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Cover Page Footnote

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Bailey thanks Professor Valorie K. Vojdik of the University of Tennessee College of Law for her comments on prior drafts.

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ABSTRACT

Marriage rates in the United States are at record lows; meanwhile, more couples are choosing to live together outside of marriage. Despite the changing landscape of romantic relationships, the law of nonmarriage has not kept pace. Rather than having a coherent, majority rule approach, the individual states have employed differing methods of providing for property distribution at the end of a long-term unmarried cohabitation. Unfortunately, absent the formal protections offered by marriage for both parties following a divorce, many cohabitants are at risk of suffering inequitable property distribution following the termination of a cohabitation. This Article proposes that states uniformly permit express and implied contracts between cohabitants to ensure that no party to the relationship is left without property after years of living and toiling together as partners.

INTRODUCTION

While the nineteenth and early-twentieth century undoubtedly changed the landscape of American domestic relations, especially as it related to the role of women in the workforce and in attaining the right to vote, some of the most radical alterations have occurred since the late-twentieth century. The sexual revolution of that period shifted the tectonic plates that underpinned the foundations of family life in the United States. This transformation has been particularly felt in how romantic couples order their lives and the state's involvement in those relationships. These fluctuating norms pose difficult legal questions when couples live together outside of marriage.

This Article surveys the changing landscape of romantic partnerships in the United States, the expansive growth of unmarried cohabitation, and the evolving roles of parenthood. Moreover, this Article highlights the inequities that potentially arise from cohabitation relationships, reviews the current state of the law in the respective states, and advocates for states to adopt a legal framework of enforcing express and implied cohabitation agreements. Admittedly, the idea of agreements between cohabitating romantic couples is neither new nor revolutionary; however, the recently changing family demographics in the United States necessitate an update of the law to ensure that the law reflects reality rather than traditional notions of family and society.

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The ill this Article primarily hopes to remedy is the inequitable distribution of property upon the cessation of a romantic couple's cohabitation. In these intimate relationships, the parties are likely not acting at arm's length in ordering their affairs. Absent the formalities of marriage and a court's supervision over the distribution of property, one party in a cohabitating partnership may endure an inequitable result following the cohabitation's termination. Unfortunately, some states prohibit cohabitating couples from contracting regarding their property following a breakup, and even when allowed, some couples neglect to expressly contract to order the partnership's financial affairs. This Article seeks to solve this injustice by advocating for states to enforce express cohabitation contracts, and where an express contract is not present, to imply that romantic couples who live together under certain circumstances wish to have their joint property split equitably upon the cohabitation's cessation.

I. CHANGING RELATIONSHIP DEMOGRAPHICS IN THE UNITED STATES

Over the last several decades, the forms and types of romantic relationships in the United States, and the expectations surrounding those arrangements, have evolved considerably. Notably, unmarried cohabitation has become increasingly destigmatized and a popular choice for couples.[1] This section investigates the shifting tectonic plates underlying American society to emphasize that now is the right time to align the law with the reality of modern romance and address the legal questions that permeate cohabitation arrangements.

A. Declining Marriage Rate in the United States

One of the most prominent evolutions in American society and culture over the last several decades has been the pronounced reduction in the number of people getting married.[2] Incredibly, from 2018 to 2020, the United States recorded the lowest marriage rates since the country has tracked that statistic.[3] Despite the generation known as millennials entering "peak marriage" age, the marriage rate in 2018 was just 6.5 new marriages per 1,000 people.[4] In 2019, that rate dropped to

1. *See infra* Section I.B.

2. *See* Allen M. Parkman, *The Contractual Alternative to Marriage*, 32 N. KY. L. REV. 125, 125 (2005); Lawrence W. Waggoner, *With Marriage on the Decline and Cohabitation on the Rise, What About Marital Rights for Unmarried Partners?*, 41 ACTEC L.J. 49, 52–53 (2015); Lawrence W. Waggoner, *Marriage Is on the Decline and Cohabitation Is on the Rise: At What Point, if Ever, Should Unmarried Partners Acquire Marital Rights?*, 50 FAM. L.Q. 215, 216–20 (2016) [hereinafter *Marriage Is on the Decline*].

3. Nat'l Ctr. for Health Stat., *Marriage and Divorce*, CTRS. FOR DISEASE CONTROL (Mar. 25, 2022), https://www.cdc.gov/nchs/fastats/marriage-divorce.htm [https://perma.cc/KKA3-ZQR5]; *see* Janet Adamy, *U.S. Marriage Rate Plunges to Lowest Level on Record*, WALL ST. J. (Apr. 29, 2020), https://www.wsj.com/articles/u-s-marriage-rate-plunges-to-lowest-level-on-record-11588132860; *see also* Ana Swanson, *144 Years of Marriage and Divorce in the United States, in One Chart*, WASH. POST (June 23, 2015), https://www.washingtonpost.com/news/wonk/wp/2015/06/23/144-years-of-marriage-and-divorce-in-the-united-states-in-one-chart/.

