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Autonomy in the Family

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ABSTRACT

Scholars largely support the concept of choice in family form. But while scholars largely agree on this abstract goal, they do not agree on which legal rules best further that end. Take the issue of economic rights for nonmarital partners. The conventional doctrine treats nonmarital partners as legal strangers. No rights arise out of their relationship. Like other legal strangers, they can alter this default rule by entering into an agreement to share. But unless they do so, the parties have no obligations to each other. The dominant scholarly defense of this rule sounds in the register of family autonomy, that is, respect for choice in family form.

This Article accomplishes two key goals. First, it offers a novel lens through which to reconsider how best to promote meaningful choice in family form. By carefully mining another area of nonmarriage law, the law of nonmarital parentage, this Article demonstrates that the conventional doctrine undermines rather than furthers that goal. To make that choice a meaningful one, the law must recognize and respect a range of different types of families that people have chosen to create.

Second, this Article draws on nonmarital parentage law, as well as the almost entirely overlooked body of what I call "interstitial marriage cases," to demonstrate that courts are capable of applying more capacious rules that give effect to chosen families. In this way, marriage-related developments can be utilized to expand rather than to forestall the law of nonmarriage.

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INTRODUCTION

There is a growing scholarly consensus in favor of family pluralism,[1] or what William Eskridge calls a "larger menu of [family] options."[2] Choices about whether to enter into a family and what one's family looks like are "deeply personal"[3] decisions that often have profound effects on a person's life. Most scholars agree that the law should permit people to choose from an array of family formation options, and that the law should respect those choices once they have been made. While there is general agreement on the abstract goal, there is less consensus on which legal rules best promote this end.

With respect to the economic rights of nonmarital partners, the dominant scholarly approach posits that the best way to protect family pluralism and choice in family form is to treat the partners like legal strangers rather than as spouses.[4] Naomi Cahn, June Carbone, and others argue that such a rule vindicates the couple's choice to reject marriage and, in turn, creates a wider menu of options.[5] Moreover, Melissa Murray continues, family pluralism and autonomy are fostered and protected by maintaining a space in which families are free from government regulation.[6]

1. *See* Kaiponanea T. Matsumura, *Consent to Intimate Regulation*, 96 N.C. L. REV. 1013, 1020 (2018) [hereinafter Matsumura, *Intimate Regulation*].
2. William N. Eskridge Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1889 (2012).
3. Village of Belle Terre v. Boraas, 416 U.S. 1, 16 (1974) (Marshall, J., dissenting) ("The choice of household comparisons . . . involves deeply personal considerations.").
4. *See, e.g.*, Elizabeth S. Scott, *Domestic Partnerships, Implied Contracts, and Law Reform*, *in* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 331, 335 (Robin Fretwell Wilson ed., 2006); June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55 (2016) [hereinafter Carbone & Cahn, *Nonmarriage*]; Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 896 (2005) [hereinafter Garrison, *Is Consent Necessary?*].
5. *See, e.g.*, Carbone & Cahn, *Nonmarriage*, *supra* note 4, at 57 (noting that the conventional doctrine "does not guide the status of nonmarriage, leaving the parties room to craft relationships of their choice").
6. *See, e.g.*, Melissa Murray, *Rights and Regulation: The Evolution of Sexual Regulation*, 116 COLUM. L. REV. 573, 577 (2016) ("[T]his system of civil regulation poses a threat to the prospect of greater liberty in intimate life."). *See also* Marsha Garrison, *Marriage Matters: What's Wrong With the ALI's Domestic Partnership Proposal*, *in* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION 305, 328 (Robin Fretwell Wilson ed., 2006) [hereinafter Garrison, *Marriage Matters*] ("The ALI proposal [to recognize domestic partnerships] deeply intrudes into relationship privacy. It dramatically expands state control over private life.").

This Article contends that the conventional approach governing the economic rights of nonmarital families impedes rather than furthers a robust vision of choice in family form. This is true, I argue, for two, interrelated reasons. First, the regime does not offer a choice between different kinds of family formations. Under the current regime, marriage is the only relationship configuration that is treated as a family for purposes of property division. All other types of relationships are treated as relationships between legal strangers. Such a system does not provide individuals with a meaningful menu of family formation options. To make that choice in family form meaningful, there must be multiple types of family forms—within and outside of marriage—that the law recognizes and treats *as families*.

Second, the current regime does a poor job of recognizing and protecting individual's decisions or choices to form a family. The current doctrine permits consideration of only a very limited set of formal decision points—the decision to enter into marriage (or not) and the decision to enter into an agreement to share (or not). The law then attributes drastic meaning to the lack of these formalities: by failing to marry, the parties have "chosen" to be treated as a nonfamily. Excluded from consideration are an enormous range of quotidian decisions and behaviors which are often more insightful with respect to whether they intended to and did indeed function as a family. In this way, the law often fails to recognize and respect the actual family formation choices people have made.

The legal treatment of nonmarital families is an issue of critical importance. Nonmarital relationships are becoming more prevalent. In 1960, there were fewer than five hundred thousand nonmarital cohabiting couples.[7] By 2016, this number had skyrocketed to a total of about nine million couples.[8] This trend is likely to continue. Between 2000 and 2010, the unmarried cohabiting partner population grew by over 40 percent.[9]

Ironically, concern about the legal treatment of this growing population of people living outside of marriage was fueled by the Supreme Court's

7. U.S. CENSUS BUREAU, UNMARRIED PARTNERS OF THE OPPOSITE SEX, BY PRESENCE OF CHILDREN: 1960 TO PRESENT, at tbl. UC-1 (2011), https://www.census.gov/population/socdemo/hh-fam/uc1.xls.

8. Renee Stepler, *Number of U.S. Adults Cohabiting With a Partner Continues to Rise, Especially Among Those 50 and Older*, PEW RES. CTR.: FACT TANK (Apr. 6, 2017), http://www.pewresearch.org/fact-tank/2017/04/06/number-of-u-s-adults-cohabiting-with-a-partner-continues-to-rise-especially-among-those-50-and-older [https://perma.cc/Y5P2-6JN2].

9. DAPHNE LOFQUIST ET AL., U.S. CENSUS BUREAU, HOUSEHOLDS AND FAMILIES: 2010 3 (2012).

marriage equality decision *Obergefell v. Hodges*.[10] Scholars warned that, while *Obergefell* marked an important advancement for those LGBT people who want to marry, it may mark a setback for those who live outside of marriage.[11] For this reason, *Obergefell* "inspired a flurry of scholarship on the topic of *nonmarriage*."[12]

Contemporary concern for those living outside of marriage carries a significant equality dimension too.[13] In 1967, when *Loving v. Virginia*[14] was decided, the overwhelming majority of adults married.[15] At that time, "there was virtually no difference by socio-economic status in the proclivity to marry."[16] Fifty years later, that is no longer the case. Today, nonmarital

10. 135 S. Ct. 2584 (2015).
11. *See, e.g.*, Melissa Murray, Obergefell v. Hodges *and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1211–12 (2016) ("As it explains, *Obergefell*, with its pro-marriage rhetoric, preempts the possibility of relationship and family pluralism in favor of a constitutional landscape in which marriage exists alone as the constitutionally protected option for family and relationship formation. In this regard, *Obergefell* does far more than venerate marriage for the purpose of democratizing access to that institution. Instead, it forecloses on the promise of greater constitutional protection for nonmarriage that *Lawrence* and its ilk offered."); Deborah A. Widiss, *Non-Marital Families and (or After?) Marriage Equality*, 42 FLA. ST. U. L. REV. 547, 552 (2015) ("*Windsor* rectifies a deep inequality in the law—that lawful same-sex marriages were denied federal recognition—but in so doing, it suggests that marriage is clearly superior to other family forms. Thus, in addressing one form of stigma, it reaffirms another.").
12. Albertina Antognini, *Against Nonmarital Exceptionalism*, 51 U.C. DAVIS L. REV. 1891, 1891 (2018) (emphasis added). *See also, e.g.*, Carbone & Cahn, *Nonmarriage*, *supra* note 4, at 114–17; Clare Huntington, Obergefell*'s Conservatism: Reifying Familial Fronts*, 84 FORDHAM L. REV. 23, 28–30 (2015) (arguing that the Court's opinion in *Obergefell* denigrates nonmarital families); Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 FORDHAM L. REV. 1509, 1526–29 (2016); Murray, *supra* note 11, at 1211–12, 1244 (arguing that the Court's decision in *Obergefell* "preempts the possibility of relationship and family pluralism" and "sound[s] the death knell . . . [for] a more pluralistic relationship-recognition regime"); Emily J. Stolzenberg, *The New Family Freedom*, 59 B.C. L. REV. 1983 (2018).
13. *See, e.g.*, Linda C. McClain, *The Other Marriage Equality Problem*, 93 B.U. L. REV. 921, 924 (2013) ("[T]he marriage equality problem that is captured in warnings about the growing class-based marriage divide and the 'diverging destinies' of children that flow from these emerging patterns of family life." (citing Sara McLanahan, *Diverging Destinies: How Children Are Faring Under the Second Demographic Transition*, 41 DEMOGRAPHY 607 (2004)).
14. 388 U.S. 1 (1967).
15. For example, in 1960, only nine percent of adults twenty-five and older had never married. Wendy Wang & Kim Parker, *Record Share of Americans Have Never Married*, PEW RES. CTR. (Sept. 24, 2014), http://www.pewsocialtrends.org/2014/09/24/record-share-of-americans-have-never-married/#fn-19804-1 [https://perma.cc/XZ88-22P2].
16. PEW RESEARCH CTR., THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES 23 (2010) [hereinafter THE DECLINE OF MARRIAGE] (noting that "76% of college graduates and 72% of adults who did not attend college were married in 1960"). *See also* Courtney G.

families are disproportionately likely to be lower-income and nonwhite,[17] and marriage is increasingly a marker of privilege.[18]

This Article offers critical insights into this important contemporary issue by reassessing how the law can best promote a vision of family-based autonomy.[19] It is important to clarify what I mean here by autonomy. The word "autonomy" is often used in a rigidly individualistic sense. Here, in contrast, I am referring to a relational concept of autonomy.[20] I do so because the choice that I am concerned about is the choice *to form a family*, and families are inherently relational. This Article thus considers which rules best recognize and protect the functional family associations that people chose to form with other people. This Article does so by intervening in an important ongoing scholarly conversation about the economic rights of nonmarital partners.[21]

Today, the law no longer criminalizes the choice to form a nonmarital partnership.[22] But the law still largely fails to meaningfully recognize and respect these relationships once they are formed. This is certainly true with

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Joslin & Lawrence C. Levine, *The Restatement of Gay(?)*, 79 BROOK. L. REV. 621, 639 (2014).

17. THE DECLINE OF MARRIAGE, *supra* note 16, at 2.

18. JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 19 (2014) [hereinafter CARBONE & CAHN, MARRIAGE MARKETS] ("Marriage, once universal, once the subject of rebellion, has emerged as a marker of the new class lines remaking American society. Stable unions have become a hallmark of privilege.").

19. Although the concept of "autonomy," including family autonomy, has a constitutional dimension, this Article uses the term in a broader sense. That is, this Article considers how the law—whether that law is grounded in constitutional, statutory, or public policy principles—can best protect and support choice in family form.

20. *Cf.* Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 637 (1980) ("It is the choice to form and maintain an intimate association that permits full realization of the associational values we cherish most.").

21. *See, e.g.*, Erez Aloni, *The Puzzle of Family Law Pluralism*, 39 HARV. J.L. & GENDER 317 (2016); Antognini, *supra* note 12; Carbone & Cahn, *Nonmarriage*, *supra* note 4, at 114–17; Matsumura, *Intimate Regulation*, *supra* note 1; Stolzenberg, *supra* note 12.

The interest in this question is not limited to academic scholars. In July 2018, the Uniform Law Commission approved the creation of a committee to draft a uniform law on the "Economic Rights of Unmarried Cohabitants." *See, e.g.*, *Committees: Economic Rights of Unmarried Cohabitants*, UNIFORM LAW COMMISSION, http://www.uniformlaws.org/Committee.aspx?title=Economic%20Rights%20of%20Unmarried%20Cohabitants [https://perma.cc/XVG4-PAY3].

22. Lawrence v. Texas, 539 U.S. 558 (2003); *see, e.g.*, Martin v. Ziherl, 607 S.E.2d 367, 371 (Va. 2005) ("[S]ubjecting certain private sexual conduct between two consenting adults to criminal penalties . . . infringes on the rights of adults to 'engage in the private conduct in the exercise of their liberty . . . .'" (quoting *Lawrence*, 539 U.S. at 564)).

regard to inter se economic rights. Consider the case of Joann Carney and Christopher Hansell. Joann and Christopher lived together from January 1985 until 2001.[23] At the time they met, Joann was not employed and was "living off the remains of a personal injury settlement [she] received 2 years earlier."[24] Joann suffered from Berger's Disease (a kidney disease) and used a prosthetic leg.[25] About six months after they began living together, in June 1985, Joann gave birth to the parties' son Joseph.[26] Throughout their relationship, Joann was in charge of maintaining the house that was purchased during their relationship, doing the "laundry, food shopping, cooking, and [providing] the primary care of their son."[27] Joann used funds from her disability check to pay for groceries, clothes for their son, and other household needs.[28] Over the course of their relationship, the parties also developed a towing business.[29] Joann handled "much of the paperwork for the business," as well as the dispatch calls, she went to court to "prosecute bad checks, she picked up parts from auto parts dealers, and she prepared monthly invoices."[30] Until 1993, Joann did not receive any payment for her services.[31] After 1993, she received $60 per week for her work. In 1995, her salary was increased to $100 per week.[32] Although Joann was "deeply involved in the business," Christopher "went to great lengths" to keep the business solely in his name.[33] When the parties finally separated, all of the parties' assets were in Christopher's name; "plaintiff had no assets except her personal effects and her monthly SSI disability check."[34]

If Joann and Christopher had been married, rights and obligations would arise between the parties by virtue of their marriage. Joann would be entitled to an equal or an equitable share of the assets accumulated during their sixteen-year relationship and likely an award of spousal support. In the absence of a formal premarital agreement opting out of the rules, spouses are entitled to an equal or an equitable share of the available estate upon

23. Carney v. Hansell, 831 A.2d 128, 130, 137 (N.J. Super. Ct. Ch. Div. 2003).
24. *Id.* at 130.
25. *Id.*
26. *Id.*
27. *Id.* at 131.
28. *Id.*
29. *Id.*
30. *Id.* at 131–32.
31. *Id.* at 135.
32. *Id.*
33. *Id.* at 132.
34. *Id.* at 133.

divorce.[35] In addition, all states permit spouses to seek an award of spousal support upon divorce.[36]

But Joann and Christopher were not married. As a result, the parties were treated as legal strangers and all Joann received was compensation at minimum-wage standards for her unpaid service at the towing business and reimbursement for her car that Christopher refused to return.[37] Joann was not even entitled to compensation for her sixteen years of domestic services because, the court said, "she received the benefit of the bargain of her relationship."[38]

Courts and scholars long have grappled with the question of how to resolve economic claims of former unmarried partners like Joann and Christopher.[39] Until the 1970s, many courts refused to permit former nonmarital partners to pursue any claims for recovery upon dissolution. Sexual relationships outside of marriage were criminalized in most states.[40] Given that they were not only partners in life but also partners in crime, courts reasoned, enforcement of an agreement between them would violate public policy. As the Illinois Supreme Court put it: "An agreement in consideration of future illicit cohabitation between the parties is void."[41]

The California Supreme Court's 1976 decision in *Marvin v. Marvin* marked an important shift in the law.[42] *Marvin*, the rule applied in Joann and

35. *See* Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1230 ("Although variations exist among the states, every state's default approach is now designed to effectuate an equal or equitable division of all property accumulated from wages during marriage, regardless of the title of that property." (footnotes omitted)).
36. *See* Robert Kirkman Collins, *The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony*, 24 HARV. WOMEN'S L.J. 23 (2001) (surveying alimony statutes in all fifty states). In practice, however, a spousal support award is increasingly difficult to get. *See* Marsha Garrison, *The Economics of Divorce: Changing Rules, Changing Results, in* DIVORCE REFORM AT THE CROSSROADS 75, 84 (Stephen D. Sugarman & Herma Hill Kay eds., 1990) (finding a substantial reduction in the frequency of alimony awards, even for very long-term marriages).
37. *Carney*, 831 A.2d at 137.
38. *Id.* at 135.
39. *See, e.g.*, Carol S. Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers' Services*, 10 FAM. L.Q. 101 (1976); Herma Hill Kay & Carol Amyx, Marvin v. Marvin*: Preserving the Options*, 65 CALIF. L. REV. 937 (1977).
40. *See* BOWMAN, *infra* note 59, at 13–20; Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 579 (2013) ("Before the 1970s, cohabitation was not just rare and regarded as deviant, but was unlawful as a result of criminal sanctions against cohabitation as well as widespread laws criminalizing fornication.").
41. Wallace v. Rappleye, 103 Ill. 229, 249 (1882).
42. 557 P.2d 106 (Cal. 1976); *see also* Garrison, *Marriage Matters*, *supra* note 6, at 305 ("Twenty-five years ago, the *Marvin* decision and its progeny stood the law of

Christopher's case, rejected the "no recovery" approach.[43] Instead, under *Marvin*, unmarried cohabitants are treated as legal strangers.[44] No rights arise by virtue of the relationship itself.[45] Rather, the law simply allows the former partners to pursue claims based on contract or, possibly, equitable theories that are available to any other legal stranger.[46] In this way, the law renders these families invisible, they are nonfamilies, and the parties in these nonfamilies are entitled to no protection, unless they affirmatively choose to extend protection to each other. The rules for determining whether one is in a family or not look only to a very limited set of formality-based decisions and exclude from consideration an enormous range of facts about the reality of their lives. *Marvin*'s contract-based approach still accurately describes the dominant approach today, over forty years later.[47]

Again, in theory, *Marvin* treats former nonmarital partners like other legal strangers.[48] In practice, however, the protection often is less than what is

nonmarital cohabitation on its head. The law's prior inhibitory approach, which disallowed even explicit agreements between cohabitants, gave way to a contractual model that permits the parties both to enforce their understandings and to rely on an extensive battery of quasicontractual remedies." (footnote omitted)).

43. *Marvin*, 557 P.2d at 122 ("In summary, we believe that the prevalence of nonmarital relationships in modern society and the social acceptance of them, marks this as a time when our courts should by no means apply the doctrine of the unlawfulness of the so-called meretricious relationship to the instant case.").

44. *Id.* at 121 ("We need not treat nonmarital partners as putatively married persons in order to apply principles of implied contract, or extend equitable remedies; we need to treat them only as we do any other unmarried persons.); *see also id.* at 116 ("In summary, we base our opinion on the principle that adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights.").

45. *See, e.g.*, Sands v. Menard, 904 N.W.2d 789, 801 (Wis. 2017) ("*Watts* simply provided that cohabitation between unmarried romantic partners is not a bar to an otherwise valid claim of unjust enrichment. It did not provide that the romantic relationship created the claim for relief.").

46. Ira Mark Ellman, *"Contract Thinking" Was* Marvin*'s Fatal Flaw*, 76 NOTRE DAME L. REV. 1365, 1365 (2001) ("*Marvin v. Marvin* held that claims that unmarried partners might have against one another at the conclusion of their relationship would be governed primarily by principles of contract law." (footnote omitted)). As discussed in more detail in Part I.A, *infra*, some states also permit nonmarital cohabitants to pursue claims in implied contract or under equitable theories, but plaintiffs rarely prevail under these theories.

47. D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW 401 (6th ed. 2016) ("The majority follows *Marvin* in recognizing express and implied agreements as well as equitable remedies."); Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309, 315 (2008) [hereinafter Garrison, *Nonmarital Cohabitation*] ("Today, *Marvin* represents, at least in the United States, the dominant approach to cohabitant claims.").

48. *See, e.g.*, Salzman v. Bachrach, 996 P.2d 1263, 1268–69 (Colo. 2000) ("We find these authorities persuasive and agree that cohabitation and sexual relations alone do not

available to other third parties. Courts tend to be wary of peering too closely into the nature of intimate relationships. As a result, courts generally require a higher degree of proof in cases involving former nonmarital partners than is required in cases involving former nonintimate partners. Moreover, most courts refuse to grant relief for one of the most common types of exchanges that happen in these relationships—the provision of homemaking and caretaking services. In this way, while the relationship is legally irrelevant for purposes of claiming protection, it often serves as a factual basis for denying otherwise available remedies.

Over the years, pro–[49] and anti–*Marvin*[50] camps emerged. The leading scholarly defenses of *Marvin* sound in the register of autonomy. The institution of marriage played an important role in reproducing race- and sex-based inequalities.[51] Family members should be able to reject this baggage-laden institution and choose other relationship forms, the argument continues. If they reject marriage, the law ought to give effect to that choice. *Marvin*, these scholars argue, best vindicates these goals by allowing families to reject marriage as well as the financial rules that apply to married spouses. This regime, scholars continue, also vindicates equality concerns. In the past, the law rigidly enforced gender-based roles in marriage. Although many of these rules regulating the relationship between husbands and wives have been eliminated, vestiges of coverture continue to shape marital relationships.[52] Families living outside this structure, the argument continues, are freed from this history. In this way, choice in family form fosters the evolution of more egalitarian family relationships.

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suspend contract and equity principles. We do caution, however, that mere cohabitation does not trigger any marital rights. A court should not decline to provide relief to parties in dispute merely because their dispute arose in relationship to cohabitation. Rather, the court should determine—as with any other parties—whether general contract laws and equitable rules apply." (footnote omitted)).

49. *See, e.g.*, Marsha Garrison, *Is Consent Necessary?*, *supra* note 4, at 896 (arguing that, at least as of 2005, the current legal regime "recognizes and honors the individual choices that cohabitants and married couples have made"); Scott, *supra* note 4, at 333–34; Carbone & Cahn, *Nonmarriage*, *supra* note 4.

50. *See, e.g.*, Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125 (1981); Ellman, *supra* note 46.

51. *See, e.g.*, Loving v. Virginia, 388 U.S. 1, 11 (1967) (noting that Virginia's anti-miscegenation law was "designed to maintain White Supremacy"); Christopher R. Leslie, *Dissenting From History: The False Narratives of the* Obergefell *Dissents*, 92 IND. L.J. 1007, 1014 (2017) ("American states historically defined the institution of marriage in a manner that legally subordinated wives to their husbands.").

52. *See, e.g.*, JILL ELAINE HASDAY, FAMILY LAW REIMAGINED 5 (2014) ("But common law doctrines and presumptions that favored husbands over wives . . . still shape family law in important respects.").

