

NONMARITAL COHABITANTS: THE US
APPROACH

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INTRODUCTION

The number of nonmarital cohabitants in the United States has increased substantially over the past half-century. The Census first began including “Unmarried Partner” as a possible relationship in 1990.¹ Today, more than 18 million people, representing seven percent of American adults, are cohabiting.² More adults have cohabited than have been married.³

For historical and other reasons, same-sex couples are more likely than different-sex couples to be unmarried.⁴ According to recent data, about 13 percent of different-sex households are headed by nonmarital partners while more than 40 percent of same-sex households are nonmarital.⁵ The number of older adults who cohabit is growing. In 1996, only two percent of partners in cohabiting households were ages 65 or older; by 2017, that number had tripled to six percent.⁶ Just over 6 percent of partners in cohabiting households earn over \$90,000 per year individually, while more than half earn less than \$30,000.⁷ Recent Census and American Community Survey data show that over one-third of different-sex unmarried couples are living with children under the age of 18, and 12 percent of same-sex unmarried couples reside with children.⁸ Finally, same-sex unmarried couples are

1. Mather et al., *America's Changing Population: What to Expect in the 2020 Census*, 74 POPULATION BULL. 1, 13 (2019).

2. Benjamin Gurrentz, *Cohabiting Partners Older, More Racially Diverse, More Educated, Higher Earners*, U.S. CENSUS BUREAU (Sept. 23, 2019), <https://www.census.gov/library/stories/2019/09/unmarried-partners-more-diverse-than-20-years-ago.html>.

3. Nikki Graf, *Key Findings on Marriage and Cohabitation in the U.S.*, PEW RESEARCH CENTER (Nov. 6, 2019), <https://www.pewresearch.org/fact-tank/2019/11/06/key-findings-on-marriage-and-cohabitation-in-the-u-s/>.

4. See Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 FORD. L. REV. 1509, 1515–17 (2016) (noting potential reasons among LGBT couples for rejecting marriage).

5. U.S. CENSUS BUREAU, ACSBR-005, SAME-SEX COUPLE HOUSEHOLDS: 2019 (2021). Among different-sex couples, there are 8 million unmarried partner households, compared to 61.4 million married couples. There are about 412,000 same-sex nonmarital partner households, compared to 568,000 married same-sex couples. *Id.*

6. Gurrentz, *supra* note 2.

7. *Id.*

8. U.S. CENSUS BUREAU, *supra* note 5, at 5.

more likely to have bachelor's and graduate or professional degrees than different-sex unmarried couples.⁹

Living arrangements between cohabitants vary considerably. Cohabitants may share financial responsibilities during their cohabitation, or they may keep their finances separate. One cohabitant may move into a dwelling the other had acquired separately. They may acquire property together. Both may work, or one may work and the other might take care of the household. The rights at separation and death that derive from cohabitation have evolved unevenly over the past half-century, in part due to the significant variations in how unmarried couples structure their lives.

This article reviews the legal status of nonmarital cohabitation in the United States. Unlike the codification of cohabitants' rights in some other Western nations, the recognition of cohabitants' claims in the United States has occurred largely through the courts. In the first section, the article provides an overview of the patchwork of legal approaches, showing a continuum from states that refuse to recognize cohabitants' rights drawn from their relationship to jurisdictions that impose status-based obligations. As this section makes clear, in most states that allow cohabitants to assert claims against one another, the law of cohabitation is common law, but a few state legislatures have enacted statutory provisions governing cohabitants' contractual claims. The next section discusses the development of the Uniform Law Commission's new nonmarital cohabitants' act, and the article concludes with projections for the future of the law of nonmarital cohabitation in the United States.

II. DEVELOPMENT OF THE LAW

One of the most influential early cases in the United States to recognize potential economic rights between nonmarital cohabitants, notwithstanding the nature of their relationship,

9. Zachary Scherer & Lydia Anderson, *Larger Share of People in Same-Sex Couples Have Graduate or Professional Degrees Than People in Opposite-Sex Couples*, U.S. CENSUS BUREAU (Apr. 1, 2021), <https://www.census.gov/library/stories/2021/04/how-people-in-same-sex-couples-compare-to-opposite-sex-couples.html>.

was the California Supreme Court opinion in *Marvin v. Marvin*.¹⁰ Before *Marvin*, courts frequently rejected claims for property or support between cohabitants, often on the rationale that recognition of such claims within an “illicit” or “immoral” relationship would violate public policy.¹¹ In *Marvin*, the court held that unmarried cohabitants could enter into enforceable contracts to share earnings or property or for support, so long as the contract was not “expressly and inseparably based upon an illicit consideration of sexual service.”¹² The court identified a broad range of possible remedies such as express or implied contract (including partnership and joint venture) and a cluster of other equitable doctrines such as quantum meruit, constructive trust, resulting trust, unjust enrichment, and equitable lien.¹³ Ironically, while *Marvin* opened the door for contractual and equitable claims by cohabitants, the plaintiff herself ultimately lost on the merits.¹⁴

While most states have followed *Marvin* in recognizing economic claims between nonmarital cohabitants, states nevertheless have developed inconsistent approaches. Many states recognize the potential existence of both express or implied contracts and include equitable claims,¹⁵ some states have

10. *Marvin v. Marvin*, 557 P.2d 106, 122–23 & n.24 (Cal. 1976). Although *Marvin* may be interpreted differently in different courts, it “remains the dominant approach to nonmarital property division claims in the United States.” Courtney G. Joslin, *Autonomy in the Family*, 66 UCLA L. REV. 912, 927 (2019).

11. See, e.g., *Updeck v. Samuel*, 266 P.2d 822, 824 (Cal. Ct. App. 1954) (refusing to enforce a contract that was based on the consideration that parties live together as husband and wife); *Hill v. Westbrook’s Estate*, 213 P.2d 727, 730 Cal. Ct. App. (1950) (refusing to enforce a promise to provide for plaintiff in will in exchange for having lived with defendant “as a concubine and bearing him children”).

12. 557 P.2d at 114.

13. *Id.* at 110.

14. See *Marvin v. Marvin*, 122 Cal. App. 3d 871, 877 (Cal. Ct. App. 1981) (finding no legal or equitable basis for relief and reversing trial court’s order of rehabilitative maintenance to Michelle Marvin).

15. E.g., *Boland v. Catalano*, 521 A.2d 142, 146 (Conn. 1987) (endorsing *Marvin*’s approach, recognizing that cohabitants may assert claims based on express or implied contract, quantum meruit, or equitable remedies); *Estate of Henry v. Woods*, 77 N.E.3d 1200, 1204–08 (Ind. Ct. App. 2017) (permitting relief based on an express contract, an implied contract, or unjust enrichment, and rejecting the argument that cohabiting couple were in a familial relationship which imposed a presumption that services were performed gratuitously).

imposed writing requirements on cohabitants' agreements,¹⁶ and a few states refuse to accept domestic or household services as lawful consideration, reasoning that such services are inextricably intertwined with the sexual relationship or are typically provided without expectation of compensation when a couple shares a home.¹⁷ Even in states that do recognize remedies for nonmarital cohabitants, courts may still be reluctant to award relief. In declining to recognize a cohabitant's claim, courts sometimes reference either the meretricious nature of the couple's relationship or a desire to preserve marriage.¹⁸ There is no predictable result when cohabitants dissolve their relationship or when one cohabitant dies.

The most ambitious effort to recognize broad obligations between cohabitants came from the American Law Institute's *Principles of Family Dissolution* (ALI *Principles*) in 2002.¹⁹ The ALI *Principles* would effectively extend the marital remedies of equitable distribution of property and spousal support or alimony to cohabitants on the basis of status. Rejecting contract theory as an unrealistic remedy between cohabitants, the ALI approach recognized economic rights between cohabitants who had lived together in an interdependent household for a defined period of time or had cared for children

16. See, e.g., MINN. STAT. § 513.075 (2020) (stating that “[i]f sexual relations between the parties are contemplated, a contract between a man and a woman who are living together in this state out of wedlock, or who are about to commence living together in this state out of wedlock, is enforceable as to terms concerning the property and financial relations of the parties only if: (1) the contract is written and signed by the parties; and (2) enforcement is sought after termination of the relationship”); N.J. STAT. § 25:1-5(h) (2009) (explaining that the promise of “support or other consideration” by party to nonmarital personal relationship must be in writing and with independent advice of counsel); TEX. BUS. & COM. CODE ANN. § 26.01 (West 2005) (noting that an agreement made “on consideration of nonmarital conjugal cohabitation” must be in writing).

