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# Against Nonmarital Exceptionalism

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*The Supreme Court's opinion on the right to marry in Obergefell v. Hodges, inspired a flurry of scholarship on the topic of nonmarriage. In the wake of that decision, scholars have made claims about the state of nonmarriage, and also laid claim to it — embracing the nonmarital legal space that remains. This Article intervenes in the literature by looking at how the law directly interacts with unmarried couples — in distributing property when their relationship ends. The overview of the cases leads to one central claim: the law of nonmarriage as it currently stands remains deeply tethered to marriage, either expressly or by implication.*

*The cases that address property distribution are particularly revealing: courts must assess the nature of the relationship, and value the contributions made throughout. The most common scenario courts face consists of a woman seeking property from a man in the context of a heterosexual relationship. Yet the most common scenario the scholarship on nonmarriage addresses involves (1) a same-sex relationship, male or female, or (2) a heterosexual relationship with the standard roles reversed, meaning that the man is requesting property from the woman. This Article turns to consider these “exceptional” cases head-on. It argues that even though they are fewer in number and muddle the standard gender composition of the parties, they are part and parcel of the larger*

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law of nonmarriage, which relies on marriage to garner meaning. A comprehensive analysis of the exceptional case law leads to an unexceptional conclusion: courts either bring these cases into marriage's pull, or use the cases as a means of gendering the nonmarital space in a way that mimics traditional marital norms, regardless of the sex of the parties seeking property distribution.

Ultimately, this Article cautions against a wholesale embrace of the law of nonmarriage, especially if one values diversity of relationship forms. Indeed, the exceptional case law reveals not only the intractable relationship between marriage and nonmarriage, but it also exposes how courts impose gendered marital norms on a relationship in which the individuals are not married, and even where they could not have married.

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INTRODUCTION

While *Obergefell v. Hodges*<sup>1</sup> is fundamentally about marriage, the Supreme Court’s recent decision has raised a number of questions about nonmarriage. Scholars currently ask whether marriage has effectively crowded out alternative means of ordering one’s intimate life.<sup>2</sup> Others consider whether there is, or should be, a constitutional right to live outside of marriage.<sup>3</sup> And some, worried about the primacy of marriage, have turned to — and embraced — the present state of nonmarriage as a promising path forward.<sup>4</sup>

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<sup>1</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2593 (2015).

<sup>2</sup> See, e.g., Clare Huntington, *Obergefell’s Conservatism: Reifying Familial Fronts*, 84 *FORDHAM L. REV.* 23, 28-30 (2015) (arguing that Justice Kennedy’s substantive due process analysis in *Obergefell* had the effect of denigrating nonmarital families); Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 *CALIF. L. REV.* 1207, 1211-12, 1244 (2016) [hereinafter *Nonmarriage Inequality*] (arguing that the decision in *Obergefell* effectively ignores the Supreme Court’s jurisprudence protecting nonmarriage and “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”); Gregg Strauss, *Why Obergefell’s Valorization of Marriage Was Wrong*, Section I.B. (on file with author) (identifying scholars who critique *Obergefell* for denigrating nonmarital families and arguing that its impact is in fact limited).

<sup>3</sup> See, e.g., Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 *B.U. L. REV.* 425, 466-71 (2017) (articulating how the gay rights canon can support a broad constitutional right to form families, and reading *Obergefell* to strengthen this constitutional right to nonmarriage); Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 *FORDHAM L. REV.* 1509, 1526-29 (2016) (arguing that the Fourteenth Amendment protects a right not to marry and addressing what kinds of state action would violate that right); Murray, *Nonmarriage Inequality*, *supra* note 2, at 1216-25 (identifying a “corpus of a jurisprudence of nonmarriage” and arguing that it provides recognition of, and protection for, nonmarital families).

<sup>4</sup> See, e.g., June Carbone & Naomi Cahn, *Nonmarriage*, 76 *MD. L. REV.* 55, 114-17 (2016) (arguing that the law regulating unmarried parents should take as a model the law regulating unmarried partners, the latter of which embraces the couples’ autonomy); Murray, *Nonmarriage Inequality*, *supra* note 2, at 1211-12, 1239-49 (arguing that *Obergefell* foreclosed the further development of a “jurisprudence of nonmarriage” that was taking root); Melissa Murray, *Accommodating Nonmarriage*, 88 *S. CAL. L. REV.* 661 (2015) [hereinafter *Accommodating Nonmarriage*] (noting the impending sociolegal erasure of nonmarriage).

This Article intervenes in the literature by developing one overarching point: the law as it stands remains tethered to marriage, either expressly or by implication.<sup>5</sup> Although it may be tempting to turn to nonmarriage as a legal category separate and apart from marriage, a close examination of property disputes involving nonmarital partners reveals that the two cannot be separated.<sup>6</sup> Importantly, this is true not only in the most common, or modal, case — where a woman seeks property from a man in the context of a heterosexual relationship — but also in the “exceptional” case — where a relationship is same-sex, or where a man seeks property from a woman thereby reversing the standard gender roles.

These cases are the exception in that they are different in form, and fewer in number, than the modal case.<sup>7</sup> I also use the term

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<sup>5</sup> Scholars in other areas have demonstrated the long shadow that marriage casts on nonmarriage. For instance, in the context of same-sex advocacy, Douglas NeJaime has shown that even before marriage was the linchpin of the lesbian, gay, bisexual, and transgender movement, “marriage shaped nonmarital recognition and, conversely, nonmarital recognition shaped marriage.” See Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87, 91, 161-65 (2014) (“Even for activists resisting marriage, marriage functioned like a riptide. Advocates were swimming with and against marriage, often at the same time. That is, they challenged marriage’s role even as they submitted to its pull.”); see also Cahill, *supra* note 6, at 47-48 (arguing in the context of domestic partnerships, de facto parenthood, and alternative reproduction that “when the law uses marginality to articulate a normative vision of intimate and family life, it is regulating through the ‘back door’ that which the Constitution prohibits it from regulating directly — namely, traditional kinship”); Ariela Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 961 (2000) (addressing the abolition of common law marriage in showing that “nonmarriage, like marriage, has a robust history of legal significance that is critical to understanding the history and significance of marriage law”).

<sup>6</sup> See Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1, 7-9 (2017) (addressing the standard nonmarital relationship, and leaving aside the other cases as raising a number of distinct issues); see also Courtney Megan Cahill, *Regulating at the Margins: Non-Traditional Kinship and the Legal Regulation of Intimate and Family Life*, 54 ARIZ. L. REV. 43, 47 (2012) (challenging the traditional conception of marriage and nonmarriage as existing in “distinct and separate domains” and arguing instead that the relationship between marriage and nonmarriage is dynamic and changing as highlighted in the regulation of alternative means of procreation).

<sup>7</sup> The Boolean search terms I employed to find the cases addressing property distribution in the context of a nonmarital relationship included variations of “nonmarital” and “unmarried” and “cohabit!” combined with “property” and “separat!.” See Antognini, *supra* note 6, at 7 n.21. The modal nonmarital cases numbered in the high 400s. *Id.* For this paper, I broadened the search by looking for cases that did not include either the term “nonmarital” or “unmarried.” Under this search, the number of cases addressing property distribution did not change appreciably, with one notable exception. Searching for cases that considered the

“exceptional” as a way of characterizing how these cases are presented in the literature — as representative of the whole of nonmarriage.<sup>8</sup> Rather than engage with the typical example of a woman requesting property from her male ex-partner in assessing the general state of nonmarriage, scholars tend to focus on cases like *Blumenthal v. Brewer*<sup>9</sup> or *Cates v. Swain*,<sup>10</sup> both of which address lesbian couples. To be sure, there are numerous reasons why these cases are interesting, and especially relevant, post-*Obergefell* — but they must be scrutinized carefully, as they risk obscuring the problematic set of gendered assumptions that underlie the modal case.<sup>11</sup> Indeed, a comprehensive analysis of these exceptional cases leads to an unavoidable conclusion: courts either bring the cases into marriage’s pull, or gender the nonmarital space in a way that mimics traditional marriage, regardless of the sex of the parties seeking property distribution.<sup>12</sup> In this way, the exceptional cases are consistent with the modal cases, which articulate a conventional set of norms that men and women ought to follow both within and outside of marriage.<sup>13</sup>

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distribution of property without the terms “nonmarital,” “non-marital,” or “unmarried” yielded about 300 more cases considering requests to terminate alimony, showing just how routinely courts address that particular issue. This paper addresses the non-modal cases that the search revealed, which are much fewer in number. After sorting out those cases that deal with issues like bankruptcy, divorce, or probate, the cases addressing same-sex or reverse different-sex couples in both the property distribution and alimony termination context are less than 100. The fewest number of cases are those involving different-sex couples with a man requesting property from a woman. See discussion *infra* Section II.B.

<sup>8</sup> While I argue that these exceptional cases are in fact representative of the law of nonmarriage insofar as courts approach them all through the lens of marriage, scholars generally rely on them as emblematic of the law of nonmarriage in ways that obscure the gendered characteristics they share with the modal case. Discussion *infra* Parts II–III.

<sup>9</sup> The discussions address both the Illinois appellate court decision and the Illinois Supreme Court decision. *Blumenthal v. Brewer* (*Blumenthal I*), 24 N.E.3d 168, 169 (Ill. App. Ct. 2014), *rev’d in part, vacated in part*, 69 N.E.3d 834 (Ill. 2016).

<sup>10</sup> *Cates v. Swain*, 215 So. 3d 492, 493 (Miss. 2013); see also Antognini, *supra* note 6, at 52–54 (noting that Illinois and Mississippi, where these two cases were decided, are understood as jurisdictions that deny recognition of any rights based on a nonmarital relationship).

<sup>11</sup> See *infra* Parts II–III; see also Antognini, *supra* note 6, at 58–61 (arguing that the modal cases provide courts with occasion to define the substantive norms of marriage and in so doing perpetuate outdated norms and traditional gender relations).

<sup>12</sup> See Antognini, *supra* note 6, at 60–61.

<sup>13</sup> *Id.* at 60–61 (“Although the cases employ different reasoning, and reach conflicting results, they are strikingly consistent in defining the role that the wife should occupy . . .”). Courts, in the exceptional cases, track the distinctions they

Not only are the exceptional cases the ones that are most prominently featured in recent scholarship, but they also complete the picture of how the law imposes rights and obligations in the context of nonmarital relations.<sup>14</sup> It is therefore crucial to address these cases head-on. The Article concentrates on the two principal property disputes that implicate nonmarital relationships: where a nonmarital couple separates and where an ex-spouse paying alimony requests to terminate those payments on account of the recipient ex-spouse's new nonmarital relationship.<sup>15</sup> In doing so, the Article covers all of the exceptional nonmarital jurisprudence. That such a feat would be possible indicates that the number of litigated cases is relatively small, so any single trend is difficult to conclusively identify.<sup>16</sup> However, a few significant distinctions emerge, which point to the primary role marriage continues to play in shaping the law of nonmarriage.

At the conclusion of a nonmarital same-sex relationship, courts either resort to marriage as a marker of what the relationship ought to look like, or deny value to contributions that take place inside the home, which are traditionally ascribed to wives. In the reverse different-sex context, where a man is requesting property from a woman, courts use the end of a relationship in much the same way — as a space to draw the line between which types of contributions can and cannot be remunerated. Indeed, the end of a nonmarital relationship provides courts with an opportunity to delineate the gender roles that men and women occupy, and they tend to mark services within the home as those a wife ought to provide. These wifely services are, however, often offered at a discount even if a man is performing them.

Courts also turn to marriage in deciding whether to terminate alimony on account of a nonmarital relationship; they consider either the couple's ability to marry or whether the new relationship looks

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enforce in the modal case.

<sup>14</sup> See *infra* Section I.A.

<sup>15</sup> These two contexts address how a nonmarital relationship implicates property distribution. The third and final type of case that addresses how a nonmarital relationship impacts property distribution is where a nonmarital relationship is coupled with marriage. This Article sets those cases aside for the time being given that it remains too uncertain of a terrain, and involves too recent a phenomenon to have much case law. There are other scholars who are beginning the work of addressing same-sex divorce in the context of longer nonmarital relationships between the parties. See, e.g., Allison Anna Tait, *Divorce Equality*, 90 WASH. L. REV. 1245 (2015); Noa Ben-Asher, *In the Shadow of a Myth: Bargaining for Same-Sex Divorce*, 78 OHIO ST. L.J. 1345 (2017).

<sup>16</sup> See *supra* note 7 and accompanying text.

like a marital one.<sup>17</sup> This is true in cases that address same-sex relationships and reverse different-sex relationships. In both situations, courts generally hold that the new relationship does not terminate the ex-spouse's payments. Where the recipient ex-spouse enters into a nonmarital same-sex relationship, which in all reported cases is a lesbian relationship, courts fail to grant it any legal relevance, or consider how marital-like it is even though same-sex couples were prevented from legally marrying.<sup>18</sup> Where the recipient ex-spouse is a man who enters into a different-sex nonmarital relation, and the paying ex-spouse is a woman, many courts end up continuing support. Although courts have different reasons for declining to terminate payments, the fact that so many decide not to implies that men do not have the same set of duties that women do.<sup>19</sup> That is, they can continue to have sex with their nonmarital partners and receive payments from their ex-wives because sex and support are not linked in the same way for men as they are for women.<sup>20</sup> Such an asymmetry is a deeply historical one, in that sex was a duty that the wife, not the husband, had to provide.<sup>21</sup> Finally, some cases, although very few, consider the financial support the new relationship furnishes to the recipient ex-spouse in determining whether alimony payments ought

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<sup>17</sup> The exception to this rule is when a court looks to financial considerations. See *infra* Section III.A; see also Antognini, *supra* note 6, at 59 (noting that the termination of alimony cases that address a different-sex relationship easily liken a nonmarital relationship to marriage with effect of "restricting an individual's property rights where a relationship was not marital").

<sup>18</sup> Because it is mostly ex-husbands who support their ex-wives, the nonmarital relationship these cases assess is the lesbian relationship. My research has not identified a single case in which the ex-wife is paying her ex-husband alimony and he is involved in a relationship with a man. See *infra* Part III.

<sup>19</sup> The effect of these decisions is to allow a man to engage in a relationship with a new woman, while he is supported by his ex-wife, which stands in stark distinction to how an ex-wife's new relationship is treated. Antognini, *supra* note 6, at 26-27.

<sup>20</sup> See Twila L. Perry, *The "Essentials of Marriage": Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1, 27 (2003) ("Th[e] examination of the impact of the duty of support and services on alimony modification demonstrates how deeply the doctrine of support and services is intertwined with gender hierarchy and male policing of women's sexuality.").

<sup>21</sup> In fact, only female prostitutes, masquerading as ex-wives, are of concern to the courts. Women are the ones cast as prostitutes; courts are not concerned over male sex, or male gigolos. In declining to distribute property where there was a sexual relationship, it is the woman who is seen as the possible prostitute, rather than the man. See KATHLEEN BARRY, *FEMALE SEXUAL SLAVERY* 230 (1979) ("Marriage and prostitution . . . are, in fact, the primary institutions through which sex is conveyed and in which *female* sexual slavery is practiced. . . . Marriage, as an institution of legalized love, presumes sex as a duty, a wife's responsibility.").

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to end; the result in these jurisdictions is that the terminating relationship is broadly defined and can be same-sex or different-sex, sexual or platonic.<sup>22</sup>

Significantly, a same-sex couple's inability to access legal marriage did not mean that courts abandoned marriage as a means of measuring value. Quite the opposite: marriage remained the gold standard.<sup>23</sup> The inability to marry does, however, impact a court's analysis. In particular, it provided courts with more freedom to liken a relationship to marriage in deciding to distribute property: because marriage was not a possibility, the institution of marriage was not affected by such an equivalence. In the termination of alimony context, the relevance of marriage becomes explicit — some courts relied solely on the same-sex couple's inability to marry to hold that alimony should not be terminated. These circumstances all have the effect of reifying the importance of marriage to the nonmarital relationship.

To be clear then, there are *some* differences in how courts distribute property in the exceptional case versus the modal case. In the same-sex context courts appear more willing to distribute property at the end of a nonmarital relationship between individuals who are same-sex than between those who are different-sex.<sup>24</sup> In the reverse different-sex context, courts do not expressly promote marriage as a status the man should seek out; moreover, they tend to support the woman's stated reasons for declining marriage when they revolve around the man's failure to financially support her.

The Article proceeds in four Parts. Part I canvasses the relevant literature on nonmarital relationships. It brings together two distinct strands of scholarship that generally do not speak to each other: scholarship regarding nonmarriage, and scholarship regarding alimony. Nonmarital relationships figure in both settings, with distinct distributional consequences in each, a point of convergence that has been largely underappreciated. Part II turns to consider the exceptional cases. It begins by analyzing how courts address the end of a nonmarital relationship between same-sex couples, followed by how

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<sup>22</sup> See *infra* Sections III.A.2–B.2.

<sup>23</sup> Even where courts do not rely on a comparison to marriage explicitly, the cases serve to establish what types of contribution merit remuneration — those that take place within the realm of the home continue to be less valued, while those that take the form of financial contributions are. See *infra* Section III.A.1.

<sup>24</sup> See *id.* at 59–61 (describing how difficult it is for a female plaintiff to recover property at the end of a nonmarital relationship regardless of the particular jurisdiction's approach).



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courts consider the end of a nonmarital relationship between different-sex couples with the genders of the modal case reversed. Part III then looks at when courts terminate alimony. The same-sex cases in this Part are exclusively made up of lesbian relationships — there has yet to be a case that addresses an ex-wife paying alimony to her ex-husband who begins a relationship with a man. This lacuna in the law can be attributed partly to the fact that there are very few cases where the ex-wife is paying alimony, period.<sup>25</sup> Part III considers the cases that do exist, which involve an ex-wife seeking to terminate her payments because of her ex-husband's new, heterosexual relationship.

What does placing these exceptional cases together accomplish? Part IV answers this question by offering some final conclusions: reading these exceptional cases alongside each other reveals not only the intractable relationship between marriage and nonmarriage, but also discloses how courts gender the familial space in familiar ways, even where the couple is not married, and even where the couple could not have married. Looking to how courts approach property claims in these nonmarital relationships tells us something further about the distributional effects they may have in the context of nonmarital relationships that do not make it to court. Ultimately, this Article cautions against embracing the legal spaces outside of marriage, especially if diversity of relationship forms is the goal.

#### I. THE LITERATURE ON NONMARITAL RELATIONSHIPS AND ALIMONY

Nonmarital relationships impact property distribution in two instances: where unmarried couples separate, and where an ex-spouse requests to terminate alimony on the basis of a nonmarital relationship. Yet the literature on nonmarriage and the literature on alimony are rarely in conversation.<sup>26</sup> This Part addresses the scholarship on nonmarriage, followed by the literature on alimony. It proposes that alimony termination can serve as a bridge between the two fields; considering them together provides a more complete

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<sup>25</sup> This leads, of course, to a variety of asymmetries, including monitoring a woman's sexual and affective lives. See Antognini, *supra* note 6, at 26-27 (arguing that the termination of alimony cases on account of cohabitation often rely on proof of sex rather than proof of support, and thus “can also be read as preventing a woman from having sexual relations with more than one man at a time”); Perry, *supra* note 20, at 27.

<sup>26</sup> *But see* Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1276, 1314 (2014) (addressing the downsides of legal recognition by considering how cohabiting relationships deprive partners of benefits they would otherwise receive, including the termination of alimony).

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picture of the nonmarital relationship and helps to question assumptions made by each literature in isolation.

Section A focuses on pieces that emphasize the importance of preserving legal spaces outside of marriage and that address the current state of the law. In the process, it shows that in the relatively few instances where the scholarship considers how courts regulate nonmarital couples, and discusses property distribution in particular, scholars tend to rely on the exceptional cases, rather than the rote nonmarital cases, in making claims about the state of nonmarriage. Section B addresses the literature on alimony. In this context, the question scholars often ask is what justifications can be provided for continuing to award alimony, given the demise of fault-based divorce and the disintegration of the husband's duty of support.<sup>27</sup> This section focuses on the small sliver of the alimony literature that addresses when alimony terminates, which includes remarriage or cohabitation. While termination of alimony is not typically addressed in the literature on nonmarriage or even much in the literature on alimony, considering it clarifies the limits of nonmarriage and helps to uncover potential reasons for awarding alimony in the first instance. Section C concludes by presenting points of overlap between the two scholarly fields and identifies questions that considering them together raises.

#### A. *Nonmarital Property Disputes*

Scholars have long criticized the law's singular focus on marriage as the principal family form recognized between adults.<sup>28</sup> With the recent expansion of marriage to include same-sex couples, nonmarriage has been increasingly hailed as a way of ensuring that marriage does not become the sole available status for ordering one's intimate life. Given that the nonmarital space is now rarely the target of direct statutory regulation,<sup>29</sup> it holds promise for some scholars in that it allows for

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<sup>27</sup> Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 GEO. L.J. 2423, 2424-26 (1994).

<sup>28</sup> See, e.g., Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 171-72 (2015) (arguing that today's family law is a "marital family law," which is ill-equipped to deal with nonmarital families).

<sup>29</sup> This Article addresses the relationships that make it to court, without the formal stamp of recognition. States have, however, attempted to provide some affirmative recognition to relationships outside of marriage. See Naomi Cahn, *Memorandum Re: Statutory and Scholarly Approaches to the Economic Rights of Unmarried Cohabitants* 3 (Oct. 14, 2017) (on file with author) (identifying states like Hawaii and Colorado that provide for reciprocal beneficiary or designated beneficiary options).

arguments to be made outside the well-worn contours of heterosexual marriage.<sup>30</sup>

The literature on nonmarriage is vast and varied.<sup>31</sup> It includes scholarly proposals that seek to destabilize the significance of marriage in regulating family life<sup>32</sup> or argue that the nonmarital space should be understood as a constitutional right.<sup>33</sup> This section concentrates only on the scholarship that makes claims about the case law distributing property in a nonmarital relationship, and that is generally in favor of preserving nonmarriage as an alternative to marriage.

Melissa Murray, for instance, is concerned with the diminishing legal recognition granted relationships outside of marriage.<sup>34</sup> In response, Murray encourages the proliferation of “multiple models — beyond just marriage.”<sup>35</sup> As such, she reads *Obergefell* as a potential danger, given that its “pro-marriage” position may have diminished

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<sup>30</sup> *But see* Antognini, *supra* note 6, at 59-61 (arguing that courts actively use the nonmarital space as a means of enforcing marital norms).

<sup>31</sup> There are, of course, a number of alternative ways to categorize the nonmarital literature. *See, e.g.*, Aloni, *supra* note 26, at 1337-42 (providing four different axes along which literature on nonmarriage intersects, including redistribution, recognition, affirmation, and transformation); NeJaime, *supra* note 5, at 154-60 (addressing the nonmarital literature through the lens of how it characterizes the advocacy surrounding same-sex marriage).

<sup>32</sup> *See, e.g.*, NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2009); Katherine M. Franke, *Longing for Loving*, 76 *FORDHAM L. REV.* 2685, 2704-06 (2008); Laura Rosenbury, *Friends with Benefits?*, 106 *MICH. L. REV.* 189, 192 (2007).

