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Abstract: The meaning of marriage, and how it regulates intimate relationships, has been at the forefront of recent scholarly and public debates. Yet despite the attention paid to marriage—especially in the wake of *Obergefell v. Hodges*—a record number of people are not marrying. Legal scholarship has mostly neglected how the law regulates these nonmarital relationships. This Article begins to fill the gap. It does so by examining how courts distribute property at the end of a relationship that was nonmarital at some point. This inquiry provides a descriptive account to a poorly understood and largely under-theorized area of the law. Analyzing property disputes offers a unique perspective: courts must assess the nature of the relationship and assign a value to the contributions made by each party. Considering various types of nonmarital relationships together—including unmarried couples who were also married at some point—shows that courts draw the line between marriage and nonmarriage inconsistently. Some courts only distribute property at the end of a relationship that looked just like a marriage; other courts require the exact opposite, refusing to distribute property in a relationship that approached, but never became, a marriage. Despite these inconsistencies, one very clear trend emerges: the individual seeking property, who in nearly all cases is a woman, has a difficult time receiving anything outside of marriage. This analysis further reveals how courts actively define marriage in deciding whether and how to distribute property in relationships that are not marital. Given the problematic picture of modern marital and nonmarital relations that materializes, this Article calls for moving beyond the marriage-nonmarriage dyad in allocating property rights between individuals who are not, or have not been, married.

No union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family. In forming a marital union, two people become something greater than once they were.

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—Obergefell v. Hodges[1]

After decades of declining marriage rates and changes in family structure, the share of American adults who have never been married is at an historic high.

—Wendy Wang & Kim Parker, Pew Research Center[2]

INTRODUCTION

Marriage is the unmistakable protagonist of *Obergefell v. Hodges*, the Supreme Court's long-awaited decision recognizing the right of same-sex couples to marry.[3] In 2015, Justice Anthony Kennedy opened the opinion with an appeal to the twin concepts of liberty and equality, culminating in its holding "that the right to marry is a fundamental right inherent in the liberty of the person."[4] "[M]arriage," according to the Court, "lies at the the foundation of government" and "transform[s] strangers into relatives, binding families and societies together."[5] Although "[t]he centrality of marriage"[6] to *Obergefell* is understandable given the question before the Court, the exclusive role it is given is nonetheless striking. Where does divorce, which affects about half of all married couples,[7] figure into *Obergefell*'s account of marriage as "timeless"[8] and "transcendent"?[9] Further, where are the vast and increasing number of individuals who are entering into relationships but declining to marry?[10]

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[1] Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

[2] WENDY WANG & KIM PARKER, PEW RESEARCH CTR., RECORD SHARE OF AMERICANS HAVE NEVER MARRIED: AS VALUES, ECONOMICS, AND GENDER PATTERNS CHANGE (2014).

[3] *Obergefell*, 135 S. Ct. at 2584.

[4] *Id.* at 2604.

[5] *Id.* at 2594. On a more intimate register, "[m]arriage responds to the universal fear that a lonely person might call out only to find no one there. It offers the hope of companionship and understanding and assurance that while both still live there will be someone to care for the other." *Id.* at 2600.

[6] *Id.* at 2594 (stating that "[t]he centrality of marriage to the human condition makes it unsurprising that the institution has existed for millennia and across civilizations").

[7] Andrew J. Cherlin, *Demographic Trends in the United States: A Review of Research in the 2000s*, 72 J. MARRIAGE & FAM. 403, 405 (2010) (noting that although divorce rates have probably declined since their peak in the 1980s, "[n]early all studies suggest that the lifetime probability of disruption is between 40% and 50%").

[8] *Obergefell*, 135 S. Ct. at 2594.

[9] *Id.*

[10] Larry Bumpass & Hsien-Hen Lu, *Trends in Cohabitation and Implications for Children's Family Contexts in the United States*, 54 POPULATION STUD. 29, 29 (2010) (identifying the various trends in the continuing increase in cohabitation); Wendy D. Manning & Pamela J. Smock, *Measuring and Modeling Cohabitation: New Perspectives from Qualitative Data*, 67 J. MARRIAGE & FAM. 989, 989 (2005) (noting that "[c]ohabitation has become a normative part of the life course of young Americans" and has "gone from a relatively uncommon experience to a commonplace one so rapidly"); *see also* Noah Feldman, *Marriage Is a Right, Not an Obligation*, BLOOMBERGVIEW (June 28, 2015),

Beginning this Article with *Obergefell* is in some ways a red herring: this Article is neither about *Obergefell* nor about the constitutional right to marry.[11] Instead, this Article starts with *Obergefell* precisely for what it omits—the individuals that remain in the shadow of its decision because they engage in sexual, affective, and economic relationships outside of marriage.[12] The Supreme Court's decision in *Obergefell* has understandably refocused scholarly attention onto the meaning of marriage and its repercussions for intimate relationships.[13] But this emphasis obfuscates the fact that marriage is not the sole place where lines are being drawn or relationships constructed. Rather, the line between marriage and nonmarriage, and the content ascribed to each, is being actively policed in the more mundane and routine cases that address and assess nonmarital relationships for purposes of distributing property.

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https://www.bloomberg.com/view/articles/2015-06-28/marriage-is-a-right-not-an-obligation [https://perma.cc/LDC6-LZW3] ("[H]istorically there have been many forms of human community that cared for people, from groups of hunter gatherers to close-knit relationship communities. Marriage is not necessarily the only solution to the existential problem of loneliness, assuming such a problem even exists.").

[11] Numerous scholars have and will address that opinion, its subject matter, and its repercussions, head-on. *See, e.g.*, Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 FORDHAM L. REV. 1509, 1544–55 (2016) (describing the contours of what a constitutional right not to marry would look like); Kenji Yoshino, *A New Birth of Freedom?:* Obergefell v. Hodges, 129 HARV. L. REV. 147, 148 (2015) (arguing that *Obergefell v. Hodges* is "a game changer for substantive due process jurisprudence").

[12] This Article invokes the term "shadow" in the way that Ariela Dubler has employed it to address the regulation of unmarried women; in addition to its regulatory properties, this Article calls upon its obfuscating qualities, in that it renders something more difficult to discern. *See* Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1645–46 (2003) ("If marriage has formally governed the legal rights and status of some women, other women have lived in the *shadow of marriage*, regulated by marriage's normative framework even as they have inhabited terrain outside of its formal boundaries."); Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979) (identifying the various ways that individuals who divorce "bargain in the shadow of the law" even in uncontested cases).

[13] *See, e.g.*, Clare Huntington, Obergefell*'s Conservatism: Reifying Familial Fronts*, 84 FORDHAM L. REV. 23, 28–30 (2015) (identifying the ways that *Obergefell* marginalizes nonmarital families by reifying the importance of marriage); Ethan J. Leib, *Hail Marriage and Farewell*, 84 FORDHAM L. REV. 41, 41 (2015) (noting that the decision in *Obergefell* "is nothing if not a paean to a very traditional picture of marriage and its centrality in the social order" in exploring how states can offer different statuses beyond marriage); Serena Mayeri, *Marriage (In)equality and the Historical Legacies of Feminism*, 6 CALIF. L. REV. CIR. 126, 127 (2015), http://www.californialawreview.org/wp-content/uploads/2015/11/Mayeri_Marraige-in-equality.pdf [https://perma.cc/WR7K-5G6K] (arguing that *Obergefell* "utterly disregards" the "struggle against laws and practices that penalized women who lived their lives outside of marriage"); Allison Anna Tait, *The Return of Coverture*, 114 MICH. L. REV. FIRST IMPRESSIONS 99, 100 (2016), http://michiganlawreview.org/the-return-of-coverture/ [https://perma.cc/25EA-G665] (describing *Obergefell* as "subconsciously invok[ing] marriage as coverture," relying on "conventional, historical tropes that construct marriage as a relationship of hierarchy, gender differentiation, and female disempowerment").

Scholars have undertaken the important tasks of critiquing the law's failure to account for nonmarital couples,[14] and arguing for the preservation of spaces outside of marriage.[15] This Article is concerned with an antecedent question: how does the law currently regulate nonmarital relationships? Unmarried couples are poorly understood, not only as a matter of fact,[16] but as a

[14] *See* CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 221, 224 (2010) (arguing that the current laws do not protect cohabitating families and that to remedy this problem a quasi-marriage status should be imposed after two years or the birth of a child); Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1276, 1299–1309 (2014) (revealing the asymmetrical recognition provided non-marital cohabiting relationships, which often bear the burdens but receive none of the benefits of marital relationships, with disproportionate effects on already vulnerable populations); Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1384 (2001) (identifying shortcomings in the law addressing cohabitants who "have no rights or obligations that arise by virtue of their shared life"); Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309, 314 (2008) (identifying the legal response to cohabitation and arguing in favor of a cautious approach); Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 202 (2015) (identifying the disjuncture between family life and family law and offering ways that family law can change to facilitate effective co-parenting). *See generally* June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55 (2016) (arguing that the law treats financial obligations differently than custodial obligations in the context of unmarried couples, and calling for a coherent approach that protects the autonomy of the individuals within nonmarital relationships); Melissa Murray, Obergefell v. Hodges *and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207 (2016) (criticizing *Obergefell* for diminishing the constitutional protection for nonmarriage).

[15] *See* Ariela R. Dubler, *From* McLaughlin v. Florida *to* Lawrence v. Texas*: Sexual Freedom and the Road to Marriage*, 106 COLUM. L. REV. 1165, 1169 (2006) (arguing for the recovery of *McLaughlin* and *Lawrence* on their own terms, instead of in relation to marriage, in order to "function as a limited corrective to the law's generally myopic view of marriage as the only form of sexual intimacy tied to one's place in the public, constitutional order"); Katherine M. Franke, *Longing for* Loving, 76 FORDHAM L. REV. 2685, 2690 (2008) (beginning the task of "mapping the positive space of the middle ground—the gap—between criminalization and marriage"); Melissa Murray, *Paradigms Lost: How Domestic Partnership Went from Innovation to Injury*, 37 N.Y.U. REV. L. & SOC. CHANGE 291, 305 (2013) (arguing that "[m]arriage equality need not and should not be the end of innovation and experimentation around the issue of relationship recognition" and calling for the acknowledgment "that for many, one paradigm does not fit all"); Deborah A. Widiss, *Non-Marital Families and (or After?) Marriage Equality*, 42 FLA. ST. U.L. REV. 547, 571–72 (2015) (arguing that the push for marriage equality should not prevent the recognition of nonmarital families and identifying "the need to reconsider the extent to which a large number of government policies and programs rely on marriage as the exclusive mechanism of recognizing family structures").

[16] *See* BOWMAN, *supra* note 14, at 117 ("In sum, the propensity to cohabit clearly differs by race, ethnic group, and immigrant status within the United States, but both the meaning of cohabitation and motivations for embracing this status can differ widely by group."); Carol S. Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services*, 10 FAM. L.Q. 101, 102 (1976) ("Not only are the members of these units diverse; equally variegated are the relationships they establish and the needs that they seek to fulfill within them."). Some scholars argue that this very difficulty in defining them as a group explains their inability to attain legal protections. *See* Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COLUM. L. REV. 293, 360 (2015) ("Two interrelated features of cohabitation have impeded progress toward legal recognition and left cohabitants with few of the legal rights and duties conferred on protected families. First, the category of cohabitants includes a broad range of couples

matter of law. Given their ubiquity, a thicker description of how the law conceives of nonmarital relationships is imperative.[17]

To begin to understand how the law regulates unmarried couples, this Article looks at how courts address a couple's relationship after it ends.[18] Courts often only have occasion to consider claims in the relationship's aftermath. Just as married couples divorce, unmarried couples separate, and these couples invoke the law when their relationships break apart. This entryway into the relationship provides a uniquely insightful perspective: courts must assess the nature of the relationship and assign a value to the contributions made by each party.[19] Unsurprisingly perhaps, marriage continues to be crucial to the project of considering nonmarriage, by either analogy or distinction. This Article is thus in direct conversation with the scholarship that explores how the relationship between marriage and nonmarriage is continuously constituted.[20]

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with varying intentions for their relationships. . . . [Second, t]he decision *not* to marry when marriage is an option sends a confusing signal about the nature of cohabitants' relationships and the extent to which they are defined by family-commitment norms.").

[17] *See generally* CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES: SELECTED ESSAYS (1973) (undertaking anthropological studies through "thick description" in order to provide context, meaning, and sufficient details to, for example, differentiate a wink from a fake-wink from a twitch). I use Clifford Geertz's term intentionally, although informally, as applied to law rather than culture. This Article seeks to engage in a more detailed and expansive analysis of the cases—describing both their facts and their reasoning—to better understand the law's characterization and construction of nonmarital relationships and identify the consequences that those characterizations and constructions bring about.

[18] *Marvin v. Marvin*, hailed as the first case to recognize the rights of non-marital couples, was decided in the context of a separation. *See* 557 P.2d 106, 110 (Cal. 1976) (holding that at the conclusion of a seven-year nonmarital relationship, the plaintiff nevertheless has rights to the property accumulated to that relationship based on contractual and equitable principles); *see also* Albertina Antognini, *Family Unity Revisited: Divorce, Separation, and Death in Immigration Law*, 66 S.C. L. REV. 1, 14 (2014) (identifying the separation of a cohabiting couple as the catalyst for recognizing those couples in the first instance).

[19] This vantage point helps blur any lingering separate spheres idea that the family and the market are diametric opposites, with economic relations suited only for the latter, given that courts actively value contributions and work done in the context of family relations. *See* Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753, 756–57 (2010) (describing the rise of "the notorious separate spheres" whereby "[p]roductive work for pay moved out of the home, both in social life and in legal taxonomy" thus turning "the dominant gender in the family . . . female," which was "segregat[ed] . . . and subordinat[ed] . . . to the masculine market"). *See generally* Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491 (2005) (identifying how legal rules permit or prohibit economic exchange in intimate relationships, with particular attention to the distributive consequences the legal rules effectuate). This is not to imply, of course, that courts do not adhere to this separate spheres view.

[20] *See* Courtney Megan Cahill, *Regulating at the Margins: Non-Traditional Kinship and the Legal Regulation of Intimate and Family Life*, 54 ARIZ. L. REV. 43, 71–72 (2012) (arguing that in regulating non-traditional forms of kinship, the law is actually expressing its normative ideals about marriage, parenting, and procreation that it would otherwise be unable to do given constitutional barriers); Dubler, *supra* note 12, at 1655–56 (exploring the history of unmarried women and arguing that

Before proceeding, some notes on scope and terminology are in order. This Article takes as its data set the state law cases that consider nonmarital relationships for purposes of property distribution.[21] The focus of this Article is on rules that regulate the rights of individuals as against each other, rather than vis-à-vis the state.[22] In analyzing these relationships, it excludes couples who mistakenly believed they were married, along with couples who experience death rather than separation. The definition of "nonmarital" this Article employs tracks the definition courts use—it includes couples who are having, or could be having, sex with each other. Many, but not all, of these couples cohabit.[23] Evaluating these cases in tandem reveals a taxonomy of different circumstances in which courts address nonmarital relationships.[24] That is, nonmarital couples are not just made up of individuals who never marry. They are also composed of individuals who lived together before getting married; they are those who continue to live with the partner they were once married to but now divorced from; they are those who are in a nonmarital relationship while receiving alimony payments from a prior marriage.

The scope of this Article is further limited insofar as it necessarily addresses those couples that end up in court. As such, this Article focuses on heterosexual couples—they form the bulk of individuals who litigate their claims, and the lack of marriage cannot be explained by a lack of choice given that they have long had the right to marry.[25] Moreover, many couples, including

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"[d]espite the explicit boundaries between the legal rights of married and unmarried women, the law understood and constructed the social and legal status of many unmarried women in relation to marriage"); Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and its Relationship to Marriage*, 102 CALIF. L. REV. 87, 144–46 (2014) (exposing the dialogic relationship between marriage and nonmarriage and the constitutive role each played in forming the other).

[21] Numerous Boolean search terms in Westlaw, mainly variations on "unmarried" & "property" & "separation," yield relevant cases numbered in the 400s, after leaving aside those cases that discuss only divorce, or death, or implicate federal questions.

[22] Other works have addressed state regulation of unmarried couples. *See* BOWMAN, *supra* note 14, at 69–80 (discussing how some state statutes implement a practical understanding of the family in areas such as health care and tort claims, thus providing benefits to cohabitants); Courtney G. Joslin, *Marital Status Discrimination 2.0*, 95 B.U. L. REV. 805, 806 (2015) (addressing the various ways the law continues to discriminate based on marital status, or lack thereof, and arguing that marital status discrimination should be included in civil rights statutes).

[23] Sex and cohabitation have a symbiotic relationship. *See infra* notes 105–161 and accompanying text (addressing instances where courts use sex and cohabitation as a proxy for marriage).

[24] Most scholarship addresses each type of nonmarital relationship separately. *See generally* Aloni, *supra* note 14 (addressing how nonmarital relationships figure in terminating alimony); Estin, *supra* note 14 (identifying the remedies available to unmarried couples when the relationship ends without differentiating the types of nonmarital relationships); Allison Anna Tait, *Divorce Equality*, 90 WASH. L. REV. 1245 (2015) (considering premarital cohabitation in the context of same-sex divorces).

[25] Indeed, many cases involving same-sex couples are at odds with the jurisdiction's general approach, possibly based in part on the fact that marriage was not available to them. *See, e.g.*, Cates v. Swain, No. 2010-CT-01939-SCT, 2013 WL 1831783, at *5 (Miss. June 27, 2013) (upholding a prop-

those without assets or those who were able to agree upon a division of assets, are not represented.[26] The rules announced in court, however, provide the network of laws against which all couples make their decisions—they apply to nonmarital couples from lower socioeconomic backgrounds[27] as they do to the increasing number of wealthier elderly adults opting to forego marriage.[28]

The survey of the case law reveals that courts approach nonmarital relationships in one of two ways: either by looking to marriage as a requirement for what a nonmarital relationship should be, or by distinguishing the nonmarital relationship from anything approaching marriage. In the process, the cases reinforce particular conceptions of what individuals in relationships across the board ought to do, and how their contributions are valued.[29] By defining each nonmarital relationship differently, courts value the contributions made by each party to the relationship differently, but with a remarkably consistent result: the individual seeking property—which in nearly all cases is a woman[30]—has a difficult time receiving anything outside of marriage. In deciding whether and how to distribute property in a relationship that is not marital, courts generally enforce a rule that recognizes title to property, over and above nonmonetary contributions made to the relationship. This prioritization of paid work over house work has its roots in coverture, the doctrine that rendered the wife legally invisible upon marriage.[31] Although many scholars convincingly

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erty distribution on the basis of unjust enrichment at the conclusion of a same-sex relationship while Mississippi generally does not allow claims of unjust enrichment to go forward in the context of nonmarital couples); Blumenthal v. Brewer, 24 N.E.3d 168 (Ill. App. Ct. 2014) *rev'd in part, vacated in part by* Blumenthal v. Brewer, No. 118781, 2016 WL 6235511, *13–16 (Ill. Aug. 18, 2016) (applying unjust enrichment to a same-sex unmarried couple). The cases operate in specifically gendered ways given the composition of the parties before the court and the claims they raise.

[26] Those with many assets may also not be represented, given that Americans with higher income and level of education not only get married in larger numbers but they also tend to stay married. *See* Anne L. Alstott, *Updating the Welfare State: Marriage, the Income Tax, and Social Security in the Age of Individualism*, 66 TAX L. REV. 695, 720–22 (2013) (noting that as a group, the "American upper class" marries later in life, marries at higher rates, and tends to remain married).

[27] BOWMAN, *supra* note 14, at 107 (noting that some scholars refer to cohabitation as "a poor man's and woman's marriage") (internal quotation marks and alterations omitted).

[28] *Id.* at 119 (noting that these older cohabitants "are primarily persons who have been divorced or widowed, and they tend for a variety of reasons not to be interested in remarriage, reasons extending beyond economic incentives and family pressures").

[29] This analysis may thus be relevant to unmarried same-sex couples. Even while same-sex couples tend to be dual income-earners, there is evidence to show that same-sex couples still "adopt default patterns of specialized labor within the household, even while preferring a narrative of equality within marriage." *See, e.g.*, Tait, *supra* note 24, at 1268–71 (identifying that in the context of marriage, "[a]s with different-sex couples, there are a number of factors that produce and maintain power as well as gender").

