Notes

SHOULD MOVING IN MEAN LOSING OUT? MAKING A CASE TO CLARIFY THE LEGAL EFFECT OF COHABITATION ON ALIMONY

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ABSTRACT

As nonmarital cohabitation has skyrocketed over the last several decades, courts and legislatures have increasingly struggled to decide what legal effect an ex-spouse's cohabitation with a new partner should have on the receipt of alimony payments. In seeking to answer this cohabitation question, states have taken a variety of approaches. Often, however, courts' answers to the cohabitation question are not grounded in the rationale that those courts used to award alimony in the first place and may therefore lead to inconsistent or absurd results. This Note addresses the cohabitation question and argues that states should revisit their current approaches in light of the multiple contemporary theories of alimony and twenty-first century social-science research on cohabitation. Ultimately, this Note proposes several clarifications to existing law in order to provide a sensible, workable rule that would introduce consistency to courts' considerations of the cohabitation question.

INTRODUCTION

When Patricia and Andrew Craissati divorced in 2001, a Florida court ordered Andrew to pay Patricia alimony for eight years.[1] The

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1. Craissati v. Craissati, 997 So. 2d 458, 458–59 (Fla. Dist. Ct. App. 2008). This Note uses the traditional term "alimony" to refer to post-divorce payments that are not part of the distribution of property at divorce. *See* BLACK'S LAW DICTIONARY 85 (9th ed. 2009) (defining "alimony" as "[a] court-ordered allowance that one spouse pays to the other spouse for maintenance and support while they are separated, while they are involved in a matrimonial

court directed Patricia's alimony to terminate, however, if she "cohabit[ed] with another person other than the parties' child."[2] Later, Patricia was sentenced to nine years in prison for driving under the influence, causing serious bodily injury, and leaving the scene of an accident.[3] Andrew filed a petition to modify the alimony payments, alleging that Patricia was "cohabiting" in violation of the original court order because she shared her prison cell with a fellow inmate.[4]

The trial court recognized that to construe cohabitation to include a prison inmate would be "absurd" and "unthinkably bizarre."[5] Instead, the trial court found that Patricia's alimony should be reduced because she had diminished financial need while incarcerated.[6] The appellate court, however, disagreed with the lower court's reasoning.[7] It did not think that labeling Patricia as a cohabitant was "absurd" because Patricia had stipulated in an evidentiary hearing that her incarceration technically amounted to cohabitation and that she had voluntarily driven under the influence.[8] The appellate court thus reversed the trial court's decision and directed the court on remand to terminate Patricia's alimony.[9]

Although Patricia needed less alimony because she was incarcerated, she did not cohabit as the term is generally understood.[10] And although Patricia's situation is unusual, she is not alone in losing

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lawsuit, or after they are divorced," and distinguishing it from property settlement, as "[a]limony payments are taxable income to the receiving spouse and are deductible by the payor spouse; payments in settlement of property rights are not"). More modern terms—such as "spousal support" and "maintenance"—are generally synonymous this Note's use of the term "alimony."

2. *Craissati,* 997 So. 2d at 459. The court incorporated the couple's separation agreement into its final judgment, and the separation agreement defined cohabitation as "the Wife living with another person (not including the parties' child) for a period of 3 (three) consecutive months or more." *Id.* (emphasis omitted) (quoting the separation agreement).

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* at 460.

8. *Id.* at 459–60.

9. *Id.* at 460.

10. As discussed in Part III, *infra*, courts and legislatures do not agree on one definition of cohabitation. Generally, however, two people in a sexual or otherwise romantic relationship must live together for a certain period of time without being married in order to be considered unmarried cohabitants. Further, *Black's Law Dictionary* defines cohabitation as "[t]he fact or state of living together, esp. as partners in life, usu. with the suggestion of sexual relations." BLACK'S LAW DICTIONARY 296 (9th ed. 2009).

her alimony on the ground of cohabitation. As cohabitation outside of marriage becomes both more prevalent and more socially acceptable, courts increasingly confront the question of what legal effect an ex-spouse's cohabitation should have on her alimony payments.[11]

Legal scholarship, by contrast, has not addressed the question in sufficient depth. Indeed, the social landscape has changed dramatically since scholars first explored this topic in the 1970s.[12] For example, between 1970 and 2000, the number of cohabiting couples increased tenfold.[13] Although some recent work has addressed the question as it applies to a specific state,[14] academics have not thoroughly explored the issue in connection with alimony's theoretical framework and twenty-first century social-science research on cohabitation.[15] Because alimony reform remains ongoing,[16] this topic is ripe for further discussion and debate.

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11. This Note presumes that the typical alimony recipient is a woman. Although alimony is available to both men and women, Orr v. Orr, 440 U.S. 268, 283 (1979), courts continue to award alimony to women much more often than they award it to men, JOHN DE WITT GREGORY, PETER N. SWISHER & SHERYL L. WOLF, UNDERSTANDING FAMILY LAW 322 (3d ed. 2005). Indeed, in 2010, 97 percent of alimony recipients were female. *See* U.S. Bureau of Labor Statistics & U.S. Census Bureau, *Source of Income in 2010—Number with Income and Mean Income of Specified Type in 2010 of People 15 Years Old and Over, by Age, Race, and Hispanic Origin, and Sex: Both Sexes, 15 Years and Over*, U.S. CENSUS BUREAU, http://www.census.gov/hhes/www/cpstables/032011/perinc/new09_001.htm (last updated Sept. 13, 2011) (reporting that 392,000 adults received alimony in 2010); U.S. Bureau of Labor Statistics & U.S. Census Bureau, *Source of Income in 2010—Number with Income and Mean Income of Specified Type in 2010 of People 15 Years Old and Over, by Age, Race, Hispanic Origin, and Sex: Female, 15 Years and Over*, U.S. CENSUS BUREAU, http://www.census.gov/hhes/www/cpstables/032011/perinc/new09_013.htm (last updated Sept. 13, 2011) (reporting that 380,000 alimony recipients in 2010 were women).

12. Professor J. Thomas Oldham was one of the first scholars to address this question. *See generally* J. Thomas Oldham, *The Effect of Unmarried Cohabitation by a Former Spouse upon His or Her Right To Continue To Receive Alimony*, 17 J. FAM. L. 249 (1978) (addressing judicial and legislative responses to the legal effect of cohabitation on alimony).

13. *See infra* note 103 and accompanying text.

14. *See, e.g.*, Cynthia L. Ciancio & Jamie L. Rutten, *Modifying or Terminating Maintenance Based on Cohabitation*, 38 COLO. LAW., June 2009, at 45 (exploring the legal effect of cohabitation on alimony in Colorado); Peter L. Gladstone & Andrea E. Gladstone, *Codifying Cohabitation as a Ground for Modification or Termination of Alimony—So What's New?*, 80 FLA. B.J., Mar. 2006, at 45 (discussing Florida's enactment of a statute that addresses the legal effect of cohabitation on alimony); Allan L. Karnes, *Terminating Maintenance Payments When an Ex-Spouse Cohabits in Illinois: When Is Enough Enough?*, 41 J. MARSHALL L. REV. 435 (2008) (exploring the legal effect of cohabitation on alimony in Illinois).

15. The social-science research on the frequency and duration of cohabitation as well as the research on the extent to which cohabitation affects an alimony recipient's financial need has

This Note addresses the "cohabitation question"—the issue of what legal effect an ex-spouse's cohabitation with a new partner should have on her right to receive alimony payments—and argues that states should revisit their current rules in light of both the multiple contemporary theories of alimony and the contemporary social-science research on cohabitation. Part I discusses the history of and justifications for alimony. Part II then presents social-science research on cohabitation. Part III explores the relevant statutes and case law across jurisdictions. Finally, Part IV identifies problems with states' current rules and proposes several clarifications. First, only if a judge awards alimony based on need—as opposed to a different reason—should cohabitation affect alimony payments. Second, states should define cohabitation and financial need to avoid excessive judicial discretion that can lead to inconsistent and absurd results. Third, in situations in which alimony modification is warranted due to an ex-spouse's cohabitation, a judge should at most suspend, not terminate, alimony payments. Although these changes do not answer every aspect of the complicated cohabitation question, this Note seeks to provide a necessary first step in exposing problems and clarifying the law.

I. CONFLICTING THEORIES OF ALIMONY

Courts' and legislatures' responses to the cohabitation question should be consistent with why courts award alimony in the first place. This Part traces the historical development of alimony and explains why alimony's original justification does not apply to divorces in the twenty-first century. It then analyzes the various contemporary theories of alimony and how courts apply them. Finally, this Part discusses the practical significance of these multiple theories.

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implications for how courts and legislatures should respond to this question in the twenty-first century. *See infra* Part II.A–B.

16. Advocates for change tend to support firmer limits on alimony payments. *See, e.g.*, Jennifer Levitz, *The New Art of Alimony*, WALL ST. J., Oct. 31, 2009, at W1 ("Long viewed as payment for life, divorce settlements are facing strict new limits as some ex-spouses—primarily men—protest the endless support of a former partner.").

A. Alimony's Complicated History

The American conception of alimony traces back to England's ecclesiastical courts.[17] Prior to 1857, there were two ways to end a marriage in England: absolute divorce and limited divorce.[18] Only an act of Parliament could sanction an absolute divorce (divorce *vincula matrimonii*), and such acts were incredibly rare.[19] Ecclesiastical courts could, however, grant limited divorces.[20] Limited divorces, commonly known as "divorce from bed and board" (divorce *a mensa et thoro*), resembled modern legal separations.[21] They thus did not end the husband's legal duty to support his wife.[22] Given the husband's ongoing legal obligation after a limited divorce, the courts awarded alimony to provide maintenance for the wife.[23] Because the law forbade married women from owning certain property, pursuing most employment opportunities, and keeping the money they earned, alimony often served as a necessary lifeline.[24]

Ecclesiastical judges had significant discretion in determining alimony awards.[25] The wife's need and the husband's ability to support her were the most important considerations in the ecclesiastical courts.[26] They also considered the husband's degree of

17. Robert Kirkman Collins, *The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony*, 24 HARV. WOMEN'S L.J. 23, 28 (2001); Chester G. Vernier & John B. Hurlbut, *The Historical Background of Alimony Law and Its Present Statutory Structure*, 6 LAW & CONTEMP. PROBS. 197, 197 (1939).

18. Collins, *supra* note 17, at 28. Ecclesiastical courts could also annul a marriage based on an impediment in existence when the couple married. Vernier & Hurlbut, *supra* note 17, at 197–98.

19. Vernier & Hurlbut, *supra* note 17, at 198; *see also* GREGORY ET AL., *supra* note 11, at 262 ("[A]bsolute divorce, or divorce from the bonds of matrimony, . . . terminates the parties' marital status."). This type of divorce was granted only 317 times in the 150 years preceding the Divorce and Matrimonial Causes Act, 1857, 20 & 21 Vict., c. 85 (Eng.); Collins, s*upra* note 17, at 28–29.

20. Collins, *supra* note 17, at 28.

21. *Id.* Courts granted this type of limited marital termination in cases of adultery and cruelty. Vernier & Hurlbut, *supra* note 17, at 197.

22. *See* HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 619 (2d ed. 1988) ("The alimony which was awarded by the ecclesiastical courts . . . merely constituted a recognition and enforcement of the husband's duty to support the wife which continued after judicial separation.").

23. Vernier & Hurlbut, *supra* note 17, at 198.

24. Collins, *supra* note 17, at 29. The word alimony comes from the Latin term "*alimonia*," meaning sustenance. Cynthia Lee Starnes, *One More Time: Alimony, Intuition, and the Remarriage-Termination Rule*, 81 IND. L.J. 971, 983 (2006).