17. See Albertina Antognini, *Nonmarital Contracts*, 73 STAN. L. REV. 67, 104–09 (2021) (analyzing case law refusing to enforce express contracts between cohabitants based on the presence of sexual services or a presumption of gratuity).

18. See *id.* Interestingly, Professor Antognini's research suggests that courts have been more receptive to contractual claims by same-sex cohabitants who sought relief at a time when marriage was not available to them. *Id.* at 122–26.

19. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03 cmt. a. (AM. L. INST. 2002) [hereinafter ALI *PRINCIPLES*] (noting that the rise of unmarried cohabiting couples in most western countries prompted courts to recognize “legal obligations arising from such relationships”).

together.²⁰ The ALI's approach has been criticized as unduly conscriptive²¹ and has not been fully adopted by any state.²² In the State of Washington, a long-term marriage-like cohabitation with a sharing of finances and other indicia of an interdependent relationship can give rise to a presumptive application of community property principles, both at dissolution and at death.²³ As this issue of the journal reveals, other countries have enacted legislation similar to the system set out in the ALI *Principles*.²⁴ Finally, as an alternative within the United States, some jurisdictions have adopted systems that allow a nonmarital couple to opt into various obligations towards one another.²⁵ The next sections discuss these developments more thoroughly.

20. See Ira Mark Ellman, "Contract Thinking" Was Marvin's Fatal Flaw, 76 NOTRE DAME L. REV. 1365, 1375, 1379 (2001) (arguing that contract theory is out of sync with the way couples actually approach cohabitation).

21. See, e.g., Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 819–21, 854–57 (2005) (noting that "[c]onscriptive cohabitation laws . . . impos[e] obligations on those who have not chosen them").

22. *Id.* at 819 n.12.

23. See *Connell v. Francisco*, 898 P.2d 831, 836–37 & n.3 (Wash. 1995) (applying equitable presumption of community property principles to parties who lived in marriage-like "meretricious relationship"); see also *Muridan v. Redl*, 413 P.3d 1072, 1078 (Wash. Ct. App. 2018) (applying *Connell* and affirming that certain assets acquired during the relationship were to be classified as community-like property subject to a 50/50 equitable division between the parties).

24. See, e.g., Adult Interdependent Relationships Act, S.A. 2002, c A-4.5 (Can.) (setting out the "applicability of Alberta laws" to unmarried Albertans in interdependent relationships); see also Family Statutes Amendment Act, S.A. 2018, c 18 (Can.) (making numerous references to the Interdependent Relationships Act and substantially affecting the rights of those who qualify as Adult Interdependent Partners).

25. E.g., COLO. REV. STAT. § 15-22-104 (2021) (establishing the requirements for a designated beneficiary agreement between a nonmarital couple); see also Mary Charlotte Y. Carroll, Note, *When Marriage Is Too Much: Reviving the Registered Partnership in A Diverse Society*, 130 YALE L.J. 478, 508–13 (2020) (discussing Belgian and French opt-in structures).

A. Common Law Claims

1. Property Claims

a. Contract

Post-*Marvin*, an overwhelming majority of states recognize rights between cohabitants arising from express contract and about half have endorsed claims based on implied-in-fact contract.²⁶ This is a recognition in theory; in practice, cohabitants often fail even on express contract claims.²⁷ States differ as to whether the cohabiting relationship itself can give rise to an implied contract claim absent a clear showing of intent on the part of the parties. Most courts require evidence of an agreement, express or implied, to share earnings or property accumulated during the cohabitation—often a difficult requirement to satisfy. In some courts the mandated evidence for implied contract comes close to what is needed to establish a common law marriage.²⁸ The absence of an agreement, whether express or implied, is often dispositive.²⁹

For contract claims between cohabitants, consideration separate and apart from the sexual relationship is necessary. As a Florida court put it, “unmarried cohabitants may agree to enter into an enforceable contract that establishes rights and responsibilities towards each other” so long as there is “lawful consideration separate and apart from any express or implied agreement regarding sexual relations.”³⁰ While most courts

26. Memorandum from Barbara Atwood to the Study Comm. on Econ. Rts. of Unmarried Cohabitants (Oct. 11, 2017).

27. See Antognini, *supra* note 17 at 78–80, 83–94, 105–09 (demonstrating through review of case law that a cohabitant’s right to contract, recognized as a matter of doctrine, is severely restricted in practice by gendered assumptions about intimate relations, the primacy of marriage, and the value of domestic work).

28. See, e.g., *Reed v. Parrish*, 286 P.3d 1054, 1057 (Alaska 2012) (citing *Bishop v. Clark*, 54 P.3d 804, 811 (Alaska 2002)) (clarifying that the determination of intent for purposes of implied contract requires consideration of a range of factors, including whether the parties jointly managed property, filed joint tax returns, held themselves out as married, shared household expenses, and jointly raised children.).

29. See *Restitution at Home: Unjust Compensation for Unmarried Cohabitants’ Domestic Labor*, 133 HARV. L. REV. 2124, 2130–31 (2020) (critiquing the judicial insistence on contract).

30. *Maio v. Clarke*, 255 So. 3d 369, 371 (Fla. Dist. Ct. App. 2018).

recognize that domestic services can constitute consideration, courts are much more likely to enforce contracts between cohabitants that rest on an exchange of property rather than services.³¹ Where consideration is limited to domestic services, a plaintiff may lose if the court finds that the services were linked to the sexual dimension of the relationship.³²

Contracts may be implied in fact from the parties' conduct, at least in most states.³³ In Nevada, for example, unmarried couples may impliedly agree to hold property as though it were community property if they have lived together with the indicia of a marital relationship.³⁴ While implied contract may be recognized in theory, in practice, courts tend to hold claimants relying on implied contract to a rigorous standard of proof. Courts in particular may bar recovery if the implied agreement rested on the rendition of homemaker services that it presumes were rendered gratuitously.³⁵

A minority of courts have rejected implied contract altogether as a basis for recovery between cohabitants, often blurring the

31. Antognini, *supra* note 17, at 78 (noting that "Courts hold that individuals cannot contract for exchanges that inhere in the relationship itself, such as services rendered, and generally decline to uphold contracts where the relationship could have been marital.").

32. See, e.g., *Smith v. Carr*, No. CV 12-3251-CAS, 2012 WL 3962904 at *4 (C.D. Cal. Sept. 10, 2012) (holding that services tied to a sexual relationship could not constitute valid consideration); *Schwegmann v. Schwegmann*, 441 So. 2d 316, 324–25 (La. Ct. App. 1983) (rejecting contract and quantum meruit claims based on domestic services brought by "concubine" of male cohabitant because claims were inextricably intertwined in provision of sexual services); see also *Bergen v. Wood*, 18 Cal. Rptr. 2d 75, 77–79 (Ct. App. 1993) (rejecting oral contract claim for support by long-term companion on basis that services were "inextricably intertwined with the sexual relationship"). See generally Antognini, *supra* note 17, at 104–09 (overviewing cases where sex is a part of an intimate relationship between parties, finding it is the relationship itself that prevents courts from recognizing a person's contractual rights.).

33. See Courtney G. Joslin, *Autonomy in the Family*, 66 UCLA L. REV. 912, 925–31 (2019) (providing an overview of state law on contractual and equitable remedies for cohabitants).

34. See *W. States Constr., Inc. v. Michoff*, 840 P.2d 1220, 1224–25 (Nev. 1992) (recognizing implied contract where parties held themselves out as married, filed tax returns as husband and wife, and designated certain property as community).