[30] This gender composition is borne out in nearly every case that deals with property division between nonmarital couples.

[31] 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *442.

argue that remnants of coverture still impact the marital relationship to this day,[32] few have considered how the legal rules that regulate nonmarital relationships actively work to support the vitality of a doctrine that renders a woman's work within the home invisible.[33] This Article does just that: it shows how the law uses the nonmarital space to stipulate, and evaluate, the duties a woman owes, in her role as a wife. It also identifies the few instances where courts allow property distribution to coexist with sex outside of marriage, despite the pitfalls of accidentally sanctioning prostitution:[34] when courts rely exclusively on marriage to define the nonmarital relationship, and when acknowledging sex outside of marriage leads to a decrease in property distribution for the woman.

This Article proceeds in four parts. Part I begins by addressing where and how the law treats nonmarriage explicitly and exclusively through the familiar lens of marriage.[35] In these situations, courts require the nonmarital relationship to look just like a marriage before awarding property. In the process, a specific definition of marriage and its attendant duties, emerges. Part II then turns to those cases that approach the nonmarital relationship on its own terms.[36] In many ways, these cases are the mirror image of those discussed in Part I—instead of requiring the relationship to be marriage-like before distributing property, these cases *deny* property distribution where the relationship looks most like a marriage, or where the services for which the plaintiff seeks compensation are those that should be rendered in the course of a marriage. Because the plaintiff is nearly always a woman, these cases tend to revolve around the wife's duties. Regardless of the court's approach or of the final outcome, all of the cases re-inscribe the same wifely obligations: she must provide

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[32] *See, e.g.*, Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 842–48 (2004) (discussing how the family law canon overstates changes over time and obscures the remnants of coverture in defining the marital relationship); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930*, 82 GEO. L.J. 2127, 2201–03 (1994) (tracing the history of how courts continued to enforce the substance of coverture under the more modern guise of "separate spheres" in marital relationships in the early twentieth century).

[33] *See* Dubler, *supra* note 12, at 1712 ("To understand the meaning of marriage today, then, still demands attention to the legal regulation of life outside of marriage."); Siegel, *supra* note 32, at 2210 (powerfully noting in the context of marriage "[w]e live in a world in which unwaged labor in the home stands as an anomaly: lacking explanation but not requiring one either").

[34] The general understanding is that courts try to keep sex separate from any sort of exchange in nonmarital relationships. *See* Hasday, *supra* note 19, at 511 ("The law regulating unmarried sexual partners conspicuously denies enforcement to some economic exchanges between intimates in order to stress and preserve the distinction between nonmarital sexual relationships and prostitution, while simultaneously sanctioning other economic exchanges that the courts understand to accord with, or even advance, appropriate differentiation between nonmarital sexual relationships and marriage.").

[35] *See infra* notes 39–160 and accompanying text.

[36] *See infra* notes 161–309 and accompanying text.

sex, along with homemaking services, and at times even help with her husband's business ventures.

Part III isolates a theme underlying the cases that address nonmarital relationships: they all reason that their decisions promote and protect the status of marriage.[37] This Part takes up that rationale directly and evaluates it by considering how it justifies outcomes in both cases that decide to distribute property and those that deny it entirely. In each instance the justification comes up wanting. In fact, courts are most directly protecting and promoting the rules of divorce, rather than those of marriage, by refusing to apply the rules of divorce to the couples who are before them. Although there may be a reasoned basis for doing so, courts have so far failed to develop any account of why that would be. In particular, they fail to explain how the rules regulating exit impact the initial decision of whether to marry or not. This Part ends by unpacking the more specific incentives the rules that distribute or deny property create depending on which party—the man or the woman—declines marriage according to the court.

Lastly, Part IV gathers the shortcomings identified in the prior sections that afflict the law of nonmarriage.[38] Even though the line between marriage and nonmarriage is a moving target, the end result is remarkably consistent: if a woman seeks property in exchange for services, then she should marry. Given the quantifiable harms these decisions inflict on the woman, and the weak rationales they rely on, this Part calls for judges and lawmakers to move beyond the marriage-nonmarriage dyad in deciding whether, and how, to distribute property. Ultimately, this Article aims to provide the necessary first step in bringing nonmarital family structures out from marriage's lingering shadow.

I. NONMARRIAGE IS (JUST LIKE) MARRIAGE

In assessing nonmarital relationships, courts at times revert to the familiar form and status of marriage. Specifically, courts rely on marriage as the relevant unit of analysis in determining whether to: award palimony; apply the laws of divorce to a couple that is not married; include a nonmarital period in distributing property where a couple had also been married; or terminate alimony payments on the basis of an ex-spouse's new, nonmarital relationship. This Part takes up each category of cases in turn.

The decisions that explicitly rely on marriage exemplify the concept of copy as homage that Ariela Dubler meticulously explores in her history of

[37] *See infra* notes 312–344 and accompanying text.
[38] *See infra* notes 345–356 and accompanying text.

common law marriage.[39] As her work explains, relationships that looked like marriage were either identified as "a fraud" and "exclud[ed] from the legal sphere of domestic relations," or they were "enlisted (or, perhaps, co-opted) to reinforce the supremacy of marriage."[40] These cases fall into the latter category: by requiring the relationships to approximate marriage as much as possible, they are essentially assimilating nonmarriage into marriage. It should come as no surprise then that courts in this context are not concerned about how their decisions may negatively impact marriage; quite the opposite, they are expanding the content of marriage to include nonmarital relationships.

Courts' reliance on marriage as the yardstick to distribute property, however, quickly becomes tautological: courts decline to distribute property in a nonmarital relationship, reasoning that the absence of an actual marriage makes it insufficiently marriage-like. The effect of these decisions therefore is to narrow the kinds of nonmarital relationships in which a court distributes property. There is, however, one important exception to this trend: where courts entertain requests to terminate alimony. In these cases, courts have a much lower bar in concluding that a nonmarital relationship approximates marriage. As long as there is evidence of sex, courts liken the relationship to one of marriage in holding that it leads to support, thus effectively denying the woman the actual payments of support she was receiving.

A. Palimony: Concerns Over Bigamy

Courts and commentators are liberal in their use of the term palimony when discussing property claims between individuals in a nonmarital couple.[41]

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[39] Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 1013–14 (2000). Dubler discusses the shift in understanding of common law marriage as homage to common law marriage as threat:

> Rather than framing copies of marriage as reinforcing the institution, legislators embraced a paradigm of parody in which copying constituted subversion. From within this conceptual framework, lawmakers posited that the preservation of marriage depended on exposing the copier as a fraud, and excluding from the legal sphere of domestic relationships those relationships that merely *looked like* marriage.

Id. at 1014. In the context of same-sex marriage, however, Clare Huntington argues that nontraditional families had to mimic traditional families to gain recognition. *See* Clare Huntington, *Staging the Family*, 88 N.Y.U. L. REV. 589, 629 (2013) (addressing the performativity of family law and arguing that in the context of same-sex couples, "to gain legal recognition, nontraditional families must closely follow a prescribed script for how families are *supposed* to act," which advocates for marriage equality incorporated into their litigation strategy).

[40] Dubler, *supra* note 39, at 1013–14.

[41] The original aggregation of claims in *Marvin* may explain the slippage that currently takes place in using the term palimony. Michelle Triola went to court to request both a division of property and post-relationship support from the defendant, Lee Marvin. She "allege[d] that the parties agreed to pool their earnings, that they contracted to share equally in all property acquired, and that defendant

This Article addresses palimony in its more specific iteration—as a form of alimony for "pals."[42] Accordingly, this section considers the cases where courts address requests for post-relationship support, as opposed to real and personal property division.[43] The few courts that allow these claims for palimony to go forward not only accept that a nonmarital relationship may approximate a marital relationship, but require that it do so. By considering whether a nonmarital relationship is sufficiently like marriage, these cases define what marriage ought to look like. More precisely, they define what kinds of duties are appropriate for a wife.

New Jersey and California are the two principal jurisdictions known for openly recognizing requests for palimony. Both, however, retain marriage as the principal relationship status. In 1979, in *Kozlowski v. Kozlowski*, the Supreme Court of New Jersey explained that its decision recognizing palimony neither challenged nor denigrated marriage; quite the opposite, the court affirmed "[t]he value of a stable marriage."[44] California also recognizes claims for palimony and requires only that the agreement for support not rest on "unlawful consideration."[45] Marriage, nonetheless, remains California's preferred status. As the California Supreme Court explained in *Marvin v. Marvin*, in 1976, "the structure of society itself largely depends upon the institution of

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agreed to support plaintiff." *Marvin*, 557 P.2d at 116. Although *Marvin* itself never used the term "palimony," widespread lore suggests that *Marvin* was the source of the term and responsible for its rise in popular consciousness. *See, e.g.*, Estin, *supra* note 14, at 1381 (noting that plaintiff's "lawyer, a Los Angeles divorce attorney named Marvin Mitchelson, was interviewed by a *Newsweek* reporter, who coined the term 'palimony' for her claims"). It is unclear whether the term was coined by the lawyer or by the writer interviewing him. As one *L.A. Times* writer explained: "Domestic partner post-dissolution support doesn't have quite the ring of 'palimony,' a felicitous pairing of pal and alimony that was coined by either Mitchelson or a Newsweek writer interviewing him. (It would not have been out of character for the attorney to claim credit for someone else's creation.)." Mimi Avins, *On Mitchelson, Palimony and Contractual Obligations*, L.A. TIMES (Sept. 21, 2004), http://articles.latimes.com/2004/sep/21/entertainment/et-avins21 [https://perma.cc/Q46G-KKW2].

[42] *See* Myrna Oliver, *'*Marvin' *Cases Hard to Win: Palimony Proves to Be an Elusive Pot of Gold*, L.A. TIMES (Jan. 30, 1986), http://articles.latimes.com/1986-01-30/news/mn-2067_1_palimony/2 [https://perma.cc/6AQC-XAE5] (identifying the source of the term palimony, which was "coined from 'alimony for pals' by a Newsweek writer" interviewing the lawyer for Michelle Triola).

[43] The definition of palimony has even been the subject of some litigation. *See* Att'y Grievance Comm'n of Md. v. Ficker, 572 A.2d 501, 507 (Md. 1990) (finding that an attorney did not mislead his clients by soliciting palimony claims because palimony "is [] a legitimate word fairly used in a broad sense . . . as referring to the collective rights of unmarried cohabitants"). Discussions addressing nonmarital couples generally fail to differentiate between the different claims for property. *See* Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 587–91 (2013) (discussing the legal options available to nonmarital couples, without differentiating between request for palimony and requests to divide tangible property); Estin, *supra* note 14, at 1383–84 (discussing palimony and cohabitation without distinguishing between the two).

[44] Kozlowski v. Kozlowski, 403 A.2d 902, 908 (N.J. 1979), *superseded by statute*, N.J. STAT. ANN. § 25:1-5 (2013), *as recognized in* Maeker v. Ross, 99 A.3d 795 (N.J. 2014).

[45] *Marvin*, 557 P.2d at 116.

marriage, and nothing we have said in this opinion should be taken to derogate from that institution."[46]

Marriage remains central to the decisions in another way. In *Kozlowski*, the New Jersey Supreme Court had occasion to address multiple relationships. Thaddeus Kozlowski was married during the entire time he cohabited with his nonmarital partner, Irma Kozlowski.[47] This fact did not prevent the court from finding that an oral promise had been made in the course of Thaddeus and Irma's fifteen-year relationship, which had "an atmosphere not dissimilar to that of a normal family unit."[48] The court held that the agreement for support was based on a legitimate exchange for the value of the services provided by Irma, which included: "to take care of defendant, his children and his home; to cook and keep house for him, and to help entertain his friends and business associates."[49] The court had little trouble concluding that these services merited remuneration, as they occurred in the context of "a stable family relationship extending over a long period of time."[50] In deciding that palimony should be awarded to Irma, the court reasoned that even though this particular relationship coexisted alongside a marital one, it looked sufficiently like a marriage, and the services were of the kind that would be provided during the course of a marriage.[51]

California courts often look to whether the parties cohabited prior to awarding palimony as a proxy for deciding whether the relationship approaches the tenor of marriage. Their stated reason for doing so is to avoid sanctioning prostitution—instead of recognizing sexual services, they recognize cohabitation as the basis for the property award.[52] Their actual concern, however, is whether the woman acted sufficiently like a wife. In denying recovery to Birgit Bergen in *Bergen v. Wood*, in 1993, the California Court of Appeal relied on the fact that she did not cohabit with her partner, Duane Wood.[53] The court

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[46] *Id.* at 122.

[47] *Kozlowski*, 403 A.2d at 904. Thaddeus only began his divorce proceedings when he met the woman for whom he would leave Irma. By the time of trial, he was married to the new woman, whom the court mentioned was "at least 30 years younger than plaintiff." *Id.* at 905.

[48] *Id.* at 904.

[49] *Id.* at 908.

[50] *Id.* (noting that *Marvin* was persuasive in this context where "plaintiff has alleged facts which demonstrate a stable family relationship extending over a long period of time").

[51] *Id.* at 907–08 (noting that a promise to marry was not provided or alleged and that it was not recognizing, or reviving, the doctrine of common law marriage).

[52] *See* Hasday, *supra* note 19, at 507 (noting that "courts are intent on distinguishing nonmarital sexual relationships from prostitution and so ardently declare their refusal to enforce contracts between unmarried sexual partners that use sex as consideration").

[53] Bergen v. Wood, 18 Cal. Rptr. 2d 75, 77 (Ct. App. 1993) (reasoning that cohabitation provides lawful consideration for a contract for support).

clarified that cohabitation itself was not a prerequisite to awarding palimony;[54] rather, living together is useful because it provides a source from which "flows the rendition of domestic services."[55] The court in *Bergen* specified, however, that only certain services are considered appropriately domestic. Despite the fact that the trial court below had concluded that Birgit's "services as a social companion and hostess were adequate consideration,"[56] the court on appeal disagreed. It reasoned that unlike the services provided a "homemaker, housekeeper and cook," being a "companion and hostess" are not "normally compensated and are inextricably intertwined with a sexual relationship."[57] Accordingly, the court defined marital-like relations, and thus marriage, to include more than mere "companionship."[58]

Because the nonmarital relationship must approximate marriage so closely prior to awarding palimony, some courts express a concern over inadvertently sanctioning bigamy. This worry is heightened by the fact that the palimony cases can involve more than one relationship—one or both of the parties may have been married at some point to other individuals.[59] This is precisely how the West Virginia Supreme Court of Appeals framed the issue in 1990 in *Thomas v. LaRosa*: instead of deciding whether to award palimony—which was the certified question submitted to the court—it set out to consider wheth-

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[54] *Id.* In 2001, the California Court of Appeal in *Cochran v. Cochran* clarified that full-time cohabitation is not necessarily a prerequisite to palimony. 89 Cal. App. 4th 283, 293 (Ct. App. 2001). It identified, however, the function that cohabitation served—namely, as a proxy for "a significant and stable relationship." *Id.* (holding that couple who lived together two to four days a week was sufficient to create a triable issue of fact).

[55] *Bergen*, 18 Cal. Rptr. 2d at 77.

[56] *Id.* Both *Bergen* and *Taylor v. Fields*, a 1986 case from the California Court of Appeal that also involved consideration in the context of a nonmarital relationship, were cases brought by Marvin Mitchelson, the lawyer for Michelle Triola in *Marvin*. *See id.* at 75; Taylor v. Fields, 178 Cal. App. 3d 653, 656 (Ct. App. 1986).

[57] *Bergen*, 18 Cal. Rptr. 2d at 76, 78. The trial court had concluded that the sexual services were "collateral to the companionship of the parties." *Id.* at 76. The plaintiff, Bergen, "was a beautiful woman and Wood [the defendant] wanted to be seen with her." *Id.*

[58] *Id.* at 859. The court in *Bergen* also expressed a concern over having any casual relationship lead to a request for palimony: "if cohabitation were not a prerequisite to recovery, every dating relationship would have the potential for giving rise to such claims, a result no one favors." *Id.* at 858. To prevent the floodgates of litigation from opening according to the court, the relationship must closely approximate marriage. Even federal courts that address claims of palimony consider how marital-like the relationship is for purposes of federal jurisdiction or application of the federal bankruptcy code. *See, e.g.*, *In re* Doyle, 70 B.R. 106, 107 (B.A.P. 9th Cir. 1986) (finding that palimony is not alimony in declining to apply provisions of the bankruptcy code); Anastasi v. Anastasi, 544 F. Supp. 866, 868 (D. N.J. 1982) (finding that a claim of palimony falls under the domestic relations exception to jurisdiction).

[59] In these cases, palimony may be the only claim available, given that there may not be any real property to share, as there was no steady cohabitation. Those jurisdictions that allow palimony claims to go forward may therefore receive a disproportionate number of claims that involve multiple relationships because it is not clear what other legal recourse such individuals would have.

er "a man can now be married to two women at the same time."[60] The court said no.[61]

In *Thomas*, the similarity between the nonmarital relationship and the marital one was what defeated any possibility for recovery. The court denied the plaintiff any property because it reasoned that she provided services that a wife would or should, which the court defined to include business advice: "[t]he type of 'business consulting services' appellant alleges that she performed—namely, chewing the fat with the appellant over the advisability of certain business decisions—are typical of the services performed by most wives who are in the good graces of their husbands."[62] It defined the litany of wifely duties to encompass business-related services, which it had no difficulty differentiating from a "legitimate business contract[]" as among "a female coal broker and a male mine operator."[63] As such, the only damages the court identified were "those to which a faithful wife would be entitled upon the dissolution of a valid marriage," which was missing here.[64]

The *Thomas* court simultaneously demarcated marriage as the sole place where an exchange of services for property could take place and defined what kinds of services the wife should provide. It therefore found that enforcing a contract for services that the court identified were fit for a wife "when one party is already married would amount to the condonation of bigamy."[65] Marriage can provide support to only one woman at a time.[66] Read another way, to receive support at the conclusion of a relationship, even one that involved business dealings, a woman should secure her rights by getting married.

Marriage remains the preferred status in cases that recognize claims to palimony in this important way then: relying on the markers of marriage to determine whether to award palimony turns into a requirement that has the effect of keeping marriage the principal locale for receiving any support payments when a relationship ends. That is, by hinging recovery on a relationship

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[60] Thomas v. LaRosa, 400 S.E.2d 809, 810 (W. Va. 1990).

[61] *Id.*

[62] *Id.* at 814.

[63] *Id.* The business related services the plaintiff had performed included traveling extensively with the defendant, scoping out potential business to be included in the construction of a mall, and acting generally as a "business assistant." *Id.* at 811.

[64] *Id.* at 814.

[65] *Id.*

[66] The court was ultimately concerned with the zero-sum proposal of a husband supporting more than one woman at a time—"if a man attempts to support more than one wife or more than one family at a time the living standard of the lawful wife *must* suffer as a matter of law." *Id.* at 815. This is also the concern articulated by courts considering whether alimony payments should be terminated on account of a new relationship—there, courts identify one man per woman although they care less about whether the relationship is marital. *See infra* notes 122–134 and accompanying text (addressing how various courts determine alimony where there is a new relationship).

that looks as much as possible like a marriage, courts make recovery difficult outside of an actual marriage. Legislatures have followed a similar tack. In 2010, New Jersey amended its statute to hold that a claim for palimony could only be actionable if the agreement was in writing.[67] For the law to recognize the value of the services provided, the exchange must be express, and the parties represented by counsel.[68] Not only does the substance of the relationship need to approach marriage, but so do the formalities: instead of saying "I do," the individuals must sign a contract stating how much they actually "do."

B. Marital Property Rights for Nonmarital Couples "By Analogy"

A limited number of states—two—apply the rules regulating property distribution at divorce to the end of a nonmarital relationship.[69] They are Nevada and Washington, and both apply the rules "by analogy" only.[70] Courts in these jurisdictions provide individuals who are not married with rights similar to couples who do marry depending on the course the relationship took, thereby extending marriage's reach into relationships that are manifestly not marital.