This Article offers a novel and important intervention into this longstanding debate about the economic rights of former nonmarital partners. Like many *Marvin* defenders, I strongly support choice in family form and the creation of a range of family options. I also support equality within families and between different kinds of families. But drawing on a careful analysis of a related but distinct body of law, nonmarital parentage law, this Article argues that the conventional doctrine undermines rather than furthers these goals. The law treats anyone other than a marital partner as a nonfamily member. If formally expressed relationships—that is, marital ones—are the only relationships that are treated by the law as families, then choice in family form is not meaningful choice. For that choice to be meaningful, the law must recognize a range of different kinds of families *as families*. Moreover, in assessing one's choice to form a family, the law must allow for consideration of a wider array of facts and factors that more accurately reflect the realities of people's lives.

In the past, parentage law followed a similar rigid, formality-based model. Initially, marriage was essential; no parental rights were extended to nonmarital partners.[53] Over time, the law evolved to provide ways of establishing parentage for nonmarital partners. But these means, like those we see in the economic realm, turned on formal markers. Parentage could be established by proof of biological parentage, subsequent marriage to the child's mother, or proof of an adoption. Here too, the defense of this rigid, formality-based regime sounded in autonomy. Parents have a liberty interest in their relationships with their children, defenders argued. To best respect that autonomy interest, courts must not extend parental rights in the absence of consent as expressed through formal mechanisms.

Recently, however, there has been a strong trend away from these rigid, formalistic parentage rules. Over time, it became clear that many people who viewed themselves as parents and were viewed as parents by others were treated as legal strangers with no rights or obligations to the child under such a system. This was true even in cases in which the legal parent invited the functional parent into the family and encouraged that person to form a familial parent-child relationship. Eventually courts came to appreciate that treating such people as legal strangers flouted rather than furthered respect for the parties' family-creation decisions.

53. *See, e.g.*, Douglas NeJaime, *The Nature of Parenthood*, 126 YALE L.J. 2260, 2271 (2017) [hereinafter NeJaime, *Nature of Parenthood*].

In their place, courts and policymakers embraced more capacious parentage rules that recognize, value, and respect chosen family relationships. This Article posits that similar principles should apply to the horizontal adult-adult relationships. Rules that recognize, respect, and protect the familial relationships people actually create best respect and give substance to a vision of family autonomy.

Next, the Article defends this position by responding to likely critiques. Some may argue that principles developed in the vertical parent-child context should not be applied to horizontal adult-adult relationships. Parentage cases involve third parties and important ones at that: children. When the needs and welfare of children are at stake, one may argue, it may be necessary to override adult autonomy interests. While it is indeed true that parentage cases involve children, that argument does not accurately describe the evolution of the parentage doctrine on which I draw. Contemporary parentage law recognizes functional parent-child relationships because that result protects the child and, simultaneously, respects and protects the family-related choices of the adults.

Others may argue that while adults often inadvertently fail to formalize actual parent-child relationships, they are less likely to do so with respect to their own economic rights. Hence, here, more meaning and weight should be accorded to the adults' failure to take those formal steps. Here the Article draws on newly available empirical data finding that key assumptions about the mutual deliberateness of relationship status in these families are inaccurate, or at least overstated. These studies report that the "failure" to transition to marriage often is *not* the result of an express, mutual decision to reject marriage. Instead, as one sees in many of the parentage cases, the failure to formalize a functional family-relationship is often the result of other factors, including the parties' lack of understanding regarding the need to undertake that formality and, more generally, life circumstances that inhibit their ability to complete the formality. Moreover, the data shows that when failure to transition to marriage *is* the result of a deliberate decision to reject marriage, the process tends to occur in gender-typical ways. To use the words of sociologists Sharon Sassler and Amanda Miller, "[p]erhaps nowhere do normative gendered expectations appear more strongly than in expectations

for marriage proposals."[54] To put it another way, men's preferences tend to carry more weight with respect to the decision to transition to marriage.[55]

Others may claim that alternatives would be too difficult to administer. Here, the Article draws on developments in the law of nonmarital parentage, as well as on an almost entirely overlooked body of law about nonmarital adult-adult relationships—what I call "interstitial marriage cases." Interstitial marriage cases are property division cases involving couples whose relationships include periods of both marriage and nonmarriage. In these interstitial marriage cases, courts are increasingly giving effect to the relationships that the parties created in fact, even when they are not marked by formalities. In this way, these cases concretely illustrate how courts are capable of assessing informal family relationships.[56]

Finally, after offering a case for change, this Article begins to chart a new path forward. There are existing alternatives from which to draw. These include the American Law Institute (ALI) Principles of the Law of Family Dissolution,[57] Washington state's intimate committed relationship doctrine,[58]

54. SHARON SASSLER & AMANDA JAYNE MILLER, COHABITATION NATION: GENDER, CLASS, AND THE REMAKING OF RELATIONSHIPS 161 (2017) [hereinafter SASSLER & MILLER, COHABITATION NATION].

55. *See* Susan L. Brown, *Union Transitions Among Cohabitors: The Significance of Relationship Assessments and Expectations*, 62 J. MARRIAGE & FAM. 833, 843 (2000) (finding that "male partner preferences for the future of the relationship hold more weight than female partner preferences"; s*ee also* Sharon Sassler & Amanda J. Miller, *Waiting to Be Asked: Gender, Power, and Relationship Progression Among Cohabiting Couples*, 32 J. FAM. ISSUES 482, 497 (2011) [hereinafter Sassler & Miller, *Waiting to Be Asked*] (finding that most cohabitants believe that the man should "pop the question").

56. Elsewhere, I argue that the marriage equality decisions along with the other decisions in the gay rights canon can be read to support rather than foreclose constitutional protection for those living outside of marriage. *See* Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425 (2017) [hereinafter Joslin, *Right to Nonmarriage*]. For a careful examination of how developments with regard to marital parentage were leveraged to expand principles of nonmarital parentage, see Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185 (2016) [hereinafter NeJaime, *New Parenthood*].

57. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6 (AM. LAW INST. 2002).

58. *See, e.g.*, *In re* Marriage of Lindsey, 678 P.2d 328 (Wash. 1984) (applying the "meretricious relationship" doctrine). The "meretricious relationship" doctrine has since been renamed the "committed intimate" relationship doctrine. Olver v. Fowler, 168 P.3d 348, 350 n.1, 357–58 (Wash. 2007) (Sanders, J., dissenting) (noting that the majority used a new term, "committed intimate relationship," to refer to what had previously been called a meretricious relationship); Matsumura, *Intimate Regulation*, *supra* note 1, at 1041–42.

and models developed by scholars and those applied in foreign jurisdictions.[59] The goal of this Article is not to identify the specific alternative rule that should be applied. Rather, given the complexity of the issue, having some state-to-state variation and experimentation in this area of law is helpful.[60] Nonetheless, the concluding Part sets forth key principles to guide the path forward.

This Article accomplishes two key goals. First, this Article offers a novel and important lens through which to consider a timely and important issue: the economic rights of nonmarital partners. Defenses of the conventional rule that treats cohabitants as strangers typically sound in the register of "autonomy." By carefully mining the related but distinct law of nonmarital parentage, I demonstrate that the current doctrine undermines rather than furthers family autonomy.

Second, this Article draws on nonmarital parentage law, as well as the almost entirely overlooked body of interstitial marriage cases, to demonstrate that courts are capable of adjudicating property claims arising out of periods of nonmarriage. In this way, marriage-related developments can be utilized to expand rather than to forestall the law of nonmarriage.

I. THE CONVENTIONAL DOCTRINE

A. In Theory

In *Marvin v. Marvin*, the California Supreme Court held that nonmarital cohabitants could pursue remedies in express contract and implied contract, and under principles of equity.[61] Previously, many states refused to provide any remedies to former cohabiting partners.[62] Historically, having sex and/or forming adult-adult relationships outside of marriage was a crime. Indeed,

59. Blumberg, *supra* note 50; Ellman, *supra* note 46; CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY (2010); Matsumura, *Intimate Regulation*, *supra* note 1, at 1063–64 (proposing a consent-based rule that "elevates the partners' conduct over their privately held intentions").

60. Courtney G. Joslin, *Federalism and Family Status*, 90 IND. L.J. 787, 816 (2015) [hereinafter Joslin, *Family Status*] (discussing when local experimentation is appropriate in the realm of family law). As I explain, state-level experimentation can be particularly helpful in the area of family law, as the law and life of families is quite dynamic. As a result, it is sometimes not entirely clear what the best set of rules are with respect to a newly emerging legal issue. *Id.* at 819–20.

61. Marvin v. Marvin, 557 P.2d 106, 122 (Cal. 1976).

62. *See, e.g.*, Wallace v. Rappleye, 103 Ill. 229, 262 (1882).

cohabitation remained a crime in many states through the 1970s.[63] Courts reasoned that enforcing a contract between parties who were engaging in criminal conduct would be violation of public policy. As the Illinois Supreme Court wrote in 1882, "[a]n agreement in consideration of future illicit cohabitation between the parties is void."[64]

At the time it was decided, *Marvin* represented an important advancement. *Marvin* acknowledged the existence of nonmarital families and declared that their relationships and the individuals in them were not inherently criminal. This move was surely important and should not be overlooked. But it is also important not to overstate or misunderstand the protection that *Marvin* provides. *Marvin* simply allows nonmarital partners to be treated like other legal strangers.

This is a distinctly different approach than is applied to marital couples. In the absence of an agreement opting out of the rules, all fifty states impose a default requirement of sharing on spouses at the time of divorce.[65] Spouses are entitled to an equal or an equitable share of the available estate upon divorce.[66] All fifty states also permit a spouse to seek an award of spousal support upon divorce.[67] These rights arise automatically, by virtue of the relationship. These rules are premised on a principle that their relationship is mutual, involving give and take, reliance, and support. Accordingly, spouses share the fruits of their relationship with each other.

A very different set of rules applies to nonmarital couples. *Marvin* removed the barrier that prevented nonmarital cohabitants from asserting claims that other nonspouses could assert. But, *as is true with all other legal strangers*, the default rule that applies to nonmarital partners is one of no sharing. As is true with other legal strangers, this default can be overcome by evidence of a sufficiently definite agreement to the contrary. Because few couples enter into such agreements, however, most parties simply walk away with what they are on title to, with maybe a claim for reimbursement for financial contributions or for nondomestic services provided. This was the

63. BOWMAN, *supra* note 59, at 15 ("[M]any states still had statutes against . . . cohabitation as late as 1978.").
64. *Wallace*, 103 Ill. at 249.
65. *See, e.g.*, Rosenbury, *supra* note 35, at 1230 ("Although variations exist among the states, every state's default approach is now designed to effectuate an equal or equitable division of all property accumulated from wages during marriage, regardless of the title of that property." (footnotes omitted)).
66. *Id.*
67. *See supra* note 36 and accompanying text.

basic scheme that *Marvin* endorsed in 1976.[68] And for couples who never marry, the law has remained largely stagnant since then; *Marvin* remains the dominant approach to nonmarital property division claims in the United States.[69]

There is, however, some state-to-state variation in its application. A plurality of states fully embrace *Marvin*'s approach permitting claims as between former cohabitants based on express contract, implied contract, and equitable theories.[70] These jurisdictions include, but are not limited to, Alaska,[71] Arizona,[72] Arkansas,[73] Colorado,[74] Connecticut,[75] Indiana,[76] Iowa,[77]

68. *See supra* notes 39–41 and accompanying text.
69. WEISBERG & APPLETON, *supra* note 47, at 401; Garrison, *Nonmarital Cohabitation*, *supra* note 47, at 315.
70. *See, e.g.*, WEISBERG & APPLETON, *supra* note 47, at 401.
71. *See, e.g.*, Levar v. Elkins, 604 P.2d 602, 604 (Alaska 1980).
72. *See, e.g.*, Maguire v. Coltrell, No. 14-01255, 2015 WL 6168417, at *5 (D. Ariz. Oct. 21, 2015) (suggesting that nonmarital cohabitants can pursue claims under theories of express contract, implied contract, and under their equitable theory of unjust enrichment).
73. Rippee v. Walters, 40 S.W.3d 823 (Ark. Ct. App. 2001) (denying relief based on the facts of the case, but suggesting that claims based on express contract, implied contract, and the equitable theory of constructive trust are available).
74. Salzman v. Bachrach, 996 P.2d 1263, 1267 (Colo. 2000) ("Although we find the rule of law in these earlier cases persuasive to some degree, social norms and behaviors have changed to such an extent that we now join the majority of courts in other states in holding that nonmarried cohabiting couples may legally contract with each other so long as sexual relations are merely incidental to the agreement. Furthermore, such couples may ask a court for assistance, in law or in equity, to enforce such agreements.").
75. Boland v. Catalano, 521 A.2d 142, 146 (Conn. 1987) ("[T]he courts should enforce express contracts between nonmarital partners except to the extent that the contract is explicitly founded on the consideration of meretricious sexual services. . . . In the absence of an express contract, the courts should inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract, agreement of partnership or joint venture, or some other tacit understanding between the parties. The courts may also employ the doctrine of quantum meruit, or equitable remedies such as constructive or resulting trusts, when warranted by the facts of the case." (quoting Marvin v. Marvin, 557 P.2d 106 (Cal. 1976))).
76. McMahel v. Deaton, 61 N.E.3d 336, 345 (Ind. Ct. App. 2016), *transfer denied*, 76 N.E.3d 142 (Ind. 2017) (affirming the prior rule that "a party who cohabitates with another without subsequent marriage is entitled to relief upon a showing of an express contract or a viable equitable theory such as an implied contract or unjust enrichment.").
77. Shold v. Goro, 449 N.W.2d 372, 373 (Iowa 1989) ("Nonmarital cohabitation does not render every agreement between the cohabiting parties illegal and does not automatically preclude one of the parties from seeking judicial relief, such as statutory or common law partition, damages for breach of express or implied contract, constructive trust and quantum meruit where the party alleges, and later proves, facts supporting the legal theory. The issue for the court in each case is whether the

Kansas,[78] Massachusetts,[79] Missouri,[80] Nevada,[81] New Hampshire,[82] North Carolina,[83] Pennsylvania,[84] and Wisconsin.[85]

Other jurisdictions permit unmarried cohabitants to pursue some but not all of these claims that are typically available to legal strangers. For example, another group of states permit oral and written contract claims, but not equitable remedies.[86] New York, for example, seems to fall into this category.[87] Another group of states only permit claims based on written contracts.[88] Take Minnesota. By statute, a contract between unmarried cohabitants is enforceable "only if . . . the contract is written and signed by the

complaining party has set forth any legally cognizable claim." (quoting Watts v. Watts, 405 N.W. 2d 303, 306 (Wis. 1987))).

78. Ellis v. Berry, 867 P.2d 1063, 1065–66 (Kan. Ct. App. 1993).

79. Bonina v. Sheppard, 78 N.E.3d 128, 132 (Mass. App. Ct.) ("Unmarried cohabitants . . . 'may lawfully contract concerning property, financial, and other matters relevant to their relationship.' Equitable relief is also available, including restitution for unjust enrichment." (quoting Wilcox v. Trautz, 693 N.E.2d 141, 146 (Mass. 1998)).

80. Johnson v. Estate of McFarlin *ex rel.* Lindstrom, 334 S.W.3d 469, 474 (Mo. Ct. App. 2010).

81. Hay v. Hay, 678 P.2d 672, 674 (Nev. 1984) ("We agree that the remedies set forth in *Marvin* are available to unmarried cohabitants."); *see also* W. States Constr., Inc. v. Michoff, 840 P.2d 1220, 1224 (Nev. 1992) ("Unmarried couples who cohabit have the same rights to lawfully contract with each other regarding their property as do other unmarried individuals. . . . Thus this court must protect the reasonable expectations of unmarried cohabitants with respect to transactions concerning their property rights. We therefore adopted, in *Hay*, the rule that unmarried cohabitants will not be denied access to the courts to make property claims against each other merely because they are not married." (citation omitted)).

82. Tapley v. Tapley, 449 A.2d 1218, 1220 (N.H. 1982).

83. Collins v. Davis, 315 S.E.2d 759, 762 (N.C. Ct. App.), *aff'd per curiam*, 321 S.E.2d 892 (N.C. 1984) ("So while we disapprove of plaintiff's breach of his marital vows to his former wife, who is not involved in this case, and his immoral liason [sic] with the defendant, we nevertheless are constrained to hold that neither the doors of law nor equity are closed to him in this case.").

84. Knauer v. Knauer, 470 A.2d 553, 565 (Pa. Super. Ct. 1983).

85. Watts v. Watts, 405 N.W.2d 303, 306 (Wis. 1987) ("Nonmarital cohabitation does not render every agreement between the cohabiting parties illegal and does not automatically preclude one of the parties from seeking judicial relief, such as statutory or common law partition, damages for breach of express or implied contract, constructive trust and quantum meruit where the party alleges, and later proves, facts supporting the legal theory.").

86. *See, e.g.*, WEISBERG & APPLETON, *supra* note 47, at 401.

87. Morone v. Morone, 413 N.E.2d 1154, 1156 (N.Y. 1980). *But see* Minieri v. Knittel, 727 N.Y.S.2d 872, 874–75 (N.Y. Sup. Ct. 2001) (suggesting that a constructive trust remedy may be available).

88. *See, e.g.*, WEISBERG & APPLETON, *supra* note 47, at 401.

parties."[89] This is also the approach taken by New Jersey and Texas, which likewise have statutes providing that a cohabitation agreement is enforceable only if in writing.[90]

Finally, there are still a few jurisdictions that permit no or only a very limited set of claims as between unmarried cohabitants. These jurisdictions include Georgia,[91] Illinois,[92] and Louisiana.[93] Mississippi used to be in this category.[94] But in 2013, the Mississippi Supreme Court held that while state

89. MINN. STAT. § 513.075 (2016). *See also* TEX. BUS. & COM. CODE ANN. § 26.01 (Vernon 2015) (providing that "an agreement made on consideration of . . . nonmarital conjugal cohabitation" is "not enforceable unless . . . it . . . is . . . in writing and signed by the person to be charged with the promise or agreement").

90. MINN. STAT. § 513.075 (2016) ("If sexual relations between the parties are contemplated, a contract between a man and a woman who are living together in this state out of wedlock, or who are about to commence living together in this state out of wedlock, is enforceable as to terms concerning the property and financial relations of the parties only if: (1) the contract is written and signed by the parties; and (2) enforcement is sought after termination of the relationship."); N.J. STAT. ANN. § 25:1–5 (2010) ("No action shall be brought upon any of the following agreements or promises, unless the agreement or promise, upon which such action shall be brought or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person thereunto by him lawfully authorized: . . . (h) A promise by one party to a non-marital personal relationship to provide support or other consideration for the other party, either during the course of such relationship or after its termination. For the purposes of this subsection, no such written promise is binding unless it was made with the independent advice of counsel for both parties."); TEX. BUS. & COM. CODE ANN. § 26.01 (Vernon 2015) ("(a) A promise or agreement described in Subsection (b) of this section is not enforceable unless the promise or agreement, or a memorandum of it, is (1) in writing; and (2) signed by the person to be charged with the promise or agreement or by someone lawfully authorized to sign for him. (b) Subsection (a) of this section applies to: . . . (3) an agreement made on consideration of marriage or on consideration of nonmarital conjugal cohabitation.").

91. Long v. Marino, 441 S.E.2d 475, 476 (Ga. Ct. App. 1994) ("Meretricious sexual relationships are by nature repugnant to social stability, and our courts have on sound public policy declined to reward them by allowing a money recovery therefor.").

92. Blumenthal v. Brewer, 69 N.E.3d 834, 856 (Ill. 2016) ("Our decision in *Hewitt* bars such relief if the claim is not independent from the parties' living in a marriage-like relationship for the reason it contravenes the public policy, implicit in the statutory scheme of the Marriage and Dissolution Act, disfavoring the grant of mutually enforceable property rights to knowingly unmarried cohabitants.").

93. Schwegmann v. Schwegmann, 441 So. 2d 316, 322 (La. Ct. App. 1983) (providing that "even if the alleged agreement was not required to be in writing [which it was not], it would be unenforceable because it is a meretricious one."). *But cf. id.* at 325 (reaffirming that nonmarital cohabitants can pursue claims arising out of a "commercial enterprise [if that commercial enterprise] is independent of the illegal cohabitation" (quoting Guerin v. Bonaventure, 212 So. 2d 459, 461 (La. Ct. App. 1968))).

94. *See, e.g.*, Davis v. Davis, 643 So. 2d 931, 936 (Miss. 1994) ("When opportunity knocks, one must answer its call. Elvis Davis failed to do so and thus her claim is all for naught. Our legislature has not extended the rights enjoyed by married people to those who

law does not extend "the rights of married persons to cohabitants," it also does not preclude a nonmarital cohabitant from recovering under a theory of "unjust enrichment based upon her monetary contributions" during a nonmarital cohabitation.[95] On the other end of the spectrum, one or two states extend marriage-like rights and protections based on proof of a sufficiently committed, interdependent nonmarital relationship.[96]

Again, *Marvin* marked an important shift in the law. *Marvin* rejected the prior approach to nonmarital cohabitant claims, under which any agreements between the parties were considered inherently illegal and outside the protection of the law. That said, it is important not to overstate what *Marvin* does. *Marvin* simply removed the barrier that had denied nonmarital cohabitants the right to pursue the claims that were available to any other nonspouses. In other words, in its most robust formulation, *Marvin* merely allows cohabitants to assert a variety of claims that are available to any other third party.[97] No rights arise out of the nonmarital relationship itself; that is, the relationship is legally irrelevant. As the Wisconsin Supreme Court recently put it:

> That [the cohabitants] were romantic cohabitants is not central to the merits of [the plaintiff's] unjust enrichment claim. For example, if [the defendant], instead, had a joint enterprise to accumulate wealth with his sister, mom or next door neighbor who provided necessary child care, domestic services and part-time office help, an unjust enrichment claim by that person would require the same proof as [the case law as established in *Watts v. Watts*] required of [the female cohabitant]. *Watts* simply provided that cohabitation between unmarried romantic partners is not a

choose merely to cohabit. To the contrary, cohabitation is still prohibited by statute. Elvis was well-compensated during and after the relationship. We see no reason to advocate any form of 'palimony' when the legislature has not so spoken.").

95. Cates v. Swain, 215 So. 3d 492, 495 (Miss. 2013).

96. *See, e.g.*, W. States Constr., Inc. v. Michoff, 840 P.2d 1220, 1223 (Nev. 1992) (holding that the complaint stated a cause of action "for breach of an express and an implied contract to acquire and hold property as though the parties were married."); Connell v. Francisco, 898 P.2d 831, 835–36 (Wash. 1995) (recognizing "meretricious relationship" doctrine). The "meretricious relationship" doctrine is now referred to as the intimate committed relationship doctrine in Washington. *See, e.g.*, *In re* Long & Fregeau, 244 P.3d 26, 27 (Wash. Ct. App. 2010). Some scholars suggest that Alaska may also fall into this category. *See* Antognini, *supra* note 12, at 1912 n.85 (citing Bishop v. Clark, 54 P.3d 804, 810–11 (Alaska 2002)).

