



2020

What is Nonmarriage?

Katharine K. Baker

Chicago-Kent College of Law, kbaker@kentlaw.iit.edu

Follow this and additional works at: <https://scholar.smu.edu/smulr>



Part of the [Law Commons](#)

Recommended Citation

Katharine K. Baker, *What is Nonmarriage?*, 73 SMU L. REV. 201 (2020)

<https://scholar.smu.edu/smulr/vol73/iss2/4>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

WHAT IS NONMARRIAGE?

*Katharine K. Baker**

ABSTRACT

As rates of cohabitation rise, and marriage becomes a status reserved almost exclusively for socio-economic elites, the scholarly calls for family law to recognize more nonmarital families grow stronger by the day. This Article unpacks contemporary proposals to recognize more nonmarital families and juxtaposes those proposals with family law's contemporary marital regime. Family law's status-based system provides a mostly simple and efficient means of distributing resources at the end of a marriage by imposing a formulaic, but distinctly communitarian, non-market-based approach to obligation, entitlement, and value. In full, the Article defends family law's status-based system for what it does well, including dispensing with invasive inquiries into financial and sexual relationships, rejecting gendered market-based measures of recovery, and imposing communitarian obligations that can be efficiently enforced. It also acknowledges that this system leaves a growing class of people unprotected, but it suggests that many of those people, particularly low-income women of color, may want to be left out. The taxonomy provided in this Article should help scholars and legislators endeavoring to grapple with when it is appropriate to treat nonmarital couples as some kind of family. First, the nonmarriage proposals that impose communitarian obligations on cohabiting couples reject market-based measures of recovery but inflict categorization costs, which are invasive judicial inquiries into people's financial and sexual practices. These proposals also may conscript those who can least afford, and have legitimate reasons to reject, communitarian obligations. Second, the non-marriage proposals that do the best job of disrupting family law's binary status system, while they respect the autonomy of those who do not want family law imposed on them against their wishes, run the risk of leaving those left vulnerable by the interdependencies of relationship with nothing. Finally, the proposals that suggest dispensing with most of family law and just relying on common law doctrines of contract and unjust enrichment inevitably incorporate gendered, neoliberal understandings of desert and reward because that is how the market assigns value. For those who want to reject a neoliberal approach to reward and obligation, there are benefits to family law exceptionalism and the much-maligned idea of seeing the family as the market's opposite.

* University Distinguished Professor of Law, Chicago-Kent College of Law. Thanks to Albertina Antognini, Brian Bix, Alex Boni-Saenz, June Carbone, Jill Hasday, Claire Hill, Mark Rosen, Chris Schmidt, Carolyn Shapiro, and participants at the University of Minnesota and Chicago-Kent College of Law faculty workshop series.

TABLE OF CONTENTS

I.	INTRODUCTION	203
II.	STATUS-BASED FAMILY LAW	206
	A. ECONOMIC REDISTRIBUTION AT DISSOLUTION BASED ON FAMILY STATUS	206
	B. COMMON LAW RIGHTS AND FAMILY STATUS	209
	C. OTHER RAMIFICATIONS OF FAMILY STATUS	210
III.	NONMARITAL FAMILIES	211
	A. THE GROWING CALL FOR LEGAL RECOGNITION	211
	B. THE GROWING CLASS OF PEOPLE WHO MAY BE RECOGNIZED	213
	1. <i>Who Cohabits</i>	213
	2. <i>Why Do Cohabitants Cohabit?</i>	215
	C. SUMMARY	218
IV.	COMMON LAW MARRIAGE AND ITS FUNCTIONAL EQUIVALENTS	219
	A. CONDUCT-BASED (OPT-OUT) SYSTEMS	219
	1. <i>Financial Interdependence</i>	221
	2. <i>Emotional Interdependence</i>	222
	B. PROTECTING THE VULNERABLE	224
	1. <i>Government and Other Private Law Benefits</i>	227
	a. The Finite Pot Problem	227
	b. The Shadow Welfare State	229
	c. Means-Tested Programs	229
	C. SUMMARY	230
V.	THE ALTERNATIVES: REGISTRATION SYSTEMS AND COMMON LAW REMEDIES	230
	A. REGISTRATION (OPT-IN) SYSTEMS	230
	1. <i>Autonomy</i>	232
	2. <i>Normativity</i>	233
	3. <i>Summary</i>	235
	B. EXISTING COMMON LAW AND EQUITABLE REMEDIES .	236
	1. <i>Blumenthal v. Brewer and the Limitations of</i> <i>Nonfamily Law Remedies</i>	239
	a. Explicit Contracts	240
	b. Implicit Contract	242
	c. Same Wine, New (Contract) Bottles	244
	d. The Grab Bag of Other Equitable Doctrines ..	245
	i. Measuring the Enrichment: Of Comparable Worth, Unique Labor, and Gift	246
	2. <i>Summary</i>	248
VI.	CONCLUSION	248

I. INTRODUCTION

WITH the battle for same-sex marriage won, much legal scholarship has turned its attention from those who want to marry to those who don't, either because marriage does not make sense for them at various times or because they affirmatively shun the institution. Given the explosion of people who now live together in conjugal relationships and share intimate tasks, economic responsibilities, and caretaking—often with children—it is no surprise that so much attention is being paid to these relationships. In an effort to make family law more inclusive in communities in which marriage is rare, and for individuals who want to reject marriage, there are multiple calls for the law to recognize “nonmarital families,”¹ “nonmarriage,”² and “kinship structures.”³ Legal recognition of relationships other than marriage also has the potential to disrupt “marriage as the measure of all things.”⁴

But what is a nonmarital family, nonmarriage, or a kinship structure? Those calling for the law to recognize alternative families must realize that before the law can recognize those entities it has to decide what they are. What makes two or more people a family? That they have sex with each other? (How often? Need it be monogamous? And why does that matter?) That they share a home? (What if there are “nonfamily” members in the home also? What if there are two homes, and the movement between them is fluid? And what does household have to do with family?) That they share their money and labor? (How much sharing is enough? What counts as labor?) That they are committed to each other? (Measured how? By whom? Must it be mutual?) The law ceased asking these questions of married people long ago. The answer to the question, “Are you a family?” is answered by reference to your marital status.

Numerous critics assail the law's binary treatment of family status—married or not married—but the binary treatment of marital status has benefits not only for people who marry but also for everyone who wants to minimize the state's role in prescribing and judging intimate behavior. Because so much turns on marital status, not the actual behavior of the parties, marriage affords married people protection from invasive state inquiries into their sex lives, their living arrangements, their interpersonal conduct, and much of their financial decision-making. It is not clear that it will be possible to incorporate non-normative families into family law

1. See Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167 (2015); Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277 (2015).

2. See Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1 (2017); Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425 (2017).

3. See Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207 (2016).

4. Katherine M. Franke, *Longing for Loving*, 76 FORDHAM L. REV. 2685, 2686 (2008).

without bringing back that which contemporary family law has effectively banished: moralistic inquiries about what kind of love and care are worthy of recognition, subjective understandings of the value of intimate care work, and necessarily normative inquiries about sexual conduct.

Moreover, there are sound reasons why many people may wish to live without the law's protection of their alternative family. Contemporary family law imposes a set of rights and obligations on those with marital status. Those rights and obligations can create unacceptable constraints and complicated problems for people with little wealth and social stability. The costs of being recognized as family for purposes of family law may well outweigh the benefits. If that is the case, then the numerous calls for greater recognition of nonmarital families, especially for low-income couples, are somewhat misplaced. It is not family law that low-income people need; it is money, education, health care, and the means to acquire the economic security that makes family law relevant.

This Article unpacks contemporary attempts to recognize more nonmarital families. It assesses the costs and benefits of different regimes, including conduct-based (opt-out) systems, which involve judicial evaluation of whether a couple should be treated as married for purposes of the law; intent-based (opt-in) systems, which involve individual couples choosing to opt in to the rules that they want to govern their relationship; and more traditional common law and equitable alternatives to family law rules, like contract and unjust enrichment.

Part II of the Article sets the stage for the comparative analysis by briefly describing the simplicity with which the current status-based family law system assigns rights and responsibilities within marital families.⁵ Though easily critiqued as too binary and formalistic, contemporary family law imposes a set of rights and obligations that are efficiently applied. Family law measures compensation only at dissolution of the family group and by reference to what the combined collective can provide. It is a distinctly communitarian, non-liberal, non-market-based approach to obligation, entitlement, and value. One is entitled because one has status, not because one earned it, and what one is obligated for is a function of what one has, not how the market values another's services.

Part III then introduces the problem of defining which people, other than those with marital status, the law may need to recognize and protect. Though the calls for greater recognition of nonmarital families seem ubiquitous, there are clear differences in why scholars think alternative "families" need to be recognized. Yet, why a couple may need access to redress or recognition affects the kind of redress they need. Com-

5. This Article uses the term "family law" to refer to a broad set of legal rights and obligations that attach to people who have family status—particularly marital status. Family law's determination of who has that status has implications for other areas of law as well, including government benefits, intestacy, and standing for various common law causes of action. This Article does not attempt a complete categorization of all the ramifications of family law status, nor does it suggest that all the ways other areas of law rely on family status are appropriate.

pounding this problem is what the demographic data underscores about those who cohabit: cohabitants are far from a monolithic group, and they cohabit for many different reasons, some rejecting marriage for ideological reasons, some for economic reasons, some merely waiting until they are ready to marry. Part III highlights the diversity in the scholarship calling for nonmarital recognition and the diversity in the population that might be recognized.

The heart of the Article is in Parts IV and V, which lay out the main differences between the recent attempts to augment family law's status-based system. Part IV.A explores conduct-based regimes. Traditionally called common law marriage, but now often labeled "domestic partnership" or "committed relationship," these regimes impose the rights and obligations of marriage on cohabitants based on whether a court finds that the couple lived in a committed, interdependent relationship. Unless such a couple explicitly opts out of family law treatment, conduct-based regimes impose family law rules on a couple based on their conduct. Evaluations of how these regimes work in practice highlight what this Article refers to as categorization costs: expensive, invasive, and usually moralistic inquiries into parties' financial and sexual arrangements to determine whether a couple should be categorized as committed and interdependent. Inevitably, courts also assess the interdependence of a nonmarital relationship by comparing it to the only referent they know: marriage. Part IV.B shows how conduct-based proposals, though designed to help the vulnerable, may impose obligations on those who do not want and can least afford them, especially when children are present.

Part V then turns to the main alternatives to conduct-based, opt-out systems: registration (opt-in) systems and traditional common law and equitable remedies. Part V.A shows how registration systems, regimes that require a couple to opt in to the rules that they want the law to apply to their relationship, do a slightly better job of disrupting marital norms and a much better job of respecting parties' autonomy than do opt-out systems, but couples who opt into a nonmarital legal regime almost uniformly opt into neoliberal regimes that emphasize individual ownership and market-based assessments of value. Opt-in regimes undermine family law's binary status-based system, but they also undermine the communitarian values that determine entitlement and obligation in family law.

Part V.B explores the potential of common law remedies—like explicit and implicit contract—and equitable remedies—like constructive trust and unjust enrichment—to do justice to cohabitants if opt-out and opt-in systems cannot. The analysis suggests that, in practice, the benefits and challenges of contract actions parallel almost perfectly the benefits and challenges of opt-out and opt-in systems. A finding of implicit contract, like a finding of domestic partnership, is likely only after an invasive inquiry in which a judge finds that a couple behaved as married people do. Explicit contracts, on the other hand, function as opt-in systems, working only when parties take the time to detail what they want the rights and

obligations of their relationship to be. When they do so, couples usually contract out of the communitarian non-market-based approach to obligation that family law imposes.

Unjust enrichment and constructive trust claims, because they are not nearly as reliant on marriage as a referent, discourage courts from invoking marital norms. But by doing so, these doctrines also eschew the communitarian non-liberal approach to valuation. Scholars rightly identify that courts are bad at even seeing the kinds of relational investments (care work, housework) that women often make in these claims. But the market is not much, if any, better. Thus, even if courts did recognize women's investments, they would inevitably undervalue them, in part because the market undervalues women's labor (this is the comparable worth problem) and in part because so much of intimate care work is unique. It has no market value.

The Article concludes by defending family law's status-based system for what it does well: dispensing with invasive inquiries into financial and sexual relationships, rejecting gendered market-based measures of recovery, and imposing communitarian obligations that can be efficiently enforced. It acknowledges that this system leaves a growing class of people unprotected, but it suggests that many of those people may want to be left out. The Article does not conclude that the various alternative frameworks for treating cohabitation are fatally flawed or unnecessary. Given the growing number of people who choose to live outside of marriage, some legal response in some situations is almost certainly appropriate. But which regime best fits which context is a much harder question. This Article provides a taxonomy that should help judges and legislatures endeavoring to grapple with that question.

II. STATUS-BASED FAMILY LAW

A. ECONOMIC REDISTRIBUTION AT DISSOLUTION BASED ON FAMILY STATUS

In the second half of the twentieth century, as the norms around sex, reproduction, and intimacy grew less uniform, family law grew more uniform. Justice O'Connor wrote at the turn of the century that "[t]he demographic changes of the [twentieth] century make it difficult to speak of an average American family,"⁶ but contemporary family law is all about averages and norms. Child support is determined based on the average marginal cost of a child for a two-parent household.⁷ Individual, non-normative living and spending patterns of potential obligors are irrelevant. Marital property division is rooted in a very strong norm that sets a base-

6. *Troxel v. Granville*, 530 U.S. 57, 63 (2000).

7. This Article is mostly about marital status, not parental status, so child support may seem beside the point, but the move to formulae for child support is a critical part of the twentieth century family law story. It was by implementing child support formulae, which worked so much more efficiently and effectively than the previous discretionary systems, that family law grew so enamored of formulae.

line of equal (50/50) division of all property earned during the marriage, regardless of who earned what or how. Post-marital support (also known as alimony or maintenance) is increasingly determined by formulae adopted by legislatures that base awards on the length of the marriage and post-marital income differential, not on what an individual spouse may have earned or sacrificed through her contribution.

These formulas are easily critiqued.⁸ The two-parent, same-household norm on which child support is based is not, in fact, a norm for most children in this country.⁹ The 50/50 rule for marital property suggests a unity and a shared economic purpose that stands in contrast to the Supreme Court's celebrated finding that "the marital couple is not an independent entity . . . but an association of two individuals each with a separate intellectual and emotional makeup."¹⁰ The recent emergence of formulae for maintenance are rooted not in any reason or theory but in the past practices of judges.¹¹ Their goal is to eliminate the relevance of context in order to bring consistency and therefore predictability.

The formulaic approach to family obligation is also relatively new. For years, the laws of child support, property division, and alimony were exceedingly discretionary. As I have previously described, the move to uniformity in law came as even the semblance of uniformity in life disintegrated.¹² And, critically, the two trends are related. The more varied peoples' actual intimate lives are, the harder it is to determine what kinds of obligations intimates owe each other.¹³ So family law gave up on individualized assessments and moved to formulas. It did this not long after having given up on individualized assessments of even more personal inquiries involving fault in divorce. Judges wanted no part in serious

8. One legal expert on child support explains that the data that underlies all child support determinations "is empirically unverifiable, theoretically questionable, and [based] . . . upon flawed [inputs]." Ira Mark Ellman, *Fudging Failure: The Economic Analysis Used to Construct Child Support Guidelines*, 2004 U. Chi. Legal F. 167, 215 (2004).

9. More than 50% of children are expected to live without two parents in the household for at least part of their childhood. Many children never live with two parents and even more live with two parents only for a limited time. *See generally* Sheela Kennedy & Larry Bumpass, *Cohabitation and Children's Living Arrangements: New Estimates from the United States*, 19 DEMOGRAPHIC RES. 1663 (2008).

10. *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972). The notion of marital unity is often traced to Blackstone: "By marriage, the husband and wife are one person in law: . . . [the] legal existence of the woman . . . is incorporated and consolidated into that of the husband . . ." 1 WILLIAM BLACKSTONE, COMMENTARIES *442.