<sup>33</sup> Faced with the prospect of a dwindling nonmarital landscape, some scholars turn to protecting nonmarital relationships by relying on the language and structure of rights. Kaiponanea Matsumura has argued that there is, and ought to be, a constitutional right to nonmarriage. Matsumura, *supra* note 3, at 1527-29. Matsumura was among the Arizona state employees to receive an email informing him that same-sex domestic partners would no longer be eligible for health benefits, given that they had the right to marry. *Id.* at 1520-21. Courtney Joslin similarly argues for a more positive right to nonmarriage, which she grounds in a reading of *Obergefell*. *See* Joslin, *supra* note 3, at 480. Joslin provides illustrations of what actions may be constitutionally impermissible, such as the complete denial of protection to nonmarital partners seeking property distribution at the end of their relationships. *Id.* at 481-82 (explaining that there are instances where treating marriage and nonmarriage differently may be constitutionally permissible, and that the level of scrutiny applied will depend upon the claim before the court).

<sup>34</sup> Murray identifies the sociolegal “erasure of nonmarriage as a viable rubric for organizing intimate life.” Murray, *Accommodating Nonmarriage*, *supra* note 4, at 675. Specifically, she argues that nonmarital relationships disappear when their recognition occurs where that relationship approaches marriage, or takes marriage as its model. *Id.* at 690 (“Put another way, nonmarriage is accommodated only insofar as it can be translated into marital terms.”).

<sup>35</sup> *See* Murray, *Nonmarriage Inequality*, *supra* note 2, at 1246.

the possibility of acknowledging relationships outside of marriage.<sup>36</sup> Murray instead favors the path that courts had been on prior to *Obergefell* insofar as property distribution is concerned, and warns of the deleterious effects of that opinion on the continued viability of nonmarital relationship recognition.<sup>37</sup>

As corroboration for the proposition that the law was on the path to acknowledging different relationship forms, Murray relies on a close reading of the appellate court's opinion in *Blumenthal v. Brewer*, which decided to distribute property at the end of a nonmarital relationship: "[i]n recognizing — and indeed extending — protections for nonmarriage and nonmarital families, the intermediate appellate court's decision in *Blumenthal* was an important counterpoint to *Obergefell's* prioritization of marriage."<sup>38</sup> Murray thus understands the Illinois Supreme Court's decision in *Blumenthal*, which was handed down after *Obergefell* and ultimately denied any property distribution to the plaintiff requesting it, as proof of "*Obergefell's* threat to nonmarital relationship recognition."<sup>39</sup> Scholars like Susan Appleton agree, predicting that *Obergefell's* reasoning — its "glorification of marriage, its history, and its rewards" — might "provide[] a new rationale for lower courts to reject financial and parentage claims after a nonmarital relationship ends."<sup>40</sup>

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<sup>36</sup> *Id.* at 1247-48.

<sup>37</sup> *Id.* at 1244 ("In nationalizing marriage equality, *Obergefell* may sound the death knell for alternative statuses — and the promise of a more pluralistic relationship-recognition regime."). In the constitutional nonmarital context, Murray persuasively argues that the Supreme Court's jurisprudence is limited by its adherence to the model of marriage. *Id.* at 1238-39 ("Taken together, *Moreno*, *Belle Terre*, and *Moore* suggest that the Court's uneven approach to nontraditional family structures and its fundamental discomfort with the prospect of expanding constitutional protections beyond the confines of marriage and the marital family.").

<sup>38</sup> *Id.* at 1244-48. Her principal concern is that *Obergefell* cut this path to nonmarital recognition short. *Id.* at 1247-49 ("*Obergefell's* language and logic make clear that marriage is the normative ideal for intimate life."); see also Susan F. Appleton, *Obergefell's Liberties: All in the Family*, 77 OHIO ST. L.J. 919, 977-78 (relying on *Blumenthal* as a signal of change in the law regulating unmarried couples post-*Obergefell*).

<sup>39</sup> Murray, *Nonmarriage Inequality*, *supra* note 2, at 1247.

<sup>40</sup> Appleton, *supra* note 38, at 955-56. Appleton also relies on the Supreme Court of Illinois's opinion in *Blumenthal*. *Id.* (citing *Blumenthal v. Brewer (Blumenthal II)*, 69 N.E.3d 834 (Ill. 2016), as support in the context of property disputes). Other scholars also understand *Obergefell* to have elevated marriage over nonmarriage, albeit without making claims about the current state of the nonmarital case law. In considering the legacies of feminism on both marriage and nonmarriage, for example, Serena Mayeri positions Justice Kennedy's opinion as part of a long history that "elevates and ennobles marriage in terms that implicitly disparage nonmarriage." Serena Mayeri,

Other scholars also turn to this nonmarital landscape as providing a path away from marriage, but characterize the case law differently. In particular, Naomi Cahn and June Carbone have hailed the current regulation of unmarried couples who seek a property distribution as desirable, especially when compared to how the law regulates unmarried couples for purposes of custody or child support.<sup>41</sup> In fact, they propose that courts fashion their decisions addressing unmarried parents in the custody context on how courts distribute property between unmarried adults.<sup>42</sup> Cahn and Carbone describe the law regulating property distribution between unmarried partners as “moving toward a deregulatory model that differs radically from the status-based regulation of marriage.”<sup>43</sup> Acknowledging variation among jurisdictions, they nonetheless identify two principal trends: first, they note that courts “untangle ownership of assets” at the conclusion of a nonmarital relationship and second, “as a general rule, courts have not engaged with the normative question of what partners owe each other.”<sup>44</sup> In doing so, they rely on a number of cases that involve either same-sex couples, or reverse different-sex couples.<sup>45</sup>

Murray, Cahn, and Carbone may disagree about the deeper normative question whether imposing property obligations on the basis of the relationship is a desirable goal.<sup>46</sup> They all coalesce, however, around two basic points: first, the law establishing property obligations between unmarried individuals can, as a descriptive matter, be severed from marriage’s regulatory pull and, second, the direction courts have taken is, overall, laudable. They also rely mainly

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*Marriage (In)Equality and the Historical Legacies of Feminism*, 6 CALIF. L. REV. CIR. 126, 134-35 (2015); accord Huntington, *supra* note 2, at 31.

<sup>41</sup> Carbone & Cahn, *supra* note 4, at 64-71.

<sup>42</sup> See *id.* at 120.

<sup>43</sup> *Id.* at 55.

<sup>44</sup> *Id.* at 67.

<sup>45</sup> *Id.* at 64-70 (relying on two cases that address lesbian relationship, *Cates v. Swain* and *Blumenthal v. Brewer*, and *Simmons v. Samulewicz*, which involves a man seeking property from a woman at the end of their relationship).

<sup>46</sup> Murray argues that this progressive trend has been negatively affected by *Obergefell*, but does not directly take up the question of what kinds of obligations ought to be imposed. Murray, *Nonmarriage Inequality*, *supra* note 2, at 1248. Carbone and Cahn characterize *Obergefell*’s impact mainly in terms of making marriage, and nonmarriage, a choice. Carbone & Cahn, *supra* note 4, at 93. They further appear to differ in terms of what the law should do — while Murray seems to support a property distribution in this context given her praise of the appellate court’s decision in *Blumenthal I*, Carbone and Cahn prefer a more hands-off approach based on their assessment of how unmarried couples organize their economic and intimate lives. Carbone & Cahn, *supra* note 4, at 71; Murray, *Nonmarriage Inequality*, *supra* note 2, at 1248.

on the exceptional cases in advancing their arguments: cases that involve the end of a relationship for same-sex couples, as in *Blumenthal*, or couples in which the standard gender composition of the parties is reversed.<sup>47</sup>

### B. Termination of Alimony

The alimony literature converges around one central theme: alimony is a legal doctrine in search of a theory. As Ira Ellman set out in *The Theory of Alimony*, the rise of divorce, the abolition of fault, and the demise of coverture have, together, led to the collapse of a cohesive rationale for continuing to award alimony.<sup>48</sup> The literature thus offers possible justifications, at the same time that it problematizes the reasons for awarding alimony in the first instance.<sup>49</sup>

The literature on alimony does not generally interact with the literature on nonmarriage, except in considering events that terminate alimony. In the quest to sharpen the theoretical underpinnings of awarding alimony, a few scholars have turned to consider the events that put an end to alimony, which include death, remarriage, and cohabitation.<sup>50</sup> Jurisdictions generally recognize that alimony

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<sup>47</sup> They both discuss *Blumenthal v. Brewer* at some length. Carbone & Cahn, *supra* note 4, at 64-65, 69; Murray, *Nonmarriage Inequality*, *supra* note 2, at 1245-49, 1255-56. In addition, Cahn and Carbone rely on *Cates v. Swain*, another case involving a lesbian relationship, and a case from Hawaii where the individual seeking property is a man. Carbone & Cahn, *supra* note 4, at 64-65, 67.

<sup>48</sup> See Ira Mark Ellman, *The Theory of Alimony*, 77 CALIF. L. REV. 1, 5-6 (1989).

<sup>49</sup> According to Ira Ellman, the ultimate goal of awarding alimony is to “maximize[] the parties’ freedom to shape their marriage in accordance with their nonfinancial preferences;” it should thereby work to “eliminat[e] any financial incentives or penalties that might otherwise flow from different marital lifestyles.” *Id.* at 50-51. June Carbone, Jana Singer, and others have been critical of the overarching economic-efficiency theory Ellman espouses. June R. Carbone, *Economics, Feminism, and the Reinvention of Alimony: A Reply to Ira Ellman*, 43 VAND. L. REV. 1463, 1464-65 (1990) (arguing that because women are generally the lower-earning spouse, role specialization casts women as the homemakers, which in turn upholds rather than undoes existing gender hierarchies); Singer, *supra* note 27, at 2437-53 (arguing that any economic efficiency critique fundamentally relies on a specialization of tasks during marriage, which “risk[s] perpetuating, perhaps unwittingly, women’s economic marginalization”); see also Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2253-58 (1994) (arguing for a formulation at divorce that moves beyond alimony, and critiquing proposals justifying alimony for not meeting the needs of “lower-status wives without post-divorce entitlements”).

<sup>50</sup> Antognini, *supra* note 6, at 21-30. This is a move similar to those scholars who turn to divorce to understand marriage. See, e.g., Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 24-25 (1987) (“[I]t is often possible to gain important insights about the composition,

terminates on the basis of remarriage, whether by statute or private agreement.<sup>51</sup> Cynthia Starnes has relied on this remarriage-termination rule to argue that alimony cannot be explained by any of the circulating theories put forth to justify it. Instead, Starnes maintains that courts' attempts to justify such a rule "only confirm the suspicion that the roots of the remarriage-termination rule lie in archaic principles of coverture, which cast a wife not as a marital partner, but rather as a marital burden, dependent on her husband for protection and survival until the next man comes along to relieve him of the task."<sup>52</sup>

Twila Perry further questions the reasons for awarding alimony by looking at whether alimony terminates upon the commencement of a nonmarital relationship, also known as the cohabitation-termination rule.<sup>53</sup> While Perry maintains that the focus of the analysis remains on money — "how much is needed, and how it might be spent" — she also points to the importance of sexual relations in the court's determination of whether to terminate alimony.<sup>54</sup> Perry explains that while an ex-wife moving in with her sister would likely not result in a termination of support, an ex-wife moving in with an unrelated man very likely would; accordingly, an analysis of need only takes place after a finding that the ex-wife is living with someone with whom she is providing marital-like services.<sup>55</sup> Perry thus characterizes alimony as "reflect[ing] an assumption that women essentially trade sexual services for financial support in their relationships with men," even outside of marriage.<sup>56</sup> As such, any working theory of alimony depends on understanding the exchange to be between sex and support.<sup>57</sup>

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structure, and function of social institutions, like that of physical objects, through analysis of their breakdown.").

<sup>51</sup> Cynthia Lee Starnes, *One More Time: Alimony, Intuition, and the Remarriage-Termination Rule*, 81 IND. L.J. 971, 973-74, 977-78 (2006).

<sup>52</sup> *Id.* at 999.

<sup>53</sup> Perry, *supra* note 20, at 26-27.

<sup>54</sup> *See id.*

<sup>55</sup> *Id.* at 27.

<sup>56</sup> *Id.* at 27-28 (also identifying that women in particular are constrained by alimony in terms of how they structure their relationships post-divorce and thus "suffer a disproportionate disadvantage since the vast majority of alimony recipients are women").

<sup>57</sup> *Id.* at 29-31 ("The tangled web between alimony, remarriage and cohabitation will only be unraveled and severed when a theory of alimony is constructed that is completely independent of the marital duty of support.").

Same-sex relationships are generally absent from the literature on alimony.<sup>58</sup> To state the obvious, same-sex couples were for a long time excluded from the institution of marriage, and have therefore not had occasion to make claims of divorce.<sup>59</sup> But same-sex couples do figure in discussions of whether nonmarital relationships should terminate alimony prior to *Obergefell*, given the cohabitation-termination rule. This is so given that the rule that alimony terminates upon remarriage has long been accompanied by the cohabitation-termination rule.<sup>60</sup>

While the literature on remarriage termination questions the purpose alimony is meant to serve, the literature on the cohabitation-termination rule mostly assumes it.<sup>61</sup> Around the same time that the Supreme Court of California issued its decision in *Marvin v. Marvin*, the pioneering case recognizing claims to property by unmarried couples,<sup>62</sup> scholars began to consider how nonmarital cohabitation would impact alimony.<sup>63</sup> J. Thomas Oldham was already writing

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<sup>58</sup> *But see id.* at 31-33 (identifying the gender neutral duties of sex and support as potential arguments in favor of same-sex marriage).

<sup>59</sup> As Katherine Franke has written, “gaining marriage rights really boils down to surrendering the break up of [a] relationship to governance by rules set by the state, rather than the ad hoc improvisations that same-sex couples used before they were able to marry.” KATHERINE FRANKE, WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY 209, 222 (2015). The inclusion of same-sex couples into marriage and divorce will test whether marriage — and alimony, when the marriage breaks apart — is an irremediably gendered institution for all of its participants, or whether its gendered nature can be disrupted by expanding its membership. The answer to the question may differ, depending on whether one looks to sociological facts about same-sex marriage and divorces, or to how the law constructs those relationships (regardless of the facts) in distributing property in a divorce. Katherine Franke fears that marriage may not work for all types of “relational commitments” in part because courts impose narratives upon same-sex relationships that do not reflect their reality. *Id.* at 222. Barbara Atwood, on the other hand, emphasizes that marriage is by no means a monolithic institution. Barbara A. Atwood, *Marital Contracts and the Meaning of Marriage*, 54 ARIZ. L. REV. 11, 41-42 (2012) (explaining that “American law does not coalesce around a single conception of marriage” and arguing that in taking marriage promotion seriously, “permitting flexibility in the meaning of marriage would seem more likely to attract people to the institution rather than adhering to a fixed and immutable status”).

<sup>60</sup> State statutes, along with marital agreements, set forth a series of “termination events,” which include death, remarriage, and cohabitation. The question is often whether the nonmarital relationship raises to the level of “cohabitation.” Antognini, *supra* note 6, at 20-23.

<sup>61</sup> *But see id.* at 21; *Aloni*, *supra* note 26, at 1324.

<sup>62</sup> *See Marvin v. Marvin*, 557 P.2d 106, 113 (Cal. 1976). The Supreme Court of California in *Marvin* recognized both express and implied contractual rights to property. *Id.* at 122-23.

<sup>63</sup> *See* J. Thomas Oldham, *The Effect of Unmarried Cohabitation by a Former Spouse*



nearly forty years ago about “[t]he increasing popularity of informal living arrangements in America,” which “has presented courts with a number of puzzling legal questions.”<sup>64</sup> Oldham’s specific concern was the question whether alimony payments should end when the spouse receiving payments enters into a living arrangement that approximates, but is not, marriage.<sup>65</sup> In addressing the question, Oldham identified alimony’s principal purpose as ensuring that the ex-spouse continue to have a suitable standard of living so as to not become a “public charge[.]”<sup>66</sup> The question in evaluating a new relationship should then be which private individual — the former partner or the current partner — should support the ex-spouse.<sup>67</sup> Given Oldham’s characterization of alimony’s overarching purpose, the nonmarital relationship becomes relevant insofar as it provides support, even if it does not rise to the level of a de facto marriage. By prioritizing the consideration of need, Oldham effectively expands the types of relationships that terminate support — while a de facto marriage should always lead to a termination of support, he argues that there may be additional instances where the support responsibility should shift to the recipient’s new cohabitant if the equities dictate such a result.<sup>68</sup>

Oldham also addresses how jurisdictions should analyze a same-sex nonmarital relationship, at a time when same-sex marriage was not recognized.<sup>69</sup> Given his preoccupation with adequate financial support, the question to ask of the relationship is whether the recipient ex-spouse’s standard of living has been affected, without regard to the sex of the parties in the relationship.<sup>70</sup> Indeed, where the main goal is to prevent the ex-spouse from becoming a public charge,

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upon His or Her Right to Continue to Receive Alimony, 17 J. FAM. L. 249, 249 (1978).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.* at 266.

<sup>67</sup> Oldham explains that the ex-spouse is no longer “the only private party” who can provide private, as opposed to state, support. *Id.*

<sup>68</sup> Oldham still argues that a relationship that amounts to a de facto marriage should terminate alimony; he adds another basis for termination where the relationship is something less, but the equities are affected. *Id.* at 266-67. For example, Oldham explains that where the incomes of the recipient ex-spouse and the payor ex-spouse are relatively similar and the marriage was of short duration, then “it would seem more equitable to require the cohabitant to support the ex-spouse (during the remainder of the cohabitation) after the cohabitation had continued for two or three years.” *Id.*

<sup>69</sup> See J. Thomas Oldham, *Cohabitation by an Alimony Recipient Revisited*, 20 J. FAM. L. 615, 630-31 (1981).

<sup>70</sup> See *id.* at 642.

the sex of the individual held responsible for the support becomes irrelevant.<sup>71</sup> Oldham was not alone in arguing that same-sex relationships should terminate alimony payments pre-*Obergefell*.<sup>72</sup>

More recently, Steven Berenson has raised the question of what types of nonmarital relationships should terminate alimony and he too turns to financial need to formulate a response.<sup>73</sup> Berenson critiques the tendency of courts to lump all cohabiting relationships together. In particular, he criticizes the cohabitation-termination rule for treating all cohabiting relationships as being “marriage like.”<sup>74</sup> Given the “variety and diversity” of cohabiting relationships, Berenson counsels courts to consider the individualized impact of the new relationship on the ex-spouse’s economic need.<sup>75</sup> In the absence of a marital relationship, the central question in the cohabitation-termination

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<sup>71</sup> See *id.*; see also Steven K. Berenson, *Should Cohabitation Matter in Family Law?*, 13 J.L. & FAM. STUD. 289, 294 (2011) (noting that “placing determinative legal effect on the mere fact of cohabitation makes no more sense in the context of same sex relationships than it does in the context of opposite sex ones” although leaving a discussion of same-sex couples and their right to marry to the side). This is not to say, however, that sex is irrelevant. Neither Oldham nor Berenson address whether alimony should be terminated if a recipient ex-spouse were to live with a family member like a parent or a sibling, thereby reducing one’s economic needs. See Oldham, *supra* note 69, at 642; Berenson, *supra* note 71, at 293-99.

<sup>72</sup> Jill Bornstein, Note, *At a Cross-Road: Anti-Same-Sex Marriage Policies and Principles of Equity: The Effect of Same-Sex Cohabitation on Alimony Payments to an Ex-Spouse*, 84 CHI.-KENT L. REV. 1027, 1027 (2010). To be clear, Oldham is not arguing that same-sex relationships ought to be recognized on an equal basis as heterosexual relationships. See Oldham, *supra* note 69, at 631. The broader legal phenomenon of which this forms a part has been termed by Erez Aloni as “deprivative recognition,” where the state recognizes a relationship, which thereby leads to a deprivation rather than a benefit. Aloni, *supra* note 26, at 1276. Aloni does not characterize scholarship in this fashion — he addresses only regulations by legal institutions. While Aloni focuses on state regulation, academic literature can also arguably fit within this rubric — as here, where the scholarship argues for relationship recognition for the purpose of denying, rather than granting, benefits. *Id.* at 1324-29. To bolster his argument, Aloni points out that same-sex relationships do not always trigger the same termination rules. *Id.* According to Aloni then, the immorality that legislators are concerned with appears to be limited to heterosexual sex outside of marriage. *Id.*

<sup>73</sup> Berenson, *supra* note 71, at 328; see also Marsha Garrison, *Reviving Marriage: Could We? Should We?*, 10 J.L. & FAM. STUD. 279, 289-92 (2008) (arguing that cohabitants and married couples differ along a number of axes, including having more “brief and transitional” relationships than marriage).

<sup>74</sup> Berenson, *supra* note 71, at 307.

<sup>75</sup> *Id.* at 313, 322-24. Berenson explains, “Only the economic needs tests, which look to looks at the unique circumstances of each post-divorce cohabitating relationship gives full accord to the diversity among cohabiting relationships that the recent research demonstrates.” *Id.* at 324.

literature becomes whether the new relationship provides financial support.

C. *A Comprehensive Account of Nonmarriage: Bridging the Two Literatures*

Bringing courts' consideration of the cohabitation-termination rule into conversation with how they distribute property at the end of a nonmarital relationship can serve as a bridge between the scholarship on alimony and nonmarital relationships. In particular, analyzing the exceptional cases in the literature on nonmarriage alongside the termination of alimony cases in the literature on alimony reveals the conditions under which property distribution outside of marriage is generally allowed. These cases all form a part of the law of nonmarriage and together, they show just how deeply tethered the nonmarital space remains to marriage. Understanding where and how they overlap helps uncover the role that marriage plays in defining nonmarital relationships across doctrinal divides.

Turning to these decisions as a group contributes to the literature on nonmarriage in that it calls into question how different nonmarriage is, and can ever be, from marriage. It also shows the uniform ways in which marital norms define the values and contributions rendered outside of marriage. It contributes to the alimony literature by calling into question what alimony's function actually is.<sup>76</sup> If the purpose of alimony is to ensure that an ex-spouse is not rendered destitute, then scholars are right in arguing that the only question that matters is whether there has been a change in an individual's financial circumstances, rather than whether the couple is same-sex or different-sex.<sup>77</sup> But even if alimony were entirely about financial need, it is not clear whose — its central function could be to ensure that the paying ex-spouse is not forced to support more than one individual at a time, rather than to ensure an ex-spouse's financial security. If, instead, the cohabitation-termination rule applies only to relationships that look like marriage, and does not consider whether

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<sup>76</sup> Much of the literature that directly addresses the effect of nonmarital relationships on alimony payments assumes that alimony's most important function is to maintain the ex-spouse's financial security, and ensure that the ex-spouse does not become a public charge. Perry, however, also points to the importance of alimony as a tool for preserving a gender hierarchy and policing women's sexuality in particular. See Perry, *supra* note 20, at 25-29.

<sup>77</sup> This is not, however, the current state of the law. See *infra* Section III.A (identifying the approaches different jurisdictions apply to the question of when alimony is terminated).

the nonmarital couple pools property, then alimony's central purpose seems to be about ferreting out couples who would otherwise marry but are "gaming" the system by not marrying. These are all alternative justifications, and explanations, which depend on how courts relate the nonmarital relationship to marriage, and to a particular property distribution.