Nevada and Washington are careful to apply the laws of divorce solely "by analogy" given that property distribution at divorce is a creature of statute.[71] Such statutes do not mention unmarried couples, but neither do they preclude property distribution between unmarried couples.[72] In Washington, as in

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[67] N.J. STAT. ANN. § 25:1-5(h) (West 2013) (prohibiting bringing an action to enforce "[a] promise by one party to a non-marital personal relationship to provide support or other consideration for the other party"); *see Maeker*, 99 A.3d at 797 (addressing the statutory amendment that prohibited oral palimony agreements).

[68] N.J. STAT. ANN. § 25:1-5(h).

[69] Washington makes a distinction between separate property and community property and applies divorce rules only to community property. Connell v. Francisco, 898 P.2d 831, 836 (Wash. 1995) ("we limit the distribution of property following a meretricious relationship to property that would have been characterized as community property had the parties been married"). The distinction is not, of course, an analytically clean one, in that it may become a proxy for assessing the type of relationship, instead of the type of property. *See* Soltero v. Wimer, 150 P.3d 552, 556 (Wash. 2007) (denying recovery based on the conclusion that the nine-year long relationship did not involve any community property).

[70] *See* W. States Constr., Inc. v. Michoff, 840 P.2d 1220, 1224 (Nev. 1992); *Connell*, 898 P.2d at 836.

[71] Both states are community property states. See *Black's Law Dictionary* 338 (West 10th ed 2014) (defining "community-property state" and noting that there are currently nine community property states).

[72] *Michoff*, 840 P.2d at 1224 (noting that unmarried cohabitating couples may lawfully contract with one another regarding their property in the same manner that married couples do); *Connell*, 898 P.2d at 836 ("We hold income and property acquired during a meretricious relationship should be characterized in a similar manner as income and property acquired during marriage."). In 1995, in *Connell v. Francisco*, the first case to address the issue in Washington relied on *In re Lindsey*, which considered a nonmarital relationship that took place prior to the couple's marriage. *Connell*, 898 P.2d at 834; *In re* Lindsey, 678 P.2d 328, 329 (Wash. 1984). The question of what property rights follow

Nevada, the fact that the individuals have not married does not foreclose the equitable division of property at the conclusion of their relationship—it just forecloses the direct application of the state's divorce laws.

Using the rules of divorce to address unmarried couples who separate brings them more directly into marriage's orbit. Not only do courts apply the same rules to each relationship at the moment of exit, they also rely on marriage to guide the decision of whether to apply the rules of divorce to nonmarital relationships in the first instance. Increasingly, courts in each jurisdiction turn to the lack of an actual marriage to deny couples the application of the divorce laws. The Nevada Supreme Court used to define the nonmarital relationship generally, and flexibly. In 1984 in *Hay v. Hay*, the aim of the court's inquiry was to protect the parties' "reasonable expectations with respect to transactions concerning property rights."[73] As such, in *Hay*, the court based the decision to distribute property between individuals in an unmarried couple "with consideration given to the purpose, duration and stability of the relationship and the expectations of the parties."[74] Since its decision in 1992 in *Western States Construction, Inc. v. Michoff*, however, Nevada asks whether the parties agreed, expressly or impliedly, "to hold their property *as though* they were married," before applying divorce rules by analogy.[75]

Similarly, the Washington Supreme Court, after *Connell v. Francisco* in 1995, has been reluctant to deem a relationship sufficiently marital-like to warrant application of the divorce laws, even by analogy. Although lower courts have not completely stopped finding meretricious relationships,[76] the tendency has been to import the characteristics of marriage into a nonmarital relationship wholesale.[77] The court in *In re Marriage of Pennington* in 2000, distilled *Connell*'s inquiry into a five-factor test, which includes consideration of the "continu[ity] [of the] cohabitation, [the] duration of the relationship, [the] pur-

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from a nonmarital relationship was therefore understood, initially, within the context of a subsequent marriage. *See infra* notes 162–247 and accompanying text (discussing how nonmarital relationships that take place before marriage figure in determining a particular property distribution).

[73] Hay v. Hay, 678 P.2d 672, 674 (Nev. 1984); *see also Michoff*, 840 P.2d at 1224 (holding that property may be distributed among unmarried couples if they lawfully contracted to do so).

[74] *Hay*, 678 P.2d at 674.

[75] *Michoff*, 840 P.2d at 1224.

[76] *See, e.g.*, Rinaldi v. Bailey, No. 66029-2-I, 2012 WL 5292816, at *9 (Wash. Ct. App. Oct. 29, 2012) (distinguishing *Pennington* and applying community law property rules to a meretricious relationship); Fenn v. Lockwood, No. 33595-6-II, 2006 WL 3629147, at *8 (Wash Ct. App. Dec. 12, 2006) (applying community property rules to a meretricious relationship); Chen v. Shulman, No. 54402-1-I, 2005 WL 2002154, at *5 (Wash Ct. App. Aug. 22, 2005) (overturning lower court's summary judgment based on its conclusion that there was no meretricious relationship); Rota v. Vandver, No. 25039-0-II, 2001 WL 1521996, at *3 (Wash. Ct. App. Nov. 30, 2001) (applying the rules regarding equitable dissolution to a meretricious relationship).

[77] *See* Huntington, *supra* note 13, at 23–24 (discussing the ways that legal opinions can reify the definitions of marriage in either a conservative, or progressive, manner).

pose of the relationship, [the] pooling of resources . . . , and the intent of the parties."[78] Considering the five factors, the court in *Pennington* denied a twelve-year-long couple the "meretricious" designation.[79] It reasoned that the individuals had dated other people at times throughout their relationship and did not continuously cohabit. Moreover, the intent of the parties to the relationship did not match up—the court found that the woman wanted to be married while the man did not.[80]

The court's conclusion in *Pennington* rested in part on the absence of an actual marriage: the woman's unfulfilled desire to marry led the court to conclude that the intent of the parties was not to be in a stable, marriage-like relationship.[81] The effect of the decision is to restrict the application of the laws of divorce to those relationships that are most marital-like: indeed, some courts arguably require that there *be* a marriage. As long as there is no actual marriage, the court will not impose any responsibilities when the relationship ends.[82]

C. Marriage and Nonmarriage: One Continuous Whole

Marriage figures in a more literal manner in decisions where the individuals in a nonmarital relationship have also been married. In addressing premarital relationships and nonmarital relationships between marriages, some courts subsume the period of nonmarriage within the overarching arc of marriage, and include it for purposes of property distribution.[83] Overall, these cases have the unintended effect of diminishing the importance of the legal tie of marriage.

Even jurisdictions that do not allow nonmarital relationships to lead to any property rights recognize them when they are paired with marriage. Mis-

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[78] *In re* Marriage of Pennington, 14 P.3d 764, 770–71 (Wash. 2000).

[79] *Id.* at 771.

[80] *Id.* There were actually two consolidated cases before the court, and it denied recovery in both.

[81] *Id.* at 776. The court in *Connell* also contemplated the parties' intent although it did not specify whether that intent was directed towards the kind of relationship the parties were in. In fact, the language of intent came from *Lindsey*, where the court used it to describe how the parties treated the property in the relationship, not how the parties understood the relationship itself. *See Connell*, 898 P.2d at 834 (citing *Lindsey* for support when discussing "the intent of the parties"); *Lindsey*, 678 P.2d at 331 (discussing intent in the context of how property was used during the relationship).

[82] In this case, the court's decision clearly insulates the man's decision not to propose. Many of the cases have this overall effect. *See infra* notes 345–352 and accompanying text.

[83] Such an approach is not inevitable. *See infra* notes 298–324 and accompanying text. From an anecdotal viewpoint, cases that consider the whole relationship are in the minority; the majority of courts appear to separate the nonmarital period from the marital period. *See* Tait, *supra* note 24, at 1295 (noting that in the premarital context at least, "[b]ecause most legal rights and responsibilities in a romantic relationship begin at the moment of marriage, courts often do not assess premarital moments of commitment and partnership").

sissippi, for instance, is one of the few holdouts that declines to provide property rights to nonmarital couples.[84] It does, however, allow for property distribution in a nonmarital relationship that was marital at some point.[85] In 2003, in *Wooldridge v. Wooldridge*, the Mississippi Court of Appeals reviewed an award of property for the caregiving services that Debra Wooldridge had provided to Steve Wooldridge after they divorced but continued to live together.[86] Steve argued that awarding Debra money for these domestic services was, in essence, awarding her "palimony," in contravention of Mississippi's refusal to award property to couples "without the benefit of marriage."[87] After considering the relevant precedents addressing nonmarital couples, the court noted that they were inapposite based on the simple fact that those couples had never been married. Here, the court explained, "Steve and Debra were more than 'pals' by virtue of their previous marriage."[88] In fact, "*but for want of obtaining another marriage license*, they lived in the same relationship in which they had lived from 1973 through 1994, holding themselves out to the public as well as their two daughters as having legally remarried."[89]

So reasoning, the *Wooldridge* court both privileged and trivialized the status of marriage. It characterized the difference between marriage and nonmarriage as merely the difference between obtaining a license and failing to do so. The fact that this couple was once married, however, was significant enough to obviate the application of any cases that denied property distribution in the context of a nonmarital relationship. Having been married at some point allowed the court to look past their divorce.[90]

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[84] *See* Wooldridge v. Wooldridge, 856 So. 2d 446, 457 (Miss. Ct. App. 2003) (holding that equitable division of property between two cohabiting partners is not allowed). Mississippi may have arguably changed its approach to allow for claims of unjust enrichment even though the only decision stating as much was issued by the Mississippi Supreme Court in 2013 in the context of a same-sex couple and remains unpublished. *See* Cates v. Swain, No. 2010-CT-01939-SCT, 2013 WL 1831783, at *5 (Miss. June 27, 2013) (upholding a property distribution on the basis of unjust enrichment at the conclusion of a same-sex relationship).

[85] Mississippi courts disagree on how to approach the relationship between marriage and nonmarriage. Specifically, the Mississippi Supreme Court disagrees with its lower courts about how to characterize the effect of marriage on a nonmarital relationship. The Supreme Court is adamant about keeping marriage and nonmarriage distinct for purposes of property distribution upon divorce, yet the courts of appeal consider the relationship as one continuous whole. *See infra* notes 292–295 and accompanying text. Under either analysis, however, Mississippi recognizes property in the context of a nonmarital relationship where the couple was married at some point.

[86] *Wooldridge*, 856 So. 2d at 448.

[87] *Id.* at 449.

[88] *Id.* at 453.

[89] *Id.* (emphasis added). Important to the court was the fact that their whole relationship was one "of provider and domestic caretaker." *Id.*

[90] *Id. But see* Bunyard v. Bunyard, 828 So. 2d 775, 778 (Miss. 2002) (expressly disagreeing with the lower courts' characterization of the effect of marriage); *infra* notes 279–282 and accompanying text.

Other cases characterize the nonmarital relationship as an inevitable precursor to an eventual marriage—this is, of course, easier to do when the relationship precedes the marriage, rather than follows the divorce. In 1989, in *Malek v. Malek*, the Hawaii Intermediate Court of Appeals rejected an ex-husband's claim that distributing land acquired prior to the marriage would constitute an award of "palimony."[91] The court explained that it was well within its discretion to consider the parties' respective contributions "during both their premarital cohabitation and subsequent marriage."[92] The court's reason was that the cohabitation did not take place on its own—instead, it was a situation where the "premarital cohabitation matured into marriage."[93] Accordingly, the "economic partnership" was understood to begin when the couple moved in together, sixteen months prior to their marriage.[94]

Some cases go so far as to collapse the distinction between marriage and nonmarriage entirely. In 1986, in *Nelson v. Nelson*, the Minnesota Court of Appeals had to assess whether a three-year period prior to the marriage should be included in the distribution of property at divorce.[95] The court noted that "[t]he nature of the parties' relationship prior to marriage was disputed at trial" in that the ex-husband admitted only to having sexual relations, while the ex-wife argued they had been living together "as husband and wife."[96] The court agreed with the ex-wife, and treated the couple as having been married the entire time they were together—"we think the record supports the finding that the parties were living together *as husband and wife* from 1976 until their *marriage* in September 1979."[97] The premarital relationship was not only included for purposes of distributing property, but it became a marriage itself.[98]

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[91] Malek v. Malek, 768 P.2d 243, 247 (Haw. Ct. App. 1989). Hawaii generally declines to distribute property between nonmarital couples. *See, e.g.*, Maria v. Freitas, 832 P.2d 259, 261 (Haw. 1992) (declining to provide plaintiff with property distribution at the conclusion of a nearly twenty-year relationship given that the intent was not to share assets).

[92] *Malek*, 768 P.2d at 246.

[93] *Id.*

[94] *Id.* at 245; *see also* Collins v. Wassell, 323 P.3d 1216, 1224 (Haw. 2014) (holding "premarital contributions are a relevant consideration where the parties cohabited and formed a premarital economic partnership" in deciding property distributions during a divorce proceeding).

[95] Nelson v. Nelson, 384 N.W.2d 468, 472–73 (Minn. Ct. App. 1986).

[96] *Id.* at 469.

[97] *Id.* at 472 (emphasis added). The court did not consider the ex-husband's argument as to whether it was awarding "palimony" in contravention to the anti-palimony statutes, given that the statutes had been enacted after the date of the parties' marriage and were not retroactive. *Id.*

[98] Minnesota does not recognize common-law marriage and has what it calls "anti-palimony" statutes that prevent "any claim by an individual to the earnings or property of another individual if the claim is based on the fact that the individuals lived together in contemplation of sexual relations and out of wedlock." Obert v. Dahl, 574 N.W.2d 747, 749 (Minn. Ct. App. 1998). Its courts interpret the statutes narrowly, however, and allow equitable and contractual claims between nonmarital couples. *Id.* at 749–50 (overturning grant of summary judgment because there was still a question of fact

Multiple marriages to the same person can also subsume a nonmarital relationship that takes place in the interim. In 1985, in *Skelton v. Skelton*, the Maine Supreme Judicial Court considered a claim for alimony after a three-year-long marriage.[99] The couple had, however, already been married nine years before and had lived together for six years in-between.[100] In fashioning its property award, the court considered the entire period of time the parties had been together, merging the two marriages, the two divorces, and the period in the middle into a single relationship. The court affirmed the propriety of the award solely because there had been a "valid marriage."[101]

The court in *Skelton* also relied on the continuous role that the woman occupied. Because the court defined the purpose of alimony to "fill the needs of the future, not to compensate for the deeds of the past,"[102] it considered not just the years the couple had been legally married, but the whole period of time that the woman had spent "in the role of spouse and homemaker."[103] The court in *Wooldridge* engaged in a similar analysis: important to its conclusion was the fact that the entire course of the relationship was defined as one "of provider and domestic caretaker."[104] Married or not, the woman's role was consistent—that of a homemaker, and thus of a wife. The appropriately marital-like quality of the services led the courts to include a relationship that was not always a marriage in the property distribution at divorce.

D. Termination of Alimony: Proof of Sex

The final context in which courts have occasion to address a nonmarital relationship for purposes of property distribution is deciding whether to terminate alimony payments. The issue courts face is whether an ex-spouse's new, nonmarital relationship should end payments awarded on the basis of the prior marriage. In these cases, courts are surprisingly willing to rely on the mere

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as to "whether the parties' sexual relations were the sole consideration for any contract between them and whether [plaintiff] seeks to preserve her own property or acquire [defendant's] earnings or property").

[99] Skelton v. Skelton, 490 A.2d 1204, 1205 (Me. 1985).

[100] *Id.* at 1206.

[101] *Id.* at 1209. There are cases where the marriage has less of a gravitational pull for the court, but it nonetheless considers contributions made during the premarital relationship. *See In re* Marriage of Clark, 71 P.3d 1228, 1231 (Mont. 2003) (including premarital property in calculating award because of contributions made by ex-wife to the land during the premarital cohabitation period).

[102] *Skelton*, 490 A.2d at 1207.

[103] *Id.* at 1208. These were important insofar as they affected her "opportunity for the development of . . . marketable employment skills." *Id.*

[104] *Wooldridge*, 856 So. 2d at 453.

presence of sex to end support; and, courts easily liken a nonmarital relationship to marriage in the process.[105]

Although the general rule used to be that remarriage terminated alimony,[106] the rising rates of cohabitation, along with the desire to promote marriage (including remarriage), led courts and legislatures to include cohabitation as a separate basis for ending alimony payments.[107] Jurisdictions have formulated a number of approaches to determine when cohabitation should terminate alimony. Erez Aloni has identified three: upon proof of cohabitation; upon proof of a change in the financial circumstances of the recipient ex-spouse; and, where the presumption that cohabitation caused a change in financial circumstances has not been rebutted.[108] The different approaches reflect the different purposes alimony is understood to serve, including providing for future support, accounting for a wife's needs post-divorce, or compensating any financial loss stemming from the marriage.[109]

Scholars have explored the asymmetry of terminating alimony on account of cohabitation without bestowing any attendant benefits onto that status,[110] and how controlling alimony results in controlling a woman's sex life, as the ex-wife is typically the recipient spouse.[111] There is, however, little scholarship deconstructing how courts define, and assess, the nonmarital relationship for the purpose of terminating support. That is the task of this section.

The termination of alimony cases are further important because they make explicit how courts themselves are linking sex and support within and

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[105] In nearly all of the cases that reach the court, the parties are an ex-wife who is receiving alimony from her ex-husband and not the other way around. *See* Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1117 (1989) (critiquing alimony in that it "still connotes the *transfer* to a financially needy and deserving wife of assets *belonging* to her ex-husband").

[106] Twila L. Perry, *The "Essentials of Marriage": Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1, 25 (2003) (noting that remarriage, or death of the recipient spouse, would terminate alimony).

[107] *See* Emily M. May, Note, *Should Moving In Mean Losing Out? Making a Case to Clarify the Legal Effect of Cohabitation on Alimony*, 62 DUKE L.J. 403, 405–06 (2012) (analyzing the case law addressing how cohabitation impacts alimony payments and arguing for an update in light of the principles undergirding alimony and the social science research on the realities of cohabitation).

[108] Aloni, *supra* note 14, at 1317–18.

[109] May, *supra* note 107, at 412–17. The rationale for alimony originated in the duties owed by the husband to support his wife. Perry, *supra* note 106, at 23; *see also* JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA 201–06 (2011) (identifying the various, and inconsistent, theories for awarding alimony); Ira Mark Ellman, *The Theory of Alimony*, 77 CALIF. L. REV. 1, 53 (1989) (arguing that there is no unifying theory of alimony and proposing one that would incentivize sharing behavior during marriage).

[110] Aloni, *supra* note 14, at 1315–20.

[111] Perry, *supra* note 106, at 27 (explaining "how deeply the doctrine of support and services is intertwined with gender hierarchy and male policing of women's sexuality" and concluding that a woman who "appears not to be having sex with anyone receives better treatment under the law than a woman who appears to have found a new sexual partner").

outside of marriage. They also provide a unique perspective on how courts draw the line between marriage and nonmarriage—courts that decide whether to terminate alimony on the basis of a nonmarital relationship articulate a concern that their decisions may elevate nonmarriage to the status of marriage.

1. Sex in Lieu of Support

In deciding whether to terminate alimony on the basis of a nonmarital relationship, courts rely on the presence of sexual relations, or the possibility of sexual relations,[112] to the exclusion of any other consideration. That is, they consider proof of sex in lieu of proof of financial support in determining whether to terminate alimony on the basis of the nonmarital relationship. By severing sex from support, these courts are in essence perfectly conflating the two: rather than distance sex from support, these decisions affirm the notion that sex and support are, and should be, exchanged. Courts' singular reliance on sex also ends up eliminating any distinction between the *de jure* and the *de facto* family: proof of sex leads courts to conclude that a nonmarital relationship approximates a marital one.