35. See Joslin, *supra* note 33, at 934–37 (discussing different courts' justifications for barring recovery for "wifely" services rendered gratuitously); see also Albertina Antognini, *Nonmarital Coverture*, 99 B.U. L. REV. 2139, 2173–79 (2019) (applying lens of coverture to courts' "treatment of cohabitants" domestic services as presumptively gratuitous).

line between contracts implied in fact and implied in law.³⁶ These courts express misgivings about reconstructing an intimate cohabitant relationship into a contractual arrangement after the fact.³⁷ Consider *Morone v. Morone*, where the New York Court of Appeals held that cohabitants are free to expressly contract between themselves, in writing or orally, but that contracts as to earnings and assets may not be implied from the provision of services within the cohabiting relationship itself.³⁸ The court's concern was that there was a "risk of emotion-laden afterthought, not to mention fraud, in attempting to ascertain by implication what services, if any, were rendered gratuitously and what compensation, if any, the parties intended to be paid."³⁹ In effect, the refusal to recognize implied contract excludes cohabitants from a remedy generally available under standard contract law—a restriction that inevitably burdens the economically weaker party.⁴⁰

An even smaller group of states reject all contractual remedies—whether express or implied—if the contract arises out of the parties' cohabitation.⁴¹ A common rationale is that permitting economic recovery by a cohabitant based on the cohabitation itself would be inconsistent with the abolition of common law marriage.⁴² A leading modern case in that regard is

36. See, e.g., *Davis v. Davis*, 643 So. 2d 931, 936 (Miss. 1994); *Morone v. Morone*, 413 N.E.2d 1154, 1158 (N.Y. 1980); see also Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L. Q. 309, 315–316 (2008) (discussing how a few jurisdictions do not allow recovery based on implied contracts).

37. See, e.g., *Davis*, 643 So. 2d at 936 (Miss. 1994) (contemplating that the legislature is better suited for questions regarding contract in cohabitant relationships); see also *Morone*, N.E.2d at 1157 (N.Y. 1980) (discussing the problems with affixing in hindsight the contractual intentions of the persons living together in a noncontractual relationship).

38. 413 N.E.2d at 1157.

39. *Id.*

40. See Joslin, *supra* note 33, at 937–38 (noting that women continue to make up the majority of plaintiffs and are thus the "primary losers" in the case law).

41. The states most often grouped in this category are Georgia, Illinois, Louisiana, and Mississippi. See Albertina Antognini, *Against Nonmarital Exceptionalism*, 51 U.C. DAVIS L. REV. 1891, 1925 (2018).

42. See, e.g., *Gunderson v. Golden*, 360 P.3d 353, 355–56 (Idaho Ct. App. 2015) (refusing to uphold cohabitation contract in light of legislature's abolition of common law marriage and absence of statutory recognition of cohabitants' rights).

Blumenthal v. Brewer.⁴³ In denying relief to a same-sex partner in a 26-year cohabitation, the Illinois Supreme Court affirmed its earlier holding that economic claims arising from a marriage-like relationship violate public policy.⁴⁴ In *Blumenthal* and other decisions taking this restrictive stance, courts point to the legislature as the more appropriate branch to balance the relevant public policy considerations regarding nonmarital cohabitants' rights.⁴⁵ "[N]ow that the centrality of marriage has been recognized as a fundamental right for all," the Illinois court wrote, "it is perhaps more imperative than before that we leave it to the legislative branch to determine whether and under what circumstances a change in the public policy governing the rights of parties in nonmarital relationships is necessary."⁴⁶ In these states, courts interpret legislative inaction as acceptance of the status quo.⁴⁷

b. Equity

In addition to contract, courts typically accept equitable theories such as quantum meruit and constructive trust/unjust enrichment as a potential basis for recovery. Equitable theories may even provide a basis for relief even in states that have rejected remedies based on contract. In *Blumenthal*, for instance, the court acknowledged that theories such as constructive trust might be available if the basis for the claim is independent of the nonmarital relationship.⁴⁸

43. *Blumenthal v. Brewer*, 2016 IL 118781.

44. *Id.* at 852–53, 857–58 (discussing *Hewitt v. Hewitt*, 394 N.E.2d 1204 (1979) where the court held questions of equity or fairness in a contract between parties in a marriage-like relationship involve fundamental policy concerns and thus should be left to the legislature).

45. *Id.* at 858.

46. *Id.*

47. See, e.g., *Davis v. Davis*, 643 So. 2d 931, 936 (Miss. 1994) (refusing to recognize economic claims by cohabitant in absence of legislative action); *Cates v. Brown*, 850 S.E.2d 764, 767 (Ga. Ct. App. 2020) (noting that *Rehak v. Mathis*, 238 S.E.2d 81 (Ga. 1977), which refused to recognize cohabitants' claims based on immoral consideration, was binding precedent in the absence of legislative action).

48. *Blumenthal*, 69 N.E.3d at 853–54 (discussing *Spafford v. Coats*, 455 N.E.2d 241 (Ill. Ct. App. 1983) where a constructive trust claim was upheld because it had "an economic basis independent of the nonmarital, co-habiting relationship").

The interpretation and application of these equitable doctrines are far from uniform. In standard applications of quantum meruit, a claimant must show that both parties had a reasonable expectation that services would be compensated, and any compensation must be reduced by benefits already received.⁴⁹ Some courts seem more willing than others to infer an expectation of compensation. Here, as in the case law interpreting cohabitants' contracts, courts may fall back on the view that domestic services rendered by a cohabitant are presumptively gratuitous. In *Simmons v. Samulewicz*, for example, the Hawaii court rejected a cohabitant's claim for the values of his services rendered, reasoning that absent evidence of an express contract or reasonable expectation of compensation, such services were presumed to be gratuitous.⁵⁰ In that case, the court drew a sharp distinction between the cohabitant's claim based on services for the "mutual comfort and convenience of the family" and his claim based on having made some of the mortgage payments—the latter presenting a triable issue.⁵¹ Based on public policy, a few courts reject quantum meruit as a basis for relief altogether in the context of cohabiting relationships.⁵²

Cohabitants asserting claims based on unjust enrichment or the related doctrine of constructive trust likewise face a range of standards in state courts. In *Watts v. Watts*, the Wisconsin Supreme Court held that a cohabitant would be entitled to the remedy of constructive trust if she could establish the elements of unjust enrichment—“(1) a benefit conferred on the defendant by the plaintiff, (2) appreciation or knowledge by the defendant of the benefit, and (3) acceptance or retention of the benefit by the defendant under circumstances making it inequitable for the

49. Memorandum from Barbara Atwood to the Study Comm. on Econ. Rights of Unmarried Cohabitants 2 (Oct. 11, 2017) (on file with author), [hereinafter Atwood Memorandum]

<https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=61c5f728-6d34-62e0-6467-fa1d1f4fbe92&forceDialog=0>.

50. *Simmons v. Samulewicz*, 304 P.3d 648, 657 (Haw. Ct. App. 2013).

51. *Id.* at 657–58.

52. See, e.g., *Schwegmann v. Schwegmann*, 441 So.2d 316, 324–25 (La. Ct. App. 1983) (rejecting quantum meruit claim for provision of domestic services brought by “concubine” of male cohabitant because claim was inextricably intertwined in provision of sexual services).

defendant to retain the benefit.”⁵³ Similarly, some courts follow the Restatement (Third) of Restitution and Unjust Enrichment:

If two persons have formerly lived together in a relationship resembling marriage, and if one of them owns a specific asset to which the other has made substantial, uncompensated contributions in the form of property or services, the person making such contributions has a claim in restitution against the owner as necessary to prevent unjust enrichment upon the dissolution of the relationship.⁵⁴

Under the Restatement approach, the claimant in a relationship “resembling marriage” need only show that the defendant received a benefit at plaintiff’s expense and that it would be unfair for the defendant to retain the benefit under the circumstances.⁵⁵ In *Bonina v. Sheppard*, for example, the Massachusetts Court of Appeals relied on the Restatement in holding that there was no presumption that funds and labor contributed by a cohabitant to improve property owned by the other cohabitant were gratuitous.⁵⁶ The court emphasized that “[t]he parties’ romantic relationship does not prevent the plaintiff from recovering from the defendant under an unjust enrichment theory.”⁵⁷ In determining the amount of restitution, courts

53. *Watts v. Watts*, 405 N.W.2d 303, 313 (Wis. 1987). Subsequent case law in Wisconsin suggests a narrow view of unjust enrichment claims based on domestic services. See *Waage v. Borer*, 525 N.W.2d 96, 98–99 (Wis. Ct. App. 1994) (interpreting *Watts* to mean that services cannot give rise to unjust enrichment claims unless they are linked to acquisition of wealth or assets).

54. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 28(1) (AM. L. INST. 2011).

55. See, e.g., *Salzman v. Bachrach*, 996 P.2d 1263, 1265–66 (Colo. 2000). For a critique of existing law on unjust enrichment and a proposal for a more generous valuation of domestic services at the dissolution of cohabiting relationships, see *Restitution at Home: Unjust Compensation for Unmarried Cohabitants’ Domestic Labor*, 133 HARV. L. REV. 2124, 2139 (2020) (“In considering restitutionary claims from former unmarried cohabitants, courts should include the value of domestic labor in determining if and to what degree one partner has been unjustly enriched.”).

56. *Bonina v. Sheppard*, 78 N.E.3d 128, 132–33 (Mass. App. Ct. 2017).

57. *Id.* at 132.

typically try to assess the net benefit conferred on the defendant but may consider other evidence when that value is uncertain.⁵⁸

In contrast, a few courts impose a more demanding standard, requiring claimants to show (1) a promise of restitution, express or implied, (2) a transfer of property and reliance by a party, (3) a confidential relationship, and (4) unjust enrichment.⁵⁹ Under that formulation, even if a cohabitant asserting an unjust enrichment claim could show that the defendant received a clear benefit, the claim would fail without evidence of an express or implied promise of restitution. In addition, the few courts that categorically reject implied remedies for unmarried cohabitants on public policy grounds likewise reject unjust enrichment claims that rest on domestic services rendered during the relationship.⁶⁰

2. Support

State courts (even in the state of Washington) agree that a long-term cohabitation in and of itself does not give rise to a claim for post-relationship support, often referred to as “palimony.”⁶¹ Most states do recognize such a claim when based on express or implied contract.⁶² A small minority of courts refuse to recognize

58. In *Bonina*, the court considered the cost to the plaintiff as the best available measure of the benefit conferred. Compare *id.* at 133–34, with *McLaren v. Gabel*, 2020 VT 8, ¶ 58, 229 A.3d 422, 443 (requiring trial court to measure net benefit to defendant and the amount of unjust increase in her net worth made possible by plaintiff’s contributions).

59. *Castetter v. Henderson*, 113 So. 3d 153, 155 (Fla. Dist. Ct. App. 2013) (summarizing elements of constructive trust claim, including a clear and convincing evidentiary standard, and rejecting claim on merits because claimant failed to show unjust enrichment).

60. See, e.g., *Cates v. Swain*, 2010-CT-01939-SCT (¶ 15), 215 So.3d 492, 495 (Mo. 2013) (upholding unjust enrichment claim between same-sex cohabitants based on monetary contributions and home improvements and distinguishing claims based on the cohabiting relationship itself).

61. Atwood Memorandum, *supra* note 49, at 2–3. See *Oliver v. Fowler*, 168 P.3d 348, 350–51 (Wash. 2007) (using terminology of “committed intimate relationship” rather than “meretricious relationship,” court applied Connell’s equitable presumption doctrine to situation where both partners were killed in car accident; presumption permitted equitable division between the decedents’ estates). See, e.g., *Gilman v. Gilman*, 956 P.2d 761, 765 (Nev. 1998) (holding that statutory remedies of spousal support are limited to marital relationship); *Thomas v. LaRosa*, 400 S.E.2d 809, 810 (W. Va. 1990) (holding the same).

62. Atwood Memorandum, *supra* note 49, at 1.

cohabitants' claims for future support, viewing such claims as an attempt to evade the abolition of common law marriage.⁶³ In the majority of courts, the contractual nature of the claim, whether express or implied, requires that the terms of the support be sufficiently specific to be enforceable, and that the contract rest on adequate consideration.⁶⁴ In *Shaw v. Smith*, the Wyoming Supreme Court held that a cohabitant's support claim based on an oral promise was sufficient to withstand summary judgment.⁶⁵ There the evidence showed that the defendant had promised financial security in exchange for the plaintiff's efforts in managing and maintaining a home, raising his children, and assisting in his business endeavors.⁶⁶ In *Shaw*, the Wyoming court took the opportunity to clarify its stance on cohabitants' claims and public policy:

Those courts which have held that implied contract or quantum meruit will not be enforced for "household" services, but will be enforced for commercial services, are based on the proposition that to allow recovery would effectively revive common law marriage. We now join the majority of jurisdictions that reject this argument. . . . If, in fact, the application of contractual principles associated with an implied contract will impose unwanted obligations on cohabiting parties, we can only suggest that the parties refrain from conduct that implies the acceptance of such obligations or that the parties clearly identify the limits of their oral promises.⁶⁷

As discussed below, a few states, either as a matter of statutory law or court decision, require support claims to be based on express contract. For those states requiring an express contract, courts disagree about the application of the statute of

63. *Thomas*, 400 S.E.2d at 810.

64. Atwood Memorandum, *supra* note 49, at 2-3.

65. *Shaw v. Smith*, 964 P.2d 428, 437 (Wyo. 1998).

66. *Id.* at 431.

67. *Id.* at 438 (citation omitted).

frauds.⁶⁸ Even where the statute of frauds clearly governs, a bar to the application of the statute may be available, such as partial performance or reliance and estoppel.

3. Status

In the State of Washington, a long-term marriage-like cohabitation with a sharing of finances and other indicia of an interdependent relationship can give rise to an equitable presumption that community property principles apply, both at dissolution and at death.⁶⁹ In *Connell v. Francisco* the Washington Supreme Court explained that a qualifying relationship should be determined by considering five factors: continuity of cohabitation, duration of the relationship, purpose of the relationship, pooling of resources, and intent of the parties.⁷⁰ If the parties' cohabitation has sufficient indicia of interdependence, then all property acquired during the cohabitation is presumed to be owned by both parties, regardless of the form of title, and is available "for a just and equitable distribution."⁷¹ The qualifying relationship, which the Washington court initially termed a "meretricious relationship" but subsequently characterized as a "committed intimate relationship,"⁷² is thus a preliminary but dispositive inquiry.⁷³

Although the parties' intent is a relevant factor under the Washington approach, the Washington courts do not require a claimant to prove that the couple specifically intended to be

68. *Compare Posik v. Layton*, 695 So. 2d 759, 761–62 (Fla. Dist. Ct. App. 1997) (recognizing claim based on express agreement to provide support at termination of same-sex cohabitation and holding, by analogy to premarital agreements, that Florida's statute of frauds should govern), *with Baron v. Suissa*, 90 N.Y.S.3d 220, 220 (N.Y. App. Div. 2018) (holding that statute of frauds did not apply to oral agreement between cohabitants relating to provision of domestic and legal services in exchange for support and profit sharing).

69. Atwood Memorandum, *supra* note 49, at 2.

70. *Connell v. Francisco*, 964 P.2d 831, 834 (Wash. 1995).

71. *Id.* at 836–37.

72. *Oliver v. Fowler*, 168 P.3d 348, 350–51, 350 n.1 (Wash. 2007).