97. As noted above, there is some state-to-state variation in the adoption of *Marvin*. Some states embrace all of the theories approved of in *Marvin*. Other states permit a more limited range of potential claims as between unmarried cohabitants.

> bar to an otherwise valid claim of unjust enrichment. It did not provide that the romantic relationship created the claim for relief.[98]

In this way, *Marvin* shifted nonmarital cohabitants from the status of criminals to that of legal strangers. That is the status they retain today.

B. In Practice

Again, in theory, unmarried partners are now treated like legal strangers. In practice, however, these doctrines are often less protective when the claimant is a former nonmarital partner. For this and other reasons, former nonmarital partners "have not had an impressive record of success in the post–*Marvin* period."[99] The impact of this failure rate is not felt evenly across the class of nonmarital cohabitants: Women disproportionately lose out under this regime.

Written agreement between cohabitants to share will be enforced in most states. Take *Posik v. Layton*, in which the Florida Court of Appeal enforced a written agreement between two same-sex cohabitants.[100] The

98. Sands v. Menard, 904 N.W.2d 789, 801 (Wis. 2017). *See also* Salzman v. Bachrach, 996 P.2d 1263, 1268–69 (Colo. 2000) ("We find these authorities persuasive and agree that cohabitation and sexual relations alone do not suspend contract and equity principles. We do caution, however, that mere cohabitation does not trigger any marital rights. A court should not decline to provide relief to parties in dispute merely because their dispute arose in relationship to cohabitation. Rather, the court should determine—as with any other parties—whether general contract laws and equitable rules apply." (footnote omitted)).

In urging the Illinois Supreme Court to finally adopt *Marvin*, the nonmarital cohabitant in *Blumenthal v. Brewer* made the point directly. In the case, the former cohabitant urged the Illinois Supreme Court to reject its earlier decision in *Hewitt v. Hewitt*, 94 N.E.2d 1204 (Ill. 1979). As she explained, in so doing, all she was asking the court to do was to allow her to bring the same claims that "any two other individuals who are not in an intimate relationship would be allowed to bring." Defendant-Appellant Eileen M. Brewer's Opening Brief and Appendix at 9, Blumenthal v. Brewer, 69 N.E.3d 834 (Ill. 2016) (No. 13–2250). In the end, the court rejected her plea and affirmed the holding of *Hewitt*. Blumenthal v. Brewer, 69 N.E.3d 834, 856 (Ill. 2016) ("Our decision in *Hewitt* bars [any claims for] relief if the claim is not independent from the parties' living in a marriage-like relationship for the reason it contravenes the public policy.").

99. Scott, *supra* note 4, at 331–49. *See also* Garrison, *Nonmarital Cohabitation*, *supra* note 47, at 319 ("California courts have treated the evidentiary requirements implied in *Marvin* very seriously. [Thus] there are [few] reported appellate decisions upholding judgments in favor of *Marvin* plaintiffs, [and] there are more decisions affirming judgments against *Marvin* plaintiffs where the trial court found insufficient evidence of a cohabitation agreement or unjust enrichment." (citations omitted)).

100. Posik v. Layton, 695 So. 2d 759 (Fla. Dist. Ct. App. 1997).

agreement, which was "drawn by a lawyer and properly witnessed" was drafted to induce one of the women "to give up her job and sell her home" and move to Broward County so that the other woman could move her medical practice.[101] The intermediate court declared: "Even though no legal rights or obligations flow as a matter of law from a non-marital relationship, we see no impediment to the parties to such a relationship agreeing between themselves to provide certain rights and obligations."[102]

While *Posik* represents the dominant rule, this rule is not very helpful in practice. It is of little assistance because few cohabiting couples enter into these kinds of written agreements.[103] As Ira Ellman explains: "[p]eople don't generally make formal contracts about either the conduct of their relationship or the consequences that ought to flow in the event they end it."[104] Moreover, in some states, this (not very helpful) protection, the enforcement of a written agreement, is the only claim available to former nonmarital partners.

Most states also permit former nonmarital partners to pursue claims based on oral agreements, or those arising in implied contract or under equitable theories. But, here again, even when these other types of claims are theoretically available, they too are not particularly helpful in practice. A regime that enforces implied contracts theoretically might be one that is less formality driven.[105] This, however, is not how the doctrine has been implemented in practice. Instead, in the context of nonmarital property division, the application of "the implied contract approach departs from mainstream contract doctrine, which takes a more permissive view of contract enforcement."[106] Indeed, the case law suggests that courts often impose a higher standard of proof when the implied contract is between unmarried cohabitants, than is the case when the dispute is between other third parties.[107] As Kaiponanea Matsumura describes: "Courts seldom recognize implied contracts because they hold litigants to stringent standards,

101. *Id.* at 760.
102. *Id.* at 761.
103. *See, e.g.*, Stolzenberg, *supra* note 12, at 2020 ("[M]ost cohabitants do not negotiate, let alone memorialize in writing, explicit contracts . . . .").
104. Ira Mark Ellman, *Inventing Family Law*, 32 U.C. DAVIS L. REV. 855, 874 (1999). *See also* Matsumura, *Intimate Regulation*, *supra* note 1, at 1018 ("The problem is that most nonmarital partners do not engage in these formalities.").
105. *See, e.g.*, Matsumura, *Intimate Regulation*, *supra* note 1, at 1020 (describing the "implied contract approach" as one that recognizes "informal relationships").
106. *Id.* at 1020–21.
107. *See infra* notes 103–114 and accompanying text.

expecting either that every contingency be expressly bargained for or that the parties have made 'marriage-like commitments.'"[108]

Take *Miller v. Garvin*. The case involved a different-sex couple who lived together for seventeen years. After their child was born, they agreed that Garvin, the man, would be the breadwinner and Miller, the woman, would be the "'stay-at-home' parent."[109] Even though Miller devoted herself to caring for the family for seventeen years, the court held that she was not entitled to support or any share of the property accumulated during their relationship. According to the court, there was "inadequate proof of any intention or promise by Garvin to continue his support after the relationship ended."[110] The result in *Miller* is the rule rather than the exception. These cases "demonstrate[ ] the difficulties that claimants face . . . when they seek post-dissolution support in the absence of an express written contract—even in a jurisdiction that is relatively open to implied contract claims."[111]

Some courts express reluctance to peering too closely into the nature of intimate relationships. As such, they err on the side of finding no implied agreement, even where the evidence suggests a very high degree of interdependence and reliance between the parties. As Elizabeth Scott puts it, even when the "evidence suggests that [the cohabitants] had some understanding about the sharing of property acquired while they were together, courts often conclude that the parties' understandings were too indefinite for contractual enforcement."[112] An illustrative example is *Morone v. Morone*. The *Morone* court explained its reluctance to provide relief under an implied contract theory this way: "For courts to attempt through hindsight to sort out the intentions of the parties and affix jural significance to conduct carried out within an essentially private and generally noncontractual relationship runs too great a risk of error."[113]

Other courts posit that special caution is warranted in this context because there is a higher potential for abuse and fraud. Courts suggest, typically without supporting evidence, that former cohabitants would be more likely to collude with each other to perpetrate a fraud. Similar concerns, the argument continues, animated the trend to abolish common law

108. Matsumura, *Intimate Regulation*, *supra* note 1, at 1020.
109. Miller v. Garvin, No. 813364-5, 2003 WL 122784, at *2 (Cal. App. Ct. 2003).
110. *Id*; *see also* Cohn v. Levy, 725 N.Y.S.2d 376, 376 (N.Y. App. Div. 2001) (holding, in a case involving a long-term different-sex couple, that "plaintiff's testimony is too vague to substantiate her current claim of lifetime maintenance").
111. Scott, *supra* note 4, at 336.
112. *Id.* at 335.
113. Morone v. Morone, 413 N.E.2d 1154, 1157 (N.Y. 1980).

marriage. As one court explained: "The consensus was that while the doctrine of common-law marriage could work substantial justice in certain cases, there was no built-in method for distinguishing between valid and specious claims and, thus, that the doctrine served the State poorly."[114]

Moreover, even when equitable claims are "successful," the remedies tend to be limited. Consider *Carney v. Hansell* described at the outset of this Article. In the case, a different-sex couple, Joann and Christopher, lived together for sixteen and a half years. Over the course of their relationship, in addition to serving as the primary caretaker for their child and "maintain[ing] the house, [doing] the laundry, food shopping, [and] cooking," Joann also "contributed substantially" to the success of the Christopher's towing business.[115] Joann "handled much of the paperwork for the business."[116] "She handled much of the dispatch of calls."[117] "She went to court to prosecute bad checks, she picked up parts from auto parts dealers, and she prepared monthly invoices."[118] Despite the fact that Joann helped build the business, the court held she was not entitled to a share of the asset. Instead, she was simply entitled to "minimum wage" compensation for the services she provided.[119]

Finally, under whatever theory, implied contract or equitable doctrines, the law almost uniformly undervalues or denies value altogether to "domestic" or "wifely" contributions.[120] The lack of success for such claims is not simply a matter of coincidence. It is baked into the law. The New Hampshire Supreme Court, for example, recently reaffirmed this type of blackletter rule. As the court explained:

> In *Tapley v. Tapley*, we declined to allow recovery for "domestic services" under an implied contract or in quantum meruit, adopting the view of other jurisdictions that have concluded that until their legislatures determine otherwise, they will not recognize a contract which is implied from the rendition of "housewifely services."[121]

114. *Id.* at 1157–58.
115. Carney v. Hansell, 831 A.2d 128, 131 (N.J. Super. Ct. Ch. Div. 2003).
116. *Id.*
117. *Id.* at 132.
118. *Id.*
119. *Id.* at 136 ("As a key employee to the business, there is no doubt her services were worth more than minimum wage, but applying another standard would be speculation not supported by the record.").
120. *See, e.g.*, *id.*
121. Brooks v. Allen, 137 A.3d 404, 410 (N.H. 2016) (citation omitted) (quoting Tapley v. Tapley, 449 A.2d 1218, 1219 (N.H. 1982)).

Even California courts adhere to such a rule. Services for which "monetary compensation ordinarily would be anticipated," for example acting as a chauffeur or bodyguard, are ones that can be compensated under *Marvin*. By contrast, parties cannot be compensated, at least in the absence of an agreement, for "those household duties normally attendant to non-business cohabitation,"[122] including the duties of serving as a "companion, homemaker, housekeeper and cook."[123] Indeed, this point is so well-established that the Restatement of Restitution and Unjust Enrichment, which generally permits equitable remedies for uncompensated contributions, provides the following limitations: "Claims to restitution based purely on domestic services are less likely to succeed, because services of this character tend to be classified among the reciprocal contributions normally exchanged between cohabitants whether married or not."[124]

The justifications for a rule barring recovery for "wifely" services vary from state to state. Some courts deny recovery based on a presumption (conclusive it seems) that these services have already been compensated. This was true in *Carney*. The *Carney* court rejected Joann's request for reimbursement for her sixteen years of "wifely" services on the ground that she had already received the benefit of her bargain.[125] As the court put it: "He provided for her support and those expenses which he approved, for as long as she resided with him."[126] Accordingly, the court reasoned, her "claims for compensation for [domestic] services rendered must fail."[127] A Louisiana court offered a similar explanation:

> In view of the parties living together as man and wife, it was only natural that plaintiff [a woman] lend some assistance to the paramour [a man] who furnished full subsistence and a home for

122. Whorton v. Dillingham, 248 Cal. Rptr. 405, 410 (Cal. Ct. App. 1988).
123. *Id.* at 408.
124. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 28 cmt. d (AM. LAW INST. 2011); *see also* Antognini, *supra* note 12, at 1963; Lawrence W. Waggoner, *With Marriage on the Decline and Cohabitation on the Rise, What About Marital Rights for Unmarried Partners?*, 41 ACTEC L.J. 49, 67–68 (2015) ("Plaintiffs seem to have no problem in stating a cause of action when they allege that they made a *financial* contribution toward the purchase of specific property on the understanding that they would be the owner or part owner . . . . [But,] unmarried cohabitors who contribute domestic services are entering into a much riskier venture."). *But see* Turner v. Freed, 792 N.E.2d 947, 948 (Ind. Ct. App. 2003) ("Because we find that Turner would be unjustly enriched if Freed were not to recover for the domestic services she provided him, we affirm that portion of the trial court's decision.").
125. *Carney*, 831 A.2d at 135.
126. *Id.*
127. *Id.*

> plaintiff and her child . . . . In this manner plaintiff received full remuneration for services rendered to defendant . . . .[128]

While this justification is premised on the theory that the person has already been adequately compensated, the decisions do not seem to contemplate the possibility that a party could rebut this presumption.

In other states, courts reason that these "wifely" services are ones that are "natural[ly]" due to the other (usually male) partner by virtue of the domestic nature of the relationship. An intermediate appellate court in New York explained it this way:

> [I]t is not reasonable to infer an agreement to pay for the services rendered when the relationship of the parties makes it natural that the services were rendered gratuitously. As a matter of human experience personal services will frequently be rendered by two people living together because they value each other's company or because they find it a convenient or rewarding thing to do.[129]

Other courts presume (again, conclusively it seems) that "wifely" services are given as a gift, and therefore ineligible for later compensation.[130] These legal bars or rules against reimbursement often do not apply to "manly" contributions. Thus, as the New Hampshire Supreme Court explained: "[O]ur holding [in *Tapley*] was 'not meant to limit recovery for business and personal services, other than normal domestic services, rendered between unmarried cohabitants.'"[131]

Here again, the rules often provide less protection if the claimant is a former cohabitant. Another New York case illustrates this principle nicely. In New York, the law does not permit recovery for domestic services if the parties were living together—which is typically the arrangement for intimate partners. This is so because in that type of domestic living situation, "it is natural that such [domestic] service should be rendered without expectation of pay."[132] By contrast, if the parties were not living together, which is more

128. Guerin v. Bonaventure, 212 So. 2d 459, 464 (La. Ct. App. 1968).
129. Morone v. Morone, 413 N.E.2d 1154, 1157 (N.Y. 1980) (citations omitted).
130. *See, e.g.*, Trimmer v. Van Bomel, 434 N.Y.S.2d 82, 85 (N.Y. Sup. Ct. 1980) (describing these kinds of services as ones that "would ordinarily be exchanged without expectation of pay").
131. Brooks v. Allen, 137 A.3d 404, 410 (N.H. 2016) (quoting Tapley v. Tapley, 449 A.2d 1218, 1220 (1982)). *See also* Sands v. Menard, 904 N.W.2d 789, 799 (Wis. 2017) ("*Watts* does not recognize recompense for housekeeping or other [domestic] services unless the services are linked to an accumulation of wealth or assets during the relationship." (quoting Waage v. Borer, 525 N.W.2d 96, 98 (Wis. Ct. App. 1994))).
132. Moors v. Hall, 532 N.Y.S.2d 412, 414 (N.Y. App. Div. 1988) (quoting Robinson v. Munn, 143 N.E. 784, 785 (N.Y. 1924)).

likely to be true in cases between true third parties, compensation may be available.[133] This rule provides a modicum of protection for those nonmarital partners who do not live together, so-called LATs[134] (intimate couples who are "living apart together"). But it leaves the larger group of committed, intimate couples who are living together less protected than true third parties.

The discounting or devaluation of domestic services is of real importance to nonmarital partners. These are forms of exchanges that occur in basically all families, and these are services that are critical to the functioning of a family.[135] Moreover, the denial of recovery for these services is not felt equally by all nonmarital partners. Women are the primary losers.[136] Women continue to make up the majority of the plaintiffs in these cases,[137] cases that are usually unsuccessful.[138]

This is not mere coincidence. Women are more likely to be plaintiffs for a confluence of reasons. First, despite their increased participation in the paid workforce, women continue to earn less than men.[139] The gender-based wage gap is particularly large for women of color.[140] As a result, female nonmarital partners tend to accumulate fewer resources titled in their names during the course of their lives and their relationships. Women continue to earn less than men in part because they continue to take on most of the homemaking and caretaking responsibilities. As the Pew Research Center recently

133. *Id.* at 415 ("*Morone v. Morone* is factually distinguishable from the case at bar in that it involved an unmarried couple who lived together. Herein, the facts clearly demonstrate that the parties always maintained separate residences throughout their relationship. Moreover, the analysis in *Morone v. Morone* clearly indicates that the court's ruling was limited to unmarried couples who cohabitate. Accordingly, *Morone v. Morone* does not preclude recovery in the case at bar.").

134. *See, e.g.*, Susan Frelich Appleton, *Leaving Home? Domicile, Family, and Gender*, 47 U.C. DAVIS L. REV. 1453, 1457 (2014).

135. *See* MAXINE EICHNER, THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS 43 (2010) (discussing "the important role that families play in citizens' lives, as well as in a flourishing polity").

136. There are cases in which men sought reimbursement for "domestic" duties, but these cases are the exception rather than the rule. *See* Antognini, *supra* note 12, at 1895 n.7 ("The fewest number of cases are those involving different-sex couples with a man requesting property from a woman.").

137. *See id.* at 1894 (noting that the "most common, or modal [nonmarital property division case, is] where a woman seeks property from a man in the context of a heterosexual relationship").

138. *See* Scott, *supra* note 4, at 337 (noting that former nonmarital partners "have not had an impressive record of success in the post–*Marvin* period.").

139. Stephanie Bornstein, *Equal Work*, 77 MD. L. REV. 581, 588 (2018) ("Yet despite women's near equal participation in the paid workforce today, a persistent gender pay gap remains.").

140. *Id.* at 584.

reported: "While women represent nearly half of the U.S. workforce, they still devote more time than men on average to housework and child care and fewer hours to paid work."[141] In addition to devoting more time to these tasks on a daily basis, women are also more likely to disrupt their careers to tend to caretaking needs in the house.[142] This is true even when female partners are the co- or primary-wage earner for the family. This puts women at a double disadvantage: They tend to accumulate fewer financial assets in their names during nonmarital relationships, and they tend to contribute more of the services that are undervalued or devalued altogether under the current doctrine.

In sum, a nonmarital relationship is legally irrelevant for purposes of claiming protection. That same relationship, however, is often relied on in practice as a basis for denying otherwise available protections. Taken together, the negative effects of this regime are not felt equally by all former partners. In this way, the conventional doctrine "entrench[es] inequality in relationships."[143]

One potential response to this descriptive account of the conventional doctrine is to urge reform. That is, one could argue that the basic framework is correct; the problem is simply that courts are applying it incorrectly. Courts should not apply different and higher standards when the claimants are former nonmarital partners, and courts must abandon rules which deny or reduce relief for the provision of "housewifely" services. While correction of these errors would constitute a positive development, this Article posits that a system built on the foundational principle that nonmarital partners are legal strangers is simply the wrong approach and should be abandoned.[144]

II. DEFENSE OF THE CONVENTIONAL APPROACH

When decided in 1976, *Marvin* was widely viewed as a progressive and welcome development.[145] Today, over forty years later, perspectives on *Marvin* are more varied. This Part surveys the leading arguments in favor of

141. Kim Parker, *Women More Than Men Adjust Their Careers for Family Life*, PEW RES. CTR.: FACT TANK (Oct. 1, 2015), http://www.pewresearch.org/fact-tank/2015/10/01/women-more-than-men-adjust-their-careers-for-family-life [https://perma.cc/2CU6-ATXL].

142. *Id.*

143. Stolzenberg, *supra* note 12, at 2042.

144. To be sure, I am not the only scholar to take this position. *See, e.g.*, Ellman, *supra* note 46, at 1365.

145. *See id.* ("When *Marvin* was decided in 1976, it was greeted by most commentators as a just development, as well as a liberating one.").

the conventional *Marvin* approach to the economic rights of nonmarital partners.[146] These arguments are gleaned both from case law as well as legal commentary.

A. Judicial Defenses

Historically, courts denied any form of relief to nonmarital cohabitants. Courts adopting this position reasoned that because the state criminalized cohabitation, it would be against public policy to permit cohabitants to pursue remedies arising out of that unlawful relationship. An illustrative decision is *Baker v. Couch*,[147] decided by the Colorado Supreme Court in 1923:

> Where the contract or transaction in question is illegal, fraudulent, or immoral, and there is mutual misconduct of the parties with respect thereto, neither law nor equity will aid either to enforce, revoke, or rescind. To such disputes the courts will not listen, and the parties thereto they will leave in the exact position in which they have placed themselves.[148]

The law, the court explained, "is well settled, and the authorities practically unanimous."[149]

Today, cohabitation is no longer a crime.[150] Indeed, it is now established that parties have a constitutionally protected right to form nonmarital relationships.[151] Consistent with this change in the law, most states no longer deny all recovery to former cohabitants. Instead, as discussed above, most states permit nonmarital cohabitants to assert a range of contract and common law claims. Despite this evolution, however, in all but one or two states, no rights or claims arise merely out of the existence of the relationship itself.[152]

146. "*Marvin v. Marvin* held that claims that unmarried partners might have against one another at the conclusion of their relationship would be governed primarily by principles of contract law." *Id.* (internal footnote omitted).
147. 221 P. 1089 (Colo. 1923).
148. *Id.* at 1090.
149. *Id.*
150. *See, e.g.*, Hobbs v. Smith, No. 05-CVS-267, 2006 WL 3103008, at *1 (N.C. Super. Ct. Aug. 25, 2006) (relying on *Lawrence* and holding unconstitutional anti-cohabitation law); *see also* Deborah A. Widiss, *Intimate Liberties and Antidiscrimination Law*, 97 B.U. L. REV. 2083, 2088 (2017) ("But now, it is clear that these anti-fornication and anti-cohabitation statutes are unconstitutional." (citations omitted)).
151. *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003).
152. *See supra* Part I.A.

