

Judicial Reticence, Legislative Inertia, and the Curtailment of Cohabitants' Rights

by
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Across the United States, the law of cohabitants' inter se claims has developed in fits and starts. Without legislative direction, some courts have recognized a full panoply of common law remedies,¹ while other courts have closed the door on cohabitants' claims precisely because the legislature has not spoken.² Scholars and policymakers disagree about the best approach to cohabitants' claims, with some advocating a framework for marriage-like rights such as that proposed by the American Law Institute in 2002³ while others have focused on strengthening judicial recognition of cohabitants' contractual and equitable remedies.⁴ In the national discourse, however, little attention has been given to the

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¹ The bellwether decision in *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976), recognizing contractual and equitable remedies for cohabitants, has been widely followed. See *infra* Part I.

² As the New Hampshire Supreme Court put it, "We adhere to the view of those jurisdictions that have concluded that until their legislatures determine otherwise, they will not recognize a contract which is implied from the rendition and acceptance of 'housewifely services.'" *Tapley v. Tapley*, 449 A.2d 1218, 1219 (N.H. 1981).

³ PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 6.01-6.06 (AM. L. INST. 2002) (hereinafter ALI PRINCIPLES), discussed *infra* at notes 107-112, and accompanying text. Professor Ira Ellman, the Chief Reporter for the ALI PRINCIPLES, defended the status-based approach as providing a more just and realistic structure than a regime of contractual remedies. See Ira Mark Ellman, "Contract Thinking" Was Marvin's Fatal Flaw, 76 NOTRE DAME L. REV. 1365 (2001).

⁴ See, e.g., Orit Gan, *Nonmarital Contract Law*, 76 RUTGERS U.L. REV. 663, 664-67 (2024) (summarizing scholarly commentary on the law governing cohabitants). Particular critiques are discussed *infra* in Part I.

interaction between the judicial and legislative branches in the development of the law governing cohabitants' claims. This Essay is a beginning contribution to that subject.

Family law policymaking is inherently difficult,⁵ as evidenced by the many critiques of the ALI Principles themselves⁶ and the lack of significant endorsement in courts or legislatures.⁷ The ALI's approach to nonmarital cohabitants,⁸ giving "domestic partners" property and support rights akin to marital rights, triggered robust scholarly debate,⁹ and courts across the country have largely rejected that framework in favor of contractual and

⁵ See, e.g., Ira Ellman, *Why Making Family Law Is Hard*, 35 ARIZ. ST. L.J. 699 (2003). In Ellman's view, family law reform is uniquely fraught since the "American tradition of family privacy is . . . in constant tension with a shifting majority's desire for rules that advance its vision of family." *Id.* at 701. My own experience chairing three drafting committees for the Uniform Law Commission on family law projects has driven home the challenges of formulating "enactable" family law policy but also sparked my interest in legislation as a vehicle for reform. See UNIFORM PREMARITAL AND MARITAL AGREEMENTS Act (2013) (UNIF. L. COMM'N); UNIFORM FAMILY LAW ARBITRATION Act (2018) (UNIF. L. COMM'N); and UNIFORM JUDICIAL INTERVIEW OF CHILDREN Act (2025) (UNIF. L. COMM'N).

⁶ See generally RECONCEIVING THE FAMILY – CRITIQUE OF THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION (Robin Fretwell Wilson, ed. 2006) (collecting scholarly critiques of the ALI's approach to child custody, spousal maintenance, property division, unmarried cohabitants, and other topics addressed in the ALI *Principles*).

⁷ Notwithstanding the lack of formal adoption, the ALI Principles have become an important thread in family law discourse and arguably have had a pervasive ideological impact. See Linda C. McClain & Douglas NeJaime, *The ALI Principles of the Law of Family Dissolution: Addressing Family Inequality Through Functional Regulation*, in THE ALI AT 100: ESSAYS ON ITS CENTENNIAL 337 (Andrew S. Gold & Robert W. Gordon eds., 2023) (arguing that the ALI Principles have shaped family law discourse and directed it toward a progressive vision).

⁸ ALI PRINCIPLES §§ 6.01-6.06, discussed *infra* at notes 107-112 and accompanying text.

⁹ In response to the ALI Principles, scholars have criticized the conscriptive nature of the domestic partner framework or other status-based approach. See, e.g., Marsha Garrison, *Is Consent Necessary?: An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815 (2005) (arguing against a status-based approach because it would falsely signal that marriage and cohabitation are equivalent); June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55 (2016) (arguing that status-based remedies undercut the autonomy of individual cohabitants). See generally SERENA MAYERI, MARITAL PRIVILEGE 260-66 (2025) (summarizing diverse critiques of ALI's domestic partner approach).

equitable doctrines.¹⁰ That common law, in turn, has been the subject of scholarly critiques, especially the reasoning of courts in rejecting cohabitants' claims.¹¹ When curtailing cohabitants' remedies, courts often invoke the need to defer to the legislature as the policy-making branch,¹² but legislative direction has not been forthcoming. The Uniform Cohabitants' Economic Remedies Act (UCERA), approved by the Uniform Law Commission in 2021,¹³ provides a ready-made legislative framework but has yet to be enacted in any state. When faced with legislative silence, moreover, courts may assume that the legislature has acquiesced in court decisions that limit remedies available to cohabitants, thus freezing the development of the common law.

In light of the demographic shift toward nonmarital families, lawmaking for cohabitants remains a topic of vital public interest. In the United States today, more couples are cohabiting outside of marriage than ever before, and cohabitation rates are expected to continue to climb.¹⁴ While cohabitation and marriage rates vary by educational level, socio-economic status, age, and race/ethnicity, cohabitation rates have increased rapidly among all groups while the marriage rate has declined or flattened.¹⁵ Also,

¹⁰ See generally Barbara Atwood & Naomi Cahn, *Nonmarital Cohabitants: The US Approach*, 44 HOUS. J. INT'L L. 191, 193-213 (2022) (summarizing common law and statutory law governing cohabitants within the United States); Courtney G. Joslin, *Autonomy in the Family*, 66 UCLA L. REV. 912, 925-31 (2019) (analyzing state law on contractual and equitable remedies for cohabitants); CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 47-91 (2010) (describing legal treatment of cohabitation in the United States).

¹¹ See, e.g., Albertina Antognini, *Nonmarital Contracts*, 73 STAN. L. REV. 67 (2021) (critiquing judicial reasoning in case law involving claims of express contract). Other critiques are discussed *infra* Part I.

¹² See case law discussed *infra* Part I.

¹³ See UNIF. COHABITANTS' ECON. REMEDIES ACT (2021) (UNIF. L. COMM'N).

¹⁴ Brief, *Change in American Families: Favoring Cohabitation over Marriage*. PENN WHARTON BUDGET MODEL (Feb. 19, 2025) (hereinafter "*Change in American Families*").

¹⁵ *Id.* (noting that marriage rates have declined among all education groups and all races but have declined most sharply among people without college education, Black and mixed-race individuals, and lower-income earning populations). See also Naomi Cahn & June Carbone, *Blackstonian Marriage, Gender, and Cohabitation*, 51 ARIZ. ST. L.J. 1247, 1252 (2019) (observing that cohabiting couples vary considerably in their economic arrangements, ranging from financially independent individuals to relationships in which one cohabitant is completely financially dependent on the other); Kaiponanea T. Matsumura, *Consent*

cohabiter rates as a share of the adult population are projected to increase from just under 10 percent today to over 16 percent by 2040.¹⁶ Surveys show widespread acceptance of cohabitation among the public, even where cohabitation is not followed by marriage.¹⁷ Significantly, the data also reveal that the overall share of the population living with a partner — whether married or unmarried — has declined.¹⁸ Put another way, the percentage of adults who are unpartnered is on the increase, a data point with potential socio-economic repercussions.¹⁹

The reasons underlying cohabitation are varied.²⁰ Moving in together may be motivated by romantic love and a desire to share resources as a preliminary step to long-term commitment or

to *Intimate Regulation*, 96 N.C. L. REV. 1013, 1039 (2018) (noting demographic differences among cohabiting couples).

¹⁶ *Change in American Families*, *supra* note 14, at 15, Fig. 8.

¹⁷ Pew Research Center, *Views on Marriage and Cohabitation in the US* (Nov. 6, 2019), <https://www.pewresearch.org/social-trends/2019/11/06/marriage-and-cohabitation-in-the-u-s/>.

¹⁸ See *Change in American Families*, *supra* note 14, Fig. 1 (showing the decline in population shares of married and cohabiting individuals from 59.6 in 1996 to 55.5 in 2023).

¹⁹ The rise in the population percentage of unpartnered individuals has been correlated with the falling fertility rate. See John Burns-Murdoch, *The Relationship Recession Is Going Global*, FIN. TIMES (Jan. 10, 2025) (noting the increase in the uncoupled population as a percentage of fertility decline, as compared to data on married couples who do not have children). For an overview of the legal status of unpartnered individuals, see Naomi R. Cahn, *Reflections on Singlehood*, 72 WASH. U. J. L. POL'Y. 27 (2023) (suggesting that the ways in which the law differentiates single individuals from people in relationships, while often illogical, privileges relationships in varied legal contexts).

²⁰ See Barbara Atwood & Naomi Cahn, *The Uniform Cohabitants' Economic Remedies Act: Codifying and Strengthening Contract and Equity for Nonmarital Partners*, 57 FAM. L.Q. 1, 2-3 (2023-24) (discussing varied circumstances of cohabiting couples); Katherine K. Baker, *What Is Nonmarriage?*, 73 SMU L. REV. 201, 205 (2020) (noting that cohabitants “are far from a monolithic group” and describing a range of reasons couples choose to cohabit); Naomi Cahn, Clare Huntington & Elizabeth Scott, *Family Law for the One-Hundred-Year Life*, 132 YALE L.J. 1691, 1708-1714 (2023) (describing family formation patterns of older adults and noting that older adults forming new relationships are more likely to cohabit than to marry).

marriage. Cohabitation, on the other hand, may be primarily motivated by economic concerns, e.g., to consolidate housing costs or to reside closer to a place of employment. Couples with children may choose to live together to facilitate the sharing of childcare. Likewise, the decision not to marry — whether temporary or permanent — may be ideological, based on rejection of the institution of marriage, or it may be a pragmatic choice to avoid potential financial burdens and responsibilities imposed by the law of marital property and spousal support.²¹ Couples may choose to cohabit rather than marry because of strong emotional and financial ties to children from a prior marriage and other familial relationships.²²

Cohabitants, then, comprise a growing and diverse segment of the population and deserve thoughtful policymaking by lawmakers. Courts today, however, adjudicate cohabitants' contractual and equitable claims in the shadow of enigmatic legislative policy. As long as legislatures fail to act, courts presumably will continue to close the door on certain claims because of a perceived legislative tenet. The combination of judicial deference and legislative stasis leaves cohabitants without full access to traditional remedies. Thus, as a practical matter, reform efforts should look to the legislative halls as a place for change.