4. Adamy, *supra* note 3.

6.1 new marriages per 1,000 people.[5] Meanwhile, in 2020, the marriage rate nosedived to 5.1 new marriages per 1,000 people.[6]

The marriage rate in the United States has been ever changing since the beginning of the twentieth century and even more starkly in the twenty-first century.[7] For instance, during the Great Depression in the 1930s, marriage rates plummeted—though they still did not plunge to current levels.[8] Then, following World War II, marriage grew increasingly popular, reaching its highest point recorded in 1946 with 16.4 new marriages per 1,000 people.[9] The 1980s through the 2000s saw a steady decline in the marriage rate before it stabilized in 2009.[10] In 2014, the marriage rate actually started to increase slightly before taking a nosedive in 2018 to the lowest point on record.[11] Therefore, the marriage rate has been on a nearly-consistent decline since at least the 1980s, despite a few anomalies, and it has now reached its lowest point in the nation's recorded history.[12]

There are several reasons that romantic partners are cohabitating rather than marrying. First, financial constraints play a role because those who are considered "middle earners" are opting out of marriage.[13] Second, there is a correlation between higher education and marriage as college graduates are more likely to wed.[14] Meanwhile, those without a post-secondary degree are more likely to cohabitate outside of marriage and, if they do marry, are more likely to get divorced.[15] Third, the decline in religious adherence in the United States is potentially a substantial reason that many are avoiding the formal, often religious, bonds of marriage.[16] In fact, in the United States, the percentage of people who describe themselves as adhering to the Christian faith, the most prevalent religion in the nation, has decreased to 65% in 2019, down from 78% in 2007.[17] Finally,

5. *See* Nat'l Ctr. for Health Stat., *supra* note 3.

6. *Id.*

7. *See* Swanson, *supra* note 3.

8. *Id.*

9. *See* Adamy, *supra* note 3.

10. *Id.*

11. *Id.*

12. *Id.*; *see* Nat'l Ctr. for Health Stat., *supra* note 3.

13. *See* Janet Adamy & Paul Overberg, *Affluent Americans Still Say 'I Do.' More in the Middle Class Don't.*, WALL ST. J. (Mar. 8, 2020), https://www.wsj.com/articles/affluent-americans-still-say-i-do-its-the-middle-class-that-does-not-11583691336?mod=searchresults&page=1&pos=9; Richard V. Reeves & Christopher Pulliam, *Middle Class Marriage is Declining, and Likely Deepening Inequality*, BROOKINGS INST. (Mar. 11, 2020), https://www.brookings.edu/research/middle-class-marriage-is-declining-and-likely-deepening-inequality/.

14. Shelly Lundberg et al., *Family Inequality: Diverging Patterns in Marriage, Cohabitation, and Childbearing*, 30 J. ECON. PERSPS. 79, 79 (2016).

15. *Id.* at 80.

16. *See In U.S., Decline of Christianity Continues at Rapid Pace*, PEW RSCH. CTR. (Oct. 17, 2019), https://www.pewforum.org/2019/10/17/in-u-s-decline-of-christianity-continues-at-rapid-pace/. Though the Pew Research Center poll does not link declining marriage rates with decreasing religious adherence, there is likely a correlation given marriage's religious roots.

17. *Id.*

changing attitudes toward unmarried romantic couples living together likely have helped people make that choice.[18]

Therefore, for myriad possible reasons, people are shunning marriage at rates higher than any previously recorded. At the same time, cohabitation among unmarried romantic couples is on the rise.[19] Since the 1940s and 1950s, American society has experienced a reckoning in family relations. These changing views about how love should be expressed and ordered, combined with declining religious adherence and the dwindling marriage rate, indicate that cohabitation among unmarried romantic couples will increase rather than decrease or stabilize. This remarkable shift of a bedrock institution in the United States over the last several decades makes a change in the law necessary.

B. Changing Attitude Toward & Increased Participation in Cohabitation

In addition to the declining marriage rate, Americans are viewing cohabitation among unmarried romantic couples more favorably than they had previously.[20] This is significant because as unmarried cohabitation becomes more socially accepted, there will necessarily be decreased pressure to get married. Prior to the 1960s, as an expression of the beliefs of the populous, most states prohibited unmarried cohabitation.[21] However in the mid-1960s, the American public began to increasingly accept, or at least tolerate, premarital sex.[22] This societal belief was buoyed by the widespread access to birth control for women.[23] Following access to birth control pills, women no longer had to fear to the same extent the possibility of

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18. *See infra* Part I.B.

19. *Marriage Is on the Decline*, *supra* note 2, at 220–21 ("As the marriage rate has declined, the cohabitation rate has risen. According to the latest U.S. Census Bureau report, 'the unmarried partner population numbered 7.7 million in 2010 and grew 41% between 2000 and 2010.'").

20. *See* Margaret Ryznar & Anna Stepian-Sporek, *Cohabitation Worldwide Today*, 35 GA. STATE U. L. REV. 299, 300 (2019) ("Between 2000 and 2010 alone, there was a 41% increase in unmarried couple households. Unthinkable and even criminal for much of history, cohabitation has become a transition to marriage or even a substitute for it."); Elizabeth Hodges, Comment, *Will You "Contractually" Marry Me?*, 23 J. AM. ACAD. MATRIM. LAWS. 385, 386 (2010) ("While marriage is typically still seen as the best option when joining two lives, unmarried cohabitation is accepted now more than ever. It is estimated that over sixty percent of couples now cohabitate prior to marriage as opposed to eleven percent in 1970.").

21. *See* Steven K. Berenson, *Should Cohabitation Matter in Family Law?*, 13 J. FAM. L. & FAM. STUD. 289, 295 (2011); *see also* Beth Bailey, *Prescribing the Pill: Politics, Culture, and the Sexual Revolution in America's Heartland*, 30 J. SOC. HIST. 827 (1997) (discussing the sexual mores of the mid-twentieth century and the difficulty in getting access to contraceptives for unmarried women).