As of now, there are only a few cases that address the termination of alimony in the exceptional contexts, either same-sex or reverse different-sex. Uncovering how courts deal with same-sex relationships is particularly important given the relatively recent ability of same-sex couples to marry, and the resulting requests for alimony if and when the parties divorce.<sup>78</sup> Considering same-sex relationships, which in practice have all been lesbian relationships, further clarifies just how much reliance there is on whether the relationship is akin to marriage, or whether financial support is the ultimate goal. Given the increase in same-sex couples marrying and the changing social norms surrounding same-sex relationships,<sup>79</sup> same-sex couples will likely seek alimony in the context of divorce. In the different-sex context, projections are being made about women's growing economic independence, which may in turn increase the number of rulings that award alimony to ex-husbands, as it would the number of men seeking property from women at the end of a nonmarital relationship.<sup>80</sup>

Addressing the decisions that terminate alimony alongside those that distribute property at the end of a nonmarital relationship serves to identify how courts link property to contributions rendered in the course of a relationship — marital or not — in an explicitly gendered manner, regardless of the sex of the parties involved. As such, they inspire pause before turning to the nonmarital space as a model for regulating intimate relationships. They are also essential to

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<sup>78</sup> Some scholars worry that same-sex couples may not seek alimony at all. See FRANKE, *supra* note 59, at 214 (addressing divorce in the context of same-sex marriage and identifying the risk that marriage and divorce "risk imposing — if not imprinting — status-based gendered identities on the parties in ways that clearly change how they might have seen themselves had marriage law not been on the scene").

<sup>79</sup> See Adam P. Romero, *1.1 Million LGBT Adults Are Married to Someone of the Same Sex at the Two-Year Anniversary of Obergefell v. Hodges*, 1 (June 23, 2017), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Obergefell-2-Year-Marriages.pdf> (noting that since June 2015, about 157,000 same-sex couples have married across the United States and a total of 1.1 million are currently married); see also Ben-Asher, *supra* note 15 (addressing the advent of same-sex divorce now that marriage equality is a legal reality).

<sup>80</sup> See Carbone & Cahn, *supra* note 4, at 58 (arguing that the law regulating cohabitation "has evolved to reflect women's increasing economic independence").

understanding how nonmarital couples, beyond those that proceed to court, may structure their relationships in the shadow of these rules.<sup>81</sup>

## II. THE END OF A NONMARITAL RELATIONSHIP

This Part addresses the set of exceptional cases — involving same-sex couples or different-sex couples with the standard gender composition of the parties reversed — that decide whether to distribute property at the conclusion of the nonmarital relationship. In the modal case of a woman seeking property from a man at the end of a nonmarital relationship, courts typically prevent her from getting much outside of marriage.<sup>82</sup> However, prioritizing the marital relationship has less force in the context of a relationship where marriage was not an option — as used to be true for same-sex couples — or where the man seeks property from the woman — given that men have not traditionally been understood to rely on marriage as a source of support.<sup>83</sup>

Courts approach same-sex couples, male and female, in one of two ways. The first is to unproblematically liken the same-sex relationship to marriage, measuring the same-sex relationship in terms of whether it appears to be marriage-like — which courts were free to do precisely because these couples could not marry. The second approach is to reinforce how the law values traditional marital relations outside of marriage — work within the home remains unquantifiable, while work that can be distinguished from services a wife would traditionally perform is remunerated. In this way, courts gender the

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<sup>81</sup> Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 950 (1979) (proposing “an alternative way to think about the role of the law” by considering “the impact of the legal system on negotiations and bargaining that occur *outside* the courtroom”).

<sup>82</sup> See Antognini, *supra* note 6, at 58-61.

<sup>83</sup> See Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1644-45 (2003) (identifying how marriage has been the vehicle with which lawmakers address female poverty in particular throughout history). This is not to say that men have not benefitted from marriage. See, e.g., JESSIE BERNARD, *THE FUTURE OF MARRIAGE* 16-24 (1982) (“There are few findings more consistent, less equivocal, more convincing than the sometimes spectacular and always impressive superiority on almost every index — demographic, psychological, or social — of married over never-married men. . . . At the present time, at least, if not in the future, there is no better guarantor of long life, health, and happiness for men than a wife well socialized to perform the ‘duties of a wife,’ willing to devote her life to taking care of him, providing, even enforcing, the regularity and security of a well-ordered home.”).

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same-sex nonmarital relationship on the same terms they do a heterosexual relationship.

In a reverse heterosexual relationship, the man seeking property is often less successful in obtaining relief than the plaintiff in a same-sex couple, and meets a similar fate as the woman in a typical heterosexual case. In denying property to a man who seeks it, however, courts send a different message to him than to the woman in his situation: rather than encourage him to get married, these decisions are best understood as encouraging him to go to work. This Part explores these two situations in detail.

### A. *Same-Sex Relationships*

Jurisdictions address the end of a nonmarital relationship through one of three general doctrinal approaches. The first and most common approach is to allow for the recovery of property on either a contractual or an equitable basis.<sup>84</sup> The second, and much less common approach, applies a status-based analysis to the relationship, asking whether the nonmarital relationship was sufficiently like a marriage.<sup>85</sup> The third approach jurisdictions take is to deny nonmarital couples property rights altogether. This final approach has, however, a number of loopholes.<sup>86</sup>

This section breaks away from each jurisdictional approach to find themes that cut across all. Two modes of analysis clearly stand out: courts either assess the same-sex relationship as though it were a marriage, and do so more freely than in the different-sex context given

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<sup>84</sup> California is perhaps the most well-known jurisdiction to allow for both approaches, but most jurisdictions recognize an arsenal of different doctrines, with slight variations. *See Marvin v. Marvin*, 557 P.2d 106, 122-23 (Cal. 1976) (allowing for recovery at the conclusion of a nonmarital relationship on the basis of an express or implied contract or equitable relief). New York, for instance, requires that there be an express contract alleged (oral or written). *See Morone v. Morone*, 413 N.E.2d 1154, 1156 (N.Y. 1980). But it also recognizes claims of unjust enrichment. *Minieri v. Knittel*, 727 N.Y.S.2d 872, 874-75 (2001) (describing that a constructive trust could be imposed in the context of a same-sex nonmarital relationship based on a confidential relationship which “can grow out of a marital or other family relationship, such as the one here”).

<sup>85</sup> It is limited to two states: Washington and Nevada. *See W. States Constr., Inc. v. Michoff*, 840 P.2d 1220, 1223 (Nev. 1992); *Connell v. Francisco*, 898 P.2d 831, 835-36 (Wash. 1995). Alaska may also follow this approach. *See Bishop v. Clark*, 54 P.3d 804, 810-11 (Ala. 2002) (finding that an unmarried couple had an implicit agreement to live together and split property “as though they were married”).

<sup>86</sup> *See, e.g., Antognini, supra* note 6, at 37-41. These loopholes also emerge when the couple is of the same sex.

that the institution of marriage is not implicated where a couple could not marry; or they refuse to distribute property and use the nonmarital relationship as a place to continue to draw the line between services that can be remunerated and those that cannot. While individuals in same-sex couples are relatively successful in their efforts to seek property outside of marriage, the decisions are most significant in that they clearly demarcate which considerations matter — be it how similar to marriage a relationship must be to warrant a distribution of property at the end, or what kinds of services may be recognized for purposes of a lawful exchange, the latter of which tend to be those farthest afield from wifely duties.<sup>87</sup>

The small number of reported cases dealing with same-sex couples renders it difficult to reach definitive conclusions — yet contextualizing these decisions against the backdrop of courts' approach to heterosexual relationships helps complete the analysis of how property is distributed outside of marriage generally, and in same-sex relationships specifically. A clear pattern plainly emerges: same-sex couples, like different-sex couples, cannot escape the influence of marriage, or marital based norms.

#### 1. Whether the Same-Sex Relationship Looks Like a Marriage

Courts measure the nonmarital relationship alongside marriage both in jurisdictions that undertake a status-based approach, and those that undertake a medley of contractual or equitable approaches.<sup>88</sup> This section addresses each in turn.

##### *a. Status-Based Approach: Washington*

The jurisdictions that approach same-sex nonmarital relationships through a status-based lens explicitly consider whether the relationship is marital-like, even though the couple was unable to actually marry. Both Washington and Nevada rely on the rules of divorce to distribute property when a couple was never legally

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<sup>87</sup> To be clear, this Article does not attempt to make claims about the relationships themselves; instead, it focuses on how the law regulates these relationships — what assumptions it makes about those relationships and the effects of the decisions on how contributions to the relationship are valued. This Article takes as its object of study all of the reported cases — it thus shares the limits that reported cases clearly have in that they can only address only those unmarried couples who have assets to divide, and who went to court to divide those assets.

<sup>88</sup> The status-based jurisdictions approach all of the cases seeking distribution on the basis of the relationship in relation to marriage; the jurisdictions that apply contractual or equitable doctrines do not all approach the relationship in this same way.

married, but only Washington has addressed same-sex relationships.<sup>89</sup> Courts in Washington have not yet denied a plaintiff in a same-sex couple his or her request for property given that they have all concluded that the relationship was sufficiently marriage-like.

Washington courts have, for the most part, discarded the moralistic-sounding label of “meretricious relationship” and replaced it with “committed intimate relationship” or “equity relationship.”<sup>90</sup> The crux of their analysis continues to be whether the relationship is “stable” and “marital-like.”<sup>91</sup> Courts generally look to five factors, including the continuity of the cohabitation, the length of the relationship, the purpose of the relationship, the pooling of resources, and the parties’ intent.<sup>92</sup>

Courts undertaking the status-based analysis in the same-sex context do not require couples to share an intent to have a wedding, or to enter into a more formal status if available, in finding that a same-sex relationship is sufficiently like marriage. Evidence too that the couple was unfaithful is not enough to defeat courts’ decisions to impose the status of a committed and intimate relationship.

In deciding to apply the status-based analysis to same-sex couples for the first time, the Supreme Court of Washington confirmed that the ability to marry is not a requirement for finding that a same-sex relationship is like a marriage. In 2004, the state supreme court held that unmarried same-sex couples could receive the designation of

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<sup>89</sup> Nevada and Washington apply the laws of divorce by analogy to unmarried couples. Yet, only Washington has had occasion to deal with same-sex couples requesting a property distribution. And it has had a number of requests to do so. See discussion *infra* Section II.A.1.a. It is unclear why Nevada has had no cases involving a same-sex couple, especially given the number of gay couples living in the state. See *Nevada Gay Households up by 87 Percent in 2010*, LAS VEGAS SUN (Aug. 6, 2011), <https://lasvegassun.com/news/2011/aug/06/nv-same-sex-couples-nevada-1st-ld-writethru> (identifying that the number of same-sex couples sharing a home in Nevada had almost doubled in the ten-year period between 2000 to 2010).

<sup>90</sup> *In re Long & Fregeau*, 244 P.3d 26, 27-28 (Wash. Ct. App. 2010). The court noted that the Washington Supreme Court has abandoned the term “meretricious” in favor of “committed intimate relationship.” It also coined yet another term, “equity relationship” explaining that it is “a neutral, more accurately descriptive, substitute term in analyzing the common fact-equity issues found in this subject area.” *Id.* at 28. It may be more than mere coincidence that the term equity relationship came about in the context of a same-sex relationship rather than a different-sex one. Same-sex relationships were given many labels, but they were not described as being “meretricious,” a term which has its roots in female prostitution.

<sup>91</sup> *Id.* at 29 (citing *Connell v. Francisco*, 898 P.2d 831 (1995) (quotation marks removed)).

<sup>92</sup> *Id.* at 29-30.



“meretricious” for purposes of intestacy.<sup>93</sup> A few years later, in *Gormley v. Robertson*, the court asked whether a same-sex couple, who was still unable to legally marry in Washington, could nonetheless be in a meretricious, or marriage-like, relationship for purposes of property distribution after separating.<sup>94</sup> The court answered in the affirmative. It reasoned that the determination of whether a relationship is quasi-marital, or meretricious, has always required “knowledge by the partners that a *lawful* marriage between them does not exist.”<sup>95</sup>

In establishing whether a same-sex relationship is marital-like, courts do not require the relationship to be monogamous. In *In re Long and Fregeau*, the Washington Court of Appeals addressed an eight-year relationship between Jeremy Long and David Fregeau, which began when David was still married.<sup>96</sup> Shortly after Jeremy and David met, David and his wife separated and the two men began living together.<sup>97</sup> Jeremy and David agreed that their relationship was both “loving and intimate.”<sup>98</sup> They cohabited, took care of each other during illnesses, visited each other’s families, worked on their separate and joint properties, and vacationed together.<sup>99</sup> During the course of their relationship, each had sexual relations with other people.<sup>100</sup> David relied on these infidelities to argue that they did not have an equity relationship. He also emphasized that even though they had seriously considered entering into a domestic partnership, they ultimately decided not to.<sup>101</sup> Moreover, David had never wanted children.<sup>102</sup> Acknowledging these facts, the court nevertheless concluded that the five factors were satisfied, finding that the parties’ intent was to be in a marriage-like relationship and that they held a shared purpose during their relationship, treating each other “as though they were married.”<sup>103</sup>

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<sup>93</sup> *Vasquez v. Hawthorne*, 33 P.3d 735, 737 (Wash. 2001) (en banc) (addressing whether a same-sex relationship could be “meretricious” after one of the parties to the relationship died, not after they had broken up).

<sup>94</sup> *Gormley v. Robertson*, 83 P.3d 1042, 1042 (Wash. Ct. App. 2004).

<sup>95</sup> *Id.* at 1045-46 (finding that the lesbian relationship was meretricious and ordering a property distribution).

<sup>96</sup> *In re Long & Fregeau*, 244 P.3d 26, 28-29.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.* at 28.

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 28-29.

<sup>101</sup> *See id.* at 30.

<sup>102</sup> *See id.*

<sup>103</sup> *Id.*

The court in *Long and Fregeau* did not give much weight to the couple's decision to see other people, or to not formalize their status by declining to register for a domestic partnership. Indeed, Washington has generally not required same-sex couples to take any steps to formalize their relationship, even where available. In *Rinaldi v. Bailey*, the court found that two women were in a committed and intimate relationship even though one of them refused to have a wedding ceremony.<sup>104</sup> The court considered the fifteen-year relationship between Tamar Bailey and Linda Rinaldi, including their cohabitation and their joint financial activities.<sup>105</sup> The court noted that Linda — the partner seeking the property distribution, and the one who had refused a wedding — could have had numerous reasons for not wanting a wedding.<sup>106</sup> Accordingly, her rejection of a marriage ceremony did not demonstrate “a lack of commitment” to the relationship.<sup>107</sup>

On the flip side, the decision to formalize the relationship does not necessarily determine the outermost limits of a committed intimate relationship for purposes of property distribution. The court of appeals in *Walsh v. Reynolds* found that an equity relationship could exist *before* a couple officially registered for a domestic partnership in Washington.<sup>108</sup> The court noted that the relationship between the two women had lasted twenty-three years, during the course of which they had two children.<sup>109</sup> Although the couple decided to formalize the relationship by registering as domestic partners in Washington, the court found that the registration did not mark the beginning of the equity relationship; instead, the appellate court held that the trial court should have considered the five factors in order to establish when the equity relationship was created.<sup>110</sup> As such, the court remanded the case for the trial court to establish when the equity

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<sup>104</sup> *Rinaldi v. Bailey*, No. 66029–2–I, 2012 WL 5292816, at \*4-5 (Wash. Ct. App. Oct. 29, 2012).

<sup>105</sup> *Id.* at \*4-7.

<sup>106</sup> These reasons included not wanting a large ceremony, and preferring instead “something more private.” *Id.* at \*5-6.

<sup>107</sup> *Id.* at \*6.

<sup>108</sup> *Walsh v. Reynolds*, 335 P.3d 984, 991 (Wash. Ct. App. 2014).

<sup>109</sup> *Id.* at 992 (holding that the couple clearly “intended to be in a marriage-like relationship with a shared purpose”).

<sup>110</sup> *Id.* at 992 (“That they later formalized their relationship by registering as statutory domestic partners does not defeat application of the common law ‘equity relationship’ doctrine to their years together before the statutory registration option became available to them.”).

relationship began, which it clarified should have been set well before they registered as domestic partners in Washington.<sup>111</sup>

The approach Washington courts take with regard to same-sex relationships arguably stands in sharp contrast to how they address different-sex relationships.<sup>112</sup> In the different-sex context, Washington courts impose a high bar for the nonmarital relationship to mimic marriage — in fact, the lack of an actual marriage often leads a court to find there was no equity relationship for purposes of distributing property.<sup>113</sup> In *In re Pennington*, the Supreme Court of Washington considered two consolidated cases brought by female plaintiffs at the end of a heterosexual relationship. In the first case, the Court declined to find a committed relationship in the context of a twelve-year relationship, reasoning that the man’s “refusal, coupled with [the woman’s] insistence on marrying, belies the existence of the parties’ mutual intent to live in a meretricious relationship.”<sup>114</sup> In the second case, the court’s analysis of the five factors was influenced by the fact that the parties had been involved with other individuals at the beginning of the relationship.<sup>115</sup> Unlike the court’s conclusion in *Long and Fregeau*, the court in *Pennington* held that dating other people disproved that the relationship was sufficiently stable and marital-like.<sup>116</sup>

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<sup>111</sup> The trial court had found that the relationship commenced before they registered in Washington, but on appeal the court held that it was not sufficiently long before. *Id.* at 992. The court on appeal did, however, rely on the fact that the couple had also registered for a domestic partnership in California in 2000. *Id.* That said, it does not expressly limit the commencement of the relationship to that initial registration. *Id.*

<sup>112</sup> See Antognini, *supra* note 6, at 16-18 (arguing that the status-based approach makes it increasingly hard for a plaintiff in a heterosexual relationship to make out a claim that the relationship was sufficiently “marital-like” outside of an actual marriage).

<sup>113</sup> *Id.* at 18 (arguing that the effect of *Pennington* “is to restrict the application of the laws of divorce to those relationships that are most marital-like: indeed, some courts arguably require that there *be* a marriage”).

<sup>114</sup> *In re Marriage of Pennington*, 14 P.3d 764, 771 (Wash. 2000).

<sup>115</sup> *Id.* at 772.

<sup>116</sup> *Id.* at 771. Infidelity may have different meanings in the context of a gay relationship than in a heterosexual one. One example of how infidelity is treated in the male same-sex context is captured by the phrase Dan Savage coined of “monogamish.” See Mark Oppenheimer, *Married, with Infidelities*, N.Y. TIMES (June 30, 2011), <http://www.nytimes.com/2011/07/03/magazine/infidelity-will-keep-us-together.html> (discussing Dan Savage’s work). That said, heterosexual couples who are married are also unfaithful. It is unclear what infidelity generally means about commitment, and if courts are indeed taking these potentially different meanings into account, then they are not doing so explicitly.

The inability of same-sex couples to marry is therefore relevant to the analysis in the following way: its absence as an available legal status allows courts to more freely find that a same-sex relationship is marriage-like. The lack of marriage also makes it such that failure to enter into any formal status short of marriage does not defeat the court's finding that the same-sex relationship was committed and intimate.

*b. Contractual and Equitable Approaches*

Jurisdictions that do not follow a strictly status-based approach exhibit a similar freedom in finding that nonmarital same-sex relationships are akin to marriage. They also appear more amenable to distribute property when the relationship ends.

In addressing same-sex relationships, many courts explicitly noted the couples' inability to marry, yet conclude that it does not bear on their ability to distribute property when the relationships end. In *Cannisi v. Walsh*, the court specified that New York did not recognize same-sex marriage, and that courts had recently interpreted the state constitution to not compel the recognition of same-sex marriage.<sup>117</sup> But, *Cannisi* clarified that the question before it did not turn on marriage, and instead concerned "the existence of same sex relationships" and the "reality that some same sex relationships dissolve."<sup>118</sup>

Courts in New York generally recognize express contracts between unmarried partners.<sup>119</sup> They also allow for some equitable claims. In *Cannisi*, the trial court declined to find an express agreement to distribute the assets acquired between Joann Cannisi and Maureen Walsh, who had two children together in the course of a nineteen-year relationship; it did, however, conclude that Maureen articulated a colorable claim for the imposition of a constructive trust.<sup>120</sup> The court reasoned that it would be unfair, and Joann would be unjustly

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<sup>117</sup> *Cannisi v. Walsh*, No. 6435/2005, 2006 WL 3069291, at \*4 (N.Y. Sup. Ct. Oct. 30, 2006).

<sup>118</sup> Courts must therefore "resolve disputes regarding the distribution of assets." *Id.* at \*4.

<sup>119</sup> See, e.g., *Morone v. Morone*, 413 N.E.2d 1154, 1156 (N.Y. 1980); *Gonzalez v. Green*, 831 N.Y.S.2d 856, 861 (N.Y. Sup. Ct. 2006) (holding that a same-sex marriage entered into in Massachusetts was invalid, but upholding a written contract distributing property at the end of a same-sex relationship); *Silver v. Starrett*, 674 N.Y.S.2d 915, 921 (N.Y. Sup. Ct. 1988) (upholding a lawyer-drafted contract between a lesbian couple).

<sup>120</sup> *Walsh*, 2006 WL 3069291, at \*1-4.

enriched, if it were only to value Maureen's financial contributions.<sup>121</sup> While it explained that "New York courts will not imply an agreement between unmarried domestic partners based on the nature of their relationship," the court found that there was sufficient evidence to "delineate an agreement of distinct roles to be held by each of the parties for the benefit of the family unit."<sup>122</sup> The court thus relied on the presence of a discernable family, where the roles were clearly defined, and held that a constructive trust could be imposed given that Maureen had "made contributions of time and effort on behalf of the family unit in reliance on [the] promise to contribute to the support of the family unit."<sup>123</sup>

New York has taken a distinctly different approach to women making similar claims in the context of a heterosexual couple. In *Tompkins v. Jackson*, the trial court affirmed a motion to dismiss the request for property at the conclusion of a twelve-year relationship that included one child.<sup>124</sup> The court was asked to consider whether Curtis Jackson was unjustly enriched by Shaniqua Tompkins's services, and eventually said no. The court noted that Shaniqua had performed housekeeping and domestic services like cooking and washing Curtis's clothes, and taking care of him after he was shot.<sup>125</sup> The court found, however, that these services were adequately remunerated during the course of the relationship: there was evidence that Curtis had given Shaniqua money and numerous gifts when they were together, like paying off her Macy's credit card.<sup>126</sup> As such, "[g]iven the usual 'give and take' ordinarily associated with persons cohabiting with one another, and the giving and receiving by both here of love, affection, gifts and the like, it cannot be said that equity and good conscience cry out for fiscal adjustment."<sup>127</sup> The "time and effort on behalf of the family unit" that amounted to a colorable claim of unjust enrichment in *Cannisi*<sup>128</sup> did not lead to a property distribution in *Tompkins*.<sup>129</sup> "To conclude otherwise," the court in

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<sup>121</sup> See *id.* at \*4. The posture of the case assumes all of her allegations to be true. See *id.*

<sup>122</sup> *Id.* at \*3.

<sup>123</sup> *Id.* at \*4.

<sup>124</sup> *Tompkins v. Jackson*, No. 104745/2008, 2009 WL 513858, at \*1, \*3-4 (N.Y. Sup. Ct. Feb. 3, 2009).

<sup>125</sup> *Id.* at \*2, \*7 (noting that Shaniqua puréed his food).

<sup>126</sup> *Id.* at \*18.

