

Unmarried Cohabitation: What Can We Learn From a Comparison Between the United States and China?

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I. Introduction

In the United States, the number of unmarried couples living together has increased dramatically due to the growing social recognition of unmarried cohabitation.¹ Concomitantly, in China, the Chinese Communist Party made the decision to reform and open China's economy to the world in 1978.² This has not only brought about great changes to China's economy and society, but also transformed the Chinese family in an unprecedented way.³

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1. See Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1128–29 (1981) (an analysis based on the March 1980 census data demonstrated that the number of unmarried heterosexual couples who shared a household had increased by 200% between 1970 and 1980). See also Jason Fields, *America's Families and Living Arrangements: 2003*, in U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P20-553, at 17, available at <http://www.census.gov/prod/2004pubs/p20-553.pdf> (2003) (in 2003, 9.2 million men and women lived together in 4.6 million unmarried-partner households; the proportion of all households that were unmarried-partner households had steadily increased from 2.9 percent in 1996 to 4.3 percent in 2003 in the United States).

2. In 1978, Deng Xiaoping, former General Secretary of the Chinese Communist Party, Chief of General Staff and Head of Central Military Commissions, announced China's "open door" policy in his famous speech at the Third Plenary Session of the Eleventh Central Committee of the Chinese Communist Party. See XIAOPING DENG, *Emancipate the Mind, Seek Truth from Facts and Unite as One in Looking to the Future*, in 2 SELECTED WORKS OF DENG XIAOPING: 1975–1982, at § 4 (People's Daily Online ed.), available at <http://english.people.com.cn/dengxp/vol2/text/b1260.html> (1978).

3. See Qi Wanxue & Tang Hanwei, *The Social and Cultural Background of Contemporary*

Despite changes in social attitudes toward unmarried cohabitation, marriage is not dead in either China or the United States. On the contrary, one American family historian argues that marriage as a private relationship between two individuals is taken more seriously and comes with higher emotional expectations than ever before in history.⁴ On the other hand, marriage as a public institution exerts less power over people's lives today than in the past.⁵

Increased nonmarital cohabitation has inspired a discussion among courts, legislators and legal scholars on whether and how the family law system should recognize unmarried cohabitation in the United States.⁶ Likewise, there have been conflicting views regarding the recognition of unmarried cohabitation in China.⁷ Nevertheless, the question remains unresolved today after decades of disputes in both countries.

In both countries, inadequate recognition of unmarried cohabitation frustrates cohabitants who live together, raise children, and commingle their lives without being married, but confront rising problems when they end their relationships. The result usually is either an effective impoverishment of one party and any children who remain in that party's custody, or a judicially imposed solution to which the parties may not have consented and which may otherwise be an anomaly under the established laws. Particularly, in China, many rural couples believe they are married, but in reality live in relationships that the law does not recognize.

This article compares historical legal treatments and evaluates contemporary legal approaches to unmarried cohabitation in the United States and in China. Part II explores the historical evolution of judicial and legislative treatments of unmarried cohabitation in both countries. By comparing their

Moral Education in China, 33 J. MORAL EDUC. 465, 473–75 (illustrating how the reform and opening-up policy has brought about some significant changes in the Chinese family structure and ideas about the family by introducing a market economy system, mass media, Internet and value pluralism). See also DEP'T OF POPULATION, SOC. SCI. AND TECH., NAT'L BUREAU OF STATISTICS OF CHINA, WOMEN AND MEN IN CHINA: FACTS AND FIGURES 2004, at 22–23, available at http://www.stats.gov.cn/english/statisticaldata/otherdata/men&women_en.pdf (2004) (marriage rate in China declined annually from 15.6 per 1,000 in 1994 to 12.2 per 1,000 in 2002 while divorce rate remained stable at less than 2 per 1,000 from 1994 to 2002).

4. See Stephanie Coontz, *For Better, For Worse: Marriage Means Something Different Now*, WASH. POST, May 1, 2005, at B01.

5. *Id.*

6. See, e.g., *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976) (applying contract principles in an unmarried cohabitation case); VT. STAT. ANN. tit. 15, §§ 1201-07 (2002) (creating civil unions to confer rights and obligations on same-sex cohabitants); *Connell v. Francisco*, 898 P.2d 831 (Wash. 1995) (en banc) (recognizing meretricious relationships); and AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 6.01-.06 (2002) (proposing that domestic partners should be treated the same as married couples at the time of dissolution).

7. See Xiaoqing Feng, *A Review of the Development of Marriage Law in the People's*

developments of family law, Part II identifies a common theme in laws governing unmarried cohabitation. Part III evaluates different legal approaches to unmarried cohabitation in the context of each country. Finally, this article argues for a functional approach in both countries, but for different reasons, and maintains that, until conditions change in a way that makes it feasible to force cohabiting couples into recognized statuses, the law should be sufficiently flexible to recognize cohabitation relationships that are functional equivalents to marital relationships. It concludes with several lessons learned from this comparative family-law study.

II. A Common Theme of Development

While a New York case recognized the doctrine of common law marriage, which dealt with unmarried cohabitants, as early as 1809,⁸ the first Marriage Law of the People's Republic of China [PRC Marriage Law] was not enacted until 1950.⁹ Despite the disparity in their developing timelines, this article finds that laws governing unmarried cohabitation have experienced a common theme of development in both countries: When marriage registration systems were not well developed in the early years, both countries recognized unmarried cohabitation based on either common law marriage or de facto marriage. Later when marriage systems became fully fledged, both countries abolished these doctrines in favor of formality. Eventually, social changes propel both countries' present limited recognition of unmarried cohabitation. Meanwhile, both countries are struggling with the reason, form, and scope of such recognition.

A. Common Law Marriage and De Facto Marriage in the Past

Common law marriage traditionally refers to legal recognition of marriage on the basis of an agreement to be married without the requirement of a ceremony.¹⁰ American common law marriage derives from English

Republic of China, 79 U. DET. MERCY L. REV. 331, 349 (2001–2002) (illustrating two views regarding treatments for unmarried cohabitation in China).

8. See *Fenton v. Reed*, 4 Johns. 52 (1809).

9. See *Hun yin fa* [Marriage Law] (promulgated by the Standing Comm. Nat'l People's Cong., May 1, 1950), *repealed* by the Standing Comm. Nat'l People's Cong., Sept. 10, 1980, *translated and reprinted* in C.K. YANG, CHINESE COMMUNIST SOCIETY: THE FAMILY AND THE VILLAGE, app. at 221–26 (1972) (P.R.C.).