In justifying this state of affairs, court decisions typically rest on one of two theories. First, in cases in which parties seek remedies under the divorce statutes or remedies equivalent to what would be available under the divorce statutes, courts typically reject these claims on statutory interpretation grounds. As a nonspouse, the claimant does not fall within the statute. Any change in that regard must be made by the legislature. Take the decision of *Joan S. v. John S.*[153] In the case, the woman sought an equitable division of the property accumulated during the parties' nonmarital cohabitation. The New Hampshire Supreme Court rejected her request. The plaintiff, the court explained, "d[id] not come within the terms of [the divorce statute]."[154] Accordingly, "it was proper for the trial court to dismiss her claim based upon the 'marriage' of the parties."[155] The court also refused to award a "divorce-like property settlement" in the case.[156] "The right to a divorce," the court said, "is predicated upon the existence of a valid marriage between the parties. In the absence of a valid marriage, the court may not exercise its statutory powers incident to a divorce."[157] The New Hampshire Supreme Court recently reaffirmed this reasoning.[158]

The Wisconsin Supreme Court offered similar reasoning in *Watts v. Watts*.[159] The case involved a nonmarital couple who cohabited for twelve years and had two children together. After the termination of their relationship, the woman filed suit seeking relief under the divorce statutes. The court rejected this claim, stating: "[T]he unambiguous language of [the divorce provision] and the criteria for property division listed in [that statute] plainly contemplate that the parties who are governed by that section are or have been married."[160]

153. 427 A.2d 498 (N.H. 1981).
154. *Id.* at 449.
155. *Id.*
156. *Id.*
157. *Id.* at 499–500 (citations omitted).
158. *In re* Mallett, 37 A.3d 333, 338 (N.H. 2012) ("While unmarried parties are expressly within the family division's jurisdiction for purposes of child-related matters, this statutory scheme plainly restricts all divorce remedies and property distribution to married couples . . . . [A]llowing unmarried parties to adjudicate their claims to assets, real property, and other 'divorce-like' remedies in the family division . . . would encroach upon the province of the legislature and is contrary to the statutory scheme.").
159. 405 N.W.2d 303 (Wis. 1987).
160. *Id.* at 305, 308. Other courts rely on similar reasoning. *See, e.g.*, Carnes v. Sheldon, 311 N.W.2d 747, 753 (Mich. Ct. App. 1981) ("While the judicial branch is not without power to fashion remedies in this area, we are unwilling to extend equitable principles to the extent plaintiff would have us to do, since recovery based on principles of

A second theory courts rely on to justify the denial of marriagelike rights and protections to former nonmarital partners combines the premise that the state has an interest in promoting marriage,[161] with a nod to promoting party "autonomy." The reasoning goes something like this: The state is entitled to extend special protections for marriage. Parties can choose not to enter into marriage if that is what they prefer. But if they make that choice, courts will give it effect by denying any family-based protections. The Mississippi Supreme Court put it this way in *Davis v. Davis*:[162] "When opportunity knocks, one must answer its call. Elvis Davis[, the woman,] failed to do so and thus her claim is all for naught."[163]

B. Scholarly Defenses

Among scholars, the leading defense of *Marvin* sounds in the register of autonomy.[164] June Carbone and Naomi Cahn, for example, write that *Marvin*'s contract-based approach "respects the parties' autonomy."[165] Adults, these scholars contend, should have the right to form families outside of marriage. When couples choose not to marry, they do so based on "an unwillingness to make a financial commitment to a partner."[166] Thus, permitting recovery only when they have entered into a formal agreement to share best recognizes and respects the "decisions" they have made. In this way, Carbone and Cahn argue, the *Marvin* rule "reflect[s] studies of the couples' own attitudes towards nonmarriage."[167]

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contracts implied in law essentially would resurrect the old common-law marriage doctrine which was specifically abolished by the Legislature." (citations omitted)); Merrill v. Davis, 673 P.2d 1285, 1287 (N.M. 1983) ("If we were to say that the same rights that cannot be gained by common-law marriage may be gained by the implications that flow from cohabitation, then we have circumvented the prohibition of common-law marriage.").

161. *See Merrill*, 673 P.2d at 1287 ("[T]he State [has] a strong continuing interest in the institution of marriage and prevents the marriage relation from becoming in effect a private contract terminable at will." (quoting Hewitt v. Hewitt, 394 N.E.2d 1204, 1210 (Ill. 1979))).
162. 643 So. 2d 931 (Miss. 1994).
163. *Id.* at 936. *See also* Tapley v. Tapley, 449 A.2d 1218, 1220 (N.H. 1982) ("It would be incongruous for a court to impose on the parties after the relationship has dissolved, the same consequences of marriage that they have sought to avoid when they entered into their arrangement.").
164. For an early articulation of this argument, see, for example, Ruth Deech, *The Case Against Legal Recognition of Cohabitation*, *in* MARRIAGE AND COHABITATION IN CONTEMPORARY SOCIETIES, 300 (John M. Eekelaar & Sanford N. Katz eds., 1980).
165. Carbone & Cahn, *Nonmarriage*, *supra* note 4, at 78.
166. *Id.* at 69.
167. *Id.* at 68.

Marsha Garrison offers a similar position. "[T]he U.S. Supreme Court has ruled that decision-making about marriage, procreation, parenthood, and family relationships is included within the liberty protected under the Fourteenth Amendment," Garrison explains.[168] Conscriptive approaches like the ALI Principles that apply marriagelike rules to nonmarital couples infringe or at least "curtail" the liberties interests of nonmarital partners.[169] The ALI Principles, the argument goes, prevents the law from respecting and valuing their rejection of marriage; "individuals are no longer free to choose when, how, and whether to marry."[170] In this way, these conscriptive approaches run "counter to one of the most important values in modern liberal societies, the ideal of individual autonomy."[171]

Conscriptive approaches, some continue, also inhibit the development of choice in family form. Nonmarital relationships, Garrison argues, look different than marital ones.[172] Garrison writes that nonmarital couples "are much less likely than married couples to have children together, to pool their resources, to feel secure and unconflicted in their relationships."[173] Moreover, she continues, "cohabitants overwhelmingly see cohabitation as a substitute for being single, not for being married."[174] The law should permit people to be in different kinds of relationships, and different rules should apply to different kinds of relationships.

Allowing people to choose among family forms and to choose the rules that apply to their families, *Marvin* defenders continue, also vindicates equality concerns. Marriage is an institution that perpetuated the oppression of women.[175] Wives lost their legal identities upon marriage.[176] They lost

168. Garrison, *Marriage Matters*, *supra* note 6, at 320.
169. *Id.* at 320–321.
170. Garrison, *Is Consent Necessary?*, *supra* note 4, at 857.
171. Garrison, *Marriage Matters*, *supra* note 6, at 320. *See also id.* at 306 ("Adoption of the [ALI] proposal would diminish personal autonomy.").
172. *See, e.g.*, *id.* at 306 (arguing against the ALI approach on the ground that "a large body of evidence establish[es] that cohabitation is simply not, as the ALI argues, the functional or expressive equivalent of marriage.").
173. *Id.* at 308–09 (footnotes omitted).
174. *Id.* at 310.
175. *See, e.g.*, Deborah A. Widiss, *Changing the Marriage Equation*, 89 WASH. U. L. REV. 721, 735 (2012) ("Historically, sex-based classifications, gender norms, and substantive marriage law were collectively coherent, albeit in a way that subordinated women to men."); Leslie, *supra* note 51, at 1014 ("American states historically defined the institution of marriage in a manner that legally subordinated wives to their husbands.").
176. *See, e.g.*, Kerry Abrams, *Citizen Spouse*, 101 CALIF. L. REV. 407, 415–16 (2013) ("The legal effects of coverture on married women were extensive: wives could not enter into

their right to sue or be sued, or to enter into a contract.[177] While many of the expressly sex-based marriage rules have been repealed or struck down,[178] spouses still tend to conform to gendered behavior patterns within marriage. The law should enable and foster the formation of other kinds of families. The promotion of new family forms not tied to this history could foster the evolution of more egalitarian relationships.

Moreover, the argument continues, the law does not need to specifically protect the more vulnerable members in these families. Today, women comprise about half of the workforce.[179] Women are expected to, and themselves expect to, have an earned income. More and more women are out-earning their male partners.[180] Law and society recognize that women, including married woman, are capable of entering into contracts. In such a world, *Marvin* supporters argue, women do not need a protective rule that looks beyond formal markers of decisions to or not to marry or enter into a contract.[181] Having a rule that protects the more vulnerable party is anachronistic and reinforces stereotyped notions that women are unable to support themselves or to make good decisions for themselves. Indeed, forcing marriagelike rules on nonmarital partners, Garrison argues, "represent[s] a form of state paternalism that our legal system generally rejects."[182]

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contracts without their husbands' consent, enter a profession, sue or be sued, make a will, or testify for or against their husbands.").

177. *Id.*

178. *See, e.g.*, Orr v. Orr, 440 U.S. 268, 283 (1979) (holding Alabama statute that imposed alimony obligations on husbands but not wives to be unconstitutional).

179. In 2015, women constituted 46.8 percent of the labor market. Richard Fry & Renee Stepler, *Women May Never Make Up Half of the U.S. Workforce*, PEW. RES. CTR.: FACT TANK (Jan. 31, 2017), http://www.pewresearch.org/fact-tank/2017/01/31/women-may-never-make-up-half-of-the-u-s-workforce [https://perma.cc/3YSX-BNXE].

> From 1950 to 2000, women's labor force participation had increased rapidly (particularly among married women and married mothers), while men's participation declined. For example, during the 1960s the female labor force grew, on average, three times faster than the male labor force—3.1% per year versus 1.0% per year. By 2000, 59.9% of women were in the labor force, up from 37.7% in 1960.

Id.

180. *See* Sarah Jane Glynn, *Breadwinning Mothers Are Increasingly the U.S. Norm*, CTR. FOR AM. PROGRESS (Dec. 19, 2016, 11:59 AM), https://www.americanprogress.org/issues/women/reports/2016/12/19/295203/breadwinning-mothers-are-increasingly-the-u-s-norm [https://perma.cc/DZ3R-P3JQ].

181. *See, e.g.*, Carbone & Cahn, *Nonmarriage*, *supra* note 4, at 109 n.324 (noting that "[t]he wage gap has narrowed . . . and women's workforce participation is close to men's").

182. Garrison, *Is Consent Necessary?*, *supra* note 4, at 857. *See also* Scott, *supra* note 4, at 332 ("Second, the approach of the domestic partnership provisions in which a marriage-like

III. RETHINKING AUTONOMY IN THE FAMILY

A. An Overview

This Article approaches this contentious issue of nonmarital property-sharing from a novel perspective. Like many *Marvin* defenders, I strongly support a legal regime that promotes and fosters a diverse range of families, including nonmarital families. This Article argues, however, that the conventional approach to the economic rights of nonmarital partners undermines rather than furthers this goal of meaningful choice in family form. This Article defends this position by drawing on insights learned in a related, but distinct body of nonmarriage law: the law of nonmarital parentage. In that context, courts and policymakers now recognize that it is the failure to recognize and give effect to the family relationships people have chosen to create that undermines a goal of respect for a diverse range of family forms.

Questions related to the legal treatment of nonmarital families are timely and critically important. Nonmarital relationships constitute a growing slice of our population. In 1960, there were just over 400,000 nonmarital cohabiting couples.[183] By 2016, there were about nine million couples.[184] Between 2000 and 2010, the unmarried cohabiting partner population grew by over 40 percent.[185] Many of these nonmarital families are raising children. In 2010 U.S. Census Bureau reported that 38 percent of all cohabiting couples were living with at least one biological child.[186] These families now constitute a critical part our national fabric. Not all demographic groups, however, are equally experiencing the shift from marriage to nonmarriage. Nonmarital families are disproportionately likely to be lower-income and nonwhite.[187] By contrast, marriage is increasingly a marker of privilege.[188]

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status attaches automatically at the end of a cohabitation period without consent or knowledge, and even against the wishes of the individual involved, is coercive and paternalistic.").

183. U.S. CENSUS BUREAU, *supra* note 7.

184. Stepler, *supra* note 8.

185. U.S. CENSUS BUREAU, HOUSEHOLDS, *supra* note 9, at 8.

186. *Id.*; *see also* Fiona Rose-Greenland & Pamela J. Smock, *Living Together Unmarried: What Do We Know About Cohabiting Families?*, *in* HANDBOOK OF MARRIAGE AND THE FAMILY 255, 257 (Gary W. Peterson & Kevin R. Bush eds., 3d ed. 2013).

187. THE DECLINE OF MARRIAGE, *supra* note 16, at 2.

188. CARBONE & CAHN, MARRIAGE MARKETS, *supra* note 18, at 19 ("Marriage, once universal, once the subject of rebellion, has emerged as a marker of the new class lines remaking American society. Stable unions have become a hallmark of privilege.").

Due in part to these demographic changes, "[t]here is a developing consensus [among family law scholars] that the law should recognize [these nonmarital] relationships, at least for some purposes."[189] Support in favor of a wider menu of family form options is often rooted in notions of autonomy and liberty. Melissa Murray, for example, has pursued "a project of family and relationship pluralism that respects and values a broader array of relationship and family forms than civil marriage alone."[190] Nancy Polikoff long has advocated for protections for a broad range of family forms, including nonmarital family forms.[191] Choices related to whether to create a family, with whom to create a family, and what that family will look like are ones that are often "deeply personal" and consequential. "[I]ndividuals should be free to enter relationships of their choice."[192] As Kenneth Karst explains, "[i]t is the choice to form and maintain an intimate association that permits full realization of the associational values we cherish most."[193]

A commitment in favor of choice in family form is often also rooted in concerns about inequality within the family and between different kinds of families.[194] As noted above, marriage is an institution that perpetuated oppression on women. Some support the right of individuals to choose family forms other than marriage based on a theory that these other forms may foster more egalitarian relationships within families.[195] When same-sex

189. Matsumura, *Intimate Regulation*, *supra* note 1, at 1020.
190. Murray, *supra* note 11, at 1209–10.
191. *See, e.g.*, NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW (2008) [hereinafter, POLIKOFF, BEYOND MARRIAGE]; Nancy D. Polikoff, *Law That Values All Families: Beyond (Straight and Gay) Marriage*, 22 J. AM. ACAD. MATRIIM. LAW. 85, 87 (2009) ("I propose family law reform that would recognize all families' worth. Marriage as a family form is not more important or valuable than other forms of family, so the law should not give it more value. Couples should have the choice to marry based on the spiritual, cultural, or religious meaning of marriage in their lives; they should never *have to* marry to reap specific and unique legal benefits." (emphasis in original)); *see also, e.g.*, Kerry Abrams, *Marriage Fraud*, 100 CALIF. L. REV. 1, 64–66 (2012); Eskridge, *supra* note 2, at 1890; Katherine M. Franke, *Longing for* Loving, 76 FORDHAM L. REV. 2685, 2686 (2008) (urging an advocacy strategy that seeks to "dislodge marriage from its normatively superior status as compared with other forms of human attachment, commitment, and desire"); Suzanne B. Goldberg, *Marriage as Monopoly: History, Tradition, Incrementalism, and the Marriage/Civil Union Distinction*, 41 CONN. L. REV. 1397, 1401 (2009).
192. Carbone & Cahn, *Nonmarriage*, *supra* note 4, at 60.
193. Karst, *supra* note 20, at 637.
194. Elsewhere, I argue in favor of family pluralism from an equal liberty perspective. *See* Joslin, *Right to Nonmarriage*, *supra* note 56.
195. *See, e.g.*, Milton C. Regan, Jr., *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 NOTRE DAME L. REV. 1435, 1437 (2001) ("Some research indicates, for instance, that those who cohabit have more egalitarian views on gender

couples were excluded from marriage, many scholars who supported equal rights for LGBT people supported protection for nonmarital family forms.[196] The current and growing race- and class-based marriage gap fuels contemporary concern regarding rules that privilege the marital family.[197] As Deborah Widiss writes, "if government policies continue to rely exclusively, or primarily, on marriage as the marker of family interdependence, the policies will leave out a significant portion of the poorest and most vulnerable . . . couples and their children."[198] The Supreme Court's decision in *Obergefell v. Hodges*[199] further fueled concern over the legal treatment of nonmarital families.[200]

I, too, am a staunch defender of family autonomy and family pluralism.[201] But I reject the conclusion that the current doctrine best furthers those goals. Instead, by carefully mining the evolution of a related, but distinct body of nonmarriage law, the law of nonmarital parentage, this Articles shows how *Marvin* undermines rather than furthers meaningful choice among and respect for diverse family forms.[202]

In advocating for the rejection of *Marvin* and its progeny, I build on the work of other scholars. Two scholars who long advocated for *Marvin*'s

roles than do spouses. For such couples, eschewing marriage may be a way to reject the gender assumptions that have been so prominent a feature of marriage as a social institution." (footnote omitted)).

196. *See, e.g.*, POLIKOFF, BEYOND MARRIAGE, *supra* note 191, at 5 (describing how "[e]arly gay and lesbian rights advocates forged alliances with others who challenged the primacy of marriage").

197. *See, e.g.*, Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277, 1279 (2015) ("The stakes of marital supremacy are higher than ever as marriage becomes the province of the privileged.").

198. Widiss, *supra* note 11, at 570.

199. 135 S. Ct. 2584, 2604–05 (2015).

200. Family law scholars generally celebrated the outcome in *Obergefell*. Many, however, were deeply concerned about the Court's route to that end. *See, e.g.*, Murray, *supra* note 11, at 1211–12; Widiss, *supra* note 11, at 552 ("*Windsor* rectifies a deep inequality in the law—that lawful same-sex marriages were denied federal recognition—but in so doing, it suggests that marriage is clearly superior to other family forms. Thus, in addressing one form of stigma, it reaffirms another.").

201. Elsewhere, for example, I argue in favor of a constitutionally based right to form families of choice. *See, e.g.*, Joslin, *Right to Nonmarriage*, *supra* note 56.

202. June Carbone and Naomi Cahn recently identified this disconnect between the law of nonmarital property sharing and the law of nonmarital parenting. Carbone & Cahn, *Nonmarriage*, *supra* note 4, at 58 ("This Article is the first to examine the contradictions between these two bodies of law and consider their implications for the meaning of nonmarriage as a distinct status."). Carbone and Cahn, however, argue that the disconnect should be resolved by moving in the opposite direction—to move principles governing nonmarital parentage to better *accord* with the existing principles governing nonmarital property (non)sharing. *Id.* at 108.

abandonment are Grace Blumberg and Ira Mark Ellman. Almost forty years ago, Blumberg wrote an article criticizing *Marvin*'s contract-based approach to the economic rights of former nonmarital partners.[203] Blumberg challenged the view that the *Marvin* approach best reflected and respected the mutual "intent" or choice of both parties.[204] According to Ellman, "[t]he main defect with contract as the conceptual underpinning for claims between intimate partners is that couples do not in fact think of their relationship in contract terms."[205] Because most couples do not think of their relationships in these terms, extending protections only where such a contract exists does not do a good job reflecting whether the parties think of themselves as family members.

This Article offers a novel and important lens through which to evaluate the appropriateness of the *Marvin* rule. After making and defending this proposition, I draw on principles developed in the context of nonmarital parentage, as well as what I call interstitial marriage cases to begin to chart out how these principles could be applied in the context of nonmarital property division.

B. Nonmarital Parentage: A Different Perspective

This Part offers a novel and important contribution to the scholarly consideration of the economic rights of nonmarital cohabitants. Specifically, by drawing on a careful review of developments in the law of nonmarital parentage, this Part argues that *Marvin* undermines rather than furthers the development of meaningful choice with respect to family form. Like the current *Marvin* doctrine, the law of nonmarital parentage long placed heavy reliance on bright-line rules and formalized expressions of family creation. Here too, the justification was rooted in concern for family-based autonomy.

203. Blumberg, *supra* note 50.

204. *Id.* at 1135 (noting that entrance into a cohabiting relationship was "seldom the result of a considered decision"); *id.* at 1168 (stating that "[m]ost discussions of 'intent' refer to 'intent of the couple' or 'intent of the parties' as though cohabitants operate with one heart and one mind despite their conflicting interests" (footnote omitted)).

205. Ellman, *supra* note 46, at 1366. Because couples don't think of their relationships in contract terms, few couples have such agreements. This was true in the past. *See, e.g.*, Blumberg, *supra* note 50, at 1164 ("[U]nmarried cohabiting couples simply do not make formal cohabitation contracts."). And it remains true today. *See, e.g.*, Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COLUM. L. REV. 293, 361 (2015) ("[A]s other scholars have noted, cohabiting couples infrequently execute formal contracts regarding property sharing and future support . . . .").

But over time, courts and legislatures increasingly recognized that parentage rules that turn only on formally expressed family creation decisionmaking did not do a good job respecting and protecting the family relationships that people actually chose to create.[206] The same is true, I argue, in the adult-adult context.

As noted above, parentage law previously utilized bright-line rules that relied heavily on formal markers of decision making. Historically, marriage was the most important and, for a long time, the only bright-line rule for establishing parentage. Under the British common law, nonmarital fathers were not treated as fathers.[207] Indeed, a nonmarital child was considered "*filius nullius,*" the "child and heir of no one."[208] U.S. states were quicker to moderate the particularly harsh common law doctrine by recognizing the relationship between nonmarital children and their mothers.[209] Evolution of the law was much slower, however, with regard to nonmarital fathers. Through most of our history, even when their genetic parentage was undisputed, nonmarital fathers generally were not considered the legal parents of their children.[210] They could be made to pay for their support,[211] but in most states, nonmarital fathers could establish legally recognized relationships with their children only by marrying the child's mother.[212] This

206. *See, e.g.*, Courtney G. Joslin, *Leaving No (Nonmarital) Child Behind*, 48 FAM. L.Q. 495 (2014) [hereinafter Joslin, *No Child Behind*].

207. Martha F. Davis, *Male Coverture: Law and the Illegitimate Family*, 56 RUTGERS L. REV. 73, 81 (2003).

208. MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH CENTURY AMERICA 197 (1985).

209. *Id.* at 207.

210. *See, e.g.*, Joslin, *Family Status*, *supra* note 60, at 803.

211. GROSSBERG, *supra* note 208, at 198 (describing how the "Poor Law of 1576 decreed that the parents of an illegitimate child had to pay for its upbringing" but also noting that this law could "compel support but not family membership").

212. *See, e.g.*, ERNST FREUND, U.S. DEP'T OF LABOR, CHILDREN'S BUREAU, ILLEGITIMACY LAWS OF THE UNITED STATES 22 (1919) (noting that, at that time, "[w]hile most American States provide[d] for legitimation of illegitimate children by marriage of the parents, only a minority of states permit legitimation without such marriage"); *see also* June Carbone & Naomi Cahn, Jane the Virgin *and Other Stories of Unintentional Parenthood*, 7 U.C. IRVINE L. REV. 511, 513 (2017) ("At one time, a man who wanted a relationship with his child had to marry the mother; if he did not, he often did not receive recognition as a father at all."); Courtney G. Joslin, *Marriage, Biology, and Federal Benefits*, 98 IOWA L. REV. 1467, 1515 (2013).

Thus, as Douglas NeJaime explains, for much of our history, "financial support and legal parentage remained distinct concepts, with officials able to 'compel support but not family membership.'" NeJaime, *Nature of Parenthood*, *supra* note 53, at 2273 (citing GROSSBERG, *supra* note 208, at 198).

regime continued in many states in this country until late into the twentieth century.