11. *See* SCOTT R. STEVENSON & JUSTIN L. KELSEY, THE DIVORCE SPOUSAL SUPPORT CALCULATOR: AN ALIMONY FORMULA RESOURCE 11–13 (2010) (describing how the alimony formulae used by Massachusetts judges were developed based on past awards); *see also* Ira Mark Ellman, *Reorganizing the Family, the Maturing Law of Divorce Finances: Toward Rules and Guidelines*, 33 FAM. L.Q. 801, 811–13 (1999) (describing the Maricopa County, Arizona commission's charge to develop guidelines to reflect current awards, not define what alimony should be).

12. *See generally* Katharine K. Baker, *Homogenous Rules for Heterogeneous Families: The Standardization of Family Law When There is No Standard Family*, 2012 U. ILL. L. REV. 319 (2012).

13. *See id.*

assessments of adultery, cruelty, and sexual desertion.¹⁴

For instance, the obligation to support children used to be tied to family context, like whether the parents had been married, and subjective understandings of need. As marriage became less ubiquitous, and more and more children were born to unmarried mothers, a marriage-based system of child support grew untenable. There was no coherent way of addressing need when so many children from so many different economic strata were the subject of child support actions. The variety of living situations into which children were born made the law less willing to accommodate context, not more. Congress now requires all states to apply formulas that are based on estimations of the average amount of money a normative two-parent family would spend on a child if the two parents lived together.¹⁵ In other words, the response to all of the people who had and raised children while living outside a marital-like relationship was to treat them as if they were living in a marital-like relationship and assign responsibility accordingly.

The advantage of this imposed normativity is that formulae provide a ready answer to the question of how much one should pay in child support without having to evaluate context at all. A parent is obligated because he is a parent, and what he owes is a question of what he has. Situational fairness takes a back seat to the formula in order to facilitate the distribution of resources to children.

In the last twenty-five years, that same preference for efficiency over context has taken hold of property division and spousal support. Context is now largely irrelevant for questions of property division. In the forty-one non-community property states, the law used to pay much more attention to who owned what in a marriage and how marital wealth was created. Women often ended up with very little property at divorce—though courts sometimes tried to alleviate women's hardship by granting them discretionary spousal support. The contemporary move to a very strong presumption of an equal division of all wealth and debt accumulated during the marriage (which is also the community property model) provides much more protection for non-market participants, but it also renders irrelevant many questions that could seem important. What if one party chose not to contribute economically when the other party wanted her to? What if the party who earned the most money also did most of the household labor? What justifies treating a spouse who contributed thousands of hours of non-market work to a household the same as a spouse who hired others to do that work, pursued her own non-re-

14. See generally Lawrence M. Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 662–67 (1984) (explaining the judicial abandonment of fault determinations during divorce).

15. Congress wanted to make sure that unwed mothers who were potential welfare recipients got more child support than judges traditionally awarded. See Baker, *supra* note 12, at 329 (explaining congressional action in 1984 and 1988 that required states to develop child support guidelines if they wanted access to federal programs designed to help low income children).

munerative interests, or just did nothing? In contemporary family law, none of those questions matter. What matters is that the parties were married. Marital status defines the existence of obligation, and the wealth accumulated determines the content of the obligation.

The same kind of analysis now applies to post-marital support. The move towards formulae in spousal support allows courts to ignore a host of invasive and moralistic inquiries, including what counts as contribution to a marriage, what economic opportunities a spouse forewent and why, what the expectations of the parties were with regard to money or sex, and how sexual performance, adultery, cruelty, or emotional distance affected those expectations. With today's formulae, if one was married long enough, and there is significant income differential post-divorce, one is entitled to post-marital support.

These formulae allow family law to define dependency—whether of children or spouses—relatively, with reference to what the collective can provide or has provided. This means that in couples who marry, family law forces a higher earning spouse to share with a lower earning spouse, regardless of their relative non-market contributions to the collective. At times, this may seem odd or unjust, but it is a compromise that family law has grown comfortable with because judges and legislatures have determined that it is easier to have bright-line rules and formulae than to do granular evaluations of entitlement for each divorcing couple. The formulaic approach to entitlement in family law reflects a trade-off. Individual property settlements and maintenance awards are unlikely to accurately assess entitlement in any given case, but the couple and the court system avoid the invasive assessment of how the couple structured their financial and emotional lives.

The consistency provided by the over- and underinclusive formulae also facilitates parties' understandings of their rights and obligations. Simplicity and transparency are particularly important to a legal regime that relies on settlements.¹⁶ In family law, there is no corporate wealth to finance litigation, few repeat players willing to fight for legal principles, and little taste for litigation among the class of people subject to marital dissolution laws. The vast majority of divorcing couples want to get in and out of the legal system quickly.¹⁷ The clarity of the family law system facilitates the bargaining that happens in its shadow.¹⁸

B. COMMON LAW RIGHTS AND FAMILY STATUS

Family status also affects the legal rights of individuals at times other than at dissolution of the relationship. The common law traditionally both

16. Aaron Thomas, *What Types of Divorces Typically Go to Trial?*, LAWYERS.COM (Mar. 31, 2016), <https://www.lawyers.com/legal-info/family-law/divorce/what-types-of-divorces-typically-go-to-trial.html> [<https://perma.cc/3NDH-A7TZ>] (estimating that over 90% of divorces settle without trial).

17. *See id.*

18. *See* Robert H. Mnookin & Lewis Kornhausert, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

restricted and granted certain rights based on marital status. For instance, the doctrine of marital unity prohibited spouses from suing each other in contract or tort. Because husband and wife were construed as having “become one” in marriage, a contract or tort action between spouses was barred as a suit against self.¹⁹

Much of the marital unity doctrine has been rejected today. Courts are far more willing to see two people who are married to each other as separate individuals. All states now allow spouses to sue each other in tort, and most states allow some contract actions between spouses.²⁰ Still, contract actions that might supplement family law rights are rarely enforced.²¹ In part, this is because the totality of a marital relationship is thought to include sex, and courts will not enforce contracts for sex. In part, though, the reticence to enforce contracts stems from the alternatives that are available to married people.

Family members are often the only ones who can presumptively sue for certain torts, like intentional infliction of emotional distress or loss of consortium. The gravamen of these torts stems from the emotional harm the law is willing to recognize in some relationships but not others. Family status allows one to sue for the loss of one’s spouse even though one cannot sue for the loss of one’s best friend. Surely, there are instances in which the loss of one’s best friend is more traumatic, but the law draws the line for economic recovery at family status. Thus, family status giveth standing to sue for compensation for torts, even while it taketh away some spouses’ ability to sue each other in contract.

C. OTHER RAMIFICATIONS OF FAMILY STATUS

Far more salient for most married people than common law rights in tort or contract are the thousand ways in which marital status affects one’s presumed, or actual, eligibility for various government entitlements.²² Intestacy and tax law are two of the most obvious areas in which family status matters, but a plethora of public and private social welfare programs also rely on family status to determine entitlement. For instance, it is only family members who can collect on another person’s Social Security or workers’ compensation account. Access to other social

19. See *supra* note 10 (providing Blackstone’s definition of the unity doctrine). The canonical modern application of this doctrine is *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16 (Cal. Ct. App. 1993), in which the court refused to enforce an alleged oral contract between two spouses for lack of consideration because the caretaking services promised in the contract were already part of the marital bargain. For more on the doctrine regarding interspousal contracts, see JILL ELAINE HASDAY, *FAMILY LAW REIMAGINED* 70–82 (2014).

20. Most states enforce pre- and post-nuptial agreements, though they vary in the scrutiny they apply to such contracts. See Hasday, *supra* note 19, at 75–82.

21. See *id.* at 67–94 (discussing courts’ reticence to use contract to regulate economic exchange within the family).

22. In 1997, the Government Accounting Office identified 1,049 provisions in the United States Code that conditioned rights and privileges on marital status. See U.S. GOV’T ACCOUNTING OFFICE, *GAO-04-353R, DEFENSE OF MARRIAGE ACT: UPDATE TO PRIOR REPORT* (2004).

welfare benefits, administered largely through employers, is also often presumptively limited to family members. Such benefits include health insurance and expanded forms of disability, life, and retirement insurance.²³

It is clear, therefore, that family status does a prodigious amount of work. Courts and administrators do not have to ask all the questions raised in the introduction about when two people should be treated as family, why they should be treated as family, and what that treatment should entail. Those questions are answered by reference to the parties' marital status. This has implications for spouses' rights vis-à-vis each other at dissolution and for legal entitlements from third parties, like the state and private insurance programs. By relying on status, family law allows all of these programs to avoid categorizing who counts as family.

Approximately 18 million couples in this country share resources, homes, and/or children without availing themselves of family status, however.²⁴ A system that relies so heavily on status leaves vast swaths of the population out of family law's orbit.

III. NONMARITAL FAMILIES

A. THE GROWING CALL FOR LEGAL RECOGNITION

Most scholars calling for family law to abandon its reliance on status in order to reach more kinds of families and family relationships do not define what they mean by "family" with much specificity. Sometimes scholars use the word family as a self-defining noun, suggesting that the word family is not a legal term but a natural or extra-legal one.²⁵ Other times, scholars use the word family or familial as an adjective defining relationship.²⁶ This latter usage suggests that not all relationships are familial but

23. See Grace Ganz Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 NOTRE DAME L. REV. 1265 (2001) (describing the expansion of these rights to same-sex partners); Kaiponanea T. Matsumura, *Beyond Property: The Other Legal Consequences of Informal Relationships*, 51 ARIZ. ST. L.J. 1325, 1338–46 (2019) (exploring employer-based benefit plans that allow an employee to choose an added beneficiary, regardless of that beneficiary's legal relationship to the employee).

24. Renee Stepler, *Number of U.S. Adults Cohabiting with a Partner Continues to Rise, Especially Among Those 50 and Older*, PEW RES. CTR. (Apr. 6, 2017), <https://www.pewresearch.org/fact-tank/2017/04/06/number-of-u-s-adults-cohabiting-with-a-partner-continues-to-rise-especially-among-those-50-and-older/> [<https://perma.cc/SWV6-3XU9>].

25. For instance, Nancy Polikoff writes that the law must provide "those supports that every family deserves." NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 8 (2008); see also Joslin, *supra* note 2, at 473 (suggesting that nonmarital families have now joined "marital families" as the "building block of our society," without defining nonmarital family).

26. See, e.g., Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COLUM. L. REV. 293 (speaking of "family forms" that can be protected). Melissa Murray uses the word "nonmarital relationship," presumably to refer to some kind of family relationship, unless she means to classify all relationships in one of two categories: marital or not. Murray also uses the term "kinship structure," presumably using kinship as a substitute for family and structure as a substitute for relationship. However, it is still not clear what makes a relationship

that there is something non-legal that parties can do to transform a relationship into a familial one.

For sure, the term family has meaning outside the law. When the Pew Research Center asks the public whether “an unmarried couple living together with no children [constitutes] a family,”²⁷ respondents have some understanding of what they are being asked. But Pew would be asking a different question if it asked, “How should the law treat an unmarried couple living together without children?” The fact that the public uses the word “family” to describe a group of non-legally related individuals does not necessarily mean either that the law should treat non-legally related individuals as if they were legally related or that the law should treat them any differently than individuals whom we would not consider “familial.” The content of the legal literature on nonmarital families suggests that scholars are far more concerned with the question of what the law should do about people who live without family status. The answer to that question depends on why one thinks the law need get involved.

Thus, one way of determining how scholars are defining family is to examine why they think the law should get involved in “nonmarital relationships” and “kinship structures.”²⁸ Embedded in the reasons for *why* the law need get involved in nonmarital relationships and kinship structures is often a definition of family. For instance, when Cynthia Bowman argues that the law must come to the aid of those who are left vulnerable by a cohabiting relationship in which the parties “merged their lives for a period of time [and] develop[ed] relations of dependency,”²⁹ she is, at least in part, arguing that the family should be defined as those relationships in which merged lives created conditions of dependence. When other scholars focus on how some relationships provide “intangible goods such as community, emotional support, and intimacy,”³⁰ or “promote[] care and interdependence,”³¹ or “recogniz[e] and support . . . caregivers,”³² they are suggesting that family should be defined functionally. When individuals do those things that make a relationship familial, the law should recognize them as such. Family is as family does.

Still others suggest that the law must recognize nonmarital relationships because the institution of marriage is too exclusive and steeped in

nonmarital or one of kinship. See Murray, *supra* note 3, at 1257; Emily J. Stolzenberg, *The New Family Freedom*, 59 B.C. L. REV. 1983, 1985 (2018) (referring to “family relationships”).

27. PEW RES. CTR., *THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES* 14 (2010), <https://www.pewsocialtrends.org/2010/11/18/the-decline-of-marriage-and-rise-of-new-families/> [<https://perma.cc/2B82-7TRZ>].

28. Murray, *supra* note 3, at 1257.

29. CYNTHIA GRANT BOWMAN, *UNMARRIED COUPLES, LAW, AND PUBLIC POLICY* 3 (2010) (“Cohabitants who have merged their lives for a period of time develop relations of dependency that leave them vulnerable when the union ends . . .”).

30. Stolzenberg, *supra* note 26, at 2040.

31. Scott & Scott, *supra* note 26, at 361.

32. ROBIN WEST, *MARRIAGE, SEXUALITY, AND GENDER* 94 (2007).

patriarchy.³³ By presenting such a rigidly binary status system—married or not married—the law arguably enshrines marriage as the only legitimate form of family and thus reifies marital supremacy.³⁴ More options for other forms of recognized family status would help disrupt marital supremacy and the social and economic reification of marriage. As Robin West explains, “Marriage makes us feel good, in part, because the state and our community tell us we are good, by virtue of participating.”³⁵ For those who don’t marry, the communal celebration of marriage feels harmful, punitive, and moralistic.³⁶ Some scholars argue that the law needs to recognize more kinds of relationships because only recognizing marriage is sending unnecessary and harmful messages of exclusion.³⁷

Finally, some scholars do try to define the relationships that need recognition but not why. When Professor Albertina Antognini critiques the Supreme Court’s decision in *Obergefell v. Hodges*³⁸ for leaving out “individuals that remain in the shadow of [the Court’s] decision because they engage in sexual, affective, and economic relationships outside of marriage,”³⁹ she suggests that those who engage in sexual, affective, and economic relationships deserve attention.⁴⁰ But she does not explain why the combination of those relationships requires distinct legal treatment. Surely not all sexual, or affective, or economic relationships are familial. Is the problem that the law treats those who engage in sexual, affective, and economic relationships differently than it treats married people, or is the problem that the law treats them the same as individuals who are not engaging in sexual, affective, and economic relationships? Or is the problem that people cohabiting in that way deserve their own kind of legal treatment that is neither marital nor completely nonfamilial? The commentary is often obtuse on that issue.

The next section explores what demographers tell us about those most likely to engage in sexual, affective, and economic relationships outside of marriage.

B. THE GROWING CLASS OF PEOPLE WHO MAY BE RECOGNIZED

1. *Who Cohabits*

“Cohabitation is an increasingly prevalent lifestyle in the United

33. See Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 619–20 (2013) (describing the reasons many people may want to reject marriage because of its gendering effects and patriarchal past).

34. Serena Mayeri probably deserves credit for coining the term, “marital supremacy.” See Mayeri, *supra* note 1.

35. WEST, *supra* note 32, at 74.

36. *Id.* at 200.

37. *Id.*; Aloni, *supra* note 33.

38. 135 S. Ct. 2584 (2015).

39. Antognini, *supra* note 2, at 4.

40. *Id.*

States”⁴¹ and across the industrialized world.⁴² The U.S. Census Bureau reports that between 2000 and 2010, the number of “unmarried couple households” grew by 41.4%,⁴³ and the Pew Research Center reports that the rate of cohabitation has increased 29% since 2007.⁴⁴ Pew also reports that “35% of all unmarried parents are living with a partner.”⁴⁵ Importantly though, these terms are not self-defining.⁴⁶ The Census Bureau asks people to identify household members who are “unmarried partners,” but studies show different results if one asks instead, “Do you have a boyfriend, girlfriend or partner in this household?”⁴⁷ Unmarried “parents” may be living with a partner, but that partner is not necessarily a parent of the child in the household.⁴⁸ More fundamentally, as Katharine Silbaugh reminds us, “households and families are distinct.”⁴⁹ Thus, much of this data must be understood as including subjective understandings of what “cohabitation,” “couple,” and “partner” mean.