10. See *Davis v. Stouffer*, 112 S.W. 282, 285 (Mo. Ct. App. 1908) (a contract of marriage *in praesenti*, without more, is a marriage). *But see In re Zemmicks Estate*, 76 N.E.2d 902, 906 (Ohio Ct. App. 1946) (an agreement to marry *in praesenti*, made by parties competent to contract, accompanied and followed by cohabitation, as husband and wife, with the result that they are treated and reputed as husband and wife in the community in which they reside, constitutes a common-law marriage).

marriage law prior to the Marriage Act of 1753.¹¹ In 1809, the plaintiff in *Fenton v. Reed*,¹² who believed that her husband had died, married her second husband, Reed. The first husband returned, did not interfere with the second marriage, and died eight years later. When Reed died, Chancellor Kent held that although the plaintiff's marriage with Reed was void while the first husband was alive, no formal solemnization of marriage was required for the marriage between the plaintiff and Reed to be valid after the first husband's death. The court recognized that a marriage may be proved from cohabitation, reputation, acknowledgment of the parties, reception in the family, and other circumstances.¹³

In 1877, the Supreme Court of the United States approved the doctrine of common law marriage in *Meister v. Moore*.¹⁴ The defendants claimed that the marriage between Mowry and an Indian woman, Mary, was invalid because it did not satisfy the requirement by Michigan's marriage statute that a minister or magistrate be present at the ceremony.¹⁵ The Court rejected this argument and held that informal marriage by contract *per verba de praesenti* constitutes a marriage at common law.¹⁶ The common law marriage doctrine was grounded on a policy favoring practice over form.¹⁷ Since common law marriage differs from ceremonial marriage only in the manner in which it was entered, couples under common law marriage are entitled to the same rights and obligations as couples going through ceremonial marriages.¹⁸

On the other hand, China historically recognized *de facto* marriage. Deeply influenced by traditional custom in imperial China, people in rural areas of China commonly emphasize the customary wedding ceremony and ignore formal marriage registration.¹⁹ Consequently, there are more

11. See LESLIE HARRIS ET AL., *FAMILY LAW* 232 (3d ed. 2005). The 1753 Act, which provided that only marriages celebrated in church or in a public chapel in the presence of two witnesses would thereafter be valid, officially abolished nonceremonial marriage in England. See *id.*

12. *Fenton v. Reed*, 4 Johns. 52 (1809).

13. See *id.*

14. *Meister v. Moore*, 96 U.S. 76 (1877).

15. *Id.* at 76. The defendants were the vendees of Mowry's mother in whom the title of the property would be vested if Mowry died intestate. See *id.*

16. See *id.* at 78. The Court explained that state marriage statutes prescribing manners of matrimonial solemnization and celebration may be construed as merely directory, instead of being treated as destructive of a common-law right to form the relation by words of present assent. See *id.* at 79.

17. MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 79 (1985).

18. See 52 AM. JUR. 2D *Marriage* § 41 (2000).

19. See LIPING WANG, HUN YIN JIA TING FA LÜ ZHI DU YAN JIU [A JURISPRUDENTIAL STUDY OF FAMILY LAW] 93-94 (2004). See also ZHANG XIANCHU, *Family Law*, in INTRODUCTION TO

unmarried cohabitants who hold themselves out as husband and wife in rural areas than in the cities.²⁰ These rural couples often genuinely believe that they are married.²¹ In contrast, urban youths in recent years increasingly choose cohabitation over marriage partly due to the change in social attitudes regarding unmarried cohabitation.²² In fact, they are choosing not to marry.

In a 1979 opinion, the Supreme People's Court defined "de facto marriage" as a man and a woman living together as husband and wife without marriage registration but with community acknowledgment.²³ The court further decided that in dealing with de facto marriages, lower courts should adhere to the principle that marriage without registration is illegal.²⁴ But if the cohabitants have reached the legal age for marriage, courts should resolve their dispute the same way as in marriage cases.²⁵

The second PRC Marriage Law, enacted in 1980, did not expressly address the issue of marriage without registration.²⁶ However, just a few years later in 1984, one Supreme People's Court opinion continued recognizing de facto marriage, while maintaining that it was unlawful for an unmarried man and woman to live together without registering for marriage.²⁷ In addition, a 1989 Supreme People's Court opinion provided

CHINESE LAW § 9.05, at 310 (Wang Chenguang & Zhang Xianchu eds., 1997) (observing that informal marriage has been one of the most serious and complicated problems in family law for a long time in China).

20. See LIPING WANG, *supra* note 19, at 93–94.

21. See ZHANG XIANCHU, *supra* note 19, § 9.05, at 310 (most informal marriages are contracted by unmarried couples with the purpose of establishing a husband-wife relationship with the only defect being the failure to carry out the marriage registration).

22. See YAN R. XIA & ZHI G. ZHOU, *The Transition of Courtship, Mate Selection, and Marriage in China*, in MATE SELECTION ACROSS CULTURES (Raeann R. Hamon & Bron B. Goldsby eds., 2003).

23. Guan yu guan che zhi xing min shi zheng ce fa lü de yi jian [Regarding Execution of Civil Law and Policy] (February 2, 1979), *repealed by* Jue ding fei zhi de 1979 nian zhi 1989 nian jian fa bu de si fa jie shi mu lu [Index of Judicial Interpretations Issued between 1979 and 1989 That Are Decided to be Repealed] (January 28, 1997) CHINALAWINFO available at <http://www.chinalawinfo.com> (last visited July 11, 2007) (P.R.C.).

24. *Id.*

25. *See id.*

26. *See* Hun yin fa [Marriage Law], art. 7 (promulgated by the Standing Comm. Nat'l People's Cong., Sep. 10, 1980, effective Jan. 1, 1981), *amended by* Standing Comm. Nat'l People's Cong., Apr. 28, 2001, *translated in* CHINALAWINFO (last visited July 11, 2007) (P.R.C.). Article 7 only states that:

Both the man and the woman desiring to contract a marriage shall register in person with the marriage registration office. If the proposed marriage is found to conform with the provisions of this Law, the couple shall be allowed to register and issued marriage certificates. The husband-and-wife relationship shall be established as soon as they acquire the marriage certificates.