22. *See* Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309, 312–13 (2008). *See generally* Rosemary Auchmuty, *Law and the Power of Feminism: How Marriage Lost its Power to Oppress Women*, 20 FEMINIST LEGAL STUD. 71 (2012) (arguing that marriage in the United Kingdom has consistently lost its significance in the lives of women since the mid-nineteenth century because of reduced stigma for pre-marital sex); Leslie Paris, *The Sexual Clock: Middle-Aged American Women and Sexual Vitality in the 1960s and 1970s*, 53 J. SOC. HIST. 922 (2020) (discussing the sexuality of middle-aged women during and after the sexual revolution); Lawrence L. Wu et al., *The Decoupling of Sex and Marriage: Cohort Trends in Who Did and Who Did Not Delay Sex Until Marriage for U.S. Women Born 1938–1985*, 4 SOCIO. SCI. 151 (2017) (arguing that women commenced decoupling sex and marriage in the years before the sexual revolution).

23. Garrison, *supra* note 22.

getting pregnant through sexual intercourse, and they gained the ability to engage in sexual activity with independence.[24] Combined with the social changes flowing from the Vietnam War and the civil rights movement, premarital sex and unmarried cohabitation became more broadly accepted.[25]

Around a decade ago, Americans started viewing cohabitation as a way to prevent divorce if a cohabitating couple later marries.[26] From 2011 to 2013, 60% of the women and 67% of the men surveyed in a particular study agreed that "[l]iving together before marriage may help prevent divorce."[27] That number paralleled the same survey's results from 2006 to 2010.[28] Thus, a majority of Americans believe that cohabitation among unmarried romantic couples has the benefit of possibly preventing divorce if that couple later marries.[29]

Similarly, Americans have softened their views on whether cohabitation is socially or morally permissible.[30] When asked in 2002 whether they agreed that "[a] young couple should not live together unless they are married," approximately 35% of women agreed with that judgment, and around 32% of men agreed.[31] Upon being asked the same query between 2011 and 2013, the disapproval rate decreased; only 28% of women agreed that a young couple should not cohabitate outside of marriage, and only around 25% of men shared that assessment.[32]

More than half of American adults have cohabitated at some point.[33] Also, most married couples now live together prior to their nuptials.[34] In a study between 2011 and 2015, around 17% of women and 16% of men between the ages of eighteen and forty-four were currently living with their romantic partner outside of marriage.[35] Of the 17% of women cohabitating with their romantic partner, around 46% were between the ages of twenty-five and thirty-four, while approximately 30% were between the ages of eighteen and twenty-four.[36] Meanwhile, of the 16% of men that were cohabitating, a little over 50% were between the ages of twenty-five and thirty-four, while only around 22% were between the ages of eighteen and twenty-four.[37]

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24. *Id.*

25. *See id.* at 313. *See generally* Adam Fairclough, *Martin Luther King, Jr. and the War in Vietnam*, 45 PHYLON 19, 19 (1984) (recognizing the social impacts of the civil rights movement and the anti-war movement related to the Vietnam conflict).

26. JILL DAUGHERTY & CASEY COPEN, TRENDS IN ATTITUDES ABOUT MARRIAGE, CHILDBEARING, AND SEXUAL BEHAVIOR: UNITED STATES, 2002, 2006–2010, AND 2011–2013, at 3 (2016).

27. *Id.*

28. *Id.*

29. *Id.*

30. *See id.*

31. *Id.*

32. *Id.* It is important to note that the survey specifically asked for a response to the question of cohabitation by young couples.

33. COLLEEN N. NUGENT & JILL DAUGHERTY, A DEMOGRAPHIC, ATTITUDINAL, AND BEHAVIORAL PROFILE OF COHABITATING ADULTS IN THE UNITED STATES, 2011-2015, at 1 (2018).

34. *Id.*

35. *Id.* at 2.

36. *Id.* at 3.

37. *Id.*

Taken together, the American public's view of cohabitation is fairly positive and growing more so with every year, which may indicate couples will increasingly opt out of marriage and cohabitate.[38] These statistics underscore that the modern reality is much different than in the 1940s and 1950s—or even the 2000s. If society is evolving, and perceptions of what is acceptable are tracking with those changes, lawmakers and courts should appreciate these shifts and respond to them. Rather than sticking their heads in the sand, legislators and judges should open their eyes to this new landscape and address cohabitation's potential issues.

II. POTENTIAL INEQUITIES IN COHABITATION

Cohabitation between unmarried romantic couples poses possible inequities when the relationship concludes. Because cohabitants are romantically involved, they are not operating at arm's length. This presents serious challenges for the legal field because the common law of contracts has developed with the assumption that the parties will operate at arm's length and with their respective guards up due to a lack of trust between the parties.[39] When the parties are romantically involved and live together, that simply is not the case.

When romantic cohabitants end their relationship, one party may be left without adequate financial resources from the partnership because romantic cohabitation lacks the built-in protections found in marriage.[40] For example, if one partner in a middle-class cohabitation makes enough money that it is not necessary for the other partner to work and generate income, the partner who does not work may nonetheless contribute to the relationship by tending to the residence or performing other activities that do not bring money into the relationship. In a marriage, this contribution would be considered when making a determination as to an equitable distribution of property because of the marriage as partnership theory.[41] Conversely, in a cohabitation relationship, the contribution of the non-working partner will not be considered because no similar "cohabitation as partnership" theory has emerged. Thus, if the income-producing partner ends the relationship and keeps the money, the non-working partner will receive nothing at

38. *See* Garrison, *supra* note 22, at 313.

39. *See* Robert S. Adler & Richard A. Mann, *Good Faith: A New Look at an Old Doctrine*, 28 AKRON L. REV. 31, 35 (1994).

