that people place on marriage as a source of gratification has contributed to the decline of marriage as an institution.”<sup>101</sup> This sense of entitlement on the rise in American society, coupled with a decline in a sense of duty, has led to the drastic and dramatic effects we see in our culture today.

#### V. CONCLUSION AND FUTURE SPECULATION

This cultural and moral weakening is evident in the current state of family breakdown. “To explain these changes, conservatives emphasize the breakdown of individual and cultural commitment to marriage . . . . They understand both trends to be the result of greater emphasis on the short-term gratification and on adults, personal desires rather than on what is good for children.”<sup>102</sup> A climate of selfishness and individuality has apparently led to the present moral decline. Cohabitation is a direct result of our national individuality. It is indeed well represented in the present state of American culture. Yet even in the midst of that moral decline, individuals who cohabit still desire to marry at some point in the future, possibly because the benefits of one over the other are intrinsically apparent to all.

In matters of the heart, no less than the market, a bigger investment means better returns. The benefits that marriage (but not cohabitation) brings are not small: . . . marriage for most people is the means to health, happiness, wealth, sex, and long life. In love, victory goes not to the half-hearted but to the brave: to those ordinary people who dare to take on the extraordinary commitment marriage represents.<sup>103</sup>

This analysis is soundly supported by the concept that marriage is a basic, intrinsic good rather than a functional, instrumental good. The law cannot regulate happiness; it can only promote stability and the welfare of its citizens. “Marriage is more than a private emotional relationship. It is also a social good.”<sup>104</sup>

The key to success in a renaissance of marriage will be a renewed commitment to a lasting relationship that overcomes selfish desires for satisfaction. A sense of entitlement must be replaced by an intentional sense of seeking something greater than oneself to fully appreciate and experience the strength and joy of marriage.

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<sup>101</sup> *Id.* at 17.

<sup>102</sup> Janet Z. Giele, *Decline of the Family: Conservative, Liberal, and Feminist Views*, in *PROMISES TO KEEP: DECLINE AND RENEWAL OF MARRIAGE IN AMERICA* (David Popenoe et al. eds., 1996) reprinted in BRINIG ET AL., *supra* note 69, at 19-20.

<sup>103</sup> WAITE & GALLAGHER, *supra* note 8, at 46.

<sup>104</sup> DOUGHERTY ET AL., *supra* note 88, at 18.