25. Vernier & Hurlbut, *supra* note 17, at 198.

26. *Id.* at 198–99.

fault in the dissolution of the marriage.[27] Some ecclesiastical judges increased the amount of alimony to punish a morally culpable or delinquent husband.[28] If a judge found that the wife had committed marital misconduct, however, she generally did not receive alimony.[29] Additionally, judges freely modified alimony awards upon a showing of changed circumstances.[30]

When absolute divorce became more readily available after mid-nineteenth century reforms, English judges began frequently awarding alimony in absolute divorce cases.[31] The courts did not provide a coherent theory, however, to explain why alimony should be granted in an absolute divorce when the duty to support had supposedly terminated.[32] American courts likewise imported the concept of alimony in the context of absolute divorce, but they faced the same conceptual difficulty. American courts awarded alimony without explaining why husbands, as opposed to the state, should support their wives after the court terminated the husband's legal duty to support.[33] Certainly, the state benefited from imposing this duty to support because alimony reduced the possibility that the ex-wife would become a ward of the state.[34] Nevertheless, courts awarding alimony continued to balance the wife's need with the husband's ability to pay.[35] And by the late 1930s, every American jurisdiction, with the exception of South Carolina, had a statute providing for alimony upon absolute divorce.[36]

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27. CLARK, *supra* note 22, at 619.

28. Vernier & Hurlbut, *supra* note 17, at 199.

29. *Id.*

30. *Id.* at 201.

31. Collins, *supra* note 17, at 30.

32. *Id.*

33. *See id.* ("The same inattention to theoretical consistency regarding support after a severance of the marital bond appears to have marked the progress of alimony on this side of the Atlantic."); *see also* David A. Hardy, *Nevada Alimony: An Important Policy in Need of a Coherent Policy Purpose*, 9 NEV. L.J. 325, 329 (2009) ("The analytical framework for alimony began to lose constancy with the end of coverture and advent of absolute divorce.").

34. JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA 195 (2011).

35. *Id.*

36. Vernier & Hurlbut, *supra* note 17, at 201. South Carolina did not provide for divorce until 1949. GROSSMAN & FRIEDMAN, *supra* note 34, at 161; *see also* Act effective Apr. 15, 1949, No. 137, 1949 S.C. Acts 216 (allowing for "divorce from the bonds of matrimony").

During the early twentieth century, American judges based divorce on fault,[37] which provided a partial explanation for alimony's persistence.[38] The number of official grounds for divorce varied among the states, but all states that permitted divorce included adultery as a ground for divorce, most awarded divorce on the grounds of desertion and cruelty, and some awarded divorce for nonsupport.[39] Findings of fault affected whether, and in what amount, courts awarded alimony.[40] Indeed, similar to the historical practice in England, the husband's marital misconduct tended to increase the wife's alimony award,[41] and courts generally did not award alimony to "guilty" wives.[42]

Over time, demand for divorce increased, and opposition to "easy divorce" decreased.[43] Although the official law of divorce changed little in the first half of the twentieth century, "[s]lowly, a kind of creeping no-fault system began to emerge."[44] Prior to the advent of no-fault divorce, couples would circumvent statutory restraints by lying about the existence of one of the statutory grounds for divorce in their state.[45] The statutory law began to catch up with this collusive behavior in 1970.[46] That year, California enacted the first no-fault divorce statute.[47] Other states soon followed, and all states

37. *Id.*

38. Starnes, *supra* note 24, at 985. Although the fault-based rationale could explain some alimony awards, that rationale only explains why a "guilty" spouse would pay alimony to an "innocent" spouse. *Id.*

39. GROSSMAN & FRIEDMAN, *supra* note 34, at 161. The issuance of divorce in practice sometimes differed from the statutorily accepted grounds and the articulated policy rationales. *See id.* at 163 ("The formal official law . . . had absolutely no relationship to what was happening on the ground. . . . [D]ivorce was a matter of routine—courts simply acted as rubber stamps; . . . a messy system of lies and collusion was in effect; and judges, for the most part, buried their heads in the sand.").

40. *Id.* at 195.

41. Edward W. Cooey, *The Exercise of Judicial Discretion in the Award of Alimony*, 6 LAW & CONTEMP. PROBS. 213, 219–20 (1939).

42. GROSSMAN & FRIEDMAN, *supra* note 34, at 195.

43. *Id.* at 163–64.

44. *Id.* at 172.

45. *See id.* at 167–68 (describing examples of such collusion, including faked evidence of adultery, in New York).

46. *See id.* at 176 ("The *legal* story of divorce in the twentieth century was basically of how this dual system decayed—at first rather slowly, then, after 1970, in almost a helter-skelter rush.").

47. *Id.*; *see also* Act of Sept. 4, 1969, ch. 1608, § 4506, 1969 Cal. Stat. 3313, 3324 (current version at CAL. FAM. CODE § 2310 (West 2004)) (listing "[i]reconcilable differences" as a ground for divorce).

now have no-fault divorce.[48] Alimony, however, survived the no-fault-divorce revolution.[49] On the one hand, alimony's continued existence makes little sense because no-fault divorce once again confirmed, at least in principle, that divorce results in a clean break and thus terminates a spouse's ongoing duty to support.[50] Yet, on the other hand, its persistence is reasonable because property distribution and alimony awards are closely related. Property distribution alone may be inadequate to support an ex-spouse because many couples do not have sufficient capital assets.[51] Further, dependent spouses may have a need for alimony regardless of whether fault is considered in divorce proceedings. Indeed, divorce often results in "economic disaster" for women.[52]

In the twenty-first century, alimony statutes continue to authorize judges to make awards in equity.[53] Concurrently, however, couples increasingly choose to craft separation agreements.[54] These agreements enable spouses to agree contractually on many different issues, including property distribution and alimony.[55] Although courts historically reviewed these agreements with suspicion, they now afford them substantial deference to promote more amicable divorces.[56]

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48. GROSSMAN & FRIEDMAN, *supra* note 34, at 177–78. New York, the last state to resist the no-fault divorce movement, finally joined the other states in 2010. *Id.* at 178; *see also* Domestic Relations Law—No Fault Divorce, ch. 384, § 1(7), 2010 N.Y. Laws Reg. Sess. 1169, 1169 (codified at N.Y. DOM. REL. LAW § 170(7) (McKinney 2010)) (allowing for divorce if "[t]he relationship between husband and wife has broken down irretrievably for a period of at least six months").

49. Interestingly, twenty-two states still authorize judges to consider fault when determining alimony awards. GROSSMAN & FRIEDMAN, *supra* note 34, at 209; *see also, e.g.*, Mani v. Mani, 869 A.2d 904, 917 (N.J. 2005) ("[W]e hold that to the extent that marital misconduct affects the economic *status quo* of the parties, it may be taken into consideration in the calculation of alimony.").

50. Starnes, *supra* note 24, at 988.

51. *See* AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 26 (2002) ("Few divorcing couples have capital assets sufficiently large to provide an adequate substitute for any but the most modest of alimony awards.").

52. ALISON CLARKE-STEWART & CORNELIA BRENTANO, DIVORCE: CAUSES AND CONSEQUENCES 96–97 (2006).

53. GROSSMAN & FRIEDMAN, *supra* note 34, at 204.

54. *Id.* at 212. Today, at least half of divorcing couples use separation agreements. *Id.* at 213.

55. GREGORY ET AL., *supra* note 11, at 111.

56. GROSSMAN & FRIEDMAN, *supra* note 34, at 213.

And although courts award alimony less frequently than they did in the past,[57] they continue to award it in a significant number of cases. In 2010, approximately 392,000 adults received alimony payments.[58] The median amount of alimony received was $8,279 per year.[59] Ninety-seven percent of alimony recipients were female,[60] and 73 percent of female alimony recipients were aged forty-five or older.[61]

B. Alimony's Various Contemporary Justifications

Many legal scholars and practitioners remain in favor of alimony even though it lacks a dominant, accepted theoretical framework.[62] Nevertheless, scholars acknowledge that the law of alimony needs theoretical justification in order to promote consistency and

57. Pamela Laufer-Ukeles, *Selective Recognition of Gender Difference in the Law: Revaluing the Caretaker Role*, 31 HARV. J.L. & GENDER 1, 23 (2008). Unfortunately, comprehensive national data on the percentage of divorced women receiving alimony are unavailable because the U.S. Census Bureau stopped collecting state data about divorce in 1995. GROSSMAN & FRIEDMAN, *supra* note 34, at 204. In 1990, 15.5 percent of divorced or separated women were awarded alimony. GORDON H. LESTER, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SER. P-60, NO. 173, CHILD SUPPORT AND ALIMONY: 1989, at 12 (1991), *available at* http://www2.census.gov/prod2/popscan/p60-173.pdf.

58. *See supra* note 11.

59. U.S. Bureau of Labor Statistics & U.S. Census Bureau, *Source of Income in 2010—People 15 Years Old and Over, by Income of Specified Type in 2010, Age, Race, Hispanic Origin, and Sex*: *Both Sexes, 15 Years and Over, All Races*, http://www.census.gov/hhes/www/cpstables/032011/perinc/new08_001.htm (last updated Sept. 13, 2011). The mean value received was $12,993 per year. *Id.*

60. *See supra* note 11.

61. Of the 380,000 female alimony recipients in 2010, 220,000 were between the ages of forty-five and sixty-four, and 58,000 were sixty-five or older. *See* U.S. Bureau of Labor Statistics & U.S. Census Bureau, *Source of Income in 2010—Number with Income and Mean Income of Specified Type in 2010 of People 15 Years Old and Over, by Age, Race, and Hispanic Origin, and Sex: Female, 45 to 64 Years*, U.S. CENSUS BUREAU, http://www.census.gov/hhes/www/cpstables/032011/perinc/new09_017.htm (last updated Sept. 13, 2011) (providing income statistics for women between the ages of forty-five and sixty-four); U.S. Bureau of Labor Statistics & U.S. Census Bureau, *Source of Income in 2010—Number with Income and Mean Income of Specified Type in 2010 of People 15 Years Old and Over, by Age, Race, and Hispanic Origin, and Sex: Female, 65 Years and Over*, U.S. CENSUS BUREAU, http://www.census.gov/hhes/www/cpstables/032011/perinc/new09_018.htm (last updated Sept. 13, 2011) (providing income statistics for women sixty-five years of age or older); *supra* note 11.

62. *See* AM. LAW INST., *supra* note 51, at 24–25 ("At least in long-term marriages one . . . finds a widespread view that marital dissolution should not dissolve all financial ties between the former spouses if the result would be a significant disparity in the spouses' post-dissolution financial standing. However this apparent consensus exists only in very general terms, and has produced no dominant theory to explain the alimony award.").

predictability.[63] Some scholars continue to support the traditional need-based rationale whereas some borrow from contract or partnership principles. Others explain alimony as compensation for economic losses. These theories exist simultaneously both in the academic literature and, to varying degrees, in statutes and judicial decisions.

This Note recognizes that courts award alimony for different reasons in different situations and discusses the cohabitation question within this complicated theoretical framework. Certainly, the existence of multiple alimony theories is problematic because it may lead to unpredictability and inconsistency, especially if courts and scholars do not agree on when to rely on different theoretical bases for awarding alimony. This Note does not, however, attempt to pick one theory that courts should apply in all situations. The reality is that courts and legislatures apply different theories in different contexts. And indeed, the existence of different theories for different contexts has some benefits. The detriments of one theory might have little impact in one context whereas they could render an alimony award inapposite in another context. An ex-spouse with a modest post-divorce income, for example, might not need alimony to provide for basic expenditures, but she may have suffered economic losses as a result of her marriage and therefore deserve compensation. The advantages and disadvantages of each theory are thus important as they indicate when judges might apply one theory instead of another. The reason that a judge awards alimony is relevant to answering the cohabitation question. What follows is a brief description of the various theories courts reference in making decisions about alimony.

1. *Need*. Many courts and statutes continue to emphasize that alimony depends on the financial need of the recipient and on the supporting spouse's ability to pay.[64] Continuing to apply the need-

63. *See, e.g.*, *id.* at 27 ("The absence of any systematic theory of alimony in modern divorce law presents difficulties that extend to the law of marital property. The law of alimony needs a justification that can support a law operating more consistently, more reliably, and more predictably.").