27. *See* Guan yu gan che zhi xing min shi zheng ce fa lü ruo gan wen ti de yi jian [Regarding Several Questions in Execution of Civil Policy and Law](Aug. 30, 1984) CHINALAWINFO (last

broad recognition for unlawful cohabitation, where the requirements for de facto marriage were not met.²⁸

Courts also had jurisdiction to dissolve unlawful cohabitation relationships.²⁹ For example, in a 1991 case in Shanxi province, 22 year-old female plaintiff Wang Hongmei sued 24 year-old male defendant Liu Guoliang for dissolution of their relationship.³⁰ The parties were arranged to be “married” by their parents and had cohabited together since December 1987.³¹ Their son was born in October 1988. Plaintiff, unsatisfied with this relationship, filed a petition for a divorce decree. The People’s Court of Hengshan County (1) dissolved the unlawful cohabitation relationship; (2) granted the defendant sole custody of the child and ordered the plaintiff to pay child support; (3) awarded the plaintiff the wardrobe, a dowry,³² and one old stone kiln³³ while awarding the defendant a greater portion of other property accrued during the relationship;³⁴ and (4) ordered the plaintiff’s family to return a gift of RMB 1,000 to the defendant.³⁵ The court, in reaching this decision, considered factors, such as the public policy to protect women and children, the practicability of dividing the property, and the absence of fault on the defendant’s part.³⁶

Common law marriage in the United States and de facto marriage in China have similar definitions. Although slightly differing among states,

visited July 11, 2007) (P.R.C.). Courts may decide disputes between unmarried cohabitants pursuant to other provisions of the Marriage Law so long as the cohabitants have reached legal age for marriage and satisfied other requirements for marriage. *See id.*

28. *See Guan yu ren min fa yuan shen li wei ban je hun deng ji er yi fu qi ming yi tong ju sheng huo an jian de ruo gan yi jian* [Regarding People’s Courts’ Handling Cases Involving Cohabitation as Husband and Wife without Marriage Registration] (Nov. 21, 1989) CHINALAWINFO (last visited July 11, 2007) (P.R.C.). For example, courts may decide on issues such as property division and child support. *Id.* at § 8. Parties’ debts accrued during the cohabitation period for the purpose of working and living together are treated as marital debts. *Id.* at § 10–11. However, unlike in de facto marriage, parties to an unlawful cohabitation relationship ordinarily do not have a right to inherit each other’s estates. *Id.* at § 13.

29. *See id.* § 7.

30. *See Wang Hongmei v. LiuGuoliang*, 2 CHINA L. REP. 55 (1991).

31. *See id.* at 57.

32. The court treated the wardrobe and dowry as private properties of the plaintiff because they were given by the plaintiff’s parents before the parties started to cohabit. *See id.* at 59.

33. The court found that the three stone kilns in dispute were property jointly possessed by the two parties, given by the defendant’s parents while the two parties were cohabiting. Thus, the plaintiff had a right to claim division. *See id.* at 59.

34. Considering the actual circumstances of this case, the court put the emphasis of consideration on the effort each party made in acquiring the property and the interests of the child. Therefore, the defendant is entitled, to an appropriate extent, a greater portion. *See id.*

35. The court noted that PRC Marriage Law prohibited the exaction of money and gifts in connections with marriage and treated the gift money as exacted money, even though the parties did not enter a formal marriage. *See id.*

36. *See id.*

common law marriage generally requires: (1) a present intent by both parties to be married;³⁷ (2) continuous cohabitation for a period of time;³⁸ and (3) the parties holding themselves out to the public as husband and wife.³⁹ The Chinese notion of de facto marriage also requires continuous cohabitation and a public declaration that the parties are husband and wife.⁴⁰ However, there is no intent element in the concept of de facto marriage.⁴¹ Thus, in theory, parties who consciously choose not to marry and cohabit as an alternative may form a de facto marriage but not a common law marriage.

B. Present Limited Recognition of Unmarried Cohabitation

The tolerance of informal marriage by nineteenth century American jurists evoked growing criticism for its laxity and its failure to protect society from marital instability.⁴² One year after Chancellor Kent's opinion in *Fenton v. Reed*, Chief Justice Parsons of the Supreme Judicial Court of Massachusetts held in *Milford v. Worcester* that it was crucial for the state to regulate marriage in order to define who may marry so as to preserve the purity of families; to prescribe the manner of solemnization so as to guard against fraud, surprise, and seduction; to secure rights and privileges of the parties and their issues so as to encourage marriage and to discountenance wanton and lascivious cohabitation.⁴³ While the majority of courts in the nineteenth century favored Kent's approach over Parsons' view, the acceptance of common law marriage clearly declined in the twentieth century.⁴⁴

Today, U.S. courts have applied different theories in cases involving unmarried cohabitation. Some cases apply contract theory; some rely on statutory recognition of cohabitation; and some articulate other theories, such as a functional recognition. But one thing is constant: courts have developed theories that allow a limited recognition of cohabitation in the United States.

Similarly, China has greatly limited its recognition for unmarried cohabitation since mid-1990's. On February 1, 1994, the Civil Administration Department of the Chinese government enacted the Regulations

37. See 52 AM. JUR. MARRIAGE § 37 (2000).

38. See *id.* § 39.

39. See *id.* § 40.

40. See *supra* note 23 and accompanying text.

41. *Id.*

42. See GROSSBERG, *supra* note 17, at 83–84.

43. *Milford v. Worcester*, 7 Mass. 48, 52–53 (1810).

44. See Ariela R. Dubler, Note, *Governing Through Contract: Common Law Marriage in the Nineteenth Century*, 107 YALE L.J. 1885, 1900 (1998).

on Control of Marriage Registration [Marriage Regulations].⁴⁵ Under the Marriage Regulations, marriage relationships are invalid for couples who have not reached the legal age for marriage but cohabit in the name of husband and wife, or those who conform to the legal requirements for marriage but cohabit in the name of husband and wife without marriage registration.⁴⁶ Thus, the Marriage Regulations arguably abolished de facto marriage in China.

Thereafter, on April 28, 2001, the Standing Committee of the National People's Congress amended the PRC Marriage Law.⁴⁷ Article 8 of the amended Marriage Law provided that a "man and woman must register with marriage registration office" and "[t]hose without registration should make it up."⁴⁸ In a 2001 interpretation of the amended Marriage Law, the Supreme People's Court held that unregistered relationships formed after the enactment of the Marriage Regulations shall be regarded as unlawful cohabitation. However, such parties may register for marriage. If they do so, the effective date of their marriage will be dated back to the beginning of their relationship.⁴⁹ Otherwise de facto marriage can only be granted under limited circumstances.⁵⁰ Thus, this amendment rejected a strict registration system and acknowledged de facto marriage conditionally.⁵¹

On the other hand, the Supreme People's Court issued a second opinion in December 2003, which explicitly provided that courts generally should not grant dissolution of any cohabitation relationship.⁵² Nonetheless, it also provided that courts may adjudicate disputes arising from such relationships, but only with respect to property division or

45. See *Hun yin deng ji guan li tiao li* [Regulations on Control of Marriage Registration] (adopted by St. Council, Jan. 12, 1994, promulgated by Decree No.1 of the Ministry of Civil Affairs, Feb. 1, 1994), translated by Central People's Government, available at http://english.gov.cn/2005-07/29/content_18376.htm (last visited July 11, 2007) (P.R.C.).