In the wake of a number of Supreme Court decisions from the 1960s and 1970s, states began to allow proof of genetic connection as a means of establishing nonmarital parentage.[213] But for nonmarital, nonbiological parents, the rule required a formal expression of consent, either marriage to the child's mother or adoption. People who fell outside these bright-line rules based on marriage, adoption, or biology were still considered legal strangers with no parental rights or responsibilities.[214]

This was the conclusion, for example, in *Nancy S. v. Michele G.*[215] In this case, Nancy and Michele, a lesbian couple in a long-term relationship, decided to have children together through assisted reproduction. In 1980, eleven years after they started living together, Nancy gave birth to their first child, a daughter.[216] Four years later, Nancy gave birth to their second child, a son.[217] The couple co-parented the two children for five years and one year, respectively, during their intact relationship, and then for another three years after they separated.[218] Eventually, however, Nancy cut off the children's contact with Michele and filed an action seeking a declaration that Michele was a legal stranger to the children. Though Nancy and Michele had

213. *See, e.g.*, NeJaime, *New Parenthood*, *supra* note 56, at 1194 ("The emerging recognition of nonmarital parent-child relationships was limited to biological relationships.").

214. *See, e.g.*, Courtney G. Joslin, *The Legal Parentage of Children Born to Same-Sex Couples: Developments in the Law*, 39 FAM. L.Q. 683, 688 (2005) ("In the past, courts across the country have held that only the birth parent in a lesbian couple is the child's legal parent, even where there was undisputed and extensive evidence that the couple jointly planned the birth of the child and jointly participated in all aspects of child rearing prior to and after the birth of the child."); Courtney G. Joslin, *Travel Insurance: Protecting Lesbian and Gay Parent Families Across State Lines*, 4 HARV. L. & POL'Y REV. 31, 31 (2010) ("At least until the recent past, the legal status of the nonbirth parent has been recognized only if the couple was able to complete a second-parent adoption."); *see also* Douglas NeJaime, *New Parenthood*, *supra* note 56, at 1202 ("But for those [same-sex] couples whose relationships dissolved before second-parent adoption gained traction or who otherwise failed to complete an adoption, the nonbiological mother was a legal stranger to her child.").

There were some early cases in which courts extended limited protections to people unconnected to children through marriage, biology, or adoption. *See generally* Nancy D. Polikoff, *This Child Does Have Two Mothers: Redefining Parenthood to Meet the Needs of Children in Lesbian-Mother and Other Nontraditional Families*, 78 GEO. L.J. 459 (1990).

215. 279 Cal. Rptr. 212, 214 (Cal. Ct. App. 1991), *overruled by* Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005).

216. *Id.*

217. *Id.*

218. *Id.*

lived together as a family for sixteen years and co-parented together for eight years, Nancy argued that Michele was a legal stranger to the children because she was unconnected to the children through any of the formally recognized markers of parenthood: marriage, adoption, or biology. The court agreed with Nancy:

> It is undisputed that appellant is not the natural mother of K. and S., and that she has not adopted either child. She does not contend that she and respondent had a legally recognized marriage when the children were born. Based on these undisputed facts, the [lower] court correctly determined that appellant could not establish the existence of a parent-child relationship under the Uniform Parentage Act.[219]

The court suggested that this result was one of Nancy and Michele's own making. The parties could have taken steps to formally establish Michele's parental status,[220] the court explained. They had "considered arranging for [Michele] to adopt the children." But, the court continued, "they never initiated formal adoption proceedings."[221] Thus, while the court acknowledged that the result in the case was unfortunate,[222] the implication was that the court's decision merely reflected the choices the parties made. Having "decided" not to complete the adoption,[223] it would be inappropriate to "adopt appellant's novel theory by which a nonparent can acquire the rights of a parent."[224]

Other courts reached similar conclusions. Take the New York high court's decision in *Alison D. v. Virginia M.*[225] The *Alison D.* decision, issued in the same year as *Nancy S.*, also involved the parentage of a child born through assisted reproduction to a lesbian couple. "Together, [the two women, Alison and Virginia,] planned for the conception and birth of the child and agreed to share jointly all rights and responsibilities of child-

219. *Id.* at 215.
220. Contrary to the court's suggestion, the availability of adoptions by an unmarried partner remained legally questionable in California for another twelve years. It was not until 2003 that a California appellate court held that second parent adoptions were available under California law. Sharon S. v. Superior Court, 73 P.3d 554, 570 (Cal. 2003). Indeed, as late as 1999, the state had a policy of opposing all adoptions by nonmarital partners. NeJaime, *New Parenthood*, *supra* note 56, at 1219.
221. *Nancy S.*, 279 Cal. Rptr. at 214.
222. *Id.*
223. *Id.* at 219.
224. *Id.*
225. 572 N.E.2d 27 (N.Y. 1991), *overruled by* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016).

rearing."[226] After the child was born, Alison and Virginia co-parented him for over two years. When the child was about two and a half years old, they ended their relationship.[227] Even after their dissolution, however, they co-parented for another four years, after which the biological mother, Virginia, cut off contact between the child and Alison.[228] Like the California court in *Nancy S.*, the *Alison D.* court held that a person unconnected to a child through marriage, adoption, or biology was a legal stranger with no parental rights or obligations.[229] This conclusion, the court continued, was necessary in order to protect the constitutional interests of the biological parent. Parents, the *Alison D.* court explained, "have the right to the care and custody of their child, even in situations where the nonparent has exercised some control over the child with the parents' consent."[230]

In some states, this approach persisted for many years. For example, the Maryland high court repeated similar reasoning in its 2008 decision in *Janice M. v. Margaret K.* "The United States Supreme Court," the Maryland high court declared, "long has recognized that the Due Process Clause of the Fourteenth Amendment protects the rights of parents to direct and govern the care, custody, and control of their children."[231] To respect and protect that autonomy interest, the court suggested, courts must generally defer to the contemporaneous wishes of the legal parent.[232] Or, as the Utah Supreme Court put it: A court should not "abridge a fit legal parent's right to govern her children's associations.'"[233] Courts subscribing to this position also highlighted the benefits of the simplicity and the certainty that such rules offer. A bright-line rule that looks to those formal markers of marriage, biology, or adoption "furnishes the biological and adoptive parents of children—and, importantly, those children themselves—with a simple and

226. *Id.* at 28.
227. *Id.*
228. *Id.* at 29.
229. *Id.*
230. *Id.*
231. Janice M. v. Margaret K., 948 A.2d 73, 79 (Md. 2008), *overruled by* Conover v. Conover, 146 A.3d 433 (Md. 2016) (citing, among other cases, Troxel v. Granville, 530 U.S. 57, 69–70 (2000); Santosky v. Kramer, 455 U.S. 745, 753–54 (1982); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925); Meyer v. Nebraska, 262 U.S. 390, 399–401 (1923)).
232. *Id.* at 87 ("In other words, where visitation or custody is sought over the objection of the parent, . . . the *de facto* parent must establish that the legal parent is either unfit or that exceptional circumstances exist.").
233. Jones v. Barlow, 154 P.3d 808, 813 (Utah 2007).

understandable rule by which to guide their relationships and order their lives."[234]

Over time, however, more courts and policy makers recognized two interrelated points. First, courts acknowledged that rigid reliance on bright-line rules often produced results that were unfair and harmful certainly to the children but also to the adults. Second, courts and policy makers also came to appreciate that these simple, formalistic rules also undermined, rather than protected, the adults' family formation decisions. It bears repeating that these principles are interrelated. That is, it is not that these courts and policy makers denied the existence of important autonomy interests at stake, or that they concluded that the autonomy interest could be infringed in order to protect the wellbeing of children. To the contrary, courts recognized that rules that protect existing functional parent-child relationships further the children's best interests and, simultaneously, protect the adults' family-based choices.

An illustrative case is *V.C. v. M.J.B.*[235] out of New Jersey. Again, the case involved a lesbian couple whose children were conceived and born through assisted reproduction. The facts of this case, however, are more complex. Here, the birth mother M.J.B. had begun planning for a potential pregnancy on her own since the 1980s, prior to beginning her relationship with V.C. on July 4, 1993.[236] M.J.B. had her first appointment with a fertility specialist five days after the women began dating.[237] As M.J.B. and V.C.'s relationship progressed, however, the situation changed. V.C. began to participate in that process,[238] and the women were living together by the time M.J.B. became pregnant.[239] During M.J.B.'s pregnancy, both women prepared for the upcoming birth of their children. They both "attend[ed] pre-natal and Lamaze classes."[240] "V.C. took M.J.B. to the hospital and she was present in the delivery room at the birth of their children."[241] Hospital staff treated both women as parents to the children. After taking the children home to their shared house, both women acted as parents and held themselves out as

234. Debra H. v. Janice R., 930 N.E.2d 184, 194 (N.Y. 2010), *abrogated by* Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016).
235. 748 A.2d 539 (N.J. 2000).
236. *Id.* at 542. M.J.B. began tracking her ovulation schedule in the months leading up to the date. *Id.*
237. *Id.*
238. For example, "V.C. attended at least two of [the insemination] sessions." *Id.*
239. *Id.*
240. *Id.*
241. *Id.*

parents to the children and to others. For example, the parties "decided to have the children call M.J.B. 'Mommy' and V.C. 'Meema.'"[242]

The couple co-parented the twins for two years as an intact family,[243] and for another year after their separation. At that point, however, when the children were about three years old, the biological mother cut off the children's contact with the nonbiological mother. In the litigation, the biological mother argued that ordering contact between the children and the nonbiological mother would unconstitutionally infringe her protected liberty interest in her relationship with the child.

While the New Jersey court appreciated the significance of the biological mother's interest in her relationship with her children, the court held that the failure to recognize the family she chose to create would diminish rather than protect that interest. A parent's autonomy or liberty interest, the court explained, permits the parent to both include and exclude outsiders.[244] When a parent exercises her autonomy interest by inviting someone else into the family, the law must recognize that exercise of choice in family form.[245] In this way, the court reasoned, a rule that considers and gives effect to informal family relationships that a person chose to create promotes family autonomy. Such a rule "places control within [the legal parent's] hands," the court explained.[246] That person has a right to choose not to create other family relationships. If that is the case, then her choice to do so will be respected. But if she has a constitutional right to make family-based decisions, that must me that the law will also respect and protect her decision to invite someone else in and form a family with them.[247]

In addition, and equally as important, the court rejected a rigid, formality-based test. Instead, the court adopted a more holistic, fact-based test for assessing whether the parties intended to and did in fact form a family together. This test is now the most commonly used equitable standard for

242. *Id.*
243. *Id.* at 544.
244. *Id.* at 552 (noting that a parent has a right "maintain a zone of privacy for herself and her child").
245. *Id.*
246. *Id.*
247. *See also* Frazier v. Goudschaal, 295 P.3d 542, 557 (Kan. 2013) ("If a parent has a constitutional right to make the decisions regarding the care, custody, and control of his or her children, free of government interference, then that parent should have the right to enter into a coparenting agreement to share custody with another without having the government interfere by nullifying that agreement, so long as it is in the best interests of the children.").

determining when functional but nonlegal parent-child relationships will be recognized:

> [T]o demonstrate the existence of the petitioner's parent-like relationship with the child, the petitioner must prove four elements: (1) that the biological or adoptive parent consented to, and fostered, the petitioner's formation and establishment of a parent-like relationship with the child; (2) that the petitioner and the child lived together in the same household; (3) that the petitioner assumed the obligations of parenthood by taking significant responsibility for the child's care, education and development, including contributing towards the child's support, without expectation of financial compensation [a petitioner's contribution to a child's support need not be monetary]; and (4) that the petitioner has been in a parental role for a length of time sufficient to have established with the child a bonded, dependent relationship parental in nature.[248]

There are two critical elements under this test: (1) the formation of an actual familial relationship; and (2) proof that this relationship was formed with the consent of the legal parent. The fact that the parties did not formalize that relationship through, for example, an adoption or a formal co-parenting agreement is not dispositive.[249] Instead, *V.C.* and many other decisions from around the country recognize that it is only by looking at and giving effect to the actual familial relationships a person chose to create that the law can give life to the principle of family autonomy.

The *V.C.* approach now represents something more like the rule rather than the exception. Courts in over half the states today apply rules that look past the presence or absence of formal markers like marriage, adoption, or

248. *Id.* at 551 (quoting Custody of H.S.H.-K., 533 N.W.2d 419, 421 (Wis. 1995)).

249. *See also* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 2.03 cmt. b (AM. LAW INST. 2002) ("Neither the unavailability of adoption nor the failure to adopt when adoption would have been available forecloses parent-by-estoppel status. However, the failure to adopt when adoption was available may be relevant to whether an agreement [to parent] was intended."); *In re* Parentage of L.B., 122 P.3d 161, 177 (Wash. 2005) (holding that former nonmarital partner was an equitable parent who stood in parity with the biological parent despite the fact that the former partner could have but never completed a second parent adoption). The biological mother relied on Carvin's failure to complete an adoption to support her argument that Carvin should be treated as a legal stranger. *See* Petitioner's Answer to Amicus Curiae Briefing at 8–9, *In re* Parentage of L.B., 122 P.3d 161 (Wash. 2005) (No. 75626-1), 2005 WL 723798 ("After the birth of L.B., Carvin never legally adopted L.B., despite being gifted money for that purpose; nor did she seek joint custody.").

biology, and give effect to the realities of the lives of the families.[250] For example, about half the states recognize functional parents through equitable doctrines, including de facto parent and in loco parentis, or broad third-party custody or visitation statutes. States recognizing functional parents under equitable doctrines include: Alaska,[251] Arkansas,[252] Kentucky,[253] Maine,[254] Maryland,[255] Montana,[256] Nebraska,[257] New Jersey,[258] New York,[259] North Carolina,[260] Ohio,[261] Pennsylvania,[262] South Carolina,[263] Washington,[264] West Virginia,[265] and Wisconsin.[266] Other jurisdictions, including the District of Columbia,[267] Hawaii,[268] Indiana,[269] Minnesota,[270] Montana,[271] Oregon,[272] and Texas,[273] extend rights to functional parents through broad third-party custody and visitation statutes.

250. *See, e.g.*, Joslin, *No Child Behind*, *supra* note 206, at 500 (describing trends).
251. Kinnard v. Kinnard, 43 P.3d 150 (Alaska 2002).
252. Bethany v. Jones, 378 S.W.3d 731 (Ark. 2011).
253. Mullins v. Picklesimer, 317 S.W.3d 569 (Ky. 2010).
254. C.E.W. v. D.E.W., 845 A.2d 1146 (Me. 2004).
255. Conover v. Conover, 146 A.3d 433 (Md. 2016).
256. Kulstad v. Maniaci, 220 P.3d 595 (Mont. 2009).
257. Latham v. Schwerdtfeger, 802 N.W.2d 66 (Neb. 2011).
258. V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000).
259. Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488 (N.Y. 2016).
260. Mason v. Dwinnell, 660 S.E.2d 58 (N.C. Ct. App. 2008).
261. *In re* Bonfield, 780 N.E.2d 241 (Ohio 2002).
262. Jones v. Jones, 884 A.2d 915 (Pa. Super. Ct. 2005).
263. Marquez v. Caudill, 656 S.E.2d 737 (S.C. 2008).
264. *In re* Parentage of L.B., 122 P.3d 161 (Wash. 2005).
265. *In re* Clifford K., 619 S.E.2d 138 (W. Va. 2005).
266. *In re* Custody of H.S.H.-K, 533 N.W.2d 419 (Wis. 1995).
267. D.C. CODE § 16-831.01-.05 (2001).
268. HAW. REV. STAT. ANN. § 571-46(a)(2) (LexisNexis 2015) (providing that "[a]ny person who has had de facto custody of the child in a stable and wholesome home and is a fit and proper person shall be entitled prima facie to an award of custody").
269. IND. CODE §§ 31-17-2-8.5(d); 31-14-13-2.5(d) (2018) (providing that if the court finds there is a de facto custodian who provided both primary caregiving and financial support, "[t]he court shall award custody of the child to the child's de facto custodian if the court determines that it is in the best interests of the child").
270. MINN. STAT. § 257C.04(c) (2016) (providing that a de facto custodian is entitled to seek custody, and that, in assessing a custody request by a de facto custodian, "[t]he court must not give preference to a party over the de facto custodian or interested third party solely because the party is a parent of the child").
271. MONT. CODE ANN. § 40-4-228 (2016) (setting forth the standards that apply "[i]n cases when a nonparent seeks a parental interest in a child . . . or visitation with a child").
272. OR. REV. STAT. § 109.119(1) (2017) (providing that a court may grant custody or visitation to a third party who "has established emotional ties creating a child-parent relationship or an ongoing personal relationship" with the child).
273. TEX. FAM. CODE ANN. § 102.003(a)(9) (Vernon 2014) (providing that a court can award custody or visitation to "a person, other than a foster parent, who has had actual care,

Many of these cases were decided before same-sex couples could marry, and therefore during a time in which same-sex couples were excluded from many of the parenting protections available to married couples.[274] But, critically, the trend in favor of utilizing more flexible approaches continued even in the wake of nationwide marriage equality. Take the recent *Brooke S.B.* case out of New York.[275] As noted earlier, in 1991, the New York high court embraced a bright-line rule: A person is a legal stranger in the absence of marriage, adoption, or genetic connection. New York courts finally abandoned that rule in 2016, one year after the Supreme Court's decision in *Obergefell v. Hodges*. The case involved a same-sex couple, Brooke and Elizabeth. Brooke and Elizabeth began their relationship in 2006 and got engaged a year later.[276] In June 2009, Elizabeth gave birth to a child conceived through assisted reproduction.[277] During their relationship, the parties could have taken a number of steps to formally establish Brooke's parentage of the child. The parties could have married before the birth of their child. Although marriage was not available for same-sex couples in New York until 2011,[278] they could have married in Canada.[279] If the child had been born during their marriage, New York courts would have recognized Brooke as a legal parent of the child.[280] Brooke could have but did not complete a second parent adoption in New York. Second parent adoptions have been available in New York for over two decades.[281] But, for this couple, as is true for many

control, and possession of the child for at least six months ending not more than 90 days preceding the date of the filing of the petition").

274. *See, e.g.*, Joslin, *No Child Behind*, *supra* note 206 (describing developments as of 2014, one year prior to nationwide marriage equality).

275. Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 490–91 (N.Y. 2016).

276. *Id.*

277. *Id.*

278. Michael Barbaro, *After Long Wait, Gay Couples Marry in New York*, N.Y. TIMES (July 24, 2011), https://www.nytimes.com/2011/07/25/nyregion/after-long-wait-same-sex-couples-marry-in-new-york.html.

279. Same-sex couples could marry in Canada starting 2003. Elisabeth Oppenheimer, *No Exit: The Problem of Same-Sex Divorce*, 90 N.C. L. REV. 73, 80 (2011). If they had married in Canada, New York would have recognized their marriage. *See, e.g.*, United States v. Windsor, 570 U.S. 744, 764 (2013) (noting that "New York recognized same-sex marriages performed elsewhere" even before it began permitting same-sex couples to marry in the state).

280. *See, e.g.*, Debra H. v. Janice R., 930 N.E.2d 184, 197 (N.Y. 2010) (holding that a woman was the legal parent of a child conceived through assisted reproduction that was born to her spouse during their Vermont civil union); *see also* Christopher YY. v. Jessica ZZ., 69 N.Y.S.3d 887, 891 (N.Y. App. Div. 2018) (applying the marital presumption to a lesbian spouse); Joseph O. v. Danielle B., 71 N.Y.S.3d 549 (N.Y. App. Div. 2018) (same).

281. Second parent adoptions have been available in New York for over two decades. *In re* Jacob, 660 N.E.2d 397, 398 (N.Y. 1995) ("Because the two adoptions sought—one by an

couples, life happened. Although they intended to get married,[282] Brooke and Elizabeth were not in a financial position to travel outside of the state to do so.[283] Their lives were busy. For these and other reasons, Brooke and Elizabeth did not take these formal steps to establish Brooke's parenthood that were available to them.

Despite their failure to get married or to complete an adoption, the parties and their child nonetheless viewed themselves as, and functioned as, a family. Brooke was present when her child was born, and she cut the umbilical cord.[284] They gave the child Brooke's last name. And, more generally, "[t]he parties continued to live together with the child and raised him jointly, sharing in all major parental responsibilities."[285] Indeed, Brooke was a stay-at-home parent for the first year of the child's life, while Elizabeth returned to work. Although Brooke and Elizabeth ended their relationship in 2010, for the next two years, they continued to share custody of their son.[286] This continued until July 2013, when Elizabeth cut off contact between their child and Brooke.[287] While noting that the outcome was "heartbreaking," the trial court held that because Brooke had not completed an adoption, she was a legal stranger to their child and lacked standing to seek custody or visitation.[288] This decision was affirmed by a unanimous intermediate appellate court decision.[289]

The New York high court reversed and finally abandoned its prior formality-based rule.[290] While a bright-line rule premised on marriage, adoption, or biology promoted certainty and uniformity, it often produced "injustice."[291] The people who felt this injustice most acutely were the

unmarried heterosexual couple, the other by the lesbian partner of the child's mother—are fully consistent with the adoption statute, we answer this question in the affirmative. To rule otherwise would mean that the thousands of New York children actually being raised in homes headed by two unmarried persons could have only one legal parent, not the two who want them.").