The question before courts often is whether the new relationship is marriage-like. Illinois, which denies nonmarital couples property distribution,[113] has nevertheless long acknowledged that a cohabiting relationship can lead to a termination of alimony if it is "conjugal" in nature.[114] In 2006, the Appellate Court of Illinois explained in *In re Marriage of James A. Susan* that the statutory requirement was intended to reach those cases where a party "becomes involved in a husband-and-wife relationship but does not legally formalize it."[115] Yet the court in *Susan* interpreted the statute to provide two distinct bases for terminating an award—where there has been a change in the financial circumstances of the ex-spouse, or where the ex-spouse begins a new relationship.[116] By cordoning off the question of whether the new relationship impacts

[112] *See, e.g.*, *In re* Marriage of Sappington, 478 N.E.2d 376, 381 (Ill. 1985) (holding that "a conjugal relationship does not require sexual conduct" insofar as "an impotent male is capable of a conjugal relationship"). Thus, Illinois has defined "conjugal" to not even require sex. *Id.*

[113] *See* Blumenthal v. Brewer, No. 118781, 2016 WL 6235511, *13–16 (Ill. Aug. 18, 2016) (affirming the court's 1979 decision in *Hewitt v. Hewitt* and overturning appellate court decision that had awarded property on the basis of a nonmarital relationship, reasoning that it is against public policy).

[114] 750 ILL. COMP. STAT. 5/510(c) (2016) (terminating alimony if "the party receiving maintenance cohabits with another person on a resident, continuing conjugal basis"); *see also* Aloni, *supra* note 14, at 1318 (noting the different standards jurisdictions employ in determining what constitutes cohabitation for the purpose of terminating alimony).

[115] *In re* Marriage of Susan, 856 N.E.2d 1167, 1170–71 (Ill. App. Ct. 2006).

[116] Its justification for understanding the two as separate requirements is the inequity that would otherwise result "when the recipient spouse becomes involved in a husband-wife relationship but does not formalize the relationship." *Id.* at 1175 (internal quotation marks omitted).

the ex-wife's financial needs, the only question that remains for the court is whether a nonmarital relationship is sufficiently like a marriage: "the goal is not to determine whether the relationship leaves the recipient financially secure, but rather to determine whether the relationship leaves the recipient effectively married."[117]

Thus severing the requirements, the court in *Susan* went about considering whether there was a marriage-like relationship—by looking to whether the parties were having sex. The ex-spouse, Monica Susan, and her new boyfriend did not live together and had sex only occasionally.[118] Yet the court found that intermittent sex and Monica's routine sleepovers at her boyfriend's place amounted to a "*de facto* marriage."[119] To bolster its conclusion, the court in *Susan* went deep into the details of the relationship—it considered who paid for the meals that each cooked and prepared, how they signed the Christmas cards they sent out every year, and which room they stayed in when they visited their respective children.[120] It did not matter that the ex-wife and her new boyfriend did not commingle funds or provide each other with any monetary support.[121] It only mattered that the contours looked roughly like marriage to the court, based in large part on the presence of sexual relations.

Evidence of sex not only supplants any requirement of support, but it also supplies proof of cohabitation. In 2003, the Tennessee Court of Appeals in *Honeycutt v. Honeycutt* was asked to interpret a marriage dissolution contract that terminated alimony if a series of conditions occurred, including the wife's remarriage, or "cohabitat[ion] with a man not related to her."[122] The trial court declined to terminate the alimony payments because the ex-wife had not remarried, and there was no evidence that her new boyfriend provided her with any financial support.[123] On appeal, the court overturned that decision. It reasoned that the plain language of the contract required cohabitation.[124] In inter-

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[117] *Id.* at 1172; *see also In re* Marriage of Schober, 379 N.W.2d 46, 48 (Iowa Ct. App. 1986) (expressing a concern that "the current status of Iowa law on modification of alimony precipitates the decision to engage in a meretricious relationship by cohabiting, when marriage is the desire of the parties, so as not to jeopardize alimony payments").

[118] *Susan*, 856 N.E.2d at 1169 (noting that at the time of trial, they had not had sex in over two years). The court's overarching intent to promote marriage by making nonmarriage an equally unattractive alternative for purposes of alimony was successful.

[119] *Id.* at 1171.

[120] *Id.* at 1169.

[121] *Id.* at 1172 ("Respondent's argument essentially confuses two separate bases for terminating maintenance: termination due to substantial change in circumstances and termination due to *de facto* remarriage.").

[122] Honeycutt v. Honeycutt, 152 S.W.3d 556, 562 (Tenn. Ct. App. 2003). Alimony is terminated not only on the basis of a state's statutes but also on the basis of agreements entered into by the parties. *Id.*

[123] *Id.* at 563.

[124] *Id.* at 566.

preting the term, the court only required proof of sex. Because it found that the "[w]life began an exclusive romantic relationship" which involved "engaging in sexual relations," staying with her new partner when she visited him in Florida, and sharing his bed,[125] the court terminated the payments. Sex, or the suggestion of sex in *Honeycutt* provided evidence of the cohabitation itself—in concluding that the couple lived together, the court quoted from testimony that showed that the ex-wife "kept a large amount of clothes, including underwear" at her new boyfriend's house.[126]

In 2004, the Kentucky Court of Appeals in *Bennett v. Bennett*, engaged in a similarly facile conflation of sex and cohabitation for purposes of terminating alimony.[127] Kentucky's alimony statute requires proof of a change in financial circumstances in order to terminate alimony payments.[128] But, in interpreting the parties' private marital settlement agreement, the court defined cohabitation so as to not require support or living together—the ex-wife's "relationship . . . qualifies as cohabitation whether considered in light of sexual involvement *or* living in the same house."[129] Even if the parties were not living together, proof that they were having sex was sufficient to support a finding that they cohabited.[130] The court's willingness in *Bennett* to recognize the sexual relationship between the ex-wife and her new boyfriend had the effect of eclipsing the marital relationship that existed between husband and wife—the court ignored the fact that the ex-wife's boyfriend was *still married* and therefore maintained his own residence, bank accounts, and investments.[131]

Sex provides courts with such a perfect proxy for support that the *lack* of sex can trump evidence of the *presence* of support. In 2015, a Florida appellate court interpreted a marital settlement agreement in *Atkinson v. Atkinson*, to not terminate alimony payments because the ex-wife's new relationship was not sexual or romantic in nature.[132] The ex-wife was living with another man who paid rent and arguably affected the ex-wife's financial situation, but the record showed that the ex-wife and her new tenant "did not have an intimate relation-

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[125] *Id.* at 564–65.

[126] *Id.* at 565 (quotation marks omitted).

[127] Bennett v. Bennett, 133 S.W.3d 487, 489 (Ky. Ct. App. 2004).

[128] Combs v. Combs, 787 S.W.2d 260, 261–62 (Ky. 1990).

[129] *Bennett*, 133 S.W.3d at 490 (emphasis added).

[130] *Id.* This is the mirror image of those cases that rely on cohabitation to presume an illicit relationship. *See infra* notes 167–230 and accompanying text. In both instances, sex and cohabitation are interchangeable.

[131] *Bennett*, 133 S.W.3d at 489.

[132] Atkinson v. Atkinson, 157 So. 3d 473, 475 (Fla. Dist. Ct. App. 2015). Florida terminates alimony by statute where "a supportive relationship" exists "between the obligee and a person with whom the obligee resides." FLA. STAT. § 61.14(b) (2010). The supportive relationship generally requires proof that it "takes the financial place of a remarriage and necessarily decreases the need of the obligee." French v. French, 4 So. 3d 5, 6 (Fla. Dist. Ct. App. 2009).

ship"; "the time that they spent together was limited"; "[t]hey did not generally take meals together"; and "[t]hey did not hold themselves out as husband and wife."[133] The court therefore declined to find that she was cohabiting according to the terms of the agreement, and decided not to terminate her payments.

These termination of alimony cases focus on the ex-wife's relationship. As *Bennett* exemplifies, a man's relationship, even if marital, is routinely ignored by the law. This state of affairs is all but guaranteed by the general rule that alimony is only terminated by a relationship entered into by the recipient spouse and not the paying spouse.[134] The effect of these decisions is to allow a man to have relationships with multiple women, while a woman suffers material consequences for having relationships with more than one man. An ex-husband's new relationship does not end his responsibility towards his ex-spouse: he can support multiple women at a time, even to his detriment. The law, however, is clear in stating that a woman can only be supported by one man at a time, whether she is married or not. Because these decisions rely on sex instead of support, they can also be read as preventing a woman from having sexual relations with more than one man at a time.

The bargain the law seeks to prevent is made explicit in the 1978 case of *In re Marriage of Leib*, decided by the California Court of Appeal just two years after *Marvin*.[135] In *Leib*, the court grappled with how a nonmarital relationship affected the termination of alimony analysis. It turned to *Marvin* for guidance.[136] The court relied on *Marvin*'s recognition of agreements between nonmarital partners to conclude that alimony should be terminated. The court reasoned that June Leib, the ex-wife, was providing her new boyfriend "the identical services a nonworking wife is expected to and generally does furnish to a working husband."[137] These services, the court concluded, were not free after *Marvin*: "On any market, the services of a homemaker, housekeeper, cook and companion" have a quantifiable value.[138] June should therefore be making a bargain with her nonmarital partner, newly sanctioned by *Marvin*, for the value of her services.

The court in *Leib* told the woman in no uncertain terms that she should negotiate for support with her current nonmarital partner: the law would no longer allow her to claim spousal support from her old one.[139] The court was

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[133] *Atkinson*, 157 So. 3d at 479–80.

[134] *See, e.g.*, Racsko v. Racsko, 924 A.2d 878, 880 (Conn. App. Ct. 2007) (dismissing petition to change alimony based on the cohabitation of the ex-husband who was paying alimony to the ex-wife).

[135] *In re* Marriage of Leib, 145 Cal. Rptr. 763, 766 (Ct. App. 1978).

[136] *Id.* at 769.

[137] *Id.*

[138] *Id.* at 770.

[139] *Id.* at 771.

especially concerned with the notion of mismatched support—the ex-husband was paying a woman to be *someone else's* wife, and receiving nothing in return. The court thus placed the duty on the new partner to provide the woman with compensation—for her "wifely" services—whether married or not.[140]

Some courts frame this exchange in more disparaging terms—as one that a savvy ex-wife seeks to capitalize on. In 1982, in *In re Marriage of Sasson*, the California Court of Appeal declined to terminate payments on the basis of a nonmarital relationship.[141] The concurring judge agreed but was preoccupied with preventing the ex-wife from securing support from more than one man.[142] The concurrence viewed the ex-wife as a shrewd player of the system—by saying no to remarriage, she was "savoring the best of two worlds, and capturing the benefits of both."[143] As such, the concurrence articulated a concern bubbling just beneath the surface in these termination of alimony cases—that the ex-wife could both retain her alimony payments, "while setting the stage for a possible future 'palimony' suit against [her] present paramour."[144]

This vision of the conniving woman who preys on unassuming (yet wealthy) men is far from new.[145] What has gone unnoted, however, is how courts themselves provide the foundation for these scheming women to act—by eliminating proof of support and replacing it with proof of sex in deciding whether to terminate alimony, courts are assuming that sex in the new relationship leads, or ought to lead, to support. Yet the effect of the decisions is exactly the reverse: engaging in sex outside of marriage leads courts to terminate any actual support the woman was receiving.

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[140] *See* Perry, *supra* note 106, at 27 (noting that alimony law "reflects an assumption that women essentially trade sexual services for financial support in their relationships with men," leading to the retention of "some kind of a proprietary interest in his ex-wife's body").

[141] *In re* Marriage of Sasson, 180 Cal. Rptr. 815, 819 (Ct. App. 1982).

[142] *Id.* at 820–21 (Hanson, J., concurring).

[143] *Id.* at 821.

[144] *Id.* A Florida court articulated a similar concern: "The law of Florida creates no legal rights or duties between live-ins. Why, then, should a duty (support) created by a lawful marriage be terminated by such a relationship?" Lowry v. Lowry, 512 So. 2d 1142, 1144 (Fla. Dist. Ct. App. 1987). The worry was that its decision would provide a basis for palimony suits—"[t]he shoe which has not yet been dropped in Florida-palimony-may then have a reason to leap into being." *Id.*

[145] *See* Dubler, *supra* note 39, at 1002 ("In abolishing common law marriage, . . . New York embraced not only a new set of legal rules, but also a new vision of femininity. The law erred . . . in constructing women as the weak victims of men that the Victorians had supposed them to be. In fact, women, not men, comprised the deceitful and conniving sex. Women, powerful and crafty, preyed mercilessly on the weakness and vulnerability of unsuspecting men."). This particular rhetoric was popular in the lead up to the abolition of common law marriage.

2. Nonmarriage as Marriage

The concurrence's fears in *Sasson* are based on an exaggerated view of the success rate of palimony suits; if the ex-wife wants to secure her property rights in the new relationship, she should remarry. The collapsing of sex and support that takes place in the alimony context is unique among nonmarital relationships. It also happens to occur when courts deny the ex-wife payment, rather than provide her with affirmative property rights. This easy substitution of sex for support, and of nonmarriage for marriage, leads courts to worry that their reasoning in the termination of alimony context may impact nonmarital relationships across the board.

In 1999, the Iowa Court of Appeals in *In re Marriage of Ales* found that nonmarriage could be akin to remarriage for purposes of determining whether a nonmarital relationship should terminate spousal support. [146] It ultimately declined to terminate support in that case, reasoning that the basis for the award was to further rehabilitation and reimbursement for services that had already taken place. The concurrence was still worried about the majority's perceived conflation of marriage and nonmarriage.[147] He predicted that blurring the two statuses in the alimony context could lead to equating a couple who merely cohabits to a couple who is married, which was a problem given that "cohabitants are not afforded the same legal rights or responsibilities as married persons."[148]

This potential equivalence between the two statuses motivated the Ohio Court of Appeals in 2009, in *Fitz v. Fitz*, to ask whether allowing a nonmarital relationship to terminate alimony would violate the state's Defense of Marriage Act.[149] The Ohio constitution prohibited providing any sort of legal status to "relationships of unmarried individuals."[150] Accordingly, the trial court refused to find that a nonmarital relationship between an ex-wife and her new boyfriend terminated alimony because "the court would have to find cohabitation tantamount to marriage."[151] The appeals court overturned the decision, by limiting the import of cohabitation. It held that it was only the fact of cohabitation led to the termination or modification of alimony, rather than any association it had to marriage.[152]

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[146] *See, e.g.*, *In re* Marriage of Ales, 592 N.W.2d 698, 702–03 (Iowa Ct. App. 1999).

[147] *Id.* at 706 (Streit, J., specially concurring) ("There is no reason to blur the legal distinction between marriage and cohabitation as the majority does here.").

[148] *Id.* at 705.

[149] Fitz v. Fitz, No. 92535, 2009 WL 3155124, at *1 (Ohio Ct. App. Oct. 1, 2009).

[150] *Id.* (quotation marks omitted). It also declined to recognize same-sex unions. *Id.*

[151] *Id.*

[152] *Id.*

Courts' concerns with accidentally elevating cohabitation to the status of marriage has led some to prevent even long-term and stable nonmarital relationships from terminating alimony.[153] In *Sasson*, the ex-husband sought to end his alimony obligations based on a dissolution contract that terminated such payments upon "remarriage." His ex-wife had not married again, but she had moved in with a new partner, had a child with him, took his last name, and shared a joint bank account.[154] The court declined to view this relationship as one of remarriage under the terms of the contract, given the lack of a formal legal status. In doing so, it relied on the state legislature's "pains to avoid equating cohabitation of any degree with remarriage."[155]

Despite the concerns articulated by courts, they rarely impose *higher* standards on a nonmarital relationship based on how it is treated outside of the alimony context. Nevada, which allows cohabiting couples to access the state's divorce laws by analogy,[156] is an exception. It relies on the cases addressing nonmarital couples in general to inform its approach in deciding alimony in particular. In 1998, the Nevada Supreme Court in *Gilman v. Gilman* refused to allow the ex-wives' nonmarital relationships in the consolidated cases before it to terminate their alimony payments.[157] It reached this conclusion by relying on the decisions addressing property distribution at the end of a nonmarital relationship.[158] The court's comparison between the different contexts led it to conclude that the bar was set too low in deciding to end alimony. The court held that the mere presence of "cohabitation" plus "a romantic relationship" was insufficient to terminate payments.[159] In a move rarely made, the court required *more* of the nonmarital relationship to terminate alimony, given how it was treated elsewhere.[160]

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[153] *See In re Sasson*, 180 Cal. Rptr. at 819.

[154] *Id.* at 820.

[155] *Id.* at 819. It also noted the specific disabilities imposed by lack of marriage—by choosing not to marry, the ex-wife "has deprived herself of the beneficient protection which the state bestows upon a wife." *Id.*

[156] Gilman v. Gilman, 956 P.2d 761, 765–77 (Nev. 1998); *see supra* notes 83–104 and accompanying text (discussing where courts define nonmarital relationships by looking to whether the couple had previously been married).

[157] *Gilman*, 956 P.2d at 765–77.

[158] *Id.*

[159] *Id.* at 767 ("There is no evidence of pooling of assets or holding themselves out as husband and wife or treating their assets as community property or building a business together."). The Chief Justice was, however, concerned with the fear already vocalized of savoring the best of both worlds, "creat[ing] a form of financial polygamy, thus providing a powerful disincentive for lawful marriage." *Id.* at 770, n.4 (Springer, C.J., concurring in part, dissenting in part).

[160] When courts require more of a nonmarital relationship, it is generally to approximate the bar set by marriage (as in the palimony context, or where jurisdictions, including Nevada, apply divorce rules "by analogy"), and not to determine what nonmarriage itself should look like. *See supra* notes 41–82 and accompanying text.

Courts are clearly attuned to the overlap among the different types of nonmarital couplings and are able to identify the differing definitions they impose depending on the claims at issue. Courts' willingness to find that a nonmarital relationship is marital-like in deciding whether to terminate alimony takes place where their decisions terminate actual payments of support (in the form of alimony) to the ex-wife. All of the cases thus have, at a very basic level, the same effect—they function to deny or diminish the woman's claim to property, as the non-wife, or the ex-wife. The decision to not marry in the strictly nonmarital context, or to not remarry in the alimony context, leads courts more often than not to deny the woman any rights to property.

II. NONMARRIAGE IS NOT MARRIAGE

This Part turns to those cases that do not require the relationship to look like a marriage in assessing property claims outside of marriage. Although marriage no longer provides the substance that courts rely on in analyzing nonmarital relationships, or the doctrines that courts apply, marriage continues to be central to the project of defining nonmarriage—by opposition instead of analogy.

This Part focuses on those cases that distinguish marriage from nonmarriage. Similar to those that liken nonmarriage to marriage, they span situations where the couple has never married and where the couple was married at some point. In a complete departure from the cases discussed in Part I, however, courts here tend to value only services that look nothing like those rendered in the course of a marriage. Accordingly, being in a marital-like relationship leads courts to deny property distribution to the party seeking it, which continues to be the woman. Despite their differences, both sets of cases ultimately have a similar effect—they demarcate marriage as the sole site where spousal-like services lead to support, in the process actively defining what those spousal-like services should be.

The standard concern voiced by courts that deny spousal-like services remuneration outside of marriage is the age-old anxiety over what essentially amounts to prostitution—an exchange of sex for property.[161] This exchange becomes problematic, however, only outside the terrain of marriage. This Part catalogues the reasoning the cases employ in addressing a nonmarital relationship without relying exclusively on marriage. Cases either construct the nonmarital relationship as a place of altruism, where sex and services are provided for free or at a discount, or they allow an exchange as long as courts can separate the relationship from anything approaching marriage. This Part concludes

[161] *See* Hasday, *supra* note 19, at 507–08 (noting how courts decline to validate contracts between nonmarital couples where sex is the consideration).

by identifying the small number of cases that are able to quantify an exchange between individuals in a sexual relationship outside of marriage, and the even fewer number that provide an egalitarian distribution of assets at the conclusion of the relationship.

A. Language of Love: Economic Exchange Not Recognized

The dynamic between love and economic exchange is one that Reva Siegel has explored in great historical detail in the context of marriage.[162] In considering how courts interpreted the marital property acts passed at the turn of the twentieth century, she found that they imposed a "regime of judicially enforced 'altruism,'" in the sphere of family relations, in stark opposition to the marketplace where "self-interest and the hope of material gain" were the norm.[163] A similar dynamic continues to take shape today. Yet courts have moved the "language of love"[164] to the spaces outside of marriage; and, it is sometimes so strong that it encroaches onto the "separate sphere" of the marketplace, rendering any work done outside of the home invisible by virtue of its association with a nonmarital relationship.