All sorts of people—young, old, rich, poor, lovers, friends, acquaintances—live together. Shared living space is especially common in urban areas where housing costs are high⁵⁰ and in low income communities where resources are scarce.⁵¹ Roommate finding services have increased the prevalence of unrelated people living together,⁵² and social norms have broken down presumptions about conjugality when people live together. When scholars speak of nonmarital couples they presumably are not speaking about roommates, but it is not necessarily clear what conjugality has to do with how the law should classify a relationship or when,

41. Richard Fry & D’Vera Cohn, *Living Together: The Economics of Cohabitation*, PEW RES. CTR. (June 27, 2011), <https://www.pewsocialtrends.org/2011/06/27/living-together-the-economics-of-cohabitation/> [https://perma.cc/NSB2-ZKGG].

42. Marcia J. Carlson, *Families Unequal: Socioeconomic Gradients in Family Patterns Across the United States and Europe*, in *UNEQUAL FAMILY LIVES* 21, 22 (Naomi R. Cahn et al. eds., 2018).

43. DAPHNE LOFQUIST ET AL., U.S. CENSUS BUREAU, *HOUSEHOLD AND FAMILIES: 2010*, at 5 (2012), <https://www.census.gov/prod/cen2010/briefs/c2010br-14.pdf> [https://perma.cc/2SR4-G9EK].

44. Stepler, *supra* note 24.

45. Gretchen Livingston, *The Changing Profile of Unmarried Parents: A Growing Share are Living with a Partner*, PEW RES. CTR. 3 (Apr. 25, 2018), <https://www.pewsocialtrends.org/2018/04/25/the-changing-profile-of-unmarried-parents/> [https://perma.cc/F8VV-ZYS3].

46. Sheela Kennedy & Catherine A. Fitch, *Measuring Cohabitation and Family Structure in the United States: Assessing the Impact of New Data from the Current Population Survey*, 49 *Demography* 1479, 1480 (2012).

47. *Id.* at 1481.

48. See Livingston, *supra* note 45, at 2.

49. Katharine Silbaugh, *Distinguishing Households from Families*, 43 *FORDHAM URB. L.J.* 1071, 1083 (2016).

50. Lauren Bretz, *As Rents Rise, More Renters Turn to Doubling Up*, ZILLOW (Dec. 14, 2017), <https://www.zillow.com/research/rising-rents-more-roommates-17618/> [https://perma.cc/9ZEY-9VSA].

51. See Paul Taylor et al., *Living Together: The Economics of Cohabitation*, PEW RES. CTR. (June 27, 2011), <https://www.pewresearch.org/wp-content/uploads/sites/3/2011/06/pew-social-trends-cohabitation-06-2011.pdf> [https://perma.cc/E9BJ-SSWF] (finding that only 20% of people without a college degree and without a spouse or partner live alone; they tend to live with other family members or other nonfamily members).

52. See Bretz, *supra* note 50.

even if conjugal, a relationship passes from being “roommates with benefits” to “couple.”⁵³

Professor Bowman, in her comprehensive account of unmarried couples, finds seven different typologies of unmarried cohabitants: dating singles, trial marriages, couples without sufficient resources (for a wedding or a home), low-income cohabitants who are living together for economic reasons, Puerto Rican couples with children, divorced individuals who are avoiding a marriage penalty or screening for a new spouse, and older people.⁵⁴ These categories overlap. Divorced individuals may be cohabitating for the same reasons as never-divorced couples who are screening for a spouse. Older people are often avoiding a marriage penalty, though they could also think of themselves more as dating singles. It is also possible, of course, that two members of a couple view their situation differently.⁵⁵ One person may think of herself as screening; the other may think of the couple as already committed.

Bowman’s data is also somewhat dated. More recent data suggests that while rates of cohabitation are increasing, fewer cohabitations are leading to marriage—though these findings reflect stark class differences.⁵⁶ Cohabitants with a college degree are more likely to end their cohabitation by marrying. Cohabitants without a college degree are likely to break up and cohabit with someone else in the future.⁵⁷ Some demographers surmise that the increase in cohabitation among those who are not likely to transition to marriage reflects the perceived economic bars to marriage and the decreased stigma associated with cohabitation.⁵⁸

2. *Why Do Cohabitants Cohabit?*

Numerous studies have tried to discern why people cohabit. A common reason given is simply “convenience and comfort.”⁵⁹ It is much easier to share a household with someone with whom one wants to spend the night than it is to travel back and forth between households. The convenience rationale might explain why many respondents suggest that the decision to cohabit was not particularly deliberate, “it just happened.”⁶⁰

For those who make a more deliberate decision to cohabit, economics

53. Elizabeth and Robert Scott suggest that the absence of conjugality “may generate skepticism about the durability and stability” of relationships. Scott & Scott, *supra* note 26, at 369. They may be correct—but note the implicit importation of normative sexuality in that assumption. Why should commitment require conjugality?

54. BOWMAN, *supra* note 29, at 122.

55. This is not only common, it is gendered and classed. *See infra* note 115.

56. Karen Benjamin Guzzo, *Trends in Cohabitation Outcomes: Compositional Changes and Engagement Among Never-Married Young Adults*, 76 J. MARRIAGE & FAM. 826, 828 (2014).

57. *Id.* at 835.

58. *Id.* at 840.

59. *Id.*

60. Wendy D. Manning & Pamela J. Smock, *Measuring and Modeling Cohabitation: New Perspectives from Qualitative Data*, 67 J. MARRIAGE & FAM. 989, 996 (2005).

often plays a role.⁶¹ Sharing living space affords obvious economies of scale.⁶² Economic advantages may be particularly compelling if one has a child, either with the partner one cohabits with or with someone else. Children are expensive. Unmarried parents today are far more likely to be cohabiting than they used to be.⁶³ For lower-income individuals, who are likely to be living with other family members (not on their own) if they are not cohabiting,⁶⁴ cohabitation also affords the opportunity to be away from others when one is with one's romantic partner.⁶⁵

The other main themes that emerge when demographers try to discern why people cohabit go to “commitment, testing, and freedom,”⁶⁶ all of which are related. Cohabitation is a way to test a relationship and maintain the freedom to leave it before one commits. In Europe, where marriage is even rarer than it is in the United States, cohabitants often cite the need to maintain flexibility in employment. Cohabitants want to be able to move to where the jobs are without having to worry about whether such a move would be acceptable to a partner.⁶⁷ Cohabitants also cite the desire to maintain freedom to choose another partner.⁶⁸ Cohabiting does not necessarily signal a commitment to monogamy.

This last set of reasons suggests that the answers to “why did you cohabit?” and “why didn't you marry?” are often the same. Not wanting to commit—to one person, to one place, to an interdependent life—is an answer to both questions. Sometimes, though, asking the “why didn't you marry” question suggests that one's willingness to marry is tied to economic stability, at least in the United States.⁶⁹

Numerous studies show that economic circumstances, especially men's

61. SHARON SASSLER & AMANDA JAYNE MILLER, *COHABITATION NATION: GENDER, CLASS, AND THE REMAKING OF RELATIONSHIPS* 38–41 (2017) (explaining that those in the “service class” are more likely to move in together for financial and housing-related reasons).

62. Economic exigency should not be confused with economic interdependence. People who live together in the same household virtually always share at least some household expenses. Financial dependence, or interdependence, usually comes into play when one member of a couple makes significantly more money than the other. That is not particularly likely to be the case for lower-income couples, though it can be. Only 25% of cohabiting couples without any college education have a significant income differential. See Taylor et al., *supra* note 51, at 17.

63. Livingston, *supra* note 45, at 3 (In 1968, 88% of unmarried parents were solo parents. In 2017, only 53% of unmarried parents were solo parents.).

64. Only 20% of people without a college degree and without a spouse or partner live alone; they live with other family members or other nonfamily members. See Taylor et al., *supra* note 51, at 21.

65. *Id.*

66. Brienna Perelli-Harris et al., *Towards a New Understanding of Cohabitation: Insights from Group Research Across Europe and Australia*, 31 *DEMOGRAPHIC RES.* 1043, 1044, 1057 (noting that in the United States, cohabitation is likely to be seen as an alternative to being single).

67. *Id.* at 1064.

68. *Id.*

69. Across industrialized countries, marriage is viewed as an expression of commitment, but European cohabitants do not cite the need for economic stability nearly as much as low-income cohabitants in the United States do. Laurie Fields DeRose et al., *Introduction*, in *UNEQUAL FAMILY LIVES*, *supra* note 42, at 8.

earnings, affect willingness to marry.⁷⁰ Thus, lower-income couples may cohabit more because of its economic benefits, but they marry less than other cohabitants because of what they perceive as inadequate resources. As one group of researchers put it, “[M]arriage both connotes and requires a certain level of economic stability.”⁷¹

Legally, marriage does not *require* any economic stability. A marriage license in the United States costs as little as \$10 and never more than \$115,⁷² yet lower-income couples routinely cite the need to get out of debt and find more stable employment before being ready to marry.⁷³ Lower-income couples are not ill-informed about the affordability of a marriage license; many acknowledge the possibility of “downtown weddings.”⁷⁴ Their reticence to marry more likely demonstrates their hesitance to enter marriage’s communitarian regime, which brings with it mutual obligations for sharing assets and debt. The less one has, the less one may be willing to share and the more dangerous is the potential accumulation of debt.

Men’s economic prospects may be so predictive of likelihood to marry because women recognize that a man with an unstable work history is unlikely to be able to share much with her and more likely to force her to share in his debt. By marrying such a man, she would incur opportunity costs (foregoing a man who might be more stable) and potential legal liability. Low-income men may be reluctant to marry because they know they will be expected to contribute to the collective more than they feel able to. As discussed more in Part IV.B, low-income women do not reject marriage *per se*; they reject the idea of marrying any of the potential spouses they have met thus far.⁷⁵

Lower-income couples also frequently cite the inability to afford a wedding as a reason for not marrying.⁷⁶ The wedding rationale may just be a smokescreen for the economic security rationale; once one can afford an expensive wedding one is likely to be economically stable enough to bear the risk of communitarian obligations. Alternatively, the wedding rationale could say something about the social meaning of marriage. If “marriage connotes economic . . . stability,”⁷⁷ one is not “allowed” to get married unless one can afford a wedding. It would be perceived as socially fraudulent.

70. See, e.g., Pamela J. Smock et al., “*Everything’s There Except Money*”: *How Money Shapes Decisions to Marry Among Cohabitants*, 67 J. MARRIAGE & FAM. 680 (2005).

71. *Id.* at 687.

72. *Marriage License Fees by State*, U.S. MARRIAGE LAWS.COM, <https://www.usmarriagelaws.com/marriage-license/application/fees-cost/> [<https://perma.cc/J3T7-YVFU>].

73. Smock et al., *supra* note 70, at 687–88.

74. *Id.* at 688.

75. See *infra* Part IV.B and text accompanying notes 115–19.

76. Smock et al., *supra* note 70, at 688 (discussing reasons for why couples did not want “just a downtown wedding”); see also GÖRAN LIND, *COMMON LAW MARRIAGE: A LEGAL INSTITUTION FOR COHABITATION* 962 (2008) (citing money as a reason people give for not marrying).

77. Smock et al., *supra* note 70, at 687.

If marriage would clearly benefit low-income couples, then the connotation of marriage with economic stability is a significant problem. But if people insist on a wedding as a way of protecting themselves from what legal marriage could impose on them, there is much less need for concern. In eschewing marriage, even under the cover of not being able to afford a wedding, lower-income people may just be smart. They do not want the legal responsibilities of marriage, so they cite the social expectations for a wedding as a legitimate reason to avoid legal status.

Before leaving the discussion of the demographic data on cohabitation, a note on the presence of children in a cohabiting household is in order. As will be clear in the next section, many proposals to extend family law's reach suggest that the presence of children should trigger a presumption of marital-like rights and obligations. But the reasons for cohabiting do not necessarily change, nor does the nature of the cohabitation necessarily change, when children are born.

Child support obligations attach to all who have parental status, regardless of where they live. One's obligation to one's legal child has nothing to do with one's living situation.⁷⁸ Parents of a child are necessarily legally bound to each other because they have responsibilities to coordinate childcare with each other, and child support obligations are determined based on their collective income (even if they do not live in a collective situation).⁷⁹ So there is already a legal connection between unmarried parents. Why should the law assume greater legal rights and obligations between parents because they live together?

The presence of children in a household may correlate with one parent doing more unpaid care work than the other. Marital dissolution formulae try to compensate for that unpaid care work by forcing parties to share at dissolution. Unlike married parents, unmarried parents who contribute disproportionate care work do not have access to that indirect form of compensation at dissolution. But if forced to choose, the person doing that care work might forego potential compensation for her care work in return for not having to worry about being obligated for her co-parent's debts. Those proposals that assume that sharing joint legal parental obligations should necessarily trigger greater legal obligations to the other parent may be depriving the parent who disproportionately invests in parenting work of the autonomy that she wants and thinks she deserves.

C. SUMMARY

The growing class of cohabiting couples is a diverse bunch with different needs, different vulnerabilities, different approaches to commitment, and different attitudes toward marriage. The scholarship calling for

78. As explained above, child support formulas are based on econometric data about what a couple would spend on a child if they lived together and a child was brought into the home, but the obligation attaches regardless of any particular living situation.

79. See Baker, *supra* note 12, at 329–31.

greater recognition of these couples is also varied, with different scholars focusing on different aspects of the work that family law does when suggesting that nonmarital couples should have their relationships recognized by the law. The next two parts dive into the benefits and challenges of proposals (many of them already implemented in different jurisdictions) that address the legal needs of cohabitants.

IV. COMMON LAW MARRIAGE AND ITS FUNCTIONAL EQUIVALENTS

A. CONDUCT-BASED (OPT-OUT) SYSTEMS

The question of whether to treat some people who are not married as if they are married dates back to Ancient Rome.⁸⁰ During the Middle Ages, the church tried to impose formal requirements on entry into marriage,⁸¹ but informal habits of cohabitation were so entrenched that the church had to find mechanisms for treating informal unions as formal ones.⁸² The Church of England assumed jurisdiction over marriage in England in 1534, but it was not able to abolish the doctrine of common law marriage—which afforded informal couples an opportunity to be recognized as married—until 1753.⁸³ By that time, the doctrine had already migrated to the United States, and it proved useful in a country whose frontier was constantly expanding and where communities were developing with minimal religious and state infrastructure. In the mid-nineteenth century, more than two-thirds of states in this country recognized common law marriage. By the mid-twentieth century, most states had abandoned the doctrine, either judicially or legislatively, after being convinced that it was unnecessary, costly, and encouraged fraud.⁸⁴ Only nine states and the District of Columbia still recognize the original doctrine.⁸⁵

Traditional common law marriage doctrine had four requirements.⁸⁶

80. LIND, *supra* note 76, at 32–37 (describing marriage under Roman law). Rebecca Probert, in her review of Lind’s book, questions how direct the line is between the Roman recognition of nonmarital relationships and the American common law marriage. See Rebecca Probert, *Common Misunderstandings*, 43 FAM. L.Q. 587, 588–89 (2009) (book review).

81. LIND, *supra* note 76, at 120.

82. *Id.* at 123.

83. Lord Hardwicke’s Act abolished common law marriage in England. See *id.* at 136. However, there is some debate about how established common law marriage was before it was abolished. See Probert, *supra* note 80, at 591 (suggesting that Lord Hardwicke’s Act was motivated by a desire to “put the requirements for a valid marriage on a statutory footing,” not to abolish a doctrine that did not exist in England).

84. See Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 740–44 (1996) (questioning whether those were legitimate rationales).