Part I of this Article sketches the case law regarding cohabitants' rights²³ with emphasis on the uneven deference by courts

²¹ See Emily J. Stolzenberg, *The New Family Freedom*, 59 B.C. L. REV. 1983, 2047-49 (2018) (emphasizing the diversity in cohabiting relationships and proposing remedial frameworks that would vary according to the duration of the relationship, whether the couple had parented a child together, and other factors). Although some cohabitants may mistakenly believe themselves to be married, that misperception is increasingly rare in light of the decline of common law marriage and the greater acceptance of nonmarital cohabitation. See BOWMAN, *supra* note 10, at 27.

²² See Cahn, Huntington & Scott, *supra* note 20, at 1712-24 (describing living patterns of older adults and circumstances driving their choices).

²³ In contrast to state law within the United States, several countries have been much more receptive to status-based frameworks for unmarried couples. See, e.g., Mary Charlotte Y. Carroll, Note, *When Marriage Is Too Much: Revising the Registered Partnership in a Diverse Society*, 130 YALE L.J. 478, 507-14 (2020) (discussing opt-in frameworks for unmarried couples in France and Belgium); Nicholas Bala, *Common Law Marriage in Common Law Canada: Legislatures and Courts Recognize "Marriage-Like" Relationships*, 44 HOUS. J. INT'L L. 287 (2022) (discussing legislative and judicial remedies for unmarried couples in Canada).

to the legislative branch. Court decisions from Illinois and New Mexico — the two states where UCERA has been introduced — are reviewed in some detail. Part II compares the legislative policies motivating various existing laws relating to unmarried cohabitants with the concerns that have surfaced when bills based on UCERA have been considered. Part III explores the process differences between judicial lawmaking and legislative lawmaking regarding cohabitants' rights and underlines the need for legislative action. While UCERA offers an improvement over the existing intransigence of the common law, it is not the only possible framework. It is simply one statutory model that, if enacted, could make a difference for cohabitants seeking ordinary contractual or equitable remedies at the end of a relationship. The challenges inherent in achieving legislative expansions of cohabitants' rights are daunting, but legislation in many states remains the singular avenue for reform.

I. Cohabitant Remedies Under the Common Law

The evolution of cohabitants' inter se rights in the United States has largely been the province of state courts acting against a backdrop of statutory law governing marriage and divorce.²⁴ Judicial determinations of legislative policy typically are based not on close textual analysis of particular statutory provisions but on policies perceived to be manifest in the states' general marriage and divorce statutes and the states' abrogation of common law marriage.²⁵ Indeed, the widespread abrogation of common law marriage is a looming presence in many of the cases.

Common law marriage served a purpose when officiants were unavailable as the country expanded, but in modern times

²⁴ For more detailed analyses of the common law of cohabitants' rights, see Atwood & Cahn, *supra* note 10 (giving an overview of state common law on cohabitants' rights); Joslin, *supra* note 10 (summarizing caselaw on cohabitants' contractual and equitable remedies and noting that the "primary losers" in the cases are generally women); Albertina Antognini, *Nonmarital Coverture*, 99 B.U. L. REV. 2139 (2019) (deconstructing the common presumption that domestic services are rendered gratuitously as a misguided application of coverture).

²⁵ An examination of modes of statutory interpretation in the state courts is beyond the scope of this Essay. For a comprehensive analysis, see Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750 (2010).

it has been associated with administrative burdens, evidentiary problems, and fraudulent claims, and the number of jurisdictions continuing to authorize common law marriage within their borders has dwindled to eight currently.²⁶ In the few states that have retained common law marriage, courts seem receptive to cohabitants' claims – either by construing the facts to support a finding of marriage²⁷ or by invoking broad equitable authority to divide jointly acquired property.²⁸ In contrast, in the many states that have abrogated common law marriage, the abrogation itself remains an enigmatic signal of state policy.

In *Marvin v. Marvin*,²⁹ the California Supreme Court held that cohabitants' claims were not barred by the “meretricious” nature of the cohabiting relationship unless the claims were “expressly and inseparably based upon an illicit consideration of sexual services.”³⁰ The court recognized a range of contractual and potential equitable remedies for nonmarital cohabitants (including express and implied contract, quantum meruit, constructive trust, and unjust enrichment), but the court was careful to emphasize that it was not resurrecting common law marriage or making

²⁶ See *Stone v. Thompson*, 833 S.E.2d 266, 268 (S.C. 2019) (describing justifications for prospectively abolishing common law marriage). Currently seven states and the District of Columbia recognize common law marriage by statute. See National Conference of State Legislatures, Human Services *Common Law Marriage by State* (2020), <https://www.ncsl.org/human-services/common-law-marriage-by-state>. See generally BOWMAN, *supra* note 10, at 21-28 (describing the history and status of common law marriage). As Professor Bowman has shown, the abolition of common law marriage has left vulnerable individuals, particularly women of color, without economic recourse. Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709 (1996).

²⁷ See, e.g., *In re J.K.N.A.*, 454 P.3d 642, 649 (Mont. 2019) (explaining that in Montana, “common law marriage is an equitable doctrine used to ensure people are treated fairly once a relationship ends,” and that public policy favors a finding of a valid marriage).

²⁸ See, e.g., *Becker v. Ashworth*, 252 P.3d 647 (Kan. Ct. App. 2011)(Table), citing *Eaton v. Johnson*, 681 P.2d 606, 610 (Kan. 1984) (even where common law marriage requirements are not met, courts may make “an equitable division of property either jointly accumulated by the parties or acquired with intent that both parties have an interest in the property”).

²⁹ 557 P.2d 106 (Cal. 1976).

³⁰ *Id.* at 114. For a critique of the doctrine that agreements based on sexual services are unenforceable, see Albertina Antognini & Susan Frelich Appleton, *Sexual Agreements*, 99 WASH. U. L. REV. 1807 (2022).

marital remedies available in contravention of legislative edict.³¹ Michelle Marvin herself ultimately lost on the merits since she was unable to establish express or implied contract or any basis for equitable relief—thus driving home the distinction between the remedies available to unmarried cohabitants and the panoply of remedies available to spouses.³²

In the fifty years since *Marvin* was decided, courts in a majority of states have followed *Marvin*'s lead in recognizing the availability of contractual and equitable claims between cohabitants, albeit with important variations. *Marvin*'s doctrinal advance, however, has not led to widespread success on the ground for cohabitant claimants. As Professor Albertina Antognini has documented, state courts that ostensibly follow *Marvin* often deny relief on the merits even for claims based on express contract, relying on the perceived inextricability of the parties' sexual relationship from their economic arrangement, the presumption that a cohabitant's domestic services were rendered gratuitously, or the fear that awarding relief would undermine the institution of marriage.³³ Thus, even when couples have taken the unusual step of contractually defining their obligations to one another, courts often close the door on their claims. In many of these cases, courts voice concerns that sustaining the cohabitants' claims would contravene the legislature's ban on common law marriage.³⁴ Such reasoning, of course, blurs the distinction between claims sounding in contract

³¹ As the court explained, "We do not seek to resurrect the doctrine of common law marriage, which was abolished in California by statute in 1895. Thus we do not hold that plaintiff and defendant were 'married,' nor do we extend to plaintiff the rights which the Family Law Act grants valid or putative spouses; we hold only that she has the same rights to enforce contracts and to assert her equitable interest in property acquired through her effort as does any other unmarried person." *Marvin*, 557 P.2d at 122 n.24.

³² See *Marvin v. Marvin*, 122 Cal. App. 3d 871, 877 (Cal. Ct. App. 1981).

³³ See Antognini, *Nonmarital Contracts*, *supra* note 11, at 104-09 (analyzing court decisions addressing express contract claims by cohabitants and finding that courts often draw on doctrines associated with coverture in denying relief to nonmarital partners).

³⁴ In *Deschane v. Klug*, 2 N.W.3d 131 (Mich. Ct. App. 2022), for example, the court explained that claims by cohabitants based on contract implied in law or quantum meruit would "essentially resurrect common law marriage," adding that "services rendered during a meretricious relationship are presumably gratuitous." *Id.* at 137. The plaintiff there was unable to defeat the presumption by showing an expectation of compensation or the defendant's intent to compensate.

or equity and statutorily defined property and support rights that arise from marriage.

In some states, courts view their common law authority more narrowly and have stopped short of a full embrace of *Marvin*'s remedies. A leading example is *Morone v. Morone*, where the New York Court of Appeals reasoned that judicial attempts "through hindsight to sort out the intentions of the parties and affix jural significance to conduct carried out within an essentially private and generally noncontractual relationship runs too great a risk of error."³⁵ Recognition of implied contracts between cohabitants, in the court's view, not only would present a risk of "emotion-laden afterthought, not to mention fraud," but also would be inconsistent with the legislature's abolition of common law marriage.³⁶ As the court noted, the rationale for New York's early abrogation of common law marriage was driven by similar concerns about problems of proof, risk of fraud, and the incentivizing of litigation. The court thus concluded that the judiciary should wait for legislative direction³⁷ — an invitation the New York legislature has not accepted.³⁸

In contrast, courts in a few states have gone considerably beyond the common law of cohabitants' rights recognized in *Marvin*.³⁹ Most notably, Washington courts, as an exercise of equitable authority, presume that income and property acquired during a "committed intimate relationship" should be divided

³⁵ *Morone v. Morone*, 413 N.E.2d 1154, 1157 (1980).

³⁶ *Id.*

³⁷ *Id.* at 1158.