282. *Brooke S.B.*, 61 N.E.3d at 490 (noting that they "announced their engagement" in 2007).
283. *Id.* at 490 ("Petitioner and respondent lacked the resources to travel to another jurisdiction to enter into a legal arrangement comparable to marriage, and it was then unclear whether New York would recognize an out-of-state same-sex union.").
284. *Id.* at 490–91.
285. *Id.* at 491.
286. *Id.*
287. *Id.*
288. *Id.*
289. *Id.*
290. *Id.* at 500 (describing the former *Alison D.* "bright-line rule").
291. *Id.*

children.[292] In addition to harming children, this rule also flouted and failed to respect the family formation decisions of the adults. This, the New York high court finally declared, could not stand. Thus, in 2016, the New York high court joined the strong trend by adopting a rule that permits courts to look past formalities to the realities of the lives of its families.[293] "[W]here a partner shows by clear and convincing evidence that the parties agreed to conceive a child and to raise the child together," a court must recognize and protect that functional parent-child relationship that the parties intended to create, even in the absence of formalities.[294]

Another state that has recently joined the fold in this regard is Vermont. In *Sinnott v. Peck*,[295] the Vermont Supreme Court likewise held that a person could be recognized as a parent, even in the absence of a marriage, an adoption, or proof of genetic parentage.[296] As was true in the *Brooke S.B.* case, the parties could have taken steps to formalize the partner's relationship with the child. They could have married[297] or entered into a civil union before the birth of their child.[298] They could have completed a second-parent adoption; second-parent adoptions have been available in Vermont since the 1990s.[299] And, indeed, the parties had intended to do these things. As was true for Brooke and Elizabeth, life intervened. As the court explained in its decision:

292. *Id.*; *see also id.* at 498 (noting that under the prior rule, lower courts were "forced to . . . permanently sever strongly formed bonds between children and adults with whom they have parental relationships.").
293. *Id.* at 490.
294. *Id.*
295. 180 A.3d 560 (Vt. 2017).
296. *Id.* at 563.
297. Vermont began permitting same-sex couples to marry on September 1, 2009. NAT'L CTR. FOR LESBIAN RIGHTS, MARRIAGE, DOMESTIC PARTNERSHIPS, AND CIVIL UNIONS: SAME-SEX COUPLES WITHIN THE UNITED STATES 20 (2017), http://www.nclrights.org/wp-content/uploads/2013/07/Relationship_Recognition.pdf.
298. Vermont began permitting same-sex couples to enter into civil unions in 2000. Edward Stein, *The Topography of Legal Recognition of Same-Sex Relationships*, 50 FAM. CT. REV. 181, 186 (2012) ("In response to this decision, in 2000, the Vermont legislature passed a law that created civil unions, a new legal status for same-sex couples that mirrored marriage under Vermont law.").
299. VT. STAT. ANN. tit. 15A, § 1-102(b) (2018); *see also In re* Adoption of B.L.V.B., 628 A.2d 1271, 1276 (Vt. 1993) (holding that second-parent adoptions were permissible); *see also* Jane S. Schacter, *Constructing Families in a Democracy: Court, Legislatures and Second-Parent Adoption*, 75 CHI.-KENT L. REV. 933, 935 n.11 (2000) ("In 1995, the Vermont legislature codified the Vermont Supreme Court's decision interpreting that state's law to permit second-parent adoption.").

> The parties intended to enter into a civil union and go through a legal second-parent adoption, but a series of life complications, ranging from the illness and death of defendant's parents to defendant's frequent travel to Washington D.C. to care for an ill friend to plaintiff's then-undiagnosed Lyme disease, prevented the parties from entering into a civil union or completing a second-parent adoption of the children.[300]

Like the New York high court's decision, the Vermont Supreme Court held that the parties' failure to complete these formalities did not prevent the court from recognizing and protecting the actual family relationships that these parties intended to and did in fact create.[301]

Here again, part of the rationale for rejecting a rigid, formality-based rule was concern for the child.[302] But, this conclusion was also rooted in concern for respecting the family formation decisions of the adults. The rule adopted by the court provides that a legally recognized parent-child relationships can be established by proof that "the parents intended to bring a child into their family and raise the child together."[303] This legally recognized relationship can be established even if the parties did not take formal steps to establish it. Such a rule, the court explained, furthered rather than infringed the autonomy rights of the birth parent.[304] A parent has a constitutionally protected right to control the care and upbringing of her child. That includes the right to decide to create a family with another person. By giving legal effect to the parent's family-formation decision, albeit an informal one, the law promotes and respects her family-based autonomy rights.[305]

The shift away from rigid-formality based parentage rules is not limited to the judiciary.[306] More and more states now statutorily recognize as legal

300. *Sinnott*, 180 A.3d at 562.
301. *Id.* at 563.
302. *Id.* at 569 ("[L]imiting parental status to individuals who are biologically linked to the child, have legally adopted, or are married or joined in civil union with the child's legal parent at birth—would have dire consequences for many children.").
303. *Id.* at 563.
304. *Id.* at 563 (noting that the holding was "consistent with our caselaw concerning parental rights.").
305. In addition, as Douglas NeJaime persuasively demonstrates, recognizing and protecting the family that the parties voluntarily chose to form also vindicates the autonomy or liberty interests of the other parent. *See, e.g.*, Douglas NeJaime, *Constitution of Parenthood*, 72 STAN. L. REV. __, 4 (forthcoming 2020) [hereinafter, NeJaime, Constitution of Parenthood] (unpublished manuscript) (on file with the author) ("This Article develops an account of the *liberty* interest in parental recognition that includes nonbiological parents." (emphasis in original)).
306. For a more detailed analysis of the trends in this area, see Joslin, *Family Status*, *supra* note 60.

parents some individuals who are unconnected to the children through any of the formal markers of marriage, adoption, or biology.[307] Four states—Delaware, Maine, Vermont, and Washington[308]—now have statutes providing that "de facto" parents can be recognized as legal parents. The Uniform Parentage Act of 2017 also includes a statutory de facto parent provision.[309] These statutory provisions codify a multifactor inquiry that is similar to the common law test enunciated in *V.C.* Here too, two key elements of the statutory standard are: (1) the existence of an actual parent-child relationship; and (2) proof that this relationship was formed with the consent and encouragement of a legal parent.[310] A number of other states, including California, Colorado, Kansas, Massachusetts, New Mexico, Vermont, reach similar conclusions through other statutory parentage doctrines.[311]

In this context as well, whether the parties could have taken steps to formalize the relationship is not dispositive. Nor is it required that the parties properly understand the legal implications of their actions. The critical inquiry under all of these tests is the formation of the familial relationship as a matter of fact. Thus, for example, in one California case, the court held that the fact that the functional parent did not understand that she was a legal parent and therefore did not identify herself as such to school and medical officials was not dispositive. Any other result, the court explained, would "ignore" the most important and compelling evidence: that the child

307. *Id.*

308. DEL. CODE ANN. tit. 13, § 8-201 (2017); ME. REV. STAT. tit. 19-A, § 1891 (2015); VT. STAT. ANN. tit. 15C, § 501 (2017); WASH. REV. CODE ANN. § 26.26A.440 (2018).

309. For more information about the Uniform Parentage Act (UPA) (2017), see Courtney G. Joslin, *Nurturing Parenthood Through the UPA (2017)*, 127 YALE L.J. F. 589 (2018); Courtney G. Joslin, *Preface to the UPA (2017)*, __ FAM. L.Q. __ (forthcoming 2019). The UPA (2017) is available at http:// www.uniformlaws.org/ shared/docs/parentage /UPA2017_Final_2017sep22.pdf.

310. *See, e.g.*, UNIF. PARENTAGE ACT §§ 609(d)(5) & (d)(6) (UNIF. L. COMM'N 2017) (requiring, among other things, demonstration by clear and convincing evidence that: "the individual established a bonded and dependent relationship with the child which is parental in nature" and that "another parent of the child fostered or supported [that] bonded and dependent relationship").

311. Elisa B. v. Superior Court, 117 P.3d 660, 668 (Cal. 2005); *In re* Parental Responsibilities of A.R.L., 318 P.3d 581, 587 (Colo. App. 2013); *In re* T.P.S., 978 N.E.2d 1070, 1985 (Ill. App. Ct. 2012); Frazier v. Goudschaal, 295 P.3d 542, 557 (Kan. 2013); Partanen v. Gallagher, 59 N.E.3d 1133, 1142 (Mass. 2016); *In re* Guardianship of Madelyn B., 98 A.3d 494, 501 (N.H. 2014); *In re* Parentage of Robinson, 890 A.2d 1036, 1042 (N.J. Super. Ct. Ch. Div. 2005); Chatterjee v. King, 280 P.3d 283, 295–96 (N.M. 2012); Sinnott v. Peck, 180 A.3d 560, 569 (Vt. 2017).

"believed [the woman] was his mother."[312] Again, it is the formation of the familial relationships as a matter of fact, not what the parties thought the legal status of the relationship was or what steps they did or did not take to formalize their familial relationship, that is critical.

The common law and statutory rules described above apply to all children, regardless of their method of conception. At least since the 1960s and 1970s, many states have had parentage rules that specifically address children conceived through assisted reproductive technology (ART).[313] Here, too, there has been movement away from rigid standards that turn on bright-line rules and compliance with formalities. Initially, the rules in most states required proof of compliance with a number of rigid requirements. For example, until about ten years ago, the rules in almost all states applied only if the parties were married. Indeed, as I explain elsewhere, even as late as 2010, "only four states and the District of Columbia [had] statutory ART provisions that" applied equally to children born to unmarried couples.[314] In addition, most statutes imposed a number of other requirements. For example, many states required the assisted reproduction procedure to be done by or at least under the supervision of a doctor.[315] In addition, almost all states required both spouses to consent in writing. States included these procedural requirements to reduce factual disputes and to guard against fraud.[316]

312. *In re* Salvador M., 4 Cal. Rptr. 3d 705, 706 (Cal. Ct. App. 2003).

313. The original version of the Uniform Parentage Act, which was promulgated in 1973, addressed the parentage of some children conceived through assisted reproduction. UNIF. PARENTAGE ACT § 5 (UNIF. LAW COMM'N 1973).

314. Courtney G. Joslin, *Protecting Children(?): Marriage, Gender, and Assisted Reproductive Technology*, 83 S. CAL. L. REV. 1177, 1179 (2010) [hereinafter Joslin, *Protecting Children*].

315. The 1973 UPA, for example, required that the insemination be done "under the supervision of a licensed physician." UNIF. PARENTAGE ACT § 5(a) (UNIF. LAW COMM'N 1973). "If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived. The husband's consent must be in writing and signed by him and his wife." *Id.* Nineteen states adopted the UPA 1973, and the 1973 UPA continues to shape the law in many states today. UNIF. PARENTAGE ACT Prefatory Comment (UNIF. LAW COMM'N 2002) ("As of December, 2000, UPA (1973) was in effect in 19 states stretching from Delaware to California; in addition, many other states have enacted significant portions of it."). For a more detailed description of the law in individual states, see generally COURTNEY G. JOSLIN, SHANNON P. MINTER & CATHERINE SAKIMURA, LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW (2018 ed.).

316. *See, e.g.*, Jhordan C. v. Mary K., 224 Cal. Rptr. 530, 535 (Cal. Ct. App. 1986) ("Another justification for physician involvement is that the presence of a professional third party such as a physician can serve to create a formal, documented structure for the donor-recipient relationship, without which, as this case illustrates, misunderstandings

Many earlier cases maintained rigid compliance with these rules, either implicitly or explicitly. This was true, for example, with respect to children born to unmarried couples through assisted reproduction. Courts almost never applied the marriage-based ART rules to nonmarital children.[317] Take *Elisa B. v. Superior Court*.[318] The parties strongly pressed this argument, but the court decided the case on other grounds without even mentioning this claim.[319]

Eventually, many courts concluded that rigidly abiding to rules that required various procedural formalities as well as formal expressions of consent not only produced unfair and harsh outcomes, but it also flouted the family creation choices of the parties. Consider *In re T.P.S.*[320] The case concerned the parentage of two children conceived and born through assisted reproduction to a lesbian couple. Both women intended to be parents of the children, both women participated in the deliberate process to conceive children through assisted reproduction, and both women functioned as parents to the children after their birth. After the parties ended their relationship, however, the birth mother argued that her former partner had no parental rights or obligations with regard to the child. The biological mother argued that her former partner was not a parent under any statutory provisions, including the statutory ART provision which, at the time, was limited to married couples. The trial court agreed with her, holding that the nonbiological parent "lacked standing . . . because she was not a biological or adoptive parent of the children."[321] The appellate court reversed. Although the court did not apply the statutory ART provision, it held as a matter of common law that when an "an unmarried couple agrees to conceive a child by artificial insemination, and the couple subsequently begins raising the child

between the parties regarding the nature of their relationship and the donor's relationship to the child would be more likely to occur.").

317. *See, e.g.*, JOSLIN ET AL., *supra* note 315, §§ 3:3, 3:5.

318. 117 P.3d 660 (Cal. 2005).

319. I served as counsel in the case for real party in interest Elisa B. In our brief, we argued that Elisa was a parent under an equal application of California's then marriage-only assisted reproduction statute—section 7613(a) of the California Family Code. Opening Brief of Real Party in Interest Emily B. at 14, Elisa B. v. Superior Court, 117 P.3d 660 (Cal. 2005) (No. PFS 20010244) (arguing that "Family Code Section 7613(a) Must Be Applied Equally To Children Born To Unmarried Parents"); *see also cf.* NeJaime, *New Parenthood*, *supra* note 56, at 1229 ("[W]hile the court did not formally decide the case on the basis of section 7613, it credited the analogy; Elisa was like 'a husband who consented to the artificial insemination of his wife using an anonymous sperm donor.'" (quoting *Elisa B.*, 117 P.3d at 670)).

320. 978 N.E.2d 1070 (Ill. App. Ct. 2012).

321. *Id.* at 1074.

as coequal parents," the nonbiological parent has standing to request custody or visitation.[322] These and many other cases illustrate that the trend in parentage is toward recognizing and giving effect to the family creation choices people make.

Courts considered the critical question of whether the parties intended to create a family in fact in *K.M. v. E.G.* If people intended to create family relationships, and especially when those family relationships did indeed form, courts recognize and protect those relationships. The case involved twins who were born to a lesbian couple through ova sharing. One woman, K.M., provided her ova. The ova were fertilized in vitro and then transferred to the other woman, E.G., who then gave birth to twins. The couple lived together and raised the children together for five years. After the couple ended their relationship, E.G., the gestational mother, took the position that K.M. was a legal stranger who had no right to see or maintain a relationship with the children. The California Court of Appeal agreed with her, holding that only E.G. was a legal parent to the children. In reaching this conclusion, the court placed heavy weight on the fact that E.G. thought she was the only legal parent, and that the parties never completed an adoption of the children by K.M.[323]

The California Supreme Court reversed. The court held that K.M., the nongestational mother, was a legal mother of the twin girls born to her former same-sex partner. Despite the fact that E.G. thought she was the only legal parent was not dispositive. Instead, the important fact was that "the couple in the present case intended to produce a child that would be raised in their own home."[324] In other words, what mattered was that the parties intended to form a family together and did in fact form a family together. This rule furthered the best interests of the children, who viewed both women as their parents. But critically, this rule also gave effect to the family-formation decisions of the adults.[325]

Consistent with these judicial determinations, state legislatures have also been moving away from rigid, bright-line ART rules. Almost a quarter of the

322. *Id.* at 1075.

323. *See, e.g.*, K.M. v. E.G., 13 Cal. Rptr. 3d 136, 141 (Cal. Ct. App. 2004), *as modified on denial of reh'g*, *review granted and opinion superseded*, 97 P.3d 72 (Cal. 2004), *rev'd*, 117 P.3d 673 (Cal. 2005) (noting that "E.G. referred to the waiver of rights on the ovum donor consent form and told K.M. she had no legal rights without adoption").

324. *K.M.*, 117 P.3d at 679.

325. *See also In re* T.P.S., 978 N.E.2d at 1075 (holding the nonbiological partner had standing to seek custody and visitation of two children conceived through assisted reproduction and born to the woman's former unmarried lesbian partner).

states now have ART rules that are not limited to married couples.[326] More and more states are also moving away from other previously required formalities, including the requirement of physician involvement as well as proof of written consent. For example, the three most recent iterations of the Uniform Parentage Act—the UPA (2000), the UPA (2002), and the UPA (2017)—all jettison the physician involvement requirement.[327] Moreover, the most recent version of the UPA, the UPA (2017), also jettisons the requirement of written consent. The UPA now permits a court to find consent to be a parent of a child conceived through assisted reproduction in the absence of written consent.[328] This new provision was added because the drafters recognized that many parties do not comply with this longstanding requirement of formal, written consent, even when the evidence indicates that the parties consented in fact.[329] Specifically, section 704 now provides that, in the absence of written consent, consent to assisted reproduction can also be established by proof "of an express agreement entered into before conception that the individual and the woman intended they both would be parents of the child."[330]

In sum, over time, courts and policy makers moved away from rigid parentage rules that required formal expressions of consent and adherence to procedural requirements. This evolution resulted from a growing appreciation that those types of bright-line rules not only often harmed children, they also often failed to recognize and appreciate the family formation choices of the adults. In their place, states embraced more capacious rules that seek to identify and give effect to these choices.

326. *See* JOSLIN ET AL., *supra* note 315, at § 3:3.

327. *See, e.g.*, UNIF. PARENTAGE ACT § 703 (UNIF. LAW COMM'N 2000); UNIF. PARENTAGE ACT § 703 (UNIF. LAW COMM'N 2002); UNIF. PARENTAGE ACT § 703 (UNIF. LAW COMM'N 2017). By contrast, the original UPA—UPA (1973)—required the insemination to have been done under the supervision of a physician. UNIF. PARENTAGE ACT § 5(a) (UNIF. LAW COMM'N 1973) ("If, under the supervision of a licensed physician and with the consent of her husband, a wife is inseminated artificially with semen donated by a man not her husband, the husband is treated in law as if he were the natural father of a child thereby conceived.").

328. UNIF. PARENTAGE ACT § 704(b) (UNIF. LAW COMM'N 2017).

329. *See, e.g.*, UNIF. PARENTAGE ACT § 704 cmt. (UNIF. LAW COMM'N 2017) ("Case law and experience make clear, however, that many parties do not consent in writing, even when the statute requires written consent and even when the evidence indicates that the parties intended that they would both be parents to the child."). I served as the Reporter for the UPA (2017).

330. UNIF. PARENTAGE ACT § 704(b)(1) (UNIF. LAW COMM'N 2017).

IV. A NEW THEORY OF FAMILY AUTONOMY: CRITIQUES AND REJOINDERS

In its most robust formulation, the conventional doctrine regarding the economic rights of nonmarital partners simply allows them to be treated like other third parties. The effect of this doctrine is to treat nonmarital partners as nonfamily members. Like any other legal strangers, they have no rights or obligations to each other absent a sufficiently definite agreement to share.[331] This approach must be abandoned in favor of one that recognizes them for what they are: family members. This is critical from a theoretical perspective. If all the concept of family autonomy means is that people who want to form families outside of marriage will not be subjected to criminal prosecution or that they have the right like (although often worse than) legal strangers, that is a meager one indeed.[332] To give life and substance to a robust concept of choice in family form, adults must be able to choose between a range of relationships that are recognized and treated as families.

Moreover, the current regime does a poor job of recognizing and protecting individual's decisions or choices to form a family. The conventional doctrine only allows for consideration of a very limited array of decision points: the formal decision to marry (or its absence) and decision to enter into an agreement to share (or its absence).[333] As the parentage cases illustrate, rules that look only to a limited set of formal decisions render invisible an enormous range of quotidian decisions and actions. In many cases, other inquiries, including how the parties interacted with one another, how long these interactions lasted, whether the parties viewed themselves as family members, and the degree to which the parties relied on each other are more insightful and important questions to ask.[334] If the goal is to offer

331. *See supra* Part I.

332. Elsewhere I develop an argument in favor of a constitutionally based right to form families of choice, including nonmarital families. Specifically, I argue that "[b]y rereading *Obergefell* in light of the gay rights canon, . . . *Obergefell* can support, rather than foreclose, a broader constitutional right to form families, including nonmarital families." Joslin, *Right to Nonmarriage*, *supra* note 56, at 488. This Article seeks to make a normative claim in favor of a robust vision of family autonomy. While the argument developed here is consistent with a constitutionally based notion of autonomy, it does not depend on the existence of such a right.

333. *Cf.* Stolzenberg, *supra* note 12, at 2041 (noting that by fixating on only two formal decisions, marriage and entrance into a contract, the conventional doctrine "fails to grasp the nature of family interchange").

334. *Cf.* Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 652–55 (1988) (advocating for a "social relations approach" that views "people as situated in various relationships with others that continue over time" and that "develop[s] over the course of relationships rather than as being fully articulated at clear decision points").

meaningful choices with regard to family form, and to give effect to those decisions once made, the law must allow for a more holistic consideration of the nature of these relationships.

Moreover, the current doctrine presumes that the limited set of recognized decision points—transition to marriage (or the failure to do so) and entrance into an agreement (or the failure to do so)—are deliberately-made, mutual decisions. As discussed in more detail below, the existing empirical data undermine or at least call into question the accuracy of these presumptions. Sometimes the choice of marriage is something that is expressly contemplated and rejected. But the empirical data suggest that the failure to transition to marriage often is not the result of an express, deliberate decisionmaking process.[335]

Even when the failure to transition to marriage or enter into a contract is the result of deliberate choice, it may not be and often is not a mutual one. Both parties must agree for one of these transitions to occur. When the decision is not mutual, the current doctrine gives effect only to the choice of the party who does not seek to make that transition, and that person is often the person with more relational power. And, for a variety of reasons, this person is most often a man. *Marvin* is often defended on the ground that it vindicates equality concerns. But experience and empirical evidence suggests that the doctrine perpetuates inequality within families and between different kinds of families.

For example, although many strides have been made with respect to gender equality, women still tend to be disadvantaged under *Marvin*.[336] As noted above and discussed in more detail below, the decision to transition to marriage is one for which men's preferences carry more weight than women's. Even under more robust applications of *Marvin* that allow for compensation for services rendered, the current doctrine devalues or denies value altogether to critical services that are disproportionately provided by women.[337]

In sum, the current doctrine undermines a robust theory of choice in family form. As a theoretical matter, the current doctrine recognizes only one

335. *See infra* Part IV.B.

336. Antognini, *supra* note 12, at 1968 (noting that the current rules that "do not recognize the[ ] contributions outside of marriage [of lower income women who are less likely to marry] may lead to entrenching their lack of access to material wealth").

337. *Id.* at 1963–64 ("It should come as no surprise then that in the context of valuing contributions made to a relationship, courts remunerate a plaintiff for bringing funds into the relationship as a result of being a successful breadwinner, but decline to do so for time invested, or services rendered, as a result of being a productive homemaker.").

type of family form as a family: the marital family. Such a system does not provide meaningful choice. Moreover, the current doctrine does a poor job in reflecting the relational decision to form families, including families outside of marriage. It is time to jettison this approach.

Before going further, however, a few points are in order. First, taking the position that the law ought to recognize and give effect to a range of family forms does not necessarily mean that all of those family forms must be treated just like marital families.[338] As June Carbone and Naomi Cahn describe, there is wide variation with regard to nonmarital families.[339] Moreover, as Marsha Garrison explains, there are some important differences between nonmarital and marital couples.[340] Nonmarital relationships tend to be shorter in duration.[341] There is less pooling of financial resources in nonmarital families as compared to marital families.[342] About "half of cohabitors pool their money."[343] A larger percent of married spouses pool their resources. (That said, it is important to note that "pooling is not universal among the married."[344] It is also important to acknowledge that behavior among nonmarital couples has changed over time.[345])

That there is variation within nonmarital families and between nonmarital families and marital families is an insufficient basis for refusing to recognize nonmarital relationships altogether. It may, however, support the adoption of rules that depart in some respects from the rules that apply to

338. Joslin, *Right to Nonmarriage*, *supra* note 56, at 482 ("There are plausible arguments in favor of applying different property division rules to married and nonmarital couples. For example, some research suggests that, on the whole, nonmarital relationships are different from marital relationships in important ways. Cohabitants, this research suggests, are less likely to be financially interdependent, and their relationships tend to be more conflicted and less stable. Given these differences, a default rule of equal sharing may not be appropriate in the context of nonmarital relationships." (footnote omitted)).