<sup>127</sup> *Id.*

<sup>128</sup> *Walsh*, 2006 WL 3069291, at \*4.

<sup>129</sup> *Tompkins*, 2009 WL 513858, at \*18. It is, of course, always a risky proposition to compare two trial court decisions. But the judges in *Cannisi* and *Tompkins* address

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*Tompkins* explained “would transform the parties’ personal, yet informal relationship to that of a marriage.”<sup>130</sup>

Characterizing a same-sex relationship in explicitly marital terms was thus much less problematic for courts when those couples could not marry, even where unmarried partners did not have rights based on their relationship. Florida, for instance, has long held that unmarried cohabitants do not have rights flowing from the mere act of cohabitation,<sup>131</sup> but unmarried parties can still exercise their general rights to property and contract.<sup>132</sup> In *Armao v. McKenney*, a Florida Court of Appeal found that an oral contract between Anthony Armao and Russell Turnbull had been established during their forty-six year long relationship.<sup>133</sup> The court noted that they were “just like a married couple” in that they took care of each other financially and emotionally, lived together, worked together, and decided to retire together.<sup>134</sup> Similarly, in *Posik v. Layton*, the Florida Court of Appeal upheld a written contract entered into by Nancy L.R. Layton and Emma Posik, which set out that Nancy would support Emma as long as Emma performed house work, yard work, and cooking.<sup>135</sup> In interpreting the lawyer-drafted contract, the court noted that the obligation to provide support was “very similar to a ‘until death to us part’ commitment,” contracting for “a permanent sharing of, and participating in, one another’s lives.”<sup>136</sup> That contract, for something akin to marriage — a status unavailable to the parties — was upheld.<sup>137</sup>

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very similar claims, on the basis of a nonmarital relationship, and their differences reflect larger differences present throughout the law.

<sup>130</sup> *Id.* at \*13.

<sup>131</sup> See *Posik v. Layton*, 695 So. 2d 759, 761 (Fla. Dist. Ct. App. 1997).

<sup>132</sup> *Id.* at 761-62 (upholding a written contract entered into with regard to property distribution by a lesbian couple).

<sup>133</sup> *Armao v. McKenney*, 218 So. 3d 481, 483 (Fla. Dist. Ct. App. 2017). Russell died after the proceedings commenced, but this began as a separation action, not an action against Russell’s estate. *Id.* at 481.

<sup>134</sup> *Id.* at 483.

<sup>135</sup> *Posik*, 695 So. 2d at 760-61.

<sup>136</sup> *Id.* at 762.

<sup>137</sup> See *id.*; see also *Ireland v. Flanagan*, 627 P.2d 496, 499 (Or. Ct. App. 1981) (noting that looking to the intent of the parties, the approach used in Oregon, applies to same-sex relationships as it does to different-sex relationship, relying in part on the women’s belief in this case that they had a relationship “similar to the relationship of husband and wife”).

## 2. Same-Sex Relationships as a Space to Gender Marriage

Where courts do not directly rely on the marital characteristics of the relationship to distribute property, they still rely on marriage as a measure of what types of services should, or should not, be remunerated. Outside of marriage, and outside of understanding nonmarriage through an explicitly marital lens,<sup>138</sup> the services that receive remuneration are only those that can be clearly separated from those a wife ought to provide. Courts thus generally decline to distribute property for work that takes place in the home, regardless of the sex of the party performing the work. Courts continue, however, to remunerate work that they deem takes place outside of the home. This approach to valuing labor spans jurisdictions that accept contractual or equitable claims, and those that profess to deny any rights based on the relationship.

### a. Contractual and Equitable Approaches

Among the jurisdictions that acknowledge nonmarital relationships, California is perhaps best known, as it led the charge in recognizing property rights in *Marvin v. Marvin*.<sup>139</sup> It has not, however, been easy to make out a successful claim for property after the end of a nonmarital relationship in California — even Michelle Triola, the plaintiff in *Marvin*, received nothing at the conclusion of her now infamous proceedings.<sup>140</sup> The difficulty in succeeding is also true, to a certain extent, of same-sex couples where the relationship approaches the division of labor undertaken in a traditional marriage and courts

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<sup>138</sup> See *supra* Section II.A.1.

<sup>139</sup> See *Marvin v. Marvin*, 557 P.2d 106, 122-23 (Cal. 1976). *Marvin* is often hailed as the beginning of the era in which jurisdictions would recognize the ubiquity of nonmarital relationships and provide rights and obligations as between the individuals in a nonmarital relationship. See Ann Lacquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1382-83 (2001) (“*Marvin v. Marvin* has been cited in approximately two hundred other court decisions, about half of which from the California courts, and approximately three hundred law review articles. It is still a fixture of family law classes, appearing as a principal case in each of the eleven casebooks currently on the market.”).

<sup>140</sup> On remand, Michelle Triola was awarded no property. ELIZABETH H. PLECK, NOT JUST ROOMMATES: COHABITATION AFTER THE SEXUAL REVOLUTION 158-59 (2012) (noting that even the rehabilitative award Michelle was given by the district judge was overturned on appeal); see also Estin, *supra* note 139, at 1407-08 (arguing that *Marvin* “drew popular attention to the legal questions that emerge from cohabitation relationships,” but failing to grapple with the reality of cohabitation and establish laws that adequately regulate it).

do not approach the relationship in terms of how marital-like it appears to be.<sup>141</sup>

These post-*Marvin* cases are best understood as continuing the project of gendering the allocation of labor, even in the context of a same-sex relationship: where the services approach the type a wife should render, then courts decline to value them. Stated otherwise, working, for instance, as a bodyguard and chauffeur can be compensated, while working to cook and clean are not.<sup>142</sup> Even though a wife is no longer the individual engaging in this labor, courts continue to render the labor itself gratuitous.<sup>143</sup>

In *Whorton v. Dillingham*, the California Court of Appeal considered whether to enforce an oral agreement between Benjamin F. Dillingham, III, and his partner of seven years, Donnis G. Whorton.<sup>144</sup> Donnis argued that an oral agreement had been established between them during the course of their relationship. He had agreed to undertake a number of services for Benjamin, including being his full-time “chauffeur, bodyguard, social and business secretary, partner and counselor in real estate investments, and to appear on his behalf when requested.”<sup>145</sup> In addition, he was Benjamin’s “constant companion, confidant, traveling and social companion, and lover.”<sup>146</sup> In order to devote his time to these endeavors, Donnis ended his pursuit of a higher educational degree.<sup>147</sup> In return, Benjamin pledged to support Donnis for life and to provide him with a one-half interest in real estate that was acquired in both their names and in all property acquired solely by Benjamin after the commencement of their relationship.<sup>148</sup>

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<sup>141</sup> There are a total of three California cases addressing same-sex couples: one involving a female couple and two involving a male couple, in addressing the distribution of property when a couple separates. Two of those end up *denying* the couple property. This Section discusses all three. *See infra* Section II.A.2.

<sup>142</sup> *See Whorton v. Dillingham*, 248 Cal. Rptr. 405, 409 (Cal. Ct. App. 1988).

<sup>143</sup> *See Robertson v. Reinhart*, No. A095025, 2003 WL 122613, at \*6 (Cal. Ct. App. Jan. 8, 2003) (declining to distribute property at the end of a six-year lesbian relationship based on a finding that the parties kept their economic affairs separate, but also on the basis that the kind of services for which the party was seeking remuneration are presumed to be gratuitous as they are “motivated by affection, not money” unless proven otherwise).

<sup>144</sup> *Whorton*, 248 Cal. Rptr. at 406.

<sup>145</sup> *Id.* at 406-07.

<sup>146</sup> *Id.* at 407.

<sup>147</sup> *See id.* When they met, Donnis was studying to obtain an Associate in Arts degree, and planned on enrolling in a four-year college to get a Bachelor of Arts. *Id.* at 406.

<sup>148</sup> *Id.* at 406-07. Benjamin also gave Donnis control over his finances, including providing him with invasionary powers for bank accounts listed only in Benjamin’s



On appeal, the court found that the parties' sexual relationship was an express part of the oral contract. It held, however, that the sexual aspect was severable from the rest of the contract's terms.<sup>149</sup> The court reasoned that the services provided by Donnis apart from sex provided sufficient consideration: working as a chauffeur, a secretary, a bodyguard, a business partner and counselor, all had independent value from sex and are "the type for which one would expect to be compensated."<sup>150</sup> The court easily distinguished these activities from those a lover would provide — which clearly implicate sex — as it did from the activities of a homemaker, traveling companion, and cook. These latter services, the court found, were too intertwined with the sexual relationship and "incident to the state of cohabitation itself" to provide adequate consideration.<sup>151</sup>

While cleaning a house and cooking are in fact services one can contract for separate and apart from sex,<sup>152</sup> these are the duties traditionally associated with women, in their role as wives.<sup>153</sup> And courts often find that they are rendered gratuitously, even when they are exchanged in the course of a same-sex relationship. Seven years prior to *Whorton*, the California Court of Appeal in *Jones v. Daly* denied Randal Jones any of the property he was requesting at the end of his relationship with James Daly.<sup>154</sup> Randal argued that he had given up his career as a model to serve as a "lover, companion, homemaker, traveling companion, housekeeper and cook" for James.<sup>155</sup> Unlike in *Whorton*, the court found that the sexual relationship could not be severed from the contract: Randal's services as a traveling companion, housekeeper, and cook were inseparable from his services as a lover.<sup>156</sup>

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name and allowing him to charge Benjamin's personal accounts. *Id.* at 407.

<sup>149</sup> Because their relationship included sex, and the services exchanged included those of a "lover," the lower court had refused to enforce the oral contract, holding that it was expressly based on, and thus inseparable from, sexual services. *Id.* at 406-07.

<sup>150</sup> *Id.* at 409.

<sup>151</sup> *Id.* at 410.

<sup>152</sup> To state the obvious, when one contracts with someone to clean a house or cook, he or she is not also contracting to have a sexual relationship with the cleaner or the cook. *See* Antognini, *supra* note 6, at 40.

<sup>153</sup> The duty of support was the husband's prerogative, while the duty of services was the wife's. *See, e.g.,* McGuire v. McGuire, 59 N.W.2d 336, 337, 342 (Neb. 1953) (declining to enforce the duty of support in exchange for the duty of services in an intact marriage, even though Lydia McGuire had by all accounts been "a dutiful and obedient wife").

<sup>154</sup> *Jones v. Daly*, 176 Cal. Rptr. 130, 131, 134 (Cal. Ct. App. 1981) (deciding the plaintiff's claims to the estate of the deceased cohabiter).

<sup>155</sup> *Id.* at 131.

<sup>156</sup> *Id.* at 134.

That is, they were too close a copy of the duties a wife owes her husband, which have routinely been considered gratuitous when provided outside of marriage.<sup>157</sup>

*Jones* could arguably be criticized as having been wrongly decided, given that *Marvin* specifically held that homemaking services could be sufficient consideration for a contract.<sup>158</sup> But this would be an incorrect characterization of the cases addressing nonmarital relationships in California. Rather than challenge the decision in *Jones*, *Whorton* built upon, and effectively crystallized, the difference between which services are separable from sex and therefore lawful, and which are not.<sup>159</sup> Moreover, *Jones* continues to be relied on for the distinction it enforces between permissible and impermissible services that lead to a property distribution. In the more recent case of *Smith v. Carr*, the district court relied on *Jones* in dismissing a woman's claims at the end of a heterosexual relationship.<sup>160</sup> Tracey Smith and Gregory Carr met at the Peninsula Hotel in Beverly Hills: she worked at the Peninsula as an aesthetician, where he was a frequent guest.<sup>161</sup> Three years into their relationship she quit her job and moved out of her apartment into his.<sup>162</sup> At around that time she also began fertility treatments.<sup>163</sup> At the conclusion of their relationship, Tracey alleged breaches of an express oral contract and implied contract.<sup>164</sup> The court denied her requests and dismissed her claims. It noted that the services Tracey agreed to provide Gregory were of the sort deemed insufficient in *Jones* — her promise to provide him with “full time attention, availability, domestic services, companionship, comfort,

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<sup>157</sup> See Antognini, *supra* note 6, at 58-61. Randal argued in his briefs that he and James cohabited, “as if (they) were, in fact, married.” See *Jones*, 176 Cal. Rptr. at 133 (internal quotation marks omitted).

<sup>158</sup> See *Bergen v. Wood*, 18 Cal. Rptr. 2d 75, 78 (Cal. Ct. App. 1993) (noting that Michelle Marvin alleged lawful consideration based on her services as a homemaker, housekeeper, and cook, and that *Jones v. Daly* may have thus been “wrongly decided”).

<sup>159</sup> See *Whorton v. Dillingham*, 248 Cal. Rptr. 405, 410 (Cal. Ct. App. 1988).

<sup>160</sup> *Smith v. Carr*, No. CV 12-3251 CAS, 2012 WL 2343305, at \*4-5 (C.D. Cal. June 18, 2012) (finding proper jurisdiction through diversity of the parties).

<sup>161</sup> *Id.* at \*1.

<sup>162</sup> *Id.*

<sup>163</sup> Tracey had also attempted in vitro fertilization prior to their engagement. Tracey used an anonymous sperm donor, but alleges that George paid for some of the procedures. *Id.* at \*1-2.

<sup>164</sup> *Id.* at \*1.

love, and emotional support” were inseparable from the sexual services that formed a part of the relationship.<sup>165</sup>

In declining to distribute property, courts sometimes justify their approach as being hands-off. But courts in these decisions are quite actively defining what kinds of services ought to be remunerated. In *Robertson v. Reinhart*, a California court declined to distribute property at the end of a lesbian relationship, given that the mere existence of a “committed relationship” was not enough to create obligations.<sup>166</sup> The court explained that it would not inflict onto the relationship “a presumption of economic unity that runs contrary to the couple’s choice.”<sup>167</sup> Instead, the court sought to respect the parties’ “economic independence.”<sup>168</sup> While the court may have been correct in identifying that the individuals in the couple did not pool their resources, it further found that the services provided in the course of the relationship were rendered gratuitously, without “the expectation of monetary compensation.”<sup>169</sup> The effect of the court’s decision is to reinforce the persistent presumption that household services are gratuitous — they are, the court in *Robertson* explained, “motivated by affection, not money,” unless proven otherwise.<sup>170</sup>

*b. No Rights Stem from a Nonmarital Relationship*

Four jurisdictions are vocal about denying property rights to individuals in nonmarital relationships: Georgia, Illinois, Louisiana, and Mississippi.<sup>171</sup> Each differs slightly in the scope of its denial,

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<sup>165</sup> *Id.* at \*5.

<sup>166</sup> *Robertson v. Reinhart*, No. A095025, 2003 WL 122613, at \*1-2 (Cal. Ct. App. Jan. 8, 2003).

<sup>167</sup> *Id.* at \*3, \*6 (noting that the parties themselves had kept their finances separate).

<sup>168</sup> *Id.* at \*3; see also Carbone & Cahn, *supra* note 4, at 63 (arguing that “later developments in the law of nonmarriage have extended greater recognition of such relationships and increased the autonomy of nonmarital cohabitants to enter into terms of their choosing, without addressing the balance between them that typically gives more power to the person with the greater income”).

<sup>169</sup> *Robertson*, 2003 WL 122613, at \*4.

<sup>170</sup> *Id.* at \*6 (noting that plaintiff “never asked for payment”); see also *Seward v. Mentrup*, 622 N.E.2d 756, 757-58 (Ohio Ct. App. 1993) (denying property distribution to appellant, noting that “[a]ppellant assumed that she would be entitled to a division of the improvements’ value simply because she viewed the parties’ relationship as similar to a marriage,” but the record showed that “appellee was not unjustly enriched” and appellee had “never promised or indicated that appellant would be reimbursed for improvements to residence”).

<sup>171</sup> See, e.g., Antognini, *supra* note 6, at 52-53; Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 587 (2013).

although all use similar rhetoric in stating that they do not distribute property based on claims arising from the relationship. Illinois refuses to enforce any obligations between individuals in a nonmarital couple, but has indicated that it may recognize a claim of restitution as long as it “has an independent economic basis apart from the parties’ relationship.”<sup>172</sup> Similarly, Louisiana denies equitable remedies to a “concubine,” but allows claims for “business services” that are “separate and distinct from the concubinage relationship” to go forward.<sup>173</sup> Georgia is, in some ways, more strict than the rest in that it refuses to return even purely financial contributions made during the relationship, like rent paid into a home from which plaintiff was ejected by her unmarried partner.<sup>174</sup> That said, Georgia provides some leeway when the claim is to partition property between a nonmarital couple.<sup>175</sup> Finally, Mississippi used to refuse to distribute property in a relationship that was not marital, explaining that its “legislature has not extended the rights enjoyed by married people to those who choose merely to cohabit.”<sup>176</sup>

Up until now, all of the nonmarital relationships these jurisdictions have addressed have been heterosexual, except for two. The two exceptional cases are of relatively recent vintage — each involves a lesbian couple, and each reaches a different outcome.<sup>177</sup> In *Blumenthal v. Brewer*, the Supreme Court of Illinois declined to distribute any property at the end a nonmarital relationship,<sup>178</sup> while in *Cates v. Swain*, the Supreme Court of Mississippi decided, for the first time, to do so.<sup>179</sup> Despite their obvious differences, both cases draw the same

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<sup>172</sup> *Blumenthal v. Brewer (Blumenthal II)*, 69 N.E.3d 834, 856, 860 (Ill. 2016) (citing *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979)).

<sup>173</sup> *Schwegmann v. Schwegmann*, 441 So. 2d 316, 324-25 (La. Ct. App. 1983) (“Concubines have no implied contract or equitable liens that afford them any rights in the property of their paramours.”).

<sup>174</sup> See *Rehak v. Mathis*, 238 S.E.2d 81, 82 (Ga. 1977).

<sup>175</sup> See *Burt v. Skrzyniarz*, 526 S.E.2d 848, 851 (Ga. 2000). The court divided the property between the male and female cohabitants based on the fact that they took joint possession of the property. *Id.* at 849. The division was ordered even though the uncontroverted evidence showed that the man had paid for the entire property. Brief of Appellant, *id.* (No. S99A1824), 1999 WL 33737977, at \*5; see also Antognini, *supra* note 6, at 39-40.

<sup>176</sup> *Davis v. Davis*, 643 So. 2d 931, 936 (Miss. 1994).

<sup>177</sup> *Blumenthal II*, 69 N.E.3d at 834; *Cates v. Swain (Cates II)*, 215 So. 3d 492, 492 (Miss. 2013) (recognizing an unjust enrichment claim after consistently refusing to do so in the context of a same-sex, nonmarital relationship).

<sup>178</sup> *Blumenthal II*, 69 N.E.3d at 834.

<sup>179</sup> *Cates II*, 215 So. 3d at 492, 495; see also *Nichols v. Funderburk*, 883 So. 2d 554, 557-58 (Miss. 2004) (limiting equitable division to parties who had been married at

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line between services that are based on the relationship and therefore gratuitous and those that are not, affirming the long-standing distinction between “wifely” work done in the home and everything else.

To be clear, the Mississippi Supreme Court’s decision in *Cates v. Swain* (“*Cates II*”) marks a departure from prior law in that it is the first case in that jurisdiction to distribute property in the context of a nonmarital couple.<sup>180</sup> According to the opinion, however, it did not overrule any prior case in doing so, save for the appellate court’s opinion below.<sup>181</sup> The court of appeals in *Cates v. Swain* (“*Cates I*”), had declined to distribute property between the two women, given that “Mississippi does not enforce contracts implied from the relationship of unmarried cohabitants.”<sup>182</sup> In *Cates I*, the court of appeals easily extended the lack of rights afforded unmarried different-sex couples to unmarried same-sex couples.<sup>183</sup> It reasoned, relying on precedent, that the basis for Elizabeth Swain’s implied contract claim against Mona Cates was inseparable from “the women’s cohabitation arrangements.”<sup>184</sup> The nature of their relationship, and of their exchange, “was personal and intimate.”<sup>185</sup> The court concluded that their nonmarital relationship could not provide the basis for an equitable remedy.<sup>186</sup>

The courts in *Cates I* and *Cates II* both asserted that they were upholding prior case law on the topic, while reaching opposite results. Yet both courts’ assertions are plausibly true: while the court in *Cates II* found in favor of the plaintiff in a nonmarital relationship, it did not depart from the lower court’s reasoning insofar as it continued to differentiate between claims that stem from the relationship, and those that do not. That is, the Mississippi Supreme Court engaged in distributing property at the end of the relationship between Mona and Elizabeth because it understood Elizabeth’s claims to be based on

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some point).

<sup>180</sup> *Cates II*, 215 So. 3d at 496-97.

<sup>181</sup> See *id.* at 494-95 (distinguishing cases that had refused to distribute property in the context of a nonmarital relationship).

<sup>182</sup> *Cates v. Swain* (*Cates I*), 116 So. 3d 1073, 1078 (Miss. Ct. App. 2012), *aff’d in part, rev’d in part*, 215 So. 3d 492 (Miss. 2013).

<sup>183</sup> *Cates I*, 116 So. 3d at 1079 (“[W]e hold we cannot extend implied contractual remedies to unmarried cohabitants, whether opposite-sex or same sex . . .”).

<sup>184</sup> *Id.* at 1080.

<sup>185</sup> *Id.* at 1077.

<sup>186</sup> *Id.* at 1080; see also *Davis v. Davis*, 643 So. 2d 931, 936 (Miss. 1994) (denying plaintiff’s claims to property because the parties “never entered into a ceremonial marriage”).

“readily identifiable assets (or tangible benefits) each party conferred on the other.”<sup>187</sup> The supreme court in *Cates II* reasoned that it could clearly and easily calculate the contributions that Elizabeth made, like the amount she paid to carpet their home, or the money she contributed to the costs of closing on the sale of their home.<sup>188</sup>

The supreme court justified its approach as both objective and removed: “We are mindful that the doctrine of unjust enrichment is not a ‘roving mandate [for a court] to sort through terminated personal relationships in an attempt to nicely judge and balance the respective contributions of the parties.’”<sup>189</sup> It was, however, actively constructing a barrier between the types of contributions it would recognize: it would remunerate financial contributions — which were “tangible benefits” that were “readily identifiable” — but not contributions in terms of time, or effort.<sup>190</sup> As such, it was consistent with *Cates I* in that both opinions devalued contributions that were not financial, like work done in the home, outside of marriage — *Cates I* just did so by employing a blanket denial of property distribution at the end of the nonmarital relationship. Ultimately, the disagreement between *Cates I* and *Cates II* is only over where that line would be drawn.

The Supreme Court of Illinois in *Blumenthal v. Brewer* (“*Blumenthal II*”) also drew a line between the kinds of claims that could be compensable and those that could not, by refusing to distribute property at the conclusion of the relationship.<sup>191</sup> It explained that contributions that were distinguishable from the relationship could provide the basis for a successful claim between nonmarital partners.<sup>192</sup> It relied on cases like *Spafford v. Coats*, which had awarded property where the contributions made to the relationship were financial and not merely the “services [of] housekeeper and homemaker,” which the court could not disentangle from the relationship itself.<sup>193</sup>

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<sup>187</sup> *Cates v. Swain (Cates II)*, 215 So. 3d 492, 496 (Miss. 2013).

<sup>188</sup> *Id.* at 495.