³⁸ Recent case law continues to follow *Morone*'s reasoning, reaffirming that contracts between cohabitants may be oral but must be express. *See, e.g.*, *Baron v. Suissa*, 167 A.D.3d 685, 90 N.Y.S.3d 220 (N.Y. App. Ct. 2018) (rejecting the statute of frauds defense in an action on an express oral agreement between cohabitants); *Matter of Estate of Polisseni*, 77 Misc. 203, 176 N.Y.S.3d 903 (N.Y. Surrogate Ct. 2022) (rejecting a claim by a cohabitant against a prior cohabitant's estate where it rested in part on implied contract).

³⁹ In Nevada, for example, a doctrine of "community property by analogy" is available if cohabitants expressly or impliedly agreed that assets acquired during their cohabitation would be treated as community property. *See Estate of Shapiro*, 634 F.3d 1055 (9th Cir. 2011) (holding that homemaker services were adequate consideration for an express or implied contract between cohabitants under Nevada law); *W. States Constr., Inc. v. Michoff*, 840 P.2d 1220 (Nev. 1992) (holding that an implied contract to acquire property as community property existed where the parties had conducted themselves as a married couple and designated certain property as community).

similarly to income and property acquired during marriage.⁴⁰ The equitable doctrine applies to stable, marital-like relationships, and the factors that courts consider 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.⁴¹

In *Connell v. Francisco*, the Washington Supreme Court clarified that the equitable doctrine applies only to property that would be deemed community property had the parties been married and not to a party's separate property.⁴² In that respect, the court in *Connell* emphasized that it was not treating cohabitation as marriage, since Washington courts by statute can equitably divide both community and separate property at divorce.⁴³ The court explained that its equitable doctrine would remain more limited "[u]ntil the Legislature, as a matter of public policy, concludes meretricious relationships are the legal equivalent to marriages."⁴⁴ Thus, the Washington court recognized that it must defer to the legislature in formulating policy, but it felt free to act so long as it did not equate cohabiting relationships with marriage. While Washington lawmakers have established a domestic partnership registration scheme,⁴⁵ they have remained silent on the committed intimate relationship doctrine, thus leaving courts to develop the doctrine case by case.⁴⁶

⁴⁰ *Connell v. Francisco*, 898 P.2d 831, 836 (Wash. 1995). Although the court in *Connell* used the term "meretricious relationship," the Washington courts have since switched to the less pejorative term "committed intimate relationship." See *Oliver v. Fowler*, 168 P.3d 348, 350-51 (Wash. 2007).

⁴¹ The five factors were announced in *In re Marriage of Lindsay*, 678 P.2d 328 (Wash. 1984), and remain the touchstone inquiry.

⁴² *Connell*, 898 P.2d at 836-37.

⁴³ WASH. REV. CODE ANN. § 26.09.080.

⁴⁴ *Connell*, 898 P.2d at 836.

⁴⁵ The domestic partnership registration scheme was enacted in 2008, extending community property and spousal support law to domestic partners. H.B. 3104, 60th Leg. Reg. Sess. (Wash. 2008).

⁴⁶ For analyses of the "committed intimate relationship" doctrine in the Washington courts, see Karen Foxx, Terry Price, & Joseph Janes, *Beyond Marvin v. Marvin: How Washington Leads the Way in Protecting Unmarried Cohabitants*, 100 WASH. L. REV. 29 (2025) (explaining the uneven development of the doctrine in the absence of legislative direction); Tom Andrews, *Cohabiting with Property in Washington: Washington's Committed Intimate Relationship Doctrine*, 53 GONZAGA L. REV. 293 (2017-18) (identifying unanswered questions in the doctrine).

Courts in a minority of states have refused to follow *Marvin*, reasoning that the legislative abolition of common law marriage precludes recognition of judicial remedies for contractual or equitable claims arising out of cohabiting relationships. In *Gunderson v. Golden*,⁴⁷ for example, the Idaho court observed that the legislature had abolished common law marriage twenty years earlier and had not recognized any remedies for cohabitants since that time. As the court put it, the claimant was asking the court “to legislate from the bench” in contradiction of established statutory law.⁴⁸

In the same vein, the Illinois Supreme Court has held that contractual and equitable claims arising out of cohabitation are unenforceable in the courts and that change, if any, would have to come from the legislature. In *Hewitt v. Hewitt*, the court dismissed contractual claims by a woman who had cohabited for fifteen years with the defendant, cared for their three children, and maintained their home.⁴⁹ The Illinois high court reasoned that recognition of express contract would inevitably invite a deluge of implied contract and other equitable claims. Such claims, in the court’s view, would weaken “marriage as the foundation of our family-based society” and would be inconsistent with the longstanding abrogation

but arguing that it is more likely to achieve justice between cohabitants than traditional common law remedies).

⁴⁷ 360 P.3d 353 (Idaho Ct. App. 2015) (barring contractual and equitable claims to divide property acquired during a couple’s twenty-five-year cohabitation).

⁴⁸ *Id.* at 355. Other courts have similarly barred cohabitants’ claims arising from the cohabiting relationship. *See, e.g.,* Schwegmann v. Schwegmann, 41 So.2d 316 (La. Ct. App. 1983) (refusing to recognize contractual or equitable claims based on domestic services rendered in “concubinage”). While an early decision in Georgia denied relief to a cohabitant based on a finding of immoral consideration, *see Rehak v. Mathis*, 238 S.E.2d 81 (Ga. 1977), a more recent decision recognized an unjust enrichment claim by a cohabitant focused on property acquired during the cohabitation. *See Cates v. Brown*, 850 S.E.2d 764 (Ga. Ct. App. 2020). Similarly, Mississippi has recognized unjust enrichment claims by a cohabitant focused on economic contributions to property acquired during cohabitation, as distinct from domestic services rendered by the cohabitant. *See Cates v. Swain*, 215 So.3d 492 (Miss. 2013). *See generally* Albertina Antognini, *Against Nonmarital Exceptionalism*, 51 U.C. DAVIS L. REV. 1891, 1921-1930 (2018) (discussing judicial reluctance to recognize implied contract or quantum meruit claims based on domestic services).

⁴⁹ 394 N.E.2d 1204 (1979).

of common law marriage.⁵⁰ The court also noted that recently enacted marriage and divorce laws in the state had adhered to fault-based divorce and had codified the putative spouse doctrine—a limited recognition of nonmarital cohabitant rights linked to an attempted formalization of marriage and based on a good faith belief in a valid marriage.⁵¹

In *Hewitt*, the court also weighed in on the “illicit” and “meretricious” behavior of couples who chose to cohabit outside of marriage.⁵² With open and notorious cohabitation still a crime at that time in Illinois,⁵³ the court’s moral condemnation of the couple’s relationship formed a backdrop to the opinion. As the court explained:

The question whether change is needed in the law governing the rights of parties in this delicate area of marriage-like relationships involves evaluations of sociological data and alternatives we believe best suited to the superior investigative and fact-finding facilities of the legislative branch in the exercise of its traditional authority to declare public policy in the domestic relations field.⁵⁴

The court concluded that the plaintiff’s claims were “unenforceable for the reason that they contravene the public policy, implicit in the statutory scheme of the Illinois Marriage and Dissolution of Marriage Act, disfavoring the grant of mutually enforceable property rights to knowingly unmarried cohabitants.”⁵⁵

⁵⁰ *Id.* at 1207.

⁵¹ *Id.* at 1210-11.

⁵² *Id.* at 1208-09.

⁵³ The court relied on *Wallace v. Rappleye*, 103 Ill. 229, 249 (Ill. 1882), holding that “[a]n agreement in consideration of future illicit cohabitation between the plaintiffs is void.” *Hewitt*, 394 N.E.2d at 1208. The Illinois Criminal Code of 1961 criminalized open and notorious fornication. See ILL. REV. STAT. ch. 38, ¶ 11-8(a).

⁵⁴ *Hewitt*, 394 N.E.2d at 1209.

⁵⁵ *Id.* at 1211. *Hewitt* sparked widespread criticism, including commentary within Illinois. See Jan Skelton, *Hewitt to Ayala: A Wrong Turn for Cohabitants’ Rights*, 82 ILL. B.J. 364 (July 1994) (disputing *Hewitt*’s reasoning that recognizing contract and equitable claims would reinstate common law marriage or undermine the institution of marriage). Some courts in sister states joined the criticism, see, e.g., *Goode v. Goode*, 396 S.E.2d 430, 437 (W. Va. 1990) (disagreeing with the “rigidity” of the *Hewitt* reasoning that “would permit one participant in a meretricious relationship to abscond with the bulk of the couple’s acquisitions.”); *Watts v. Watts*, 405 N.W.2d 303, 310-11 (Wis. 1987) (rejecting the argument that the state’s family law statutes and abrogation of common law marriage precluded

Almost four decades later, an equally compelling set of facts came before the Illinois Supreme Court, this time in the context of a same-sex relationship. In *Blumenthal v. Brewer*⁵⁶ a majority of the justices refused to recognize claims arising out of a cohabiting relationship and in so doing doubled down on its deference to policies attributed to the legislature. The case concerned a couple who had cohabited for more than twenty-five years. Although both women had professional careers, Blumenthal operated a high-earning medical practice and brought in the majority of the couple's income, while Brewer worked as a judge and devoted more time to raising the couple's children and attending to other domestic responsibilities.⁵⁷ After Blumenthal brought a partition action regarding the couple's home, Brewer asserted a counterclaim seeking a share of the value of Blumenthal's medical practice based on constructive trust, unjust enrichment, and restitution.

While the intermediate appellate court ruled in Brewer's favor on the counterclaim, reasoning that the state's public policy had shifted dramatically since *Hewitt*,⁵⁸ the Illinois Supreme Court reversed and harshly admonished the court of appeals for having assumed that *Hewitt* was no longer good law.⁵⁹ Over a blistering dissent,⁶⁰ the supreme court adhered to the position established in *Hewitt*: the state's prohibition against common law marriage and its interest in furthering the institution of marriage precluded the recognition of rights arising from a cohabiting relationship.⁶¹ Ironically, the court cited *Obergefell v. Hodges*⁶²—decided several years after the termination of the couple's relationship—

recognition of cohabitants' express or implied contract claims or that the court should refrain from resolving cohabitants' disputes until the legislature gives direction).

⁵⁶ 69 N.E.3d 834 (2016).

⁵⁷ *Id.* at 852.