64. *See, e.g.*, N.C. GEN. STAT. ANN. § 50-16.3A(a) (West 2000) ("The court shall award alimony to the dependent spouse upon a finding that one spouse is a dependent spouse, that the other spouse is a supporting spouse and that an award of alimony is equitable after considering all relevant factors . . . ."); Gayet v. Gayet, 456 A.2d 102, 103 (N.J. 1983) ("[T]he court must consider, among other factors, 'the actual need and ability to pay of the parties . . . .'" (quoting N.J. STAT. ANN. § 2A:34-23 (1980))).

based theory in the wake of no-fault divorce makes some sense because the specialization of labor within a marriage may contribute to a spouse's need upon divorce. A spouse who takes a less lucrative job or puts her career on hold to care for children—even for only a few years—will probably never recover her lost earning capacity and may thus need alimony.[65] If a woman divorces at a relatively young age, she may have small children and still need to juggle work and family.[66] Alternatively, if an ex-spouse has been out of the workforce for many years, prospective employers may find that she has little market value because she has limited recent work experience outside the home.[67] Thus, because this theory focuses on the ex-spouse's financial need,[68] ex-spouses who do not actually *need* alimony—even if they incurred opportunity costs during their marriage—would not qualify for alimony under this theory.[69]

Critics of the need-based theory highlight two principal difficulties. First, there is no clear definition of what level of support satisfies "need."[70] Decisions variously conflate need with subsistence, with a middle-class lifestyle, or with the prior marital standard of living.[71] Second, the need-based approach may not explain satisfactorily why the ex-spouse, as opposed to the state or another entity, should provide continuing support in the wake of no-fault divorce.[72]

2. *Contract and Partnership*. The contract and partnership theories help to explain why the ex-spouse, as opposed to another entity, should be obligated to support the other ex-spouse after a

65. Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts, and Dissociation Under No*-Fault, 60 U. CHI. L. REV. 67, 81 (1993); *see also* Jacob Mincer & Solomon Polachek, *Family Investments in Human Capital: Earnings of Women*, *in* NAT'L BUREAU OF ECON. RESEARCH, ECONOMICS OF THE FAMILY: MARRIAGE, CHILDREN, AND HUMAN CAPITAL 397, 415 (Theodore W. Schultz ed., 1973), *available at* http://www.nber.org/chapters/c2973.pdf (noting that increased time spent at home results in a "net depreciation of earning power").

66. Starnes, *supra* note 65, at 82.

67. *Id.* at 81.

68. Collins, *supra* note 17, at 40.

69. This focus on need instead of on loss distinguishes the need-based theory from the economic-damages approach discussed *infra*, Part I.B.3.

70. Collins, *supra* note 17, at 41 (internal quotation marks omitted); *see also* Ira Mark Ellman, *The Theory of Alimony*, 77 CALIF. L. REV. 1, 4 (1989) ("[T]he definition of 'need'—the most fundamental issue created by [alimony] statutes—is hopelessly confused.").

71. Ellman, s*upra* note 70, at 4.

72. Collins, *supra* note 17, at 40–41.

divorce. The idea that ex-spouses deserve alimony based on one of these theories is thus in part pragmatic. These theories borrow from already-established legal principles. Both, however, have deficiencies.

The law generally treats marriage as a species of contract.[73] Indeed, the contractual rights and duties of spouses can be inferred from the marriage vows.[74] Although the specific rights and duties to which the spouses contract may depend on each spouse's subculture and social class, the spouses essentially contract for future spousal services.[75] Parties to the marriage contract include not only the spouses, but also the state.[76] The state's presence as a party explains why it can confer duties and benefits as well as determine when the marriage ends.[77] The contract approach construes divorce as a breach of the marriage contract and alimony as damages for that breach.[78] Unfortunately, contract theory may not provide justification for all instances in which courts award alimony.[79] Some scholars also say that the contract theory's conception of damages is problematic. The idea that one party has breached the marriage contract does not easily fit within the no-fault framework. And even if no-fault divorce did not complicate this theory, the contract approach often does not prescribe an appropriate amount or duration for alimony payments.[80]

The partnership theory also adopts existing legal principles, but it does not share some of the contract theory's weaknesses. A significant body of scholarship supports the view that marriage is an economic partnership.[81] According to one proponent, partnership theory is a "richer" model than the contract approach and has significant normative appeal because it is based on an egalitarian framework.[82] Under the partnership approach, divorce does not

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73. GREGORY ET AL., s*upra* note 11, at 33.

74. Lloyd Cohen, *Marriage, Divorce, and Quasi Rents; Or "I Gave Him the Best Years of My Life*," 16 J. LEGAL STUD. 267, 272 (1987).

75. *Id.* at 273.

76. GREGORY ET AL., s*upra* note 11, at 33.

77. *Id.* at 33–34.

78. Collins, *supra* note 17, at 42.

79. Treating marriages as contracts may work better in cases in which the parties entered into a written prenuptial agreement. Ellman, *supra* note 70, at 32. Indeed, some scholars strongly criticize the contract approach in the absence of a written agreement. *See, e.g.*, *id.* at 33 (arguing that applying contract principles "is no more than a concealed way of vindicating the court's own preferences" and only "purport[s] to follow the parties' intentions").

80. Collins, *supra* note 17, at 42.

81. *Id.* at 43 & n.94.

82. Starnes, *supra* note 65, at 119.

automatically terminate the couple's shared marital enterprise. Rather, the spouse who earns less should receive a "buyout" because divorce is a dissolution of the partnership.[83] The analogy to a partnership accounts for the specialization of labor within a marriage. Critics note, however, that many of the default rules of business partnership law may not apply to spouses.[84] In practice, courts generally do not explicitly apply partnership principles in divorce proceedings.[85]

3. *Economic Damages or Compensation*. This theory focuses on the spouse's economic damages that stem from the marriage itself. The American Law Institute (ALI) adopted this basic idea: Alimony serves as compensation for economic losses, not as payment for future need.[86] To a certain extent this approach may resemble the partnership theory, but it does not share the same problems.

Although states have not officially adopted this theory as the dominant framework,[87] courts do apply it in some circumstances. For example, a majority of jurisdictions emphasize the spouse's economic damages in "diploma dilemma" cases.[88] In those cases, one spouse has sacrificed career opportunities to support the other spouse's schooling but never realizes any financial benefits because the couple divorces shortly after the other spouse graduates.[89] Most states hold that the spouse who sacrificed career opportunities has a right to be compensated for her financial contributions to the professional

83. *Id.* at 139.

84. Ellman, *supra* note 70, at 40.

85. Collins, *supra* note 17, at 43.

86. *See* AM. LAW INST., *supra* note 51, § 5.02 cmt. a (referring to alimony as both a "residual category" of financial awards unrelated to spousal support and as "compensatory payments"). Scholars articulated economic-loss-based theories well before the ALI published its recommendations. *See, e.g.*, Elisabeth M. Landes, *Economics of Alimony*, 7 J. LEGAL. STUD. 35, 63 (1978) ("The empirical results in this paper suggest that the alimony system, as administered, acts to compensate wives for their opportunity costs incurred by entering and investing in marriage. This interpretation of the economic function of alimony is directly opposed to the common allegation that alimony is an 'anachronistic' manifestation of the wife's dependency upon her husband.").

87. Hardy, *supra* note 33, at 334.

88. *See, e.g.*, Guy v. Guy, 736 So. 2d 1042, 1046–47 (Miss. 1999) ("We adopt a similar approach [to other jurisdictions], allowing the supporting spouse to be reimbursed for putting the student spouse through school where the supported spouse obtained a degree and then leaves the supporting spouse.").

89. Downs v. Downs, 574 A.2d 156, 157 (Vt. 1990).

education of the other spouse.[90] Some courts have also applied a compensation rationale when the ex-spouse has worked as a homemaker in a marriage of long duration.[91] Moreover, some alimony statutes now explicitly recognize homemaker contributions.[92]

4. *Practical Implications*. As suggested by the preceding discussion of the modern theories behind alimony awards, courts and legislatures do not follow one model all the time. Pure "at law" remedies—such as damages for breach of the marriage contract—do not support awards in all situations in which alimony is awarded. Alimony statutes thus incorporate significant discretion and often blend alimony theories. Tennessee's statute, for example, directs courts to consider both need and homemaker contributions, among other factors, in determining alimony.[93]

This Note argues that the reason a court awarded alimony in the first place should inform a subsequent decision to modify the alimony award. This argument is grounded in two principal concerns. First, to the extent feasible under a system in which judges award alimony in equity,[94] awards should be consistent to serve those equitable purposes. The parties should understand why a court awarded alimony and be able to predict under what circumstances payments will end. The parties should feel that they are treated fairly when compared to other divorcing couples. Second, without a theoretical basis for their decisions, courts and legislatures may be more likely to incorporate moral, rather than legal, judgments into their alimony rulings. Thus, the justifications that courts use in awarding alimony should be an important factor in determining the legal effect of

90. *See, e.g.*, *In re* Marriage of Francis, 442 N.W.2d 59, 62 (Iowa 1989) (holding that a spouse who supports the other spouse through professional school should be compensated); *Guy*, 736 So. 2d at 1046–47 (same); Bold v. Bold, 574 A.2d 552, 556 (Pa. 1990) (same); Washburn v. Washburn, 677 P.2d 152, 153 (Wash. 1984) (en banc) (same).

91. *See, e.g.*, Clapp v. Clapp, 653 A.2d 72, 74 (Vt. 1994) (holding that "one purpose of maintenance under [Vermont's alimony statute, VT. STAT. ANN. tit. 15, § 752(a) (1993)] is to compensate a homemaker for contributions to family well-being not otherwise recognized in the property distribution").

92. *See, e.g.*, TENN. CODE ANN. § 36-5-121(i)(10) (2010 & Supp. 2011) (stating that courts should consider "[t]he extent to which each party has made such tangible and intangible contributions to the marriage as monetary and homemaker contributions, and tangible and intangible contributions by a party to the education, training, or increased earning power of the other party").

93. *Id.* § 36-5-121(i).

94. *See supra* note 53 and accompanying text.

cohabitation on alimony. The effect of specific theories on the cohabitation question is discussed in Part IV.

Before proceeding, it should be noted that nearly every jurisdiction terminates alimony payments if the recipient remarries.[95] Indeed, many state statutes explicitly authorize the termination of alimony upon remarriage.[96] Although the remarriage-termination rule is outside the scope of this Note, it raises related questions. As long as alimony remains need-based and tied to the spousal duty to support, courts may have reason to terminate alimony upon a recipient's remarriage. To the extent that alimony is based on a different rationale—be it contract, partnership, or economic-damages theories—even the remarriage-termination rule may no longer be justified.[97]

II. DYNAMIC COHABITATION NORMS AND OUTDATED LAWS

Although cohabitation has traditionally been an uncommon phenomenon in the fabric of American life, the frequency and acceptance of cohabitation have risen dramatically since 1970. Although most states no longer criminalize cohabitation, they also generally do not afford significant legal protections to cohabitants. Both the recent social-science research and the lack of legal protections for cohabitants should influence how states answer the cohabitation question.[98]

95. CLARK, *supra* note 22, at 665.

96. Starnes, *supra* note 24, at 977; *see also, e.g.*, ARIZ. REV. STAT. ANN. § 25-327(B) (2007) ("Unless otherwise agreed to in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated on . . . the remarriage of the party receiving maintenance.").

97. For a more thorough treatment of the remarriage-termination rule, see generally Starnes, *supra* note 24.

98. Considering social-science data is especially desirable in this context. To understand the practical effect any answer to the cohabitation question will have on ex-spouses, courts and legislatures must understand the realities of cohabitation in the twenty-first century. This is necessary because alimony rulings are always dependent on the realities of ex-spouses' social and economic relationships. Therefore, if courts adjust their understanding of the consequences of cohabitation, as recent social-science research would suggest, *see infra* Part II, then courts should also adjust their application of the various theories of alimony in the cohabitation context, *see infra* Part IV.

A. The Increasing Prevalence and Acceptance of Cohabitation

Scholars use various descriptions—from "meteoric"[99] to "extraordinary"[100] to "one of the remarkable social changes of our era"[101]—to convey the rise in cohabitation over the last few decades. Although in the past the great majority of Americans either married or remained single, the social landscape now looks markedly different.[102] Between 1970 and 2000, the number of cohabiting couples increased tenfold: Whereas approximately 500,000 couples cohabited in 1970, approximately five million couples cohabited in 2000.[103]

In 2010, the United States Department of Health and Human Services released a report that further documents this upward trend.[104] According to the report, half of all women and nearly half of all men reported cohabiting at some point in their lives,[105] and 9 percent of adults were cohabiting in 2002.[106] Moreover, the report documented what scholars have recognized for years: Cohabiting relationships are generally of short duration.[107] After a few years, the cohabiting

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99. GROSSMAN & FRIEDMAN, *supra* note 34, at 121.

100. Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309, 314 (2008).

101. Cynthia Grant Bowman, *Social Science and Legal Policy: The Case of Heterosexual Cohabitation*, 9 J.L. & FAM. STUD. 1, 2 (2007).

102. Before the 1970s, cohabitants were considered "statistically and socially invisible." *Id.* at 4.

103. GROSSMAN & FRIEDMAN, *supra* note 34, at 125. These numbers vary somewhat according to the source, but the dramatic increase is well documented. *Compare* Garrison, *supra* note 100, at 313 ("Between 1970 and 2000, the number of U.S. unmarried-cohabitant households rose almost ten-fold, from 523,000 to 4,880,000."), *with* Bowman, *supra* note 101, at 7 (noting the change "from fewer than 500,000 opposite-sex cohabiting couple households in 1960 to 4.9 million (almost ten million individuals)").

104. *See generally* PAULA Y. GOODWIN, WILLIAM D. MOSHER & ANJANI CHANDRA, NAT'L CTR. FOR HEALTH STATISTICS, U.S. DEP'T OF HEALTH & HUMAN SERVS., MARRIAGE AND COHABITATION IN THE UNITED STATES: A STATISTICAL PORTRAIT BASED ON CYCLE 6 (2002) OF THE NATIONAL SURVEY OF FAMILY GROWTH (2010), *available at* http://www.cdc.gov/nchs/data/series/sr_23/sr23_028.pdf (providing data on cohabitation and marriage in the United States based on a representative sample of 12,571 men and women aged fifteen to forty-four in 2002). The report defined cohabitation as "a man and woman living together in a sexual relationship without being married." *Id.* at 1.

105. *Id.* at 27–28 tbls.11 & 12.

106. *Id.* at 1.

107. *See, e.g.*, Pamela J. Smock, *Cohabitation in the United States: An Appraisal of Research Themes, Findings, and Implications*, 26 ANN. REV. SOC. 1, 3 (2000) ("[A]bout 55% of cohabiting couples marry and 40% end the relationship within five years of the beginning of the cohabitation. Only about one sixth of cohabitations last at least three years and only a tenth last five years or more." (citations omitted)).

relationship usually terminates in one of two ways: either the couple terminates their relationship or they marry, so they are no longer classified as cohabitants. Only 31 percent of women and 24 percent of men remained in their first cohabiting relationship for three or more years.[108] Only 16 percent of women and 13 percent of men remained in cohabiting relationships after five years.[109]

Although remarkably comprehensive in many aspects, the report fails to account for the increasing rate of cohabitation among senior citizens, who are most likely to have been awarded long-term or permanent alimony.[110] Fortunately, another survey tracked cohabitation among "older adults," which it defined as people over the age of fifty.[111] In 2000, 1,088,428 older adults, who equaled 4 percent of the unmarried older adult population, were cohabiting.[112] And nearly 9 percent of unmarried adults between the ages of fifty-one and fifty-nine were cohabiting.[113] Moreover, as baby boomers continue to enter this group, these percentages are expected to increase.[114]

There are several reasons why some older adults cohabit, even if they did not do so earlier in their lifetimes. First, older cohabitants may refrain from remarriage because their previous marriage ended badly. Of all Americans over the age of fifty cohabiting in 2000, 71 percent were either separated from their spouses or divorced.[115] Second, older adults' financial situations are often complicated.[116] They may want to preserve their assets for children from a prior

108. GOODWIN ET AL., *supra* note 104, at 34–35 tbls.18 & 19.

109. *Id.*

110. Alimony awards have shifted from being permanent support to being short-term awards; permanent alimony is generally only available to women whose marriages endured for many years. GROSSMAN & FRIEDMAN, *supra* note 34, at 203–04.

111. *See generally* Susan L. Brown, Gary R. Lee & Jennifer Roebuck Bulanda, *Cohabitation Among Older Adults: A National Portrait*, 61B J. GERONTOLOGY: SOC. SCI. S71 (2006) (using data from the 2000 Census and the 1998 Health and Retirement Study to analyze cohabitation among older adults).

112. *Id.* at S74–S75. Data from the Health and Retirement Study revealed slightly higher percentages. *Id.* at S75.

113. *Id.* at S75.

114. *Id.* at S78.

115. *Id.* at S75 tbl.1.

116. Steven K. Berenson, *Should Cohabitation Matter in Family Law?*, 13 J.L. & FAM. STUD. 289, 313 (2011).

relationship instead of sharing those assets with a cohabitant.[117] Further, older adults may lose sources of income—such as certain social-security and pension benefits—if they marry.[118]

A major question is the extent to which cohabitants of all ages become economically interdependent. Research indicates that cohabitants financially support each other less than do married couples.[119] The extent to which cohabitants do become economically interdependent, however, is debated.[120] This question demands further research and has major significance for this Note's discussion of economic need in Part IV.

Finally, just as the frequency of cohabitation has increased dramatically since 1970, social acceptance of cohabitation has also increased. In the mid-1900s, cohabitation outside of marriage was widely viewed as shameful.[121] By the mid-1970s, however, attitudes were changing—at least among young people.[122] In 1981, 40 percent of survey respondents approved "of men and women living together without being married if they want to."[123] Forty-five percent disapproved.[124] In response to a similar question in 2007, 55 percent of respondents approved whereas only 27 percent disapproved.[125]

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117. *Id.* The cohabitants may also fear the emotional impact that a remarriage might have on those children. *Id.*

118. Brown et al., *supra* note 111, at S72. Remarriage also generally terminates alimony. *See supra* notes 95–96 and accompanying text.

119. Garrison, *supra* note 100, at 323.

120. *Compare id.* ("[Cohabitants] are *much* more likely [than married couples] to split expenses instead of pooling their resources." (emphasis added)), *with* Bowman, *supra* note 101, at 23 ("It is true that cohabitants are somewhat less likely than married couples to pool their income. However, a majority of both cohabitants and married couples *do* maintain joint finances. . . . 55% [of cohabitants] *do* join their incomes." (citation omitted)).

121. Garrison, *supra* note 100, at 311.

122. *See* Arland Thornton & Linda Young-DeMarco, *Four Decades of Trends in Attitudes Toward Family Issues in the United States: The 1960s Through the 1990s*, 63 J. MARRIAGE & FAM. 1009, 1023 (2001) ("[I]n the mid-1970s more than half of all high school seniors reported that a man and woman living together without being married were 'doing their own thing and not affecting anyone else,' and almost another fifth said that cohabiting couples were 'experimenting with a worthwhile alternative lifestyle.'" (citation omitted)).

123. PEW RESEARCH CTR., THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES 66 (2010), *available at* http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf.

124. *Id.*

125. *Id.*

B. Outdated Cohabitation Laws and the Lack of Legal Protections

Historically, the law either ignored or criminalized cohabitation.[126] In 1962, the year when the Model Penal Code[127] was first published, a majority of states criminalized nonmarital cohabitation.[128] The Model Penal Code itself, however, did not criminalize cohabitation,[129] and in the 1970s and 1980s many state bans were repealed or narrowed to target only public sexual behavior.[130] Yet a handful of statutes remain on the books.[131]

Any bans that remain today—as well as any related laws that penalize private sexual behavior between consenting adults—are effectively void after the Supreme Court's 2003 decision in *Lawrence v. Texas*.[132] In *Lawrence*, the Court declared a Texas statute criminalizing sexual activity between same-sex adults to be unconstitutional.[133] The statute at issue violated the petitioners' right to liberty under the Due Process Clause of the Fourteenth Amendment.[134] This same right to liberty applies to heterosexual cohabitants. Subsequent to *Lawrence*, the Seventh Circuit noted that "[i]t is impossible to see how an unmarried heterosexual couple in a long-term relationship could receive less protection [than a homosexual couple]."[135] When confronted with this issue, state courts generally agree.[136]

The extent to which the law otherwise protects unmarried cohabitants, however, is limited. There is no comprehensive law of cohabitation in the United States.[137] In every American jurisdiction,

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126. GROSSMAN & FRIEDMAN, *supra* note 34, at 121.

127. MODEL PENAL CODE (Proposed Official Draft 1962).

128. Margaret M. Mahoney, *Forces Shaping the Law of Cohabitation for Opposite Sex Couples*, 7 J.L. & FAM. STUD. 135, 141 (2005).

129. *Id.*

130. GROSSMAN & FRIEDMAN, *supra* note 34, at 122.

131. Mahoney, *supra* note 128, at 147.

132. Lawrence v. Texas, 539 U.S. 558 (2003).

133. *Id.* at 578–79.

134. *Id.* at 578.

135. Christensen v. Cnty. of Boone, Ill., 483 F.3d 454, 463 (7th Cir. 2007) (per curiam).

136. *See, e.g.*, Hobbs v. Smith, No. 05 CVS 267, 2006 WL 3103008, at *1 (N.C. Super. Ct. Aug. 25, 2006) (holding that North Carolina's statute criminalizing cohabitation "violates plaintiff's substantive due process right to liberty as explained in *Lawrence v. Texas*"). Case law on this issue is sparse, however, because enforcement of criminal cohabitation statutes is rare. GROSSMAN & FRIEDMAN, *supra* note 34, at 122.

137. Anna Stepień-Sporek & Margaret Ryznar, *The Legal Treatment of Cohabitation in Poland and the United States*, 79 UMKC L. REV. 373, 378 (2010).

unmarried cohabitants have fewer legal rights and duties than do married partners.[138] Moreover, the law generally does not recognize cohabitation as a legally significant status.[139]

The Court's holding in *Lawrence* and the persistent lack of legally recognized protections for cohabitants have important implications for the cohabitation question. First, *Lawrence* suggests that termination of alimony based on a recipient's post-divorce sexual conduct is an unconstitutional punishment. Second, courts' reluctance to recognize a legal duty between cohabitants highlights the financial uncertainty for an alimony recipient in a system where she risks losing financial support from both her ex-spouse as well as from her current cohabitant. This Note accounts for those constitutional and policy-based concerns in proposing a solution to the cohabitation question in the following Parts.

III. VARIATIONS, AMBIGUITIES, AND INCONSISTENCIES ACROSS JURISDICTIONS

Rising rates of cohabitation and changing social mores have increasingly led state courts and legislatures to consider the cohabitation question.[140] This Part details the current variation in case law and statutes across jurisdictions. First, it highlights some factors that affect how courts and legislatures answer the cohabitation question. Second, it explains the majority rule in states without specific statutory guidance. It then analyzes statutes that explicitly address the cohabitation question. Finally, it explores litigation across jurisdictions pertaining to what constitutes cohabitation and diminished need.

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138. *Id.*

139. Mahoney, *supra* note 128, at 158.

140. Historically, courts took one of two approaches. Some decided that an alimony recipient's post-divorce cohabitation had no effect on alimony payments because the law did not recognize cohabitation as a legally significant status. *See, e.g.*, Bowman v. Bowman, 79 N.W.2d 554, 561, 563 (Neb. 1956) (reversing the trial court's alimony modification on the ground of cohabitation because the relationship between the ex-wife and her new partner was "meretricious rather than marital"). Other courts, by contrast, terminated an ex-wife's alimony as punishment for her "illicit" behavior. *See, e.g.*, Weber v. Weber, 140 N.W. 1052, 1055 (Wis. 1913) ("[I]f the wife, without the fault of the husband, and without any adequate excuse or palliation, deliberately chooses a life of shame and dishonor, has no other equitable claim upon property in the hands of the husband, and he is compelled by his daily toil to earn the money paid to her, the court may make the misconduct of the wife the ground for cutting off all alimony, or for reducing the same as may, in its discretion, seem just and equitable under all the circumstances of the case.").

A. Factors Affecting How Courts and Legislatures Respond

Decisions to modify or terminate alimony based upon cohabitation are often grounded in fairness concerns. Some courts specifically state two issues that arise when an alimony recipient cohabits: (1) that an alimony recipient might unfairly receive financial support from both her ex-spouse and her cohabitant, and (2) that an alimony recipient might use her alimony payments to support her cohabitant.[141]

Because alimony recipients generally lose their alimony when they remarry, courts fear that failing to terminate or modify alimony upon cohabitation by an alimony recipient may discourage remarriage.[142] Thus, some courts and legislatures may equate remarriage and cohabitation in the alimony context in an attempt to encourage remarriage.