<sup>189</sup> *Cates II*, 215 So. 3d at 496 (alterations omitted) (quoting *Slocum v. Hammond*, 346 N.W.2d 485, 491-92 (Iowa 1984)).

<sup>190</sup> *Id.* at 495-96 (distinguishing two other cases which denied distribution because the claims were based on efforts expended during the relationship and the relationship itself).

<sup>191</sup> See *Blumenthal v. Brewer (Blumenthal II)*, 69 N.E.3d 834, 856 (Ill. 2016).

<sup>192</sup> See *Blumenthal II*, 69 N.E.3d at 853.

<sup>193</sup> *Spafford v. Coats*, 455 N.E.2d 241, 245 (Ill. App. Ct. 1983) (noting that claims for property “based primarily upon [] services as housekeeper and homemaker . . . obviously fell afoul of the court’s concerns”).

The court of appeals in *Blumenthal v. Brewer* (“*Blumenthal I*”) had allowed Eileen Brewer’s claims against Jane Blumenthal to move forward at the conclusion of their twenty-six year long relationship, based in part on its assessment of a change in the law regulating both marriage and nonmarriage.<sup>194</sup> The Supreme Court in *Blumenthal II* overturned the appellate court’s decision; it characterized the request for property between Eileen and Jane as being exactly the kind that stems from the marriage-like relationship between the parties and therefore impermissible.<sup>195</sup> The court reasoned that the decision to mingle their finances was “economically dependent on the parties’ marriage-like relationship.”<sup>196</sup> Because there was no “independent economic basis apart from the parties’ relationship,” the court declined to award Eileen any property.<sup>197</sup>

Outside of marriage, and outside of an approach that reads the nonmarital relationship purely in marital terms, courts deny claims for property sought in exchange for what appear to be wifely services, rendered in the course of a relationship that looked like a marriage. Indeed, the plaintiff who was eventually denied property distribution was by all accounts in the most traditional, marriage-like of the two couples. Jane and Eileen had been together for twenty-six years, and had three children.<sup>198</sup> Jane was a doctor, and the primary breadwinner of the family, while Eileen, although a judge at the time, had taken time off from her career to raise their three children.<sup>199</sup> As the court in *Blumenthal II* explained, because the relationship “was identical to that of a married couple,” any claims for distribution of property in this context was dependent upon, and inseparable from, that relationship.<sup>200</sup> On the other hand, Elizabeth Swain and Mona Cates had met on a dating website, had no children, and were together for only six years.<sup>201</sup> For the entirety of their relationship, Elizabeth remained married to her husband, and divorced only when her

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<sup>194</sup> *Blumenthal v. Brewer (Blumenthal I)*, 24 N.E.3d 168, 174 (Ill. App. Ct. 2014), *rev’d in part, vacated in part*, 69 N.E.3d 834 (Ill. 2016).

<sup>195</sup> *Blumenthal II*, 69 N.E.3d at 851-52.

<sup>196</sup> *Id.* at 855.

<sup>197</sup> *Id.* at 856. The appellate court’s decision in *Blumenthal I* had claimed to overturn *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979), as no longer being good law given the changes regarding the regulation of cohabitation and unmarried couples generally, and followed instead the jurisdictions that recognize property distribution between an unmarried couple. *Blumenthal I*, 24 N.E.3d at 181-82.

<sup>198</sup> *Blumenthal I*, 24 N.E.3d at 169.

<sup>199</sup> *Id.* at 170-71.

<sup>200</sup> *Blumenthal II*, 69 N.E.3d at 855.

<sup>201</sup> *See Cates v. Swain (Cates II)*, 215 So. 3d 492, 493-94 (Miss. 2013).

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relationship with Mona ended.<sup>202</sup> The court in *Cates II* was thus able to distinguish their relationship from a marriage, and remunerate financial contributions provided, given that they were not legible as wifely services.

Some scholars have argued that the Supreme Court's decision in *Obergefell v. Hodges* bore on the difference in outcomes between *Blumenthal I* and *Blumenthal II*, and predict more generally that now that marriage is available to same-sex couples, claims based on nonmarital relationships will become less viable.<sup>203</sup> The prediction seems almost certain to be correct; but stepping back from *Blumenthal* to consider *Cates*, along with how courts regulate nonmarital relationships writ large, reveals that these decisions are entirely consistent with the traditional approach to nonmarital relationships courts have taken pre-*Obergefell*. Together, these two exceptional cases show the rather unexceptional way that services approaching those rendered by a wife remain unremunerated when they occur in a same-sex relationship, outside of marriage.<sup>204</sup> The principal distinction among them is how far courts go in refusing to award any property at all.

#### B. Reverse Different-Sex Relationships

The second set of exceptional cases involves the standard heterosexual relationship in reverse, where a man seeks property from a woman when they break up.<sup>205</sup> Similar to the same-sex cases, courts consider whether the claims are based upon services rendered, or financial contributions made to the relationship. While the reasoning follows a similar pattern, the success rate in these cases is lower than those in a same-sex relationship. And, unlike the same-sex cases, courts do not approach these relationships by an express comparison

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<sup>202</sup> *Id.* at 493. They remained married so that her husband could continue being covered by her medical insurance policy. *Id.*

<sup>203</sup> Murray, *Nonmarriage Inequality*, *supra* note 2, at 1247-48 (arguing that the fact that same-sex couples are legally able to marry threatens the recognition of nonmarital relationships, using *Blumenthal II* as an example that supports the point); *see also* Appleton, *supra* note 38, at 977-78 (interpreting *Blumenthal II*, among other cases, as a signal of *Obergefell*'s "marginalization of other family forms").

<sup>204</sup> The impact of *Obergefell* on courts' willingness to liken the same-sex relationship to marriage is another story. Here, it is likely that courts will be more cautious in the same-sex context, as they have been in the different-sex context, given that marriage is now an option. *See* discussion *infra* Section IV.B.

<sup>205</sup> This sometimes means that the man is the defendant, as when he counterclaims by seeking property in response to a suit for ejectment. *See, e.g.,* Aehagma v. Aehagma, 797 P.2d 74, 77, 80 (Haw. Ct. App. 1990) (declining to distribute property to man on the basis of his counterclaims).



to marriage. Instead, courts either engage in line-drawing between which contributions can be remunerated and which cannot, or define the appropriate role men ought to occupy in a different-sex relationship. While there is overlap in these two approaches, this section addresses each in turn.

The reverse different-sex context makes clear that courts gender the nature of the services here too, regardless of the sex of the party performing them. The cases that recognize a property distribution adhere to the limits articulated throughout the nonmarital case law: services that look like those a married wife ought to perform are not compensated, even when they are performed by a man in a different-sex relationship. The cases that decline to distribute property have a similar effect — they identify the role the man should occupy if he seeks to recoup property at the end. Importantly, no court explicitly advises the man to marry, which occurs in cases where the woman seeks property.<sup>206</sup> Rather, courts seem to affirm the woman's decision not to marry where the man proves himself not to be adept at handling his finances, and is an inadequate breadwinner overall.

#### 1. Line-Drawing Among Contributions to the Relationship

As already mentioned, there are markedly fewer cases in which a man seeks property from a woman than vice-versa.<sup>207</sup> This difference in number may be the result of broader economic inequities between men and women; it may also be that men are not as active in taking their former nonmarital partners to court given either conventional performances of masculinity, or perceived potential losses in court, or lack of funds.<sup>208</sup> These cases are nevertheless important to analyze given the assumptions they make, the effects they generate, and the importance scholars place on their reasoning as evidence that courts respect a party's choice not to marry.<sup>209</sup> Had the genders been

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<sup>206</sup> See Antognini, *supra* note 6, at 52-54 (identifying cases that encourage, explicitly and implicitly, the woman to have married if she seeks property at the end of a relationship).

<sup>207</sup> The total number of cases that involve a man seeking property from a woman is difficult to reach definitely given that they often depend on reading through the case itself and cannot be completely captured through a Boolean search. The cases I found that fit the reverse gender composition number in the thirties.

<sup>208</sup> Cf. FRANKE, *supra* note 59, at 213-14 (noting that the lower-income producing man in a gay relationship may not want to demand property because it “genders him as a wife to do so” and that courts are also more prone to “reinforce the view that men are individual economic units”).

<sup>209</sup> See Carbone & Cahn, *supra* note 4, at 67-68 (relying on a Hawaii case where

reversed, and the court been affirming a man's decision not to marry a woman given her precarious financial status, endorsing such an outcome would seem to inspire at least some pause.

The gendered approach to domestic labor present in the standard case is alive and well in the exceptional case. Where a man seeks remuneration for taking care of the home and rearing children born to the relationship, courts are not very receptive. While Illinois is one of the few jurisdictions that continues to decline to recognize property rights in a nonmarital relationship, its treatment of the issue is nonetheless illustrative.<sup>210</sup> In *Costa v. Oliven*, the appellate court in Illinois declined to find a basis for property distribution.<sup>211</sup> The parties — Eugene Costa and Catherine Oliven — had lived together for twenty-four years in a “quasi-marital” relationship.<sup>212</sup> After the birth of their child, Eugene decided to stay at home and care for the child so that Catherine could work full-time.<sup>213</sup> Eugene explained that he “perform[ed] all of the usual activities associated with maintaining an efficient household.”<sup>214</sup> He also alleged that Catherine “wielded much power and superior bargaining power” over him, which further explained why she had sole title over the property they had acquired through what he alleged were joint efforts.<sup>215</sup> Nonetheless, the court denied his requests to impose a constructive trust on the property held in Catherine's name, or for punitive damages. The court concluded, without much discussion, that Illinois does not recognize rights between unmarried couples.<sup>216</sup> That is, the claim for property on account of homemaking and childrearing services was not, according to the court, severable from the relationship itself.<sup>217</sup>

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the woman chose not to marry the man in part “because she feared making a financial commitment to him” and describing the court as “willing to unwind their commingled financial affairs, but not willing to pass judgment on their conduct toward each other”).

<sup>210</sup> See discussion *supra* Section II.A.2.b.

<sup>211</sup> *Costa v. Oliven*, 849 N.E.2d 122, 125 (Ill. App. Ct. 2006).

<sup>212</sup> *Id.* at 123.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Id.* at 247-48.

<sup>217</sup> Remember that Illinois has indicated that it would recognize a claim for restitution that “has an independent economic basis apart from the parties' relationship.” See *Blumenthal v. Brewer (Blumenthal II)*, 69 N.E.3d 834, 856, 860 (Ill. 2016), *aff'g* *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979). It has also held as much. *Spafford v. Coats*, 455 N.E.2d 241, 245 (Ill. App. Ct. 1983) (distributing property at the conclusion of a nonmarital relationship on the basis of financial contributions).

Cases that decide to distribute property to the man seeking it do so in a way that preserves the distinction between services traditionally rendered by a wife and all other types of contributions. In *Salzman v. Bachrach*, the Colorado Supreme Court decided that the male plaintiff successfully made out a claim of unjust enrichment based on his contributions to the female defendant's home.<sup>218</sup> Erwin Bachrach and Roberta Salzman met over a personal advertisement that Erwin had placed in a newspaper.<sup>219</sup> Seven years into their ten-year relationship, they decided to move in together, in a home built and designed by Erwin and paid for mostly but not exclusively by Roberta.<sup>220</sup> During the course of their relationship, Roberta was receiving alimony from her ex-husband, who agreed to continue his payments despite her new relationship based on a letter Erwin had written to him. Erwin's letter asserted, among other things, that he and Roberta kept their finances entirely separate, that she owned the home, and that he did not pay rent — his contributions to the home were his form of payment.<sup>221</sup> Nonetheless, the court found that Erwin had successfully alleged a claim of unjust enrichment after the relationship ended.<sup>222</sup> Unsurprisingly, the court agreed with Erwin that he should be reimbursed for the the monetary contributions he had made towards the purchase of the house and its construction.<sup>223</sup> The court, however, went further, and found that he should also be reimbursed for the value of his "design work, construction, management services."<sup>224</sup>

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<sup>218</sup> *Salzman v. Bachrach*, 996 P.2d 1263, 1269 (Colo. 2000) (en banc).

<sup>219</sup> *Id.* at 1264.

<sup>220</sup> *Id.* The parties had split the original cost of the home, which was \$49,000, and then Roberta paid \$353,347.64 of the construction, while Erwin paid \$167,528.86. *Id.* at 1264. Erwin, however, did not pay any of the mortgage payments. Roberta was the sole payer of the mortgage, and Erwin contributed to paying for only some of the utilities, and food. *Id.* at 1265.

<sup>221</sup> *Id.* at 1265.

<sup>222</sup> *Id.* at 1268-69. On remand, the court noted that the trial court should consider the doctrine of "clean hands" given his agreement to write the letter. *Id.* at 1269.

<sup>223</sup> The parties had originally taken title over the home together, but he quitclaimed his interest in the home to Roberta for reasons that benefitted Roberta. *Id.* at 1265-66.

<sup>224</sup> *Id.* at 1265, 1268-69. To be clear, there are instances where courts recognize claims of unjust enrichment for work done in the home. See Antognini, *supra* note 6, at 43-46 (identifying successful claims of unjust enrichment based on woman's claims at the conclusion of a different-sex relationship for contributions in terms of time and services like childrearing, often leading to awards much less than half of the property accrued). Significantly, such cases existing does not, however, deny the reality of line drawing that tends to differentiate between services rendered in making a home, as opposed to managing that home.

Even though the parties cohabited, and engaged in sexual relations, the court found they were easily severable from their agreement.<sup>225</sup> While courts generally refuse to remunerate homemaking services, services rendered in actually making a home are compensable.<sup>226</sup>

This is not to imply that the sex of the party requesting property never makes a difference — it may affect the language used by the court and the contours of its reasoning. Like Illinois, Louisiana refuses to recognize property rights on the basis of what it calls a “concubinage relationship.”<sup>227</sup> Yet the terms that tend to generously pepper a court’s opinion when the plaintiff is a woman — terms like “concubine” and “paramour” — are conspicuously absent when the plaintiff is a man. In *Troxler v. Breaux*, the Court of Appeal of Louisiana declined to find a basis for Depp Troxler’s unjust enrichment claims against his former partner, Melinda Breaux.<sup>228</sup> Depp was requesting the return of funds he had paid towards the moving and living expenses of a home he shared with Melinda but did not live in, given that his work had taken him to Alaska.<sup>229</sup> The court summarily denied his claims.<sup>230</sup> The court reasoned that even though Depp had deposited funds in a joint account he shared with Melinda, the house was in Melinda’s name and he had sufficiently benefited from living there the months he was in town.<sup>231</sup> While Depp recovered

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<sup>225</sup> *Salzman*, 996 P.2d at 1268-69 (“While the home purchase related to their intimate relationship because they both lived in the home, Bachrach’s cause of action does not depend on their sexual relations.”).

<sup>226</sup> See *Gfrerer v. Lemcke*, No. A08-0873, 2009 WL 749584, at \*1-2 (Minn. Ct. App. Mar. 24, 2009). The court found that the male plaintiff had shown that he “performed extensive work on the home and yard” and oversaw the “substantial remodeling of appellant’s home and yard to accommodate the larger family.” As such, he was able to recover under an agreement the court found they had entered into, despite having lived in her house, rent-free. *Id.* at \*1, \*3.

<sup>227</sup> *Schwegmann v. Schwegmann*, 441 So. 2d 316, 324-25 (La. Ct. App. 1983); see also Wm. Hardcastle Browne, *The Law of Marriage and Divorce*, 11 YALE L.J. 340, 340 (1902) (“A concubine in the Civil Law did not mean a harlot. She possessed the character of a wife, but without the sanction of a legal marriage. It was confined in Europe to a single person, and was a perpetual obligation, and was generally entered into by men who were forbidden by the State to marry one who lacked quality or fortune. The concubine could be accused of adultery. Her station was above the infamy of a prostitute, and below the honors of a wife.”).

<sup>228</sup> *Troxler v. Breaux*, 105 So. 3d 944, 948 (La. Ct. App. 2012).

<sup>229</sup> *Id.* at 946-48.

<sup>230</sup> *Id.* at 949. The court noted that Melinda already admitted she owed Depp money on a loan he made to her and had also offered Depp the option of picking up his personal items from the home. *Id.* at 948-49.

<sup>231</sup> *Id.* at 949.

nothing,<sup>232</sup> the court did not once mention his status under Louisiana law as a paramour, or Melinda's as a concubine.<sup>233</sup> It merely denied Depp's request.

## 2. Male Plaintiff as Inadequate Breadwinner

In addition to drawing the line around what kinds of activities are remunerated upon the conclusion of a relationship, cases that address male plaintiffs often consider the specific question whether there has been a sharing of living expenses, or an intertwining of economic lives. They also take into account the woman's decision not to marry, and generally refuse to distribute property where the woman's decision was based on her desire to protect her financial assets. Not all opinions mention whether there was a discussion about marriage, or who declined the option. It is meaningful, however, that courts in choose to highlight the woman's decision not to marry in protecting her property from the male plaintiff.<sup>234</sup> The courts' concern in these cases becomes whether the man seeking property failed in his traditional role of breadwinner.<sup>235</sup>

The impetus to protect a woman from her partner's financial inadequacies motivated the Hawaii Court of Appeals in *Simmons v. Samulewicz* to decline to distribute property to the man seeking it.<sup>236</sup> The parties in that case had engaged in a "spiritual wedding ceremony" but never signed a marriage license.<sup>237</sup> The reason April Samulewicz gave for not finalizing the marriage was her concern over

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<sup>232</sup> Other than the debt Melinda had promised to repay. *Id.* at 947-50.

<sup>233</sup> *But see* *Brown v. Brown*, 459 So. 2d 560, 564-65 (La. Ct. App. 1984) (rejecting female plaintiff's claim for partition or property distribution given that as a "concubine" she did not meet her burden of proof). For a more recent case using the term in the context of a female plaintiff requesting property from a man she was living with, while married to someone else, see *Fairrow v. Marves*, 862 So. 2d 1234, 1238-39 (La. Ct. App. 2003).

<sup>234</sup> Where the plaintiff seeking property is the woman, and there is evidence that she declined marriage, courts have denied the female plaintiff property. *See* Antognini, *supra* note 6, at 52-53 (noting "if it is the woman who says no, the law is likely to make her decision financially unsound").

<sup>235</sup> The wife's services are undertaken in exchange for the support provided by her husband, which defined his role within marriage. HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY 165-66* (2000) ("The structure of reciprocity — of duty for obedience, rights for support — that appeared to organize the received law of coverture was less a distribution of rights between husbands and wives and more a way of conceptualizing the terms of being a husband.").

<sup>236</sup> *Simmons v. Samulewicz*, 304 P.3d 648, 650 (Haw. Ct. App. 2013).

<sup>237</sup> *Id.* at 651.

Scott Simmons's personal financial obligations, and her worry over the "potential financial liability legal marriage could entail."<sup>238</sup> Scott argued that he and April had a partnership agreement, based on the fact that they lived together and were involved in each other's personal and financial affairs.<sup>239</sup> The court rejected these claims, arising as they did out of their "romantic relationship."<sup>240</sup> It explained that the services Scott rendered were for the "mutual comfort and convenience of the family" and therefore "presumed to be gratuitous."<sup>241</sup> The only claim the court allowed to proceed was Scott's request to recoup the mortgage payments he had made on a house that was owned by April.<sup>242</sup> The court followed the well-worn steps laid out by countless decisions before it in recognizing only financial contributions to the relationship. But absent from the same-sex or the modal cases is the undercurrent present here of protecting April from Scott's poor economic decisions.<sup>243</sup>

In the status-based jurisdiction of Washington, courts consider among other factors whether couples pooled resources, which becomes determinative when a man requests property from a woman. In *Stanford v. Villanueva*, the Court of Appeals in Washington relied on the lack of a joint bank account or joint investments to conclude that the fourteen-year relationship was not marital-like, and the man ought not to recover any property at its conclusion.<sup>244</sup> Similarly, in *Hobbs v. Bates*, the Washington Court of Appeals found it was more significant that a couple chose *not* to "function as an economic unit" than it was that they had decided to co-parent children they had together.<sup>245</sup> The court explained that while "conceiving and raising children together may be considered persuasive evidence of the

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<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 653-54.

<sup>240</sup> *Id.* at 655 (noting that a partnership applies to for-profit ventures).

<sup>241</sup> *Id.* at 657-58 (internal quotation marks and citation omitted).

<sup>242</sup> *Id.* at 658.

<sup>243</sup> *Id.* at 655-58; *see also* Rippee v. Walters, 40 S.W.3d 823, 826 (Ark. Ct. App. 2001) (holding that contributions to a relationship are insufficient to provide a claim for which property ought to be distributed from woman to man in a nonmarital relationship); Aehagma v. Aehagma, 797 P.2d 74, 77, 80 (Haw. Ct. App. 1990) (finding that the woman in a nonmarital relationship was "financially independent" and so even though they had a fictitious wedding ceremony the man did not prove any basis for a property distribution).

<sup>244</sup> *Stanford v. Villanueva*, No. 62126-2-I, 2009 WL 2992592, at \*1-2 (Wash. Ct. App. Sept. 21, 2009) (noting that the woman's mother paid for the home and repairs during the course of their relationship).

<sup>245</sup> *Hobbs v. Bates*, No. 51463-6-I, 2004 WL 1465949, at \*12 (Wash. Ct. App. June 28, 2004).

existence of a meretricious relationship,” the parties did not intend to “obtain assets . . . for the mutual benefit of a quasi-marital relationship.”<sup>246</sup>

Courts have an especially difficult time awarding a man property when the woman required no financial support from him, which often coincides with the presence of a significant age gap between the parties. In *In re Greulich*, the couple had lived together eighteen years.<sup>247</sup> Richard Greulich and Julie Ann Creary met when he was thirty years old and she was fifty-two.<sup>248</sup> They planned to get married on three separate occasions, yet each time they ended up calling off the wedding.<sup>249</sup> One of the main reasons Julie Ann gave for deciding not to marry Richard was “to protect her assets from his financial liabilities.”<sup>250</sup> Oregon law looks to the parties’ intent in deciding whether to distribute property outside of marriage, and here the court considered whether they intended to pool resources.<sup>251</sup> Despite the length of the parties’ relationship, the court found that there was no “financial interdependence” between them.<sup>252</sup> It further found that Richard had not contributed to the upkeep of their shared residence, given that the maintenance of Julie Ann’s estate “was performed by a cadre of hired gardeners, handymen, nurses, housekeepers, plumbers, machinery repair specialists, and roofers, among others.”<sup>253</sup> The court did note that Richard “may have occasionally mowed the surrounding fields, maintained the swimming pool, maintained the tractor, and trimmed the trees.”<sup>254</sup> But the court ultimately concluded there was

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<sup>246</sup> *Id.* at \*12; *cf.* *Ross v. Hamilton*, No. 39887-7-II, 2011 WL 1376767, at \*3, \*10 (Wash. Ct. App. Apr. 12, 2011) (finding that the nonmarital couple invested time and money into real property as an investment and distributing property to the man who was seeking it at the end of a fifteen-year nonmarital relationship).

<sup>247</sup> *In re Greulich*, 243 P.3d 110, 111 (Or. Ct. App. 2010). The action began as one of separation between the parties, but the defendant, Margaret Creary, died during the proceedings. *Id.* at 111 n.1.

<sup>248</sup> *Id.* at 112.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 114.