⁵⁸ See *Blumenthal v. Brewer*, 24 N.E.3d 168, 176-80 (Ill. App. Ct. 2014) (noting that cohabitation was no longer criminalized, no-fault divorce had been enacted, and same-sex relationships were viewed more favorably).

⁵⁹ The Illinois Supreme Court pointedly criticized the appellate court for departing from *Hewitt*, stating that the lower court "could question *Hewitt* and recommend that we revisit our holding in the case, but it could not overrule it." *Blumenthal*, 69 N.E.3d at 852.

⁶⁰ *Id.* at 860-67 (Theis & Burke, JJ., dissenting in part, concurring in part).

⁶¹ *Blumenthal*, 69 N.E.3d at 857.

⁶² 576 U.S. 644 (2015).

as evidence of the continuing significance of the institution of marriage in contemporary America.⁶³ In summarily disposing of Brewer's constitutional claims, the court reasoned that its holding did not prevent partners from forming intimate relations but rather respected the legislature's goal of limiting the benefits of marriage to married individuals.⁶⁴

Pointing to various post-*Hewitt* amendments to Illinois statutory law and the continuing prohibition of common law marriage,⁶⁵ the court in *Blumenthal* opined that the Illinois legislature knew how to alter family-related statutes when it believed public policy so required. By failing to do so, the legislature had "acquiesced in *Hewitt*'s judicial interpretation of the statute prohibiting marriage-like rights to those outside of marriage."⁶⁶ A presumption of legislative acquiescence based on legislative silence, however, is speculative unless a specific statutory construction has been considered by the legislature and reenacted without change.⁶⁷ In *Blumenthal*, the court's presumption was not based on a specific statutory construction but on a generalized interpretation of legislative policy, and not until 2023 did the legislature consider a bill proposing a change in that policy.⁶⁸

The Illinois high court again invited the legislature to weigh in. "Until the legislature sees fit to change our interpretation of the public policy in Illinois, . . . Brewer's claim for restitution is prohibited, as it contravenes the public policy implicit in the Marriage

⁶³ *Blumenthal*, 69 N.E.3d at 858.

⁶⁴ *Id.* at 859-60. Justices Theis and Burke were more sympathetic to Brewer's constitutional claim that applying *Hewitt* to same-sex domestic partners "whose relationships ended before they were permitted to marry in Illinois, violates due process and equal protection." *Id.* at 869 (Theis & Burke, JJ., dissenting from denial of rehearing).

⁶⁵ The court listed various changes in Illinois law, including the Religious Freedom and Civil Union Act making civil union status available to different-sex and same-sex couples, and the 2014 Religious Freedom and Marriage Fairness Act, making marriage available to same-sex couples. See *Blumenthal*, 69 N.E.3d at 856-57 (citing to 750 ILL. COMP. STAT. 75/1 and 750 ILL. COMP. STAT. 80/1).

⁶⁶ *Blumenthal*, 69 N.E.3d at 857.

⁶⁷ In *State ex rel. Raoul v. Elite Staffing, Inc.* 238 N.E.3d 1084, 1096-97 (Ill. 2024), the court noted that a legislature's choice not to amend a statute after a judicial construction can be evidence of acquiescence but is highly dependent on context, citing William N. Eskridge, *The New Textualism*, 37 UCLA L. REV. 621 (1990).

⁶⁸ See *infra* notes 125-135 and accompanying text.

and Dissolution Act.”⁶⁹ Thus, unless the legislature does take action, contractual and equitable claims arising from nonmarital cohabitation in Illinois, without regard to the strength of the claims on the merits, will be subject to dismissal as a matter of course.⁷⁰

Turning to New Mexico case law, a somewhat similar path is reflected but without the added element of moral condemnation. An early decision from the New Mexico Court of Appeals upheld enforcement of an express oral agreement between cohabitants to jointly own property acquired during their cohabitation. In *Domingues v. Cruz*, the cohabitation had lasted little more than a year, but the parties had pooled their financial resources, shared household chores and expenses, bought property for joint use and ownership, and acquired personal property that they agreed would be jointly owned.⁷¹ The New Mexico appellate court endorsed *Marvin*’s reasoning, explaining that “if an agreement such as an oral contract can exist between business associates, one can exist between two cohabiting adults who are not married if the essential elements of the contractual relationship are present.”⁷² Notably, the New Mexico court did not find any public policy objections to its holding.

Three years later, however, the New Mexico Supreme Court took a decidedly less receptive stance toward agreements between cohabitants. In *Merrill v. Davis* the court held that implied agreements between cohabitants to pool earnings and share property acquired during cohabitation are unenforceable.⁷³ There the

⁶⁹ *Blumenthal*, 69 N.E.3d at 858.

⁷⁰ Illinois courts have drawn a distinction between cohabitants’ claims based on monetary contributions to property and those arising out of the cohabiting relationship. In *Spafford v. Coats*, 455 N.E.2d 241 (Ill. App. Ct. 1983), for example, the Illinois court of appeals upheld a constructive trust claim by a cohabitant that arose out of money the cohabitant had paid for a vehicle that was titled in the other cohabitant’s name. The court distinguished *Hewitt* since the plaintiff’s claim was substantially independent of the nonmarital relationship. In a more recent case, the appellate court distinguished *Blumenthal* in requiring recognition in Illinois of a civil union entered into in Vermont. See *Hamlin v. Vasconcellos*, Nos. 2-16-0715, 2-17-0274, 2018 WL 1358867 (Ill. App. Ct. Mar. 14, 2018) (unreported). The court emphasized that in *Blumenthal*, the parties had not formalized their relationship in any manner, but the parties in *Hamlin* had entered into a legal civil union giving rise to enforceable rights.

⁷¹ 617 P.2d 1322 (N.M. Ct. App. 1980).

⁷² *Id.* at 1323.

⁷³ 673 P.2d 1285 (N.M. 1983).

couple had married and divorced before cohabiting for about five years and then marrying again. Focusing on assets acquired during the parties' cohabitation, the court reasoned that if "the same rights that cannot be gained by common law marriage may be gained by the implications that flow from cohabitation, then we have circumvented the prohibition of common law marriage."⁷⁴ The court thus engaged in the familiar blurring of cohabitants' inter se common law remedies with the property and support rights available to spouses. At the same time, the court left open the question whether an *express* agreement arising out of cohabitation would be enforceable.⁷⁵ The state high court has yet to resolve that question.

Expressly endorsing the reasoning in *Hewitt*, the *Merrill* court concluded that recognition of implied contractual rights flowing from cohabitation would conflict with the state's rejection of common law marriage and its statutory requirement of solemnization.⁷⁶ "It is the policy of this state to foster and protect the institution of marriage," the court stated, adding that it agreed with the principle announced in *Hewitt*, that the state's interest in the institution of marriage "prevents the marriage relation from becoming in effect a private contract terminable at will."⁷⁷ Thus, the court gave central weight to the state's marriage solemnization statute as indicative of legislative policy and failed to acknowledge the distinction between marital rights and cohabitants' access to traditional common law remedies.

Much has changed in New Mexico family law since *Merrill* was decided,⁷⁸ but the holding remains binding law. While *Merrill* left open whether *express* contracts arising from cohabitation were valid, lower courts in the state seem to have assumed that such agreements are enforceable, but courts continue to reject implied

⁷⁴ *Id.* at 1287.

⁷⁵ *Id.* at 1286.

⁷⁶ N.M. STAT. ANN. §§ 40-1-2 and -3 (1978).

⁷⁷ 673 P.2d at 1287, quoting *Hewitt*, 394 N.E.2d at 1210.

⁷⁸ Two years before *Obergefell v. Hodges*, for example, the New Mexico Supreme Court ruled that the state's ban on same-sex marriage was unconstitutional under the state constitution's equal protection provision. See *Griego v. Oliver*, 316 P.3d 865 (N.M. 2013). Also, New Mexico law criminalized nonmarital cohabitation at the time of *Merrill*, N.M. STAT. ANN. § 30-10-2, but the statute was repealed in 2001. See 2001 N.M. LAWS, ch. 32 § 1.

contracts between cohabitants as unenforceable.⁷⁹ Moreover, one decision relied on *Merrill*'s logic to foreclose an unjust enrichment claim based on homemaking services. In *Battishill v. Ingram* the parties had lived together for ten years during which the plaintiff maintained the parties' home, cared for the defendant's children, and also performed administrative work for the defendant's business.⁸⁰ The plaintiff asserted claims based on express contract and various equitable theories in an effort to get around *Merrill*, but she was met with summary judgment on all claims in the trial court. The appellate court affirmed summary judgment on the contractual claim, citing *Merrill* for the proposition that cohabiting adults, while as competent as other adults to contract, are required to enter into express contracts to jointly own property.⁸¹ The court noted that the plaintiff was attempting to infer an agreement from conduct and had failed to establish offer, acceptance, or mutual assent.⁸² The court, moreover, rejected the plaintiff's unjust enrichment claim based on the plaintiff's homemaking services, reasoning that permitting such a claim based on implied obligations would "circumvent the prohibition of common-law marriage."⁸³

In both Illinois and New Mexico, then, the courts purport to rely on legislative policy in holding that greater recognition of cohabitants' rights would conflict with the prohibition of common law marriage and ultimately undermine the institution of marriage. While the Illinois Supreme Court has been more resistant to cohabitants' claims than the courts of New Mexico, both judiciaries are averse to remedies arising from cohabitants' conduct, and both judiciaries explain their decision making in part as necessary deference to legislative prerogative. In failing to acknowledge the

⁷⁹ In *Ontiveros v. Silva*, No. 29,892, 2011 WL 704497 (N.M. Ct. App. Jan. 5, 2011) (unreported), for example, the court affirmed a decision against a cohabitant's claim of joint venture or partnership, reasoning that under *Merrill* "the parties may not circumvent the prohibition of common-law marriage through an implied joint venture or partnership based on their conduct."

⁸⁰ 539 P.3d 1203 (N.M. Ct. App. 2023).

⁸¹ *Id.* at 1207.

⁸² *Id.* at 1208.

⁸³ *Id.* at 1209. The court disagreed with the trial court in one respect, noting that the plaintiff's evidence had created an issue of fact regarding the professional benefits she had provided to the defendant when she had worked at the defendant's business. *Id.* Thus, the court drew a clear distinction between claims based on domestic services and those based on business activities.

distinction between spousal rights and cohabitants' inter se claims in contract and equity, the courts ascribe legislative policy untethered to the statutes themselves. And in both states, courts have made clear that until legislative action is taken, the common law will remain unchanged.