Beginning from the baseline that nonmarriage is not marriage, the cases addressing claims brought by individuals at the conclusion of their relationship vary in their approach. Courts generally undertake one of two corollary modes of reasoning: they either treat the individuals in a nonmarital relationship purely as lovers—as such their relation is defined by affection and altruism—or they value the exchange if they ignore the sexual and affective nature of the relationship altogether. Some courts—very few—go beyond the presence or absence of love, and consider the exchanges that took place without ignoring the sexual aspect of the relationship. They do so by addressing the accumulation of property by one individual, or the intent of the parties in the relationship.[165]

Overall, this section shows that in most cases, the plaintiff fares better in a nonmarital relationship where both individuals contribute financially than in a relationship where the individuals follow a breadwinner-homemaker model.

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[162] *See* Siegel, *supra* note 32, at 2127–28 (exploring how the abolition of coverture did not signal the end of a gendered body of status law).

[163] *Id.* at 2131. The result was that "title to family assets would remain with the husband" and women "found themselves economically disempowered in marriage and impoverished at divorce." *Id.*

[164] *Id.* at 2211.

[165] Although some of these considerations sound more in contract, and others in equity, they do not precisely map onto these doctrinal divisions and actually cut across different claims. For a discussion of the standard doctrine-based modes that courts undertake in addressing claims made by cohabiting couples, see Gregg Strauss, *Why the State Cannot "Abolish Marriage": A Partial Defense of Legal Marriage*, 90 IND. L.J. 1261, 1276–83 (2015) (categorizing courts' approaches in addressing property division at the end of a cohabiting relationship).

Although this conclusion may come as no surprise when understood in the context of arguments that the law considers homemaking services, typically performed by women, to be gratuitous, it nevertheless challenges the notion that nonmarital relationships must mimic traditional marriage in all circumstances in order to gain recognition for purposes of property distribution.[166] Instead, the contrary is generally true in these cases—those relationships that the court describes as most like a traditional marriage are the most penalized for not being marital, insofar as the court declines to distribute any property when they end. The only consistent exception to this claim is where the court considers the parties' intent—in these cases, the court is more willing to recognize a quantifiable exchange, regardless of the particular form the relationship may take.

1. Lovers Are Not Spouses

In evaluating whether to distribute tangible property at the conclusion of a nonmarital relationship, cases employ twin lines of reasoning. The first characterizes the nonmarital relationship as one based on love and emotion, to the exclusion of any economic relations. A separate, but related strand, ignores the romantic element of the relationship entirely—the court places the couple in the category of just friends, or of more distant acquaintances, refusing to acknowledge any sexual or romantic element whatsoever. Each approach leads to a different property distribution: acknowledging sex outside of marriage turns the relationship into a lovers' quarrel without any expectation of economic exchange; only its absence allows the court to value the bargain that took place during the course of the relationship. Thus, where the court discusses terms of endearment, the plaintiff generally does not recover any property; where the court discusses terms of an exchange, the plaintiff generally does.[167]

Both lines of reasoning work in tandem to support the same result: an exchange of money where sex is involved can only take place squarely within marriage.[168] The cases that emphasize love in a relationship outside of marriage devalue contributions made to the relationship that are not explicitly fi-

[166] *See supra* notes 39–160 and accompanying text; *see also* Dubler, *supra* note 39, at 1019–21 (identifying the complicated relationship between "acting married" and being married and noting that, at times, a "performance-based standard rewards couples who structure their relationships around historically contingent understandings of what it means to act married" and "penalizes nontraditional couples by upholding the idea that there is a single, normative model of legally cognizable relations"). The reasoning in these cases is the mirror image of those that require the nonmarital relationship to model marriage as a prerequisite to distributing property.

[167] *Cf.* Siegel, *supra* note 32, at 2205 (noting that in the marital context "the discourse of marital status has evolved so that family relations originally expressed in the language of property can now be expressed in the language of affect").

[168] This tends to hold true whether the basis for the claim is contract or equity.

nancial. The plaintiffs who succeed then are those who make monetary contributions to the relationship, rather than contributions in terms of time, or services. The effect is to disfavor the partner who stays at home—generally the woman—and favor the partner who engages in paid work—generally the man.

In 2009, the New York Supreme Court in *Tompkins v. Jackson*, began its decision denying recovery to the plaintiff in a nonmarital relationship, by describing the facts before it as an "unfortunate tale of a love relationship gone sour."[169] The court dismissed the case on a motion for summary judgment, definitively declaring an end to "this saga."[170] The plaintiff, Shaniqua Tompkins, pled a variety of theories of recovery including breach of contract, quantum meruit, and unjust enrichment.[171] Shaniqua and her partner, Curtis Jackson (commonly known by his stage name 50 Cent), had one son together and a relationship that spanned over twelve years.[172] At the basis of most of Shaniqua's claims was the refrain that she and Curtis had an agreed-upon exchange whereby she offered homemaking and domestic services while he devoted his time to becoming a recording artist, which would eventually lead to earnings from his success that they would share.[173]

The court, however, considered the "homemaking and cleaning services" Shaniqua performed to be "of a nature which would ordinarily be exchanged without expectation of pay."[174] Declining to recognize any property rights flowing from the relationship, the court noted that "[p]roviding loving care and assistance to her boyfriend and the father of their son . . . does not transform her relationship to [] one founded upon contract."[175] In deciding whether there was any breach of contract, the court excerpted Shaniqua's testimony in which she explained that she loved Curtis: "I was going to be with him whether he was 50 Cent, with a hundred million dollars, or Curtis Jackson, working for sanitation."[176] The court found that such statements that "demonstrate loving devotion and loyalty" are precisely the ones that "undermine" both Shaniqua's breach of contract and quantum meruit claims.[177] In fact, deciding to recognize

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[169] Tompkins v. Jackson, No. 104745/2008, 2009 WL 513858, at *1 (N.Y. App. Div. Feb. 3, 2009).

[170] *Id.*

[171] The breach of contract claim was based on an alleged oral agreement to "take care of plaintiff for the rest of her life in exchange for her promise to perform household services and take care of the parties' children." *Id.* at *13–14.

[172] *Id.* at *1–4.

[173] *Id.* at *12.

[174] *Id.* at *14.

[175] *Id.* at *13.

[176] *Id.* at *12 (internal quotation marks omitted).

[177] *Id.*

payment for such care would, according to the court, "transform the parties' personal, yet informal relationship to that of a marriage."[178]

New York law generally presumes that marriage is the only place where an exchange between sex and domestic services can occur, outside of an express contract. New York allows for unmarried couples "to contract with each other in relation to personal services, including domestic or 'housewifely' services,"[179] as long as the contract is express, rather than implied.[180] The requirement depends on a specific understanding of the nature of a nonmarital relationship: namely, that "the relationship of the parties makes it natural that the services were rendered gratuitously."[181]

The nature of the nonmarital relationship is also what counsels courts against implying a contract between the unmarried individuals. The New York Court of Appeals in 1980 in *Morone v. Morone*, explained that it was the emotional character of these relationships that rendered it difficult to assess when services were provided gratuitously or required compensation.[182] In fact, feelings run so strong that the court presumed they would impact the quality of the testimony given—without the benefit of an express contract, the *Morone* court opined that there was a "substantially greater risk of emotion-laden afterthought, not to mention fraud."[183]

Having a written agreement, however, is not always a shield to love's tempestuous sword. In 2012, the Ohio Supreme Court in *Williams v. Ormsby*, relied on affection and love in denying the claimant recovery and criticized the dissent for doing the opposite: for having a "cynical view of the relationship between the parties" which was more appropriate for "a business transaction."[184] At the crux of the case was a written agreement between the couple—it stated that Amber Williams would move back into the home she shared with Fredrick Ormsby if he transferred back to her an undivided half interest in the property (which had previously been hers).[185] The question the court set out to answer was "whether the emotional aspect of resuming a relationship by moving in together can serve as consideration for a contract."[186] The court found

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[178] *Id.* at *13.

[179] Morone v. Morone, 413 N.E.2d 1154, 1156 (N.Y. 1980).

[180] *Id.* at 1155 (distinguishing itself from the California law set forth in *Marvin*, which recognizes implied contracts).

[181] *Id.* at 1157.

[182] *Id.*

[183] *Id.*

[184] Williams v. Ormsby, 966 N.E.2d 255, 258 (Ohio 2012) (*Williams II*).

[185] *Id.*

[186] *Id.* This was distinct both from the question framed by the dissent, and from the holding of the appellate court, which found that Amber had established "consideration in that she shared her assets . . . and resumed living together as a couple." Williams v. Ormsby, 944 N.E.2d 699, 704 (Ohio Ct. App. 2010) (*Williams I*), *rev'd*, 966 N.E.2d 255 (Ohio 2012).

that it could not, thus overturning the appellate court's decision to the contrary, and concluded that nothing else of value was exchanged.[187]

Justice Pfeifer, writing in dissent, criticized the majority for its misguided focus, "chas[ing] a red herring ('love and affection') all the way upstream until it reached a dry creek bed."[188] He turned to the express agreement at the center of the case and concluded that there was valid consideration, provided by the repudiation of the initial agreement the parties had entered into.[189] Justice Pfeifer explained that Fredrick wrote the second agreement, by which he gained certain benefits not present in the prior contract. Trading the language of spurned lovers for one of contract, the dissent carved out a space where the individuals in a nonmarital relationship could engage in negotiations.[190]

Nonetheless, courts uniformly agree that sex cannot be the basis for any type of enforceable agreement between nonmarital couples.[191] Indeed, Shaniqua was careful to note that she did not expect any remuneration for sex—"'when you love a person . . . it's not about the monetary. If you're a prostitute, then it's a monetary thing. We were two people in love with each other.'"[192] The court concurred and relied on love to deny her remuneration for any services at all.

Courts routinely expand the prohibition on remunerating sex to include remunerating any services that take place in a relationship outside of marriage. The specific services courts decline to recognize however, are only those that are expected to take place in a marriage. Even outside of a contractual claim, only "[m]oney, labor, and material—separate and distinct from spouse-like services—are valid consideration."[193] In 1989, in *Evans v. Wall*, the defendant, Douglas Evans, ejected the plaintiff, Kathie Wall, from the premises they had

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[187] *Williams II*, 966 N.E.2d at 264 (internal quotation marks omitted).

[188] *Id.* at 266 (Pfeifer, J., concurring in part and dissenting in part).

[189] *Id.*

[190] The dissent does not completely ignore the relationship's romantic characteristics—it simply does not end its analysis based on that fact. An in-depth discussion of the case for a survey of Ohio law characterized the majority's decision as "blatant about its concern for nearing the slippery slope of palimony." Hannah de'Von Armentrout, Williams v. Ormsby, 39 OHIO N.U. L. REV. 957, 971 (2013). The survey further argued that the dissent got the better of the argument, as it "relied heavily upon the express provisions" of the contract, "did not delve into the complications of 'love and affection,' and steered clear of the slippery palimony slope the majority feared." *Id.* at 971–72.

[191] *E.g.*, Marvin v. Marvin, 557 P. 2d 106, 112 (Cal. 1976) ("a contract between nonmarital partners is unenforceable only [t]o the extent that it [e]xplicitly rests upon the immoral and illicit consideration of meretricious sexual services"); Hasday, *supra* note 19, at 507–08 ("In reviewing any contract between unmarried sexual partners, a court will first sever any aspect of the contract based on the exchange of sexual services for economic compensation.").

[192] *Tompkins*, 2009 WL 513858, at *12.

[193] *See* Evans v. Wall, 542 So. 2d 1055, 1057 (Fla. Dist. Ct. App. 1989) (upholding a constructive trust imposed in favor of female plaintiff at the end of a nonmarital relationship).

occupied together for five years.[194] Both Kathie and Douglas were employed. The Florida District Court of Appeals noted that Kathie had used her income to pay for food, household furnishings, and the like.[195] She also worked on the land that Douglas had paid for, helping to upkeep the mango grove and assisting with the construction of a new concrete dwelling and barn.[196] In addition, she was responsible for the cooking, cleaning, and washing.[197] In the five years they lived together, the land appreciated in the amount of $75,000.[198] The court acknowledged Kathie's right to remuneration on the basis of a constructive trust for her efforts. In doing so, the court assessed her contribution only in terms of labor, money, and materials.[199] Kathie was ultimately awarded $8,000—about 11% of the land's increase in value.[200]

The dissent in *Evans* characterized its disagreement with the majority as being over the value of love. It concluded that awarding Kathie even 11%of the value of the property appreciation was too generous, and declined to quantify Kathie's efforts given that the relationship was "one of mutual convenience [that] was grounded upon a love relationship, which, unfortunately, turned sour."[201] Further dissenting from the denial of en banc review, Judge Jorgenson used similar love-sick language—establishing a new cause of action was "inappropriate" where the basis was "the fallout of unmarried, cohabiting lovers."[202] Ultimately, however, portraying the separation as a "lovers' quarrel" was insufficient to invalidate the financial exchange that took place, based on the majority's understanding that it existed entirely outside the realm of spousal-like relations.[203]

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[194] *Id.*

[195] *Id.*

[196] *Id.*

[197] *Id.*

[198] *Id.*

[199] *Id.* ("This case is about reimbursing a woman-ejected from her former lover's home-the reasonable value of capital, materials, and labor invested over a five-year period, in his residential/commercial property. It is not at all about palimony . . . as the dissent suggests.").

[200] *Id.*; *see also* Porter v. Zuromski, 6 A.3d 372, 376 (Md. Ct. Spec. App. 2010) (imposing a constructive trust to prevent the unjust enrichment of defendant for the value of rent and property-related expenses); McKechnie v. Berg, 667 N.W.2d 628, 630 (N.D. 2003) (considering only the parties' financial expenditures, such as their use of a joint bank account and their pooled earnings, and that they both contributed roughly equal amounts in acquiring assets).

[201] *Evans*, 542 So. 2d at 1058 (Jorgenson, J., dissenting).

[202] *Id.*

[203] *Id.* at 1057 (majority opinion); *see also* Stevens v. Muse, 562 So. 2d 852, 852 (Fla. Dist. Ct. App. 1990) (overturning trial court's decision that any agreement between an unmarried couple was unenforceable because it would violate public policy and holding that cosigning a note, pledging a certificate of deposit, and promising to repay a loan could be valid given that it was made separate and apart from any sexual relations).

Jurisdictions that refuse to award any property rights in the context of a nonmarital relationship are even more explicit in upholding the separation between lovers and spouses. Peering beneath their wholesale rejection reveals that courts in these jurisdictions still distribute property among individuals who are in a relationship without the stamp of marriage, as long as they can keep marriage entirely distinct. The Louisiana Court of Appeal's 1983 decision in *Schwegmann v. Schwegmann* epitomizes these concerns.[204] The court held that "unmarried cohabitation does not give rise to property rights analogous to or similar to those of married couples."[205] The specific distinction Louisiana set up was between a "concubine" and a "wife": a concubine is "a woman who occupies the position, performs the duties, and assumes the responsibilities of a wife, without the title and privileges flowing from a legal marriage."[206] That is, the central difference between a concubine and a wife lies in the latter's legal title.[207]

The court in *Schwegmann* declined to recognize property rights based on either contractual or equitable theories stemming from a twelve-year nonmarital relationship between John G. Schwegmann, Jr., "a twice divorced, middle age male who owned a chain of supermarkets and other assets" and Mary Ann Blackledge, "a 24 year old unmarried female who had no property or other financial assets."[208] The court's reasoning revolved entirely around the fact that the individuals "were never married and neither of them ever believed they were married to each other."[209] Accordingly, the domestic services Mary Ann had performed, including cooking, caring for John's daughter, chauffeuring, cleaning, and nursing John after a stroke, were not entitled to compensation.[210] These were, according to the court, "inextricably interwoven with the sexual relationship."[211]

The sole issue that survived the court's dismissal in *Schwegmann* was whether Mary Ann had performed "real and substantial business services . . . that ha[d] not been previously compensated and which were separate and dis-

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[204] *See* Schwegmann v. Schwegmann, 441 So. 2d 316, 319 (La. Ct. App. 1983).

[205] *Id.* at 324.

[206] *Id.* at 323 (internal quotation marks omitted) (quoting Purvis v. Purvis, 162 So. 239, 240 (La. Ct. App. 1935)).

[207] The definition of a "paramour" is dependent on the status of the woman—a paramour is defined as a man who lives with a concubine. *Id.*

[208] *Id.* at 320.

[209] *Id.* at 323; *see also id.* at 322 (finding a universal partnership created such that a writing was required and that "[i]n the absence of the marriage, some relationship, other than a sexual one, must exist between the parties for the civil benefits to flow to the person acting as the pseudo wife").

[210] *Id.* at 324.

[211] *Id.*

tinct from the concubinage relationship."[212] Sex is only a problem for the court with relation to services that take place in a context similar to the give-and-take of *marriage*. The parties in *Schwegmann* were "living together as man and wife"—he provided her "with full subsistence and a home" in exchange for her duties as a "mistress."[213] Because she was not in fact a wife, however, the court refused to consider property distribution for services that a wife would or should render. But even courts in jurisdictions like Louisiana are open to entertaining requests for property where the claims are based on services that courts consider not to be a part of the marital relationship.

Georgia also declines to recognize property rights in the context of an unmarried couple, based on the standard concern that it would otherwise be condoning illicit sexual relations.[214] Courts, however, deny property rights without considering whether the illicit relation actually played a role in the property exchange. In 1977, in *Rehak v. Mathis*, the Georgia Supreme Court refused to consider Hazel Rehak's claims that she should receive property after her partner, Archie Mathis, told her to vacate the home in which they lived.[215] Hazel and Archie had shared installment payments on the home throughout most of their eighteen-year relationship; Hazel further alleged that she had cooked, cleaned, and cared for Archie during the time they lived together.[216] The court's opinion was brief. It relied on the "well settled" principle "that neither a court of law nor a court of equity will lend its aid to either party to a contract founded upon an illegal or immoral consideration."[217] The court, however, defined "immoral consideration" as "[t]he parties being unmarried and . . . having admitted the fact of cohabitation."[218] The "illicit sexual relations" were nowhere to be found.[219]

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[212] *Id.* at 325. In this way it was, at least in theory, more solicitous of a potential property distribution than those courts that relied on the language of love in negating any possibility of recovery, even for services rendered to a business.

[213] *Id.* (internal quotation marks omitted) (discussing the reasoning of *Guerin v. Bonaventure*, 212 So. 2d 459 (La. Ct. App. 1968), as applicable to the case before it).

[214] *See* Wellmaker v. Roberts, 101 S.E.2d 712, 713 (Ga. 1958) (declining to provide a remedy for a claim based on "a contract founded upon an illegal or immoral consideration" such as the "illicit sexual relations" between the parties).

[215] Rehak v. Mathis, 238 S.E.2d 81, 82 (Ga. 1977).

[216] *Id.* at 81 (noting that appellant alleged that appellee neither paid her for her purchase interest in the house or the value of the services she rendered).

[217] *Id.* at 82. The dissenting opinion notes that there was no evidence in the record regarding the exact terms of the contract. *Id.* at 83 (Hill, J., dissenting) ("In the case before us, the movant has not carried the burden on a [motion] for summary judgment of showing that sex was any part of the consideration of this alleged contract. This court has simply presumed that sex was agreed to.").

[218] *Id.* at 82 (majority opinion).

[219] As the dissent pointed out, Archie had not shown that "sex was any part of the consideration of this alleged contract." *Id.* at 83 (Hill, J., dissenting).

Instead, the court based its denial of property on the fact that the couple was unmarried and living together. Like in the palimony context, where cohabitation was important as a means of allowing the court to value the domestic, rather than the sexual, services that flowed from it,[220] cohabitation here is problematic because of those same reasons. That is, cohabitation functions not necessarily as a proxy for sex but rather as a proxy for *marriage*. It results in a denial of property for the very reason it ensures that the woman seeking palimony will receive support—because courts assume that cohabitation leads to cooking, cleaning, and caring, services that approach those that are, or should be, provided in a marriage. Sex, or illicit consideration, becomes a problem only in a relationship that looks too much like a marriage.