85. *Common Law Marriage Fact Sheet*, UNMARRIED EQUALITY, <https://www.unmarried.org/common-law-marriage-fact-sheet/> [https://perma.cc/6YYH-WEGM]. Other states including, Georgia, Idaho, Ohio, Oklahoma, and Pennsylvania don’t recognize common law marriages started after a given date. *Id.* New Hampshire only recognizes common law marriages for inheritance purposes (the opposite of the American Law Institute approach). *Id.*

86. See Bowman, *supra* note 84, at 712.

Two people had to have the capacity to marry (they were old enough, of the opposite sex, not barred by incest laws, and not married to others) and also an intent or an agreement to marry. Further, they had to have cohabited, and they had to have held themselves out to the community as married.⁸⁷

Almost twenty-five years ago, Professor Cynthia Bowman presented the feminist case for reinvigorating common law marriage.⁸⁸ In her article and subsequent book, Bowman argued that common law marriage protects those who have invested in, and relied on, a relationship. She asserts that “[c]ohabitants who have merged their lives for a period of time develop relations of dependency that leave them vulnerable when the union ends in separation or death.”⁸⁹ The investment in relationships that Bowman argued deserves redress is the investment in relationship that family law also honors.

In her book, Bowman refined the common law marriage doctrine, replacing the traditional four requirements with a simple temporal requirement: “After they have been living together for two years or have a child, a cohabiting couple should be treated by the law as though they were married. This status would be imposed on a couple without their consent”⁹⁰ However, “couples [could] easily and effectively . . . contract out” with a notarized standard form that would be filed with a court.⁹¹ In 2000, the American Law Institute (ALI) offered a comparable idea, “domestic partnerships,” though it left states free to choose the number of years necessary to trigger the obligations.⁹² In cases in which a child was born to or adopted by the couple, the ALI—like Bowman—suggested that its “domestic partner” rules should apply regardless of any temporal requirement.⁹³

Notably, when both the ALI and Bowman first offered their proposals, no states yet recognized same-sex marriage. Recognizing domestic partners was a way of providing the rights and responsibilities of marriage to people who could not access the institution, but advocates for these proposals also had broader concerns. Bowman wrote that by treating a couple that has cohabited as if they were married, the law protects against the “injustice” that results to the person (more often a woman) who has become “interdependen[t] and vulnerab[le].”⁹⁴ Other scholars echo the belief that “[c]ohabitation causes dependency”⁹⁵ and that common law marriage tries to alleviate the harm to those left vulnerable by that de-

87. *Id.*

88. *Id.* at 711–12.

89. BOWMAN, *supra* note 29, at 3.

90. *Id.* at 224.

91. *Id.* at 228.

92. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03(2), (7) (AM. LAW INST. 2000).

93. *Id.* § 6.03(7)(1).

94. BOWMAN, *supra* note 29, at 172.

95. LIND, *supra* note 76, at 964.

pendency.⁹⁶ Another scholar refers to “the fact of dependency and interdependency in adult relationships.”⁹⁷

A proposal comparable to Bowman’s and the ALI’s was adopted by Washington state. Washington does not use a strictly temporal approach to assessing these relationships, which it calls “equity relationships” or “committed intimate relationships,”⁹⁸ but asks courts to assess the purpose of the relationship, the extent to which the couple pooled their assets, the intent of the parties, and the length of the relationship.⁹⁹ Australia, and most of the Canadian provinces, employ judicial assessments like this, which can be invoked unless the couple “opts out.”¹⁰⁰ All of these opt-out systems are conduct-based in that it is a couple’s conduct, not state registration or contract, that gives rise to the obligation.

The proposals that use time as a trigger suggest that it is cohabitation itself, not the intention of the parties or their subjective understanding of commitment to the other person, that leads to obligation. In contrast, the traditional common law marriage cause of action—and jurisdictions like Washington and most of the Canadian provinces—use conduct to infer cohabitants’ intent, purpose, and level of commitment. Those factors have emerged as proxies for the emotional and financial interdependence which proponents of these conduct-based regimes believe flow from cohabitation.¹⁰¹

1. Financial Interdependence

There is no question that cohabiting couples can become financially interdependent, especially if they divide labor in traditionally gendered ways. This division of labor can benefit both parties but leave only one of them financially vulnerable at dissolution if only that party forwent financial opportunities, provided unpaid household labor, or rendered herself less able to take care of herself in a market economy.¹⁰² In explaining why it adopted an opt-out regime, instead of a regime that required unmarried couples to register for alternative family status, the Australian government opined it was people removed from market work who were likely the “most vulnerable” and least likely to have knowledge of, or access to, registration systems that might help them.¹⁰³ In its official statement explaining why many provinces adopted an opt-out system for co-

96. *Id.* at 864 (“A point of family law legislation is that [someone] . . . who has not been able to provide any contribution to the community . . . is still given legal protection. . .”).

97. Stolzenberg, *supra* note 26, at 2019.

98. *Walsh v. Reynolds*, 335 P.3d 984, 986 n.1 (2014). The Washington courts initially called these relationships “meretricious relationships,” but have since used a variety of terms including “equity relationships,” “stable, marital-like relationship,” and “committed intimate relationship.” *See id.*

99. *Id.* at 991.

100. BOWMAN, *supra* note 29, at 186–94 (Canada); *id.* at 194–201 (Australia).

101. In assessing a “relationship purpose,” the Washington courts looked to whether the couple “support[ed] each other emotionally and financially.” *Walsh*, 335 P.3d at 991.

102. LIND, *supra* note 76, at 964 (explaining benefits of common law marriage).

103. BOWMAN, *supra* note 29, at 200.

habitants, a Canadian Commission wrote, “It is likely that one or both partners have assumed that the relationship will be permanent and that the assets . . . are likely to be intermingled.”¹⁰⁴

When courts try to determine whether cohabitants are financially interdependent, the extent to which couples divide their labor in traditionally gendered ways affects courts’ willingness to award relief. Washington state, considered a leader in recognizing nonmarital relationships because of its committed relationship doctrine, is more willing to find that a couple that divided their labor along traditional gender lines pooled their income than did a couple in which the woman continued to work but just earned much less than the man.¹⁰⁵ Canadian courts are split, sometimes looking for gender roles, sometimes trying not to, but leaving litigants confused about what kind of economic behavior will be considered interdependent.¹⁰⁶

In assessing interdependence this way, these courts are engaging in the kind of granular analysis of a couple’s financial decision-making that family law has abandoned. If a couple is married, it does not matter how much a spouse forewent paid opportunities or how much unpaid labor she performed in the household. She can be a stay-at-home mom, or a college professor, or a waitress who never wanted to give up her job. It is the fact that she (or he) is married that entitles her (or him) to marital property and maintenance if the couple was married long enough. As one observer commented, under Canada’s opt-out system “[c]ohabitants fall under evaluative scrutiny of a kind spared to married couples by no-fault divorce and a presumption of equal sharing.”¹⁰⁷

2. *Emotional Interdependence*

While the financial interdependence inquiry is usually tied to traditional gender roles, the emotional interdependence inquiry, under the guise of assessing “commitment” and “intent,” is usually tied to sex. Göran Lind, in his comprehensive survey of common law marriage, found that the judicial inquiries into whether a relationship qualifies as common law marriage routinely depended, and still depends, on judicial evaluation of the sexual relationship.¹⁰⁸ Washington state found that having sex with other people is an indication of an intent not to be committed,¹⁰⁹ while monogamy is evidence of intent to be committed¹¹⁰—though the court has also indicated that some non-monogamy is consistent with a finding

104. ONT. LAW REFORM COMM’N, REPORT ON THE RIGHTS AND RESPONSIBILITIES OF COHABITANTS UNDER THE FAMILY LAW ACT 3 (1993).

105. Compare *Fenn v. Lockwood*, 136 Wash. App. 1017 (Wash. Ct. App., 2006), with *In re Marriage of Pennington*, 14 P.3d 764 (Wash. 2000).

106. See Robert Leckey, *Judging in Marriage’s Shadow*, 26 FEMINIST LEGAL STUD. 25 (2018).

107. *Id.* at 26.

108. LIND, *supra* note 76, at 1042–44 (discussing the awkward inquiries into sex lives in Washington state, New Zealand, and Canada).

109. *In re Marriage of Pennington*, 14 P.3d at 771.

110. *In re Long & Fregeau*, 244 P.3d 26, 30 (Wash. Ct. App. 2010).

of a committed relationship because married people have affairs too.¹¹¹ A court in British Columbia explained the difficulty, “With no social barrier to a sexual relationship while dating and no social pressure to get married, it is hard to say when a dating relationship turns from the casual to the committed relationship.”¹¹²

Defenders of conduct-based systems implicitly or explicitly argue that the judicial and personal costs of evaluating these relationships are necessary because of the social good that these relationships do: “Family relationships provide their members with necessary intangible goods such as community, emotional support, and intimacy, thereby promoting their individual well-being and helping them to develop the capacities necessary for collective life.”¹¹³ Committed relationships in which emotional interdependencies develop no doubt do that, but courts do not seem particularly comfortable assessing which relationships those are. “Beyond the sheer variety of conduct within couples, judges also stress difficulties relating to the psychological element of commitment.”¹¹⁴

Bank accounts, spending patterns, and division of labor can, to a certain extent, determine financial interdependence, but it is much harder to determine emotional interdependence. Commitment to any relationship varies over time and is rarely completely mutual. Most studies find gendered differences regarding both motivations for cohabitation and beliefs about the permanence of the relationship.¹¹⁵ Ultimately, courts appear to base their assessment of whether couples are committed by deciding whether they think the couple’s relationship looks like “a good marriage.”¹¹⁶

If in trying to recognize nonmarital families, courts are deciding whether that nonmarital relationship looks like a good marriage, courts are not recognizing alternative families at all. They are reifying whatever normative view of marriage they bring with them to the courtroom. They are providing relief only to those people who conduct their lives within the norms of marriage. They are propping marital supremacy up, not bringing it down.

Courts are also presiding over inquiries that may be acutely awkward for litigants. Imagine the evidence one party might marshal to defeat a claim that the relationship was committed: sexual behavior, disputes over money, financial mistakes, disputes about sex, flirtations with other peo-

111. *See id.*

112. *Bressette v. Henderson*, [2013] B.C.S.C. 1661, ¶ 26 (Can.).

113. *Stolzenberg*, *supra* note 26, at 2040.

114. *Leckey*, *supra* note 106, at 31.

115. *Id.* at 22 (citing studies reflecting gendered differences for cohabitation); June Carbone & Naomi R. Cahn, *Commentary, Afterword, and Concluding Thoughts on Family Change and Economic Inequality*, in *UNEQUAL FAMILY LIVES*, *supra* note 42, at 275 (citing studies regarding class and gender differences regarding subjective understandings of cohabitants’ likelihood to marry. For those with a college education, two-thirds of the women and only one-third of the men said they expected the cohabitation to end in marriage; for those without any college education, those percentages were reversed).

116. *Leckey*, *supra* note 106, at 26.

ple, rejections within the relationship, etc. It was the distaste for, and inability to evaluate, this kind of evidence that led to the no-fault divorce revolution in family law in the 1970s and 1980s.¹¹⁷ Judges do not like evaluating the emotional and financial behavior of couples. They are not particularly good at it, and they do not tend to trust the evidence in front of them. Given any particular judge's lack of comprehensive experience, they are left to judge the relationships in front of them with reference to the only ones they know well—their own.

B. PROTECTING THE VULNERABLE

Proponents of conduct-based regimes may think such systems are nonetheless necessary because they are likely to help the most vulnerable. To assess this vulnerability rationale, it is worth integrating what the demographic data tells us about who would most likely be affected. Relying on Census Bureau data, June Carbone and Naomi Cahn point out that in the demographic most vulnerable economically, those in the bottom quintile of earnings, 70% of women make the same, or more, money than their spouses.¹¹⁸ It is harder to get that kind of economic data on cohabiting couples (because they do not always identify as such), but there is little reason to think that unmarried working-class women will be helped that much by these opt-out regimes if they are likely to be earning as much if not more than their cohabitants.

Nor is there reason to think that women of color, who are less likely to marry than white women, would be helped by such a regime. Cohabitation is more common in the Black community and cohabitations are likely to last longer for Black couples than for white cohabiting couples of all income levels, but the wage gap between Black women and Black men is lower than it is for any other demographic group.¹¹⁹ Further, unemployment is significantly higher for Black men than Black women.¹²⁰ Ac-

117. As the Mortimer Commission of the Church of England concluded in 1966, these kind of inquiries “invest[] with spurious objectivity acts [whose] real significance varies widely.” MORTIMER COMM’N OF THE CHURCH OF ENGLAND, PUTTING ASUNDER: A DIVORCE LAW FOR CONTEMPORARY SOCIETY 29 (1966); see also AIDAN R. Gough et al., Report of the Governor’s Comm’n on the Family 26 (1966); Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 35–36 (1987) (explaining the desire of reformers to avoid excessive “factual” inquires involving intimate conduct).

118. See June Carbone & Naomi Cahn, *Whither/Wither Alimony?*, 93 TEX. L. REV. 925, 949–50 (2015) (reviewing CYNTHIA LEE STARNES, *THE MARRIAGE BUYOUT: THE TROUBLED TRAJECTORY OF U.S. ALIMONY LAW* (2014)) (noting that almost 70% of women in the bottom quintile of earners have the same or higher income than their spouses).

119. Ariane Hegewisch & Heidi Hartmann, *The Gender Wage Gap: 2018: Earning Differences by Age and Ethnicity*, INST. FOR WOMEN’S POL’Y RES. (March 7, 2019), <https://www.iwpr.org/publications/gender-wage-gap-2018> [https://perma.cc/EZD4-5MKZ] (In 2017 and 2018, Black women averaged over 90% of what Black men made, compared to white women who averaged 81.7% of what white men made.).

120. U.S. BUREAU LAB. STAT., LABOR STATISTICS FROM THE CURRENT POPULATION SURVEY, U.S. DEP’T LAB., https://www.bls.gov/web/empsit/cpsee_e16.htm [https://perma.cc/TX2N-6DBA] (last modified Jan. 10, 2020).

cordingly, there is less reason to assume economic disparity in a Black couple.

This does not mean that there is less reason to assume a gendered division of unpaid work in communities of color or low-income communities.¹²¹ Various studies have concluded that lower-income men have not taken on the responsibilities of the traditional non-working spouse; they just do less work of all kinds.¹²² If the couple splits, these men could benefit from a cohabitant being forced to split the property she brought into the relationship.

For a host of reasons, working-class men, particularly men of color, are vulnerable in today's social and political economy.¹²³ They deserve more support—including policy initiatives to help them—but the working-class women with whom they share their intimate lives should not necessarily be the ones responsible for alleviating these men's vulnerability. Imposing marital rules on these cohabiting women could do just that.

The working-class woman, who earns comparably to her partner and does most of the unpaid labor, can be doubly hurt by opt-out regimes. Her ex-partner can invoke the law's protection of cohabitants and trigger an unpleasant and invasive judicial assessment of their home life. In addition, if the court determines that he was financially and emotionally dependent, she may have to provide for him even though she never wanted to commit to him financially. That is why she did not marry him in the first place.¹²⁴

The presence of children does not necessarily change this analysis. Many unwed couples begin to cohabit after they learn that one of them is pregnant.¹²⁵ Pregnancies are often unplanned; having a child does not always represent a decision to further commit to a cohabiting relation-

121. RICHARD A. LIPPA, GENDER, NATURE, AND NURTURE 183 (2005); JOAN C. WILLIAMS, RESHAPING THE WORK-FAMILY DEBATE: WHY MEN AND CLASS MATTER 59 (2010) (explaining that traditional gender expectations are higher among working-class men than other men).

122. Daniel Schneider, *Market Earnings and Household Work: New Tests of Gender Performance Theory*, 73 J. MARRIAGE & FAM. 845, 857 (2011) (explaining that studies find that men who do not earn as much as female partners do less, not more, work in the household).

123. WILLIAMS, *supra* note 121, at 81 (examining plight of working-class families in an era in which there is no longer "family wage" that can support multiple dependents); JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 15–157 (2014) (proposing various policies to help provide employment and more security for working-class men (and women)); Tonya L. Brito, *Fathers Behind Bars: Rethinking Child Support Policy Toward Low-Income Noncustodial Fathers and Their Families*, 15 J. GENDER RACE & JUST. 617 (2012) (discussing the vicious circles and economic exigency for many low-income men).