II. Cohabitant Statutes, UCERA, and Legislative Policy

A throughline can be traced from the abrogation of common law marriage to the concerns animating legislative approaches to cohabitation, particularly legislatures' desires for certainty and predictability. Legislative activity affecting unmarried cohabitants includes registration schemes entitling unmarried partners to designated benefits, the imposition of writing requirements for agreements between cohabitants, and the designation of cohabitation as a ground for terminating spousal maintenance. This section discusses those statutory enactments before turning to UCERA and its reception in the states.

A. Statutory Provisions Addressing Cohabitants

About a dozen state legislatures have registration schemes entitling nonmarital partners to certain benefits and responsibilities, often equivalent to spousal property rights and support obligations.⁸⁴ The push for such registration schemes pre-*Obergefell* came most prominently from marriage-equality advocates seeking legal recognition of same-sex relationships.⁸⁵ In that sense,

⁸⁴ See *Civil Unions & Domestic Partnership Statutes*, NAT'L CONF. OF STATE LEGISLATURES (Mar. 10, 2020), <https://www.ncsl.org/human-services/civil-unions-and-domestic-partnership-statutes> (listing states). Two states provide distinct registration frameworks. See COLO. REV. STAT. §§ 15-22-101 (permitting "designated beneficiaries" to select from a menu of rights and protections); HAW. REV. STAT. §§ 572C-1 to -7 (entitling "reciprocal beneficiaries" to rights relating to health insurance, hospital visitation, healthcare decisionmaking, and providing certain property and intestacy rights).

⁸⁵ See McClain & NeJaime, *supra* note 7, at 339-41 (observing that the momentum for civil unions and domestic partnerships was driven in large part by marriage equality advocates and that the movement lost some of its force once the Supreme Court decided *Obergefell v. Hodges*, 576 U.S. 644 (2015)); William N. Eskridge, Jr., *Marriage Equality's Lessons for Social Movements and Constitutional Change*, 62 WM. & MARY L. REV. 1449, 1453-54 (2021) (discussing

legislatures were not only serving an equality goal but also endorsing a norm of formalization and certainty in relationships, with registration obviating the need to determine parties' intent.

Laws such as the Illinois civil union law⁸⁶ or California's domestic partnership law⁸⁷ require couples to register their relationship with a governmental authority, and in turn they have the same rights and responsibilities as a married couple.⁸⁸ Registrants must notify the governmental authority if the relationship terminates, but the exit from a civil union or domestic partnership is typically easier than exiting from marriage.⁸⁹ While these frameworks emerged in many states before same-sex marriage was available, they continue to be popular today among couples who desire a recognized status other than marriage.⁹⁰ Still, several states withdrew their registration statutes after the decision in *Obergefell* and converted the civil unions or domestic partnerships in their state to marriages, signaling that the original legislative goal was to provide a means of recognition for same-sex couples, not necessarily to provide an alternative to marriage.⁹¹

the widespread enactment of registration schemes as a means of giving formal recognition to same-sex relationships). For historical accounts of the marriage equality movement, see MICHAEL J. ROSENFELD, *THE RAINBOW AFTER THE STORM: MARRIAGE EQUALITY AND SOCIAL CHANGE IN THE U.S.* (2021); WILLIAM N. ESKRIDGE, JR. & CHRISTOPHER R. RAINO, *MARRIAGE EQUALITY: FROM OUTLAWS TO IN-LAWS* (2020).

⁸⁶ The Illinois Religious Freedom and Civil Union Act, available to both same-sex and different sex couples, was enacted in 2011. Pub. Act 96-1513, codified at 750 ILL. COMP. STAT. ANN. 75/1 (West 2010).

⁸⁷ See CAL. FAM. CODE §§ 297 – 299.

⁸⁸ In Illinois, persons entering into a civil union have the same “obligations, responsibilities, protections, and benefits afforded or recognized by the law of Illinois to spouses.” See 750 ILL. COMP. STAT. ANN. 75/5. Similarly under the California Domestic Partnership Act, registered domestic partners have the “same rights, protections, and benefits, and shall be subject to the same responsibilities, obligations, and duties under law . . . as are granted to and imposed upon spouses.” CAL. FAM. CODE § 297.5(a).

⁸⁹ See, e.g., Me. REV. STAT. tit. 22, § 2710 (requiring the filing of notarized statements signed by both partners to terminate a domestic partnership).

⁹⁰ See Carroll, *supra* note 23, at 483-98 (exploring ideological and economic reasons why couples may seek a status other than marriage).

⁹¹ See *Civil Unions & Domestic Partnership Statutes*, *supra* note 84. For a critique of the conversion of registered civil union or domestic partnership to a marriage, see Kaiponanea T. Matsumara, *A Right Not to Marry*, 84 FORDHAM L. REV. 1509 (2016).

The imposition of writing requirements for cohabitants' agreements similarly serves a norm of certainty and predictability, and statutes of frauds have been expanded to include cohabitation or palimony agreements in a handful of states, often in response to unpopular court decisions. The legislatures in Texas⁹² and Minnesota,⁹³ for example, enacted writing requirements for certain kinds of cohabitant agreements in response to court decisions upholding claims based on oral agreements.

The interplay between the judicial and legislative branches in New Jersey is illustrative. In 2002, the New Jersey Supreme Court in *Devaney v. L'Esperance*⁹⁴ held that a palimony claim need not be based on cohabitation but could be supported by evidence of an implied agreement based on a marital-like relationship. Six years later in *In re Estate of Roccamonte*,⁹⁵ the state high court held that a palimony claim based on an implied oral promise survives the death of the promisor and could be asserted against his estate. After *Roccamonte* was decided, the New Jersey legislature acted quickly to amend its statute of frauds. Making clear that the enactment was in response to the state supreme court's palimony decisions,⁹⁶ the legislature expanded the list of contracts for which a writing is required to include "[a] promise by one party to

⁹² The Texas legislature simply amended its existing statute of frauds governing agreements on consideration of marriage to include agreements made "on consideration of nonmarital conjugal cohabitation." VERNON'S TEX. BUS. & COMM. CODE § 26.01(b)(3).

⁹³ In Minnesota, the statute provides that "[i]f sexual relations are contemplated, a contract between a man and a woman who are living together out of wedlock is enforceable as to property and financial relations only if it is written and signed and enforcement is sought after the termination of the relationship." MINN. STAT. § 513.075. The Minnesota legislature went even further than the statute of frauds, declaring that state courts are "without jurisdiction to hear and shall dismiss as contrary to public policy any claim to earnings or property" if the claim is based on the fact that the couple lived together in Minnesota in contemplation of sexual relations out of wedlock. MINN. STAT. § 513.076.

⁹⁴ 949 A.2d 743.

⁹⁵ 808 A.2d 838 (N.J. 2008).

⁹⁶ As recognized in *Maeker v. Ross*, 99 A.3d 795, 802-03 (N.J. 2014), the purpose of the amendment was to "overturn recent 'palimony' decisions by New Jersey courts by requiring that any such contract must be in writing and signed by the person making the promise," *Assem. Judiciary Comm. Statement to S. No. 2091*, 213th Leg., 2d Sess. 1 (Dec. 3, 2009); *S. Judiciary Comm. Statement to S. No. 2091*, 213th Leg., 2d Sess. 1 (Feb. 9, 2009).

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.”⁹⁷ Concerned about the risk of parties entering into agreements without adequate understanding, the legislature went one step further and declared that “no such written promise is binding unless it was made with the independent advice of counsel for both parties.”⁹⁸

The advice of counsel requirement, in turn, came before the New Jersey Supreme Court in *Moynihan v. Lynch*.⁹⁹ There the court considered the enforceability of a palimony claim based on a written agreement entered into by the parties without consulting lawyers. When the cohabiting relationship ended, the male cohabitant failed to fully comply with the agreement and argued that the agreement was unenforceable because of the parties’ failure to consult counsel. Noting the irony of the defendant’s attempted use of the lack of counsel as a means of stripping the plaintiff of her contractual rights, the state high court struck down the advice of counsel requirement as unconstitutional under the state constitution.¹⁰⁰ As the court noted, New Jersey law did not require consultation with counsel for any other agreement in the family law domain, and self-representation is common in family court, especially for low-income populations.¹⁰¹

The New Jersey experience illustrates the tensions and shifting hierarchy of authority between a state’s judiciary and its legislature on the sensitive question of cohabitants’ rights. Like lawmakers in several other states, the New Jersey legislature had concerns that the judiciary had gone too far in recognizing implied agreements. The courts, on the other hand, were attempting to reach just

⁹⁷ N.J. STAT. ANN. § 25:1-5(h) (2010).

⁹⁸ The legislature added the following language: “For the purposes of this subsection, no such written promise is binding unless it was made with the independent advice of counsel for both parties.” *Id.* In *Maeker v. Ross*, 99 A.3d 795 (N.J. 2014), the court clarified that the writing requirement was to be applied prospectively only.

⁹⁹ 269 A.3d 435 (N.J. 2022).

¹⁰⁰ *Id.* at 447-52. Article 1, Section 1 of the New Jersey Constitution provides: “All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.”

¹⁰¹ *Moynihan*, 269 A.3d at 451-52.

results in individual cases. When the legislature not only required a writing but also imposed an advice of counsel mandate, the state high court was able to invoke the state constitution to override the statute in part. Still, implied agreements for support remain unenforceable in New Jersey if they are between cohabitants – a curtailment of rights that the court was unable to negate.

Another statutory trend involving cohabitants is the treatment of cohabitation as a ground for terminating alimony owed to a cohabitant by a prior spouse.¹⁰² In some states, the termination of alimony based on the obligee's cohabitation is absolute.¹⁰³ Notably, under Illinois law, cohabitation with another person “on a continuing conjugal basis” is ground for terminating an award of maintenance from the date the cohabitation began.¹⁰⁴ In other states cohabitation can trigger an inquiry to determine if the obligee's economic circumstances have changed. In California, for instance, an obligee's cohabitation can give rise to a presumption of decreased need for spousal support.¹⁰⁵

Under either approach, these statutes appear to assume that cohabitation provides economic benefits equivalent to marriage — an assumption not supported by law or fact. Furthermore, such statutory provisions can lead to post-divorce monitoring of a former spouse's lifestyle and sexual partners.¹⁰⁶ In a state such as Illinois, where the courts have rejected economic claims arising from cohabitation, the use of cohabitation as a basis for terminating maintenance seems particularly punitive. Still, the termination of alimony on the basis of cohabitation likely resonates with legislators' sense of moral right and wrong. Lawmakers may

¹⁰² See generally Cynthia Lee Starnes, *I'll Be Watching You: Alimony and the Cohabitation Rule*, 50 FAM. L.Q. 261 (2016).