40. *See generally* Cynthia L. Ciancio & Jamie L. Rutten, *Modifying or Terminating Maintenance Based on Cohabitation*, 38 COLO. LAW. 45, 45 (2009) (discussing the consequences a former spouse who has received an award of spousal support or alimony faces when they begin cohabitating with a new partner); Twila L. Perry, *The "Essentials of Marriage": Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1 (2003) (detailing the duties and obligations of the parties to a marriage); Cynthia Lee Starnes, *I'll Be Watching You: Alimony and the Cohabitation Rule*, 50 FAM. L.Q. 261 (2016) (outlining spousal alimony obligations in the context of how alimony payments may cease based on the alimony recipient's romantic cohabitation with another person following the marriage's dissolution); Brooke Oliver, Note, *Contracting for Cohabitation: Adapting the California Statutory Marital Contract to Life Partnership Agreements Between Lesbian, Gay, or Unmarried Heterosexual Couples*, 23 GOLDEN GATE U. L. REV. 899 (1993) (listing the specific statutory rights available to married couples in California so that cohabitating couples can contract into or out of some of those rights and obligations).

41. *See, e.g.*, Susan N. Gary, *Marital Partnership Theory and the Elective Share: Federal Estate Tax Law Provides a Solution*, 49 U. MIAMI L. REV. 567, 572–74 (1995).

the end of the cohabitation. This situation is only exacerbated when there are children involved. If one parent cares for the child rather than generating financial revenue for the family, they may be financially insecure upon the end of the relationship.

Take, for instance, a young parent who stays home with their child because the child's other parent earns enough income for the family. If the working parent abruptly ends the cohabitation, the non-working parent will be left without professional experience, financial assets, and the connections they likely would have made during their employment. When combined, these circumstances can leave the non-working parent with little economic independence.

This harm is neither abstract nor theoretical. In the Author's private practice, these exact circumstances have been retold by clients who have been left with nothing after long cohabitations. In one such case, a Tennessee woman with a physically disabled child had been cohabitating with the child's father for approximately three years. She stopped working full-time to care for the child while the father worked at a factory job. The mother did not reach this decision alone; the father told her that he made enough money for her to stay home with the child and take care of the home. While this arrangement seemed acceptable for some time, the father eventually became disgruntled with the mother—and, unfortunately, the child's disability—and simply told the mother to move out of the home in which they had been cohabitating, which the father owned in his name alone. Without a written contract, which may or may not have been enforceable under existing law, absent a marriage certificate, and without sufficient specific facts to prove an implied contract, the mother was left with basically nothing to show for years of cohabitating with the father. Unfortunately, under the current legal framework for dealing with long-term cohabitation relationships, there was little to nothing that an attorney could do for this young mother other than creating a parenting plan and securing child support payments. This solution was inadequate given the mother's hard work during the cohabitation—work that the legislature and courts thus far have failed to recognize as a basis for equitable distribution of property at dissolution of cohabitating relationships.

In another real-world example, a man and woman in a romantic relationship lived together in Tennessee for twenty years and generally shared expenses and household duties. Tragically, on what appeared to be just another normal day, the man unexpectedly died. The man had not executed a will and thus died intestate, which meant that his long-term partner, to whom he was not married, was unknown to him under the law. Throughout the cohabitation relationship, the parties acquired real and personal property, but following traditional gender roles, the parties always deeded or titled the property in the man's name alone. When the man unexpectedly died, the woman was left living in a house she did not legally own, surrounded by property that was not in her name; basically, all she had in her name was her car and a bank account. While the decedent's children were initially cooperative with the woman who had helped raise them, they soon changed their tune. They kicked the woman out of the house and informed her that she would not receive any of the decedent's property. Therefore, after twenty years together, working as a team to build a life and acquire property and assets, this woman was left without her partner, home, or property.

III. STATE APPROACHES TO COHABITATION RELATIONSHIPS

While not an exhaustive list, there are several ways that states have handled dissolution of cohabitation: express contracts, implied contracts, quasi-equities, general partnership agreements, and prohibition of all contracts. In express contract states, including California, Indiana, Missouri, North Carolina, and Wisconsin, cohabitating romantic couples can make express agreements, either oral or written, dictating how their cohabitation will be managed at dissolution.[42] This is similar to a pre- or post-nuptial agreement in a marriage. The main caveat of this method is that sexual intercourse cannot serve as the consideration for the contract, as this would amount to the state enforcing a prostitution contract.[43] For instance, regarding express cohabitation agreements, the California Supreme Court has declared that "a contract between nonmarital partners is unenforceable only [t]o the extent that it [e]xplicitly rests upon the immoral and illicit consideration of meretricious sexual services."[44]

In implied contract states, which are largely the same states as those that permit express contracts, the court may find an agreement, even though not expressly stated by the parties, "where the *conduct of the parties* clearly indicates their intention to create a contract or [a contract] may be implied-in-law based on the restitutionary theory of quasi-contract which operates to prevent unjust enrichment."[45] Under this approach, if the parties' outward, objective conduct convinces the court either (i) that the parties intended to create a contract but never did so, or (ii) that it would be inequitable not to have a contract, the court may infer a contract to divide property.[46] For instance, the North Carolina Court of Appeals found a valid implied cohabitation contract where the partners had engaged in a business relationship prior to the cohabitation that continued throughout the romantic relationship.[47] Finding that the existence of the business partnership