124. See *supra* text accompanying notes 72–76 (exploring why many low-income women may not want to marry).

125. KATHRYN EDIN & TIMOTHY J. NELSON, DOING THE BEST I CAN: FATHERHOOD IN THE INNER CITY 41, n.27 (2013) ("a good number of [couples they studied] enter cohabitation 'shotgun' . . .").

ship.¹²⁶ In low-income communities, traditional gender roles still tend to determine who does most of the child care, even while mothers assume the breadwinning role as well.¹²⁷ Kathryn Edin's ethnographic work in the inner city, with both unmarried mothers and unmarried fathers, shows that mothers assume the primary provider role for a child in part because that gives mothers the power to leave a relationship.¹²⁸ Given economies of scale, if a partner is earning anything, cohabiting with that partner may enhance a woman and her children's living standard, but that does not mean that she wants to be tied to that partner or that higher standard of living. Low-income women often value their autonomy over their relationship.¹²⁹

The ability to walk away from a cohabitation that she feels is harmful or insulting to her or her children can be more important than the money a cohabitant can provide. This explains why so many low-income mothers refuse to go after a child's father for child support. As I have explained elsewhere, in a manner the law does not officially countenance, many unmarried mothers decide to be single mothers by choice.¹³⁰ They forego child support in return for the autonomy they feel is more important.¹³¹ They willingly reject the economic interdependence that proponents of opt-out systems argue inevitably follows from cohabitation.

Recall that most low-income cohabitants cite the absence of resources as the reason they have not gotten married. As discussed, it is not clear why the absence of resources should matter to the marriage question because getting married is not expensive.¹³² But the absence of resources correlates with the extent to which women seem to prize their autonomy over their relationship. Living in, or at the edge of, poverty may make one particularly wary of interdependence because of the risk that a partner will not be able to provide what he has implicitly or explicitly promised (she knows she cannot depend on him financially) and the need to be flexible in one's own personal life (to be able to move closer to child care, take a job elsewhere, or move in with other family members). It is per-

126. *See id.* at 53–54 (noting that while pregnancies follow a decision not to use condoms, that decision is understood as more about a commitment to monogamy than a decision to have a child).

127. KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE 117, 203 (2005) (noting that low-income men in their studies believe in traditional gender roles).

128. *Id.* at 203–04 (women understand that being the economic provider for their children allows them to “follow through on [their] threat to leave [their partners] without being ‘left with nothing’”).

129. *Id.*; *see also* CARBONE & CAHN, *supra* note 123, at 119–21 (discussing the importance of autonomy to lower-income women who do not feel they can rely on their partner financially or emotionally).

130. Katharine K. Baker, *The DNA Default and Its Discontents: Establishing Modern Parenthood*, 96 B.U. L. REV. 2037, 2079–81 (2016) (describing the dynamics of the decision-making that leads women to forego child support in return for freedom to leave a relationship).

131. CARBONE & CAHN, *supra* note 123, at 132 (“[a]utonomy means staying out of court.”).

132. *See supra* notes 72–73 and accompanying text.

fectly possible that contrary to what the Australian government suggested, the most vulnerable cohabitants are the ones who knowingly, carefully, and intelligently avoid a legal regime that assumes they are living in an interdependent relationship.¹³³

1. Government and Other Private Law Benefits

Most opt-out systems, like traditional common law marriage, treat a cohabiting couple as married for all purposes, not just for purposes of allocating property under family law rules.¹³⁴ As indicated above, many other legal entitlement programs rely on family law's designation of marital status. Social Security, workers' compensation, intestacy, tax, tort law, and the regulatory bodies in charge of many forms of private insurance (ERISA, health insurance) use marital status to determine various forms of eligibility.¹³⁵ Scholars often lament that so many unmarried cohabitants are denied access to these legal regimes.¹³⁶ The battle for same-sex marriage brought the scope of family law status determinations to light, as advocates underscored all of the ways in which the failure to allow same-sex couples to marry deprived them of benefits regularly available to others.¹³⁷ But it is not clear that unmarried cohabitants want to be treated as connected for purposes of such benefits.

a. The Finite Pot Problem

There is a difference between preventing one partner from accessing the other partner's Social Security benefits when both partners want her to (which was the case for many same-sex couples) and creating a default in which people are forced to share their Social Security benefits when they may not want to (which may be the case for many low-income women). Social Security retirement, survivors and disability programs—which collectively constitute the bulk of all non-Medicare Social Security spending—allow family members to collect on an insured's account.¹³⁸ Spouses and children, together with the insured, can usually collect between 150% and 180% of the insured's base level.¹³⁹ But the amount that family members can collect is capped and must be shared.¹⁴⁰ Thus, if the

133. See *supra* note 103 and accompanying text.

134. The ALI proposals apply only to traditional family law obligations but that was all the drafters believed they were being charged with defining. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.01 cmt. a. (AM. LAW INST. 2000).

135. See *supra* Part II.B–C.

136. See, e.g., WEST, *supra* note 32, at 119–21 (suggesting there is no justification for spouses but not unmarried partners to have access to another's Social Security retirement or disability).

137. See BRIEF ON THE MERITS OF AMICI CURIAE FAMILY LAW PROFESSORS & THE AMERICAN ACADEMY OF MATRIMONIAL LAWYERS IN SUPPORT OF RESPONDENT EDITH SCHLAIN WINDSOR at 20–24, *United States v. Windsor*, 570 U.S. 744 (2013) (No. 12-307) (discussing federal statutes that invoked family status to determine federal benefits).

138. 20 C.F.R. § 404.403 (2015).

139. *Id.*

140. *Id.*

insured's primary insurance amount is \$600, the maximum amount for collection is usually \$900. That incremental \$300 must be split among eligible family members.¹⁴¹ In this way, Social Security, like workers' compensation regimes that have a family cap,¹⁴² provides only a finite pot, not unlike intestacy.

There is only so much in the pot, whether it be a deceased's estate or a Social Security account. The more takers, the less each taker gets. If the law treats those without family status as if they had family status, then the recipients who actually have family status have to share. An injured cohabitant's children would have to share Social Security disability or workers' compensation benefits with her cohabitant.

It is this scenario which belies the notion that there is necessarily injustice in not treating a cohabitant, whether a co-parent or not, as married for purposes of Social Security benefits. What if the insured would prefer that her children get the entirety of her Social Security benefit? If she marries her cohabitant, she forecloses that option, but prioritizing her children may be part of her reason for not marrying. Many women, particularly low-income women, have children and commit to parenthood before they find an adult they want to marry.¹⁴³ Parenthood is the primary familial commitment for them. These women know what marriage is and understand that they could marry but choose not to enmesh themselves with their cohabitants in order to protect their relationship with their children. If mothers are prioritizing their children's well-being over their romantic partnerships, then arguably social welfare regimes should as well.

The same analysis applies to critiques of the intestacy system. Bowman cites studies showing that most cohabitants would prefer that some or all of their estate go to their partner.¹⁴⁴ If intestacy rules were only about replicating donor intent, then arguably cohabitants should "take" under intestacy statutes because most cohabitants would prefer it. But cohabitants with children, particularly children who are young and/or struggling, may not prefer that at all. In most states, treating cohabitants as married would mean the cohabitant would necessarily take approximately half the estate in intestacy.¹⁴⁵ Spousal share requirements would force the children to share even if the deceased left a will in which everything went to her children.¹⁴⁶ Given the variety of cohabiting arrangements, and the

141. *Id.*

142. For a famous example see *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), where the Supreme Court ruled that the legitimate children of the deceased had to share the workers' compensation award with the illegitimate child of the deceased.

143. EDIN & KEFALAS, *supra* note 127, *passim*.

144. BOWMAN, *supra* note 29, at 227.

145. See RALPH C. BRASHIER, *INHERITANCE LAW AND THE EVOLVING FAMILY* 14–15 (2004) (discussing elective share for spouses).

146. *Id.* at 10 ("In the United States, the surviving spouse receives greater protection in inheritance schemes than any other family member. In fact, in all but one state the surviving spouse is the *only* family member who consistently receives significant protection from *intentional* disinheritance by the decedent."); see also ROBERT H. SITKOFF & JESSE

different reasons people have for cohabiting, this seems like a stark denial of autonomy for people who have chosen to live outside of family law's status-based regime.

b. The Shadow Welfare State

As for “shadow welfare state programs,” largely administered through employers in this country,¹⁴⁷ opt-out systems would treat cohabitants as spouses by default. This would likely expand access to many of these programs and would probably be an unqualified good for cohabitants, allowing them access to critical benefits that spouses get as a matter of course. However, many employer-based programs already require employees to list who they want to count as their beneficiaries for particular benefits.¹⁴⁸ In effect, these programs already operate as a mandatory opt-in system because employees must choose how they want third-party insurers to treat their relationships. The benefits of an opt-out system dissipate if a mandatory opt-in system is in place because no one can forget to opt in. A status-based approach to cohabitation would likely make more shadow-welfare state benefits potentially available on the basis of cohabitation, but it would not guarantee that a cohabitant would choose to designate his or her partner as a beneficiary.

c. Means-Tested Programs

Finally, as Erez Aloni has detailed, opt-out systems create significant problems of deprivative recognition.¹⁴⁹ Any cohabitant receiving means-tested benefits, including Medicaid, Temporary Assistance for Needy Families, student financial aid, or Supplemental Security Income, and cohabitants receiving benefits based on previous marital status, like maintenance or survivor's benefits (including pension benefits) could lose those benefits under an opt-out system either because their cohabitant's income would be imputed to them or because their entitlement only runs to those who have not remarried.¹⁵⁰ Those who have the most to lose from marital status may be those who are dependent on means-tested programs or a former spouse's benefits. It seems likely that this *is* the group that is most vulnerable. They also may well be the ones least likely to know they must opt out of conduct-based regimes that impose marital status.

DUKEMINER, WILLS, TRUSTS, AND ESTATES 72 (10th ed. 2017) (“In most states, the surviving spouse receives at least a one-half share of the decedent's estate, which is a significant increase from the one-quarter or one-third that was typical earlier in the twentieth century.”).

147. See Blumberg, *supra* note 23, at 1266–67 (describing evolution of employer plans that expanded health, disability, and retirement benefits).

148. See Matsumura, *supra* note 23, at 1340 (discussing employer plans that allow employees to name beneficiaries and the positive effects on employees of being able to have their informal relationships recognized).

149. Erez Aloni, *Deprivative Recognition*, 61 UCLA L. Rev. 1276, 1281–82 (2014).

150. *Id.* at 1297.

C. SUMMARY

All of the opt-out systems force individuals to share much of what they have. In doing so, these systems honor and reward people who do the relational care work that usually goes uncompensated in economic markets. Like family law, opt-out systems do not value that work with reference to the market but by reference to what the more financially empowered partner can provide. Need is defined relatively. For those concerned, as family law is, with honoring non-market work, opt-out systems make sense. But they come with costs. Because most opt-out regimes are conduct-based, not status-based, they require invasive judicial inquiries into the couple's personal life. Proposals that use time or children, rather than conduct, avoid categorization costs, but they potentially impose obligations on those who can least afford them and force cohabitants to preference their conjugal relationship over their parental relationships.

V. THE ALTERNATIVES: REGISTRATION SYSTEMS AND COMMON LAW REMEDIES

A. REGISTRATION (OPT-IN) SYSTEMS

In the early twenty-first century, in an effort to afford marital rights and obligations to same-sex couples who could not marry, many states and countries adopted (and several state supreme courts ordered) civil union or domestic partnership alternatives that allowed same-sex couples to opt into the rights and obligations of marriage.¹⁵¹ These alternative statuses had no effect at the federal level, but within the states that recognized them, couples who registered for these alternative statuses were subject to family law's redistribution system and were usually treated as married people for all (state-based) tort, contract, and intestacy purposes.¹⁵² After the U.S. Supreme Court enshrined the right of same-sex couples to marry in *Obergefell v. Hodges*,¹⁵³ many states eliminated these marriage alternatives, but several states and foreign jurisdictions still offer them as an option to both gay and straight couples. Opting into one of these regimes is a way of undermining marital supremacy. It allows one to accept family law's communitarian rules, but not the patriarchal norms and baggage that many believe accompany marriage.¹⁵⁴

California, Hawaii, Maine, Maryland, Nevada, New Jersey, Oregon, Washington, Wisconsin, and the District of Columbia all still allow couples to enter into a domestic partnership or civil union—the legal ramifications of which are identical to those that would follow if they got married.¹⁵⁵ New Zealand, South Africa, the Netherlands, and Quebec

151. See Aloni, *supra* note 33, at 587–95.

152. *Id.*

153. 135 S. Ct. 2584 (2015).

154. For a summary of that particular critique of marriage, see Aloni, *supra* note 33, at 619–20.

155. Survey of state domestic partnership programs (on file with author).

also offer something comparable to a domestic partnership program, which if elected by a cohabiting couple, offers most or all of the legal rights and obligations of marriage.¹⁵⁶ Given the recurring critique of marriage and marital norms one might think these marriage alternatives would be popular. They are not. As Erez Aloni notes, “[O]nly in a minority of cases have the alternatives [to marriage] survived the legalization of same-sex marriage, and even in cases where civil unions still exist, they are hardly used”¹⁵⁷

A notable exception to the dearth of robust civil union registration is in France, where the option of entering a *Pacte Civil de Solidarité* (PAC) is oft-chosen.¹⁵⁸ PACs do not act as a substitute marriage provision, i.e. an alternative status that grants the package of marital rights and obligations under a different name.¹⁵⁹ Instead, PACs offer couples even more control over how the state treats their relationship by giving them the option of registering their own contract detailing their obligations to each other.¹⁶⁰ If couples do not draft their own contract, a default separate property regime governs.¹⁶¹ Thus, in France, couples can marry and opt into the traditional community property regime to govern the disposition of their property at dissolution, they can allocate property rights as they wish, or they can just use the PAC default which requires no sharing of property at dissolution.¹⁶² PACs have proved very popular in France; just as the wedding industry flourishes in the United States,¹⁶³ there is a PAC industry in France.¹⁶⁴ Couples can register for PAC gifts with department stores and schedule a PAC honeymoon vacation package.

Several commentators have argued that allowing couples the ability to choose among obligation packages to each other best protects cohabitants’ rights. Under this view, PAC-like provisions should be one of several alternatives available. In 2009, William Eskridge predicted (or perhaps hoped) that by now there would be variety of options, with everything from the most traditional covenant marriage—which makes divorce particularly difficult—to civil marriage, civil unions, cohabitation plans with varying degrees of reciprocal duties imposed on the couple, and domestic partnerships in which there were no mutual obligations to each other but the couple could opt to have an employer provide health

156. See Aloni, *supra* note 33, at 632 (most of the Canadian provinces have an opt-out system, but Quebec has an opt-in system).

157. *Id.* at 626–27.

158. *Id.* at 577.

159. *Id.* at 636.

160. *Id.*

161. *Id.*

162. For a discussion of PACs, see *id.* at 633–43.

163. For a survey of the industry, see *Wedding Services Industry in the US—Market Research Report*, IBISWORLD (last updated March 2020), <https://www.ibisworld.com/industry-trends/market-research-reports/other-services-except-public-administration/repair-maintenance/wedding-services.html> [<https://perma.cc/V2SS-TXER>].