¹⁰³ Under Texas law, for example, termination of alimony is required if the court finds that the obligee cohabits “with another person with whom the obligee has a dating or romantic relationship in a permanent place of abode on a continuing basis.” TEX. FAM. CODE § 8.056(b).

¹⁰⁴ 750 ILL. COMP. STAT. 5/510(c).

¹⁰⁵ CAL. FAM. CODE § 4323.

¹⁰⁶ In her biting critique of the cohabitation rule, Professor Starnes recommends getting rid of the rule altogether or, at a minimum, using cohabitation as a trigger for evaluating a recipient's changed economic circumstances. See Starnes, *supra* note 102, at 300-01. See also Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1, 21-30 (2017) (noting the conflation of sexual relations and support in the case law terminating alimony based on cohabitation).

sympathize with individuals “burdened” by the obligation to pay alimony to their former spouses who are cohabiting with new partners in marriage-like relationships, and they may feel little sympathy for alimony recipients perceived to be enjoying multiple sources of support.

B. UCERA’s Reception

When the Uniform Law Commission began drafting an act governing cohabitants’ rights in 2019, the goal was to create a statutory framework that not only would implement wise policy for cohabiting couples but also would be widely enacted.¹⁰⁷ In the drafting process, the ALI’s status-based framework in the Principles was of obvious relevance. The ALI’s structure, set out in Sections 6.01-6.06 of the Principles, embraced an approach that would impose marriage-like rights and duties on cohabitants who lived together as a couple for a defined period of time or raised a common child together for a defined period and conducted themselves in marriage-like ways, i.e. a shared life reflecting economic and personal interdependence.¹⁰⁸ Heavily influenced by the “committed intimate relationship doctrine” developed in the Washington state courts, the ALI included factors reminiscent of the factors identified in *Connell v. Francisco* in determining whether persons are domestic partners.¹⁰⁹ For couples who met those standards, the Principles made available remedies similar to remedies available to divorcing couples, including equitable distribution of property and, unlike Washington’s approach, spousal support (renamed “compensatory payments”).¹¹⁰

¹⁰⁷ The concept of “enactability” is a key concern in all ULC drafting projects. See *New Project Criteria*, UNIF. L. COMM’N, <https://www.uniformlaws.org/projects/overview/newprojectcriteria> (last visited Oct. 10, 2025).

¹⁰⁸ See ALI PRINCIPLES, *supra* note 3, at § 6.03.

¹⁰⁹ See *id.*, § 6.03, cmt.; § 6.04, cmt. 1, citing to *Connell v. Francisco*’s reference to “property acquired during the parties’ relationship.” 898 P.2d at 836.

¹¹⁰ See ALI PRINCIPLES, *supra* note 3, at § 6.05 (directing that domestic-partnership property be divided according to principles governing division of marital property); § 6.06 (directing that a domestic partner is entitled to compensatory payments after the end of domestic partnership period on the same basis as a spouse). In a somewhat similar vein, Larry Waggoner proposed a “Uniform De Facto Marriage Act” for couples in a committed relationship and sharing a common household according to familiar criteria. See Lawrence W. Waggoner, *Marriage Is on the Decline and Cohabitation Is on the Rise: At What*

In addition to normative disagreements with the standards for determining which cohabiting relationships should qualify for domestic partner status,¹¹¹ critics of the ALI Principles have noted that couples may choose cohabitation precisely to avoid the property-sharing and support obligations associated with marriage.¹¹² Section 6.06 recognized that couples could opt out of the framework, but opting out would require that couples be aware of the default regime and be willing to take the initiative to exclude themselves.¹¹³

The ULC considered but ultimately rejected a status-based approach, concluding that the law of cohabitants' rights should be sufficiently flexible to accommodate individual choice.¹¹⁴ Early drafts included provisions that would have recognized rights in property acquired during cohabitation for qualifying relationships, with the ability to opt out of the system by agreement.¹¹⁵ The policy debates among members of the drafting committee covered

Point, if Ever, Should Unmarried Partners Acquire Marital Rights?, 50 FAM. L.Q. 215 (2018). Unlike the ALI's approach or Washington's committed intimate relationship doctrine, Waggoner's proposal would recognize the parties as married. Given the unpopularity of common law marriage in state legislatures, his proposal would be a hard sell among lawmakers.

¹¹¹ See, e.g., David Westfall, *Forcing Incidents of Marriage on Unmarried Cohabitants: The American Law Institute's Principles of Family Dissolution*, 76 NOTRE DAME L. REV. 1467 (2001).

¹¹² 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 conscriptive laws may result in frameworks being applied that are fundamentally at odds with the parties' intent).

¹¹³ See, e.g., Katharine Baker, *What Is Nonmarriage*, 73 SMU L. REV. 201 (2020) (pointing out the practical problems with both opt-out and opt-in systems for nonmarital couples as well as the flaws in remedies based on contract and equitable doctrine).

¹¹⁴ For a more detailed discussion of the drafting process, see Atwood & Cahn, *supra* note 20, at 11-17.

¹¹⁵ The first draft considered by the Drafting Committee included a bracketed article that contained a status-based remedy, denominated a "presumptive equitable partnership." See ECON. RTS. OF UNMARRIED COHABITANTS ACT art. 4 (UNIF. L. COMM'N Draft Nov. 13, 2019) (Committee Archive). For qualifying relationships based on a multi-factor standard, the partners would be entitled to an interest in property acquired during the relationship. The second draft also included a status-based remedy, called "interdependent economic unit." See ECON. RTS. OF UNMARRIED COHABITANTS ACT art. 4 (UNIF. L. COMM'N, Draft Jan. 4, 2020) (Committee Archive).

familiar ground. While a status-based framework imposed by statute would risk conflicting with a couple's expectations or intent, codifying a framework based on contract and equity might cement in the failings of the common law.

The ULC opted for a structure centered on common law contractual and equitable remedies,¹¹⁶ but the drafters also addressed the recurrent themes that undercut cohabitants' claims in the common law.¹¹⁷ Significantly, UCERA grounds its remedial scheme on contributions to the relationship, defined broadly to include economic and non-economic contributions.¹¹⁸ It also expressly rejects the tenets that courts have invoked to defeat cohabitants' claims, including the devaluing of homemaker services, the presumption that such services are performed gratuitously, and the view that a couple's sexual relationship is inevitably a part of the consideration in a cohabitants' agreement.¹¹⁹ Still, the ULC did not buy into the more fundamental critique aimed at the common law – that contractual and equitable theories are the wrong way to think about cohabitants' rights in the first place.¹²⁰ Such a critique, however valid, would seem to lead inevitably to a status-based remedy and would be unlikely to achieve widespread enactment in the states.

¹¹⁶ See UNIF. COHABITANTS' ECON. REMEDIES ACT § 6 (Cohabitants' Agreement) & § 7 (Equitable Relief) (UNIF. L. COMM'N 2021).

¹¹⁷ Critics of the common law of cohabitants' rights have identified numerous failings, including the biased treatment of domestic services, the imposition of heightened standards for equitable claims such as unjust enrichment, and the incoherence in the very use of contract and equitable remedial theories for cohabitants' claims. See, e.g., Antognini, *Nonmarital Contracts*, *supra* note 11; Katharine Baker, *What Is Nonmarriage?* 73 SMU L. REV. 201 (2020); Joslin, *supra* note 10.

¹¹⁸ See UNIF. COHABITANTS' ECON. REMEDIES ACT § 2(3) (defining "contributions to the relationship" to mean contributions "that benefit the other cohabitant, both cohabitants, or the cohabitants' relationship, in the form of efforts, activities, services or property" and expressly including domestic services and caregiving).

¹¹⁹ See UNIF. COHABITANTS' ECON. REMEDIES ACT § 2(3) & Prefatory Note.

¹²⁰ See *supra* notes 108-110 and accompanying text. In a recent article, Professor Katharine Baker has argued that treating family members as fully autonomous parties capable of self-interested contracting would be worse for women and children than some current approaches that recognize family members' vulnerability. See Katharine K. Baker, *Family Law Exceptionalism Revisited*, 37 J. AM. ACAD. MATRIM. LAW. 395 (2025). In the realm of cohabitants' rights, however, a state's refusal to recognize contractual and equitable remedies leaves vulnerable cohabitants without recourse at the end of a cohabiting relationship.

Early in the drafting process, some members of the UCERA drafting committee voiced concerns that implied contract claims would be hard to prove and might pose a risk of fraud. The committee considered requiring a clear and convincing evidence standard for such claims,¹²¹ but ultimately was persuaded that imposing a heightened burden of proof solely because a claim arose in the context of cohabitation was unwarranted. Section 4 of UCERA makes clear that contractual and equitable claims cannot be subjected to heightened burdens of proof solely because they arise in the context of cohabitation or a sexual relationship.¹²²

Other provisions of UCERA provide options for enacting states. Section 8, for example, addresses the priority of a cohabitant's claims over the claims of a third party, including a cohabitant's absent spouse. Alternatives for states range from treating a cohabitant's claim as that of a general creditor to giving absolute protection to spousal property claims as against any claim by a cohabitant.¹²³ Options are also available in Section 12, the transitional provision, permitting states to choose whether to make the act retroactive.¹²⁴

For a range of reasons, UCERA has failed to gain traction in the two states where it has been introduced. A modified version of UCERA was introduced in the Illinois General Assembly in 2023.¹²⁵ The Illinois bill tracked the language of UCERA essentially verbatim in recognizing claims based on express or implied

¹²¹ See ECON. RTS. OF UNMARRIED COHABITANTS ACT § 205 (UNIF. L. COMM'N, Draft Nov. 13, 2019) (Committee Archive).