46. See *id.*

47. See Xiaoqing Feng, *supra* note 7, at 349.

48. See *Hun yin fa* [Marriage Law], art. 8 (promulgated by the Standing Comm. Nat'l People's Cong., Sep. 10, 1980, effective Jan. 1, 1981, amended Apr. 28, 2001), translated in CHINALAWINFO (last visited July 11, 2007) (P.R.C.).

49. See *Zui gao fa yuan guan yu shi yong "Zhonghua Renmin Gongheguo hun yin fa" ruo gan wen ti de jie shi* [Interpretations of the Supreme People's Court About Several Problems Concerning the Application of the Marriage Law of the People's Republic of China], § 4 (Dec. 24, 2001) CHINALAWINFO (last visited July 11, 2007) (P.R.C.).

50. See *id.* § 5 (requiring parties to satisfy the conditions for de facto marriage before Feb. 1, 1994).

51. See *id.* § 4 (the recognition for de facto marriage is conditioned upon the parties' willingness to register for marriage).

52. See *Zui gao fa yuan guan yu shi yong "Zhonghua Renmin Gongheguo hun yin fa" ruo gan wen ti de jie shi* (2) [Interpretations of the Supreme People's Court about Several Problems Concerning the Application of the Marriage Law of the People's Republic of China (II)], § 1 (Dec. 25, 2003) CHINALAWINFO (last visited July 11, 2007) (P.R.C.).

child-rearing issues. The courts have no power to address inheritance or spousal support. However, the Court carved out an exception, which allowed the courts to dissolve cohabitation relationships if one party had a legal spouse but also cohabited with a nonlegal spouse. This exception was made specifically to discourage the widespread phenomenon of *bao'ernai*, a synonym for “concubines.” Thus, according to the Supreme People’s Court, the legislature intended the PRC Marriage Law to entail a double standard.⁵³

Moreover, in this opinion, the Supreme People’s Court replaced the phrase “unlawful cohabitation” with “cohabitation.”⁵⁴ This indicates a policy shift from denying the legality of cohabitation to acquiescence in cohabitation. This subtle change could be rooted in a change in public attitudes. In summary, the case and statutory laws in both countries afford a limited recognition of unmarried cohabitation today, but they differ in their approaches.

III. Legal Approaches to Treatment of Unmarried Cohabitation

The current PRC Marriage Law and its judicial interpretation from the Supreme People’s Court are problematic because they set forth a relate-back rule.⁵⁵ This rule not only significantly undermines the social meaning of civil marriage, but also creates an incentive for fraud. Resurrecting de facto marriage is also disfavored both because it is against the clearly expressed legislative intent,⁵⁶ and because de facto marriage is unlikely to solve the cohabitation problems in the urban areas of China.⁵⁷ Even if de facto marriage was revived, its scope has been significantly restricted since 1994.⁵⁸

53. *Id.*

54. *See id.*

55. *See supra* notes 49–50 and accompanying text (explaining the relate-back rule under the current marriage law in China).

56. *See supra* note 51 and accompanying text (de facto marriage should only be granted under very limited circumstances).

57. This is because it requires cohabiting couples to hold themselves out as husband-and-wife, *see supra* note 24 and accompanying text, and many urban youths choose cohabitation because they do not want to be married, *see generally* YAN R. XIA & ZHI G. ZHOU, *supra* note 22 and accompanying text.

58. The PRC Marriage Law required the parties to register with the marriage registration office. *See* Hun yin fa [Marriage Law], art. 8 (promulgated by the Standing Comm. Nat’l People’s Cong., Sep. 10, 1980, effective Jan. 1, 1981, *amended by* the Standing Comm. Nat’l People’s Cong., Apr. 28, 2001), *translated in* CHINALAWINFO (last visited July 11, 2007) (P.R.C.). The Marriage Regulations required that the parties present themselves in person. *See* Hun yin deng ji guan li tiao li [Regulations on Control of Marriage Registration] (adopted by St. Council, Jan. 12, 1994, promulgated by Decree No. 1 of the Ministry of Civil Affairs, Feb. 1, 1994), *translated by* Central People’s Government, *available at*

Meanwhile, U.S. courts, legislators and legal scholars have developed several modern theories applicable to unmarried cohabitation over the years. These theories primarily include a contract-based approach, a status-based approach, and a functional approach. This article next introduces these approaches in turn and discusses considerations when applying them in the context of the United States and China respectively.

A. Contract-based Approach

A contract-based approach bases obligations between unmarried cohabitants upon the agreement between cohabiting partners, as with the seminal case of *Marvin v. Marvin*.⁵⁹ In that case, Michelle and Lee Marvin lived together for seven years without getting married.⁶⁰ Michelle sued Lee for half of the property acquired during the parties' cohabitation and for a reasonable amount of support and maintenance. She based her claim on an oral agreement between the parties in which they agreed that while the parties lived together they would combine their efforts and earnings and would share equally any and all property accumulated as a result of their efforts. Furthermore, she alleged they agreed to hold themselves out as husband and wife and that she would render her services as a companion, homemaker, housekeeper and cook. Thereafter Michelle gave up her lucrative career as an entertainer and singer in order to perform the oral contract. However, Lee compelled Michelle to leave his household in May of 1971 and stopped supporting her in November of 1971.⁶¹ The California Supreme Court held that the court should ordinarily enforce express contracts between nonmarital partners unless the contract was expressly premised on sexual service.⁶²

In the absence of an express or implied contract, some courts have applied the doctrine of quantum meruit. Rather than basing parties' obligations on their agreements, the doctrine of quantum meruit is rooted in the concept that when one party in a relationship benefits at the other party's expense, the party deriving the benefits should compensate the other party for the costs incurred.⁶³ Other courts have relied upon the con-

07/29/content_18376.htm (last visited July 11, 2007) (P.R.C.). Thus, the PRC Marriage Law and the Marriage Regulations, when read together, no longer protect the inheritance right of the parties to a de facto marriage. This means that de facto marriage no longer confers rights and obligations equivalent to marriage.

59. *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

60. *Id.* at 110.

61. *Id.*

62. *See id.* at 122.