<sup>252</sup> *Id.* at 115. The court relied on a prenuptial agreement they both signed stating they would reach retain their separate property upon a divorce, although they never married as evidence of intent to not share property. *Id.* at 114.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 112. Richard also “ran some errands for [Julie Ann’s] interior design business, accompanied her on some of her business trips, and did odd jobs at the rental properties” but the court noted that “nearly all of the repairs and maintenance of those properties was performed by hired workers.” *Id.*

nothing to reimburse — Julie Ann was clearly able to support herself with her own resources, and without Richard's help.<sup>255</sup>

The New York trial court's decision in *Trimmer v. Van Bomel* provides another case in point.<sup>256</sup> The court dealt with a five-year relationship between Leonard Trimmer, "a gentleman," and Catherine Van Bomel, "a wealthy widow."<sup>257</sup> Leonard had left his employment, which the court made sure to note was not particularly lucrative, to tend to "the needs, whims and desires" of Catherine.<sup>258</sup> When their relationship came to an end, Leonard alleged breach of an express oral agreement, and sought recovery on the basis of quantum meruit for the value of the services he rendered.<sup>259</sup> The court dismissed his claims. It explained that his services — including paying "time and attention" to Catherine, acting as her companion, traveling with her, accepting gifts and jewelry — "are of a nature which would ordinarily be exchanged without expectation of pay."<sup>260</sup>

The decision in *Trimmer* is consistent with the nonmarital case law in that it reifies the line between contributing money and contributing anything else to the relationship. It differs, however, in that the court has trouble defining the nature of a relationship which was highly unequal in terms of wealth, and age, where the man seeks money at its end. The court begins by identifying the "complex and varied relationships between men and women," which often end, according to the court, in appeals for money.<sup>261</sup> Later in the decision, the court characterizes the relationship between plaintiff and defendant as one of friendship, which should lead to "virtue" rather than money.<sup>262</sup> Indeed, as the law currently stands, friends have no obligations towards each other: "To imply an obligation by a wealthy friend to

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<sup>255</sup> Where the man, however, is able to contribute in the form of an initial outlay of property, along with "his labor in developing the farm properties, building the bridge and residence and maintaining the rental properties" then Oregon courts will find an intent to share. *Shuraleff v. Donnelly*, 817 P.2d 764, 766 (1991). The type of labor remunerated is once again more akin to making a home than homemaking. The court in *Shuraleff*, however, also noted that it decided to distribute property to the man because the woman was in charge of their finances, and the man "had virtually no skills in managing money." *Id.* at 768.

<sup>256</sup> See generally *Trimmer v. Van Bomel*, 434 N.Y.S.2d 82 (N.Y. Sup. Ct. 1980).

<sup>257</sup> *Id.* at 83.

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 83-84.

<sup>260</sup> *Id.* at 85. It also found that the evidence establishing any agreement was too vague to enforce. *Id.* at 88-89.

<sup>261</sup> *Id.* at 83. The court made its views on the topic clear, explaining that "cash" is often "a poor substitute for love, affection or attention." *Id.*

<sup>262</sup> *Id.* at 86.



compensate a less wealthy companion for being together, dining together, talking together and accepting tokens of regard stretches the bonds of friendship to the breaking point.”<sup>263</sup> At other times still, the court likens the relationship to that of employer and employee and, as such, terminable at will like an employment contract.<sup>264</sup> Given this employee-employer relationship, the court asks whether Catherine should be bound by law to continue paying Leonard for having “rendered ‘services’ . . . for a matter of months by accompanying her to restaurants such as Lutece and Palm Court.”<sup>265</sup> The court answers its leading question in the negative.

The opinion ends by not giving the companion/friend/employee, any property.<sup>266</sup> The effect of *Trimmer*, like the modal case, is to allow the wealthier partner to retain property where the other only contributes in terms of time, or services. It is, however, dissimilar from the modal case in that marriage is neither promoted nor preferred. Here, the court cannot fathom that the relationship before it — an older, wealthy woman and a younger, financially destitute man — could ever be marital-like and thus impact the status of marriage. The relationship does not fit neatly into any of the court’s relationship boxes. Instead, it grasps at the analogy to friendship, and employment, as a way of addressing the claims made by the man, who was clearly not husband material.

Considering financial entanglements over and above romantic ones devalues the non-monetary contributions made to the relationship, regardless of the sex of the party seeking property. The way that sex plainly impacts the analysis, however, is that courts tend to reward a

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<sup>263</sup> *Id.* at 85-86; see also Laura Rosenbury, *Friends with Benefits*, 106 MICH. L. REV. 189, 190-91 (2007) (illustrating how the law’s failure to acknowledge friendship gets in the way of achieving gender equality).

<sup>264</sup> *Trimmer*, 434 N.Y.S.2d at 89.

<sup>265</sup> *Id.* As the court explains, it was Catherine “who took pleasure in seeing that plaintiff’s shoes came from Gucci and his accessories from Saks.” *Id.* Accordingly, once that relationship ended, so too did its “usufructs.” *Id.*

<sup>266</sup> *Id.* While the court is clearly deprecating the lavish lifestyle plaintiff was leading with defendant, and presents him as contemptibly pathetic, it does not present him as “conniving” and seeking to wheedle the defendant out of her fortune. See *id.* This stands in some contrast to how younger women have been treated in the context of older men. New York had been particularly receptive to this image, and its lawmakers abolished common law marriage as a result of the image of these “gold diggers and blackmailers.” Dubler, *supra* note 5, at 965-66, 1002-03 (turning to New York to illustrate “the legislative trend away from common law marriage” and consider “the social and legal construction of marriage in a period characterized by shifting understandings of femininity and women’s place in the social order”).

man seeking property when he has been an effective breadwinner, or a successful house-maker, and devalue his contributions where he has not.

### III. THE BEGINNING OF A NONMARITAL RELATIONSHIP

The decision to award alimony is controlled by statute or by the judicial enforcement of a private settlement agreement.<sup>267</sup> So too is the decision to terminate alimony.<sup>268</sup> Numerous events can trigger the termination or modification of alimony payments.<sup>269</sup> Those events include death, remarriage, and cohabitation by the recipient spouse.<sup>270</sup> Jurisdictions vary in deciding when and how cohabitation terminates alimony.<sup>271</sup> What constitutes “cohabitation” also varies across jurisdictions, and at times even within the same jurisdiction, depending on whether a court interprets a private agreement between the parties or a state statute.<sup>272</sup> Same-sex relationships further complicate matters, given that statutes and private agreements do not always specify whether the cohabiting partner must be of the same or different sex.<sup>273</sup>

This Part begins by considering what effect a nonmarital, same-sex relationship has on the receipt of alimony payments. The only same-sex relationship courts have addressed in this context is between two women. Ex-husbands are the party most often paying alimony, which means that if the relationship is same-sex, it will by definition be with another woman. In considering whether a lesbian relationship terminates alimony, courts vary in their analysis. Some look exclusively to whether the parties can marry, rather than to whether they are having sex or pooling their resources. Others look at whether

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<sup>267</sup> See D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW: CASES AND MATERIALS* 582-93 (6th ed. 2016).

<sup>268</sup> David M. Cotter, *Same-Sex Cohabitation as a Basis to Modify or Terminate Spousal Support*, 17 *DIVORCE LITIG.* 99 (2005).

<sup>269</sup> 32 MANUEL E. NESTLE, *Modification of Spousal Support Award*, in *AM. JUR. PROOF OF FACTS 2D* § 1 (1982) (June 2017 update).

<sup>270</sup> *Id.* § 10; see also Antognini, *supra* note 6, at 21-27.

<sup>271</sup> Some require only proof of cohabitation; others hold that proof of cohabitation simply raises a rebuttable presumption of a change in the financial circumstances of the recipient spouse; and a few require proof that the cohabitation has in fact changed the financial circumstances of the recipient ex-spouse. See Aloni, *supra* note 26, at 1317-18. Each of these approaches prioritizes different considerations — be it the marital-like quality of the relationship, or the financial need of the recipient spouse — that this Part addresses.

<sup>272</sup> Cotter, *supra* note 268 (noting that courts do not necessarily import their state statutes into interpreting private settlement agreements between ex-spouses).

<sup>273</sup> *Id.*

the financial conditions of the recipient ex-spouse have changed. Finally, some approach the relationship by looking at whether the couple behaves like a married couple, even where they were unable to legally marry.<sup>274</sup>

This Part ends by considering the rare case where the ex-wife is paying alimony to her ex-husband. Courts in this context have to decide whether to terminate the ex-wife's payments on account of her ex-husband's new relationship, which has until now always been heterosexual. Courts generally allow the ex-husband to continue receiving payments from his ex-wife, despite acknowledging that he is in a new relationship. These decisions lend credence to the argument that terminating alimony on the basis of a new relationship serves to police women's sexual behavior in particular.<sup>275</sup>

Overall, marriage emerges as the marker against which same-sex nonmarital relationships are measured, even where the individuals could not marry. Meanwhile, men in the reverse different-sex situations do not suffer the same property-related consequences for beginning nonmarital relationships, as they are generally able to continue receiving alimony from their ex-wives.

#### A. Same-Sex Relationships

In terminating alimony, courts take one of three different tacks, which work in tandem with the different jurisdictional approaches. This section analyzes each approach in turn, and identifies how courts' determination of whether alimony should end reveals how they define the purpose of alimony in the first instance. Although same-sex couples are now able to marry, these cases are still significant in that they illuminate the way marriage is central to a nonmarital relationship and they provide a sense of how the law will adjust its treatment of alimony termination now that same-sex couples can marry.

The first tack courts take is to consider — sometimes explicitly, other times implicitly — the legal inability of same-sex couples to marry. Courts following this approach hold as a matter of law, and regardless of the nature of the relationship at issue, that same-sex

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<sup>274</sup> These approaches cut across the different jurisdictional approaches. See discussion *infra* Section III.A.

<sup>275</sup> See Perry, *supra* note 20, at 26-27 (“The sexual access that was a part of the duty of services [the wife] once owed to her husband is now being provided to another man. An ex-wife cannot keep receiving money from her ex-husband while she is presumably performing household tasks for and engaging in sex with another man, even if she is divorced.”).

nonmarital relationships do not terminate alimony payments.<sup>276</sup> While these courts tend to rely on the inequity of having same-sex relationships terminate alimony payments when the couples could not have married had they wanted to, the effect of these decisions, intended or not, is to render the relationship between two women legally irrelevant. The second tack in deciding whether a same-sex relationship terminates alimony is to address the financial impact of the nonmarital relationship;<sup>277</sup> these cases either focus on the ex-wife's financial needs, or on the financial effect of the payments on the paying ex-spouse. Considering the financial impact of the nonmarital relationship differs from the first approach in that it makes the couple's inability to marry irrelevant — the only consideration is whether the ex-wife's economic needs may be lessened by a new relationship, be it same-sex or different-sex, sexual or platonic.<sup>278</sup> The third, and final, tack courts take is to terminate alimony on account of a same-sex relationship that looks like a marriage.<sup>279</sup> Jurisdictions adhere to this approach of measuring the nonmarital relationship against marriage even where same-sex couples were prohibited from legally marrying.

#### 1. Same-Sex Couples Cannot Marry

Surprisingly perhaps, the ability or inability to marry figures prominently in opinions where the request to terminate alimony is brought in the context of a relationship that is indisputably not marital. Some courts rely on the inability of same-sex couples to marry overtly; others do so implicitly, by limiting the termination of alimony to couples of the “opposite sex.” In the process, these opinions all import marriage — by requiring the ability to marry prior to terminating alimony — into defining nonmarriage and its consequences.

The ability of a same-sex couple to marry was the central consideration raised by the Ohio Court of Appeals in deciding what constitutes a “state of concubinage” for purposes of alimony

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<sup>276</sup> See discussion *infra* Section III.A.1.

<sup>277</sup> See discussion *infra* Section III.A.2.

<sup>278</sup> It is also, arguably, the only approach that effectively privatizes support. See Brenda Cossman, *Contesting Conservatism, Family Feuds and the Privatization of Dependency*, 13 AM. U. J. GENDER SOC. POL'Y & L. 415, 419-20 (2005) (identifying at least three competing definitions of privatization, including a “transfer of public goods and services to the private sphere of the family”; a “shift from public norms to private choice”; and “a return to the ‘traditional family’ and the sanctity of marriage”).

<sup>279</sup> See discussion *infra* Section III.A.3.

termination.<sup>280</sup> In *Gajovski v. Gajovski*, the court was tasked with interpreting a marital dissolution agreement that terminated alimony payments if the recipient ex-spouse died, remarried, or “lived in a state of concubinage.”<sup>281</sup> Danny Gajovski, the paying ex-husband, requested that the court terminate his payments because his ex-wife, Sandra Lee Grace Gajovski, was living in state of concubinage with another woman.<sup>282</sup> The court concluded that Sandra was in fact living with Vicki Johnson and was having sexual relations with her.<sup>283</sup> That did not, however, answer the question for the court of whether Sandra Lee’s same-sex relationship could ever “constitute concubinage.”<sup>284</sup> The court held that the two women could not “be concubines,” because same-sex couples could not marry in Ohio.<sup>285</sup> Rather than take into account the presence of sexual relations,<sup>286</sup> or the financial impact of the relationship on Sandra Lee, the court only considered whether the couple could marry; because same-sex couples could not formalize their union, the court held that a same-sex nonmarital relationship could not terminate payments, even under a requirement that was included as an *alternative* to remarriage.<sup>287</sup>

In interpreting its state statute, the Supreme Court of Georgia in *Van Dyck v. Van Dyck* also found that a same-sex relationship could not, as a matter of law, terminate alimony.<sup>288</sup> Unlike the court in *Gajovski*, its reasoning did not turn on whether same-sex couples could marry;

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<sup>280</sup> *Gajovski v. Gajovski*, 610 N.E.2d 431, 433 (Ohio Ct. App. 1991).

<sup>281</sup> *Id.* at 432.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.* at 431-32.

<sup>285</sup> *Id.* at 432-33.

<sup>286</sup> This is precisely the question courts focus on in the context of nonmarital heterosexual relationships — the presence of a sexual relationship. See Antognini, *supra* note 6, at 23-27.

<sup>287</sup> The concubinage language was listed in addition to remarriage, and death, as a circumstance that would terminate alimony. *Gajovski*, 610 N.E.2d at 432. As the dissent pointed out, “It seems reasonable to suppose that the parties had in mind a permanent living arrangement, involving sex, under circumstances leading to the inference that some of the alimony was going toward the support of the paramour. It does not seem readily apparent why the parties would have wanted to continue the alimony merely because the paramour is not legally able to marry the former spouse.” *Id.* at 433 (Bard, J., dissenting); cf. *Yaeger v. Yaeger*, No. 2002-G-2453, 2004 WL 833187, at \*3-4 (Ohio Ct. App. Apr. 23, 2004) (leaving for another day the question whether a same-sex couple’s relationship could terminate alimony, and instead declining to terminate alimony on the basis of the ex-wife’s same-sex relationship given that settlement agreement terminates alimony only on account of “death, remarriage or assuming a status thereto” and did not specify cohabitation).

<sup>288</sup> *Van Dyck v. Van Dyck*, 425 S.E.2d 853, 854 (Ga. 1993).

instead, it relied on the language of its Domestic Relations Code.<sup>289</sup> The Code defined cohabitation that could lead to a modification of alimony as “dwelling together continuously and openly in a meretricious relationship *with a person of the opposite sex*.”<sup>290</sup> While the trial court below had relied on legislative intent to interpret the statute to apply to same-sex cohabiting relationships, the Georgia Supreme Court looked exclusively to its plain language, concluding that cohabitation could only occur between individuals of the “opposite sex.”<sup>291</sup>

The opinion is brief, and the sole proffered reason for its decision was deference to the legislature’s clear pronouncements.<sup>292</sup> The ability of same-sex couples to marry was, however, clearly implicated by its decision. The link between the ability to marry and the ability to terminate alimony on account of a *nonmarital* relationship only begins to make sense if terminating alimony is understood as punishment for a couple who has chosen to cohabit instead of remarry. Writing in concurrence, Justice Sears-Collins provides some insight into the way that marriage is central to the majority’s decision. Her principal rationale for agreeing with the majority rested on the inability of same-sex couples to marry: “lesbian and gay couples in America today cannot legally marry, no matter how deep their love and how firm their commitment.”<sup>293</sup> Because same-sex couples could not marry, she reasoned, their relationships should not terminate alimony. Only relationships that could have been marital should be held to terminate alimony — like those cases where a recipient ex-wife begins a relationship with a man.

Courts that decline to terminate alimony because same-sex couples cannot marry, or that limit the termination of alimony to members of the opposite sex, reveal that the purpose, or at least effect, of terminating alimony is to incite couples who can marry *to marry*.<sup>294</sup> Where there is no possibility of marriage, as when the relationship was between individuals of the same sex, terminating alimony no longer

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<sup>289</sup> *Id.*

<sup>290</sup> *Id.*

<sup>291</sup> *Id.*

<sup>292</sup> *See id.*

<sup>293</sup> *Id.* at 855 (Sears-Collins, J., concurring).

<sup>294</sup> The Legislature did not seem to share this view. *See* GA. CODE ANN. § 19-6-19(b) (2007). Georgia amended its statute in 2007, before it afforded same-sex couples the right to marry, to terminate alimony on account of “dwelling together continuously and openly in a meretricious relationship with another person, regardless of the sex of the other person.” *Id.*

serves its purpose. Justice Sears-Collins clarifies the tie between marriage promotion and alimony termination, albeit couched in the language of fairness: it would “not be fair to . . . saddle gay and lesbian couples with a penalty accorded unwed heterosexual couples who live together who have the choice of taking advantage of the benefits of marriage” given that the law does not “accord[] homosexual couples who live together the benefits of a relationship that for them can never happen.”<sup>295</sup>

Like the Georgia statute, Alabama’s statute specifies that alimony is terminated upon remarrying or “cohabiting with a member of the opposite sex.”<sup>296</sup> The Alabama Court of Appeals in *J.L.M. v. S.A.K.* held that “applying the statute as written . . . does not require the termination of alimony in a case in which an ex-wife who is receiving alimony is living openly and cohabiting with another woman with whom she is engaged in a committed lesbian lifetime partnership.”<sup>297</sup> The court in *J.L.M.* also relied on the underlying purpose of awarding alimony, which it defined as “preserv[ing], insofar as possible, the economic status quo of the parties.”<sup>298</sup> Because the court interpreted the parties’ financial condition to be relevant to the analysis of whether to terminate alimony, but only in the context of a different-sex relationship, the effect of *J.L.M.* goes beyond imposing a legal invisibility to introducing a financial one as well — it implies that an ex-wife’s financial need can only ever be alleviated by a man, either her ex-husband, or current boyfriend. The decision re-entrenches a male partner as the sole source of support.

Indeed, the cases that limit the nonmarital relationship that can terminate alimony to those individuals who can actually marry do so despite evidence of the financial intertwinement of the nonmarital

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<sup>295</sup> *Van Dyck*, 425 S.E.2d at 855 (Sears-Collins, J., concurring).

<sup>296</sup> *J.L.M. v. S.A.K.*, 18 So. 3d 384, 388 (Ala. Civ. App. 2008). Alabama still has the statute in place, ALA. CODE § 30-2-55 (2018), although there is currently a proposal to change the language to terminate alimony “when the spouse receiving the periodic payments remarries or openly cohabits with another person, regardless of the sex of that person.” H.B. No. 63, 2017 Leg., Reg. Sess. (Ala. 2017). The central issue would be whether the couple acts “as if they were married.” *Id.* Two more states contain this language: Oklahoma and Pennsylvania. Oklahoma preserves the different-sex requirement in defining cohabitation, but does not have cases interpreting whether it applies to a nonmarital same-sex couple. OKLA. STAT. tit. 43, § 134(C) (2018). Pennsylvania’s statute does too, but courts have interpreted it more expansively. 23 PA. CONS. STAT. § 3706 (2018); see also *Kripp v. Kripp*, 849 A.2d 1159, 1162 (Pa. 2004) (holding that the term “cohabit” is subject to multiple meanings and may include same-sex relationships).

<sup>297</sup> *J.L.M.*, 18 So. 3d at 389.

<sup>298</sup> *Id.* at 390.

couple. In *Taylor v. Taylor*, the appellate court of Connecticut interpreted the term “cohabitation” in a private settlement agreement to incorporate its “ordinary use,” which it defined as “a dwelling together of man and woman in the manner of husband and wife.”<sup>299</sup> It was irrelevant to the termination of alimony analysis that the ex-wife purchased a house with her female friend as joint tenants with rights of survivorship; that they lived together with their children; or that they had set up a joint checking account to pay for common expenses.<sup>300</sup> What mattered was that these women could not cohabit as “man and woman in the same place in the manner of husband and wife.”<sup>301</sup>

In dissenting from an order terminating alimony payments on the basis of an ex-wife’s nonmarital heterosexual relationship in *Konzelman v. Konzelman*, Justice O’Hern of the Supreme Court of New Jersey discussed the perils of eliminating financial need from the analysis of whether alimony should be terminated on account of a cohabiting relationship.<sup>302</sup> When financial need drops out, he reasoned, the only question left to consider is whether the relationship is like marriage, or remarriage.<sup>303</sup> As such, the analysis essentially “equat[es] cohabitation with marriage.”<sup>304</sup> And, if the court’s sole consideration is whether the couple can legally marry, then the difference between marriage and nonmarriage is completely eliminated, for purposes of terminating alimony.

Sex, however, remains part of the equation. Justice O’Hern notes that terminating alimony where a different-sex couple is not married, without assessing financial need, infringes upon the ex-wife’s autonomy to engage in sexual relationships of her choosing.<sup>305</sup> To support his argument that the decision penalizes sex, he identifies

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<sup>299</sup> *Taylor v. Taylor*, 551 A.2d 1285, 1286 (Conn. App. Ct. 1989) (holding that the term “cohabitation” as used in a private settlement agreement incorporated the “ordinary use” of the term which it defined as “a dwelling together of man and woman in the manner of husband and wife”).

<sup>300</sup> *Id.* at 1286.

<sup>301</sup> The two women admitted that they were not in a sexual relationship. *Id.* This assertion appears to be ultimately irrelevant to the court’s decision in that it restricted cohabitation by definition to different-sex couples. *Id.* (citation omitted).

<sup>302</sup> *Konzelman v. Konzelman*, 729 A.2d 7, 19 (N.J. 1999) (O’Hern, J., dissenting).

<sup>303</sup> *See id.* (O’Hern, J., dissenting).

<sup>304</sup> *Id.* (citation omitted) (“By abandoning the economic needs test . . . the Court has equated cohabitation with marriage.”).

<sup>305</sup> *See id.* at 17 (O’Hern, J., dissenting) (“The private lives of divorced women are no business of the law. We have enough to do without inquiring into such matters. However, the economic needs of divorced women are the business of the law.”).



which nonmarital relationships fail to terminate alimony: “If [it] were not about sex, why then is cohabitation with another person of the same sex permitted without a reduction in support?”<sup>306</sup> Stated otherwise, the sex that matters most is heterosexual sex. Jurisdictions that decline to terminate alimony as a matter of law on the basis of a same-sex relationship thereby routinely ignore the relevance of the sexual relationship between two women outside of marriage — even if it exists, and even if that jurisdiction labels it a crime.<sup>307</sup>

The way that sex matters is, crucially, limited once again to marriage: the reason courts respond to heterosexual sex as an act that can terminate alimony is that it can take place within marriage. Holding that same-sex relationships do not terminate alimony highlights the purpose alimony termination serves in these jurisdictions — as a means of channeling sexual relationships into marriage. Terminating alimony is therefore deployed not as a means of penalizing a couple who has sex, but rather penalizing a couple who has sex *outside of marriage*. The invisibility of same-sex sex is a direct consequence of the inability of same-sex couples to marry — same-sex sex can only take place outside of marriage, leaving courts without another status in which to channel the relationship.<sup>308</sup> Terminating alimony on account of a relationship that could not have been marital does not serve to further the goal of pushing sex into marriage.