42. *See* Marvin v. Marvin, 557 P.2d 106, 116 (Cal. 1976) (en banc); Bright v. Kuehl, 650 N.E.2d 311, 315 (Ind. Ct. App. 1995); Hudson v. DeLonjay, 732 S.W.2d 922, 927 (Mo. Ct. App. 1987); Johnston v. Estate of Phillips, 706 S.W.2d 554, 558 (Mo. Ct. App. 1986); Suggs v. Norris, 364 S.E.2d 159, 161–62 (N.C. Ct. App. 1988); Watts v. Watts, 405 N.W.2d 303, 310 (Wis. 1987). Professor Albertina Antognini has conducted an exhaustive review of express contract states. *See* Albertina Antognini, *Nonmarital Contracts*, 73 STAN. L. REV. 67, 102–04 (2021) ("[A]ll jurisdictions except for two state that they recognize express contracts entered into by a nonmarital couple . . . . Regardless of the specific approach different jurisdictions adopt, courts routinely decline to uphold an express contract alleged in a different-sex relationship.").

43. *See* sources cited *supra* note 42. *See generally* Gavin M. Parr, Note, *What is a "Meretricious Relationship"?: An Analysis of Cohabitant Property Rights Under* Connell v. Francisco, 74 WASH. L. REV. 1243 (1999) (outlining what constitutes a meretricious relationship for cohabitants and the role of sexual intimacy in these contractual situations).

44. *Marvin*, 557 P.2d at 112. Antognini has taken issue with courts' use of a sexual relationship as an obstacle to enforcing express cohabitation covenants. Antognini, *supra* note 42, at 109. Antognini has noted that "[i]dentifying sex as the real obstacle to enforcing these contracts is mistaken . . . . In particular, sex can generally be kept separate and apart from money: [w]hile services cannot be recouped in a relationship that involved sex, property can." *Id.*

45. *Suggs*, 364 S.E.2d at 162 (emphasis added); *see also* Neibert v. Perdomo, 54 N.E.3d 1046, 1051–54 (Ind. Ct. App. 2016); *Watts*, 405 N.W.2d at 316; *Hudson*, 732 S.W.2d at 926; *Bright*, 650 N.E.2d at 315; *Marvin*, 557 P.2d at 122–23; *Johnston*, 706 S.W.2d, at 558.

46. *See, e.g.*, *Suggs*, 364 S.E.2d at 162.

47. *Id.*

permitted a reasonable jury to find that sexual services did not serve as the consideration for the cohabitation agreement, the North Carolina Court of Appeals enforced the implied contract.[48]

Under the quasi-equity or quasi-contract approach, which could also be termed the "unjust enrichment" method, a court may look to the conduct of the parties and find, even absent an implied contract, that equity requires an equitable distribution of property to be employed in the case.[49] Some of the states that adhere to this view include California, Colorado, Indiana, Massachusetts, Ohio, North Carolina, Vermont, and Wisconsin.[50] Though states' approaches differ to varying degrees, typically a party making a claim of unjust enrichment must prove that "at plaintiff's expense . . . [the] defendant received a benefit . . . under circumstances that would make it unjust for [the] defendant to retain the benefit without paying."[51] Unlike the implied contract theory, upon a finding of unjust enrichment, courts may either create a constructive trust or use quantum meruit to award the value of services provided to the partnership to make the distribution equitable.[52] Additionally, the quasi-equity approach differs from the implied contract method of recovery because quasi-equity does not give weight to the intentions of the parties so long as there is a seemingly unjust enrichment.

Interestingly, some courts have found that former cohabitants were also general business partners.[53] Both Tennessee and Vermont have acknowledged the potential existence of a business partnership between unmarried cohabitants.[54] In this approach, as in all commercial partnership cases, the court looks to see if the romantic cohabitants were engaged in a joint venture for profit. If so, the court can find that a general partnership exists under the law of business associations and order a windup of the partnership, which involves dividing the partnership's property.[55] For example, the Tennessee Supreme Court found that a couple who had lived together for more than a decade and jointly worked in multiple businesses owned in the man's name alone were business partners, despite their cohabitation relationship.[56] The court expressly rejected the idea that romantic couples who engaged in a venture for profit together could not be deemed business partners by virtue of their sexual relationship.[57]

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48. *Id.*

49. *Marvin*, 557 P.2d at 122–23; *see also* Salzman v. Bachrach, 996 P.2d 1263, 1269 (Colo. 2000) (en banc); *Watts*, 405 N.W.2d at 316; *Neibert*, 54 N.E.3d at 1051; *Bright*, 650 N.E.2d at 315; Bonina v. Sheppard, 78 N.E.3d 128, 132 (Mass. App. Ct. 2017); *Suggs*, 364 S.E.2d at 162; McLaren v. Gabel, 229 A.3d 422, 437 (Vt. 2020).

50. *See* sources cited *supra* note 49.

51. *Salzman*, 996 P.2d at 1265–66.

52. *Marvin*, 557 P.2d at 110.

53. *See* Martin v. Coleman, 19 S.W.3d 757, 759 (Tenn. 2000); Via v. Oehlert, 347 S.W.3d 224, 230 (Tenn. Ct. App. 2010); Montgomery v. Montgomery, 181 S.W.3d 720, 730 (Tenn. Ct. App. 2005); Harman v. Rogers, 510 A.2d 161, 164–65 (Vt. 1986); s*ee also* Antognini, *supra* note 42, at 127–30 (noting that some courts are willing to uphold contracts related to property distribution between former romantic cohabitants only where the contract relates to property and not to the relationship itself).

54. *See McLaren*, 229 A.3d at 430–33; Bass v. Bass, 814 S.W.2d 38, 40–44 (Tenn. 1991).