164. Scott Sayare & Maïa de la Baume, *In France, Civil Unions Gain Favor Over Marriage*, N.Y. TIMES (Dec. 15, 2010), <http://www.nytimes.com/2010/12/16/world/europe/16france.html> [<https://perma.cc/N5RL-CVC9>].

insurance and other benefits to a named partner.¹⁶⁵ Professor Aloni's idea of Registered Contractual Relationships updates Eskridge's spectrum by suggesting that the parties themselves (as in France) craft their rights and obligations, rather than choosing between certain menu choices provided by the state.¹⁶⁶

Since 2009, Colorado has had a statute that blends some of Aloni's respect for autonomy with Eskridge's menu idea.¹⁶⁷ Its "Designated Beneficiary Agreement" provision allows a couple, neither of whom is married or in a civil union with someone else, to choose all or only some of twelve different reciprocal rights traditionally allocated to spouses.¹⁶⁸ Notably, everything on the Colorado menu pertains to the right to have the state or third parties treat one's partner as a spouse. The Colorado statute does not give cohabitants any redistribution rights against each other. When Vermont adopted civil unions, it creatively extended an idea like this to people who wanted to share various benefits even though they were not in a conjugal relationship. (The Vermont legislature later moved to eliminate that extension of civil union status because no one, literally not one set of two people, signed up for it.)¹⁶⁹

1. *Autonomy*

The indisputable advantage of these opt-in regimes is the control they afford cohabitants to determine how the law will treat their intimate relationships. They provide couples the autonomy to shape their own rules and escape the marriage/nonmarriage binary. If a couple does not want to share property or debt with their cohabitant, they do not have to. If they want their cohabitant to inherit their property in the event of their death, or they want their cohabitant to have standing to sue a third party for tortious conduct (intentional infliction of emotional distress or wrongful death), they can so designate. On the other hand, if a couple wants to marry, they can. No jurisdiction has done away with marriage. Thus, a couple that opts in to one of these alternative statuses clearly opts out of marriage.

What of the people who just do nothing, neither opting in nor opting out? The adoption of an opt-in regime makes imposing marital rules on that couple through an opt-out system untenable. The imposition of family law rules on people who have not married may make sense if there is only one set of family law rules. In those instances, if a party sacrificed as if she was in a family, the law can treat her as it treats everyone else who is in a family. But why should the law enforce marriage when the opt-in

165. William N. Eskridge, Jr., *A Liberal Vision of U.S. Family Law in 2020*, in *THE CONSTITUTION IN 2020*, at 245, 249–50 (Jack. M. Balkin & Reva B. Siegel eds., 2009).

166. See Aloni, *supra* note 33, at 607–09.

167. See COLO. REV. STAT. ANN. § 15-22-105 (West 2017).

168. *Id.* For instance, one can designate a partner to get rights to workers' compensation, inheritance, hospital visitation, pensions, standing to sue for wrongful death, and health insurance, among other benefits.

169. See H. 738, 2013–2014 Leg. Sess. (Vt. 2014).

regime presents so many alternatives? If there are many ways of treating family members as family members, how can the law know which set of rules to apply? The rejection of the marriage/nonmarriage binary in opt-in regimes nullifies the functional, “family is as family does,” rationale for opt-out regimes.

Moreover, in practice, those who opt into something other than marriage also opt into non-communitarian, neoliberal rules of property distribution. Colorado’s reciprocal beneficiary statute has no provision for sharing accumulated property or future income.¹⁷⁰ The state does not provide any mechanism (other than traditional contract) for sharing, so the decision to use that menu is a decision not to adopt family law’s communitarian rules. In France, where couples have the opportunity to craft their own contract and distribute their joint and future wealth in a manner of their own choosing, couples rarely do so; only 2% of PAC couples submit their own contract.¹⁷¹ Instead, PAC couples allow the default rule of separate property to control, thus ensuring the economic vulnerability of a cohabitant who disproportionately invests in non-market work. When given a choice, couples in France are choosing not to protect against the vulnerabilities caused by economic and emotional interdependence.

Those who favor opt-out systems argue that opt-in systems thus run too much risk of leaving cohabitants unprotected. This autonomy/vulnerability trade-off is inevitable. One’s position on which is more important—protecting individuals’ autonomy and ability to craft their own family law rules as opt-in systems do, or protecting against the vulnerabilities that can be caused by cohabitation, as opt-out systems do—likely determines whether one favors an opt-in or opt-out system.

2. Normativity

Opt-in systems reject marital normativity and “marriage as the measure of all things”¹⁷² by providing more options. In theory, marriage will not reign as supreme, and marital norms can be more easily eroded if marriage is not the only game in town. But opt-in systems do not appear to be as good at disrupting marital normativity as proponents may imagine. As the dearth of domestic partnership and civil unions entered into post-*Obergefell* attests, when given the option to marry alongside another registration option, the vast majority of people choose marriage. This is not the law privileging marriage so much as it is people privileging marriage.

Professor Serena Mayeri is right that “marriage is both a privileged status and a status of the privileged,”¹⁷³ but it is a privileged status, in part, for reasons exogenous to the legal regime. People choose marriage

170. See §§ 15-22-101 to -112.

171. Aloni, *supra* note 33, at 644.

172. See Franke, *supra* note 4, at 2686.

173. Mayeri, *supra* note 1, at 1283.

even when it is not the only game in town. The commercial and social infrastructures that support marriage as an institution—The New York Times Wedding Section, the billion dollar bridal industry, secular traditions around exchanging rings and gifts, religious traditions around marriage—thrive not because the law mandates them, but because people, especially privileged people, enthusiastically and lavishly prop them up.

Even if the law were to abandon marriage as an option, the experience of PACs in France suggests that the commercial and social infrastructure that has supported marriage as an institution can readily shift to support an alternative. That social and economic infrastructure now channels French couples into PACs just as the American infrastructure channels people into marriage. People in France are normalizing, celebrating, and financially supporting PACs just as marriage is supported in this country. Thus, PACs do not offer “nonnormative notions of kinship, intimacy, and sexuality.”¹⁷⁴ They offer an alternative structure with comparable norms and, coincidentally, less economic protection for those who invest in the relationship at the expense of market work.

Professor Aloni argues that one of the fundamental goals of family law is to provide cultural recognition of relationships because “recognition is a vital human need.”¹⁷⁵ Other scholars seem to share this view, criticizing the way in which nonmarital relationships are seen as “undignified, less profound, and less valuable” than marriage.¹⁷⁶ Opt-in systems are thought to provide the dignity that comes from recognition while simultaneously rejecting marital hegemony. But the PAC experience suggests that there is a recognition/normativity tradeoff just as there is an autonomy/vulnerability tradeoff.

The cultural recognition that people crave for their relationships necessarily encourages a normative approach to kinship, intimacy, and sexuality. An alternative normative approach, i.e. an alternative to marriage, may be preferable, but if we displace marital supremacy by providing alternative forms of recognition, those new forms of recognition will become the new normal. PAC supremacy, civil union supremacy, or some comparable supremacy will emerge and bring with it a new normative approach. Couples will be channeled into something else precisely because they want recognition.

Indeed, all of the current opt-in approaches channel people into certain kinds of intimate behavior. Someone has to decide what goes on the menu. Of the states that still allow couples to register for domestic partnership instead of marriage, all but California require that the couple live together, even though no state requires married people to live together.¹⁷⁷ Almost all domestic partnership provisions require parties to

174. Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1414 (2004).

175. Aloni, *supra* note 149, at 1333–34.

176. See generally Murray, *supra* note 3, at 1210. This critique was particularly strong in response to Justice Kennedy’s paean to marriage in *Obergefell*.

177. See *supra* note 154.

attest to some level of “commitment” and all require that those entering not be married or in another domestic partnership.¹⁷⁸ Colorado prohibits designating beneficiaries under its statute if one is already married or has entered into any other designated beneficiary arrangement.¹⁷⁹ Even contract-based PACs require that those submitting an individualized set of commitments under that system not have entered into a marriage or PAC with anyone else.¹⁸⁰ All of these options channel people into monogamous, committed, exclusive relationships.¹⁸¹ They do not appear willing to recognize “family forms” that are very much different from marriage or remotely “complex.”¹⁸²

3. Summary

To be clear, there is no obvious harm in states offering opt-in alternatives even if they do just provide slight variations on marriage’s normative path, as long as one is comfortable with prioritizing a couple’s autonomy over the potential vulnerability that opt-out systems protect against. Opt-in systems let individual couples choose alternatives to marriage. Not only does the choice of alternatives serve autonomy goals by giving individuals nonmarital options, the options couples most commonly choose serve autonomy goals because couples tend to choose sets of rights and obligations which make them less responsible for each other than does marriage. In other words, when given the choice, couples who reject marriage also reject marriage’s imposition of non-market-based communitarian approaches to obligation, entitlements, and value. The family law approach consciously quashes autonomy; opt-in systems celebrate it. If policymakers want to provide autonomy and retain family law’s communitarian values, they must make sure that a communitarian option is a “on the menu,” though experience to date suggests that people will not choose it.

Opt-in systems thus mostly serve the needs of those who want their relationships recognized, legally and culturally, but do not want to buy into family law’s obligations or marriage’s troubled history. Opt-in systems undermine marital supremacy somewhat, but all forms of legal and cultural recognition necessarily bring with them some normative channeling. The law has to recognize the family forms that it is honoring, and people have to recognize the family forms they are celebrating.

A regime that avoided all legal categorization of intimate relationships, one that treated cohabitants just like all other people who engage in so-

178. *Id.*

179. *See* COLO. REV. STAT. ANN. § 15-22-104 (West 2017).

180. *See* Aloni, *supra* note 33, at 609.

181. This is where the Vermont reciprocal beneficiary status was truly different. The couple could be blood relatives or related by adoption to be reciprocal beneficiaries. But no one wanted that alternative kind of recognition. *See* H.738, 2013–2014 Leg. Sess. (Vt. 2014).

182. Aloni, *supra* note 149, at 1278, 1300 (extolling opt-in systems’ ability to recognize “complex family forms”).

cial and economic relations, would arguably involve the least amount of channeling and the least normativity. That is why some scholars argue that cohabitants should just be treated like everyone else who enters into contracts, provides services, or bestows gifts. Cohabitants should be entitled to legal rights not because they are in identifiable relationships, but because they have entered into agreements, invested resources, and behaved in ways that the law elsewhere recognizes as worthy of compensation or redress. The problem, according to these scholars, is that courts refuse to see the economic exchange in these relationships as a legitimate subject for courts. We turn to that next.

B. EXISTING COMMON LAW AND EQUITABLE REMEDIES

In the last fifty years, courts have wrestled with whether contract law or other equitable remedies might provide relief for those who feel harmed by the consequences of cohabitation. Traditionally, the law did not enforce contractual claims between cohabitants on the theory that all such contracts necessarily included sex as consideration.¹⁸³ Enforcing a contract between cohabitants or paramours was seen as inevitably enforcing a contract for sex.¹⁸⁴

By denying relief to cohabitants, who could not sue in family law because they were not married but were barred from suing outside family law because such suits would sanction immoral behavior, the traditional treatment of cohabitation channeled sexual activity into marriage and helped enshrine what Professor Janet Halley has referred to as “family law exceptionalism.”¹⁸⁵ What happens in families and among family members is one thing; what happens in the market is something altogether different.¹⁸⁶ By the late twentieth century, though, contract arguments emerged in most states as a viable means of determining some rights and obligations between former cohabitants because the channeling was not working. Cohabitation was becoming much more prevalent and the moral opprobrium for nonmarital sex grew outdated. The trend started in California.

In 1971, after having been asked to leave the home she had shared for seven years with movie star Lee Marvin, Michelle Triola sued Marvin for damages associated with their breakup.¹⁸⁷ She alleged a breach of express

183. See, e.g., *Wallace v. Rappleye*, 103 Ill. 229, 249 (1882) (“An agreement in consideration of future illicit cohabitation between the parties is void . . .”); *Gauthier v. Laing*, 70 A.2d 207, 210 (N.H. 1950); *Grant v. Butt*, 17 S.E.2d 689, 692 (S.C. 1941).

184. RESTATEMENT (FIRST) OF CONTRACTS § 589 (AM. LAW. INST. 1932) (“A bargain in whole or in part for or in consideration of illicit sexual intercourse or of a promise thereof is illegal . . .”).

185. Janet Halley, *What is Family Law?: A Genealogy Part I*, 23 YALE J.L. & HUMAN. 1, 3 (2011) (“Contract, quasi-contract, and tort became the law of everyone . . . while the law of marriage became the law of special persons, incapacitated to varying degrees from contract . . . [t]he market was the family’s opposite . . .”).

186. HASDAY, *supra* note 19, at 7 (“Family law rejects what the law otherwise embraces, and embraces what the law otherwise rejects . . .”).

187. *Marvin v. Marvin*, 557 P.2d 106, 110–11 (Cal. 1976).

and implied contract and pled various equitable doctrines, including unjust enrichment and constructive trust.¹⁸⁸ She asked the court to use market-like remedies—damages—to compensate for what was seen as a family law harm: the economic loss that results when a couple splits up.¹⁸⁹ The California Supreme Court said she could proceed.¹⁹⁰

Marvin made headlines at the time because it involved a celebrity in what was still considered risqué behavior, nonmarital cohabitation. *Marvin* continues as a staple in family law casebooks because it marks the beginning of the modern trend to break down the barrier that traditionally separated family law from other legal claims.

Three years after *Marvin*, the Illinois Supreme Court decided the reciprocal family law casebook staple, *Hewitt v. Hewitt*.¹⁹¹ In a case involving a less famous, but arguably more sympathetic plaintiff, the Illinois Supreme Court denied all relief to a woman who had lived with a man for fifteen years, raised three children with him, secured loans from her parents on his behalf, and helped him grow his dentistry practice; but the couple never married.¹⁹² Like Michelle Triola, Victoria Hewitt brought explicit and implicit contract claims as well as claims for other equitable relief.¹⁹³ The Illinois court explicitly rejected the reasoning of the *Marvin* court, finding that if express contracts could be enforced, then implicit contracts must be actionable as well.¹⁹⁴ Enforcing such claims would constitute “the return of varying forms of common law marriage,” which the Illinois Legislature abolished in 1905.¹⁹⁵ The primary concern of the court seems to have been not condoning cohabitation.

Hewitt was widely criticized and not much followed in its totality. Only Georgia, Louisiana, and Mississippi are “as vocal about non-recognition”¹⁹⁶ of contract and equitable remedies as Illinois. Most state courts now entertain some form of contractual or equitable action at the end of a cohabitation.¹⁹⁷ Several states require an allegation of an explicit contract.¹⁹⁸ A few states enforce only written contracts between cohabitants.¹⁹⁹

Prior to *Obergefell*, contractual causes of action were particularly important to same-sex couples who were denied access to marital dissolution rules. Some members of same-sex couples had success, particularly in

188. *Id.* at 111, 116.

189. *Id.* at 116.

190. *Id.*

191. 394 N.E.2d 1204 (Ill. 1979).

192. *See id.* at 1205.

193. *See id.*

194. *Id.* at 1207.

195. *Id.* at 1209.

196. Albertina Antognini, *Against Nonmarital Exceptionalism*, 51 U.C. DAVIS L. REV. 1891, 1922 (2018) (“Four jurisdictions are vocal about denying property rights to individuals in nonmarital relationships: Georgia, Illinois, Louisiana and Mississippi.”).

197. *Id.* at 1912.

198. *Id.* at 1918.

199. For a list, see Gregg Strauss, *Why the State Cannot “Abolish Marriage”*: A Partial Defense of Legal Marriage, 90 IND. L.J. 1261, 1278 n.98 (2015).

states that may have been more accepting of same-sex relationships. Three years ago, one member of a same-sex couple in Illinois, Eileen Brewer, sought to capitalize on the particular vulnerability that same-sex couples faced before *Obergefell* and asked the Illinois Supreme Court to overturn *Hewitt*, at least for same-sex couples who could not have married.²⁰⁰ As the Illinois Supreme Court wrote, the “facts of [*Blumenthal v. Brewer* were] almost indistinguishable from *Hewitt*, except, in this case, the parties were in a same sex relationship.”²⁰¹

Eileen Brewer, a lawyer and judge, and Jane Blumenthal, a doctor, broke up in 2008, three years before civil unions became available in Illinois, and six years before that state passed legislation allowing same-sex couples to marry.²⁰² Brewer and Blumenthal had been together since 1981.²⁰³ To the surprise of many, the Illinois Supreme Court was unphased by the length of the couple’s relationship, their economic and financial enmeshment, their parenting of three children, and the couple’s lack of access to family law.²⁰⁴ The court found the basic holding of *Hewitt*—that because the legislature had abolished common law marriage in 1905, contracts based on a marriage-like relationship were unenforceable in Illinois—still persuasive.²⁰⁵

Blumenthal has been as widely criticized as *Hewitt*.²⁰⁶ According to the Illinois Supreme Court, marriage and civil unions are the *only* legal vehicles available if one wants to establish legal rights and obligations stemming from a relationship.²⁰⁷ If the legislature has denied access to those family law statuses, one has no remedy. This means, as Professor Courtney Joslin has explained, that the act of cohabitation deprives one of rights otherwise available to everyone.²⁰⁸ One loses the right that unmarried non-cohabitants have to sue in contract and unjust enrichment,

200. *Blumenthal v. Brewer*, 69 N.E.3d 834, 839 (Ill. 2016).