73. See generally Tom Andrews, *Cohabiting with Property in Washington: Washington's Committed Intimate Relationship Doctrine*, 53 GONZ. L. REV. 293, 295–97, 299, 312–15, 317, 323, 327, 330–31 (2018) (discussing many of the legal questions left unanswered by the "committed intimate relationship" doctrine).

governed by community property law.⁷⁴ While no other state has gone as far as Washington in this regard, a few states seem willing to infer intent to share property and earnings based on the interdependent nature of the cohabitants' relationship, but in these states the parties' intent is central to the inquiry.⁷⁵ In Nevada, for instance, courts have recognized implied agreements to equally share property acquired during cohabitation where there is sufficient evidence of intent to be governed by community property law.⁷⁶ Other states similarly emphasize the need for evidence of intent—either to divide property as if married or to share property jointly—thus avoiding the pitfalls of a status-based remedy.⁷⁷

Washington's equitable presumption, the ALI's "domestic partnership" proposal,⁷⁸ and similar status-based proposals from scholars⁷⁹ all seek to recognize marriage-like rights and obligations for certain cohabiting couples, but they may not be the most appropriate mechanism for achieving fairness when

74. See *Connell*, 898 P.2d at 833, 835–37 (Wash. 1995) (explaining how even after applying determinative factors, the court must then decide if the couple is subject to community property rules).

75. See, e.g., *Frazier v. Goudschaal*, 295 P.3d 542, 546, 551, 558 (Kan. 2013) (upholding equitable division of property accumulated by cohabitants but only to the extent that property was jointly acquired or acquired by either cohabitant with the intent that both should have an interest in it); see also *Reed v. Parrish*, 286 P.3d 1054, 1057–58 (Alaska 2012) (recognizing implied contract claim for equal division of property accumulated during cohabitation where parties made joint financial arrangements, filed joint tax returns, shared household expenses, contributed to maintenance and improvement of property, held themselves out as married, and jointly raised children).

76. See *W. States Constr., Inc. v. Michoff*, 840 P.2d 1220, 1224–25 (Nev. 1992) (finding implied agreement based on parties' living together and holding themselves out to be a married couple, filing federal tax returns as husband and wife, designating stock as community property, and signing a spousal consent form).

77. See, e.g., cases cited *supra* note 75; see also *Beal v. Beal*, 577 P.2d 507, 510 (Or. 1978) (holding that courts may infer intent to share equally in accumulated property based on nonmarital cohabitation itself and joint financial activities of the cohabitants).

78. See ALI PRINCIPLES, *supra* note 19, §§ 6.03–.05 (explaining how ALI's domestic partnership proposal extended marital property and support rights to cohabitants who maintain a common household for a prescribed period).

79. See, e.g., Lawrence W. Waggoner, *Marriage Is on the Decline and Cohabitation Is on the Rise: At What Point, if Ever, Should Unmarried Partners Acquire Marital Rights?*, 50 FAM. L.Q. 215, 216, 231, 233, 239–40, 246 (2016) (proposing a "Uniform De Facto Marriage Act" that would recognize marital rights for unmarried cohabitants).

cohabitants separate⁸⁰ As Professor Marsha Garrison has observed, “[m]arried couples have chosen obligation; cohabitants have chosen independence,” and, in her view, the law should recognize and honor both choices.⁸¹ Or, as Emily Stolzenberg put it, “these [status-based] doctrines aid the poorer party by making the richer party responsible for her dependency,” but they overlook the variety of cohabiting relationships.⁸² The status-based proposals assume that one party has become economically vulnerable (by providing domestic services) during the relationship, but in some relationships, one party may be more likely to be both breadwinner and caretaker, and the economic vulnerability may predate the relationship or not be a result of the relationship.⁸³ An ongoing challenge for courts and lawmakers regarding cohabitants’ rights is to craft a legal regime that respects individual autonomy, justified expectations, and community norms without using marriage as the baseline comparison.

B. *Statutory Provisions Relating to Cohabitants’ Rights*

In most states, the rights of cohabitants have been incrementally established through court cases rather than the comparative clarity of a statute. The few legislative provisions that exist impose special requirements on contracts between cohabitants or establish a set of obligations that cohabitants can choose to assume through a state-sanctioned procedure, rather than addressing the rights of cohabitants to bring claims against one another.

80. See, e.g., Naomi Cahn & June Carbone, *Blackstonian Marriage, Gender, and Cohabitation*, 51 ARIZ. STATE L.J. 1247, 1248–52 (2019) (noting that nonmarital relationships exist on a continuum and that legal presumptions of marriage-like norms risks coercing couples into undesired or unexpected regimes); see also Garrison, *supra* note 21, at 818, 856–57 (arguing that cohabiting couples vary in their relationships, may wish to avoid marital obligations, and that conscriptive standards diminish personal autonomy).

81. Garrison, *supra* note 21, at 896.

82. Emily J. Stolzenberg, *The New Family Freedom*, 59 B.C. L. REV. 1983, 2026–28 (2018).

83. See Eleanor Brown et al., *The Price of Exit* (forthcoming 2022).

1. Statute of Frauds Issues

A few states, including Minnesota, New Jersey, and Texas, regulate contracts between nonmarital cohabitants through their statute of frauds.⁸⁴ New Jersey, for example, requires a writing “signed by the party to be charged therewith” in order to enforce:

A promise by one party to a non-marital personal relationship to provide support or other consideration for the other party, either during the course of such relationship or after its termination. . . . [N]o such written promise is binding unless it was made with the independent advice of counsel for both parties.⁸⁵

The states do not otherwise include legislative regulation of these contracts.

2. Opt-In Frameworks⁸⁶

Two jurisdictions recognize the possibility of voluntary obligations between cohabitants. In 1997, Hawaii developed the status of reciprocal beneficiaries.⁸⁷ Those who register are subject to a set of state-mandated rights and responsibilities. Any two unmarried adults “over the age of 18 who are not eligible for marriage either because they are of the same sex [sic]” or because they are related to each other can register as reciprocal beneficiaries.⁸⁸ The enacting legislation uses, as an example, a

84. See cited statutes and accompanying parenthetical notes *supra* note 16.

85. N.J. STAT. ANN. § 25:1-5(h) (West 2010).

86. For an overview of many of the different statutes, see generally NAT’L CTR. FOR LESBIAN RTS., MARRIAGE, DOMESTIC PARTNERSHIPS, AND CIVIL UNIONS: SAME-SEX COUPLES WITHIN THE UNITED STATES (2017), http://www.nclrights.org/wp-content/uploads/2013/07/Relationship_Recognition.pdf (detailing each state’s statutes and regulations regarding same sex marriages, domestic partnerships, and civil unions); see also John G. Culhane, *United States v. Windsor and the Future of Civil Unions and Other Marriage Alternatives*, 59 VILL. L. REV. TOLLE LEGE 27 (2013) (detailing various court decisions regarding civil unions for same-sex couples).

87. HAW. REV. STAT. §§ 572C-1 to -7 (1997) (§ 572C-4 amended 2012, §§ 572C-2, 572C-7 amended 2013).

88. Memorandum from the Study Comm. on the Econ. Rts. of Unmarried Cohabitants to the Chair and Vice Chair of the Study Comm. on the Econ. Rts. of Unmarried Cohabitants (Oct. 14, 2017) (on file at

widowed mother and her unmarried son.⁸⁹ The applicants must register their status by filing a signed notarized declaration of reciprocal beneficiary relationship with the director of health.⁹⁰

Reciprocal beneficiaries receive a set of rights relating to health insurance, hospital visitation, healthcare decision making, suits for wrongful death, time off for bereavement, and some property rights, including the ability to hold property in a tenancy by the entirety.⁹¹ A reciprocal beneficiary is treated as a spouse for purposes of intestacy, the elective share, and a premarital will.⁹² The status does not impose post-relationship responsibilities if the relationship is voluntarily terminated. The relationship can be terminated: (1) when either party files a signed notarized declaration of termination of reciprocal beneficiary relationship; or (2) automatically, when either party enters into a marriage or civil union.⁹³

Colorado established the status of “designated beneficiary” in 2009.⁹⁴ It is an opt-in status, with individuals allowed to specify which responsibilities attach to their relationship. This status is available to any two unmarried people over the age of 18 regardless of sex or familial relationship, although they must not be in a civil union or marriage or another designated beneficiary

<https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=9496048e-4f1f-c3fa-a380-8daa77b02b38&forceDialog=0>; see also HAW. REV. STAT. §§ 572C-2, -4 (2013).