339. Carbone & Cahn, *Nonmarriage*, *supra* note 4, at 96 (noting the "persistence of varying expectations among cohabitants").

340. *See, e.g.*, Garrison, *Marriage Matters*, *supra* note 6, at 307–08 (discussing differences); *see also, e.g.*, Margaret F. Brinig, *Domestic Partnerships and Default Rules*, *in* RECONCEIVING THE FAMILY 274–77 (Robin Fretwell Wilson ed., 2006) (discussing how "cohabitation differs from marriage").

341. *See, e.g.*, Garrison, *Marriage Matters*, *supra* note 6, at 307–08.

342. *See, e.g.*, *id*. at 308.

343. Sarah Avellar & Pamela J. Smock, *The Economic Consequences of the Dissolution of Cohabiting Unions*, 67 J. MARRIAGE & FAM. 315, 317 (2005).

344. *Id.* For example, a recent study "of low-income parents . . . found that only 73% of married couples pooled their income, compared to roughly 52% of cohabitors." Catherine Kenney, *Cohabiting Couple, Filing Jointly? Resource Pooling and U.S. Poverty Policies*, 53 FAM. REL. 237, 243 (2004).

345. *See, e.g.*, Rose-Greenland & Smock, *supra* note 177.

married couples. Some existing models already do this. For example, the Washington intimate committed partnership doctrine treats covered nonmarital couples similarly but not identically to the way married couples are treated.[346] In some foreign countries, there is more variation with respect to the legal treatment of marital and nonmarital couples. For example, in Sweden and Norway, nonmarital cohabitants are entitled to an equal division of some assets, like the family home and household goods, but not other assets.[347] Parentage law offers some useful guidance as well. In some states, nonbiological, nonmarital functional parents are recognized but they are not treated as the equivalent of legal parents.[348] Instead, they fall in a category between third parties and legal parents.[349] States could do something similar here with respect to property division upon dissolution: the rule could treat nonmarital partners as family members (rather than as legal strangers), but could treat them differently than legal spouses.

Second, while my theory posits that the law should impose a default sharing requirement on adults who form families together, these adults, like married spouses, should be able to opt out of this default rule.[350] This is one place where the adult-adult rules can and should depart from parentage developments. In the parentage context, the law places limits on the ability of

346. *See, e.g.*, Connell v. Francisco, 898 P.2d 831, 836 (Wash. 1995) ("While portions of [the divorce statutes] may apply by analogy to meretricious relationships, not all provisions of the statute should be applied. The parties to such a relationship have chosen not to get married and therefore the property owned by each party prior to the relationship should not be before the court for distribution at the end of the relationship. However, the property acquired during the relationship should be before the trial court so that one party is not unjustly enriched at the end of such a relationship.").

347. Anna Stepień-Sporek & Margaret Ryznar, *The Consequences of Cohabitation*, 50 U.S.F. L. REV. 75, 93 (2016) (describing the law in Sweden and Norway).

348. For example, in Wisconsin, de facto parents are only entitled to visitation, not custody. Holtzman v. Knott, 533 N.W.2d 419, 435 (Wis. 1995). For further discussion of this issue, see Joslin, *Protecting Children*, *supra* note 281, at 1200 & n.112.

349. *See, e.g.*, Dara E. Purvis, *The Origin of Parental Rights: Labor, Intent, and Fathers*, 41 FLA. ST. U. L. REV. 645, 659 (2014) ("[F]unctional theories do not necessarily create status as legal parent: as in the New Jersey case, functional theories sometimes merely give the adult some legal standing to request visitation or custody that is nonetheless subordinate to status as legal parent.").

When parties intentionally create families together through assisted reproduction, I do not think that difference in treatment is appropriate. *See, e.g.*, Joslin, *Protecting Children*, *supra* note 281, at *passim*. But for our purposes here, this body of case law offers an example of how states can create new family status models that provide gradations of rights and responsibilities.

350. All fifty states permit spouses to opt out of marital property rules by entering into enforceable premarital agreements. Barbara A. Atwood & Brian H. Bix, *A New Uniform Law for Premarital and Marital Agreements*, 46 FAM. L.Q. 313, 318–19 (2012).

adults to opt out of their obligations to children.[351] This limitation is imposed because there is a third party, a child, who would be harmed if the adults had unfettered rights to limit their obligations to that child.

By contrast, with respect to horizontal adult-adult nonmarital relationships, the adults should be permitted to opt out of their obligations to each other. This opt out right is permitted under many, if not most, of the existing models. For example, domestic partners, like married spouses, can opt out of the default sharing rules under the ALI Principles of the Law of Family Dissolution.[352] In this way, the intent of the parties remains key. But, under this proposed approach, the burden would be on the party who wants to escape this default rule, not the other way around. In Part V, I begin to sketch out some additional principles that should guide courts and policymakers as they seek to further a more robust vision of family autonomy. Before getting into those guiding principles, the next Part responds to some potential critiques of this position.

A. Parent-Child Cases Are Different

An initial and obvious rejoinder to my position is the claim that disputes about vertical parent-child relationships are different. The parentage cases discussed above involve a third party, a child. This third party is one that is of vital interest to the state; indeed, the state has a compelling interest in the welfare and wellbeing of children.[353] By contrast, one might say, in the context of horizonal adult-adult relationships, there is no third party, much less a child, that needs to be protected. As a result, it is argued, the rationale for the rules developed in the vertical parent-child cases have "less force" in the horizontal context. As Kaiponanea Matsumura puts it:

> "[children played] no role in the creation of [their] dependency because they exercise no agency in their birth nor in the circumstances in which they find themselves. In contrast, . . . it is

351. *See, e.g.*, Wallis v. Smith, 22 P.3d 682, 685 (N.M. Ct. App. 2001) ("We will not re-enter the jurisprudence of illegitimacy by allowing a parent to opt out of the financial consequences of his or her sexual relationships just because they were unintended. Nor will we recognize a cause of action that trivializes one's personal responsibility in sexual relationships.").

352. *See* Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1276, 1305 (2014) ("Couples who want to opt out of this default need a prior written agreement.") .

353. *See, e.g.*, Prince v. Massachusetts, 321 U.S. 158, 166 (1944) (noting that the state can override a parent's liberty interest where necessary to "guard the general interest in youth's well being").

> difficult to argue that a competent adult had a comparably reduced level of agency in the nonmarital relationship."[354]

The fact that the parentage cases involve third parties and that those third parties happen to be children is an important distinction between the two types of cases. For example, in finally overturning the twenty-five-year-old *Alison D.* decision, the New York high court noted the harm that the prior New York rule inflicted on many children:

> [I]n the years that followed, lower courts applying *Alison D.* were "forced to . . . permanently sever strongly formed bonds between children and adults with whom they have parental relationships." By "limiting their opportunity to maintain bonds that may be crucial to their development," the rule of *Alison D.* has "fall[en] hardest on the children."[355]

Indeed, it is likely due to the very real harm that rigid, formality-based rules inflicted on children that the parentage law doctrine shifted and evolved more quickly.

That said, as discussed above, contemporary parentage doctrine does not stand for the proposition that it is permissible to infringe an adult's autonomy because that is necessary to protect the wellbeing of a child. To the contrary, the parentage-related developments discussed above instead are based on the principle that rules that protect intentionally created parent-child relationships (and in turn the child) also protect the family-creation decisions of the adults.

This was true, for example, in the New Jersey Supreme Court's decision in *V.C. v. M.J.B.* In *V.C.*, the New Jersey Supreme Court embraced and applied an equitable functional parent doctrine. This rule, the court suggested, would best protect the wellbeing of the children at issue. That rule, the court continued, also respected and gave substance to the family-creation decisions of the children's biological mother. A right of family autonomy, the court recognized, encompasses not just the right to exclude; it also encompasses the right to join in others. Once a parent has exercised her autonomy rights in this way, respect for that interest requires the court to recognize and give effect to that choice. Otherwise, the right to form families of choice is a hollow one: it is entitled to no respect or protection once it is exercised.

354. Matsumura, *Intimate Regulation*, *supra* note 1, at 1055.
355. Brooke S.B. v. Elizabeth A.C.C., 61 N.E.3d 488, 498 (N.Y. 2016) (citations omitted).

This principle also flows through the ART developments reviewed above. The ART-related developments, both the statutory and the case law developments, likewise seek to give substance and meaning to the principle that adults should be able to form a variety of types of families and that once those families have been formed, they should be recognized by law. Consistent with this principle, many states have ART statutes that apply equally without regard to marital status or sex. As a result, when an individual—married or unmarried, male or female—chooses to have a child through ART with another person, that family-formation choice is recognized and protected.

This rule can and should be applied to adult-adult relationships. People should have the right to form families of choice, including families outside of marriage. Once a familial relationship is formed, it should be treated for what it is: a family. As noted above, adopting an approach that recognizes nonmarital relationships as families does not necessarily require treating those relationships exactly like marital ones. Such an approach also does not require treating every cohabiting relationship as a familial relationship.

A related argument suggests that while adults may be unlikely to express their intent formally with regard to their children, it is reasonable to expect them to do so with regard to their own economic rights and obligations. Again, to restate, the current rule allows consideration of only a very limited set of decisions, the decisions to marry and the decision to enter into a contract. Moreover, the law, and those that defend the current law, treat the failure to do one of those things as a deliberate decision to reject not just marriage itself but also any type of familial-based obligations.[356]

Recent empirical studies, however, undermine or at least provide good reason to question this assumption. First, research suggests that in a significant number of these families, the failure to transition to marriage is not a deliberate decision. The work of sociologists Wendy Manning and Pamela Smock, for example, "call into question the assumption [often] made in research of a conscious decisionmaking process leading to cohabitation." Their findings suggest that "the decision may be better characterized as a slide into cohabitation" rather than a deliberate decision to cohabit.[357] Similarly, many cohabitants do not have explicit conversations about whether and

356. *See, e.g.*, Carbone & Cahn, *Nonmarriage*, *supra* note 4, at 58 (describing nonmarital couples as having "very intentionally said 'no' to marriage because they did not want the commitments marriage entails").

357. Wendy D. Manning & Pamela J. Smock, *Measuring and Modeling Cohabitation: New Perspectives From Qualitative Data*, 67 J. MARRIAGE & FAM. 989, 995 (2005).

when to transition to marriage.[358] For example, in their new book Cohabitation Nation, sociologists Sharon Sassler and Amanda Miller report that only a small number of their respondents "reject[ed] marriage as an institution." Not only did few expressly reject marriage, most of their respondents reported that they did not "explicitly discuss[ ] plans for marriage prior to moving in together."[359] Kathryn Edin and Maria Kefalas, also sociologists, report that only a minority of the lower-income women that they interviewed expressly rejected marriage.[360] To the contrary, most of the women they spoke to wanted to marry.[361]

Moreover, to the extent a deliberate decision is involved, the current rule presumes or treats the decision not to marry as a mutual one. The research, however, suggests that this is not always the case. The data also suggests that to the extent that the failure to transition to marriage is the result of a deliberate decision, men's preferences carry more weight.[362] To use the words of Sharon Sassler and Amanda Miller: "Perhaps nowhere do normative gendered expectations appear more strongly than in expectations for marriage proposals. Among the couples we interviewed, men are overwhelmingly expected to be the ones to propose marriage."[363] As a result, "men's preferences for the future of the relationship carry more weight that women's."[364] This is true even when the woman is the higher wage earner in the couple.[365]

Moreover, even for those couples who made a deliberate, mutual decision not to marry, it is not clear that that "decision" was always or most

358. Manning and Smock conclude that "most young adults do not appear to be explicitly deciding between cohabitation and marriage." *Id.* at 999.

359. SASSLER & MILLER, COHABITATION NATION, *supra* note 54, at 151.

360. KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE 131 (2005) (noting that only 17 percent of the women they spoke to "adamantly t[old] us they do not plan to marry").

361. *Id.* at 111 ("Poor women are not disinterested in marriage, quite the contrary.").

362. Penelope M. Huang, Pamela J. Smock, Wendy D. Manning & Cara A. Bergstrom-Lynch, *He Says, She Says: Gender and Cohabitation*, 32 J. FAM. ISSUES 876, 879 (2011) ("[C]ohabiting couples are, in fact, rather gender-typical in terms of relationship progression." (citing Anne Reneflot, *A Gender Perspective on Preferences for Marriage Among Cohabitating Couples*, 15 DEMOGRAPHIC RES. 311 (2006))).

363. SASSLER & MILLER, COHABITATION NATION, *supra* note 54, at 161.

364. Huang et al., *supra* note 362, at 879 (citing Susan L. Brown, *Union Transitions Among Cohabitators: The Significance of Relationship Assessments and Expectations*, 62 J. MARRIAGE & FAM. 833, 843 (2000)); *see also* Sassler & Miller, *Waiting to Be Asked*, *supra* note 50, at 497 (finding that most cohabitants believe that the man should propose).

365. SASSLER & MILLER, COHABITATION NATION, *supra* note 54, at 10 ("Even if cohabiting women earn a larger proportion of the couples' combined earnings, they still remain disadvantaged when it comes to their negotiating power relative to men.").

commonly made for the purpose of rejecting any property sharing obligations. First, if that was the sole or primary reason for not marrying, there is a much more direct way to achieve that result. All fifty states permit the parties to opt out of the marital property division rules by entering into a valid premarital agreement.[366] Second, here too empirical data provides a basis for questioning this logic, at least in some cases. For example, researchers Kathryn Edin and Maria Kefalas found that while most of the low-income women they interviewed aspired to marry *at some point*, many reported that they did not want to marry *at that point*. Even in these cases when the decision not to transition to marriage was deliberate and possibly mutual, it is not clear that this decision is always or primarily fueled by a rejection of the marital property rules. What Edin and Kefalas's data reveal is that many of the low-income women they interviewed reported that they wanted to be more financially stable before getting married. Among this subgroup, the data also reveals that when and if the women are able to achieve this greater financial stability themselves (which, unfortunately, many will not[367]), this increases the likelihood that they will marry:

> [S]tudies that focus on disadvantaged women's economic situations and likelihood of marriage are quite consistent and straightforward in their findings: for those at the bottom of the educational distribution, women's employment increases marital transitions. That relationship is further confirmed by recent analyses of the Fragile Families Survey, which find that more education and higher hourly wage for women increased marriage rates among couples in the year following their child's birth.[368]

If the failure to transition to marriage was primarily driven by the women's desire to avoid a default property sharing obligation, one may expect the results to point in the opposite direction—as women amassed more assets (assets that they would have to share under a sharing regime), their likelihood of marriage would decrease. But instead, the findings suggest the opposite.

366. Atwood & Bix, *supra* note 350, at 318–19 ("Under current law, all jurisdictions recognize the enforceability of premarital agreements concerning the economic consequences of death and divorce").

367. *See, e.g.*, THE DECLINE OF MARRIAGE, *supra* note 16, at i ("The survey finds that those in this less-advantaged group are as likely as others to want to marry, but they place a higher premium on economic security as a condition for marriage. This is a bar that many may not meet.").

368. Kathryn Edin & Joanna M. Reed, *Why Don't They Just Get Married? Barriers to Marriage Among the Disadvantaged*, 15 FUTURE CHILD. 117, 127 (2005).

To the extent one justifies treating unmarried cohabitants differently based on an assumption that this distinction in family form is the result of a mutual, deliberate, egalitarian decision to opt out of marriage and its rules, the emerging data suggests reasons to question this assumption. For many couples, the failure to transition to marriage is not the result of a deliberate, decision-making process. To the extent that their family form is the result of someone's deliberate decision, the emerging research suggests that it may not be the result of a mutual decision-making process. And, there is reason to believe that this decision-making process is highly gendered.

B. Too Difficult to Administer

Some scholars may argue that even if it is possible to apply more capacious rules in the parenting context, the same is not true with regard to the economic rights of the adults. In this vein, Elizabeth Scott argues that the ALI proposal, for example, "is costly, intrusive, and fraught with uncertainty."[369] Marsha Garrison expresses similar concerns. Conscriptive schemes, she says "present daunting fact-finding challenges."[370] Defenders of *Marvin* might also point to the almost stagnant body of law with respect to the economic rights of nonmarital partners as evidence that alternatives are not feasible.

While it is true that there has been little development in the law of property division for couples who never marry, these general claims of lack of administrability overlook a developing body of law, what I call interstitial marriage cases. Interstitial marriage cases are cases involving couples whose relationships include periods of marriage and periods of nonmarriage. Courts have been grappling with interstitial marriage cases for many years.[371] But while these cases are not entirely new, there has been a noticeable shift in recent years.

In the last decade, an increasing number of courts have concluded that when the relationship includes a period of marital living, courts can impose a

369. Scott, *supra* note 4, at 340.

370. Garrison, *Nonmarital Cohabitation*, *supra* note 6, at 325.

371. *See, e.g.*, Skelton v. Skelton, 490 A.2d 1204, 1208–09 (Me. 1985) ("The foregoing provides the basis for our view that the District Court may correctly take the entire eighteen-year span of the relationship into account for the proper purpose, despite the earlier marriage, after which no alimony was awarded, and the intervening period between marriages."); Nelson v. Nelson, 384 N.W.2d 468, 472 (Minn. Ct. App. 1986) (treating the three-year cohabitation period before the marriage as part of the marriage).

sharing requirement with respect to the period of nonmarital cohabitation. For example, the state high courts in Hawaii[372] and New Hampshire[373] reached these conclusions in 2014 and 2016, respectively.[374] What is also distinctive about some of these more recent interstitial marriage cases is that they employ a more sophisticated approach for addressing the period of cohabitation.

In earlier interstitial cases, courts that gave effect to periods of cohabitation often simply swept the cohabitation in and treated it as part of the marriage itself.[375] Under the rule recently adopted in Hawaii in *Collins v. Wassell*, by contrast, cohabitation does not simply fold into marriage. And not all cohabitation gives rise to a sharing requirement. Instead, in these interstitial marriage cases, Hawaii courts consider the nature of the cohabitation itself. In this way, the rule seeks to impose sharing only on those cohabiting relationships in which the parties' conduct indicates that they intended to share and support one another. Indeed, "[w]hether a premarital economic partnership has been formed depends upon the intentions of the parties."[376]

While the rule is one that turns on intent, it is important to appreciate that the rule does not limit the inquiry to formal markers of intent, like entry into marriage or an agreement to share. Instead, the rule requires courts to

372. Collins v. Wassell, 323 P.3d 1216, 1227 (Haw. 2014) ("We now affirm the holding of *Helbush* that premarital contributions are a relevant consideration when the parties entered into a premarital economic partnership during a period of cohabitation.").

373. *In re* Munson, 146 A.3d 153 (N.H. 2016) (holding, for the first time, that trial court abused its discretion when it refused to consider the parties' premarital cohabitation when dividing marital property and determining spousal support).

374. *See also, e.g.*, Harrelson v. Harrelson, 932 P.2d 247, 251 (Alaska 1997) ("Separate [premarital] property becomes marital only upon a showing that the parties intended to treat the property as marital." (quoting Chotiner v. Chotiner, 664 P.2d 568, 571 (Alaska 1983))); Sprouse v. Sprouse, 678 S.E.2d 328 (Ga. 2009) (holding that trial court did not abuse its discretion by considering the parties' premarital cohabitation in setting spousal support award); Hendricks v. Hendricks, 784 N.E.2d 1024 (Ind. Ct. App. 2003) (holding that trial court did not abuse its discretion when it considered 3.33 years of premarital cohabitation when dividing marital property); Duff-Kareores v. Kareores, 52 N.E.3d 115 (Mass. 2016) (holding that length of marriage included a period of cohabitation between the two marriages of the parties); *In re* Marriage of Clark, 71 P.3d 1228 (Mont. 2003) (holding that trial court did not err in considering seven years of premarital cohabitation with respect to the distribution of the marital property); Meyer v. Meyer, 620 N.W.2d 382 (Wis. 2000) (holding that the court can consider premarital contributions when making a maintenance/spousal support award).

375. *See, e.g.*, *Hendricks*, 784 N.E.2d at 1024 (holding that trial court did not abuse its discretion when it considered 3.33 years of premarital cohabitation when dividing marital property).

376. *Collins*, 323 P.3d at 1227.

dig deeper and assess the realities of people's lives. Thus, in its decision in *Collins*, the Hawaii Supreme Court said that the trial court erred in concluding that the parties were not in a premarital cohabitation based simply on evidence that they had decided not to marry at an earlier point.[377] Relying solely or heavily on this lack of a formal marker, the Hawaii Supreme Court held, was erroneous. "Although Collins and Wassell agreed not to become legally married in 2000," the Hawaii Supreme Court explained, "that does not mean that they agreed they would not be economic partners."[378] "The relevant inquiry," the court explained, "is whether the parties intended to apply their resources, efforts, and energies for each other's benefit before ultimately marrying."[379] This may be true even if the parties "decided" not to get married.

While the court rejected a test that looked only to formal markers, it did not leave lower courts without any moorings. Instead, the court provided some guideposts for lower courts going forward. "[I]n evaluating whether the parties intended to form a premarital economic partnership," the court explained, "the family court must consider the totality of the circumstances."[380] In making this determination, relevant considerations may include, but are not limited to, joint acts of a financial nature, the duration of cohabitation, whether and the extent to which finances were commingled, economic and noneconomic contributions to the household for the couple's mutual benefit, and how the couple treated financials before and after marriage.[381] These interstitial marriage decisions serve as concrete examples of property division cases in which courts apply more holistic rules that recognize and protect chosen familial relationships. These cases demonstrate that courts are capable of figuring out how to, and indeed do account for periods of nonmarital cohabitation.

To be sure, very few states currently apply these principles developed in interstitial marriage cases to relationships that do not include a marriage. One could argue, of course, that interstitial relationships are different in important ways from those that do not include marriages. Those that marry eventually have made a conscious decision, it is argued, to take on the rights

377. The trial court in *Collins* held that the parties were not in a premarital economic partnership. In reaching that conclusion, the trial court "explained that the most obvious example of Collins's and Wassell's separate financial identities was the couple's conscious decision not to make their first marriage legal." *Id.* at 1222.
378. *Id.* at 1230–31.
379. *Id.* at 1231.
380. *Id.* at 1236.
381. *Id.* at 1227.

and obligations of that status. Having made that decision, one could argue, it is appropriate and fair to impose sharing on them even with respect to periods of nonmarital cohabitation. While it is true that couples who never marry have never formally taken on all of the rights and obligations of marriage, that does not necessarily mean that they have not chosen to enter into a familial relationship characterized by interdependency and reliance. When they have chosen to create that kind of familial relationship, the default rule should allow a court to recognize and give effect to that chosen family. While not all nonmarital relationships involve the type of reliance and give and take that should give rise to obligations, many do.