¹²² UNIF. COHABITANTS' ECON. REMEDIES ACT § 4 (contractual and equitable claims are not barred because of the cohabitants' sexual relationship and are not subject to heightened procedural or substantive requirements because of the cohabitation or a sexual relationship). In that respect, UCERA is aligned with the ALI's approach to unjust enrichment. See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 28 (AM. L. INST. 2011) (recognizing that parties' status as cohabitants does not bar an unjust enrichment claim).

¹²³ UNIF. COHABITANTS' ECON. REMEDIES ACT § 8(a) & Alternatives A – D. Interestingly, the ALI Principles provide that domestic partner claims cannot “compromise” a marital claim of a partner's spouse and suggest that the putative spouse doctrine might be available to the partner who had no knowledge of the prior marriage. See ALI PRINCIPLES § 6.01(5) & comments (c) & (d).

¹²⁴ UNIF. COHABITANTS' ECON. REMEDIES ACT § 12 (UNIF. L. COMM'N 2020).

¹²⁵ See HB 4404, 103rd General Assembly, State of Illinois (2023 - 2024). The sponsor of the bill was Illinois State Representative Daniel Didech, also a commissioner with the Uniform Law Commission.

contract and claims for equitable relief based on contributions to the cohabitants' relationship.¹²⁶ In Section 8 of the Illinois bill, the drafters chose to give basic protections for spousal claims, providing that a cohabitant's claim may not impair the right of a cohabitant's spouse unless the spouse had notice and an opportunity to be heard.¹²⁷ Also, while the Illinois bill initially would have operated retroactively, it was amended to provide for prospective application only.¹²⁸ The Illinois bill advanced through the Illinois House and passed easily on a party line vote,¹²⁹ with generalized concerns expressed that the bill might disincentivize marriage.¹³⁰ The bill did not advance in the Senate.¹³¹ The House sponsor commented that without the support of the family law bar, as discussed below, the bill was simply not a priority.¹³²

To supporters of UCERA, Illinois seemed to be the optimal state for a first introduction of the Act. The decisions in *Hewitt* and *Blumenthal* had effectively closed the door on any contractual or equitable claims between cohabitants arising out of the cohabiting relationship. The state high court, moreover, had expressly invited the legislature to exercise its power to clarify policy for the state. If enacted in Illinois, UCERA would open the courts to traditional contract and equitable claims between cohabitants. Although Illinois courts have recognized that cohabitants may enter enforceable agreements resting on consideration other than the cohabiting relationship, the state high court has effectively barred cohabitants from basing a claim on contributions to the couple's

¹²⁶ H.B. 4404, §§ 6 & 7.

¹²⁷ *Id.* § 8(c). In addition to notice and opportunity to be heard, the Illinois bill provided that "(2) before entering the order or judgment, the court determines based on the totality of the circumstances that justice requires that all or part of the cohabitant's claim should be satisfied; and (3) the order or judgment preserves as much of the spouse's right or interest as appropriate or legally required." *Id.* § 8(c)(2) & (3).

¹²⁸ *Id.* § 12. That choice by the Illinois drafters was consistent with the Legislative Note to Section 12, providing that a state that has not previously recognized a claim based on contributions to the relationship (such as Illinois) may choose prospective application.

¹²⁹ Bill Status of H.B. 4404, 4/19/2024, Third Reading – Short Debate – Passed 063-033-001.

¹³⁰ Author's telephonic Interview with Representative Daniel Didech, Sept. 11, 2025.

¹³¹ Bill Status of H.B. 4404, 4/24/2024, Senate, Referred to Assignments.

¹³² Interview with Didech, *supra* note 130.

relationship itself. In practice, this means that homemaking services, caregiving for children or vulnerable adults, companionship, and other benefits of a relationship cannot give rise to claims based on express or implied contract or theories of unjust enrichment or quantum meruit.

The family law bar, however, was less than enthusiastic about UCERA. Bar leaders opined that UCERA might give cohabitants more rights than married people, would encourage cohabitation, and would introduce uncertainty about family relations and thus foment litigation.¹³³ Particular concern focused on the availability of equitable relief, a remedy the bar leaders viewed as unbounded and lacking in clear standards.¹³⁴ As one family law attorney stated, if you expect to receive money or property from a relationship, “put a ring on it.”¹³⁵ Understandably, the Illinois practitioners who weighed in on UCERA may have been put off by the prospect of representing or defending cohabitants with hard-to-prove claims. They may have believed that the practice of family law is complex enough without the addition of claims based on the unfamiliar concept of “contributions to the relationship.” In other words, family law attorneys may have preferred the status quo, even if it meant that some deserving claimants might go uncompensated. Notably, there was no lobbying group in support of the bill.

Somewhat related concerns surfaced in New Mexico. The New Mexico legislature has considered UCERA twice, in consecutive legislative sessions.¹³⁶ In its first introduction in 2023, the bill largely tracked the language of the uniform act and overwhelmingly passed the House¹³⁷ but did not progress in the state Senate where action was postponed indefinitely.¹³⁸ In 2025 it was again introduced and progressed out of the initial committee to

¹³³ Telephonic Conference (Feb. 29, 2024), with ULC Legislative Counsel Libby Snyder; Commissioner Turney Berry, Chair, Uniform Cohabitants’ Economic Remedies Act Drafting Committee; Commissioner Mary Devine, Vice-Chair, Uniform Cohabitants’ Economic Remedies Act Drafting Committee; Illinois State Representative Daniel Didech; David Eldrige, Illinois State Bar Association lobbyist, and members of ISBA Family Law Section Council.

¹³⁴ *Id.* (comments from members of ISBA Family Law Section Council).

¹³⁵ *Id.*

¹³⁶ See H.B. 273, 56th N.M. Leg. 1st Sess. (2023); H.B.123, 57th N.M. Leg., 1st Sess. (2025).

¹³⁷ H.B. 273, 57th N.M. Leg., 1st Sess. (Mar. 11, 2023) (showing vote of Y:63 N:1).

¹³⁸ *Id.* Referral to Sen. Jud. Comm. (Mar. 12, 2023).

which it was assigned with a “do pass” recommendation.¹³⁹ At the behest of the bill’s sponsor, the bill was amended to impose a unique standard of proof for claims based on implied contract and equitable remedies.¹⁴⁰ Under the amended bill, a cohabitant could commence an action “for breach of an implied-in-fact cohabitants’ agreement *if failure to permit the action would result in fundamental unfairness.*”¹⁴¹ Likewise, the amendment would permit an equitable claim if “*failure to permit the action would result in fundamental unfairness.*”¹⁴² Thus, a demanding standard of fundamental unfairness was made a prerequisite to any cohabitant’s claim based on implied contract or equitable doctrine. The House Bill did not progress further.¹⁴³

As in Illinois, the drafters of the New Mexico bill were likely responding to a discomfort with standards that would have significantly changed the common law as interpreted by the state’s courts. Legislators expressed concern that the bill might flood the courts with trivial claims by cohabitants.¹⁴⁴ By requiring a showing of fundamental unfairness for implied contract and equitable claims, the amended bill thus imposed a threshold limitation that favored claims based on express contract.

If UCERA is introduced in the future in New Mexico, the lawmakers may very well again insert the heightened burden of proof for implied contract and equitable claims, thus departing from UCERA black letter. Even with that difference in policy, enactment of UCERA in the state would be of benefit by clarifying the law for cohabitants and opening the courts to implied contract as well as equitable actions, albeit under a heightened standard. As the law stands now, the courthouse remains closed to cohabitants with strong implied contract or unjust enrichment claims, regardless of fairness considerations.

¹³⁹ H.B. 123, 57th N. M. Leg., 1st Sess. (Gov’t, Elections & Indian Affairs Comm.) (Feb. 8, 2025).

¹⁴⁰ *Id.* (Proposed Amendment by Rep. Charlotte Little) (Mar. 4, 2025).

¹⁴¹ H.B. 123, § 6(F) (emphasis added).

¹⁴² *Id.*, § 7(A) (emphasis is added).

¹⁴³ HB 123, 57th N.M. Leg., 1st Sess. (Mar. 2025) (Action Postponed Indefinitely).

¹⁴⁴ Comments from Sarah Bennett, New Mexico Commissioner with the Uniform Law Commission (Email Oct. 7, 2025). Commissioner Bennett observed the legislative discussion of UCERA in the New Mexico House.

III. The Challenge of Legislative Reform

As summarized in Parts I and II, recognition of cohabitants' rights and remedies has largely occurred through court action, with legislatures weighing in sporadically as a corrective. This Part briefly explores the differences between judicial and legislative lawmaking to highlight the challenges of reforming cohabitants' law through legislation.

Courts and legislatures are distinct but overlapping sources of law with differing points of entry and obligations to the public.¹⁴⁵ State courts, unlike federal courts, exercise robust common law authority, albeit with deference to the policy-making role of the legislative branch.¹⁴⁶ As Judge Judith Kaye of the New York Court of Appeals observed, "Even in today's legal landscape, dominated by statutes, the common-law process remains the core element in state court decisionmaking."¹⁴⁷ State courts are divided, however, on the scope of their common law authority with respect to cohabitants' rights in the face of legislative silence. As in *Marvin*, courts sometimes announce shifts in the law based on shifts in social norms, but with deference to the legislature as the policy making body. A majority of courts follow *Marvin's* reasoning that permitting cohabitants to assert contractual and equitable claims

¹⁴⁵ Debates about the respective virtues of common law and codified law have a long history. See, e.g., GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982) (analyzing the relationship between courts and legislatures and proposing that courts have authority to modify obsolete statutes that no longer reflect contemporary policies or norms); J. Lyn Entriku, *The Death of the Common Law*, 42 HARV. J. LEGIS. & PUB. POL'Y 351, 361-63 (2019) (describing the gradual evolution of American law toward greater reliance on positive law through enactment of statutes, rules, and regulations and arguing that characterizing the United States as a common law system is a "legal fiction"); Norman Spaulding, *The Luxury of the Law: The Codification Movement and the Right to Counsel*, 73 FORDHAM L. REV. 983 (2004) (reviewing DEBORAH RHODE, ACCESS TO JUSTICE (2004)) (recounting the early embrace of codification in the nineteenth century as a reform aimed at increasing access to justice, only to be replaced later by a reification of adjudicatory law).

¹⁴⁶ See, e.g., *City of Milwaukee v. Illinois*, 451 U.S. 304, 312 (1981) ("Federal courts, unlike state courts, are not general common-law courts and do not possess a general power to develop and apply their own rules of decision.").