63. *See* 66 AM. JUR. 2D *Restitution and Implied Contracts* § 9 (2001) (defining unjust enrichment as the unjust retention of a benefit to the loss of another). *E.g.*, *Salzman v. Bachrach*,

structive trust theory.⁶⁴ Constructive trusts differ from quantum meruit primarily because they permit the plaintiff to claim title to specific property rather than pursue an action for damages.⁶⁵

1. UNITED STATES

The *Marvin* case is significant because it not only allowed parties to alter the State-defined terms of marriage through private agreements, but also recognized the cohabitation arrangement as an alternative to marriage.⁶⁶ In *Marvin*, the court reiterated the established principle in California that nonmarital partners may lawfully contract concerning the ownership of property acquired during the relationship.⁶⁷

However, *Marvin* also exposes some practical problems and theoretical limitations to this approach. First, *Marvin*'s test for distinguishing permissible contracts from illegal contracts for prostitution lacks certainty.⁶⁸ While usually the parties' sexual relations are not mentioned explicitly in their agreement, it is normally an essential part of their relationship.⁶⁹ Thus, sexual relations are hardly a severable component in such contracts between unmarried cohabitants. The *Latham* test prescribed by the Oregon Supreme Court may cure the flaw in the *Marvin* test by requiring that the agreement contemplate all the burdens and amenities of married life.⁷⁰

Second, a more fundamental problem with *Marvin* is that the decision is based solely on contract principles. On the one hand, as one commentator points out, couples in a cohabitating relationship do not in fact think

996 P.2d 1263 (Colo. 2000) (a plaintiff seeking recovery for unjust enrichment must prove: (1) at plaintiff's expense; (2) defendant received a benefit; (3) under circumstances that would make it unjust for defendant to retain the benefit without paying).

64. See, e.g., *Story v. Lanier*, 166 S.W.3d 167, 185 (Tenn. Ct. App. 2004) (the doctrine of constructive trusts applies where: (1) a person procures the legal title to property in violation of some duty, express or implied, to the true owner; (2) the title to property is obtained by fraud, duress or other inequitable means; (3) a person makes use of some relation of influence or confidence to obtain the legal title upon more advantageous terms than could otherwise have been obtained; and (4) a person acquires property with notice that another is entitled to its benefits).

65. See *id.* at 184 (the resulting trust and constructive trust both represent equitable devices used by courts to avoid unjust enrichment).

66. See *Marvin v. Marvin*, 557 P.2d 106, 116 (Cal. 1976) ("So long as the agreement does not rest upon illicit meretricious consideration, the parties may order their economic affairs as they choose, and no policy precludes the courts from enforcing such agreements."). Cf. *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1209 (Ill. 1979) (questioning *Marvin* on whether it is appropriate for courts to grant a legal status to a private arrangement substituting for the institution of marriage).

67. See *Marvin*, 557 P.2d at 106.

68. See IRA MARK ELLMAN ET. AL., *FAMILY LAW: CASE, TEXT, PROBLEMS* 954 (3d ed. 1998).

69. See *id.* at 954–55.

70. See *Latham v. Latham*, 547 P.2d 144, 147 (Or. 1976).

of their relationship in contract terms.⁷¹ On the other hand, the issue cannot be regarded merely as a problem in contract law. “There are major public policy questions involved in determining whether, under what circumstances, and to what extent it is desirable to accord some type of legal status to claims arising from such relationships.”⁷²

Finally, a practical problem in *Marvin* lies in the burden of proof, which is illustrated by the outcome of the case. On remand, the trial court found no express or implied contract between Lee and Michelle.⁷³ Neither did Michelle receive any award based on equitable trust or quantum meruit because she suffered no damage resulting from her relationship with Lee.⁷⁴ The proof becomes even harder in palimony actions based on implied contracts. Although an implied-in-fact contract may be inferred from the parties’ conduct, situation or mutual relation, the very heart of this kind of agreement lies in an intent to promise.⁷⁵ With little doubt about the parties’ intent to live together, courts have been troubled by their intent to support each other upon the termination of their relationship in the absence of an express contract.⁷⁶

2. CHINA

Chinese courts have rejected the American contract-based approach that recognizes cohabitation relationships in favor of property and child support awards based on national policies and equitable principles. Both the *Marvin* court and the Hengshan People’s Court provided some recognition for unmarried cohabitants. Nonetheless, the *Marvin* court, relying on contract theories, focused on the parties’ intent and expectations.⁷⁷ By contrast, the Hengshan decision was oblivious to the parties’ expectations.⁷⁸ It overrode these individual concerns in order to protect state policy concerns such as providing for women and children.⁷⁹ As such, the Hengshan decision departed drastically from the contractual approach.

The limitations of uncertainty, public policy and proof burden similarly apply to the cases in China. More specifically, adopting *Marvin*’s contractual approach in China would lead to at least two problems. First,

71. See Ira Mark Ellman, “Contract Thinking” Was *Marvin*’s Fatal Flaw, 76 NOTRE DAME L. REV. 1365, 1367 (2001).

72. See *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1207 (Ill. 1979).

73. See *Marvin v. Marvin*, 176 Cal. Rptr. 555, 558 (Ct. App. 1981).

74. See *id.*

75. See *Div. of Labor Law Enforcement v. Transpacific Transp. Co.*, 137 Cal. Rptr. 855, 859 (Ct. App. 1977).

76. See *Friedman v. Friedman*, 24 Cal. Rptr. 2d 892, 896–97 (Ct. App. 1993).

77. See *Marvin v. Marin*, 557 P.2d 106, 111 (Cal. 1976).

78. See *supra* notes 30–36 and accompanying text.

79. See *id.*

China's contract law development is very recent.⁸⁰ Unlike most U.S. citizens who routinely get involved in various contracts in their everyday life, the general public in China knows very little about contract law. Thus, if unmarried cohabitants in the United States do not ordinarily think of their relationship in contract terms, it is even less likely that those in China would.

Second, contract principles in the arena of marriage law do not comport with the traditional notions of family relationships in China. The contract law in China primarily deals with commercial contracts,⁸¹ which are different from "marriage contract" under the PRC Marriage Law.⁸² Unlike the family law regulations in the United States, the PRC Marriage Law treats marriage as a social contract⁸³ and imposes State-defined mutual duties to parties entering the institution.⁸⁴ Accordingly, the National People's Congress, which treated marriage as a special "contract," intended that the PRC Contract Law should not apply in the context of family law.

B. Status-based Approach

In recent years, domestic partnership statutes in some jurisdictions of the United States make affirmative recognition available for unmarried cohabitants. The domestic partnership models fall into three dominant categories: (1) same-sex couples only; (2) all couples; and (3) same-sex and other couples ineligible to be married.⁸⁵ Under such domestic partnership laws, a couple's formal registration as domestic partners entitles them to access certain prescribed legal rights and obligations under the state law.

80. See He tong fa [Contract Law] (promulgated by the Standing Comm. Nat'l People's Cong., Mar. 15, 1999, effective Oct. 1, 1999), translated in CHINALAWINFO (last visited July 11, 2007) (P.R.C.).

81. See *id.*

82. See Hun yin fa [Marriage Law] (promulgated by the Standing Comm. Nat'l People's Cong., Sep. 10, 1980, effective Jan. 1, 1981, amended Apr. 28, 2001), translated in CHINALAWINFO (last visited July 11, 2007) (P.R.C.).