Finally, whether explicitly noted or simply implied, moral assessments may influence judicial and legislative responses. The language in opinions and statutes sometimes reflects a negative moral assessment of cohabitation.[143] One ex-wife expressed frustrations that likely extend to other alimony recipients in her situation: "I don't know why . . . I'm getting tarred and battered because I have a boyfriend."[144] Although her ex-husband had lived with his second wife before they married without any negative repercussions,[145] the court terminated the ex-wife's alimony because she cohabited and failed to overcome a presumption of mutual support.[146] Moral assessments,

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141. *E.g.*, Austin v. Austin, 866 N.E.2d 74, 77 (Ohio Ct. App. 2007).

142. AM. LAW INST., *supra* note 51, § 5.09 cmt. a; *see also* Gayet v. Gayet, 456 A.2d 102, 105 (N.J. 1983) ("We respect the concerns of commentators that this approach to cohabitation may discourage marriage, at a time when human relationships have grown more and more transient.").

143. Georgia, for example, injects explicit moral distaste for cohabitation into its statute when it describes the relationship as "meretricious." *See* GA. CODE ANN. § 19-6-19(b) (2010) (defining cohabitation as "dwelling together continuously and openly in a *meretricious* relationship with another person, regardless of the sex of the other person" (emphasis added)). For an example of a court decision that offers a negative moral assessment of cohabitation, see *Love v. Love*, 626 S.E.2d 56 (S.C. Ct. App. 2006). In *Love*, the court found that "[b]ecause the State has 'a compelling interest in promoting marriage and discouraging meretricious relationships,' a rule allowing alimony to continue when the supported spouse cohabits without marrying is 'illogical and offensive to public policy.'" *Id.* at 59. (quoting Croom v. Croom, 406 S.E.2d 381, 382 (S.C. Ct. App. 1991) (per curiam)).

144. Rester v. Rester, 5 So.3d 1132, 1134 (Miss. Ct. App. 2008) (alteration in original) (quoting Beth Rester) (internal quotation mark omitted).

145. *Id.*

146. *Id.* at 1137.

along with other factors, affect judicial and legislative responses. The next Sections address how courts and legislatures respond to the cohabitation question.

B. Judicial Responses: The Development of the Majority Rule

Many states have not enacted explicit legislation pertaining to the cohabitation question. In the absence of explicit legislation, courts look to the general alimony statutes in their respective states.[147] Two statutory provisions often inform these courts' decisions. First, most alimony statutes provide for the modification of alimony upon a showing of substantially changed circumstances.[148] Second, many statutes explicitly authorize the termination of alimony upon remarriage.[149]

A minority of states without statutes addressing the cohabitation question automatically terminate alimony when the recipient cohabits.[150] These jurisdictions thus treat cohabitation and remarriage identically in the alimony context. The majority of jurisdictions without specific statutes, however, have rejected the rule that alimony payments are automatically terminated upon a finding of cohabitation. These states only modify or terminate alimony upon proof that the cohabitation has resulted in diminished need.[151] In *Garlinger v. Garlinger*,[152] a New Jersey court articulated a need-based test that became the majority rule.[153] The *Garlinger* court rejected an automatic-termination rule but held that cohabitation constituted a relevant factor in determining whether to modify alimony

147. A majority of states authorize modification of alimony by statute in certain circumstances. GREGORY ET AL., *supra* note 11, at 322–23.

148. *Id.*; *see also, e.g.*, ARIZ. REV. STAT. ANN. § 25-327(A) (2007) ("[T]he provisions of any decree respecting maintenance or support may be modified or terminated only on a showing of changed circumstances that are substantial and continuing . . . .").

149. *See supra* note 96 and accompanying text.

150. AM. LAW INST., *supra* note 51, § 5.09 cmt. a; *see also, e.g.*, ALA. CODE § 30-2-55 (LexisNexis 2011) (terminating alimony upon proof that the spouse receiving alimony "is living openly or cohabiting with a member of the opposite sex").

151. *See, e.g.*, Miller v. Miller, 892 A.2d 175, 182 (Vt. 2005) ("The majority rule in jurisdictions without a specific statute is that cohabitation by the recipient spouse can result in reduction or elimination of a maintenance award only if it improves the financial circumstances of the recipient spouse enough to substantially reduce the need for maintenance.").

152. Garlinger v. Garlinger, 347 A.2d 799 (N.J. Super. Ct. App. Div. 1975).

153. *See* Gayet v. Gayet, 456 A.2d 102, 104 (N.J. 1983) ("[T]he majority of jurisdictions have adopted an economic needs test . . . clearly defined in *Garlinger* . . . [and] used by other courts." (quoting Lillian Hamor, Note, *The Effect of Third Party Cohabitation on Alimony Payments*, 15 TULSA L.J. 772, 779 (1980))).

payments.[154] Under *Garlinger*, if the alimony recipient is financially supported by her cohabitant or uses her alimony payments to support her cohabitant, a court may modify or terminate alimony.[155] This approach recognizes that courts should not decrease alimony when the cohabitation does not affect the alimony recipient's financial need.

At its core, the need-based test seeks to balance conflicting interests. Courts recognize the concern that alimony recipients could choose cohabitation instead of marriage in order to continue receiving alimony.[156] At the same time, however, states are also concerned with "individual privacy, autonomy, and the right to develop personal relationships free from governmental sanctions."[157] Moreover, an alimony recipient would be unprotected if her alimony were terminated and her cohabitation subsequently ended.[158] By focusing on financial need, majority-rule jurisdictions seek to reject the "model of domestic relations that provided women with security in exchange for economic dependence and discrimination."[159] Majority-rule jurisdictions, however, struggle with defining financial need as well as defining cohabitation.[160]

Some courts may decide that some questions are better left to the legislative branch and refrain from making policy determinations related to the need-based test, such as whether to presume that the cohabitation diminished the alimony recipient's need. At least one court has explicitly called for legislative action:

> [A]ny changes in such declared policy must originate in the legislature. A number of states—most notably California, Illinois, and New York—have enacted statutes that specifically deal with this

154. *Garlinger*, 347 A.2d at 803.

155. *Id.*

156. *See supra* note 142 and accompanying text.

157. *Gayet*, 456 A.2d at 103.

158. *See* Gilman v. Gilman, 956 P.2d 761, 765 (Nev. 1998) ("[T]he test . . . recognizes the fact that a recipient spouse may be left largely unprotected, from an economic standpoint, if he or she breaks off a relationship with a cohabitant."). This concern is particularly worrisome because states created alimony in part to prevent ex-spouses from becoming wards of the state. *Id.*

159. *Gayet*, 456 A.2d at 104 (quoting Lepis v. Lepis, 416 A.2d 45, 54 (N.J. 1980)) (internal quotation mark omitted).

160. *See infra* Part III.D–E.

> problem. If changes in Arizona law are desirable, they should be left to legislative action and not to the courts.[161]

C. Varied Legislative Responses

Unlike the jurisdictions without specific statutes, some legislatures explicitly address the cohabitation question. These statutes vary widely. And although legislative guidance should direct courts in this area, these statutes are in reality often no more clear than the rules laid down by the common-law decisions they replace.

1. *Disagreement over the role of financial need.* A number of statutes follow the automatic-termination rule and thus direct courts to terminate alimony upon cohabitation without regard to a change in financial need.[162] Some of these statutes expressly analogize cohabitation to marriage and include both relationships in the same clause.[163]

California does not terminate alimony automatically, but it assumes that the cohabitation has decreased the alimony recipient's financial need: "Except as otherwise agreed to by the parties in writing, there is a rebuttable presumption, affecting the burden of proof, of decreased need for spousal support if the supported party is cohabiting with a person of the opposite sex."[164] If the court

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161. Smith v. Mangum, 747 P.2d 609, 612 (Ariz. Ct. App. 1987) (citation omitted).

162. *See, e.g.*, ALA. CODE § 30-2-55 (LexisNexis 2011) (terminating alimony upon proof that the spouse receiving alimony is cohabiting); 750 ILL. COMP. STAT. ANN. 5/510(c) (West 2009 & Supp. 2012) (same); N.C. GEN. STAT. ANN. § 50-16.9(b) (West 2000) (same); S.C. CODE ANN. § 20-3-150 (1985 & Supp. 2011) (same); UTAH CODE ANN. § 30-3-5(10) (LexisNexis 2007 & Supp. 2012) (same); VA. CODE ANN. § 20-109(A) (2008) (terminating alimony upon proof that the spouse has cohabited for a year or more).

163. *See, e.g.*, VA. CODE ANN. § 20-109(A) (2008) (terminating alimony, subject to two limited exceptions, when "the spouse receiving support has been habitually cohabiting with another person in a relationship analogous to marriage for one year or more"); *see also* ALA. CODE § 30-2-55 (LexisNexis 2011) (terminating alimony upon "proof that the spouse receiving such alimony has remarried or that such spouse is living openly or cohabiting with a member of the opposite sex").

164. CAL. FAM. CODE § 4323(a)(1) (West 2004). This Note sometimes discusses California's approach to various facets of the cohabitation question—even though California departs from the approaches taken by other states—for two principal reasons. First, California was the first state to enact a no-fault divorce statute, and other states followed. *See supra* notes 47–48 and accompanying text. Second, California has taken "dramatic step[s]" in addressing certain marriage-law and cohabitation issues before other states have taken such steps. *See* GROSSMAN & FRIEDMAN, *supra* note 34, at 10 ("The next dramatic step began, as usual, in California, in the famous case of *Marvin v. Marvin*[, 557 P.2d 106 (Cal. 1976) (en banc)]."). In essence, the California Supreme Court recognized that contracts between cohabitants to share any money

determines that circumstances have changed, it may modify or terminate alimony.[165] This statute thus gives courts some leeway when the recipient establishes that the circumstances do not result in diminished need.

Other statutes direct courts to intervene only if the cohabitation has actually resulted in diminished financial need—endorsing the majority rule in these jurisdictions without statutes.[166] Connecticut, for example, authorizes its courts to modify or terminate alimony "because the living arrangements cause such a change of circumstances so as to alter the financial needs of that party."[167] Likewise, Oklahoma courts may modify or terminate alimony upon changed circumstances "relating to [the] need for support or ability to support."[168] These statutes, however, do not indicate what constitutes diminished need. Further, many statutes do not elucidate whether the alimony payments should only be modified by the amount of a demonstrated change in need or whether cohabitation should itself serve as a signal that the recipient no longer needs support.

2. *Conflicting definitions of cohabitation.* The other major issue faced by courts interpreting cohabitation statutes is defining cohabitation with precision. Statutes that use the term "cohabitation" vary widely in whether they define it and, if they do, how they define it. Other statutes do not use the term at all, referring to it by another name.

States that define cohabitation in their statutes differ in how specifically they define the term. North Carolina, an automatic-

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and property could be legally enforced, *Marvin*, 557 P.2d at 110, which "caused a stir in legal circles, was widely reported in the papers, and was a topic of nervous humor on talk shows and in magazines." GROSSMAN & FRIEDMAN, *supra* note 34, at 10.

165. CAL. FAM. CODE § 4323(a)(1) (West 2004).

166. *See* CONN. GEN. STAT. ANN. § 46b-86(b) (West 2009 & Supp. 2012) (authorizing superior courts to modify, suspend, or terminate alimony upon a showing that the recipient "is living with another person under circumstances which the court finds should result in the modification, suspension, reduction or termination of alimony because the living arrangements cause such a change of circumstances as to alter the financial needs of that party"); FLA. STAT. ANN. § 61.14(1)(b)(1) (West 2012) (authorizing the court to reduce or terminate alimony upon proof that "a supportive relationship has existed between the obligee and a person with whom the obligee resides"); OKLA. STAT. ANN. tit. 43, § 134(C) (West 2001 & Supp. 2012) (granting the court the power to reduce or terminate alimony payments if cohabitation is alleged and there is "proof of substantial change of circumstances of either party to the divorce relating to need for support or ability to support").