Georgia can therefore distribute property when it ignores the relationship's sexual, affective, or marital-like component altogether. In 2000, in *Burt v. Skrzyniarz*, the Georgia Supreme Court awarded property at the conclusion of a nonmarital relationship.[221] It did so without any discussion of the nature of the relationship, relying solely on the doctrine of tenancy in common. The couple, Paul Burt and Nancy Skrzyniarz, took possession of a home seven years into their nonmarital relationship.[222] When they split, Nancy claimed a half interest in the property; Paul, on the other hand, argued that he owned a ninety-nine percent interest.[223] The court, relying on testimony of the former couple's real estate agent and a few witnesses, held that the evidence was insufficient to rebut the presumption of a tenancy in common by which each owned fifty percent of the property at issue.[224]

The claim in *Burt* involved a property-based doctrine as opposed to a contractual or equitable doctrine, which may explain the court's different approach. Nevertheless, the court's reliance on tenancy in common proves the point that where it avoids any discussion of the parties' sexual or romantic relationship—which both parties explicitly raised in their briefs[225]—it can distribute property in a nonmarital relationship. By restricting its analysis to tenancy in common, the court avoided a discussion of immoral consideration, or

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[220] *See supra* notes 41–68 and accompanying text (addressing situations where courts used cohabitation as a marker for property distribution).

[221] Burt v. Skrzyniarz, 526 S.E.2d 848, 850–51 (Ga. 2000).

[222] *Id.* at 849.

[223] *Id.*

[224] *Id.* at 850.

[225] The briefs submitted to the court clearly set out the sexual nature of their relationship: "The undisputed evidence at trial established that Mr. Burt and Ms. Skrzyniarz were involved in a sexual relationship for approximately seven years. . . . During their entire relationship, Ms. Skrzyniarz was married to a man other than Mr. Burt." Brief of Appellant, at 2, *Burt*, 526 S.E.2d 848 (No. S99A1824), 1999 WL 33737977, at *2. Nancy's brief specified: "Even though both were married at the time, they were estranged from their spouses." Brief of Appellee, at 2, *Burt*, 526 S.E.2d 848 (No. S99A1824), 1999 WL 33737980, at *2.

of Paul and Nancy's cohabitation, in deciding whether and how to divide the property. It was also silent as to who had original title over the property. The court thereby distributed property in a context it had explicitly declined to do so.[226]

Applying a doctrine that addresses only the property at issue, or focuses on the purely financial contributions to the nonmarital relationship, raises few problems for courts given that they can neatly cordon off the sexual relationship from the award of property. Raising a child or cleaning a house, however, are also activities that exist separate from sex and are similarly quantifiable.[227] Yet valuing homemaking services causes courts to worry about inadvertently sanctioning prostitution. The court in *Schwegmann* affirmed the link between the two, explaining "the domestic services of child care, nursing, cooking, etc., were inextricably interwoven with sexual services in a concubinage relationship."[228] The court's reasoning was based on the critical fact that the exchange in that case was for Mary Ann "to be a wife."[229] This is precisely how sex and domestic services are "interwoven": both are duties a wife owes to her husband. Accordingly, these cases dictate that a woman can receive compensation for such services only if they take place within a marriage, not outside of it.

These cases demarcate marriage as the site where this exchange is sanctioned by law. In the process, they unmistakably identify the duties of the wife:

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[226] Georgia is understood as a jurisdiction that denies cohabitants any type of remedy. *See* Strauss, *supra* note 165, at 1276 (describing Georgia as a jurisdiction that denies cohabitants legal remedies, including "written relationship contracts"). Illinois, another jurisdiction that has declined to recognize property rights between unmarried couples since 1979 in *Hewitt v. Hewitt*, follows similar reasoning. 394 N.E.2d 1204, 1211 (Ill. 1979). In 1983, the Illinois Court of Appeals, in *Spafford v. Coats*, reasoned:

> The plaintiff's claims in *Hewitt* for one-half of defendant's property were based primarily upon her services as housekeeper and homemaker and obviously fell afoul of the court's concerns. However, where the claims do not arise from the relationship between the parties and *are not rights closely resembling those arising from conventional marriages*, we conclude that the public policy expressed in *Hewitt* does not bar judicial recognition of such claims.

455 N.E.2d 241, 245 (Ill. App. Ct. 1983) (emphasis added) (imposing a constructive trust over vehicles that were jointly accumulated during a nonmarital relationship but held only in defendant's name).

[227] *See What to Look for in a Nanny*, WHAT TO EXPECT, http://www.whattoexpect.com/first-year/childcare-options/what-to-look-for-in-a-nanny.aspx [https://perma.cc/9A5B-NFQX] (last visited Nov. 23, 2016) (identifying qualities to look for in a "good" nanny and not listing willingness to have sex as one of those qualities); *House Cleaner Job Description*, AMERICA'S JOB EXCHANGE, http://www.americasjobexchange.com/house-cleaner-job-description [https://perma.cc/W758-EDHQ] (last visited Nov. 23, 2016) (not listing sexual services as part of job description). A potential employer generally hires a nanny, or a house cleaner, for pay and without the expectation that they will also have sex with the employer.

[228] *Schwegmann*, 441 So. 2d at 324.

[229] *Id.* (internal quotation marks omitted).

she must provide sex, along with homemaking services. The jurisdictions that approach the nonmarital relationship through the lens of marriage identify these very same wifely duties[230]—the difference is that they allow for, rather than prevent, a distribution of property.[231]

2. Lovers Are Not Business Partners

Courts' reluctance to compensate domestic services in the context of a nonmarital relationship can be so strong as to extend beyond the boundaries of the relationship itself, and into the realm of employed work. Contributions made outside of the home in a literal sense are sometimes absorbed into its loving, affective and, ultimately gratuitous, pull.

In 1997, in *Featherston v. Steinhoff*,[232] the Michigan Court of Appeals declined to provide the plaintiff with any recovery for a breach of contract claim. Karen Featherston and Lee Steinhoff had lived together for eight years and had one son.[233] In Michigan, "services rendered during a meretricious relationship are presumably gratuitous."[234] The court thus held that Karen's "performance of household services" did not overcome the presumption that they were freely given.[235] During the course of their relationship, however, Karen had assumed more than household services—she also took a job working with Lee. As such, the lower court found that there had been a contract implied in fact: it reasoned that when Karen met Lee, she provided consideration by quitting school and her job, thus foregoing those opportunities to provide not only housework and childcare services, but also to assist with Lee's business.[236] On appeal, the court rejected these findings. Not only did the presumptively gratuitous housework remain gratuitous, but even those services she provided to Lee's business—without pay—did not merit remuneration.[237]

Courts sometimes acknowledge the contributions made to a business in the context of a nonmarital relationship; but their value is assessed—specifically, decreased—given that they take place outside of marriage. In 2007, in *Gazvoda v. Wright*, the Indiana Court of Appeals addressed a sixteen-year relation-

[230] They further assert what is excluded from these wifely duties, as for instance, mere companionship. *See* Bergen v. Wood, 18 Cal. Rptr. 2d 75, 77–78 (Ct. App. 1993) (stating housekeeping services are marital services but companionship services are not); *supra* notes 52–58 and accompanying text.

[231] There is an exception found in the termination of alimony cases, which deny the ex-wife property but still identify similar duties. *See supra* notes 116–173 and accompanying text.

[232] Featherston v. Steinhoff, 575 N.W.2d 6, 10 (Mich. Ct. App. 1997).

[233] *Id.* at 8.

[234] *Id.* at 9.

[235] *Id.* at 10. The irony of this determination is that when they began the relationship, Karen was self-employed as a house-cleaner. *Id.* at 9.

[236] *Id.* at 10.

[237] *Id.*

ship during which the couple started a business together.[238] Bruce Gazvoda met Sabrina Wright when she was still in high school. She dropped out of school shortly after Bruce asked her to help him learn about the electric business with the hopes of setting up a company of their own. As the court noted: "Bruce and Sabrina worked together every day, sometimes for up to twelve hours."[239] Over the course of four years, they built their business. Sabrina "wired boxes and stuffed plugs"; "trained electrical helpers, handled the company's billing and payroll, and oversaw job sites when Bruce was not available to do so."[240] She was also responsible for maintaining their home, including cooking and cleaning.[241] The court noted that the relationship went "beyond the traditional family arrangement of one person maintaining a household . . . in exchange for the other person providing home and living expenses."[242] During this time, Sabrina did not receive compensation.

Over the course of their relationship, marriage was discussed. Bruce, however, "told Sabrina that the businesses and assets belonged to both of them and that marriage was just a piece of paper."[243] It turned out to be a valuable piece of paper for Sabrina. The court found that Sabrina worked both in the business and the home. In fact, "[t]he parties' joint efforts, their lifestyle, and Bruce's representations that the assets and businesses were 'ours' created an expectation that both parties had access to the assets while they remained together."[244] The court concluded, however, that Bruce "contributed more to the businesses" than Sabrina had.[245] Significantly, it reasoned that "[t]he presumption of an equal division of assets that would apply in a dissolution of marriage does not apply here."[246] Accordingly, the court affirmed the award to Sabrina on the basis of unjust enrichment, which it calculated to be less than a quarter of the assets acquired during their relationship.[247]

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[238] Gazvoda v. Wright, No. 07A01-0607-CV-288, 2007 WL 2284722, at *1 (Ind. Ct. App. Aug. 10, 2007).

[239] *Id.*

[240] *Id.*

[241] *Id.*

[242] *Id.* at *2.

[243] *Id.* at *1.

[244] *Id.* at *2.

[245] *Id.*

[246] *Id.*

[247] The court awarded Sabrina $250,000 on a theory of unjust enrichment. The value of the assets acquired during the course of the relationship was estimated at over one million dollars. *Id.* at *3 (noting that cohabitants who have not married could also bring claims based on express or implied contract). The question of what amount would constitute an appropriate, or a fair, award remains. This Article does not address that question directly—instead, it focuses on identifying the reasoning employed in reaching the decision of whether to distribute property in the first instance, linking that reasoning with differing amounts, and critiquing the effects of such reasoning.

The plaintiffs in *Featherston* and *Gazvoda*—both women—worked at home and at the businesses they helped run. Yet, in both cases, the court either did not value, or decreased the value of, the contributions made in the home and to the business. In the process, these courts identify marriage as the only site where business services can presumably be equitably remunerated: it pays to be a wife not only at home, but also at work.

B. Beyond Love or Money: Economic Exchange Recognized

There are indeed cases where courts assess the exchanges present within a relationship head-on without relying exclusively on appeals to love or money. *Gazvoda* provides an example of a case where the court entertained the possibility of an economic exchange within a nonmarital relationship. It did so without ignoring the "spousal-like" quality of the services or the sexual nature of the relationship. Courts in these circumstances quantify homemaking services even where the relationship was not marital.[248]

Most of the cases that provide compensation to the plaintiff, like *Gazvoda*, are based on claims of unjust enrichment; this equitable doctrine requires courts to conclude that "one party has received money or benefit at [the] expense of another, and that it is against equity and good conscience to permit the other party to retain what is sought to be recovered."[249] For some courts, however, the intent of the individuals in the relationship is paramount in ensuring equity.

The two different approaches—unjust enrichment and intent—result in different property distributions. Courts that rely on a straightforward application of the unjust enrichment doctrine award the plaintiff some property but generally much less than half of the assets accumulated during the relationship. Courts that consider the intent of the parties provide the plaintiff with half of the property at issue, including cases where the parties' relationship followed a traditional, breadwinner-homemaker structure.

1. Unjust Enrichment: Less Than Half

The court in *Gazvoda* quantified Sabrina's efforts under the doctrine of unjust enrichment, but denied her an equal division of assets at the conclusion of the relationship.[250] Courts that apply the doctrine of unjust enrichment do not always rely on the language of love to negate an economic exchange; but

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[248] This valuation takes place at the moment of separation. Courts often explain that whatever value those services may have had, they were compensated during the course of the relationship itself.

[249] 42 C.J.S. *Implied Contract* § 9 (2016).

[250] *Gazvoda*, 2007 WL 2284722, at *1; *see also supra* notes 193–202 and accompanying text (noting that courts refuse to recognize anything but money, labor, and material as valid consideration).

they generally decline to award the complainant anywhere near half of the property at issue.

In 2003, in *Turner v. Freed*, the Indiana Court of Appeals applied the doctrine of unjust enrichment in acknowledging that homemaking services had economic value—only, they did not have half of the value of the property acquired over the course of the ten-year nonmarital relationship.[251] The court acknowledged that during her relationship with Danny Turner, Angela Freed "took care of their child . . . regularly maintained the home and contributed financially by performing one of [defendant]'s daily newspaper delivery routes."[252] The court concluded that Danny would be "unjustly enriched if [Angela] were awarded no part of the value of the assets [Danny] acquired in his name alone during their cohabitation."[253] This meant that she was entitled to $18,000, when the total value of the assets accumulated during the relationship was calculated at $108,000.[254]

In the more protracted 1987 litigation of *Watts v. Watts*, the Wisconsin Supreme Court came to a similar conclusion—homemaking services are worth something, just not half of the value of the property acquired during the course of the relationship.[255] Sue Ann Evans Watts and James Watts lived together for twelve years and had two children together.[256] The court adopted Sue Ann's version of events in deciding the motion to dismiss, which explained that she was in essence "living . . . in a 'marriage-like relationship.'"[257] During this time, Sue Ann contributed both to the home and to James's business. In addition to furnishing her own personal property, she did the "cleaning, cooking, laundering, shopping, errands, and maintain[ed] the grounds surrounding the parties' home."[258] She also worked as a receptionist, typist and bookkeeper for

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[251] Turner v. Freed, 792 N.E.2d 947, 948 (Ind. Ct. App. 2003) (taking into account that defendant "*received substantial benefit from* [plaintiff's] *homemaking and housekeeping responsibilities*" in providing an award based on unjust enrichment).

[252] *Id.* at 950.

[253] *Id.* at 951.

[254] *Id.* at 949.

[255] Watts v. Watts, 405 N.W.2d 303, 305 (Wis. 1987) (*Watts I*) (considering an appeal from the grant of a motion to dismiss for failure to state a claim); Watts v. Watts, 448 N.W.2d 292 (Wis. Ct. App. 1989) (*Watts II*) (considering appeal after remand). Given the clearly articulated bases for an award, *Watts I* is a favorite of textbook authors, included in both contracts and property textbooks. *See, e.g.*, CHARLES L. KNAPP ET AL., PROBLEMS IN CONTRACTS LAW 295–304 (7th ed. 2012); JOSEPH WILLIAM SINGER ET AL., PROPERTY LAW 712–16 (6th ed. 2014).

[256] *Watts I*, 405 N.W.2d at 305.

[257] In determining that the relationship was marriage-like, the court noted that Sue Ann assumed the defendant's surname as her own; their two children also took his surname; they filed joint tax returns and maintained joint bank accounts; they purchased real and personal property as husband and wife, and so on. *Id.* at 306.

[258] *Id.*

around twenty to twenty-five hours a week at James's office, for which she received no compensation.[259]

The court declined to apply Wisconsin's laws of divorce,[260] but it recognized that unmarried partners may request a property distribution based on a variety of claims including express or implied contract, unjust enrichment, or partition. Moreover, it held that homemaking services could either be acceptable consideration for a contract, or provide the basis for an unjust enrichment claim. The court relied on the latter theory, reasoning that Sue Ann had adequately alleged that her services provided James with a benefit.[261] On remand, the jury awarded Sue Ann $113,090.08. This amounted to about 13% of the property acquired throughout the relationship according to James's expert and 10% according to Sue Ann's expert.[262]

The court affirmed the jury award even though it admitted that it did not have a clear sense of how the particular amount was reached. It noted only that there was evidence that the services Sue Ann performed to maintain their home and help James's business, "fertilized the increased value of Watts' property, not only by helping him in the business but also by freeing him from many nonbusiness tasks."[263] The court further relied on the percentage of property James had left Sue Ann in a will he had executed during their relationship, even though intent, as a doctrinal matter, is irrelevant to the question of unjust enrichment.[264] Sue Ann was thereby awarded substantially less than half of the property accrued during their twelve-year relationship.[265]

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[259] *Id.* at 306–07.

[260] The court interpreted the statute to only address and promote the marital family. *Id.* at 308–09.

[261] *Id.* at 314, 316.

[262] *Watts II*, 448 N.W.2d at 294, 294 n.1. The trial court below did not find that any implied in fact contract had been breached. There was some doctrinal confusion as to what the jury concluded on the implied in fact claim, but the Wisconsin Supreme Court ultimately found that the terms of the implied contract were to provide support only as long as the relationship lasted, and that interpreted in this fashion the jury had found that the contract was not in fact breached. *Id.* at 295–96.

[263] *Id.* at 296–97.

[264] 42 C.J.S. *Implied Contract* § 9. As such, the intent of James—not the intent of Sue Ann—came in through the back door in the unjust enrichment analysis. He had left her 10% of his property, excluding business-related property. *Watts II*, 448 N.W.2d at 297.

[265] *Watts II,* 448 N.W.2d at 297. The amount she was paid came out to approximately $12,000 a year for both her business and home-related activities. *Id.* In 1987, the poverty threshold for a four-person family was about $11,000. *National Longitudinal Study of Youth*, U.S. BUREAU LAB. STAT., https://www.nlsinfo.org/content/cohorts/nlsy79/other-documentation/codebook-supplement/nlsy79-appendix-2-total-net-family-3 [https://perma.cc/4WDF-6SPA] (last visited Nov. 24, 2016). Since *Watts II*, Wisconsin has retreated from quantifying homemaking services of their own accord. Waage v. Borer, 525 N.W.2d 96, 98–99 (Wis. Ct. App. 1994). The Wisconsin Court of Appeals explained that "*Watts* does not recognize recompense for housekeeping or other services unless the services are linked to an accumulation of wealth or assets during the relationship." *Id.* at 98. As such, it overturned the jury's award in favor of plaintiff in the amount of $25,000. *Id.* at 97–98.

The absence of marriage does not completely preclude courts in these cases from recognizing a quantifiable exchange during the relationship. In deciding claims of unjust enrichment, however, courts appraise services provided during the relationship as distinctly less valuable than financial contributions, which take the form of title over property or money.[266] Although no longer gratuitous, the services provided in the home and at work, but outside of marriage, are offered at a discount.[267]

2. Turning to Intent: Equal Distribution

Where courts focus on the intent of the parties to the relationship, in interpreting an agreement or imposing equity, the result is a more egalitarian division of assets. In the process, they end up turning the relationship between the affective and the economic on its head.

In 2006, in *Dutton v. Laine*, the Kansas Court of Appeals considered the parties' intent in dividing the property acquired by Cara Dutton and Edward Laine during the time that they lived together.[268] Cara had downloaded an agreement titled "Prenuptial/Cohabitation Agreement" from the Internet, which the couple signed before moving in together.[269] The agreement specified that the separate property owned by each would remain separate throughout the relationship and any future dissolution.[270] The court upheld the agreement but found that it was silent as to what to do with any joint property acquired *during* the relationship.[271] Accordingly, the court found that the parties had entered into an agreement beyond the written one. The consideration for that agreement, the court held, was the mutual love and affection each had for the other.[272] That is, the language of love that typically raises the presumption of

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[266] This is not to say that courts are misapplying the doctrine of unjust enrichment—it may be the correct application of the doctrine itself that values the housework at such rates.

[267] Divorce is different, despite its various shortcomings. In a community property state, divorce generally leads to an equal distribution, as does equitable distribution in separate property states, though many criticize the latter for continuing to miss the mark. *See* Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1236–37 (in arguing that a partnership theory of marriage undergirds the law of divorce, the article identifies the similarities between the two property regimes at divorce and notes "courts must take into account nonfinancial contributions to the accumulation of marital property" and "even unequal but equitable divisions of property embrace a concept of marriage as a partnership similar to that employed in the community property states").

[268] Dutton v. Laine, No. 93,934, 2006 WL 851389, at *4 (Kan. Ct. App. Mar. 31, 2006).

[269] *Id.* at *1.

[270] *Id.*

[271] *Id.* at *4 ("[T]he agreement says nothing about how jointly owned property would be divided upon separation or how it would be determined whether property was jointly owned or separately owned. . . . There is simply no language covering the issue.").