By requiring that a couple have the ability to marry before allowing a nonmarital relationship to terminate alimony, courts are in effect conflating cohabitation with marriage, defining the nonmarital relationship purely in terms of whether it could be marital.

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<sup>306</sup> *Id.* (O’Hern, J., dissenting). Justice O’Hern is clearly talking only about heterosexual sex. *See id.*

<sup>307</sup> *J.L.M. v. S.A.K.*, 18 So. 3d 384, 389 (Ala. Civ. App. 2008). Needless to say, same-sex marriage was prohibited in Alabama. *Id.* Even courts that did not categorically hold that same-sex couples could not terminate alimony were receptive to concluding that a relationship between two women is not sexual in nature, and instead is just one of friendship. *See, e.g., Partenio v. Partenio*, No. FM-02-1160-02, 2012 WL 2035823 (N.J. Super. Ct. App. Div. June 7, 2012) (declining to find that two women who were living in the same apartment were “cohabiting,” concluding that the absence of sex counseled in favor of continuing alimony payments). There are, of course, cases where two women are in fact living together and not having sex. But evidence that is insufficient in terminating alimony in the lesbian relationship would often be sufficient to terminate it in the modal, different-sex relationship. *See Antognini, supra* note 6, at 21-27.

<sup>308</sup> There may also be something about the sex at issue, and prejudices around lesbian sex in particular. *See Ruthann Robson, Posner’s Lesbians: Neither Sexy nor Reasonable*, 25 CONN. L. REV. 491, 495-96 (1993) (addressing the difficulty in quantifying lesbian sex if the metric is heterosexual or gay male sex).

Terminating alimony only in the context of a different-sex relationship sheds further light on the purpose that awarding alimony serves in the first instance — as a vehicle to support the recipient ex-wife until she begins a new relationship, which the court assumes should soon be marital.

## 2. Financial Considerations: Ex-Wife versus Ex-Husband

Other courts do consider financial need, and rely on it as the primary mode of determining whether alimony should be terminated. Unlike the cases that consider a same-sex couple's inability to marry, an ex-wife's nonmarital same-sex relationship is not legally barred from ending alimony payments, but courts may decline to hold that it does.

In assessing financial impact, courts either look to the need of the ex-wife, or to the burden on the ex-husband. Where courts focus on the financial need of the ex-wife, the same-sex relationship does not necessarily end alimony.<sup>309</sup> In the process, these cases clarify that the goal of alimony termination in this context is not to punish the new relationship. Rather, the main goal of the decisions that consider the financial status of the ex-wife is to privatize support effectively. Where courts focus on the financial burden to the ex-husband, the same-sex relationship typically ends payments. Across the board, the focus on the financial impact of the relationship allows for a plurality of relationships to potentially terminate alimony, not just marital ones — courts de-emphasize the nature of the relationship itself, and terminate alimony on the basis of a relationship that is same-sex, and sometimes even platonic.

In *Crissinger v. Crissinger*, an Ohio Court of Appeals allowed for the possibility that a same-sex relationship could end alimony.<sup>310</sup> The rule set out by statute in Ohio is that cohabitation terminates or modifies

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<sup>309</sup> See *In re Marriage of Kroft*, No. G041233, 2009 WL 5156642, at \*4 (Cal. Ct. App. Dec. 29, 2009) (holding that the court has “broad discretion to consider whatever is relevant to the overall ‘big picture’ concerning the parties’ needs and abilities” including the ex-wife’s cohabitation with her same-sex partner and declining to award alimony because the ex-wife was able “to maintain the status quo of her prior married life”).

<sup>310</sup> See *Crissinger v. Crissinger*, No. 05–HA–579, 2006 WL 389641, at \*2 (Ohio Ct. App. Feb. 17, 2006). Ohio has interpreted private agreements differently. See discussion *supra*, notes 280–86. See also *Boccuzzio v. Boccuzzio*, No. FA010275818, 2007 WL 2390692, at \*1-2 (Conn. Super. Ct. Aug. 7, 2007) (allowing, in dicta, for the possibility that a same-sex couple could lead to a termination of alimony where the language used is gender-neutral and states that a person is cohabiting with another “in a marriage like relationship”).

alimony payments, and cohabitation is established where the individuals are “actually living together, [] for a sustained duration, and []they share expenses with respect to financing and day-to-day incidental expenses.”<sup>311</sup> Despite finding that the ex-wife was cohabiting with another woman in a “deep and soulful relationship,” the court ordered the husband to continue his payments.<sup>312</sup> It did so because it concluded that the ex-wife was still in need of financial support and health insurance.<sup>313</sup> While the lesbian relationship in this case was no longer legally immaterial, and impacted the fashioning of the award, its mere existence was insufficient to overcome evidence of the ex-wife’s financial needs.<sup>314</sup> The court in *Crissinger* was also attuned to the effect that terminating alimony would have on the ex-wife, reasoning that she “should not be punished for her relationship.”<sup>315</sup> While the recognition of the same-sex relationship could be considered deprivative, the court expressed an intent to *not* punish the ex-wife.<sup>316</sup> Rather than penalize the wife, the court’s decision affirmed the propriety of assessing multiple sources of support, including from both her ex-husband and her current female partner.

The *Crissinger* court’s reasoning stands in stark contrast to the cases that look to whether the couple can marry — in those situations, punishing the nonmarital relationship is decidedly the goal, with the ultimate aim of encouraging remarriage.<sup>317</sup> Courts whose analyses focus on an ex-wife’s ability to support herself have no need to consider whether she can marry her nonmarital partner — financial matters moot any question of the couple’s ability to marry. In *In re Marriage of Vandenberg*, the Kansas Court of Appeals addressed as a matter of first impression whether “the cohabitation of two same sex adults [can] be the basis for the denial of spousal support.”<sup>318</sup> Answering the question in the affirmative, the court relied on its assessment of alimony’s purpose, which was to ensure “the future

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<sup>311</sup> *Crissinger*, 2006 WL 389641, at \*2.

<sup>312</sup> *Id.* at \*2, \*5. The court defines cohabiting as: living together for a sustained duration and sharing expenses. *Id.* at \*2.

<sup>313</sup> *Id.* at \*4.

<sup>314</sup> *See id.* at \*5.

<sup>315</sup> *Id.* at \*4.

<sup>316</sup> The recognition would be deprivative insofar as the same-sex relationship would be recognized for the purpose of modifying or terminating alimony, thus depriving the recipient of material benefits. *See Aloni, supra* note 26, at 1281.

<sup>317</sup> *See discussion supra* Section III.A.1.

<sup>318</sup> *In re Marriage of Vandenberg*, 229 P.3d 1187, 1195 (Kan. Ct. App. 2010).

support of the divorced spouse.”<sup>319</sup> Accordingly, the fact that the same-sex couple could not marry did not figure into the analysis.<sup>320</sup> Instead, the same-sex relationship had purchase insofar as it impacted the ex-spouse’s living conditions.<sup>321</sup> Moreover, the court in *Vandenberg* did not rely solely on the nonmarital relationship — it was one of many factors it considered, in addition to the age of the divorcing parties, their earning capacity, and their overall financial situation.<sup>322</sup> The court reasoned that doing otherwise, and declining to award support solely on account of the ex-wife’s cohabitation — same-sex or not — would be tantamount to finding that the ex-wife was at fault for cohabiting.<sup>323</sup> Punishment, the court concluded, was not the goal.<sup>324</sup>

At least two courts have focused not on the need of the recipient spouse, but on the burden imposed on the paying spouse.<sup>325</sup> Despite this change in emphasis, the cases are similarly expansive in their acknowledgment of different types of relationships. The Appellate Court of Illinois described the aim of its termination of alimony statute to be, “at least in part, to relieve the injustice of requiring the paying spouse to continue paying maintenance to an ex-spouse who uses the money to support someone else or is receiving support from someone else.”<sup>326</sup> Because priority was placed on considering the financial situation of the paying spouse — as opposed to the recipient

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<sup>319</sup> *Vandenberg*, 229 P.3d at 1196.

<sup>320</sup> Same-sex couples were unable to marry in Kansas at the time. *See id.* (under Kansas’s Defense of Marriage Amendment). It also did not matter that Kansas courts generally excluded same-sex couples from the term “cohabitation,” which was limited to those “living together as husband and wife.” *Id.* (internal quotation marks omitted) (quoting *In re Marriage Kuzanek*, 105 P.3d 1253 (Kan. 2005)).

<sup>321</sup> Because the lower court had taken into consideration the cohabiting relationship in determining the amount of support the ex-wife should receive, the court upheld its order. *Id.* at 1199.

<sup>322</sup> *Id.* at 1198.

<sup>323</sup> The court explained that terminating alimony upon a finding of cohabitation would be tantamount “to a finding of fault,” which is not considered by the court unless the fault alleged is “gross and extreme.” *Id.* The court notes that the statute does not specifically identify “cohabitation” as a factor, only that the court should reach an award that is “fair, just and equitable under the circumstances.” *Id.* at 1196 (internal quotation marks omitted).

<sup>324</sup> *See id.* at 1199.

<sup>325</sup> *In re Marriage of Weisbruch*, 710 N.E.2d 439, 445 (Ill. App. Ct. 1999); *see also* *Luttrell v. Cucco*, 784 S.E.2d 707, 711-12 (Va. 2016) (considering whether a recipient spouse “has entered a committed, financially interdependent relationship with a third person” regardless of the sex of the individuals and interpreting its statute “to prevent one former spouse from obtaining a windfall at the expense of the other after the recipient has entered such a relationship”).

<sup>326</sup> *Weisbruch*, 710 N.E.2d at 444.

spouse — the court in *In re Marriage of Weisbruch* explained that “it makes no difference . . . whether the ex-spouse’s new relationship is one that society is prepared to recognize as legitimate or can be legally consummated by marriage.”<sup>327</sup>

Not only does the ability to marry fall out of the analysis, but so too does the requirement that the couple have a sexual relationship.<sup>328</sup> In *Weisbruch*, the court found that the ex-wife, Carol Weisbruch, and her female friend, Sandra Diesel, were not having sex: they did not sleep in the same bedroom, they were not affectionate in public, and they dated other people.<sup>329</sup> Yet they had co-purchased a home, shared household expenses, opened a joint checking account, co-owned personal property, and co-signed loans for each other.<sup>330</sup> The court therefore concluded that they were engaged in a “conjugal relationship.”<sup>331</sup> The determination that the relationship was “conjugal” was based not on their sexual or romantic lives but rather on their financial lives, which the court concluded were “intertwined.”<sup>332</sup> Thus, the real inequity to the ex-husband was “economic” in nature rather than “moral or legal.”<sup>333</sup>

Significantly, the *Weisbruch* court’s focus on the paying spouse eliminated consideration of the actual economic need of the recipient spouse. The trial court determined that the ex-wife still required maintenance in the amount of \$950 per month.<sup>334</sup> On appeal, however, the court concluded that her “continuing conjugal relationship . . . terminated her maintenance entirely.”<sup>335</sup> The effect of looking to the paying spouse instead of the recipient spouse was to ignore evidence of continuing financial need, which persisted despite the new relationship.

The cases that consider the financial impact of the nonmarital relationship on the recipient ex-spouse are the ones that most successfully ensure that support is privatized — they impose

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<sup>327</sup> *Id.*

<sup>328</sup> *See id.* at 445. This effect is different from those cases that render the sex that may take place between the individuals in the couple legally invisible. *See* discussion *supra* Section III.A.1.

<sup>329</sup> *Weisbruch*, 710 N.E.2d at 441, 445.

<sup>330</sup> *Id.* at 441.

<sup>331</sup> *Id.* at 445.

<sup>332</sup> *Id.* (internal quotation marks omitted).

<sup>333</sup> *See id.* at 443 (noting that courts in Illinois “have routinely focused on the economic realities of the ex-spouse’s new relationship rather than on its moral or legal implications”).

<sup>334</sup> *Id.* at 442.

<sup>335</sup> *Id.*

obligations on the relationships the ex-spouse has with those around her, on the basis of her actual need. The cases that consider the financial burden on the paying ex-spouse are less successful in this regard, given that they dispense with an analysis of the recipient ex-spouse's financial situation, raising the distinct possibility that she may still require support. In both contexts though, economic considerations trump any sort of explicit relationship-prioritization. That is, courts do not consider whether the same-sex relationship is capable of turning into a marriage, whether it looks like a marriage, or whether it ought to become a marriage.<sup>336</sup> Instead, the relationship is severed from marriage, as it is from sex. Insofar as diversity of relationship forms is concerned then, privatizing support and considering the financial consequences of entering into a relationship have a rather radical potential — they allow courts to acknowledge relationships beyond the marital one, on their own terms.<sup>337</sup>

### 3. Marriage-Like Relationships Terminate Alimony

The third approach courts take is to assess whether a nonmarital same-sex couple looks like a married couple in deciding whether to terminate alimony. In some ways, this approach combines the two prior methods by considering marriage and, tangentially, need. This is so because the determination of whether a relationship is marital-like can include an express consideration of financial impact, or can impliedly serve as a proxy determination for the existence of financial support. Courts, however, tend to sever the two requirements, and end up replacing any consideration of support with an analysis of how marital-like the relationship appears to be. The deep-seated irony in these cases is that courts terminate alimony where a same-sex relationship looks like a marriage, even though that same-sex couple was prevented from legally marrying.<sup>338</sup>

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<sup>336</sup> Addressing the financial burden on the ex-husband may harm the recipient ex-spouse by terminating payments even if she still needs them, which may end up punishing her decision to begin a relationship. It is far from clear, however, that this outcome is meant to, or does, channel that nonmarital relationship into a marriage.

<sup>337</sup> This specific set of cases lends support to Susan Appleton's prediction that courts may provide "affirmative legal recognition of polygamy, of friendship, and of other intimate connections" and recognize "inclusive legal notions of family" insofar as doing so "suppl[ies] new private obligations." See Appleton, *supra* note 26, at 978-79.

<sup>338</sup> Some courts interpret the term "cohabitation" in private agreements to include same-sex couples even when their statutes defining "cohabitation" — rather than marriage — are limited to opposite sex-couples. See *Kripp v. Kripp*, 849 A.2d 1159, 1162, 1665 (Penn. 2004) (holding that the term "cohabit" is subject to multiple meanings and affirming the use of parol evidence to establish what the parties meant

Illinois provides an example of a jurisdiction that changed its approach from considering financial repercussions to considering whether the nonmarital relationship was sufficiently like marriage. The state supreme court ultimately disagreed with how the appellate court in *Weisbruch* characterized the nature of the problem with ordering an ex-spouse to continue to pay maintenance upon the recipient spouse's entrance into a nonmarital relationship.<sup>339</sup> In *In re Marriage of Susan*, the Illinois Supreme Court explained that the injustice suffered by the paying ex-spouse was not having to support "an ex-spouse who uses that money to support someone else or is receiving support from someone else," but rather having to support an ex-spouse who "becomes involved in a husband-wife relationship but does not formalize that relationship."<sup>340</sup> The court in *Susan* wholly replaced *Weisbruch*'s inference of support with a direct comparison to marriage. In so doing, it cleaved apart the question of need from the question whether there is a de facto marriage.<sup>341</sup> Determining whether alimony should be terminated can now be undertaken by considering only whether a couple is in a marriage-like relationship.<sup>342</sup> Even though same-sex couples were unable to marry in Illinois, the court affirmed that its reasoning would also apply to them.<sup>343</sup>

Subsequent Illinois cases have upheld *Weisbruch*'s outcome insofar as it concluded that the financial need requirement was not about actual need, but about whether the partners would "look to each other" for support.<sup>344</sup> That latter determination is conclusively established by whether the relationship is "a de facto marriage." Importantly, the analysis of what constitutes a de facto marriage does not require any evidence of joint financial undertakings; instead, it addresses factors like the "length of the relationship," "whether [the

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by the use of the word in their settlement agreement, holding that it did include same-sex relationships). Other jurisdictions, like Ohio, have been more restrictive in interpreting private agreements than their state statute. Compare *Gajovski v. Gajovski*, 610 N.E.2d 431, 433 (Ohio Ct. App. 1991), with *Crissinger v. Crissinger*, No. 05-HA-579, 2006 WL 389641, at \*2 (Ohio Ct. App. Feb. 17, 2006).

<sup>339</sup> See *supra* notes 323–32.

<sup>340</sup> *In re Marriage of Susan*, 856 N.E.2d 1167, 1176-77 (Ill. App. Ct. 2006) (internal quotation marks omitted) (addressing a heterosexual nonmarital relationship post-divorce); see also Antognini, *supra* note 6, at 23-24.

<sup>341</sup> *Susan*, 856 N.E.2d at 1176-77.

<sup>342</sup> *Id.* at 1177.

<sup>343</sup> See *id.* at 1176 ("[W]e agree with the ultimate holding of [*Weisbruch*], that two cohabiting women may be considered *de facto* married . . .").

<sup>344</sup> *In re Marriage of Miller*, 40 N.E.3d 206, 225-26 (2015) (quoting *In re Marriage of Weisbruch*, 710 N.E.2d 439, 444 (Ill. App. Ct. 1999)).

individuals] spend holidays together,” and “whether they vacation together.”<sup>345</sup> Illinois has exchanged the question of financial support for how much the relationship looks like a marriage.

Other courts are similarly explicit in replacing the financial impact of the nonmarital relationship with an assessment of its marital characteristics.<sup>346</sup> In *Kemp v. Green*, the Delaware family court held that the recipient ex-wife, Cathi Green, was “cohabiting” with Kim Langford for purposes of its alimony statute.<sup>347</sup> The Delaware statute specifically dispenses with the requirement of financial need, indicating that alimony terminates when “the parties hold themselves out as a couple, [] regardless of whether the relationship confers a financial benefit on the party receiving alimony.”<sup>348</sup> It also specifies that the other individual may be “an adult of the same or opposite sex.”<sup>349</sup> Accordingly, behaving “like a couple” triggers a conclusive presumption that the ex-spouse no longer needs support.<sup>350</sup> In *Kemp*, the court relied on evidence that Cathi and Kim traveled together, shared a residence, and showed public affection towards each other.<sup>351</sup> It was of no consequence that same-sex couples were unable to legally marry at the time.<sup>352</sup> The optics of marriage replace any consideration of the ability to marry, or any proof of support.

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<sup>345</sup> *Susan*, 856 N.E.2d at 1171 (internal quotation marks removed). The only factor that could potentially encompass financial considerations is the general “interrelation of their personal affairs.” *Id.* at 1172.

<sup>346</sup> See, e.g., *Garcia v. Garcia*, 60 P.3d 1174, 1175 (Utah Ct. App. 2002) (internal quotation marks omitted) (interpreting Utah’s statute, which terminates alimony upon “cohabitation,” to include same-sex relationships and requiring only proof of “common residency” and “sexual contact evidencing a conjugal association”); *Stroud v. Stroud*, 641 S.E.2d 142, 145 (Va. Ct. App. 2007) (interpreting “cohabitation” in a settlement agreement to include a same-sex couple and undertaking an analysis to determine whether the ex-wife and her female partner were in a relationship “analogous to marriage”).

<sup>347</sup> *Kemp v. Green*, No. CS 98-04630, 1999 WL 33100127, at \*1 (Del. Fam. Ct. Dec. 3, 1999).

<sup>348</sup> *Id.* at \*1 (internal quotations omitted) (citing DEL. CODE ANN. tit. 13, § 1512(g) (1995)).

<sup>349</sup> *Id.* (internal quotations omitted) (citing DEL. CODE ANN. tit. 13, § 1512(g)).

<sup>350</sup> *Id.* (“It is well settled Delaware law that there exists a conclusive presumption that, during cohabitation, the cohabiting spouse is not dependent on the former spouse for support.”).

<sup>351</sup> *Id.* at \*3.

<sup>352</sup> See *Same-sex Marriage in Delaware*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Same-sex\\_marriage\\_in\\_Delaware](https://en.wikipedia.org/wiki/Same-sex_marriage_in_Delaware) (last visited Aug. 9, 2017). Cathi and Kim also denied that they were in a romantic relationship, and testified that they slept in separate rooms of the same house. See *Kemp*, 1999 WL 33100127, at \*2. The court, however, was generally unconvinced that their relationship was purely platonic and



Courts were not alone in concluding that same-sex relationships could terminate alimony even though the individuals could not marry; legislatures did so too. North Carolina, for instance, amended its alimony statute to specify that payments could be terminated upon finding “two adults dwelling together continuously and habitually in a private heterosexual relationship, even if this relationship is not solemnized by marriage, or a private homosexual relationship.”<sup>353</sup> North Carolina prohibited same-sex marriage by statute at the time.<sup>354</sup> Courts in North Carolina terminate alimony where a nonmarital relationship has the characteristics of marriage — and they included nonmarital same-sex relationships when the couple could not marry.<sup>355</sup> They explained, however, that the inquiry into the nature of the relationship actually touches on the “economic impact” of the new relationship:<sup>356</sup> courts interpreted the legislature to have intended to terminate alimony “in relationships that *probably* ha[d] an economic impact,” but not to go so far as to require that the relationship have a proven economic impact.<sup>357</sup> Accordingly, courts in North Carolina consider financial impact only obliquely, by looking at factors like relationship duration, and public expressions of affection.<sup>358</sup>

The inclusion of same-sex couples who could not marry as a ground for terminating alimony in jurisdictions that rely on whether a nonmarital relationship is marriage-like raises questions about what role alimony is meant to play. Courts and legislatures that terminated alimony on the basis of a same-sex relationship that looked like a marriage, without affording same-sex couples the right to legally marry, do not articulate a justificatory theory for doing so. They would be hard-pressed to come up with one; the only feasible rationale is to penalize the recipient ex-wife for entering into any type of marriage-

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concluded that they were indeed “cohabiting.” *See id.* at \*3.

<sup>353</sup> N.C. GEN. STAT. § 50-16.9(b) (2018); *see also* GA. CODE ANN. § 19-6-19(b) (1995) (specifying that per Georgia law like North Carolina law, the term “cohabitation” includes “dwelling together continuously and openly in a meretricious relationship with another person, regardless of the sex of the other person”).

<sup>354</sup> N.C. GEN. STAT. § 51-1 (1995).

<sup>355</sup> North Carolina included same-sex relationships in defining what kinds of nonmarital relationships could terminate or modify alimony awards. N.C. GEN. STAT. § 50-16.9(b). The analysis its courts undertake in assessing whether the nonmarital relationship terminates alimony is whether the individuals assumed “marital rights, duties, and obligations that are usually manifested by married people.” *Smallwood v. Smallwood*, 742 S.E.2d 814, 819 (N.C. Ct. App. 2013) (internal quotations omitted).

<sup>356</sup> *Smallwood*, 742 S.E.2d at 817-18.