167. CONN. GEN. STAT. ANN. § 46b-86(b) (West 2009 & Supp. 2012).

168. OKLA. STAT. ANN. tit. 43, § 134(C) (West 2001 & Supp. 2012).

termination state, defines cohabitation as "the act of two adults dwelling together continuously and habitually in a private heterosexual relationship even if this relationship is not solemnized by marriage, or a private homosexual relationship."[169] In North Carolina, evidence of cohabitation includes "the voluntary mutual assumption of those marital rights, duties, and obligations which are usually manifested by married people, and which include, but are not necessarily dependent on, sexual relations."[170]

Other statutory definitions provide less guidance for the courts but still highlight certain factors. Several statutes emphasize that the cohabitation must be continuous.[171] South Carolina's statute provides the most straightforward definition of continuity: "continued cohabitation" signifies "a period of ninety or more consecutive days."[172] Some states also require that cohabitation involves a conjugal relationship.[173] South Carolina does not state that the relationship must resemble marriage, but it does note that it must be "romantic."[174] Instead of defining cohabitation, California only states what the term does *not* require. In California, the couple need not hold themselves out as husband and wife.[175]

Finally, some state legislatures that did not address the cohabitation question in the past have recently clarified their definitions of cohabitation. In 2011, the governor of Massachusetts signed an alimony-reform act that took effect in 2012.[176] The statute provides that "[g]eneral term alimony shall be suspended, reduced or

169. N.C. GEN. STAT. ANN. § 50-16.9(b) (West 2000).

170. *Id.* North Carolina's discussion of what constitutes evidence of cohabitation closely resembles the definition of cohabitation from the sixth edition of *Black's Law Dictionary*. *See infra* note 189 and accompanying text.

171. *See, e.g.*, 750 ILL. COMP. STAT. ANN. 5/510(c) (West 2009 & Supp. 2012) (terminating alimony when the recipient "cohabits with another person on a resident, continuing conjugal basis").

172. S.C. CODE ANN. § 20-3-150 (1985 & Supp. 2001). Further, South Carolina's statute prevents couples from evading the ninety-day requirement. *See id.* ("The court may determine that a continued cohabitation exists if there is evidence that the supported spouse resides with another person in a romantic relationship for periods of less than ninety days and the two periodically separate in order to circumvent the ninety-day requirement.").

173. *See* OKLA. STAT. ANN. tit. 43, § 134(C) (West 2001 & Supp. 2012) ("[C]ohabitation means the dwelling together continuously and habitually of a man and a woman who are in a private conjugal relationship not solemnized as a marriage . . . ."); *supra* note 171.

174. S.C. CODE ANN. § 20-3-150 (1985 & Supp. 2011).

175. CAL. FAM. CODE § 4323(a)(2) (West 2004).

176. Act effective Mar. 1, 2012, ch. 124, 2011 Mass. Adv. Legis. Serv. (LexisNexis) (codified at MASS. ANN. LAWS ch. 208, § 49 (LexisNexis Supp. 2012)).

terminated upon the cohabitation of the recipient spouse when the payor shows that the recipient spouse has maintained a common household . . . with another person for a continuous period of at least 3 months."[177] A "common household" means that a couple "share[s] a primary residence together with or without others."[178] The statute also provides that courts may reinstate alimony that was suspended, reduced, or terminated on the ground of cohabitation if the cohabitation ends before the termination date in the original court order.[179]

Statutes that do not use the term cohabitation vary in what terms they use instead. Connecticut, for example, employs the phrase "living with another person."[180] And New York, the first state to enact a statute explicitly addressing the cohabitation question,[181] directs its courts to ask whether "the wife is habitually living with another man and holding herself out as his wife, although not married to such a man."[182] Florida's cohabitation statute, enacted in 2005,[183] likewise does not use the term cohabitation.[184] It provides an extensive, but not exhaustive, list of relevant factors in assessing whether a "supportive relationship" sufficient to modify or terminate alimony exists.[185] One factor is the extent to which the recipient and her partner "have held

177. MASS. ANN. LAWS ch. 208, § 49(d) (LexisNexis Supp. 2012).

178. *Id.*

179. *Id.*

180. CONN. GEN. STAT. ANN. § 46b-86 (West 2009 & Supp. 2012).

181. Prior to the 1970s, only New York had enacted a statute addressing cohabitation by an alimony recipient. J. Thomas Oldham, *Cohabitation by an Alimony Recipient Revisited*, 20 J. FAM. L. 615, 620–21 (1982). New York enacted its statute in 1938. Act of Mar. 26, 1938, ch. 161, § 1159, 1938 N.Y. Laws 682, 682–83 (current version at N.Y. DOM. REL. LAW (McKinney 2010)).

182. N.Y. DOM. REL. LAW § 248 (McKinney 2010). Some statutes explicitly note that alimony is only affected if the recipient is cohabiting with someone of the opposite sex. *See, e.g.*, ALA. CODE § 30-2-55 (LexisNexis 2011) (terminating alimony upon proof that the spouse receiving alimony "is living openly or cohabiting with a member of the opposite sex"); CAL. FAM. CODE § 4323 (West 2004) (creating a rebuttable presumption of decreased need for alimony if the recipient is "cohabiting with a person of the opposite sex"). *But see* GA. CODE ANN. § 19-6-19 (2010) ("'[C]ohabitation' means dwelling together . . . with another person, *regardless of the sex of the other person*." (emphasis added)).

183. Act effective June 10, 2005, ch. 2005-168, § 1(b), 2005 Fla. Laws 1726, 1727 (codified as amended at FLA. STAT. ANN. § 61.14(1)(b) (West 2012)). The 2005 enactment essentially codified the existing case law in Florida on the cohabitation question. Gladstone & Gladstone, *supra* note 14, at 45.

184. FLA. STAT. ANN. § 61.14(1)(b) (West 2012).

185. *Id.* § 61.14(1)(b)(2).

themselves out as a married couple."[186] Other relevant factors include the length of time that the couple has resided together "in a permanent place of abode," their "financial interdependence," the extent to which they have "supported" each other, any "property sharing or support" agreement, whether they have "worked together to create or enhance anything of value," whether they have purchased property together, and whether they have supported each other's children.[187]

D. Problems Defining Cohabitation in Litigation

States with specific statutes on the cohabitation question and states with common-law rules face similar problems in litigation. Litigation that touches upon the cohabitation question often turns on whether the recipient indeed "cohabited." Generally, parties disagree about two issues: first, what constitutes living together, and second, what facts in addition to common residency are required for courts to make a finding of cohabitation.

As a threshold matter, courts do not agree on whether the term cohabitation has a plain meaning.[188] Courts referring to the term's ordinary meaning have relied on the definition of cohabitation in the sixth edition of *Black's Law Dictionary*: "to live together as husband and wife. The mutual assumption of those marital rights, duties and obligations which are usually manifested by married people, including but not necessarily dependent on sexual relations."[189] *Webster's Third New International Dictionary* offers a similar definition: "to live together as husband and wife usually without a legal marriage having

186. *Id.*

187. *Id.*

188. Some jurisdictions hold that the term cohabitation—without an explicit provision in the separation agreement or a stipulation by the parties—is ambiguous and lacks a plain meaning. *See, e.g.*, Graev v. Graev, 898 N.E.2d 909, 914 (N.Y. 2008) ("[T]he word 'cohabitation' is ambiguous . . . neither the dictionary nor New York case law supplies an authoritative or 'plain' meaning. Similarly, courts in other states have not ascribed a uniform meaning to the word 'cohabitation' as used in separation agreements." (citation omitted)). Other courts, by contrast, have held that cohabitation does have an ordinary, plain meaning. *See, e.g.*, Adamson v. Adamson, 958 S.W.2d 598, 600–01 (Mo. Ct. App. 1998) (relying on the term's plain meaning and holding "that when a man and woman spend as much time together as their respective jobs allow, regularly engage in sexual relations . . . , purchase a home together," and engage in other similar activities, "such people are 'cohabiting' as that word is understood by reasonable people").

189. *See, e.g.*, Baker v. Baker, 566 N.W.2d 806, 811 (N.D. 1997) (citing BLACK'S LAW DICTIONARY 260 (6th ed. 1990)).

been performed."[190] Courts less frequently cite other definitions of the term that do not include an analogy to marriage; they "defin[e] cohabitation as merely living together in a sexual or intimate relationship."[191]

1. *Residency*. Regardless of whether courts determine that the term cohabitation has a plain meaning, courts often struggle to determine to what extent the couple must live together and for how long. Some courts do not require that couples reside together continuously, which leads to the problem that some casual dating relationships may be construed as cohabitation. When couples stay together at most five times a week, some courts find that the couple cohabited.[192] Similarly, in *In re Marriage of Susan*,[193] an appellate court affirmed that a couple that maintained separate residences and that did not share expenses had cohabited.[194] The *Susan* court emphasized that the couple dated for several years, often spent the night together, vacationed together, and spent holidays together.[195]

South Carolina's ninety-day requirement,[196] by contrast, provides clear guidance to courts so that judges are not forced to weigh the exact number of overnight stays that tips the scale in favor of a finding of cohabitation. Thus, applying its statute in a recent case, a South Carolina court found that a couple did not cohabit because "they did not spend ninety *consecutive* nights together."[197]

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190. *Id.* (citing WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 440 (1971)).

191. Smith v. Smith, 769 N.W.2d 591, 593 (Mich. 2008) (Corrigan, J., dissenting) (citing four dictionaries that offer such a definition).

192. *See, e.g.*, Rehm v. Rehm, 409 S.E.2d 723, 724 (N.C. Ct. App. 1991) (affirming the trial court's conclusion that the couple cohabited based on the trial court's finding that the couple stayed over as many as five nights per week, that the couple kissed goodbye at the door, that the couple took overnight vacations of more than one night, and that the parties had an exclusive, monogamous relationship). In some circumstances, however, courts may find cohabitation even when an unmarried couple does not live together continuously but otherwise acts as a cohabiting couple. *See, e.g.*, Adamson v. Adamson, 958 S.W.2d 598, 601 (Mo. Ct. App. 1998) (finding cohabitation as a matter of law when a couple "spend[s] as much time together as their respective jobs allow, regularly engage in sexual relations when they are together, purchase a home together (taking title as joint tenants), and sign a deed of trust declaring their intention to 'occupy, establish and use the [p]roperty as [their] principal residence'" (second and third alterations in original) (quoting the deed)).

193. *In re* Marriage of Susan, 856 N.E.2d 1167 (Ill. Ct. App. 2006).

194. *Id.* at 1170–71.

195. *Id.*

196. *See supra* note 172 and accompanying text.

197. Biggins v. Burdette, 708 S.E.2d 237, 239 (S.C. Ct. App. 2011).

2. *Additional elements.* Aside from determining the frequency of overnight stays that constitutes living together, courts also wrestle with what additional elements are required to constitute cohabitation. Not requiring additional elements leads to absurd results. In the Florida case *Craissati v. Craissati*,[198] described in the Introduction, an appellate court held that Patricia had cohabited with her cellmate in prison and thus terminated her alimony.[199] In that case the court required nothing more than the ex-wife sharing a prison cell.[200] As a general rule, courts have recognized that more than living together is required; otherwise, mere roommates would constitute cohabitants, and alimony recipients would be forced to live in isolation to receive alimony.[201]

Courts disagree on the importance of sexual relations in determining whether a couple cohabited. Some require sexual conduct.[202] Others do not.[203] Requiring sexual conduct prevents courts from classifying a mere roommate relationship as cohabitation. Making it a required element, however, would mean that if a couple indeed has a relationship akin to that of married partners, but does not have sex—if, for example, the male cohabitant is impotent—then the court would not find that they are cohabitants.[204]

Nor is it clear that requiring a sexual relationship in any definition of cohabitation brings courts closer to a coherent approach. There are certainly circumstances in which two people live together and have sex, but where few would consider the relationship to constitute cohabitation. A 2011 case illustrates this point. In *Myers v.*

198. Craissati v. Craissati, 997 So. 2d 458 (Fla. Dist. Ct. App. 2008).

199. *Id.* at 460.

200. *Id.* (Klein, J., dissenting).