¹⁴⁷ Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 6 (1995). See also Stephen E. Sachs, *Finding Law*, 107 CALIF. L. REV. 527 (2019) (defending the creative authority of judges in discerning the law).

is not inconsistent with the abrogation of common law marriage. A minority, however, including courts in Illinois and New Mexico, refuse to recognize full common law remedies for cohabitants based on a cramped view of judicial authority due to the abrogation of common law marriage. When such court decisions are followed by legislative silence, moreover, the restraint on judicial authority is locked in.¹⁴⁸

Presuming that legislative silence means a legislature has acquiesced in a prior judicial construction of legislative policy is inherently problematic if the legislature has not considered specific proposals to change the policy at issue.¹⁴⁹ The hazards of drawing conclusions from legislative inaction are well known.¹⁵⁰ As the California Supreme Court recently observed, “Legislative inaction may . . . reflect nothing more than the sheer pressure of other and more important business, political considerations, or a tendency to trust . . . the courts to correct their own errors.”¹⁵¹ Ironically, the recent introductions of UCERA in both Illinois and New Mexico and the failure of either body to enact the bills despite early support may fuel the argument that the legislatures have acquiesced in the

¹⁴⁸ The reticence of courts to address social harms in the absence of legislative action can leave unfortunate regulatory gaps in a range of contexts. See Andrew Woods, *The New Social Contracts*, 77 VAND. L. REV. 1831, 1886-88 (2024). Professor Woods would like courts, in the absence of legislative action, to consider societal harms when scrutinizing private dealmaking in the digital world. His concern is the “massive social impact of today’s platform terms and the relative silence about the social impact in both contract law and contract scholarship.” *Id.* at 1839.

¹⁴⁹ The doctrine that legislative intent can be discerned from legislative inaction has long been criticized, including by the U.S. Supreme Court. In referencing congressional silence, the Court stated that when “Congress has not comprehensively revised a statutory scheme but has made only isolated amendments . . . [i]t is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of [a court’s] statutory interpretation.” *Alexander v. Sandoval*, 532 U.S. 275, 292 (2001). See also William N. Eskridge, Jr., *Interpreting Legislative Inaction*, 87 MICH. L. REV. 67, 91 (1988) (“For every case where the Court rhapsodizes deliberative inaction, there is a counter-case subjecting such inferences to scathing critique.”).

¹⁵⁰ As the Kansas Supreme Court put it, “We should observe legislative inaction with a gimlet eye. Legislative inaction is not necessarily indicative of legislative intent.” *Unified Sch. Dist. No. 501 v. Baker*, 6 P.3d 848, 853 (Kan. 2000).

¹⁵¹ *People ex rel. Garcia-Brower v. Kolla’s, Inc.*, 529 P.3d 49, 59 (Cal. 2023) (internal citations omitted).

status quo. The bills, however, were advancing, despite some debate, and were tabled as a result of other legislative goals having priority.

Courts encounter disputes *ex post*, and while court decisions carry precedential impact for the future, the judicial task is first and foremost to resolve the dispute at hand based on the variables of parties, evidence, and applicable law. As a result, the common law is interstitial in nature and inevitably leaves gaps.¹⁵² Legislatures, in contrast to courts, encounter disputes *ex ante*. They are asked to create law and policy for the future – often a difficult balancing act in the family law realm. The legislative process often involves compromise among interest groups and divided constituencies along with the ever-present pressure of the electoral system.¹⁵³ Still, legislatures, with their ability to conduct investigations and gather empirical data, are viewed as the appropriate branch for policy making — a role that was emphasized in *Hewitt*.¹⁵⁴ When legislatures fail to act, however, outdated or ill-conceived policies from the past may continue to govern.

In addition to the challenge of achieving consensus about family law norms, the legislative process poses unique stumbling blocks for bills addressing cohabitants' rights. Despite the public's widespread acceptance of cohabiting relationships,¹⁵⁵ there is no strong lobbying group for such bills, a reality that distinguishes it from other family law reforms that succeeded with the help of advocacy coalitions.¹⁵⁶ Unlike the marriage equality movement,

¹⁵² See Foxx, Price, & Janes, *supra* note 46 (identifying numerous ambiguities in the “committed intimate relationship” doctrine).

¹⁵³ See, e.g., Clare Huntington, *Pragmatic Family Law*, 136 HARV. L. REV. 1501, 1520 (2023) (noting that polarization of state legislatures may lead to potentially harmful policies in the family law realm); Vicki C. Jackson, *Pro-Constitutional Representation: Comparing the Role Obligations of Judges and Elected Representatives in Constitutional Democracy*, 57 WM. & MARY L. REV. 1717, 1757-68 (2016) (suggesting that elected representatives have obligations of accountability and responsibility, including the duty to be present and to compromise).

¹⁵⁴ See *supra* note 55 and accompanying text.

¹⁵⁵ Pew Research Center, *supra* note 17, and accompanying text. In recent years, social scientists have paid increasing attention to the incongruence between state legislative action and constituent views, especially on polarizing issues. See JOHN G. MATSUSAKA, LET THE PEOPLE RULE: HOW DIRECT DEMOCRACY CAN MEET THE POPULIST CHALLENGE (2020); Miriam Seifter, *Countermajoritarian Legislatures*, 121 COLUM. L. REV. 1733 (2021).

¹⁵⁶ For an analysis of the paramount role of interest groups, referred to as “policy demanders,” in state legislative processes, see Charles W. Tyler &

cohabitant disputes today do not readily give rise to political coalitions, since cohabitants vary by socio-economic status, age, race, ethnicity, sexual orientation, and other demographic groupings.¹⁵⁷ Cohabitation often is temporary, and cohabitants' expectations of the economic consequences of their cohabitation vary. Thus, legislatures may hesitate to codify regimes based on a particular blueprint of cohabitants' goals. As illustrated by the reactions to UCERA in Illinois and New Mexico, legislators may harbor concerns that recognition of cohabitants' claims based on contractual or equitable doctrines will open the proverbial floodgates to cohabitants' disputes or undermine the institution of marriage.

Also, compromises during the legislative process may produce a law that is far from the original design. When legislators attempt to codify the common law, the messy give-and-take of lawmaking can yield unfortunate results.¹⁵⁸ At least in theory, the uniform law process — involving nonpartisan drafting with the advice of multiple experts and stakeholders — should decrease that risk. As demonstrated by the New Mexico experience, however, legislators may revisit policies underlying a uniform law and alter the black letter.

In light of the challenges, why pursue legislative reform? The short answer is that change in the law of cohabitants' rights, if change is to come, must be through the legislative process. As demonstrated in case law from Illinois and New Mexico, courts have an outsize fear that any recognition of cohabitants' rights will run afoul of the abrogation of common law marriage. Permitting cohabitants to seek traditional contractual and equitable remedies, however, is a far cry from treating cohabitants as spouses with statutorily defined rights to property and support, intestacy protections, and other aspects of the marital relationship. A legislative fix could clarify that cohabitants' remedies can easily co-exist alongside the prohibition of common law marriage. Rather

Heather K. Gerken, *The Myth of the Laboratories of Democracy*, 122 COLUM. L. REV. 2187 (2022).

¹⁵⁷ See MAYERI, *supra* note 9, at 245-66 (describing divisions among reformers supporting marriage equality and those opposing the privileging of marriage over nonmarital relationships).

¹⁵⁸ See Thomas P. Gallanis, *The Dark Side of Codification*, 45 ACTEC L.J. 31 (2019) (exploring the risks inherent in efforts to codify common law doctrine when legislators change doctrine in response to interest groups).

than presuming that the public can discern the governing doctrine from erratic court decisions, a statutory framework for cohabitants' rights could consolidate and simplify the law.¹⁵⁹ Importantly, legislation could reflect shifts in widely accepted norms about non-marital cohabitation and not leave courts to infer policy from legislative silence.

Conclusion

Reforming the law of cohabitants' rights and remedies is never easy, but even incremental progress is worth the effort. The challenge for those promoting a framework such as UCERA is to persuade legislatures that nonmarital couples at a minimum should have access to ordinary contractual and equitable remedies. As discussed in Part II, current laws that impact cohabitants' rights suggest that legislators favor certainty and formality in cohabiting relationships over subjective and indefinite standards that might incentivize litigation or invite fraud and overreaching. Also, legislators' sense of right and wrong seems tilted more toward protecting individuals from "unfair" economic burdens than toward protecting vulnerable individuals who bargained for support. Proponents of legislative reform, then, should be prepared to meet those concerns and be willing to compromise, if necessary.

A legislative framework for cohabitants' remedies is particularly needed in the minority of states whose courts refuse to recognize claims arising out of cohabiting relationships absent a statutory go-ahead. Cohabitants in those states are caught between blanket deference from the judicial branch and inertia from the legislative branch. While the courts have created this stalemate, the onus is on the legislatures to act. In states that ostensibly embrace full contractual and equitable remedies but whose courts evoke doctrinal and evidentiary barriers to deny relief, a legislative framework could address the pernicious impediments imposed by the common law. The relatively concise and accessible statutory framework of UCERA consolidates and improves on the common

¹⁵⁹ However doubtful as an empirical matter, courts presume that individuals have knowledge of case law as well as statutory law. *See, e.g., Commonwealth v. Robertson*, 186 A.3d 440, 446 (Pa. Super. Ct. 2018), *appeal denied*, 195 A.3d 852 (Pa. 2018) (recognizing that individuals are presumed to know statutory law and developments in case law).

law doctrines followed in many states. Whether legislators turn to UCERA or devise another framework, they should draft for a range of cohabiting couples with diverse economic expectations.¹⁶⁰ Until lawmakers act, the signals from vague legislative policy will continue to constrain cohabitants – a growing percentage of the adult population – in their access to ordinary remedies available to others.

¹⁶⁰ See Eleanor Brown, Naomi Cahn, & June Carbone, *The Price of Exit*, 99 WASH. U. L. REV. 1897 (2022) (urging policy makers when devising frameworks to govern cohabitants to consider the price of exiting highly interdependent relationships with the intended ease of leaving “contingent relationships”). For a provocative analysis questioning the core concept of intent or choice in family obligation, see Emily J. Stolzenberg, *Nonconsensual Family Obligations*, 48 BYU L. REV. 625 (2022).