55. *See McLaren*, 229 A.3d at 432–33; *Bass*, 814 S.W.2d at 40–44.

56. *Bass*, 814 S.W.2d at 40–44.

57. *Id.* at 42–43.

While the partnership theory appears to be a reasonable way to distribute cohabitation property, its main pitfall is its dependence on financial contributions. If all states adopted this approach, partners without any assets who contributed only in non-financial ways likely would not be considered business partners. Thus, there would still be little remedy for partners who make non-financial contributions to a cohabitation that would otherwise be recognized in a marriage dissolution proceeding. Since it is the financial and labor contributions alone that are considered in the partnership theory, it is an imperfect remedy to cure the issue of inequitable property distribution in cohabitating romantic partnerships.

Still, some states take the stance that any contract between cohabitants violates public policy and is prohibited.[58] In those states, marriage is the only venue for couples who want financial protections in their relationships. Because the state seeks to incentivize marriage over cohabitation, providing any contractual protections to cohabitants would violate public policy.[59] Moreover, some states interpret their legislature's intent in abolishing common law marriage as demanding that individuals only receive marriage-like benefits through a statutory marriage.[60]

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58. *See* Cates v. Swain, 2010-CT-01939-SCT (¶ 15) (Miss. 2013); Lauper v. Harold, 492 N.E.2d 472, 474–75 (Ohio Ct. App. 1985); Carnes v. Sheldon, 311 N.W.2d 747, 750–53 (Mich. Ct. App. 1981); Tarry v. Stewart, 649 N.E.2d 1, 6–7 (Ohio Ct. App. 1994); *Martin*, 19 S.W.3d at 761–62. *See generally* Margaret M. Mahoney, *Forces Shaping the Law of Cohabitation for Opposite Sex Couples*, 7 J.L. & FAM. STUD. 135, 164–96 (2005) (providing more information on the competing policy interests inherent in marriage and unmarried cohabitation); Milton C. Regan, Jr., *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 NOTRE DAME L. REV. 1435, 1439–49 (2001) (providing more on the same). In the landmark 2015 Supreme Court decision *Obergefell v. Hodges*, which legalized same-sex marriage nationwide, the Court opined about the sanctity and preeminent position of marriage. Obergefell v. Hodges, 576 U.S. 644, 666 (2015) ("The nature of marriage is that, through its enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality. This is true for all persons, whatever their sexual orientation."). Justice Kennedy, writing for the majority, continued, "the right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals." *Id.* Finally, Justice Kennedy quoted from *Griswold v. Connecticut*, declaring:

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Id. at 667 (quoting Griswold v. Connecticut, 381 U.S. 479, 486 (1965)). Therefore, the Court, along with state courts, has acknowledged the primacy of the institution of marriage in ordering domestic relationships.

59. *See generally* William C. Duncan, *The State Interests in Marriage*, 2 AVE MARIA L. REV. 153, 154–81 (2004) (outlining the longstanding state interests in marriage as being procreation, child rearing, tradition, and interstate uniformity); Kari E. Hong, Obergefell*'s Sword: The Liberal State Interest in Marriage*, 2016 U. ILL. L. REV. 1417, 1418–31 (2016) (discussing the elevation of marriage as an institution as a way to criticize same-sex relationships); Andrew W. Scott, Note, *Estop in the Name of Love: A Case for Constructive Marriage in Virginia*, 49 WM. & MARY L. REV. 973, 974–75 (2007) (recognizing the fundamental state interest in marriage and detailing the concrete ways the state has justified that interest).

60. *See* sources cited *supra* note 58.

IV. STATES SHOULD PERMIT ROMANTIC COHABITANTS TO CONTRACT

Given the changing demographics, the increased popularity of cohabitation, and the potential inequities posed by cohabitation relationships, states should adopt a uniform approach to provide certainty and promote justice in these cases.[61] The best way to ensure these goals are met is to permit parties to a romantic cohabitation to freely contract regarding property, and where the parties neglect to expressly contract, look to their outward conduct to determine if an implied contract to equitably divide joint property may be inferred. Doing so best protects both parties to the agreement while also preserving the parties' autonomy to order their personal lives as they deem fit.

A. Express Contracts

The express contract theory requires states to move beyond antiquated objections to pre-marital sex.[62] States already permit individuals to contract with one another and corporate entities, with only limited exceptions for incompetent

61. Professor Michael J. Higdon has proposed the creation of an "equitable marriage" doctrine to fill the void in the law related to nonmarried, romantic cohabitation property division. *See* Michael J. Higdon, *(In)Formal Marriage Equality*, 89 FORDHAM L. REV. 1351, 1394–1400 (2021). Higdon has described this suggested approach by noting:

> Thus, what courts need is a new doctrine, equitable marriage, which would draw on elements of the existing approaches to recognizing informal relationships. At a minimum, this doctrine would need to give the courts license to extend benefits to a marriage-like relationship that cannot otherwise qualify as a legal marriage. In that sense, this new doctrine would be similar to the marriage validation principles of marriage by estoppel and putative marriage, which protect void marriages . . . . However, unlike those doctrines, this new equitable doctrine needs to provide not just some family law protections but all of the rights and obligations associated with marriage.

Id. at 1399–1400. Unlike Higdon's proposal, a universal approach of inferring implied contracts and enforcing any express contracts made by cohabitants already has support in the common law of multiple states. *See supra* notes 42, 45 and accompanying text. Undoubtedly, Higdon's suggested method would remedy many of the inequities inherent in romantic cohabitation, but it would require significantly more willingness by courts to be creative.