83. See *id.* ch. 2.

84. See, e.g., Hun yin fa [Marriage Law], art. 12 (duty to practice family planning); art. 14 (duty to support and assist each other); and art. 15 (duty to rear and educate children).

85. See Nancy D. Polikoff, *Ending Marriage as We Know It*, 32 HOFSTRA L. REV. 201, 218-19 (2003). Some states made domestic partnership available only to same-sex couples. See, e.g., ME. REV. STAT. ANN. tit. 22, § 2710 (Supp. 2005) (Maine domestic partnership statute is fully available to opposite-sex couples); CAL. FAM. CODE § 297 (2004 & Supp. 2006) (California domestic partnership status is available to opposite-sex couples who are at least sixty-two years old); N.J. STAT. ANN. § 26:8A-4 (Supp. 2005) (New Jersey domestic partnership status is available to opposite-sex couples over sixty-two years old); and HAW. REV. STAT. ANN. § 572C-4 (Supp. 2004) (Hawaii reciprocal beneficiary status is available to opposite-sex couples who cannot get married). But see VT. STAT. ANN. tit. 15, § 1201 (2002) (Vermont civil union is only available to same-sex couples).

For example, Vermont's Civil Union Law permits eligible same-sex couples to form civil unions and accords partners of a civil union all the benefits, protections and responsibilities of spouses in a marriage under Vermont law.⁸⁶ Therefore, these statutes permit unmarried couples to opt into a state-created status, which amounts to a status-based recognition for unmarried cohabitation.

1. UNITED STATES

Domestic partnership laws in the United States have been seen as a challenge to the traditional "nuclear family," consisting of a married couple and their common children.⁸⁷ Nevertheless, existing domestic partnership laws rarely extend to opposite-sex unmarried cohabitants.⁸⁸ Given that a large number of individuals make nontraditional choices about family structures, proponents of family law reform believe that status-based regulations should extend to unmarried opposite-sex cohabitants. Legal recognition for unmarried couples whose families involve economic and emotional interdependency would protect dependent individuals, support the family unit, and further the state interest in healthy and stable families.⁸⁹

However, the legal system has not responded to such calls for family law reform. Professor Margaret M. Mahoney summarized a number of reasons as an explanation. First of all, morality-based considerations continue to play a role in shaping the law of cohabitation, especially for opposite-sex couples.⁹⁰ Second, a compelling policy consideration favors the protection of the venerable institution of marriage and fears that creating a legally significant alternative would channel couples away from their

86. Tit. 15, § 1204(a). The rights and responsibilities to which partners of a civil union are afforded under Vermont law include: laws relating to title and administration of estates; civil tort actions related to or dependent on spousal status; probate; adoption; spousal abuse programs; workers' compensation rights; hospital visitation and emergency treatments; public assistance benefits under state law; taxes imposed by the state or a municipality other than estate taxes; immunity and the marital privilege; etc. Tit. 15, § 1204(e). In addition, the Vermont family court has jurisdiction over all proceedings relating to the dissolution of a civil union. Tit. 4, § 454(17).

87. See Margaret M. Mahoney, *Forces Shaping the Law of Cohabitation for Opposite Sex Couples*, 7 J.L. & FAM. STUD. 135, 164 (2005).

88. See generally J. Thomas Oldham, *Lessons from Jerry Hall v. Mick Jagger Regarding U.S. Regulation of Heterosexual Cohabitation Or, Can't Get No Satisfaction*, 76 NOTRE DAME L. REV. 1409 (2001) (arguing that the essential purposes of family regulation cannot be fully accomplished when "family" is defined to exclude a significant part of the population of actual households; also, the failure to assign responsibilities between the partners or to impose obligations on third parties based on the existence of such cohabitation relationship often will result in economic hardships).

89. See *id.*

90. See Mahoney, *supra* note 87, at 203-04.

marriage decisions.⁹¹ Finally, the analytical complexity of the formulation of a new status, the autonomy of unmarried couples and privacy concerns are some additional factors.⁹²

2. CHINA

Status-based approach is probably unworkable in China. Since China has such a large population, maintenance of a large scale registration system is a challenging task. In fact, one of the reasons causing such widespread unmarried cohabitation in the rural areas of China is the lack of access to the marriage registration system.⁹³ Such lack of access may be due to the inadequate legal knowledge possessed by people in those areas or the prohibitive costs that render marriage registration unaffordable for many people in rural areas.⁹⁴ A status-based approach is unlikely to circumvent these practical problems.

C. Functional Approach

During the 1980s, some courts started to shift to a functional approach in response to the increase in unmarried cohabitation. Under this approach, the court inquires whether a relationship shares the essential characteristics of a traditionally accepted relationship and fulfills the same human needs.⁹⁵ The New York case *Braschi v. Stahl Assocs.* illustrates this approach.⁹⁶ Miguel Braschi lived with his partner Leslie Blanchard in a rent-controlled apartment until Blanchard died in 1986.⁹⁷ Thereafter the defendant sought to evict Braschi. The issue turned on whether Braschi was Blanchard's family member within the meaning of the statute. The New York Court of Appeals held that in the absence of a statutory definition, the term "family" for rent control purposes included unmarried lifetime partners of tenants. It looked at the exclusivity and longevity of the

91. See *id.* A recent empirical social study, however, undercuts this policy consideration because cohabitants generally do not decide between cohabitation and marriage, but between single status and cohabitation. See Wendy Manning & Pamela J. Smock, *Measuring and Modeling Cohabitation: New Perspectives from Qualitative Data*, 67 J. MARRIAGE AND FAM. 989, 990 (2005).

92. See *id.* This is because forming a new status would necessarily entail a process of defining a set of rights and obligations. Cf. *supra* note 90. Such process would require a principled method for selecting which consequences of the marriage should be included. See Mahoney, *supra* note 91, at 197.

93. See Xiaoqing Feng, *supra* note 7, at 346.

94. See *id.* at 347.

95. Note, *Looking for a Family Resemblance: The Limits of the Functional Approach to the Legal Definition of Family*, 104 HARV. L. REV. 1640, 1646 n.30 (1991).

96. *Braschi v. Stahl Assocs.*, 543 N.E.2d 49 (N.Y. 1989).