201. *See, e.g.*, *In re* Marriage of Molloy, 635 P.2d 928, 930 (Colo. App. 1981) (holding that the ex-wife was not cohabiting because "there was no evidence of a sexual relationship, a romantic involvement, or even a homemaker-companion relationship" between the ex-wife and her cotenant); Austin v. Austin, 866 N.E.2d 74, 79 (Ohio Ct. App. 2007) (holding that cohabitation did not occur because the recipient's "living arrangement [wa]s nothing more than a business relationship").

202. *See, e.g.*, Haddow v. Haddow, 707 P.2d 669, 674 (Utah 1985) ("'[C]ohabitation' means to dwell together in a common residence and to participate in sexual contact that evidences a larger conjugal relationship.").

203. *See, e.g.*, *In re* Marriage of Sappington, 478 N.E.2d 376, 381 (Ill. 1985) ("We believe that when two people live together . . . it is the husband-and-wife-like relationship which bears the rational relationship to the need for support, not the absence or presence of sexual intercourse.").

204. *Cf. id.* (holding that it is possible for an impotent male to cohabit and clarifying that under Illinois law a conjugal relationship does not require sexual conduct).

Myers,[205] the alimony recipient moved into her parents' home, at least part time, and commenced an allegedly sexual relationship with her parents' teenage foster son.[206] The trial court held that the two requirements for cohabitation were met under Utah law: (1) the couple shared a common residence, and (2) the alimony recipient failed to carry her burden proving the lack of sexual conduct.[207] The Court of Appeals subsequently reversed, holding that the two lacked a relationship akin to marriage, even if they occupied the same household and engaged in sexual conduct.[208] The Supreme Court of Utah affirmed, explaining that

> [t]he ultimate question in this case was whether Ms. Meyers and [the foster child] were cohabiting, and Mr. Myers bore the burden on that issue. The existence of an intimate sexual relationship was relevant to the statutory inquiry, but Ms. Myers bore no specific burden of disproving it. Instead, it was Mr. Myers's burden to establish cohabitation by a preponderance of the evidence, and both parties were entitled to present—and did present—evidence they deemed relevant to that inquiry.[209]

Both the Court of Appeals and the Supreme Court of Utah recognized the unique circumstances in *Myers*. Even if the ex-wife had a sexual relationship with her parents' teenage foster son, finding cohabitation in *Myers* would not have served the underlying purpose of Utah's approach to the cohabitation question.[210] Indeed, this case neither resembled a marriage-like arrangement nor a relationship that resulted in diminished financial need on the part of the alimony recipient.

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205. Myers v. Myers, 266 P.3d 806 (Utah 2011).

206. *Id.* at 807. Ms. Myers denied that she had a sexual relationship with her parents' teenage foster son, and there was no direct evidence to contradict her assertion. Her ex-husband, however, used circumstantial evidence to suggest the existence of a sexual relationship. *Id.* at 807–08.

207. *Id.* at 808.

208. Myers v. Myers, 231 P.3d 815, 819 (Utah Ct. App. 2010), *aff'd*, 266 P.3d 806 (Utah 2011).

209. *Myers*, 266 P.3d at 812.

210. *Id.* at 809, 813–14 ("Even if Ms. Myers and M.H. had a sexual relationship and lived together under the same roof, their relationship had almost none of the other hallmarks of a marriage. . . . Their relationship may eventually have led to sexual intimacy, but that alone is insufficient to establish cohabitation.").

E. Problems Defining Diminished Need in Litigation

In jurisdictions that do not automatically terminate alimony if the recipient cohabits, litigation centers not only on the definition of cohabitation but also on the definition of diminished financial need. In addition, issues arise regarding who bears the burden of proof.

Courts applying the need-based test generally do not modify alimony when an alimony recipient's cohabitant incidentally benefits from fixed expenses that the alimony recipient pays.[211] For example, although a cohabitant may benefit from an alimony recipient's expenditure on heating in a shared residence, the cost of heat would remain constant even if the alimony recipient lived alone, and thus this expenditure does not indicate that the court should modify alimony.[212] Indeed, the fact that a cohabitant may benefit from an alimony recipient's payment of fixed expenses does not indicate that the ex-spouse herself has experienced any decrease in financial need.[213]

Whether sharing household expenses that are not fixed constitutes a change in circumstances sufficient to warrant a reduction in alimony payments, however, has engendered debate. Some states hold that if an alimony recipient purchased a cohabitant's food, it would be possible to find that she did not need that portion of her alimony.[214] Similarly, some courts consider whether an alimony recipient's cohabitant performs house maintenance and repairs.[215] The Vermont Supreme Court, however, has disagreed and has stated that "even if the new partner contributed equally to the expenses of the household, [the court] would not hold . . . that this alone is a

211. *See, e.g.*, Gilman v. Gilman, 956 P.2d 761, 765 (Nev. 1998) ("Shared living arrangements, unaccompanied by evidence of a decrease in the actual financial needs of the recipient spouse, are generally insufficient to call for alimony modification.").

212. Mitchell v. Mitchell, 418 A.2d 1140, 1143 (Me. 1980).

213. *Id.*

214. *See, e.g.*, Perri v. Perri, 608 N.E.2d 790, 795 (Ohio Ct. App. 1992) (noting that the trial court could find on remand that the recipient "was not in need of that portion of the alimony, if any, that directly benefited [the cohabitant], such as the cost of the food for him which she paid"); Olson v. Olson, 552 N.W.2d 396, 401 (S.D. 1996) ("[A]lthough it would be permissible for the court to consider any tangible increases in Judy's expenses arising from her companion's residing with her, such as increases in grocery or phone bills, the value of intangibles which do not actually increase Judy's living expenses, such as the fair rental value of her home, are irrelevant.").

215. *See, e.g.*, Van Dyke v. Steinle, 902 P.2d 1372, 1384 (Ariz. Ct. App. 1995) (noting that the house maintenance and repairs that an alimony recipient's cohabitant performed could be considered on remand in determining whether the court should reduce the recipient's alimony).

substantial improvement in the recipient spouse's financial circumstances so as to warrant a modification of maintenance."[216] According to the court,

> [t]his improvement cannot alone be changed circumstances unless [courts] are prepared to hold that a former spouse who takes a roommate to reduce expenses will lose the savings because of an offsetting reduction in maintenance. Maintenance recipients should normally retain the benefit of actions they take to live more economically.[217]

States also differ on who has the burden of proving diminished need. Some require actual evidence that the recipient is benefiting financially whereas others presume that cohabitation itself reduces the recipient's need.[218] States in the first group place the burden of establishing diminished need on the party seeking the modification.[219] Other states, however, create a rebuttable presumption of diminished need and hold that upon a prima facie showing of cohabitation, the burden shifts to the alimony recipient to prove that her financial need has not changed.[220]

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216. Miller v. Miller, 892 A.2d 175, 185 (Vt. 2005).

217. *Id.* at 183.

218. AM. LAW INST., *supra* note 51, § 5.09 cmt. a.

219. *See, e.g.*, *Van Dyke*, 902 P.2d at 1382 (stating that the "burden does not shift to presume reduced [financial] need"); *In re* Marriage of Dwyer, 825 P.2d 1018, 1019 (Colo. App. 1991) (same); Mitchell v. Mitchell, 418 A.2d 1140, 1142–43 (Me. 1980) (same); Smith v. Smith, 849 P.2d 1097, 1098–99 (Okla. Civ. App. 1992) (same).

220. *See, e.g.*, Wallace v. Wallace, 12 So. 3d 572, 575 (Miss. Ct. App. 2009) ("[P]roof of cohabitation creates a presumption that a material change in circumstances has occurred. This presumption will shift the burden to the recipient spouse to come forward with evidence suggesting that there is no mutual support . . . ." (citation omitted) (quoting Scharwath v. Scharwath, 702 So. 2d 1210, 1211 (Miss. 1997) (en banc)) (internal quotation mark omitted)); Ozolins v. Ozolins, 705 A.2d 1230, 1232 (N.J. Super. Ct. App. Div. 1998) (holding, upon a showing of cohabitation, that "[t]he burden of proof, which is ordinarily on the party seeking modification, shifts to the dependent spouse"). California creates a rebuttable presumption by statute. *See supra* notes 164–165 and accompanying text. The ALI's *Principles of the Law of Family Dissolution: Analysis and Recommendations*, AM. LAW INST., *supra* note 51, likewise create a rebuttable presumption, *see id.* § 5.09(3) ("An obligation to make periodic payments . . . is suspended when the obligor shows that the obligee maintained a 'common household' . . . unless . . . the obligee shows that he or she and the other person do not share 'a life together as a couple.'"). Although the ALI argues that treating cohabitation and marriage differently can lead to "[p]otentially troublesome results," *id*. cmt. a, this rebuttable presumption is inconsistent with the ALI's explanation of alimony as compensation for economic losses, *see supra* note 86 and accompanying text.

IV. HIGHLIGHTING PROBLEMS AND PROPOSING SOLUTIONS

Courts and legislatures addressing the cohabitation question face three major obstacles. This Part highlights those problems and proposes some solutions. First, there are multiple alimony theories,[221] and not all of the contemporary theories support modification of alimony upon cohabitation. Judges should only modify payments based on an alimony recipient's cohabitation if the initial court awarded alimony based on need, as opposed to a different theory. Second, the meaning of both cohabitation and of diminished need is often unclear. Courts and legislatures should define these terms precisely to promote predictability and consistency across awards. Third, courts and legislatures should consider what happens when cohabitation ends. In situations when alimony modification is warranted based on a recipient's diminished need, a judge should at most suspend, not terminate, alimony.

A. Grounding Responses to the Cohabitation Question in Theory

As discussed in Part I, courts do not follow a single theoretical model to justify alimony awards.[222] They award alimony for different reasons in different situations. This practice is reasonable and perhaps even advantageous so long as judges consider the theoretical basis for alimony relied upon for the original award when subsequently deciding whether to modify alimony payments. Judges deciding the cohabitation question should thus read the order dissolving the marriage and awarding alimony and determine *why* a court awarded alimony in the first place.[223] Only if the court awarded alimony based on need should cohabitation affect alimony payments. Thus, any rule that would automatically terminate alimony payments upon a finding of cohabitation, no matter the theoretical basis for the original alimony award, is not appropriate.

Courts awarding alimony in the twenty-first century generally base awards on one of several rationales. They may emphasize the recipient's need and the supporting spouse's ability to pay, as courts

221. *See supra* Part I.B.

222. *See supra* Part I.B.

223. Ideally, the court that initially awarded alimony would state why it did so. Even without an explicit statement from the court, however, judges deciding the cohabitation question should be able to determine the initial court's reason for awarding alimony based on the circumstances of the particular case.

have for centuries.[224] Or they may refer to something else that loosely fits under a contract, partnership, or compensation theory.[225] They may emphasize that the alimony recipient sacrificed career opportunities to support her spouse while in school, contributed to the marriage through her work within the home, or cared for the couple's children and perhaps continues to do so post-divorce.[226]

If judges award alimony on the basis of something other than need, cohabitation should *not* be considered when deciding whether to modify alimony. This practice does not make sense based on the reason that the court awarded alimony in the first place,[227] and it unfairly punishes an ex-spouse for her post-divorce conduct. Moreover, *Lawrence* suggests that penalizing private sexual behavior—including an ex-spouse's post-divorce sexual conduct—is unconstitutional.[228] Any portion of an alimony award that is based on something other than need should not change based on cohabitation.[229]

To the extent that alimony remains need-based and tied to spousal support, there may be a justification to modify alimony upon cohabitation in certain circumstances.[230] One reason not to eliminate the cohabitation inquiry altogether is that cohabitation may signal the existence of a supportive relationship that decreases the alimony recipient's financial need. Allowing this inquiry protects former spouses who pay alimony because they may not know whether alimony recipients' needs have changed. Indeed, it is difficult to

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224. *See supra* note 35 and accompanying text.

225. *See supra* Part I.B.2–3.

226. *See supra* notes 88–91 and accompanying text.

227. As discussed in the Introduction, *supra*, this argument stems from concerns about consistency and predictability as well as from concerns that courts and legislatures may be more likely to incorporate moral or other personal judgments in the absence of a theoretical basis for their decisions. *See supra* text accompanying note 94.

228. *See supra* notes 132–136 and accompanying text.

229. Sometimes judges award alimony for multiple reasons. In those cases, judges addressing the cohabitation question should determine what theories support each part of the alimony award.