89. HAW. REV. STAT. § 572C-2 (1997) (amended in 2013) (still unchanged to recognize *Obergefell*'s decision to allow marriage between same-sex couples as of October 7, 2017); see *Obergefell v. Hodges*, 576 U.S. 644, 680–81 (2015) (holding that same-sex couples have the right to marry in all states).

90. Haw. Rev. Stat. Ann. § 572C-5 (West 2017).

91. Act 383, 1997 Leg., Reg. Session §§ 323, 431:10A, 509-2, 663-3 (Haw. 1997).

92. HAW. REV. STAT. §§ 560:2-102 (intestacy); 560:2-202 (“Elective share”); 560:2-301 (premarital will). It appears when adopting the Uniform Probate Code, Hawaii added “or reciprocal beneficiary” after the word “spouse.” HAW. REV. STAT. § 560:2-402 (1997) (“Homestead allowance”).

93. HAW. REV. STAT. § 572C-7 (2012) (lacking a mention of death in the statute); see also *About Reciprocal Beneficiary Relationships*, HAW. DEP'T OF HEALTH, <http://health.hawaii.gov/vitalrecords/about-reciprocal-beneficiary-relationships/#register> (last visited Oct. 25, 2021) (providing the forms and links for registering and terminating the reciprocal beneficiary relationship).

94. COLO. REV. STAT. §§ 15-22-101, -112 (2017).

relationship.⁹⁵ The agreement must be properly recorded to be valid.⁹⁶

The individuals can each choose to include or to exclude any of the 16 rights and protections including jointly owning property, inheriting through intestacy, making health care decisions, suing for wrongful death, and benefitting from workers' compensation.⁹⁷ The status does not impose post-relationship responsibilities if the relationship is voluntarily terminated.

Either party can revoke a designated beneficiary by recording a revocation in the county in which the agreement was recorded, and the revocation is effective immediately.⁹⁸ The death of either party ends the agreement.⁹⁹

3. Civil Unions and Domestic Partnerships

Civil unions generally offer the same rights as marriage, and while some are limited to same-sex couples, others include opposite-sex couples as well. Vermont was the first to authorize civil unions, but it repealed the law in 2009 after the state recognized same-sex marriage.¹⁰⁰ Civil unions are currently available in Colorado, Hawaii, Illinois, and New Jersey.¹⁰¹

Domestic partnerships carry a variety of benefits, depending on the jurisdiction. Statewide domestic partnership laws, like civil union laws, typically extend the rights of marriage to the

95. COLO. REV. STAT. § 15-22-104 (2017) ("Requirements for a valid designated beneficiary").

96. *See id.*; *see also* COLO. REV. STAT. § 15-22-107 (2017) (stating how to properly record a signed and acknowledged designated beneficiary agreement with a county).

97. COLO. REV. STAT. § 15-22-105 (2017).

98. COLO. REV. STAT. § 15-22-111 (2017).

99. COLO. REV. STAT. § 15-22-112 (2017).

100. COURTNEY G. JOSLIN ET AL., LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW 460–461 (2017-2018 ed. 2017). The legalization of same-sex marriage resulted in other states withdrawing the option of civil unions. *See Civil Unions & Domestic Partnership Statutes*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 10, 2020), <http://www.ncsl.org/research/human-services/civil-unions-and-domestic-partnership-statutes.aspx>; *See also* Jessica R. Feinberg, *The Survival of Nonmarital Relationship Statutes in the Same-Sex Marriage Era: A Proposal*, 87 TEMP. L. REV. 45, 52–53 (2014).

101. COLO. REV. STAT. §§ 14-15-107, -117 (2018); HAW. REV. STAT. § 527B-1 to -6 (2012); 750 ILL. COMP. STAT. 75/5 (2011); N.J. REV. STAT. §§ 37:1-28, 1-36 (2013), *invalidated by* Garden State Equal. v. Dow, 79 A.3d 1036 (N.J. 2013).

domestic partners.¹⁰² The following jurisdictions allow domestic partnerships: California, the District of Columbia, Maine, Nevada, New Jersey, Oregon, Washington, and Wisconsin.¹⁰³ Many employers and municipalities also recognize domestic partnerships for limited purposes, such as health insurance or hospital visitation privileges.¹⁰⁴ While domestic partnership laws are traditionally limited to two people who are not married to others, the City of Cambridge, Massachusetts, enacted an ordinance that allows for multiple parties (even if one is married) to enter into a domestic partnership.¹⁰⁵ The Cambridge law grants visitation privileges at hospitals and correctional institutions and health insurance coverage for domestic partners of city employees, among other benefits.¹⁰⁶

4. Common Law Marriage

If cohabitants' rights exist on a continuum, with some states refusing to recognize any economic claims that arise from the relationship, the opposite end of the spectrum might be those states that continue to recognize common law marriage, which allows the cohabitants themselves to decide on the assumption of marital obligations. In a dwindling minority of states, couples may enter into common law marriage.¹⁰⁷ The requirements for

102. See, e.g., KAREN MOULDING ET AL., *SEXUAL ORIENTATION AND THE LAW* § 2:4 (2020).

103. Lisa Klinger, *Summary of Same-Sex Marriage; Domestic Partnerships; Civil Unions; and Common Law Marriage in the United States*, LEAVITT GRP. (July 22, 2013, 2:43 PM), <https://news.leavitt.com/employee-benefits-compliance/benefits-compliance/summary-of-same-sex-marriage-domestic-partnerships-civil-unions-and-common-law-marriage-in-the-united-states/>.

104. See e.g., Cambridge, Mass., Ordinance No. 2020-14 (Mar. 8, 2021) (amending Cambridge Municipal Code § 2.119); D.C. CODE § 32-704 (1992).

105. Cambridge, Mass., Ordinance No. 2020-14 (Mar. 8, 2021) (amending Cambridge Municipal Code § 2.119).

106. *Id.*

107. Kaiponanea T. Matsumara, *Choosing Marriage*, 50 U.C. DAVIS L. REV. 1999, 2006 n.35 (listing Colorado, Iowa, Kansas, Montana, New Hampshire, Rhode Island, South Carolina, Texas, Utah, and the District of Columbia as states that still recognize common law marriage). South Carolina subsequently abolished the status. See *Stone v. Thompson*, 833 S.E.2d 266, 270 (S.C. 2019). For an argument that the abolition of common law marriage has primarily disadvantaged low-income women and women of color, see

such a marriage typically include: (1) the parties must be eligible for marriage; (2) they must cohabit; (3) they must hold themselves out as married; and (4) they must have the mutual intent to be married.¹⁰⁸ While the status truly is the product of common law in most of the states that recognize it, a few states have enacted statutes spelling out the requirements for common law marriage.¹⁰⁹ Once the parties show the existence of a common law marriage, their rights and obligations are the same as those in a “ceremonial” marriage, and a common law marriage must be dissolved by a formal divorce proceeding (there is no common-law divorce).¹¹⁰

The abolition of common law marriage has largely been the product of legislative action, but courts have also exercised their prerogative to abandon the doctrine as a court-made relic of the past. In *Stone v. Thompson*, for example, the South Carolina Supreme Court abrogated common law marriage, remarking that marriage itself is no longer a condition for social acceptance, and noting that the evidentiary questions presented by common law marriage cases are burdensome for the courts.¹¹¹ The increase in nonmarital cohabitation across all age groups was an additional factor in the court’s decision. Some states also recognize *putative spousehood*,¹¹² an equitable doctrine that accords relief to a

generally Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709 (1996).

108. See, e.g., TEX. FAM. CODE ANN. §§ 2.401–.402 (West 2005).

109. Montana, New Hampshire, Texas, and Utah have statutes concerning the status. See MONT. CODE ANN. § 40-1-403 (2021); S.B. 375, 65th Leg., Reg. Sess. (Mt. 2017); TEX. FAM. CODE ANN. § 2.401 (West 2005), *invalidated by Ranolls v. Dewling*, 223 F. Supp. 3d 613 (E.D. Tex. 2016); UTAH CODE ANN. § 30-1-4.5 (LexisNexis 2021). For example, the New Hampshire statute provides that “[p]ersons cohabiting and acknowledging each other as husband and wife, and generally reputed to be such, for the period of 3 years, and until the decease of one of them, shall thereafter be deemed to have been legally married.” See N.H. REV. STAT. ANN. § 457:39. Colorado establishes the eligibility requirements. See COLO. REV. STAT. § 14-2-109.5 (2021).