97. *Id.* at 50.

relationship, the level of emotional and financial commitment, the manner in which the parties have conducted their everyday lives and held themselves out to society, and the reliance played upon one another for daily family services. It then concluded that Braschi and Blanchard constituted a family because they held themselves out as partners for eleven years and had shared social lives, domestic duties and financial obligations.⁹⁸

Due to its lack of determinate standards and its reliance on case-by-case adjudication, the *Braschi* decision has not been widely followed by courts in the context of other determinations, such as inheritance, where certainty is more important.⁹⁹ Nonetheless, in 1995, the Supreme Court of Washington held in *Connell v. Francisco* that courts may perform a just and equitable distribution of property upon the termination of any meretricious relationship.¹⁰⁰ The court held that there was a rebuttable presumption that property acquired during the relationship was owned by both parties and remanded the case for an equitable distribution of property.¹⁰¹ One commentator analogized this decision to a functional recognition of cohabitation relationship.¹⁰²

In 2002, the American Law Institute [ALI] proposed that couples who have been living together for a substantial period of time should be treated the same as married couples at the dissolution of their relationship.¹⁰³ The ALI commented that a complete treatment of family dissolution cannot limit itself to marital relationships.¹⁰⁴ It observed that, although societal interest in the orderly administration of justice and the stability of marriage is best served with formal marriages, a rapidly increasing percentage of

98. *Id.* at 55.

99. *See, e.g., In re Estate of Lasek*, 545 N.Y.S.2d 668 (N.Y. Sur. Ct. 1989) (the extension of the term “family” as used in the noneviction provisions of the rent control laws did not apply to claims against estates); and *In re Cooper*, 592 N.Y.S.2d 797 (N.Y. App. Div. 1993) (a survivor of homosexual relationship was not entitled to the right of election against the decedent’s will).

100. *Connell v. Francisco*, 898 P.2d 831 (Wash. 1995) (en banc)(finding that the relevant factors for establishing a meretricious relationship include continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources, and services for joint projects, and the intent of the parties. *See id.* at 834.

101. *See id.* at 837.

102. *Cf. Cynthia Grant Bowman, Legal Treatment of Cohabitation in the United States*, 26 LAW & POL’Y 119, 129–32 (2004) (arguing that the Washington scheme for meretricious relationship in effect created a status-based recognition of unmarried cohabitation without a registration system). However, “legal status” refers to a relationship between persons, which by virtue of its existence, entails legal consequences. *See Mahoney, supra* note 87, at 158. Accordingly, rather than creating a status-based recognition, the *Connell* decision more likely has created a functional recognition because the Court did not prescribe a bright-line test that qualified certain cohabitation relationships as a meretricious relationship.

103. *See AMERICAN LAW INSTITUTE, supra* note 6, at §§ 6.04-.06.

104. *See id.* § 6.02 cmt. A.

Americans form domestic relationships without such formalities. Rather than trying to resolve the issue of unmarried cohabitation indirectly through contract theory, equitable principles, and the like, the ALI proposed a functional recognition of unmarried cohabitation. The ALI's highly controversial proposal¹⁰⁵ has not been adopted by any state legislature.

1. UNITED STATES

The most obvious advantage of the functional approach is that it evaluates a family relationship based on considerations directly related to the nature and quality of the relationship. Therefore, it gives "marriage" its ideological social meaning.¹⁰⁶

However, there are several critiques against the functional approach. First, unlike relationships established through a public record, significant family relationships created by a course of conduct are difficult to identify. Thus, as a practical matter, the determination of whether a relationship is functionally equivalent to a marital relationship is necessarily a case-by-case decision.¹⁰⁷ As such, the functional approach was criticized for its lack of determinate standards and its reliance on case-by-case adjudication.

Second, some social science researches disfavor a functional recognition of unmarried cohabitation. These researches demonstrate that cohabitation relationships are generally less stable than marriage.¹⁰⁸ These findings, however, may not indicate that the quality of married life is superior to that of unmarried cohabitation. To the contrary, empirical studies have failed to establish a strong causal linkage between premarital cohab-

105. See William C. Duncan, *Domestic Partnership Laws in the United States: A Review and Critique*, 2001 BYU L. REV. 961, 989 (2001) (criticizing the ALI's approach in its proposal for domestic partnership laws); Terry S. Kogan, *Competing Approaches to Same-Sex Versus Opposite-Sex, Unmarried Couples in Domestic Partnership Laws and Ordinances*, 2001 BYU L. REV. 1023 (explaining why the ALI's approach in its domestic partnership law is the preferred approach under the current circumstances); and Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 821-32 (2005) (arguing that the sources of relational obligations should be limited to parties' consent or dependency-causation that mandates parental obligations).

106. Cf. Coontz, *supra* note 4, at B01 (marriage is taken more seriously and comes with higher expectation).

107. See *Braschi v. Stahl Assocs.*, 543 N.E.2d 49, 60 (N.Y. 1989) (Simons, J., dissenting) (noting serious practical problems in adopting the plurality's interpretation of the statute because it would require a subjective determination in each case).

108. See, e.g., Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 245 (2004). This research indicates that marriages tend to last considerably longer than informal unions; cohabiting couples express lower levels of commitment to their relationships than do married spouses; they are more likely than married persons to engage in acts of sexual infidelity and domestic violence; and married couples express greater happiness with their relationships and are more likely to share assets and income and to commingle their finances. *See id.*

itation and marital instability.¹⁰⁹ Some studies even suggest that the instability of cohabitation is a matter more of selection than causation.¹¹⁰ That is, those who are less religious and have less traditional beliefs or poorer relationship skills than ordinary couples tend to be drawn into cohabiting relationships. The same factors also account for the instability of cohabitation relationships.¹¹¹

Perhaps a better reason for insisting on formality in marital status is that it clarifies the meaning of the commitment that cohabiting couples make and underscores the seriousness of such commitment.¹¹² Legal formalities serve three functions in contract law: an evidentiary function of clarifying the terms and meaning of the contract; a cautionary function of encouraging deliberation by the parties in executing the agreement; and a channeling function of providing a simple external test of an intention by the parties to undertake a particular set of legally enforceable obligations.¹¹³ The same functions are manifest in the legal formalities associated with marriage.

Nonetheless, it is equally important to note the large number of unmarried cohabitants living together in the United States today. There are at least three groups of unmarried cohabitants: (1) couples who do not want to get married; (2) couples who want something close to marriage but either disapprove of marriage or could not marry for various reasons; and (3) couples who hold different attitudes regarding marriage.¹¹⁴ The extent to which legal formalities serve their functions is almost certainly different for different groups.¹¹⁵ Thus, we might want to take a closer look at how much importance is to be attached to the formality of marriage.

Another strong argument against the functional approach relates to the development of children born to the relationship. It is well established that secure parent-child relationships contribute significantly to healthy child development and that family dissolution imposes financial and psycho-

109. See, e.g., Pamela J. Smock & Wendy D. Manning, *Living Together Unmarried in the United States: Demographic Perspectives and Implications for Family Policy*, 26 LAW & POL'Y 87, 90-91 (2004). But see Margaret F. Brinig, *Empirical Work in Family Law*, 2002 U. ILL. L. REV. 1083, 1092-03 (2002) (a substantial debate surrounded the cause and effect problems of relationship instability and cohabitation).