62. *See generally* Lauren A. DiMartino, Note, *The Procreation Prescription: Sexuality, Power, and the Veil of Morality*, 22 CUNY L. REV. 41 (2019) (describing the state's efforts to legislate morality related to sex, especially as it relates to women's bodies and the institution of marriage); J. Thomas Oldham & David S. Caudill, *A Reconnaissance of Public Policy Restrictions Upon Enforcement of Contracts Between Cohabitants*, 18 FAM. L.Q. 93, 97 (1984) ("Contracts between cohabitants traditionally were unenforceable, because sex—illegal consideration—was considered an integral part of the contract. Many courts have recently abandoned this traditional approach, however, and have endorsed the 'modern' view that all such contracts are enforceable, unless . . . the contract is a prostitution agreement."). Moreover, the state does not have a legitimate interest in controlling the sex lives of consenting adults. *See* Lawrence v. Texas, 539 U.S. 558, 559 (2003) ("[L]iberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."); *see also* Eisenstadt v. Baird, 405 U.S. 438, 448–49 (1972); *Griswold*, 381 U.S. at 485–86. Indeed, states have often not only attempted to dissuade pre-marital sex, but rather have outlawed the act altogether. *See* Hong, *supra* note 59, at 1422–25.

persons.[63] Beyond religious, moral, or traditional motivations, it is hard to find a compelling reason for the state not to permit sexual partners who live together to order their financial affairs. While the state may insist that marriage should be shielded and incentivized, the state has failed to effectively incentivize marriage, as evidenced by the plummeting marriage rate and skyrocketing rise of unmarried cohabitations.[64] Moreover, the state's concern about sexual acts serving as consideration for contracts does not appreciate the actual circumstances of these relationships. While cohabitants may be engaging in sex, that is not the sole aspect of their relationship. Just like married couples, cohabitants comingle their lives in many ways.[65] The state's apparent concern that permitting express cohabitation agreements will result in paid paramours across the nation is not persuasive. Therefore, the justifications used by courts and legislators to proscribe cohabitation contracts are unconvincing in the twenty-first century. Society is rapidly changing, and antiquated justifications for outdated policies cannot abide.

Of course, cohabitating partners are not acting at arm's length because of their romantic connection. Accordingly, courts would need to carefully examine express contracts between cohabitants to ensure that duress, fraud, or unconscionability does not render the contract invalid—but that is what courts already do with every contract brought before them.[66] Nevertheless, valid express contracts between cohabitants should be the gold standard in determining joint property division from a terminated cohabitation. These agreements preserve the parties' autonomy and effectuate their intent in commingling their lives without the governmental regulation that accompanies marriage. As long as express cohabitation contracts are supported by adequate consideration and are not unconscionable, these agreements prevent the injustice of one party potentially being left without any assets following a cohabitation.

B. Implied Contracts

Permitting judges to imply contracts between romantic cohabitants necessarily requires allowing express contracts to exist between them. However, implying a contract is more likely to impinge on the parties' autonomous decisions. Logistically, the implied contract approach involves a fact-intensive analysis. The court looks to see if the parties intended, based on an objective view of their actions and conduct during the relationship, to have an agreement regarding property

63. *See, e.g.*, J.B. Esker & Sons, Inc. v. Cle-Pa's P'ship, 757 N.E.2d 1271, 1278 (Ill. App. Ct. 2001); Faun M. Phillipson, Note, *Fairness of Contract vs. Freedom of Contract: The Problematic Nature of Contractual Obligation in Premarital Agreements*, 5 CARDOZO WOMEN'S L.J. 79, 83 (1998); David E. Pierce, *Freedom of Contract and the Kansas Supreme Court* 86 J. KAN. BAR ASS'N 36, 37 (2017) ("Freedom of contract is the foundation of the American economy and our capitalist society.").

64. *See supra* Part I.

65. *See* Susan L. Brown & Alan Booth, *Cohabitation Versus Marriage: A Comparison of Relationship Quality*, 58 J. MARRIAGE & FAM. 668, 677 (1996) ("The results of this study suggest that cohabitation is highly similar to marriage . . . . This study adds considerable strength to the argument that cohabitation is very much another form of marriage.").

66. *See, e.g.*, Val Ricks, *Consideration and the Formation Defenses*, 62 KAN. L. REV. 315, 317–33 (2013) (discussing the doctrinal and historical underpinnings of the defenses to contract formation).

distribution and other matters in the cohabitation.[67] Some of the possible factors courts should consider when determining distribution of property at the dissolution of a cohabiting relationship include (i) the length of the cohabitation; (ii) whether the partners lived in a residence owned by one of the partners, rather than leased or rented; (iii) whether the partners intended for one partner to contribute to the cohabitation in non-financial ways; (iv) the extent of each partner's contribution, financial or otherwise, to the cohabitation; and (v) whether there were any children of the cohabitation. The individual circumstances of each case should be of particular importance to the courts, and the courts should adapt their approach to the facts before them. The formula should not be so rigid as to prevent redress merely because of a failure to meet a boilerplate test. However, courts also should not strain to find an implied contract where the parties' conduct shows an arm's length relationship in which the couple did not comingle assets and it was understood that everything would remain separate. The main goal of the implied contract approach is to protect vulnerable parties and to effectuate the parties' intent while endeavoring to preserve autonomy.

The potential drawbacks of an implied contract approach are an encroachment on individual autonomy, a tax on judicial economy, and a lack of access to justice. The reason that many individuals might choose not to marry is because they want the ability to order their relationships how they choose, not how the government chooses for them. Thus, the implied contract approach risks stripping parties of their autonomy.[68] Yet, if the government completely removes itself from the regulation of personal lives, parties without power in their relationships will suffer serious harms.