C. Produces Asymmetries and Privatizes Dependency

Some may claim that it is unfair to impose sharing requirements on the individuals as against each other (for example, inter se obligations) when they have few if any rights as against the government or other third parties.[382] I share the concern that nonmarital cohabitants are denied many critical government family-related provisions. But the current lack of access to family-based government protections is an insufficient justification for refusing to adopt a fairer inter se rule. As a preliminary matter, it is important to acknowledge that there are already asymmetries in the law with respect to consideration of nonmarital relationships.[383] Abandonment of the *Marvin* rule would not create these asymmetries in the first instance.

More fundamentally, by extending inter se rights and obligations, the law would be recognizing and giving effect to the familial relationships that the parties themselves choose to create. When the parties choose, explicitly or implicitly, to create a relationship of reliance and mutual interdependence,

382. *See, e.g.*, Matsumura, *Intimate Regulation*, *supra* note 1, at 1021 ("Moreover, both approaches only recognize inter se rights—obligations running between the partners. They leave off the table whether and how the law should recognize rights against the state or third parties, like standing to sue for wrongful death or favorable tax treatment.").

383. *See* Aloni, *supra* note 320, at 1283 ("I contend that deprivative recognition is an asymmetrical apparatus. Couples are recognized only for the purpose of terminating a benefit; they are not recognized when it is a matter of gaining most of the partnership rights that would otherwise stem from these same relationships."); *see also* Blumberg, *supra* note 50, at 1138 (noting how federal and state statutory programs sometimes do take nonmarital cohabitation into account, but "only for the purpose of reducing or eliminating benefits"); Courtney G. Joslin, *Family Support and Supporting Families*, 68 VAND. L. REV. EN BANC 153 (2015) [hereinafter Joslin, *Family Support*] (exploring asymmetries regarding the provision of benefits to and the imposition of obligations on nonmarital families).

the law should recognize those relationships and protect parties who have not yet benefited under that give and take relationship. For example, when the parties explicitly or implicitly decided to have one person step back from the paid work force in order to serve as the primary homemaker and caretaker, the court should be able to consider those collective actions and do justice upon the dissolution of the relationship.

Also, the extension of these inter se rights can be a step towards greater access to third-party rights and benefits. As Grace Blumberg points out, the lack of access to federal and state benefits is often justified based on the lack of inter se obligations. A good example of this type of reasoning is *Elden v. Sheldon*.[384] The case raised the question of whether a person should be entitled to pursue tort claims upon the death of or injury to the person's nonmarital partner. The court answered the question in the negative. Among other things, the court grounded its conclusion in the fact that nonmarital partners have no inter se obligations to one another. As the court put it:

> Formally married couples are granted significant rights and bear important responsibilities toward one another which are not shared by those who cohabit without marriage. For example, a detailed set of statutes governs the requirements for the entry into and termination of marriage and the property rights which flow from that relationship, and the law imposes various obligations on spouses, such as the duty of support. Plaintiff does not suggest a convincing reason why cohabiting unmarried couples, who do not bear such legal obligations toward one another, should be permitted to recover for injuries to their partners to the same extent as those who undertake these responsibilities.[385]

Thus, as *Elden* makes clear, the lack of inter se obligations has impeded the extension of third-party rights and benefits to nonmarital parties in the past. This reasoning suggests that the expanding inter se protections may be an important first step in the struggle for more fair rules with respect to third parties.

Indeed, this is the very progression seen in the parentage context. Initially rights were extended under the equitable doctrines discussed above. The cases were almost always about the right of the nonmarital, nonbiological parent to seek inter se custody and visitation rights. A few cases explored

384. Elden v. Sheldon, 758 P.2d 582 (Cal. 1988), *as modified* (Sept. 19, 1988).
385. *Id.* at 587 (citations omitted).

whether there was an inter se child support obligation.[386] But in many states, it was unclear whether an equitable parent was entitled to rights or benefits through the government or some other third party.[387]

Over time, however, states expanded the rights and obligations of functional, nonmarital, nonbiological parents.[388] First, states expanded the inter se rights and obligations of equitable parents.[389] While early equitable parent cases held that such partiers were only entitled to seek visitation,[390] later decisions were more apt to conclude that they could also seek custody.[391] Eventually, more courts began to treat nonmarital, nonbiological, functional parents as standing in parity with statutory parents.[392] Even more recently, a number of states enacted statutory parentage provisions under which a nonmarital, nonbiological parent can be recognized as a legal parent. As legal parents, these parties have all of the same inter se rights and obligations as do any other legal parents, and they are also generally recognized for all purposes as well, including with respect to government and third-party benefits. As a result, in many states today, functional parents are recognized both for purposes to inter se rights and obligations and for purposes of third-party rights and benefits.[393]

Relatedly, some suggest that imposing inter se obligations on nonmarital partners "privatizes dependency."[394] I am in favor of more government support for all families, marital and nonmarital.[395] This claim, however, is a

386. For example, in 2010, I wrote that it was "almost entirely uncertain" in many states "whether these children have a right to support from both of the people who intentionally brought them into the world." Joslin, *Protecting Children*, *supra* note 314, at 1202.

387. *See id.* at 1211 (exploring children's access to Social Security benefits through an equitable parent).

388. For a more detailed discussion of this evolution, see Joslin, *No Child Behind*, *supra* note 206, at 503.

389. *Cf.* JOSLIN ET AL., *supra* note 315, § 7:1 ("Arguments seeking custody or visitation based on a lesser *de facto* parent status that applies only to people who are not legal parents should be used only when a more protective status is not available, as an alternative argument, or to protect true stepparents who were not involved in conception and who are not legal parents.").

390. *In re* Custody of H.S.H.-K., 533 N.W.2d 419, 437 (Wis. 1995).

391. *See, e.g.*, V.C. v. M.J.B., 748 A.2d 539 (N.J. 2000).

392. *See, e.g.*, *In re* Parentage of L.B., 122 P.3d 161, 176–77 (Wash. 2005) (holding that de facto parents "stand[ ] in parity with an otherwise legal parent" and that they are entitled to the same "rights and responsibilities which attach to parents in this state").

393. *See, e.g.*, Joslin, *No Child Behind*, *supra* note 206, at 503.

394. Stolzenberg defines "privatizing dependency" as follows: the "redistribut[ion of] resources between family members in lieu of publicly supporting those who cannot support themselves." Stolzenberg, *supra* note 12, at 1984 (2018).

395. As I argue elsewhere:

red herring. Reliance on fears of privatizing dependency to support the current regime is implicitly premised on the notion that nonmarital partners are currently receiving robust support from the government. The concern then is that this government support would be eliminated if the law imposed a sharing obligation on former nonmarital partners. The reality, however, is that government support for healthy, working-age adults has been diminishing for years.[396] Thus, for most such people, their dependency is already largely privatized.[397] That is, the current law largely leaves former nonmarital partners to fend for themselves after dissolution. My proposal would allow courts to require a former partner to share some of the fruits of their mutual relationship upon dissolution and, by doing so, require that party to help support the other. In this way, former partners may go from having to rely only on themselves post-dissolution to being able to also rely on financial support from their former partner. Moreover, as noted above, it is possible that creating inter se obligations could be a step towards greater access to family-based government and third-party benefits. While more reforms are needed, both potential results are steps in the right direction.[398] Finally, creating a default sharing obligation between former nonmarital

> [F]rom a family law perspective, the goal should not necessarily be to eliminate a presumption of family-based care and financial support, or even to eliminate the legal imposition of these responsibilities on family members. Helping people care for one another can be a positive end. But such a system can only function well if family members have the support they need to fulfill these caregiving obligations. Accordingly, a critical question to examine is whether the government is striking the correct balance between the imposition of obligations and the provision of support.

Joslin, *Family Support*, *supra* note 383, at 165 (footnote omitted).

396. *See, e.g.*, *id.* at 168–69 ("[H]ealthy adults of working age are generally expected to care for themselves, or to find care for themselves, regardless of whether they are in a marital or some other recognized family form. This has become increasingly true in light of drastic cuts to need-based government assistance in recent years."); *see also* Stolzenberg, *supra* note 12, at 1994 ("In all of these ways, modern family law embodies the principle that the state bears little responsibility for the costs of social reproduction.").

397. Indeed, Stolzenberg suggests that it is the current *Marvin* regime that more completely privatizes dependency. Stolzenberg, *supra* note 12, at 2006 ("Under the auspices of respecting autonomy, courts and legislatures cast intimates as having 'assumed the risk' of limited or non-existent family-based obligation by virtue of their choices over the course of a relationship—effectively requiring each party to privatize her own dependency.").

398. *See, e.g.*, Joslin, *Family Support*, *supra* note 383, at 170 ("The fact that people in nonmarital families are expected to fend for themselves, but must do so without access to some of the family-based benefits and supports is particularly concerning in light of the growing demographic shift in family formation." (footnote omitted)).

partners does not preclude advocacy in favor of more overall government support for individuals and for families.

Others claim that it is important to maintain a space for families to exist outside the scope of government regulation.[399] This space, it is suggested, may be freeing. Freedom, however, is often in the eye of the beholder. The more powerful and asset-rich partner in a nonmarital relationship may find it "freeing" to be outside government regulation upon dissolution. The current regime largely allows them to walk away from the relationship with no strings attached. The more vulnerable partner may, however, have a different perception. This was certainly true in many of the parentage cases. The more vulnerable, nonbiological parents often did not find it "freeing" to be treated as legal strangers who had no right to maintain a relationship with their children; they often found it devastating.[400]

D. Opens the Floodgates

Some oppose abandonment of the current regime based on fears that more capacious and protective rules would result in more litigation. Maybe there will be more litigation than there currently is under the existing regime. That said, there are a number of reasons to think that adoption of this rule would not result in an enormous flood of litigation.

First, it is important to keep in mind that all states currently allow at least some claims as between cohabitants. Even the so-called "no recovery" states allow some claims.[401] And more types of claims are permissible in the states that follow *Marvin*. Thus, adoption of my proposal would not shift the regime to one in which no claims are permitted to one in which an unlimited number of claims are permitted. The same number of people are entitled to

399. *See, e.g.*, Melissa Murray, *The Space Between: The Cooperative Regulation of Criminal Law and Family Law*, 44 FAM. L.Q. 227, 253 (2010) ("In theory, the interstitial space between marriage and crime is one of tremendous possibility. Indeed, it is a place where law is largely absent and intimate life is not regulated by family law or criminal law. It offers the prospect of dislodging marriage's position as the benchmark for acceptable intimacy and, in so doing, provides refuge and dignity to those who wish to construct their intimate lives beyond marriage's boundaries.").

400. For a devastating chronicle of the aftermath of the *Nancy S.* decision, see Elaine Herscher, *How the Court Gave Nancy Springer Custody but Destroyed Her Family*, S.F. CHRON. (Aug. 29, 1999), https://www.sfgate.com/news/article/Family-Circle-For-Nancy-Springer-a-1991-court-2911717.php.

401. Blumenthal v. Brewer, 69 N.E.3d 834, 856 (Ill. 2016) ("Our decision in *Hewitt* bars such relief if the claim is not independent from the parties' living in a marriage-like relationship for the reason it contravenes the public policy . . . disfavoring the grant of mutually enforceable property rights to knowingly unmarried cohabitants.").

file actions. The real change is with respect to remedies or results. Under my proposal, more robust relief may be available. To be sure, some people today may not bother to litigate given that their likely recovery is small. If recoveries increase, that may indeed increase the number of claims filed.

That said, it would continue to be the case that many people would be entitled to only relatively modest relief even under my proposal. Nonmarital cohabitation tends to be relatively short in duration. In 2008, Marsha Garrison reported that "only about 10% of cohabitants who do not marry are still together five years later."[402] And most couples have limited assets available for distribution.[403] "As a result of these demographics, cohabitants frequently do not have valuable resources to fight about."[404] Moreover, as is true with married spouses, many of the parties likely will resolve their disputes themselves without court intervention.

V. CHARTING A NEW PATH FORWARD

This Part begins to chart out what this new rule might look like in practice. While this Part offers some guiding principles, the goal of this Article is not to offer a specific test, or to choose between the existing models. Elsewhere, I consider when uniformity in family law is to be pursued.[405] One important consideration is the importance of experimentation. As Ann Estin puts it: "Sometimes experimentation is useful in finding policy solutions to our most difficult family policy problems . . . ."[406] Here, given the variability in nonmarital families and given the infancy of this body of law, I think that state experimentation is particularly valuable.[407]

There are, however, some basic principles that should guide future lawmaking. First, it is critical to remember that states are not working from an entirely blank slate. There are existing models out there, both here in the United States and abroad. Here in the United States, Washington state has already embraced this approach. Specifically, Washington state recognizes the doctrine of "intimate committed partnership." Under this doctrine, marriagelike property sharing rules apply to cohabitants who demonstrate

402. Garrison, *Marriage Matters*, *supra* note 6, at 322.
403. *See generally* CARBONE & CAHN, MARRIAGE MARKETS, *supra* note 18 (exploring the growing race and class gaps in family formation).
404. Garrison, *Marriage Matters*, *supra* note 6, at 322.
405. Joslin, Family Status, *supra* note 60, at 819–20.
406. Ann Laquer Estin, *Sharing Governance: Family Law in Congress and the States*, 18 CORNELL J.L. & PUB. POL'Y 267, 334 (2009).
407. Joslin, *Family Status*, *supra* note 60, at 819–20.

they were in an intimate committed partnership.[408] "Relevant factors establishing an [intimate committed relationship] include, but are not limited to: continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties."[409] There are key similarities between this doctrine and the parentage doctrines discussed above. As was true with respect to parentage, this rule makes "intent of the parties" an important consideration.[410] In addition, like the parentage rules, this test is a holistic fact-based one that looks to the nature of the parties' relationship, whether or not it was marked by formalities.

Although it has not yet been applied to fully nonmarital relationships, Hawaii's premarital economic partnership test is another model from which states can draw. As noted above, an "economic partnership" is formed when, "prior to their subsequent marriage, [two people] cohabit and apply their financial resources as well as their individual energies to and for the benefit of each other's person, assets, and liabilities."[411] Here too, "whether a premarital economic partnership has been formed depends upon the intentions of the parties."[412] And, here too, formalities, like an express agreement, are not necessary. Instead, in the absence of a written agreement, the court can find such a partnership exists by looking at the "totality of the circumstances," including, but not limited to: "[j]oint acts of a financial nature, the duration of cohabitation, whether—and the extent to which—finances were comingled, economic and non-economic contributions to the household for the couple's mutual benefit, and how the couple treated their finances before and after marriage."[413]

408. The rules are similar but not identical to the rules that apply to married couples. Washington state is a hotchpot state with regard to property division upon divorce. By contrast, for nonmarital couples, only property acquired during the relationship is available for distribution. *See, e.g.*, Connell v. Francisco, 898 P.2d 831, 836 (Wash. 1995) ("While portions of [the divorce statutes] may apply by analogy to meretricious relationships, not all provisions of the statute should be applied. The parties to such a relationship have chosen not to get married and therefore the property owned by each party before the relationship should not be before the court for distribution at the end of the relationship. However, the property acquired during the relationship should be before the trial court so that one party is not unjustly enriched at the end of such a relationship.").
409. *Id.* at 834.
410. *Id.*
411. Collins v. Wassell, 323 P.3d 1216, 1227 (Haw. 2014) (quoting Helbush v. Helbush, 122 P.3d 288 (Haw. Ct. App. 2005)).
412. *Id.*
413. *Id.* at 1228.

The ALI Principles of the Law of Family Dissolution offer a different approach. The ALI Principles are, in some ways, more formalistic. Under the ALI Principles, two people are presumptively considered "domestic partners" if they "share[d] a primary residence and a life together as a couple" for a required period of time.[414] The principles do not delimit what that time period must be, and instead leave it to the states to choose the time period. Other countries and foreign provinces that have similar systems tend to set the cohabitation period between one and three years. If parties are considered domestic partners under the ALI Principles, then the parties are subjected to the same property division and same support rules that apply to married spouses.[415] The ALI Principles, however, do allow the domestic partners, like married spouses, to opt out of these rules.[416] Other models can be found around the world. Some Canadian provinces extend both property and spousal support protections to nonmarital partners,[417] as do some Scandinavian countries.

Second, states should be circumspect about models that simply replace one rigid formality with another. Here I am primarily thinking about the formality of cohabitation. Replacing a rigid marriage requirement with a rigid cohabitation requirement may be both under- and overinclusive. Parentage law offers useful guidance. Generally, states do not treat someone as a parent simply because the person has cohabited with the child for some set period of time. Adults residing in the same house with a child may have a wide range of relationships with that child. The purpose of the functional parent doctrine is to capture only those people who view themselves as and are viewed by the child as the child's parent. Using cohabitation alone or even

414. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03 (AM. LAW INST. 2002).

415. David Westfall, *Forcing Incidents of Marriage on Unmarried Cohabitants: The American Law Institute's Principles of Family Dissolution*, 76 NOTRE DAME L. REV. 1467 (2001) ("[The ALI Principles] generally mandate for them the same rights and obligations for division of marital property and alimony (renamed "compensatory spousal payments") that the Principles would create on dissolution of marriage." (punctuation omitted)).

416. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 7.02 (AM. LAW INST. 2002).

417. As Robert Leckey explains, the approach in Canada is varied:

> At one end, cohabitation produces no rights and obligations under the private law of the family in Quebec. In the middle, it attracts an obligation of maintenance in some provinces. At the other end, it triggers a panoply of matrimonial rights and obligations, including protections of the family home, maintenance, and equalization of family property in jurisdictions including British Columbia and Saskatchewan.

Robert Leckey, *Judging in Marriage's Shadow*, 26 FEM. L. STUDIES 2, 5 (2018).

a set period of cohabitation would be overinclusive. It would be overinclusive because it would sweep in a whole host of people who may reside with a child for many years without developing a true parent-child relationship. This could include, for example, roommates or extended family members who are living in the household but who are not performing a parental role with respect to the child.

In recognition of this concern, most existing property division models that take the length of the relationship into account also require consideration of the nature of the relationship. The ALI Principles, for example, consider both the length of the relationship and whether the parties shared "a life together as a couple."[418]

The parentage case law also suggests a basis for being wary of rules that turn on rigid, fixed time requirements. While most functional parent doctrines do not utilize rigid time requirements, there is one doctrine that does: the holding out presumption.[419] Under both the UPA (2002) and the UPA (2017), the holding out presumption only applies to persons who resided with the child for the first two years of the child's life.

Case law offers concrete examples of how utilizing rigid, fixed time requirements can also be underinclusive. Consider *L.P. v. L.F.*[420] In the case, a nonbiological, nonmarital father functioned as one of the child's parents for most of his ten years of life. The court, however, held that the man was not entitled to the holding out presumption (and therefore was a legal stranger) because he had only parented the child for between eighteen and twenty-two months out of the child's first twenty-four months of life.[421] The relevant holding out parentage presumption required the person to have "resided in the same household with the child" "for the first two (2) years of the child's life."[422]

Recognizing the harshness that can be produced by a rigid time requirement, the 2017 iteration of the Uniform Parentage Act adds another method of establishing the parentage of a nonmarital, nonbiological parent

418. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION § 6.03 (AM. LAW INST. 2002).
419. *See* UNIF. PARENTAGE ACT § 204 (UNIF. LAW COMM'N 2002); UNIF. PARENTAGE ACT § 204(a)(2) (UNIF. LAW COMM'N 2017) ("An individual is presumed to be a parent of a child if: . . . the individual resided in the same household with the child for the first two years of the life of the child . . . and openly held out the child as the individual's child.").
420. LP v. LF, 338 P.3d 908, 912 (Wyo. 2014).
421. *Id.* at 914 ("Appellant concedes that he and Mother lived together for only twenty-one months, which is of course less than two years, but argues that the district court should have overlooked the shortfall and presumed him to be KEP's parent.").
422. WYO. STAT. ANN. § 14-2-504(a)(v).

that is more flexible.[423] As the comment to the new section explains, this new means of establishing parentage "ensures that individuals who form strong parent-child bonds with children with the consent and encouragement of the child's legal parent are not excluded from a determination of parentage simply because they entered the child's life sometime after the child's birth."[424] The comment also reaffirms that no specific time length requirement is included and that the length of time necessary will vary depending on the age of the child.

Likewise in the horizontal adult-adult context, states should be wary of utilizing rules that rigidly require the parties to cohabit for some set period of time before the sharing obligation would apply. This too is incorporated into the ALI Principles. Even when the parties have not lived together for the cohabitation period, parties can nonetheless argue that they should be considered domestic partners based on an evaluation of the nature of their relationship.

Third, as noted above, taking the position that there should be a default rule under which some nonmarital partners have economic rights and obligations as to each other, does not necessarily mean those partners should be treated identically to married spouses. Some models do apply the same property division rules to nonmarital partners and married spouses. This is true, for example, under the ALI Principles of the Law of Family Dissolution.[425] In contrast, other models treat nonmarital partners and spouses differently.

CONCLUSION

The conventional approach governing the economic rights of nonmarital families impedes rather than furthers a robust vision of family autonomy. The conventional approach permits consideration of only a very limited set of formal decision points to assess whether one has chosen to form a family. The law then attributes drastic meaning to the lack of these

423. The new provision, Section 609, permits a person claiming to be a de facto parent, a parent in fact, to establish his or her legal parentage. UNIF. PARENTAGE ACT § 609 (UNIF. LAW COMM'N 2017).

424. *Id.* at Comment to § 609.

425. *See, e.g.*, Nancy D. Polikoff, *Making Marriage Matter Less: The ALI Domestic Partner Principles Are One Step in the Right Direction*, 2004 U. CHI. LEGAL. F. 353, 353–54 (noting that under the Principles, "the same economic consequences applicable to divorcing spouses" apply to "separating couples who meet the definition of 'domestic partners'").

formalities: by failing to marry, the parties have "chosen" to be treated as a nonfamily. Excluded from consideration are an enormous range of quotidian decisions and behaviors which are often provide more insight into whether the parties intended to and did indeed function as a family. In this way, the law fails to recognize and respect the actual family formation choices people have made. The consequences of the contemporary rule can be harsh and this harshness is not felt equally by both parties in the relationship. Instead, women are most commonly the losers under this regime. This long-entrenched approach must be abandoned in favor of one that does a better job valuing and respecting the actual families people have formed, including the growing number of nonmarital families.

State legislatures and courts have done so in the area of nonmarital parentage. This Article posits that similar principles should apply to the horizontal adult-adult relationships. Rules that recognize, respect, and protect the familial relationships people actually create best respect and give substance to a vision of relational family autonomy.