110. See Smock & Manning, *supra* note 109, at 90-91.

111. See *id.*

112. See Scott, *supra* note 108, at 245.

113. See Lon Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800-01 (1941).

114. For example, in *Marvin*, Michelle probably wanted a marriage while Lee disagreed. Cf. *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

115. For instance, the second group of people might not even need the cautionary function of legal formalities because they probably have deliberated about marriage no less than married people do.

logical costs on children.¹¹⁶ Other than in high conflict situations such as domestic violence, intense inter-parental conflict, or maltreatment, children's development usually is enhanced if their parents' relationship endures.¹¹⁷ Therefore, the institution of marriage helps to provide a more stable family environment in which to raise children to the extent that marriage encourages commitment.

However, this argument only addresses the situation where children are born within the wedlock. Unfortunately, for children born out of wedlock, they are not protected in any way by such a policy favoring formality. Punishing unmarried cohabitants by denying their equal rights, benefits and privileges, assuming doing so would encourage couples with children to marry, has not achieved its goal of protecting children in the past decades. The number of couples in unmarried cohabitation and children born to such relationships remains high. Thus, maybe now is the time to change our past approach. Engaging, as opposed to stigmatizing, unmarried cohabitants will effectuate an increase in the cost of the dissolution of such relationships and thus encourage cohabiting couples to stay committed. In this sense, a functional recognition of cohabitation can stabilize cohabitation relationship and protect the best interest of children in such households.

2. CHINA

Chinese courts have never adopted a functional approach. The Hengshan court focused on the parties' situations at the time of dissolution, which seems to suggest that the court had taken a functional approach.¹¹⁸ However, unlike in *Connell*, the Hengshan court did not consider factors related to the nature of the cohabitation, such as the continuity, the duration and the purpose of the cohabitation, the intent of the parties, etc.¹¹⁹ Therefore, the court did not reach its decision regarding property division and child support due to its recognition of the relationship itself. On the contrary, the court treated the relationship as "illegal" throughout the case

116. See generally Elizabeth S. Scott, *Divorce, Custody, and the Culture Wars*, 9 VA. J. SOC. POL'Y & L. 95 (2001).

117. *Id.* at 96–97; ROBERT EMERY, MARRIAGE, DIVORCE, AND CHILDREN'S ADJUSTMENT 33–53 (2d ed. 1999); and PAUL AMATO & ALAN BOOTH, A GENERATION AT RISK 195–207 (1997).

118. See *supra* notes 30–36 and accompanying text (regarding how Hengshan People's Court resolved a case involving unlawful cohabitation). One difference between common law marriage and the functional approach is the critical time period that the two theories examine in determining whether a relationship meets the requirement.

119. See *supra* notes 30–36 and accompanying text; and *Connell v. Francisco*, 898 P.2d 831, 834 (Wash. 1995) (en banc).

and ruled solely on fairness considerations.¹²⁰

Nevertheless, functional recognition in fact is an excellent approach to the issue in China. Unlike *de facto* marriage, which only requires cohabiting couples to hold themselves out as a married couple, the functional approach requires that the parties demonstrate a deeper degree of commitment to each other by intending and maintaining an exclusive and permanent relationship.

Moreover, an important concern by the National People's Congress is the *bao'ernai* phenomena, for which general rules governing unlawful cohabitation do not apply.¹²¹ A functional approach imposes more responsibilities and obligations from its recognition of the relationship.¹²² It encourages parties to contemplate the consequences of having concubines. As a result, a functional approach would serve the legislative purpose of deterring concubines without any need to make exceptions.

In addition, the concerns about the unpredictability of the functional approach are not evident in China. China is a civil law country without *stare decisis* doctrine. Thus, courts rely heavily on statutes and the judicial interpretations issued from the Supreme People's Court. When these authorities are silent or ambiguous on an issue, lower courts have great discretion in their interpretations of the law. The risk of inconsistent decisions is intrinsic to China's legal system. The marginal increase of such risk from the adoption of the functional approach would be negligible.

IV. Conclusion

The legal treatment of unmarried cohabitation is inherently a controversial issue. U.S. courts and legislators have made many attempts to solve the issue.¹²³ China has amended its marriage law twice and issued numerous judicial opinions to deal with this.¹²⁴ Both countries have gone through a similar path from the recognition of common law marriage or *de facto* marriage, to an absolute abolition of such doctrines, and eventually to a growing limited or conditional recognition. Nevertheless, neither country has reached a satisfactory solution.

Over the years, several approaches have been developed by U.S. courts, legislators and legal scholars. These approaches primarily include a contractual recognition represented by the California Supreme Court's

120. See *supra* notes 30–36 and accompanying text.

121. See *supra* notes 54–55.

122. See AMERICAN LAW INSTITUTE, *supra* note 6, at §§ 6.04–06.

123. See *supra* note 6.

124. See discussion *supra* Part II.B.

decision in *Marvin v. Marvin*,¹²⁵ a status-based recognition represented by Vermont's Civil Union Law,¹²⁶ and a functional approach represented by the ALI Principles proposed in 2002.¹²⁷ By comparing the advantages and limitations of these approaches, this article concludes that the functional approach, which will give marriage its true meaning, is preferable in both countries.

Furthermore, a comparison between unmarried cohabitation in the United States and China teaches several important lessons in analyzing legal treatment for unmarried cohabitation. First, the analysis must be dynamic. A static morality-based argument can hardly survive the changing society. Not only have the social attitudes toward unmarried cohabitation changed dramatically in both countries, but the meaning of "unmarried cohabitation" has changed as well.¹²⁸

Second, the analysis must consider the unique social attributes of each country and the different areas within each country. For example, the extremely large population in China and the lack of access to marriage registration system in rural areas render a status-based approach largely unworkable in China. On the other hand, the functional approach serves to deter concubines, a social phenomenon about which China's legislature has expressed significant concerns.

Finally, institutional characteristics can also play an important role in the analysis. The short history of China's contract law makes contract-based recognition more difficult in China than in the United States. Yet the uncertainty in the functional approach becomes a relatively insignificant concern because the risk of inconsistency is intrinsic to China's civil law legal system. In fact, the functional approach, when providing a concrete guideline to lower courts in deciding cohabitation cases, can reduce the inconsistency in such cases.

125. *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

126. VT. STAT. ANN. tit. 15, §§ 1201-07 (2002).

127. AMERICAN LAW INSTITUTE, *supra* note 6, at §§ 6.01-.06 (2002).

128. For example, more urban cohabitants in China choose not to marry in recent years, which is a change from the past customary marriage in rural China. *See supra* notes 19-22 and accompanying text.