[272] *Id.*

gratuity became the very basis for the exchange that led to a property distribution.[273]

In reaching its conclusion, the Kansas court looked beyond who had contributed financially to acquiring the property and instead relied on the parties' intent. Even though Edward had bought most of the furniture that the couple used, the court considered the property to be joint property because "[i]t is clear they intended to use the items together in their new house, and the items were jointly acquired for that purpose, notwithstanding the source of payment."[274] Given that "both [parties] contributed to household expenses" and they "lived in a residence together as a family," Cara was awarded half of all of the items.[275]

The intent of the parties to the relationship was also paramount for the Oregon Court of Appeals in the 1993 case of *Wilbur v. DeLapp*, which considered an especially pronounced disparity in the financial contributions made to the relationship.[276] Wilma Wilbur and Noel DeLapp had lived together for sixteen years without marrying.[277] The court acknowledged that it was entitled to "distribute property owned by the parties in a non-marital domestic relationship."[278] Even if the property was all held in Noel's name, the primary determination in the equitable proceeding was whether there was "an intent to share equally."[279]

The court's focus on the parties' intent to share allowed it to value each party's contribution to the relationship, even where the contribution took a non-financial form. The court noted that Wilma "assumed the role of homemaker"; when possible, she would use her money to improve the home, or chip in for their living expenses.[280] The court concluded that all of these contributions had economic value. Because the financial arrangement and division of responsibilities was accepted by both parties, the court found that "it was the intent of the parties that plaintiff have an interest in the house" and it awarded Wilma a one-half interest "as a matter of equity."[281] The court also relied on Wilma's role as homemaker in awarding her half of Noel's retirement account—"[h]er contribution to the relationship" was "assist[ing] defendant in his career and allow[ing] for a more comfortable standard of living."[282] For

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[273] *See supra* notes 39–160 and accompanying text.
[274] *Dutton*, 2006 WL 851389, at *4–5.
[275] *Id.* at *4 (affirming the lower court's order).
[276] Wilbur v. DeLapp, 850 P.2d 1151, 1152 (Or. Ct. App. 1993).
[277] *Id.* At the time of their separation, Wilma was sixty-three years old and Noel was forty-six. *Id.*
[278] *Id.* at 1153.
[279] *Id.*
[280] *Id.*
[281] *Id.*
[282] *Id.*

this, she merited remuneration.[283] As such, the court recognized Wilma's contributions to the relationship, including household services, on equal terms as Noel's financial ones.[284]

The lodestar in the cases that compensate homemaking services during a nonmarital relationship is the parties' intent. The result is a much more egalitarian division of property—where generally half is awarded to the plaintiff—even when only one party brings in the money, or has title over the property.

C. Marriage and Nonmarriage: Separate and Distinct

Courts do not always subsume periods of nonmarriage into marriage in the course of a relationship that experienced both:[285] some cases compartmentalize each period into separate and distinct statuses. This latter set of cases defines the world in terms of people who are married, and those who are not, regardless of the fact that the couple before the court was both married and unmarried at some point. Such a partitioning of the relationship does not lead to a consistent outcome in terms of property distribution: some courts award property on the basis of the nonmarital relationship; others, especially those that provide unmarried couples with rights upon separation, refuse to include the nonmarital period in the property distribution at divorce. Although one may expect those jurisdictions that allow a nonmarital relationship to lead to a property division to also include that relationship at the conclusion of a marriage, this is not the case.[286] Moreover, some jurisdictions that expressly refuse to divide property among unmarried individuals include the nonmarital relationship in assessing property rights at divorce.

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[283] The court found that "[g]iven her primary role as homemaker, she had a limited opportunity to accrue a retirement fund of her own." *Id.* Combined with her modest financial contributions to household expenses, the court decided they were also enough to award Wilma interest in Noel's retirement funds. *Id.*

[284] The court in *Marvin* also considered the intent of the parties in establishing whether there was an implied contract or another claim based in equity. *See Marvin*, 557 P.2d at 117, n.11 ("[T]he mere fact that a couple have not participated in a valid marriage ceremony cannot serve as a basis for a court's inference that the couple intend to keep their earnings and property separate and independent; the parties' intention can only be ascertained by a more searching inquiry into the nature of their relationship."). Accordingly, *Marvin* declined to consider domestic services rendered throughout the course of the relationship as gratuitous—"[t]here is no more reason to presume that services are contributed as a gift than to presume that funds are contributed as a gift." *Id.* at 121.

[285] For a discussion of those cases that treat this period as one continuous marital relationship, see *supra* notes 83–104 and accompanying text.

[286] New Jersey, for instance, does not include premarital cohabitation into the property distribution at divorce, even though it allows for both property division and palimony in the context of nonmarital relationships. *Supra* notes 248–284 and accompanying text.

In 2006, in *Loughlin v. Loughlin*, a case with a very similar fact pattern to *Skelton* in that the couple had also been twice married and twice divorced,[287] the Connecticut Supreme Court recognized only the last period of marriage.[288] In deciding whether to award alimony at the end of the couple's second divorce, the court kept the marriage entirely separate from the nonmarital relationship. The result was that the court addressed only the six-year period of the second marriage rather than the collective twenty-two years the couple had been together.[289]

Although the *Loughlin* court had the task of interpreting the statutory term "length of a marriage" for purposes of alimony and property distribution, it revealed a very specific understanding of marriage—as completely distinct from any other status, even if the same two individuals had been both married and unmarried.[290] The court explained that when the parties divorced, "they reassumed the legal status of two single people, regardless of their intentions."[291]

The Mississippi Supreme Court espouses a similar split in statuses.[292] Despite enforcing a separation between marriage and nonmarriage, however, the court does not unequivocally exclude the nonmarital period in determining an appropriate property distribution. In 2002, in *Bunyard v. Bunyard*, the Mississippi Supreme Court affirmed the lower court's decision to include the period of cohabitation in distributing property at divorce. It did fault the appellate court for its reasoning though—the lower court had relied on a theory of marriage and nonmarriage as one continuous whole in concluding that the marriage had ratified the prior relationship.[293] Rather than rely on the retrograde influence of marriage, the Mississippi Supreme Court found that the decidedly

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[287] *See* Loughlin v. Loughlin, 910 A.2d 963, 967 (Conn. 2006); *see also supra* notes 99–103 and accompanying text (discussing *Skelton v. Skelton*, where the Maine Supreme Judicial Court addressed an alimony claim after a marriage of three years).

[288] *Loughlin*, 910 A.2d at 972–74.

[289] *Id.* at 974 (admitting that "the difference between the length of their entire relationship, approximately twenty-two years, and the length of their second marriage, six years, is not insubstantial").

[290] *Id.* at 970. Massachusetts recently came to the opposite conclusion in interpreting the statutory term "length of the marriage," holding "the length of the marriage includes the period during which the parties were cohabiting before they remarried, and the period of the parties' first marriage." Duff-Kareores v. Kareores, 52 N.E.3d 115, 117 (Mass. 2016).

[291] *Loughlin*, 910 A.2d at 972 (internal quotation marks and citation omitted).

[292] The Mississippi Supreme Court is actually in conflict with the reasoning its appellate courts employ. *See infra* notes 293–295 and accompanying text.

[293] Bunyard v. Bunyard, 828 So. 2d 775, 778 (Miss. 2002) (holding that land acquired by husband prior to marriage was joint property given wife's contributions to the land). As such, *Wooldridge v. Wooldridge*, discussed in notes 285–309 and accompanying text, arguably failed to comply with the Mississippi Supreme Court's decision in *Bunyard*.

*pre*marital property had been improved by the joint efforts of the couple.[294] In particular, although the husband had purchased the land, the wife had "work[ed] on the land . . . putting up the fence, gardening, feeding the cows, and building the pier for the catfish pond."[295]

Jurisdictions that recognize a nonmarital relationship on its own terms sometimes refuse to consider it when paired with marriage, based on the strength of their acknowledgment. California and New Jersey, both of which attach relatively strong property rights to a nonmarital relationship, keep marriage and nonmarriage distinct when they take place in the course of a single relationship. They also generally refrain from including the nonmarital period in the distribution of property at divorce. In *In re Marriage of Bukaty*, in 1986, the California Court of Appeal advised the wife seeking a property distribution at divorce to plead a separate cause of action for any claim based on the nonmarital period of the relationship.[296] The husband and wife had been married for twelve years, after which they divorced. They resumed living together for twenty-seven years before getting married again. Their second marriage lasted just one year and seven months.[297] In determining how to allocate the property at the time of the second divorce, the court affirmed the trial court's consideration of only the last marriage. The court declined to address the nearly thirty years the couple lived together after the initial marriage, divvying up the relationship into the portion that was marital and the portion that was not: "Any right to support attributable to the period of the parties' cohabitation would be a *Marvin* right and could be asserted only in a separate civil action, not in a proceeding under the Family Law Act."[298]

New Jersey erects a similar wall between nonmarriage and marriage. In 1987, in *Rolle v. Rolle*,[299] the New Jersey Superior Court declined to include a premarital period in distributing property at divorce. Instead, "where the cohabitation is, in fact, followed by a marriage,"[300] the court held that the cases addressing nonmarital relationships *tout court* should apply.[301] Relying on the plain terms of the New Jersey divorce statute that addressed property division

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[294] *Id.* at 777.

[295] *Id.* at 776. The couple also "ate the fish they caught and the vegetables" grown in the garden. *Id.*

[296] *In re* Marriage of Bukaty, 225 Cal. Rptr. 492, 495–96 (Ct. App. 1986).

[297] *Id.* at 494.

[298] *Id.* at 495–96. In doing so, it relied on the importance of protecting and privileging the marital status. *Id.* at 496 ("The efforts of the Legislature to protect marital status were clearly written and have been held to apply only to a legal marriage. For us to do otherwise would be to disregard totally legislative intent to grant certain rights and privileges to persons who sought and obtained that special status." (citation omitted)).

[299] Rolle v. Rolle, 530 A.2d 847, 851 (N.J. Super. Ct. Ch. Div.1987).

[300] *Id.*

[301] *Id.*

"during marriage," the court concluded that "[p]roperty acquired during a period of cohabitation prior to the marriage cannot be equitably distributed" at divorce.[302] As in California, the plaintiff was advised to bring a wholly separate claim given that New Jersey has a distinct body of law dealing with the rights of nonmarital couples.[303]

The stark demarcation between statuses can sometimes lead the marital period itself to be ignored. In 1994, in *Wallender v. Wallender*, the Oregon Court of Appeals addressed a couple who had been married for fifteen years, and then lived together for another nine after their divorce was finalized.[304] The court explained that "[t]he parties' personal relationship was not affected significantly by the divorce."[305] The plaintiff, Sharon Wallender, continued be the primary caretaker and help with the family farm, while the defendant, Fredrick Wallender, remained the "primary provider of financial resources for the family."[306] Yet, in deciding how to distribute the property accrued at the end of their relationship, the court treated them as though they had never been married at all, applying precedent that dealt only with nonmarital relationships. Because Oregon courts rely on the parties' intent in distributing property,[307] it identified the prior marriage only to rely on the subsequent divorce, which the court interpreted as a clear signal of what the parties intended during their nonmarital relationship. Unlike a case that involved only nonmarital cohabitation, "here, plaintiff knew that defendant did not intend to share his ownership of the farm after the dissolution."[308] The decision to have married at some point rendered the plaintiff worse off than if she had never married at all.[309]

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[302] *Id.*

[303] *See id.* Some New Jersey courts have used the term "merger" to describe the legal relationship between nonmarriage and marriage. Said "merger," however, functions as a blanket replacement—any prior agreement that existed during the nonmarital relationship is "subsumed and merged into the contract created by the marriage vows." Mangone v. Mangone, 495 A.2d 469, 471 (N.J. Super. Ct. Ch. Div. 1985) (holding that because "plaintiff's cause of action rests on the marriage contract, it must follow that plaintiff's prayer for damages for breach of the live-together contract fails to state a claim upon which relief can be granted"). Courts essentially decline to recognize any property rights stemming from the nonmarital relationship because they are worried about the woman double-dipping into property that is not hers. *Id.* ("To allow plaintiff's claims to succeed would duplicate the relief . . . to which she is entitled . . . in the dissolution action.").

[304] Wallender v. Wallender, 870 P.2d 232, 233 (Or. Ct. App. 1994).

[305] *Id.*

[306] *Id.*

[307] Oregon is home to *Wilbur*, one of the few cases that awarded plaintiff half of the relevant property in distributing it at the conclusion of a nonmarital relationship, on the basis of the parties' intent. 850 P.2d at 1153. *Wallender* distinguished *Wilbur*, not on the basis of having been married, but rather on the basis of intent—in *Wilbur*, the court found that the parties intended to share ownership. *Wallender*, 870 P.2d at 234–35; *Wilbur*, 850 P.2d at 1153.

[308] *Wallender*, 870 P.2d at 234.

[309] *See id.* at 235. Ignoring the marital portion of a relationship can sometimes result in a distribution of property for the plaintiff. *See* Glasgo v. Glasgo, 410 N.E.2d 1325, 1326 (Ind. Ct. App. 1980)

III. NONMARRIAGE AS A SITE TO PROMOTE MARRIAGE

The cases that address nonmarital couples all assume, and many explicitly state, that the ultimate goal of their nonmarital jurisprudence is to promote marriage. Accordingly, their disagreement lies not over whether to promote marriage—an undisputed aim and rhetorical flourish they all employ—but rather over which outcome better satisfies this goal.[310]

This Part focuses on two opposite ends of the spectrum in order to highlight the central differences in courts' reasoning. It first analyzes the cases in jurisdictions that deny nonmarital couples any property rights upon separation. It then considers the cases that equate the nonmarital relationship to marriage either "by analogy" or in deciding to award palimony.[311] These two sets of cases exhibit a similar preoccupation with marriage, albeit with different emphases and results. The cases that do not recognize property rights reason that refusing to do so promotes marriage; those that recognize property rights by relying on the substance and form of marriage reason that doing so promotes marriage. In the process, both fail to consider how the rules regulating exit from a relationship impact the initial decision of which kind of relationship to enter—be it marital or not.

But, determining whether to award or deny property at the end of a relationship impacts more than the decision of whether to marry—it also tells a specific story about which individual in the relationship should seek out the status. The cases that decline to award property are focused on ensuring that the woman says yes when asked; the cases that decide to award property are focused on the man's incentives to propose—by making it equally costly for him if he does not.

A. Denying Property Rights Promotes Marriage

The states that do not recognize rights between unmarried couples are Louisiana,[312] Mississippi,[313] Georgia,[314] and Illinois.[315] All do so based on an

(treating a relationship as purely nonmarital even though couple had been married for eleven years prior to their divorce and resumption of cohabitation and deciding to distribute some of the property to prevent the unjust enrichment of one of the parties). These scenarios generally arise, of course, where the nonmarital relationship follows the initial marriage.

[310] The indeterminacy of appealing to the importance of marriage is perhaps most evident when courts invoke it in the course of discussing a nonmarital relationship that involved marriage at some point—these cases expose the futility of relying on marriage promotion when the parties have already opted to marry at least once.

[311] These cases are discussed in sections A and B in Part I.

[312] Schwegmann v. Schwegmann, 441 So. 2d 316, 324 (La. Ct. App. 1983) ("Under present Louisiana law, unmarried cohabitation does not give rise to property rights analogous to or similar to those of married couples. Concubines have no implied contract or equitable liens that afford them any rights in the property of their paramours.").

expressed motivation to preserve the legal status of marriage. In protecting the institution of marriage, these cases end up placing the responsibility squarely onto the woman to say yes when asked.

Mississippi is unambiguous in setting the responsibility on the woman to marry. In 1994, in *Davis v. Davis*, the Mississippi Supreme Court declined to divide any property between a couple that had lived together for thirteen years.[316] It was particularly preoccupied with the fact that Elvis Davis had rejected Travis Davis's marriage proposal—noting that the Mississippi legislature has declined to "extend[] the rights enjoyed by married individuals to those who merely cohabit," it chided Elvis for having turned down Travis's request to marry.[317] To receive compensation for the labor she performed, the court made clear that "[w]hen opportunity knocks, one must answer its call";[318] in other words, Elvis should have married. Because Elvis "failed to do so," the court concluded "her claim is all for naught."[319]

The Mississippi Supreme Court employed similar reasoning in 1995 in *Malone v. Odom*, relying on *Davis* for support.[320] Patt Odom and Sidney Malone had an eighteen-year "on-again, off-again relationship"[321] after which Patt filed an action for equitable division of their home. Like the couple in *Davis*, "Patt had the opportunity to marry Sidney."[322] Yet she "chose not to."[323] The Mississippi Supreme Court therefore declined to award Patt the $55,000 the appellate court had ordered as compensation for the time, money, and effort Patt had invested into the property.[324] The court's message was clear: to receive compensation, Patt should have said yes.

Even where the court is less explicit about stating that the woman should marry, the effect of the cases is to penalize her decision to say no. In *Schwegmann*, the Louisiana Court of Appeal asserted the importance of the

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[313] Davis v. Davis, 643 So. 2d 931, 936 (Miss. 1994) ("Our legislature has not extended the rights enjoyed by married people to those who choose merely to cohabit. To the contrary, cohabitation is still prohibited by statute.").

[314] Rehak v. Mathis, 238 S.E.2d 81, 82 (Ga. 1977) ("It is well settled that neither a court of law nor a court of equity will lend its aid to either party to a contract founded upon an illegal or immoral consideration.").

[315] Blumenthal v. Brewer, No. 118781, 2016 WL 6235511, at *15, *18 (Ill. Aug. 18, 2016) (affirming *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979), holding that it "bars such relief if the claim is not independent from the parties' living in a marriage-like relationship").

[316] *Davis*, 643 So. 2d at 936.

[317] *Id.* at 935–36.

[318] *Id.* at 936.

[319] *Id.*

[320] Malone v. Odom, 657 So. 2d 1112, 1117 (Miss. 1995).

[321] *Id.* at 1114.

[322] *Id.* at 1117.

[323] *Id.*

[324] *Id.* at 1115–16.

family to a "civilized society."[325] The court defined the family as one bound only by legal ties—as such, that "family" excluded nonmarital couples. To hold otherwise, the court stated, "is to do violence to the very structure of our civilized society. Without the family, the State cannot exist and without marriage the family cannot exist."[326] Such reasoning, however, places the cost of upholding the "civilized" families of society almost entirely on the woman who has not married: it is she, the "concubine,"[327] who typically goes to court, seeking property that she believes is rightfully hers, and which courts refuse to even hear.[328] The court's decision to abstain from distributing property at the conclusion of the relationship denies the plaintiff—which in nearly every case is a woman—a forum to request the property she wishes to obtain.[329]

Thus, if it is the woman who says no, the law is likely to make her decision financially unsound.[330] The corollary effect is: if the man declines to ask, then the law is generally supportive of his decision, insofar as it imposes no costs on his choice not to propose.

B. Awarding Property Rights Promotes Marriage

Courts that apply divorce laws "by analogy" and courts that provide for awards of palimony, are as preoccupied with promoting the institution of marriage as those cases that refuse to recognize any exchange. These courts, however, understand the incentives to play out differently. In particular, a woman's decision to marry—or not—is less relevant to a court's analysis. Instead, these courts are concerned with ensuring that foregoing marriage is not financially beneficial for the individual with more assets. This means that they are more concerned with the man's decision-making process.

Nevada and Washington remain wholly committed to the institution of marriage in applying the laws of divorce by analogy. In *Michoff*, the Nevada Supreme Court "reaffirm[ed] [the] state's strong public policy interest in encouraging legally consummated marriages."[331] Likewise, marriage is the cornerstone of the Washington Supreme Court's decision in *Connell*, which defines the nonmarital relationship by relying entirely on marriage—a "meretri-

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[325] *Schwegmann*, 441 So. 2d at 323–24.

[326] *Id.* at 326.

[327] *Id.* at 324 ("Concubines have no implied contract or equitable liens that afford them any rights in the property of their paramours.").

[328] In nearly all cases the woman is bringing the claim seeking a property distribution to court.

[329] The incentives are typically placed on the woman to either seek out marriage, or say yes when propositioned. *See supra* notes 316–328; *infra* notes 343–352 and accompanying text.

[330] Courts literally make her decision not to marry costly by not providing her with any property at the conclusion of the relationship.