110. GORAN LIND, COMMON LAW MARRIAGE: A LEGAL INSTITUTION FOR COHABITATION 6 (2008).

111. *Stone*, 833 S.E.2d 266 at 269.

112. See e.g., UNIF. MARRIAGE AND DIVORCE ACT § 209 (COMM’RS ON UNIF. STATE L. 1973); see also SOC. SEC. ADMIN., PROGRAM OPERATIONS MANUAL SYSTEMS GN 00305.085 (2006) (listing Arizona, California, and Illinois, among other states, as states that recognize putative spousehood).

cohabitant who believed erroneously but in good faith that she was married.

III. THE DEVELOPMENT OF A UNIFORM LAW

In recognition of the variations in state law, in 2016, the Joint Editorial Boards on Uniform Family Law and Trusts and Estates Law of the Uniform Law Commission recommended the creation of a study committee to explore the feasibility and appropriateness of a drafting project on the Economic Rights of Unmarried Cohabitants.¹¹³ The Study Committee began working in 2017, and its initial recommendation for the appointment of a drafting committee included consideration of provisions that might include: (1) an “opt-in” status for unmarried cohabitants who wish to share rights and resources while they cohabit; (2) remedies in express or implied contract for unmarried cohabitants when the cohabitation ceases because of dissolution or death, in the absence of an “opt-in” agreement; and (3) a status-based remedy providing presumptive remedies for couples who cohabited for a defined period or raised children together.¹¹⁴

The ULC’s Scope and Program Committee expressed concerns regarding several aspects of the Study Committee report, including the “opt-in” option in which individuals could register with a system that provides defined economic benefits, duties, and privileges for registrants.¹¹⁵ After another round of memos, a Drafting Committee was established. The Committee considered a series of approaches, including status and opt-in, before developing a relatively simple act focused on contractual and equitable claims: the Uniform Cohabitants Economic

113. Memorandum from the Joint Ed. Bd. for Unif. Fam. L. and the Joint Ed. Bd. for Unif. Tr. and Est. Acts to Comm. on Scope and Program (Dec. 2016) (on file with Unif. L. Comm’n).

114. Minutes from Midyear Meeting of Comm. on Scope and Program of the Unif. L. Comm’n (Jan. 19, 2018) (on file with author).

115. See Minutes from Midyear Meeting of Comm. on Scope and Program of the Unif. L. Comm’n (Jan. 19, 2018) (on file with author); Memorandum from Mary Devine, Craig Stowers, and Naomi Cahn to Econ. Rights of Unmarried Cohabitants Drafting Comm. (Feb. 25, 2019) (on file with Unif. L. Comm’n).

Remedies Act [UCERA].¹¹⁶ UCERA is an enabling act that does not create any special status for cohabitants but rather allows cohabitants to exercise the usual rights of individual citizens of a state to contract with others and to bring equitable claims against others in appropriate circumstances.¹¹⁷

UCERA seeks to harmonize the varying state approaches by enunciating the basis for nonmarital cohabitants to pursue remedies against one another.¹¹⁸ In doing so, the Act actually serves two purposes: providing certainty and predictability in the law while protecting the expectations of nonmarital cohabitants. Most states have not codified their approaches to nonmarital cohabitation, and UCERA provides standard language for enactment.

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In defining who qualifies as a cohabitant, the Act requires that two individuals “live together as a couple.”¹²⁰ As the Act explains, this does not necessarily require a sexual relationship, although the parties must either be adults or emancipated minors.¹²¹ The parties can also be married to third parties, a position in accord with most of the states that have considered the issue.¹²²

116. See Memorandum from Mary Devine, Craig Stowers, and Naomi Cahn to Econ. Rights of Unmarried Cohabitants Drafting Comm. (Feb. 25, 2019) (on file with Unif. L. Comm’n); UNIF. COHABITANTS’ ECON. REMEDIES ACT (UNIF. L. COMM’N, Draft July 2021), at 1.

117. UNIF. COHABITANTS’ ECON. REMEDIES ACT (UNIF. L. COMM’N, Draft July 2021) at 1.

118. *Id.* at 4.

119. *Id.* at 4.

120. Unif. Cohabitants’ Econ. Remedies Act § 2 (Unif. L. Comm’n 2021).

121. *Id.*

122. There is no 50-state survey of such cases, but anecdotes confirm the irrelevance of the marriage of one cohabitant to a court’s decision. See, e.g., *Cates v. Swain*, 215 So. 3d 492, 493–95 (Miss. 2013); *Baldassari v. Baldassari*, 420 A.2d 556, 558–59 (Pa. Super. Ct.

A norm underlying the Act is that cohabitants should be able to assert contractual and equitable claims against one another in the same manner as other litigants. Perhaps the boldest section of UCERA is its recognition of an equitable claim for sharing property acquired during the cohabitation based on contributions to the relationship. "Contribution to the relationship," in turn, is defined broadly to encompass domestic services, caregiving, and other efforts that benefit the cohabitants or the relationship.¹²³ The Act thus rejects the view that household services and caregiving by a cohabitant are presumptively gratuitous and cannot support equitable relief. Determining whether to provide a remedy for such an equitable claim requires courts to look to the nature of the parties' relationship, including their contributions, reliance on one another's conduct, and their intent to share property.¹²⁴ Importantly, the value of a cohabitant's contributions is not limited to market value but includes the subjective value to the other cohabitant and to the couple.¹²⁵ The remedy is not a conscriptive default; rather, UCERA requires a close examination of the circumstances of the parties' cohabitation in determining whether any division of property is appropriate.¹²⁶

The Act would thus provide a framework for resolving cohabitants' claims and would meet the concerns expressed in court decisions about the lack of legislative guidance. Importantly, the Act constitutes an expression of public policy: recognition of cohabitants' contractual and equitable claims, including claims based on contributions to the relationship, can exist in the law alongside recognition of the institution of marriage.

1980); *In re Estate of Roccamonte*, 787 A.2d 198, 200, 202 (N.J. Super. Ct. App. Div. 2001); *Crandell v. Resley*, 804 P.2d 272, 276 (Colo. App. 1990); see also *Freedman v. Muller*, 2015 IL App (1st) 141410 ¶ 1237 (demonstrating that marriage of one of the parties was a defense, yet the courts held on other grounds).

123. Unif. Cohabitants' Econ. Remedies Act § 2 (Unif. L. Comm'n 2021).

124. See *id.*

125. See *id.*

126. See *id.*

IV. CONCLUSION: THE FUTURE?

With the law of cohabitants' economic rights within the United States being largely judge-made, it has evolved in piecemeal fashion, case by case, as courts respond to controversies before them. Except for those states that have statutory registration schemes, the few states that have enacted statutes affecting cohabitants' rights have restricted rather than enhanced their ability to assert claims. Legislating in the family law realm is always challenging,¹²⁷ and legislating about cohabitation is no exception. Legislators may react quickly to perceived risks, such as the extension of the Texas statute of frauds to include palimony agreements due to the "abusive filing of palimony suits" that were "an embarrassment to the legal profession."¹²⁸ Numerous legislatures have also addressed cohabitation in the post-divorce context, to identify cohabitation as a ground for terminating alimony.¹²⁹ No state legislature to date, however, has established a regime for cohabitants' economic rights. We are left primarily with judge-made law that is often difficult for nonlawyers to access or to fully understand.