201. *Id.* at 852.

202. *Id.* at 848, 857.

203. *Id.* at 840.

204. *See id.* at 853.

205. *Id.* at 853, 857.

206. *See* Douglas NeJaime, *The Family’s Constitution*, 32 CONST. COMMENTARY 413, 448 n.116 (2017) (classifying *Blumenthal* as “regressive”); Joslin, *supra* note 2, at 469 (suggesting the *Blumenthal* court used an “ossified . . . framework”); Murray, *supra* note 3, at 1246–48 (critical of the holding for reifying marriage).

207. The Court in *Blumenthal* distinguished a line of Illinois cases that had allowed former cohabitants to collect on claims that were “substantially independent of the nonmarital relationship between the parties.” *Blumenthal*, 69 N.E.3d at 853–54. In these cases, a cohabitant would usually bring a claim for partition or unjust enrichment based on one party’s investment in a piece of property that was titled in the other party’s name. *Id.* The entitlement is not construed as born of investment in the relationship, but investment in a piece of property, and it must be substantial. *Compare* Spafford v. Coats, 455 N.E.2d 241, 245–46 (Ill. 1983) (cohabitant who purchased or contributed down payment to vehicles that were titled in the other cohabitant’s name was entitled to equitable relief), *with* Ayala v. Fox, 564 N.E.2d 920, 920, 922 (Ill. App. Ct. 1990) (cohabitants jointly obtained loan for property that was titled in only one of their names. Both parties contributed to loan, tax, and insurance payments, but title was never transferred to both parties. No recovery based on *Hewitt*.).

208. Joslin, *supra* note 2, at 482.

but one is also barred from pursuing the family law claims that family status affords.

As written, *Blumenthal* is a hard decision to defend and this section does not try. But analyzing the facts of *Blumenthal* suggests that if the Court had been less eager to uphold *Hewitt*, and allowed Brewer to proceed as Michelle Triola had, Brewer might well have ended up like Michelle Triola did—with nothing. *Marvin*, *Hewitt*, and *Blumenthal* were all summary judgment decisions. On remand, after a trial on the facts, the court in *Marvin* found no express contract, no implied contract, and no grounds for equitable relief.²⁰⁹ Indeed, it found that Michelle Triola had been more enriched by her relationship with Lee Marvin than vice versa.²¹⁰ Eileen Brewer could well have encountered the same fate, and therein lies the problem with common law and equitable claims in cohabitation. It is a practical problem, not a theoretical one.

1. *Blumenthal v. Brewer and the Limitations of Nonfamily Law Remedies*

After *Blumenthal* and Brewer split up, Dr. Blumenthal filed a complaint for partition of their Chicago home, one of the three properties that the two women owned together.²¹¹ Brewer's counterclaim contained five counts, four of which pertained to the Chicago home²¹² and one of which sought either a constructive trust on the net earnings from Blumenthal's medical practice, or restitution for the funds that Brewer contributed towards the purchase of the medical practice.²¹³ The arguments made in all of the house-related claims were ultimately entertained by the trial court deciding the partition action.²¹⁴ After a three-day trial, in which the trial court heard evidence regarding who contributed the down payment to the house, who lived in the house when, whose inheritance was spent, and how the couple handled joint investments, the trial court awarded Brewer \$534,200.55 worth of the \$1 million house.²¹⁵

Brewer got slightly more than half of the value of the house, notwithstanding the unrefuted testimony that Blumenthal contributed the en-

209. *Marvin v. Marvin*, 176 Cal. Rptr. 555, 558–59 (Cal. Ct. App. 1981).

210. *Id.* at 558.

211. There was also jointly owned property in Michigan and Mexico, but the parties apparently divided that without incident. See Cynthia Dizikes et al., *Legal Battles Hidden from Public View*, CHI. TRIB. (Feb. 24, 2013, 2:00 AM), <https://www.chicagotribune.com/news/ct-met-cook-county-hidden-cases-20130224-story.html> [https://perma.cc/TM8M-2Y5H] (explaining that the record was sealed in this case, but that the parties owned properties in Michigan and Mexico as well as in Chicago).

212. Count I sought a constructive trust on the house based on unjust enrichment; Count II sought an “equitable distribution” of the house (equitable distribution is the term commonly used to describe how marital property is distributed in non-community property states. See *supra* Part II); Count IV claimed that Brewer should be compensated for the amounts she spent taking care of the house after Blumenthal moved out; Count V sought quantum meruit for the value Brewer's labor had added to the house. See *Blumenthal*, 69 N.E.3d 834.

213. See *id.* at 841.

214. *Id.* at 845.

215. *Id.* at 845–46.

tirety of the original \$235,000 down payment to the house.²¹⁶ In other words, Brewer likely got what she would have gotten if the court had treated the home as marital property subject to division.²¹⁷ The one claim not relevant to the partition action, Brewer's claim to a share of the medical practice or the proceeds of the medical practice, was the only claim the Illinois Supreme Court specifically rejected as inconsistent with state law that had abolished common law marriage.²¹⁸

Under family law doctrine, if the couple had been married, the medical practice would not have been subject to property division because, as a nondoctor, Brewer could not be considered an owner of a medical practice under Illinois law.²¹⁹ But, if they had been married, Brewer could have made a claim for maintenance (alimony), based on Blumenthal's higher earnings in the medical practice.²²⁰ Her equitable claims for ongoing proceeds from the medical practice, which sounded in contract and unjust enrichment, were the nonmarital alternatives to maintenance.²²¹

a. Explicit Contracts

If Brewer and Blumenthal had made an explicit, oral contract regarding how to divide the earning from the medical practice, what would it have said? We can't know for sure, of course. The vast majority of explicit contracts courts see are written pre- or post-nuptial agreements, entered into in order to contract around the marital sharing rules.²²² In order to make an explicit contract claim for the kind of relief she sought, Brewer would have had to allege that the couple explicitly agreed to the marital law principles that require post-dissolution sharing of future income.

For same-sex couples pre-*Obergefell*, that kind of agreement might make sense. Contract would have been the only way to signal that desire to share. For couples with the option of marrying or entering a civil union, however, one would have to allege that the decision to contract instead of entering into a formal status had to do with concerns other

216. *Id.*

217. *See id.*

218. *Id.* at 856.

219. *Id.* at 849.

220. *See* 750 ILL. COMP. STAT. ANN. 5/504 (West 2018).

221. It is not at all clear Brewer would have been entitled to that support under the Illinois maintenance statute. *See id.* According to her online resume, she was continually employed as a lawyer during the couples' relationship. *Hon. Eileen M. Brewer*, JAMS, <https://www.jamsadr.com/brewer/> [<https://perma.cc/LF6V-SV8L>]. She was chief counsel to arguably the second most powerful political position in Chicago, and she was a judge after that. *Id.* She alleged that she invested more in the family because Dr. Blumenthal earned more—and the Illinois court took that as true at summary judgment—but it easily could have been contested. By 2012, two years after she filed her claim against Blumenthal, her pension as judge vested, entitling her to 80% of her judicial salary for life. Under Illinois family law doctrine, Blumenthal could have claimed an entitlement to a share of Brewer's pension.

222. *See* Judith T. Younger, *Lovers' Contracts in the Courts: Forsaking the Minimum Decencies*, 13 WM. & MARY J. WOMEN & L. 349, 420 (2007) (analyzing courts' willingness to enforce prenuptial contracts in which one party gets substantially less than half of the property).

than the financial ramifications of dissolution. The contract would have to reflect a desire to eschew the institution of marriage (and civil unions) while embracing their communitarian approach to property. In practice, these allegations of express oral contracts often crumble under scrutiny at trial.²²³ Michelle Triola's is one famous example. The trial court did not believe that Lee Marvin agreed to share anything.

More common are alleged contracts that never make it to trial. Consider the contract alleged by Donnis Whorton, a gay man suing his ex-partner, Benjamin Dillingham.²²⁴ Whorton, who at the beginning of the parties' relationship was studying for an Associate of Arts degree, alleged that the parties orally agreed that in return for Whorton rendering services as "chauffeur, bodyguard, social and business secretary, partner and counselor in real estate investments, . . . [and] traveling and social companion," Dillingham promised "a one-half equity interest in all real estate acquired in their joint names, and in all property thereafter acquired by Dillingham."²²⁵ Whorton alleged Dillingham further "agreed to financially support Whorton for life, . . . grant Whorton invasionary powers to savings accounts held in Dillingham's name, and permit Whorton to charge on Dillingham's personal accounts."²²⁶ In addition, "the parties [apparently] specifically agreed that any portion of the agreement found to be legally unenforceable was severable and the balance of the provisions would remain in full force and effect."²²⁷

Whorton survived summary judgment on this claim, but it is hard to see how his allegations pass a laugh test. Would any reasonable judge or jury believe that Dillingham actually promised all that without writing it down? How plausible are oral severability provisions?²²⁸ Perhaps Dillingham did make lavish promises when in the throes of early love, but a serious assessment of the contract would require an analysis of whether it was reasonable to conclude that both parties believed they had a legally binding agreement.²²⁹ Relying so heavily on the idea that Dillingham might have done so out of "love" opens the door for Dillingham to argue that Whorton was comparably compromised by "love," so compromised that he was willing to throw away his associate's degree in order to live (a significantly more luxurious life) with Dillingham without any promise of

223. See Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1396–97 (2001); Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309, 317–19 (2008) (both articles describe the difficulty in bringing these claims).

224. Whorton v. Dillingham, 248 Cal. Rptr. 405, 406–07 (Cal. Ct. App. 1988).

225. *Id.* at 407.

226. *Id.*

227. *Id.*

228. Whorton needed to allege this in case the court found that sex was a part of their bargain. Whorton did not want the sexual consideration to invalidate the rest of the alleged contract. Cf. Jones v. Daly, 176 Cal. Rptr. 130, 133 (Cal. Ct. App. 1981) (alleged services provided included "lover"). Jones's claim was denied. *Id.* at 135.

229. See RESTATEMENT (FIRST) OF CONTRACTS § 20 (AM. LAW. INST. 1932) ("A manifestation of mutual assent by the parties to an informal contract is essential to its formation . . .").

future compensation in return.²³⁰

No trial ever determined the existence of the alleged oral contract in *Whorton*. No doubt it was not worth it to Dillingham to litigate the non-existence of the oral agreement. He was better off just paying off his ex-lover to settle the case. When trial courts do try to ascertain the content of an alleged contract, they impose high evidentiary burdens—probably because they are wary of claims like Whorton’s. Such claims are not that prevalent or successful.²³¹

In *Blumenthal*, the Illinois Supreme Court reaffirmed its refusal to entertain any such claim. That reasoning has been rightly rejected by commentators, but the problem for most cohabitants seeking relief under express contract is that absent a writing, the claims often lack plausibility. People in affective relationships don’t usually think or speak “contract” with each other.²³² Risk-averse, forward thinking, or especially careful people may be willing to think in such contract terms, but their fastidiousness leads them to write their contracts down, which makes enforcement much easier.²³³ Those written contracts also don’t tend to provide the kind of comprehensive post-dissolution equalization of property and income that family law provides and that Eileen Brewer was asking for.

b. Implicit Contract

Litigants who are either unable or unwilling to conjure up an explicit agreement can also use notions of implicit contract to make a claim against a former cohabitant. Standard contract doctrine holds that courts can find contracts implied in fact when “[a] promisor . . . has reason to believe that the promisee will infer” an intention to be bound.²³⁴ The doctrine of implied-in-fact contract applies social norms to facts in order to determine whether both parties should have understood that they were entering into an agreement that the law would enforce. Perhaps living together in the same home, pooling one’s money, going out in public together, and providing emotional support to each other constitutes conduct from which courts can infer an agreement to divide jointly used

230. The plausibility of Whorton’s claim also relies completely on marital norms. He is alleging an agreement to share property and the post-dissolution income stream in a manner that finds a parallel nowhere in law but marriage. The laws of partnership do not require sharing post-dissolution income from all sources. In allowing this case to survive summary judgment, the court reified the marital norms that Whorton invoked by alleging a contract that paralleled marital rights and obligations, but it was not the judge that initiated the use of marital norms, it was Whorton. *See Whorton*, 248 Cal. Rptr. at 410.

231. *See Estin*, *supra* note 223, at 1396–97.

232. *See* Ira Mark Ellman, “Contract Thinking” Was Marvin’s Fatal Flaw, 76 Notre Dame L. Rev. 1365, 1373 (2001) (“people do not think of their intimate relationships in contract terms. . . . [Because] contract involves more than reciprocity; it involves a bargained-for exchange.”).

233. It is the relative ease of enforcing written agreements that led several states to require a writing if a cohabitation contract is to be enforced. *See, e.g.*, MINN. STAT. ANN. § 513.075 (West, 1980); TEX. BUS. & COM. CODE ANN. § 26.01 (West 2005); *Posik v. Layton*, 695 So.2d 759, 762 (Fla. Dist. Ct. App. 1997); *Morone v. Morone*, 413 N.E.2d 1154, 1157 (N.Y. 1980); *Kohler v. Flynn*, 493 N.W.2d 647, 649 (N.D. 1992) (written contracts).

234. RESTATEMENT (SECOND) OF CONTRACTS § 2 cmt. b (AM. LAW. INST. 1981).

property and post-dissolution income. That is what Michelle Triola alleged. On remand, the trial court was not convinced, holding instead that “the conduct of the parties . . . [did] not reveal any implementation of any contract nor . . . give rise to an implied contract.”²³⁵

In practice, implied contract claims are not that much more successful than express oral contract claims, unless a party is suing for a share of particular piece of property, usually titled in the other party’s name, but into which the suing party invested labor or resources.²³⁶ Successful claims usually involve a distinct monetary contribution or investment in a house²³⁷ or valuable collector’s item.²³⁸ Courts will entertain these suits as long as the consideration alleged steers clear of the sexual relationship and can be traced to the distinct piece of property.²³⁹

As discussed, the claim of Brewer’s that the Illinois Supreme Court rejected was not the claim for the Chicago house, but a claim for a share of the proceeds from her partner’s medical practice, an economic entity in which she played no direct part, except contributing to the joint funds that, years earlier, had allowed Blumenthal to buy into the practice. Brewer’s claim to the proceeds of the medical practice, like Michelle Triola’s implied contract claim for part of Lee Marvin’s income, asked the court to find a contractual bargain in the relationship itself, in how she cared for the family and the home, not in her contribution to the medical practice.

This argument should sound familiar. The claimant is asking the court to infer that the parties should be legally bound to each other because of the way they lived as a couple. In determining what can be inferred from that way of life, a court must use the same social norms that it uses when considering whether a cohabitating couple lived together in a committed relationship in which economic and emotional interdependencies developed.²⁴⁰ Implicit contract claims are the doctrinal equivalent of an opt-

235. Garrison, *supra* note 223, at 316 (quoting *Marvin v. Marvin*, 5 Fam. L. Rep. (BNA) 3077 (Cal. Ct. App. 1979)).

236. See Antognini, *supra* note 2, at 46–48 (discussing cases in which courts award nonmarital cohabitants a share of property).

237. *Kaiser v. Fleming*, 735 N.E.2d 144 (Ill. App. Ct. 2000) (recovery of money contributed toward mortgage on house titled in cohabitant’s name).

238. See *Spafford v. Coats*, 455 N.E.2d 241 (Ill. App Ct. 1983) (recovery for money used to buy antique cars during the relationship).