[331] W. States Constr., Inc. v. Michoff, 840 P.2d 1220, 1223 (Nev. 1992).

cious relationship" that merits application of divorce rules "is a stable, marital-like relationship."[332] These courts also distribute property at the conclusion of a nonmarital relationship in furtherance of their stated desire to promote marriage. The problem they articulate is different from those cases that deny property rights altogether: *Michoff* and *Connell* are concerned that not recognizing rights would "allow[] 'one participant in a meretricious relationship to abscond with the bulk of the couple's acquisitions.'"[333]

Disagreements over what outcome better promotes marriage thus stem from opposing views regarding which individual the law should attempt to incentivize. While the jurisdictions that decline to recognize rights seek to incentivize the woman to marry, the jurisdictions that liken the relationship to a marriage are more concerned with removing incentives for the man not to propose. The justices' differing views in *Michoff* showcase this disagreement: the dissent criticized the majority's reasoning, predicting that the application of divorce rules to nonmarital relationships would create a "disincentive to marriage" because "it gives unmarried persons the rights of community property without imposing upon them the mutual assumption of duties that is attendant to the marital status."[334] Since imposing rights and duties at the conclusion of a relationship would disincentivize marriage, the dissent concluded that no obligations should be imposed.[335]

These conflicting accounts of competing incentives protect different individuals in the relationship: the dissent's account prevents the distribution of property and thereby protects the wealthier partner, generally the man, as do the cases that decline to distribute property at the conclusion of the relationship. The majority's account allows for the distribution of property and thereby benefits the poorer partner, typically the woman, once the relationship ends.

Courts that award palimony are similarly concerned with protecting the status of marriage, which they do by ensuring that abstaining from marriage does not leave the wealthier partner with all of the assets. In upholding the award in *Kozlowski*, the New Jersey Supreme Court specifically considered what would better promote the institution of marriage, given that "[t]he joining of the man and woman in marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a life-

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[332] Connell v. Francisco, 898 P.2d 831, 834 (Wash. 1995).

[333] *Michoff*, 840 P.2d at 1223–24; *see also Connell*, 898 P.2d at 836 (reasoning that "the property acquired during the relationship should be before the trial court so that one party is not unjustly enriched at the end").

[334] *Michoff*, 840 P.2d at 1229 (Springer, J., dissenting).

[335] *Id.* Those seeking to avoid community property from kicking in when a relationship ends, however, would presumably be less inclined to marry if no obligations were imposed on them at the end of a relationship.

time."[336] The court sought to guarantee that individuals would not forego "the most socially productive and individually fulfilling relationship" by making it financially unsound for the wealthier individual to not marry. It reasoned that refusing to recognize rights between nonmarital partners "can only encourage a partner with obvious income-producing ability to avoid marriage and to retain all earnings which he may acquire."[337] In response, the court made it costly for him to do so. These cases therefore place less of a premium on the woman's decision to marry or not: the woman can say yes or no, and the law will not penalize either decision.

C. Divorce Versus Separation

In each set of cases, courts tend to focus on the initial decision to marry, and on the substance the nonmarital relationship assumes, in deciding whether to distribute property. The true comparison, however, is not between the course each relationship takes. The question before the court is whether a nonmarital *separation* should be treated like a *divorce*. Uncovering the actual comparison reveals some of the assumptions that courts make in promoting marriage at the relationship's end—namely, how the rules regulating exit impact the decision regarding entry.

Because these cases arise at the conclusion of the relationship, the most direct comparison accessible to courts is between divorce, available to married couples, and separation, available to unmarried couples. Only the decision to marry, however, remains the opinions' explicit concern. The Illinois Supreme Court's opinion in *Hewitt v. Hewitt*, in 1979, exemplifies the circuitous reasoning courts employ.[338] The court in *Hewitt* prioritized encouraging the institution of marriage to the detriment of the individuals before it.[339] The court was worried that distributing property at the moment of separation would sanction the availability of statuses other than marriage; specifically, that the "judicial recognition of mutual property rights" may "make that alternative to marriage more attractive by allowing the parties to engage in such relationships with

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[336] Kozlowski v. Kozlowski, 403 A.2d 902, 907 (N.J. 1979).

[337] *Id.* at 908. This is not to imply that the cases that do not recognize property rights do not impact the rights between couples. They do, even if the economic nature of the decision goes unstated, and it generally harms the woman, not the man.

[338] Hewitt v. Hewitt, 394 N.E.2d 1204, 1211 (Ill. 1979). *Hewitt* was as seminal of a case as *Marvin*, for crystallizing the opposing viewpoint. *See* Marvin v. Marvin, 557 P.2d 106, 112 (Cal. 1976) (recognizing implied contracts between unmarried couples). Illinois continues to deny cohabiting couples property rights upon separation. *Blumenthal*, 2016 WL 6235511, at *7 (declining to recognize property rights upon separation between an unmarried couple).

[339] *Hewitt*, 394 N.E.2d at 1207 ("Of substantially greater importance than the rights of the immediate parties is the impact of such recognition upon our society and the institution of marriage.").

greater security."[340] The court, however, offered no account of how the rules regulating exit would impact the initial decision to marry. It only speculated that distributing property would "potentially enhanc[e] the attractiveness of a private arrangement over marriage" and contravene the recently-enacted Illinois Marriage and Dissolution of Marriage Act's "policy of strengthening and preserving the integrity of marriage."[341]

Rather than assess the calculus individuals might enter into in deciding whether to marry given what rules are available to them when their relationships end, courts assume it. The result is a guesstimate of the competing incentives that may play out in the decision of whether to marry. The *Hewitt* court declined to distribute property because it reasoned that private arrangements may become *more* attractive if parties can evade the obligations imposed by marriage.[342] The example *Hewitt* raised as cause for concern was that husbands would seek to get out of supporting their wives.[343] *Hewitt*, however, arguably sanctions a very similar, if not the same, evasion—where the parties do not marry and the court refuses to distribute property, the defending party, almost always the man, succeeds in avoiding property obligations that would have otherwise been triggered by the decision to marry. In effect, the decisions that decline to distribute property impose competing incentives onto the individuals in the relationship, at least in considering property distribution: the man may seek to avoid marriage in order to retain his assets, while the woman may seek out that very status in order to ensure her property rights when the couple separates. The decision to marry therefore rests on which individual has the most bargaining power in the relationship, and how important the rules regulating exit are to their initial decision.[344]

The cases that decide to distribute property at the end of a nonmarital relationship also impose a questionable incentive structure onto the parties involved. If a nonmarital relationship can still lead to a property distribution,

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[340] *Id.* at 1209.

[341] *Id.*

[342] The contours of this argument are somewhat familiar and track the original reasons for declining to recognize prenuptial agreements as promoting divorce, which have largely been discredited and discarded. *See* Edwardson v. Edwardson, 798 S.W.2d 941, 944–46 (Ky. 1990) (abandoning the prohibition against enforcement of antenuptial agreements, rejecting the argument that entering into these private agreements promote divorce, and identifying other jurisdictions reaching the same conclusion).

[343] *Hewitt*, 394 N.E.2d at 1209 (voiding "agreements releasing husbands from their obligation to support their wives").

[344] These scenarios assume an unequal property distribution, which tracks the claims brought to court. This decision-making process, however, could also play out where both individuals in a relationship have relatively equal amounts of assets—doing so might just make the decision to marry even less relevant, insofar as it is linked to the question of property distribution at the conclusion of the relationship.

then marriage does not necessarily emerge as the preferred or promoted status insofar as property is concerned. Instead, the court is making the decision to marry neutral. That is, if the cost to the party with more assets is the same within marriage as it is outside of it, then so too is it to the party with fewer assets. The decision to marry or not to marry becomes equal at least where property distribution at the end is implicated, which is the scenario that all of these cases address.

None of the cases that appeal to marriage promotion engage with how the rules regulating property distribution at the end of a relationship may impact the decision to marry at the outset. Nor do they consider how divorce may differ from separation in the couple's calculus. Engaging in the comparison would first require the court to acknowledge that married couples divorce: if marriage did last forever, or if individuals and courts believed marriage lasted forever, then the rules regulating property division at the relationship's end would presumably be less important to the initial decision, and less relevant to ensuring the continued existence of the institution of marriage. To decide, or decline, to distribute property after a separation because of the perceived impact such a decision has on marriage would imply that courts understand individuals to consider options available to them when their relationship ends. By retaining the analysis at the level of the existing relationship, courts avoid recognizing this reality. The result is that the cases do not provide an account of how the rules regulating divorce measure up to those applied to a separation, or how either promotes marriage.

IV. A Critique of the Law of Nonmarriage

Considering how courts treat nonmarital relationships when they end clarifies how the law defines marriage and nonmarriage. In particular, placing these decisions side-by-side leads to critiques along two axes. First, this more complete analysis demonstrates not just that the law polices the boundaries between marriage and nonmarriage, but that in doing so it actively defines the content of each. Second, analyzing the cases together identifies the limits of relying on marriage in deciding whether and how to distribute property in a nonmarital relationship. This Part addresses each critique in turn. Although it is beyond the scope of this Article to provide a comprehensive resolution, it takes the necessary first step of exposing the flaws with the dominant modes of legal reasoning. Engaging with these shortcomings provides the initial foundations for moving beyond the legal system's current limitations.

A. The Duties of Marriage and Nonmarriage

Those cases that address nonmarital relationships through the lens of marriage, and those that address nonmarital relationships on their own terms, de-

fine the contours of all relationships that involve sex, where one of the parties seeks some form of property distribution at the end. In protecting the boundaries of marriage, these cases supply both marriage and nonmarriage with substantive content. Understanding how the law distributes property across nonmarital relationships reveals how the space outside of marriage functions to perpetuate outdated norms, out of the spotlight.

The cases that require the nonmarital relationship to be marriage-like in distributing property or awarding palimony are actively engaged in defining marriage by deciding what kind of relationship is sufficiently similar to marriage to merit recognition. As such, they impose a specific, and exclusive, definition of marriage. For instance, marital services include cooking and cleaning—but not hosting or providing companionship.[345] Rather than threaten the institution of marriage, these cases that consider how closely nonmarital relationships resemble marriage bring the relationships directly under the aegis of marriage.[346]

Marriage materializes as the preferred status in another way: the metric of marriage results in making recovery difficult for nonmarital couples where the relationship veers in any way from what marriage ought to look like according to the court, including not actually being legally married. The cases that consider the termination of alimony contravene this trend by easily likening nonmarriage and marriage as long as there is proof of sex, but towards similar ends—restricting an individual's property rights where the relationship was not marital.

The cases that consider whether to distribute property in a nonmarital relationship by opposition to marriage are also involved in defining marriage: if the relationship looks anything like marriage, or the services provided approach those exchanged during marriage, courts prevent the plaintiff from recovering. A definition of what constitutes marriage emerges from these decisions, like the "wispy form of the figures of a Chagall painting"[347]: it generally involves a man who accumulates property by working outside of the home, and a woman who provides services inside of the home, and sometimes at work, if it involves her nonmarital partner. Where these marital-like services are completed outside of marriage, however, courts appraise them as gratuitous. Even where courts consider the possibility of quantifying the exchange,

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[345] *See supra* notes 44–58 and accompanying text (addressing instances where courts deemed household services marital services).

[346] The termination of alimony cases provides a particularly stark example of where courts collapse most remaining distinctions between marriage and nonmarriage. *See supra* notes 105–160 and accompanying text.

[347] Marvin v. Marvin, 557 P.2d 106, 116 (Cal. 1976) (discussing how the rule for addressing nonmarital couples emerged from prior precedent).

they are generally offered at a discount, valued at much less than half of the property acquired. The only exception to this rule is where courts consider the parties' intent in sharing property during the course of the relationship: in this context, services rendered or assets provided are valued on a more egalitarian basis.[348]

Although the cases employ different reasoning, and reach conflicting results, they are strikingly consistent in defining the role that the wife should occupy: she should provide homemaking services such as cooking, cleaning, and childcare. She should also expect to provide advice, as well as time and energy, to her husband's business ventures.[349] Last but not least, the wife should provide sex, which can only lead to financial support in the context of a marriage. Indeed, sex is limited to the province of marriage both by those cases that address the nonmarital relationship as marital, and by those that deny recovery when the relationship is understood as strictly nonmarital. Importantly, these cases identify sex specifically as a wifely duty, given that they arise when it is the woman who is having the sexual relations. In the process, courts themselves create the link between sex and support, a tit for tat that becomes explicit in the termination of alimony cases. In these situations sex becomes sufficient—on its own—to provide both proof of marriage and end payments of support. Instead of distancing the exchange of money for sex, courts effectively seal this particular deal.[350]

The overarching definition of marriage that these decisions impose is one steeped in archetypal gender relations—it is the principal relationship status that provides the plaintiff, in almost every case a woman, with support. By refusing to recognize the contribution of the woman on an equal basis, except in the few cases that consider intent, courts reinforce the notion that a woman's labor within the home is either less valuable, or completely gratuitous.[351] It is

[348] Where the court considers the intent of the parties, it tends to award the plaintiff half of the property at issue. *See supra* notes 268–284 and accompanying text (discussing how a determination of intent affects property distribution).

[349] That is, in addition to taking care of the home she should "chew[] the fat with [her husband] over the advisability of certain business decisions." Thomas v. LaRosa, 400 S.E.2d 809, 814 (Va. 1990). She should also help "at the office and also at a new business that the [husband] established." Featherston v. Steinhoff, 575 N.W.2d 6, 10 (Mich. Ct. App. 1997) (internal quotation marks omitted).

[350] Moreover, the aversion courts proclaim to meddling in the details of a particular relationship is belied by their willingness to enter into the contents of an underwear drawer to determine whether a particular relationship should terminate alimony. *See supra* notes 112–145 and accompanying text (discussing how sexual relations factor into the determination of alimony).

[351] Of course, this conclusion could be gender neutral if the individual doing the housework is male. That is exceedingly rare among these cases.

her duty to engage in housework, just like it was under coverture.[352] Yet here, she is subject to these duties outside of marriage.

Read together, these cases complete the picture of modern heterosexual relations: these decisions can be understood to promote marriage as a status that the woman in particular should seek out. When asked, the woman should say yes. The law regularly inflicts a penalty on the woman in a nonmarital relationship—either she cannot receive a property distribution as the plaintiff in a nonmarital relationship that has ended, or she stops receiving alimony payments as the defendant in a termination of alimony case for having entered a nonmarital relationship.[353] Indeed, the law routinely protects the person who has more assets, given that the individual can keep nearly all of them intact at the conclusion of a nonmarital relationship. Because this person is generally the man in the cases that reach the court, these decisions essentially subsidize his decision not to marry. The dividing line courts etch between marriage and nonmarriage distinctly and quantifiably harms the woman.

B. Beyond Marriage

This Article has identified and categorized the different approaches courts take in addressing nonmarital relationships and their attendant effects. The thread underlying all of them is marriage—there are those that rely on marriage to give it content and meaning; there are those that rely on marriage to distinguish it from nonmarriage. In all cases, marriage is the preferred status.

Marriage, however, clearly falls short of guiding courts towards any particular outcome. Courts fail to agree on what best promotes marriage—whether it is recognizing a property distribution, or declining to do so. This question is especially relevant in a context where state-imposed benefits already differentiate marital from nonmarital relationships. Although this Article does not engage with the propriety of such regulation,[354] it exposes the rather capricious ways courts use the nonmarital space to promote marital status.

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[352] Hasday, *supra* note 32, at 845 ("Under common law coverture, a husband had a right to his wife's domestic services.").

[353] The broader argument of whether the law *should* recognize care work undertaken by women is not the issue here—the purpose of this Article is to identify the ways in which the law denies women property rights by continuing to prioritize marriage as a status they should seek out, given the type work they have undertaken. *See* Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189, 214–217 (2007) (describing the critique of feminists who value domestic care work to the exclusion of other type of care work performed by women).

[354] *See* BOWMAN, *supra* note 14, at 229 (arguing for public recognition of nonmarital status); Aloni, *supra* note 43, at 607 (arguing for a registration-based marriage alternative recognized by the state); *see also* Strauss, *supra* note 165, at 1287–98 (presenting reasons why the state may have a legitimate interest in privileging the status of marriage).

The cases that deal with a single couple who experienced a relationship that was both marital and nonmarital provide unique insight into the marriage promotion rationale. In some instances, the court denies any legal recognition to the nonmarital relationship that preceded or sometimes followed a marriage. A central justification courts supply is that ignoring nonmarital relationships promotes marriage. This reason, however, becomes less meaningful in cases where the couple was, at some point, married. The justification also comes up wanting in situations where the couple never married—by denying nonmarital couples a property distribution to protect the institution of marriage, courts are effectively denying them the laws that regulate divorce. In more accurate terms then, the law protects and promotes the laws of divorce, by excluding unmarried couples. Although there may be a reasoned basis for doing so, courts do not provide one. As such, they do not develop an account of how the rules regulating divorce incentivize couples to get married, as opposed to remain unmarried given the rules that regulate separation. Nor do they address how the cases turn marriage into a status that the woman should seek out if she expects compensation for sex, or homemaking services.[355]

One potential path beyond the marriage-nonmarriage dyad is to turn towards friendship. Scholars have raised alternatives to the sexual-romantic relationship around which family law revolves—Katherine Franke and Laura Rosenbury have offered friendship as a model that may destabilize the centrality of marriage.[356] A reliance on friendship is particularly productive in this context where the relationships at issue lie along a spectrum of obligations, and are poorly suited to an all-or-nothing approach.[357] Friendship is also helpful in breaking away from the gendered valuation of work that takes place within the home and outside of marriage. Relying on friendship could mean expanding the types of situations in which individuals are able to seek a property distribution—beyond marriage or marriage-like relationships. It could also mean abandoning the court's reliance on markers of a romantic relationship modeled

[355] This holds true regardless of the realities of divorce—which may very well fall short of doing either.

[356] *See* Franke, *supra* note 15, at 2702–05 (proposing friendship as an alternative to marriage around which to organize human connection); Rosenbury, *supra* note 353, at 220–24 (arguing for a more robust recognition of friendship by rules that regulate relationships and critiquing the division between marriage and friendship); *see also* Ethan J. Leib, *Friendship & the Law*, 54 UCLA L. REV. 631, 653–57 (2007) (identifying where the law privileges friendship and arguing that friendship should be further promoted throughout the law).

[357] The turn towards intent seems promising insofar as it addresses contributions to the relationship without relying on a definition, and valuation, of husband-wife roles. It is an inflexible mechanism, however, and functions as a categorical cut-off point. In a relationship that has experienced marriage and nonmarriage, for instance, the fact of divorce serves as definitive proof of intent, leaving the ex-wife with nothing even after living together for numerous years. *See supra* notes 304–309 and accompanying text.

on marriage in determining whether property should be distributed. Courts would thus be free to more fully evaluate the multiple relationships before them, and the obligations incurred, regardless of the particular form they take.[358]

Much work remains to be done in considering how courts can break away from marriage in addressing the various forms of nonmarriage.[359] At the very least, in an era where marriage is not the only reality, the law has to do more than depend on marriage in deciding whether and how to assign property.

CONCLUSION

This Article has undertaken the first and necessary step of analyzing how the law mediates relationships between individuals who are not married. Rather than consider how nonmarriage *should* be treated, this Article has identified how nonmarriage *is* treated—how the absence of marriage shapes courts' willingness to distribute property, and what consequences these decisions bring about. In the process, it becomes clear that the law defines not only the content of various forms of nonmarriage, but also the content of marriage itself. The more complete, and complicated, picture of modern marital—and nonmarital—relations explored in this Article provides us with the tools to evaluate the state of the law. It also counsels for special caution in assessing those proposals that call for a more robust recognition of nonmarriage, given the legal regime's current limitations.

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[358] *See* Carbone & Cahn, *supra* note 14, at 61 (noting that when it comes to nonmarital relationships, "one size does not fit all").

[359] The doctrine these courts apply depends on the composition of the parties before the court. It remains a matter of speculation how courts would respond to requests for property distribution where the plaintiff seeking the property is a man and the defendant protecting the property is a woman. A complicating factor may be the gendered division of labor which continues to exist even where the woman holds title to most of the assets. Turning towards friendship would thus still be productive in this context.