230. Another justification is the fact that jurisdictions generally terminate alimony upon remarriage. As previously noted, whether alimony should terminate upon remarriage is beyond the scope of this Note. *See supra* notes 95–97 and accompanying text. It should be reiterated, however, that as long as alimony is need-based and tied to spousal support there may be a justification for terminating alimony on remarriage. But to the extent alimony is based on a different rationale, such as the economic-damages rationale, that original rationale for awarding alimony would not suggest that termination of payments upon marriage would be warranted.

imagine an alimony recipient who would go to the trouble of alerting her former partner that she needs less alimony.

Although one plausible reason for the automatic-termination rule is to encourage remarriage, that explanation fails to recognize two fundamental differences between cohabitation and marriage. First, unmarried cohabitants do not assume the legal duties of married couples.[231] Indeed, as one state supreme court noted, "[t]he length of [the cohabiting] relationship is unknown . . . . [A]ny support [the ex-spouse] may receive from her cohabitant is provided from his benevolence and comes with no reciprocal or continuing obligation."[232] Thus, when a cohabiting relationship ends, the ex-spouse is generally left without a remedy. Second, the encouragement-of-remarriage explanation ignores the social-science research that distinguishes cohabitation from marriage. Cohabiting relationships are generally of short duration,[233] and cohabitants may not share economic expenses to a greater extent than do mere roommates.[234]

Further, automatic-termination rules are overly broad. The Kentucky Supreme Court feared that an automatic-termination rule could "open the floodgates to motions to terminate or suspend maintenance payments in every situation in which the maintenance recipient has begun dating, or has formed casual relationships with persons of the opposite sex."[235] The increasing prevalence of cohabiting relationships that do not materially affect an alimony recipient's underlying financial need would threaten to call a great number of alimony awards into question.[236] To constitute changed circumstances, the cohabiting relationship should actually approach the permanency of a marital relationship instead of more closely resembling a more casual dating relationship.[237]

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231. *In re* Marriage of Dwyer, 825 P.2d 1018, 1019 (Colo. App. 1991).

232. Cermak v. Cermak, 569 N.W.2d 280, 284 (N.D. 1997). As the Nevada Supreme Court noted, "[b]ecause no legal support obligation is imposed on the parties during the relationship, no spousal maintenance can be awarded when and if the relationship ends. Moreover, absent an express or implied agreement to the contrary, no quasi-marital property rights accrue as a result of cohabitation." Gilman v. Gilman, 956 P.2d 761, 765 (Nev. 1998) (citation omitted).

233. *See supra* notes 107–109 and accompanying text.

234. *See supra* note 119 and accompanying text.

235. Combs v. Combs, 787 S.W.2d 260, 262 (Ky. 1990).

236. Miller v. Miller, 892 A.2d 175, 182 (Vt. 2005).

237. *Id.* Courts can decide whether the cohabiting relationship actually approaches the permanency of a marital relationship on a case-by-case basis.

Nor would maintaining separate rules for separate types of relationships likely contribute to a substantial erosion of the institution of marriage.[238] Other means of financial assistance—such as certain social-security and pension benefits—treat married people and cohabitants differently,[239] and the institution of marriage remains strong.

Finally, automatic termination of alimony payments upon a finding of cohabitation has a "distinct punitive aspect."[240] Merely living together does not suffice in other contexts, such as when an ex-spouse moves in with a platonic roommate or with family members.[241] As the New Jersey Supreme Court noted, automatic termination "imposes upon a former wife the obligation to lead a chaste life lest she forfeit her alimony payments in whole or in part."[242] Alimony should not be awarded as a reward or penalty, but instead should rectify economic imbalances between the former spouses.[243]

B. Clearly Defining What Constitutes Cohabitation and Diminished Need

When courts and legislatures rely on a need-based theory for alimony, their responses to the cohabitation question should reflect that policy. They should define cohabitation and diminished need precisely in order to capture the types of relationships that, under a need-based theory, warrant alimony modification. Precise definitions will promote consistency and predictability within jurisdictions. Unclear definitions, by contrast, could lead judges in similar cases to

238. *See* Bowman, *supra* note 101, at 43 ("[O]ffering legal recognition and support to cohabitants and making their lives easier does not appear to discourage marriage, and in fact the opposite may be true.").

239. *See supra* note 118 and accompanying text.

240. Garlinger v. Garlinger, 347 A.2d 799, 802 (N.J. Super. Ct. App. Div. 1975).

241. *See* Twila L. Perry, *The "Essentials of Marriage": Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1, 27 (2003) ("An ex-husband's protest that his ex-wife is living with her sister, or even with her best friend would also likely fall on deaf ears. The fact is that the inquiry as to whether an ex-wife still 'needs' the alimony is usually only triggered in the event that she begins to live with a member of the opposite sex to whom the court assumes that she is now providing marital-type services."). *But see In re* Marriage of Sappington, 478 N.E.2d 376, 380, 382 (Ill. 1985) (terminating the ex-wife's alimony because her relationship with her roommate was more akin to that of a husband and wife than of casual friends although the couple denied having a sexual relationship or any romantic feelings).

242. *Garlinger*, 347 A.2d at 802.

243. Drummond v. Drummond, 590 S.W.2d 658, 661 (Ark. 1979).

reach different conclusions about whether parties cohabited or whether an alimony recipient's need has diminished.

1. *Cohabitation.* Courts and legislatures must define carefully what constitutes cohabitation. Without a workable test, judges may make determinations that do not have a reasonable theoretical basis or that do not reflect the social-science data on cohabitation. Unclear definitions risk unpredictable and inconsistent awards as well as moral, rather than legal, judgments. Indeed, courts sometimes reach absurd results.[244]

The definition of cohabitation should turn on whether the couple acts like a family unit. Courts should thus ask whether the cohabitation resembles a marriage. Although not perfect, the "marriage-like" test is a reasonable proxy. This approach acknowledges the interest in protecting the institution of marriage and highlights relationships that are most likely to include economic interdependence.

Although this definition affords courts some flexibility, it excludes dating relationships that likely do not result in diminished need and instead only captures the type of supportive relationship that resembles a serious long-term commitment akin to marriage. Under this definition, simply sleeping together and moving back and forth between residences does not suffice because this type of relationship does not suggest permanency and mutual financial support. And mere roommate relationships do not suffice; indeed, courts and legislatures should not penalize alimony recipients for their attempts to save money by reducing their living expenses.[245]

There are two reasons to adopt this definition, which excludes relationships that some courts currently classify as cohabitation. First, social-science data indicate that non-marital cohabitation is often fluid and usually lasts only a few years.[246] And scholars agree that cohabitants support each other to a lesser extent than do married couples.[247] If the reason judges should modify alimony is diminished need, some relationships that are loosely classified as cohabitation do not fit the bill. Second, cohabitants generally do not incur a legal duty

244. *See supra* notes 199–201 and accompanying text.

245. The Vermont Supreme Court has applied this logic. *See supra* note 217 and accompanying text.

246. *See supra* notes 107–109 and accompanying text.

247. *See supra* note 119 and accompanying text.

to support each other either during or after their relationship.[248] Cohabitants thus do not have the same duty to support one another as do married couples. The definition of cohabitation should account for these realities and capture a subset of cohabiting relationships, not all of them.

Under the marriage-like test, sexual conduct is perhaps helpful in determining whether two people under the same roof are more than roommates, but it is not dispositive. Requiring a sexual relationship for a finding of cohabitation may penalize the ex-spouse for her post-divorce private behavior. Even if looking at sexual conduct during the marriage is appropriate, sexual conduct is not "meretricious" or "illicit" after the divorce.[249] After the marriage ends, any obligation of fidelity terminates as well. The better inquiry is thus whether the couple has a sexual *or* otherwise intimate, romantic relationship that looks like the equivalent of a common-law marriage. When the focus is on economic need, the inquiry should focus on permanency and financial support, and courts should avoid penalizing post-divorce sexual conduct.

2. *Diminished need.* Only cohabitation that results in an actual decrease in financial need should affect alimony. The research on cohabitants' economic interdependence conflicts somewhat, but the consensus is that cohabitants financially support each other to a lesser extent than do married couples.[250] Vermont's approach to financial need thus makes sense: merely sharing household expenses should not suffice to modify alimony.[251] Such inquiries are nitpicky and unnecessarily intrusive. Alimony recipients should not be forced to live in isolation, and they should be allowed to share household expenses as they would with roommates without penalty. And contrary to the holdings of some courts,[252] the fact that an ex-spouse occasionally pays for a cohabitant's groceries or other small expenses does not mean that her financial need has diminished. Establishing that cohabitants are economically interdependent should require more than merely showing that they share the type of financial relationships that ordinary roommates often do.

248. *See supra* notes 138–139 and accompanying text.
249. *See supra* notes 132–136 and accompanying text.
250. *See supra* notes 119–120 and accompanying text.
251. *See supra* notes 216–217 and accompanying text.
252. *See supra* notes 214–215 and accompanying text.

Although cohabitants are less likely to become economically interdependent than are married couples, a rebuttable presumption that financial needs have changed may work best in practice.[253] Cohabitants could easily hide evidence of changed financial circumstances, which could make proving that an alimony recipient's needs have diminished very difficult for the other ex-spouse. Yet this presumption should not be too difficult to overcome. To rebut the presumption, an alimony recipient could provide evidence that the couple does not have joint bank accounts, that they pay bills separately, and that she does not receive financial assistance beyond a typical roommate relationship. Finally, if cohabitation has occurred and the recipient's needs have indeed diminished, the court should only modify alimony to the extent of the diminished need.

C. Providing for Alimony's Reinstatement

Courts should at most suspend—not terminate—alimony and should retain jurisdiction for the length of the original alimony term.[254] They should reinstate alimony payments for the duration of the original term if the former alimony recipient can establish that she is no longer cohabiting and is no longer retaining any benefits from her former cohabitant.

Reinstatement corresponds to two realities. First, cohabitation generally lasts for at most a few years.[255] Second, cohabitants generally do not incur a legal duty to support each other after their relationship ends.[256] These facts indicate that even if an ex-spouse is financially supported by her cohabitant, she will likely lose that support when the relationship ends. Because cohabitants do not incur a legal duty to support each other, a rule that fails to account for reinstatement could leave former alimony recipients who were awarded alimony on the basis of need in precarious financial circumstances. Reinstatement better protects alimony recipients than does a termination rule.

The alimony recipient, however, should bear the burden of proving both that she is no longer cohabiting and no longer retaining

253. A few states already apply a rebuttable presumption in this manner. *See supra* note 220 and accompanying text.

254. Massachusetts recently adopted this approach. *See supra* notes 176–179 and accompanying text.

255. *See supra* notes 107–109 and accompanying text.

256. *See supra* notes 138–139 and accompanying text.

any economic benefits from her former cohabitant in order to receive a reinstatement of alimony payments. This assignment of the burden of proof respects the supporting spouse and the fact that he is not in the best position to know whether the former alimony recipient retains economic support from her cohabiting relationship. It also respects the limited resources of courts. Setting a high bar for the former alimony recipient will likely decrease the number of unwarranted suits. Moreover, the fact that most alimony awards last for only a few years—as opposed to a lifetime—also limits the potential for this rule to overwhelm the courts with requests to reinstate alimony.[257] Finally, because judges make and modify awards in equity,[258] they can prevent unjust results.

CONCLUSION

With the dramatic rise in prevalence and acceptance of cohabitation, its impact on alimony payments deserves immediate attention from courts and legislatures. Although different states can, and perhaps should, tailor their responses to the cohabitation question based on state policy choices, there are certain underlying principles that should be applicable given the various theories of alimony and the social-science data on cohabitation. This Note provides an initial framework for a sensible, workable set of rules that respects both ex-spouses. In doing so, it offers three principal suggestions. First, cohabitation should only affect alimony awards based on need. Second, courts and legislatures should define cohabitation and need precisely to capture relationships that resemble the permanency and mutual financial support of marriage. And third, courts should at most suspend, not terminate, alimony in cases of diminished financial need. Although these clarifications do not answer every aspect of the cohabitation question, this Note seeks to spark necessary discussion and reform. The social landscape has changed, and it is time for the law to follow.

257. *See supra* note 110 and accompanying text.

258. *See supra* note 53 and accompanying text.