Undoubtedly, some autonomy is lost through the implied contract approach. By its very nature, implying contracts between parties to ensure that they are on equal or near-equal footing following the dissolution of the cohabitation imposes formal equality on the relationship. However, in a divorce, the state attempts to achieve the same equal or near-equal footing through property distribution, spousal support, child custody, and myriad other doctrines. Cohabitants are specifically and explicitly choosing not to marry, but implied contracts ensnare them in a marriage-like formal framework.

Nevertheless, the danger of suppressing autonomy is outweighed by the need to ensure that the weaker party in a relationship is not exploited. Though people should be free to order their personal lives, they should not be free to order them in ways that oppress those who trust them. Even in contract law, which is based on the concepts of freedom of contract and buyer beware, courts require parties to act

67. *See* sources cited *supra* note 45.

68. *See generally* Albertina Antognini, *Regulating Nonmarriage*, U. KY. L. NOTES, Fall 2017, at 47 (highlighting the nonmarriage phenomenon and the pitfalls of the current system of regulation); Katharine K. Baker, *What is Nonmarriage?*, 73 SMU L. REV. 201, 215–18 (2020) (acknowledging the fundamental questions of autonomy and ordering one's personal life involved in the decision of whether to marry); June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 59, 120–21 (2016) (concluding that autonomy, rather than formal equality, should be the highest priority in government regulation of nonmarriage or cohabitation); Melissa Murray, Obergefell v. Hodges *and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1212–16 (2016) (discussing reasons people choose not to marry in relation to the Supreme Court's infatuation with the institution of marriage as articulated in *Obergefell*).

with good faith and to deal fairly. These requirements are all that the implied contract approach imposes. Additionally, because the implied contract approach inherently includes the potential for express contracts, it is completely within the cohabitants' power to expressly contract out of the obligations that an implied contract might impose on their relationship.

Finally, some may criticize the implied contract approach because of the potential for unequal enforcement as a result of a lack of access to justice. For example, while one partner in a cohabitation may have considerable financial resources and the ability to acquire an attorney to pursue or defend a contract claim, the other partner may be without those resources. Thus, when it comes time to enforce or defend an implied contract claim, the party without resources will face difficulty in seeking justice. This is an argument worthy of sympathy and consideration. However, access to justice is a widespread concern throughout the civil justice system.[69] Therefore, while the issue is significant, the concern relating to a lack of access to justice, alone, does not outweigh the particular need for enforceable cohabitation agreements.

Enforcing cohabitation agreements protects vulnerable partners. The preferable outcome is that states will enforce express contracts reached by romantic cohabitants for splitting their joint property. Absent such an agreement, courts can employ the implied contract approach to ensure that one party will not keep all the property while the other is left with nothing. Indeed, through this approach courts can imply a contract based on the parties' actions that includes terms recognizing that one partner contributes to the relationship in a non-financial manner while the other partner contributes financially. Both contributions are valid and deserve to be recognized in the equitable distribution of assets. Until courts routinely recognize express and implied contracts, this protection will go unrealized.

CONCLUSION

Wholesale changes in American society related to family relations in the last several decades have rendered certain laws out of date. Many state laws have failed to keep up with the reality of modern relationships. Romantic partners are choosing not to marry in numbers higher than ever, but instead are choosing to live together outside of marriage, and the American public increasingly views that decision more favorably than ever. Accordingly, states should accept this reality, stop using marriage as the gold standard to the detriment of all other forms of

69. *See generally* Douglas A. Blaze & R. Brad Morgan, *Toward More Equal Access to Justice: The Tennessee Experience*, 10 TENN. J.L. & POL'Y 163 (2015) (articulating the access to justice gap generally and praising the Tennessee Supreme Court's creation of an Access to Justice Commission); Russell Engler, *Access to Justice and the Role of the Private Practitioner*, 24 KAN. J.L. & PUB. POL'Y 554 (2015) (arguing for public funding for appointed civil counsel, along with other proposals to cure access to justice deficiencies); Ronald S. Flagg, *Access to Civil Justice: Keeping America's Promise*, 24 KAN. J.L. & PUB. POL'Y 571, 572–79 (2015) (detailing the failings of access to justice in the civil justice system in the United States); Thomas J. Methvin, *Access to Justice–Now More Than Ever*, 70 ALA. LAW. 319 (2009) (encouraging practitioners to volunteer their time and efforts to help clients who are not able to afford a lawyer); Matthew A. Shapiro, *Distributing Civil Justice*, 109 GEO. L.J. 1473, 1482–1502 (2021) (articulating the many "goods" that are under the umbrella of civil access to justice and how those goods are not being distributed or advocated for equitably).

relationships, and protect the parties in cohabitations. States can accomplish this by permitting romantic cohabitants to reach agreements about the division of their joint assets should the cohabitation cease, and by implying contracts based on the cohabitants' conduct when appropriate under the circumstances. Doing so will align the law with modern society and protect all parties in cohabitation relationships.

States permit parties to contract regarding property owned between them when the parties are not actively engaged in a sexual relationship and living together. Antiquated ideas about which relationships are socially acceptable and elevating marriage to such a sacred place that it becomes the only way for sexual partners to order their joint financial lives ignores reality and has tragic real-world consequences. As long as sex is not the only consideration for such an accord, it is imperative that states update their laws to match reality and permit sexual partners who live together to contract regarding the distribution of their property following the cohabitation's termination. Some states have already accepted this reality, and it is beyond time for all other states to do the same.