239. Compare *Jones v. Daly*, 176 Cal. Rptr. 130, 133 (Cal. Ct. App. 1981) with *Whorton v. Dillingham*, 248 Cal. Rptr. 405, 406–07 (Cal. Ct. App. 1988); see also *Bergen v. Wood*, 18 Cal. Rptr. 2d 75, 79 (Cal. Ct. App. 1993) (“services as a social companion and hostess” are insufficient consideration because they “are not normally compensated and are inextricably intertwined with the sexual relationship”). In her recent comprehensive review of cases in which courts distributed property at the end of a relationship that was nonmarital at some point, Albertina Antognini argues that when courts take seriously the question of whether cohabitants *intended* to share their property, they are more likely to divide the property equally. See Antognini, *supra* note 2, at 46–47. Mutual intent is, of course, the lynchpin of contract.

240. In this sense—if not in others—the Illinois Supreme Court was right in *Hewitt*. Implicit contract claims are, in essence, claims for common law marriage, and if a legislature has abolished common law marriage, it is not clear that courts should reinstitute it under the guise of implicit contract.

out regime.

c. Same Wine, New (Contract) Bottles

In implicit contract claims, courts avert their eyes from the sexual conduct instead of highlighting it (as courts do in opt-out regimes inquiries²⁴¹), but there is the same scrutiny of other interpersonal behavior that conduct-based opt-out regimes require.²⁴² The social norms used to infer marital-like obligations are, in both instances, marital norms. Why else would a court infer that Jane Blumenthal agreed to provide post-dissolution support to Eileen Brewer? Why would Blumenthal make such a promise? Because married people do. Scholars often assail the way courts' evaluation of nonmarital relationships reinforce marital norms,²⁴³ but litigants invite that paternalistic evaluation when they ask courts to infer a contract. From what can a judge infer a contract except from the marital norms for cohabitation and affective relationships with which he or she is familiar?²⁴⁴ Just as judges in opt-out regimes assess whether a given relationship was emotionally and financially interdependent enough to look like a "good marriage,"²⁴⁵ so a judge must assess the existence of an implicit contract by looking at whether the behavior of the parties parallels situations in which parties are legally bound to each other to the extent alleged in the implicit contract. The vast majority of those situations involve marriage. Implicit contract doctrine thus reifies traditional marriage, just as opt-out systems do.

Explicit contract claims, on the other hand, leave parties free to craft their rights and obligations as they choose. Like opt-in regimes they invite parties to reject the marriage–nonmarriage binary. But they respect a couple's autonomy at the possible expense of protecting those made vulnerable by relationship. Just as the opt-in systems discussed in Part IV.A

241. In contract claims, sex assumes a reciprocal role to the one it plays in opt-out conduct-based claims. As discussed previously, in trying to evaluate whether cohabitants were sufficiently emotionally interdependent to justify imposing marital obligations in an opt-out regime, courts scrutinize the sexual relationship. In trying to evaluate whether cohabitants' relationship included an implicit contract to share their property, courts insist on ignoring the sexual relationship. That the sex is critical to one doctrine but critically absent in the other does not likely reflect the role that sex plays in the relationships courts are evaluating. The importance of sex to a relationship—the extent to which it plays a role in the parties' understanding of their rights and obligations to each other—likely varies over time and situation, and it almost certainly varies by couple. Courts are not well-suited to deal with that nuance. *See supra* Part IV.A.2.

242. Notably, Eileen Brewer (possibly using her judicial connections) got the court to seal the record in her case, ostensibly to protect her children. *See Dizikes et al., supra* note 211. That she wanted the record to be sealed is an indication of how invasive categorization costs can be.

243. *See, e.g., Franke, supra* note 4, at 2689 ("marriage is the measure of all things. Thus, affective associations that lie outside . . . marriage are evaluated and understood by virtue of their likeness to, or dissimilarity from, marriage."); Antognini, *supra* note 196, at 1892 (citing the "intractable relationship between marriage and nonmarriage").

244. Recall the promise that Whorton alleged Dillingham made, *supra* text accompanying notes 224–228. What would make Dillingham promise so much if not the norms of sharing that infuse family law?

245. *See supra* note 116.

often result in parties sharing less than family law would otherwise require, so enforcement of explicit contract claims—at least plausible ones—are likely to work to the disadvantage of those with fewer resources.²⁴⁶

Thus, contract doctrine does not add much to the opt-out/opt-in regime debate; it repeats it. The costs and benefits of implicit contracts are the costs and benefits of opt-out systems, including categorization costs and reification of marital norms. The costs and benefits of express contracts are the costs and benefits of opt-in systems, including leaving vulnerable those who may invest most in non-market work, and reifying a neoliberal non-communitarian system of entitlement.

d. The Grab Bag of Other Equitable Doctrines

Most cohabitants seeking a legal remedy at the end of a cohabiting relationship also assert some other equitable claims, like restitution, constructive trust, or general quantum meruit. These claims posit that one of the cohabitants was unjustly enriched by the other's contribution to the relationship, or the property at issue. Again, the more specific the contribution to a particular piece of property, the greater the likelihood of succeeding on any particular claim. The more the claim is based on the totality of the relationship, the harder it is for one to recover. The Court in *Marvin* not only failed to award Triola anything in unjust enrichment, it found that she, not he, had been the one enriched by the relationship.²⁴⁷

Other litigants have gotten more out of unjust enrichment claims, but those rewards are routinely criticized as too low and too gendered.²⁴⁸ Professor Antognini argues that regardless of the sex of the plaintiff, “wifely services” are not valued, “while monetary contributions or services expended in actually building a home [as opposed to caring for it] are.”²⁴⁹ Moreover, as Antognini demonstrates, women's contributions are routinely categorized as gift, not labor, thus obviating the need for any valuation.²⁵⁰ Professor Antognini's insightful reading of nonmarital cases identifies how much of a problem this is, but the law of equity is not well suited to solve it. Even if a judge thought a man and woman's contributions were equal, under unjust enrichment doctrine, if the market does not reflect that belief, the judge has no basis for valuing the contributions equally.

246. See Younger, *supra* note 222, at 358.

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

248. See BOWMAN, *supra* note 29, at 41–43 (criticizing courts' tendency to under-reward in equitable claims and usually only reward if the work performed is “male”).

249. Albertina Antognini, *Nonmarital Coverture*, 99 B.U. L. REV. 2139, 2172–73 (2019).

250. Antognini, *supra* note 249, at 2173. Turning women's labor into “love,” is a problem feminist commentators have long recognized. See generally, Katharine Silbaugh, *Turning Labor Into Love: Housework and the Law*, 91 Nw. U. L. REV. 1, 36–45 (examining the laws in which courts and governmental agencies routinely treat women's domestic labor as gift, as opposed to work that should be compensated).

i. *Measuring the Enrichment: Of Comparable Worth, Unique Labor, and Gift*

The measure of unjust enrichment remedies is usually the defendant's gain or benefit, not the plaintiff's loss,²⁵¹ but neither measure is likely to pay someone who performs traditionally feminine jobs adequately because women's work is notoriously undervalued in the market. For years, scholars have unearthed how the law of coverture and its remnants treated women's domestic and relational investments as lesser, usually inevitable or gratuitous and certainly not as valuable as men's.²⁵² But the market does not do much better. Pink collar workers have always been paid less than blue collar workers; maids are paid less than garbage collectors; and grade school teachers are paid less than high school teachers and college professors. These disparities are what gave rise to calls for comparable worth reform.²⁵³

How should one value the work that Michelle Triola performed while cohabiting with Lee Marvin? What did Jane Blumenthal receive from Eileen Brewer in the twenty-six years they were together? For sure, there is value in what these women did but putting a monetary figure on it is extremely difficult, and it opens the door to counterarguments. Dr. Blumenthal might well have argued that her greater monetary contribution to the household allowed Brewer to pursue a more meaningful and flexible job as a government lawyer and judge, a position Brewer may well have preferred to a more lucrative, but more draining and less satisfying, private law practice.²⁵⁴ As a judge, Brewer also earned the right to collect a generous pension for the rest of her life, a pension that she might have had to share with Blumenthal if they had been married and then divorced.²⁵⁵

Contemporary family law avoids asking courts to evaluate who was more enriched by how much by simply dividing what is there in half,

251. DAN B. DOBBS & CAPRICE L. ROBERTS, *Law of Remedies: Damages, Equity, Restitution* 215 (3d ed. 2018) ("To measure damages, courts look at plaintiff's loss or injury. To measure restitution, courts look at defendant's gain or benefit, and not plaintiff's loss.").

252. See generally, NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 54 (2000) (explaining how women's domestic labor was necessarily considered part of the marital bargain and not subject to independent evaluation); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Right to Earnings, 1860-1930*, 82 *GEO. L.J.* 2127, 2131 (1994); Silbaugh, *supra* note 249, at 35 (discussing how the law resists counting women's labor as labor); HASDAY, *supra* note 19, at 92 (family law assumes and enforces women's altruism).

253. See Jone Johnson Lewis, *Comparable Worth: Equal Pay for Work of Equal Value*, THOUGHTCO, <https://www.thoughtco.com/comparable-worth-pay-equity-3529471> [https://perma.cc/95HR-3Z8U] (last updated Jul. 24, 2019) ("Comparable worth is shorthand for 'equal pay for work of equal value' or 'equal pay for work of comparable worth.' The doctrine of 'comparable worth' is an attempt to remedy the inequities of pay which result from a long history of sex-segregated jobs and different pay scales for 'female' and 'male' jobs. Market rates, in this view, reflect past discriminatory practices, and cannot be the only basis of deciding current pay equity.").

254. See *supra* note 221.

255. *Id.*

whether it be property or post-dissolution income stream.²⁵⁶ That is what the family law move from discretion to formulae allowed and required. What one is entitled to is not a function of the work one actually performed, or why one performed it or how much it is worth in a market, but the fact of belonging to the family unit. What one is obligated to pay is not a function of what one received, but what one can pay.

As a matter of family law, the person who helps maintain the house, by cleaning and furnishing it, is entitled to just as much as the person who built it.²⁵⁷ The person who provides the emotional support for the family is entitled to just as much as the person who provides the physical support. Making dinner and mowing the lawn are treated the same way, regardless of who did what job. Those who mock the idea that the law treats the family as the market's opposite²⁵⁸ often fail to acknowledge how that perspective allows family law a means of removing women's work from traditional market analysis. Family law remedies avoid the comparable worth problem.

The non-market-based approach to entitlement and obligation is particularly important in family law because so much of the work performed in affective relationships is unique. There are many jobs that only a person in the affective relationship can do. The value of the work stems from the relationship that the provider of the care has to the person receiving it. One cannot ask Google to find someone to provide emotional support after a rough day, or to accompany a sibling to a chemotherapy appointment, or to attend a family funeral, or to eat breakfast with a child. These are the kinds of investments that cohabitants and family members make all the time. They have enormous social and individual value, but they have no market value because there is no demand for them outside the particular relationship.

Family law solves the problem of how to value unique contributions the same way it solves the problem of how to define entitlement and obligation, by taking all that is there and splitting it in two. This results in plenty of what, in market contexts, we might call inequities. The spouse who never took care of her father-in-law is entitled to just as much as the spouse who did. The wealthy spouse who paid others to do vast amounts of childcare is paid more than a less wealthy parent who did all the childcare herself. Individual desert has no relevance in family law.

Finally, as Gregg Strauss has thoughtfully explained, family law's sta-

256. Maintenance rarely divides post-marital income in half, but formulas do base the amount awarded on a set amount of the collective joint income, usually no more than 40% of the combined income. *See, e.g.*, 750 ILL. COMP. STAT. ANN. 5/504 (West 2018) (the applicable Illinois maintenance statute in *Blumenthal*).

257. Thus, the problem that Professor Antognini identifies with courts refusing to value "wifely services"—defined as caring for the home or rearing children—is much less an issue at the dissolution of a union in family law. *See* Antognini, *supra* note 249, at 2172–73.

258. *See supra* notes 185–186 and accompanying text.

tus-based entitlement system reduces the gift problem.²⁵⁹ Professor Antognini rightfully deplors how courts far too readily assume that the labor women perform is gratuitous. But for many—probably most—relationships, whether they be marital or not, a huge amount of what one gives in relationship is gift with no expectation of compensation. Love ceases to be love if it is given and received within a market framework. Disproportionate gift-giving, feeling as if one has given more than the other, is one of the risks one always assumes in relationship, whether it be platonic or conjugal. The ability to exit the relationship is what allows one to minimize the damage from a bad risk. To suggest that the law must protect against, or prevent, people from assuming that risk in the first place would substantially alter our understandings of what relationships are.

2. Summary

The numerous contemporary calls to recognize nonmarital families, kinship structures, and cohabiting couples likely stem from the recognition that these relationships are different from market relationships. They are marked by a different set of norms, norms that include giving without a clear expectation of compensation. As Robin West observes, we are praised at home for not profit-maximizing, for being less individualistic.²⁶⁰ What makes nonmarital families, kinship structures, and cohabiting couples a subject of so much concern is that they operate according to non-market norms, yet without family law's help. Contract doctrine and restitutionary doctrine can provide some redress for people who invest in these relationships without family status, but the nature of relational investment and the non-market norms that pervade such relationships, make it unlikely that legal doctrines that rely on market measures will provide effective relief.

VI. CONCLUSION

As noted in Part II, there are over 18 million people in the United States who live together but are not married. For decades, the law professed little concern for these couples because, the thought was, ignoring them would eventually channel them into marriage and family law's status-based system. However effective this channeling function may have once been, it no longer works. The number of cohabitants continues to grow. The hard question is what, if anything, the law should do about that.

This Article has provided a taxonomy of the costs and benefits associated with the current alternatives to family law's status-based system. Opt-out, conduct-based systems reject gendered market-based measures

259. See Gregg Strauss, *Why the State Cannot "Abolish Marriage": A Partial Defense of Legal Marriage Based on the Structure of Intimate Duties*, at 22 (Spring 2015) (unpublished manuscript) (published with revisions, *supra* note 199).

260. WEST, *supra* note 32, at 92.

of recovery and impose communitarian obligations on cohabitants, but they require invasive judicial inquiries and they may conscript those who can least afford and have legitimate reasons to reject communitarian obligations. Those opt-out systems that are triggered by time or children fail to appreciate how many people who cohabit, especially low-income women, value their autonomy and parental relationships more than their conjugal ones. The arguments presented here suggest that to avoid categorization costs and to respect individuals' autonomy, opt-out systems should be triggered by time, not conduct, but substantial amounts of time. Two to five years seems like far too short a time to trigger mutual obligations, and the presence of children does not change that analysis.

Opt-in registration systems disrupt family law's binary status system and respect the autonomy of those who do not want family law imposed on them against their wishes, but they run the risk of leaving those left vulnerable by the interdependencies of relationships with nothing. They also undermine the communitarian norms of family law. If policy makers want to protect those communitarian norms while simultaneously honoring individuals' desire not to marry, they should make sure that opt-in regimes include communitarian nonmarital choices—though, to date, when given a nonmarital communitarian choice, most people reject it and opt instead for a neoliberal individualistic regime.

Finally, contract solutions end up paralleling opt-out and opt-in systems, depending on whether the claim sounds in implicit or explicit contract; and unjust enrichment claims inevitably incorporate market-based neoliberal understandings of desert and reward because that is what equitable doctrines use to assign value. There is little to no justification for courts' refusal to use these doctrines in claims between cohabitants, but there is also little reason to assume that these doctrines will protect those who invest in relationships as robustly as does family law's communitarian regime.

This taxonomy of alternatives helps highlight the benefits of family law's status-based system. Treating status as determinative and relying on the formulaic approach that has overtaken family law in the last twenty-five years allows courts to avoid invasive moralistic inquiries into parties' financial and sexual relationships. It removes questions of entitlement from the market and the individualistic neoliberal approach to rights and obligation that predominate in other areas of law. It treats family law as the market's opposite in ways that inure to the benefit of those who have performed the affective, emotional, and unique work of relationship.

As the law moves to address the perceived needs of those who do that work without family law status, policymakers will be well served by evaluating the categorization costs of administering alternative systems, weighing the relative weight of values like autonomy and communitarianism, and considering how we may benefit from viewing the family as the market's opposite.