With more couples of greater diversity cohabiting outside of marriage,¹³⁰ more cohabitant disputes inevitably show up in court, and courts increasingly look to legislatures for guidance. In this final section, we briefly turn to the statutory approaches that might gain widespread acceptance. Any discussion of cohabitants' economic rights must be informed by the reality that people

127. Legislative deliberations on family law proposals often trigger emotional arguments from competing interest groups. See, e.g., Ira Ellman, *Why Making Family Law is Hard*, 35 ARIZ. ST. L.J. 699, 700, 708 (2003) (suggesting that family law reform is hard because people disagree about family norms themselves and about the role of law in promoting those norms); see also Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 VA. L. REV. 79, 80 (2016) (recounting the history of controversial reforms promoted by fathers' rights groups).

128. See *Zaremba v. Cliburn*, 949 S.W.2d 822, 826 (Tex. Ct. App. 1997) (quoting legislative hearings leading up to amendment of Tex. Bus. & Com. Code Ann. § 26.01(b)(3)).

129. See Cynthia Lee Starnes, *I'll Be Watching You: Alimony and the Cohabitation Rule*, 50 FAM. L. Q. 261, 264 (2016) (discussing statutes across the U.S. that authorize termination of alimony on account of the recipient's cohabitation).

130. Gurrentz, *supra* note 2 (citing statistics that cohabitating partners in interracial relationships increased from 6% to 10% from 1996 to 2017).

cohabit rather than marry for a range of reasons. As Katharine Baker has put it, “cohabitants are far from a monolithic group.”¹³¹ They may live together as a trial-run or precursor to marriage, for financial efficiency, or to test their compatibility. Most couples who married within the last decade cohabited for a period of time before they married,¹³² but couples may also choose to cohabit because they oppose the institution of marriage. Couples may want to avoid marital property law, obligations of spousal support, or a cumbersome divorce process. Older couples may live together without marriage to preserve benefits they would otherwise lose. Some people fall into cohabitation for no reason at all, as the path of least resistance.¹³³ And some simply “view marriage as hard to exit and are reluctant to assume restrictive gender roles.”¹³⁴

Any legal regime that forces these varied forms of nonmarital couplehood into a single prototype might provide simplicity and clarity but at the same time risks standardizing non-standard relationships based on a set of norms that may not be applicable.¹³⁵ A status-based approach, such as Washington’s presumptive application of community property principles to property acquired during a “committed intimate relationship,”¹³⁶ reflects a value judgment that people who live together as intimate partners *should* be willing to share equally any property acquired and obligations assumed during their relationship. Such an approach risks upending the parties’ own understandings and expectations of their relationship, often entails intrusive inquiries into a couple’s private life, and may undermine community norms.¹³⁷ Moreover, in a jurisdiction with a presumptive

131. See Katharine K. Baker, *What is Nonmarriage?*, 73 SMU L. REV. 201, 205 (2020); see also Cahn & Carbone, *supra* note 80, at 1252 (identifying four types of cohabitants).

132. See Laura Tach & Sarah Halpern-Meekin, *Why They Cohabit: Couples’ Reasons for Cohabitation and Relationship Quality* 9–10 (2014).

133. See Cynthia Grant Bowman, *Unmarried Couples, Law, and Public Policy* 239–41 (2010) (explaining how various categories of cohabitant relationships form due to factors such as economy, convenience, or for no reason at all).

134. Amanda J. Miller et al., *The Specter of Divorce: Views from Working- and Middle-Class Cohabitants*, 60 Fam. Rels. 602, 602 (2011).

135. See generally Brown, *supra* note 83.

136. Andrews, *supra* note 73, at 296.

137. See Baker, *supra* note 130, at 248–49.

property-sharing regime for cohabiting couples, parties may disagree with the presumption but not know enough about the law to exercise their right to opt out.¹³⁸ It is significant that the ALI domestic partner approach has never gained traction as a legislative model in the United States.

Opt-in registration schemes, which permit couples to sign on to a legally enforceable set of obligations, exist in a few states (as well as other countries). In some states, they allow registrants to take on particular legal obligations from a menu of choices. If the registration scheme mimics marriage, couples may be more likely to simply marry. If offered a selection of options, couples ideally will tailor their choices to their unique needs and expectations.¹³⁹ Such schemes, of course, maximize individual autonomy, but they are effective only to the extent that couples know of their existence and choose to use them. Empirical research on the use of Colorado's Designated Beneficiaries law suggests that when marriage and a registration scheme are both available, couples who want to formalize their relationships turn to marriage in overwhelming numbers.¹⁴⁰

In our view, UCERA offers a statutory framework for cohabitants' remedies that is consistent with the common law in most states but does more than provide a "restatement." By recognizing contractual and equitable claims arising from contributions to the cohabitants' relationship, the Act rejects the minority view that such claims will either resurrect common law marriage

138. See Erez Aloni, *Compulsory Conjugalinity*, 53 CONN. L. REV. 55, 60, 80 (2021) (reporting that one-third to one-half of interviewees knew too little about British Columbia's Family Law Act—an opt-out property-sharing regime—to exercise their right to opt out). Interestingly, Professor Aloni found that couples who knew about the existence of the law conformed their relationship expectations to it. See *id.* at 98–102. In other words, the constitutive aspect of the law created a norm that some cohabitants gradually embraced.

139. See Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 599 (2013) (suggesting that a registration scheme for cohabitants with a menu of options best serves the values of autonomy, individuality, and pluralism); see also Carroll, *supra* note 25, at 508 (describing an alternative form of partnership recognized in France known as “PACS,” codified by CODE CIVIL [C. CIV.] [CIVIL CODE] art. 515 (Fr.).

140. Kaiponane T. Matsumura, *Consent to Intimate Regulation*, 96 N.C. L. REV. 1013, 1018 (2018) (reporting that only 672 couples in three populous counties used Colorado's designated beneficiary law, compared to 131,100 couples who married).

or destroy the institution of marriage. Indeed, the steady decline in marriage rates and the increase in cohabitation rates—without regard to the presence or absence of a cohabitants' remedial scheme—suggest that other socio-economic factors are at work in the decline of marriage.¹⁴¹

Under UCERA, cohabitants would have access to familiar contractual and equitable remedies.¹⁴² In that sense, UCERA levels the playing field for cohabitants seeking relief in court, but it does not presume a particular conceptual mindset for any cohabiting relationship. Until UCERA, courts' consideration of remedies in contract and equity, particularly unjust enrichment/constructive trust, have not proven entirely satisfactory. When courts apply market-based doctrines to family-like disputes, they are often reluctant to reconstruct parties' actions within an intimate personal relationship into commercial arrangements. Judges may undervalue or exclude altogether domestic services and caregiving.¹⁴³

The new uniform act attempts to address those concerns by directing courts, in resolving equitable claims, to focus on the nature of the cohabitation and the parties' contributions—including nonmonetary contributions—as well as their intentions and their reliance on conduct by the other cohabitant.¹⁴⁴ The discretionary nature of equitable relief is a given, but UCERA guides the exercise of that discretion. To the extent statutory law is more

141. June Carbone & Naomi Cahn, *Marriage Markets: How Inequality Is Remaking the American Family* 8 (2014) (analyzing class-based differences in family formation and the impact of socioeconomic status on marriage rates); see also Maxine Eichner, *The Privatized American Family*, 93 *Notre Dame L. Rev.* 213, 228–29 (2017) (exploring the link between a decrease in social welfare support for families and a decline in marriage rates among low and middle-income populations).

142. See generally *Unif. Cohabitants' Econ. Remedies Act* (Unif. L. Comm'n 2021) (providing cohabitants relief based on breach of contractual or equitable claims based on contributions to the relationship).

143. See Antognini, *supra* note 17, at 2177 (noting how the Supreme Court of New Hampshire denies claims for domestic services); see also Baker, *supra* note 130, at 209 (discussing how courts ignore moralistic inquiries when considering what constitutes contribution to a marriage).

144. *UNIF. COHABITANTS' ECON. REMEDIES ACT* § 7 (UNIF. L. COMM'N 2021).

easily accessed than case law, UCERA may also guide cohabitants as they bargain in the shadow of known law.¹⁴⁵

145. Cohabitants would benefit if the law regarding their economic remedies were accessible and clear. Cf. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979) (discussing how most divorcing spouses settle their disputes according to their understanding of the law).