<sup>357</sup> *See id.* at 818-19.

<sup>358</sup> *See id.* at 819.

like relationship after her divorce, regardless of whether it provided support and regardless of whether it could become marital.

Although jurisdictions prevented same-sex couples from marrying, marriage remained the marker by which their relationships were measured for purposes of terminating alimony. Indeed, courts relied on marriage even where they disavowed the importance of marrying to their analysis. Utah, for example, has long interpreted its alimony termination statute to apply to both same-sex and different-sex couples.<sup>359</sup> The Court of Appeals of Utah in *Garcia v. Garcia* explained that its analysis applied equally to same-sex couples, when they could not marry, because the two factors it analyzes — whether the couple shares a residence and has sexual contact — have little to do with the ability to marry.<sup>360</sup>

Marriage is, however, still doing work in defining the kinds of relationships that terminate alimony. In fact, courts in Utah consider whether the nonmarital relationship is “‘akin’ to a marriage.”<sup>361</sup> In *Myers v. Myers*, the Supreme Court of Utah specified that alimony should not terminate upon a finding that an ex-wife was having sex with her parents’ foster child.<sup>362</sup> Becky Sue Myers, the ex-wife receiving alimony, had moved back into her parents’ house while they were fostering a teenage boy.<sup>363</sup> The ex-husband moved to terminate alimony under Utah’s statute given that Becky Sue was living in the same house as, and having a sexual relationship with, the teenager, thereby satisfying Utah’s two-part analysis.<sup>364</sup> The court reasoned, however, that “cohabitation requires more than a sexual relationship between two individuals living under the same roof.”<sup>365</sup> The question the court asked was whether the relationship between Becky Sue and her parents’ teenage foster son “was akin to that generally existing between husband and wife.”<sup>366</sup> The court said that it was not.<sup>367</sup> While Becky Sue’s relationship did not terminate payments, same-sex

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<sup>359</sup> *Garcia v. Garcia*, 60 P.3d 1174, 1175-76 (Utah Ct. App. 2002).

<sup>360</sup> The court reasoned: “We fail to see how the differing legal rights of married and same-sex couples necessitates the statutory interpretation that same-sex couples may not have sexual contact.” *Garcia*, 60 P.3d at 1176 n.1 (noting that “cohabitation is comprised of two elements: (1) common residency and (2) sexual contact evidencing a conjugal association”) (alterations in original) (internal quotation marks omitted).

<sup>361</sup> *Myers v. Myers*, 266 P.3d 806, 807 (Utah 2011).

<sup>362</sup> *Myers*, 266 P.3d at 807.

<sup>363</sup> *Id.*

<sup>364</sup> *Id.*

<sup>365</sup> *Id.*

<sup>366</sup> *Id.* at 810 (internal quotation marks omitted).

<sup>367</sup> *See id.* at 811.

relationships did.<sup>368</sup> Even when same-sex couples were unable to legally marry, marriage was still the shadow under which the decisions to terminate alimony were being made.

### B. Reverse Different-Sex Relationships

As already stated, there are no cases that address an ex-husband who is a recipient spouse engaged in a same-sex nonmarital relationship. There are, however, some cases that address an ex-husband who is a recipient spouse who begins a different-sex nonmarital relationship. They are few in number, and difficult to ferret out from the standard case.<sup>369</sup> In the circumscribed set of cases that involve an ex-wife paying alimony to an ex-husband who takes up a relationship with another woman, courts tend to hold that the alimony payments should continue. The overall effect is to allow the husband to remain in the relationship with his girlfriend, while receiving support from his ex-wife.

The two overarching approaches to alimony termination mirror those taken in the same-sex context. Courts either consider whether the relationship looks like a marriage, or require proof of a change in financial circumstances.<sup>370</sup> These terminating events imply that alimony is generally awarded until the ex-spouse enters into a relationship that looks like marriage; but courts here seem to set the bar high, requiring, for instance, that the couple not be apart for even one night prior to terminating support.<sup>371</sup> The small number of cases that consider the nonmarital relationship's financial impact means that in most jurisdictions the purpose of awarding alimony to an ex-husband is not principally about alleviating his financial need.

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<sup>368</sup> *Garcia*, 60 P.3d at 1175-76 (finding that the recipient ex-wife's lesbian relationship terminated alimony payments).

<sup>369</sup> The only way to identify these kinds of cases is to read through all of the cases that address nonmarital couples to determine which party — ex-husband or ex-wife — is seeking what. Thus, there is some room for human error. What is clear, however, is that these cases are nonetheless few and far between.

<sup>370</sup> The third category that was relevant in the same-sex context is not applicable here. Courts do not need to consider the heterosexual's couple ability, or inability, to marry.

<sup>371</sup> See, e.g., *McKinney v. Pedery*, 776 S.E.2d 566, 571-72 (S.C. 2015) (overturning the lower court's opinion that had reasoned that spending some nights apart does not break the "consecutive" nature of the cohabiting). The lower court had described the brief absences as "more akin to a temporary absence for out-of-town travel than it was to routine separation based on separate residences." *Id.* at 572 (citations omitted) (internal quotation marks omitted).

### 1. Different-Sex Relationships Look Like Marriage

As in the same-sex context, courts that turn to the tried-and-tested analysis of whether the nonmarital relationship looks like a marriage do not explicitly include whether the new relationship provides economic support. In *Baker v. Baker*, the Supreme Court of North Dakota ended the paying ex-wife's obligations to her ex-husband on account of his cohabitation with another woman.<sup>372</sup> The crux of the determination was whether the ex-husband and his new partner "were cohabiting in an informal marital relationship."<sup>373</sup> The court concluded that the ex-husband, Ralph Baker, was in a marital-like relationship with Sharon Mittleider: they shared a common residence, Sharon prepared meals for them, they went on vacation together, they both contributed to household expenses, and they had sex.<sup>374</sup> The lower court did not consider whether Ralph and Sharon shared, for instance, bank accounts.<sup>375</sup> On appeal, the state supreme court affirmed the trial court's decision, reasoning that proof of the relationship itself was proof of financial impact — indeed, "it was impossible" that a relationship that looked like an informal marriage did "not include a commingling of funds."<sup>376</sup> The court also did not place any weight on the fact that unmarried cohabitation was a Class B misdemeanor in North Dakota.<sup>377</sup> The contours of the relationship appeared marital, and so Ralph could no longer receive payments.<sup>378</sup>

Looking to whether the relationship is marital-like sometimes means that the court *ignores* financial support that a nonmarital relationship is providing. In *Remillard v. Remillard*, the Supreme Court of Connecticut found that the term "cohabitation" as used in a private settlement agreement was ambiguous, either referring to a couple who lived together like man and wife, or a couple who just lived together.<sup>379</sup> The court concluded that the term cohabitation contemplated "a romantic or sexual relationship," like that of man and

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<sup>372</sup> *Baker v. Baker*, 566 N.W.2d 806, 812 (N.D. 1997).

<sup>373</sup> *Id.* at 808 (internal quotation marks omitted).

<sup>374</sup> *Id.* at 812.

<sup>375</sup> *Id.*

<sup>376</sup> *See id.* at 809 (alteration in original) (internal quotation marks omitted).

<sup>377</sup> *See id.* at 810.

<sup>378</sup> *Id.* at 808; *see also In re Marriage of Jones*, No. E030007, 2002 WL 818253, at \*4 (Cal. Ct. App. Apr. 30, 2002) (resulting in a holding similar to *Baker* in which cohabitation was established by proof that ex-husband was living with new girlfriend, in a romantic relationship, and because he did not provide evidence showing that he was not receiving support).

<sup>379</sup> *Remillard v. Remillard*, 999 A.2d 713, 720-21 (Conn. 2010).

wife.<sup>380</sup> Accordingly, the fact that the recipient ex-husband was living with a co-worker twenty-five years his junior who was dating other people did not trigger termination of the ex-wife's payments.<sup>381</sup> In reaching its conclusion, the court did not consider whether the ex-husband's female roommate contributed to rent or other household payments: addressing whether a relationship is marital-like replaces any assessment of need. The termination of alimony in these cases functions to channel relationships that could be marital into marriage, regardless of financial support.

That said, courts tend to conclude that an ex-husband's nonmarital relationship does not terminate alimony.<sup>382</sup> They do so by imposing relatively high live-in standards on the relationship. Delaware requires that for a nonmarital relationship to terminate alimony, the couple must be "regularly residing" together.<sup>383</sup> In *BAM v. PAT*, the family court held that the ex-husband's new girlfriend was not "regularly residing" under the statute for purposes of terminating his ex-wife's alimony payments.<sup>384</sup> While the court agreed that "Husband and Girlfriend may hold themselves out as a couple," and noted that they "have taken steps to conceal their relationship," there was uncontroverted proof that the girlfriend still lived with her father.<sup>385</sup> Courts in South Carolina also consider whether the couple lives together continuously to determine whether alimony should end. In *McKinney v. Pedery*, the South Carolina Supreme Court concluded that

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<sup>380</sup> *See id.* The court admitted testimony by the ex-husband to determine which meaning the agreement intended to capture; he testified that he thought it meant living together in a marital-like relationship. *See id.* at 720-21. The court also considered the terms of the agreement itself, which specified living with an "unrelated female," thereby excluding family relations. *See id.* at 721.

<sup>381</sup> *Id.* at 716, 721.

<sup>382</sup> This is not to say that they are coming out differently than they would otherwise; the small number of cases makes it impossible to adequately compare.

<sup>383</sup> *BAM v. PAT*, No. CN00-09020, 2001 WL 1773915, at \*3-4 (Del. Fam. Ct. Aug. 20, 2001) (holding that ex-wife did not prove that ex-husband and girlfriend were "regularly residing" under Delaware termination of alimony statute).

<sup>384</sup> *Id.* at \*4.

<sup>385</sup> *Id.* at \*2, \*4. Where an ex-husband sought to end alimony payments to his ex-wife, the court had a rather expansive definition of "regularly residing," stating that it was less than "residing" and more like "usually residing." *Paul v. Paul*, 60 A.3d 1080, 1082-83 (Del. 2012) (internal quotation marks and citations omitted) (holding that the lower court erred in finding that separate residences meant that the ex-wife could not regularly reside with her boyfriend and remanding for the court to reconsider its decision to continue alimony payments). *See also Kemp v. Green*, No. CS 98-04630, 1999 WL 33100127, at \*1 (Del. Fam. Ct. Dec. 3, 1999) (not engaging in a discussion of what "regularly residing" means in holding that alimony was terminated by a same-sex relationship); discussion *supra* notes 344-49.

Frank Pedery was not living continuously with Cynthia Hamby.<sup>386</sup> The supreme court found that Frank and Cynthia were involved in “a permanent arrangement of a romantic nature.”<sup>387</sup> But, the plain language of the statute requires proof that the couple cohabit for ninety or more “consecutive days.”<sup>388</sup> The family court below had interpreted the statute to allow for brief periods of separation in the context of their long-term relationship and terminated Frank’s payments.<sup>389</sup> On appeal, however, because Cynthia did not spend every single night with Frank — she spent about two nights per week with her son — the court found that there was no consecutive cohabitation.<sup>390</sup> The court ordered the ex-wife to continue to pay Frank alimony.<sup>391</sup>

Support is still the metric used to consider the man’s role in a relationship, even when he is the alimony recipient. Where the recipient ex-spouse is the husband, the new relationship is defined to be marital-like if he is providing financial support to his new girlfriend; if he is not providing for her in a way that mimics a traditional marriage, the court holds that he can continue to receive financial support from his ex-wife. In *Waters v. Boney*, the Court of Appeals of Ohio rejected the ex-wife’s request to stop paying alimony on account her ex-husband’s new relationship.<sup>392</sup> The court noted that alimony would be terminated upon proof that the parties were living together for a sustained period, and that they “shared expenses.”<sup>393</sup> In the case before it, the court held that neither prong was satisfied. The ex-wife had failed to prove that her ex-husband, Wayne Boney, and his “fiancé,” Robin Hardesty, were actually living together.<sup>394</sup> The court defined this requirement literally — it found that they lived in separate residences, even though Wayne had purchased the house he lived in with Robin as a joint tenant with rights of survivorship.<sup>395</sup> The court also found that there were no “shared expenses” because Robin

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<sup>386</sup> *McKinney v. Pedery*, 776 S.E.2d 566, 571-72 (S.C. 2015).

<sup>387</sup> *See id.*

<sup>388</sup> *Id.* at 572 (emphasis omitted).

<sup>389</sup> *See id.* at 571.

<sup>390</sup> *Id.* at 572.

<sup>391</sup> *Id.*

<sup>392</sup> *Waters v. Boney*, No. 2008-CA-00127, 2009 WL 321295, at \*5 (Ohio Ct. App. Feb. 9, 2009) (declining to terminate alimony because paying ex-wife had not shown that her ex-husband was in a relationship that was a “functional equivalent of marriage”).

<sup>393</sup> *Id.* at \*3.

<sup>394</sup> *See id.* at \*5.

<sup>395</sup> *See id.* at \*4.

supported herself and paid her own costs.<sup>396</sup> Rather than ask whether Wayne's financial condition had been improved by his relationship with Robin, or whether Robin was supporting Wayne — given that he was the alimony recipient — the court asked only whether Wayne was supporting Robin in assessing whether the relationship was marital-like. The court found that he was not, reasoning that there was no proof that Wayne “financially supported” Robin “to the extent that it was the ‘functional equivalent of marriage.’”<sup>397</sup>

Courts that hold that a marital-like relationship terminates alimony indicate that the purpose alimony serves is to channel relationships into marriage. Where, however, the bar for the marital-like relationship is set so high that it fails to terminate alimony in most circumstances, its purpose becomes less intelligible. By failing to terminate alimony, and thus failing to channel these relationships into marriage, courts demonstrate that they care less about incentivizing men to marry, as they care less about men having sex outside of marriage.<sup>398</sup> The effect of continuing alimony payments to the ex-husband further implies that courts are less worried about a woman financially supporting multiple men than the reverse. The fact that courts look to a man's provision of support, rather than his receipt of support, or his sexual relations with his girlfriend, reveals that the exchange of sex for support goes one way — men provide support in exchange for women's sexual services.<sup>399</sup> Courts refrain from ensuring that this exchange takes place within marriage when men are the recipients of support, and the individuals having sex.

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<sup>396</sup> *Id.* at \*4-5.

<sup>397</sup> *Id.* The line between what is marital-like and what constitutes support is porous, and often gendered. *See* *Murphy v. Murphy*, 201 So. 3d 18, 22 (Fla. Dist. Ct. App. 2013) (holding in the context of a recipient ex-wife that alimony can be terminated either upon proof that cohabitant provides support to the recipient spouse or, significantly, “whether the recipient spouse contributes to the support of the cohabitant”). In *Murphy*, the court of appeal of Florida found that the supportive relationship could be made up not only of direct economic support, but also of non-economic services provided by recipient ex-wife to cohabitating party. *See id.* at 26; *see also* *Antognini*, *supra* note 6, at 26-27 (noting courts' concerns with “mismatched support” whereby “the ex-husband [is] paying a woman to be *someone else's* wife, and receiving nothing in return”).

<sup>398</sup> *See* *Antognini*, *supra* note 6, at 21-28 (arguing that courts addressing a recipient ex-wife in a nonmarital different-sex relationship generally terminate her alimony payments upon proof of sex).

<sup>399</sup> *See* *Perry*, *supra* note 20, at 27 (“The law [] reflects an assumption that women essentially trade sexual services for financial support in their relationships with men.”).

## 2. Financial Impact on Recipient Ex-Husband

As in the same-sex context, only a small number of courts choose to consider the economic impact of the new relationship directly; when they do, they explicitly avoid imposing a penalty on the new relationship.<sup>400</sup> In *Else v. Else*, the Supreme Court of Nebraska interpreted its state statute to require more than mere proof of cohabitation in deciding whether to terminate the ex-husband's receipt of alimony payments.<sup>401</sup> Deferring to the legislature, the court looked to the history of the statute governing divorce, of which alimony is a piece. In particular, it noted that the Nebraska Legislature had removed from the divorcing process "the entire conceptual structure of fault."<sup>402</sup> Given that misconduct was no longer a bar to alimony, the court reasoned that the central aim of providing spousal support is "to rectify the frequent economic imbalance in the earning power and standard of living of the divorced husband and wife."<sup>403</sup> As such, the court found that the husband's cohabitation, without proof of improved financial condition, was insufficient to terminate alimony.<sup>404</sup> The purpose alimony is meant to serve is clear by what fails to terminate it, which is to ensure that the ex-spouse's financial needs are being met.

### IV. DE-EXCEPTIONALIZING NONMARITAL RELATIONSHIPS

The exceptional case law is, as it turns out, not all that exceptional. It is part and parcel of the law of nonmarriage writ large. Looking to how the law understands the end of a nonmarital relationship alongside how a nonmarital relationship ends alimony helps crystallize a very basic, but often elusive, point: the law of nonmarriage remains fundamentally anchored to marriage. These exceptional cases reaffirm the role marriage plays in determining both their reasoning and their outcome.

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<sup>400</sup> The only examples of reverse different-sex relationships that the searches revealed were two cases that both take place in Nebraska. See *Else v. Else*, 367 N.W.2d 701, 702-03 (Neb. 1985); *Ostendorf v. Ostendorf*, No. A-99-372, 2000 WL 1673322, at \*4 (Neb. Ct. App. Nov. 7, 2000).

<sup>401</sup> See *Else*, 367 N.W.2d at 704-05.

<sup>402</sup> *Id.* at 703.

<sup>403</sup> *Id.* at 704 (internal quotation marks omitted) (quoting *Drummond v. Drummond*, 590 S.W.2d 658, 661 (Ark. 1979)).

<sup>404</sup> *Id.* at 705; see also *Ostendorf*, 2000 WL 1673322, at \*2-3 (affirming the holding in *Else* that proof of cohabitation must be accompanied by a change in the ex-spouse's financial conditions in considering a recipient ex-wife's cohabitation).



As such, we should take care if and when we decide to promote the law of nonmarriage. These cases show that concerns that are explicit in the modal relationship are also present in the exceptional one, even if the gendered dynamics are slightly more submerged. In particular, the inability of a couple to legally marry does not limit the court's reliance on marriage, and the sex of the parties does not prevent the court from gendering the contributions made to a nonmarital relationship.

#### A. *Nonmarriage Is Tethered to Marriage*

Locating the same-sex cases and reverse heterosexual cases within the larger body of law regulating nonmarital relationships problematizes some of the decisions that scholars and advocates have hailed as positive legal developments. An overview of the case law reveals that jurisdictions generally treat these exceptional cases in a similar fashion as they would a standard different-sex case; and, when there is evidence to support the existence of differences between the two — in either outcome or reasoning — they are based on problematic premises. Bringing together cases that consider whether to distribute property at the conclusion of a relationship with cases that consider whether alimony should be terminated shows the extent to which marriage still defines the nonmarital relationship. Significantly, understanding how courts reach decisions in these two contexts reveals how they are using the nonmarital relationship to enforce traditional marital norms.

Courts addressing same-sex and reverse different-sex nonmarital relationships impose the gendered system embedded in an archaic marital tradition whereby services rendered in a relationship are devalued.<sup>405</sup> When considered in the context of a same-sex couple, or of a different-sex couple where a man is requesting property from a woman, the valuations courts engage in may be less obvious. But they are of a piece with a long line of cases that demote the work done in the home, for the family, and elevate the work done outside of the home, for the workforce. 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 productive breadwinner, but decline to do so for time

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<sup>405</sup> Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2210 (1994) (“We live in a world in which unwaged labor in the home stands as an anomaly: lacking explanation but not requiring one either.”).

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invested, or services rendered, as a result of being a productive homemaker.

Indeed, the exceptional cases clearly gender the valuation of the work done at the end of a relationship by providing compensation for actually building a home, but not for being a traditional homemaker.<sup>406</sup> The reverse different-sex cases in particular import into their decisions the role a man ought to occupy: by penalizing a man for being an inadequate breadwinner at the end of a nonmarital relationship, or by assuming that the man's role is one of provider in determining whether his alimony payments should end on account of his new relationship, courts define his role as that of provider.

The principal difference between the modal and the exceptional cases is the court's diminished concern with promoting and protecting marriage in deciding whether to distribute property at the end of a relationship. In the same-sex context, courts liken the relationship to marriage in a way they would refrain from doing for a different-sex couple even though — or rather, *because of* — the fact that same-sex couples could not actually marry. In the reverse different-sex context, courts are less preoccupied with promoting marriage as the status a man should seek out prior to receiving a property distribution because marriage has not so obviously been a source of support for the man. Quite the opposite, in fact: the husband was expected to provide support in marriage, which the wife received in exchange for the performance of her specific duties.<sup>407</sup>

Marriage emerges as the true marker of the nonmarital relationship in the termination of alimony cases. Courts explicitly ask whether couples can marry in deciding whether to terminate alimony — marriage not only defines the nonmarital relationship, but also becomes the intended goal of alimony termination by incentivizing couples who can marry, to marry. Other courts import marriage into the analysis by considering whether the nonmarital relationship is like a marriage — even where the couple was prevented from marrying by statute. The only approach that disregards nonmarriage's relationship to marriage, and the nature of the nonmarital relationship itself, is looking at the financial status of the parties; courts that undertake this analysis do not distinguish between the sex of the individuals in the

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<sup>406</sup> See *supra* Section II.B.1.

<sup>407</sup> The common law of marital status dictated that “a husband was obliged to support his wife, and she to serve him.” See Siegel, *supra* note 405, at 2158. As Siegel explains, “in the nineteenth century, married women performed most of their productive labor in the family setting: the economically valuable but uncompensated work of raising, feeding, and clothing a family.” See *id.* at 2144.

couple, or even whether the individuals in the couple are having sex.<sup>408</sup>

Considering how courts approach the end of alimony as they do the end of a relationship shows that regulating these relationships for purposes of property distribution is anything but arbitrary. The nonmarital relationship depends for definition on how the court characterizes its association with marriage. The only instance where marriage is irrelevant to the termination of alimony analysis is where the court considers the financial impact of the relationship on the ex-spouse. That is, when the financial need of the ex-spouse is the central concern, and privatization of support the ultimate goal if not explicit aim, then the definition of the relationship is broad — it can be one of friends, or lovers, or something else entirely. Prioritizing the privatization of support leads to the rather radical acknowledgment of a plurality of relationship forms that disrupt the status of the marital family. This very point has been made by scholars who identify that the law's more expansive recognition of families coincides with the goal of privatizing support.<sup>409</sup> Of course, recognizing the relationship for purposes of holding the other individual responsible at its conclusion does not lead to any other attendant rights.<sup>410</sup>

Admittedly, the traditional values courts impose may be more palatable in the same-sex or reverse different-sex context, where the gendered nature of the work is not immediately obvious, or where a

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<sup>408</sup> This final approach is the only one that has the privatization of support as its goal. See Emily J. Stolzenberg, *The New Family Freedom*, 59 B.C. L. REV. (forthcoming 2018) (manuscript at 45) (on file with author) (identifying “privatizing dependency” as “[t]he most fundamental rationale for alimony,” which ensures that “responsibility for supporting the poorer spouse” is placed “on the richer ex-spouse, rather than the public fisc”).

<sup>409</sup> See Appleton, *supra* note 40, at 978 (predicting that “marriage still looms large but perhaps merely as a template for other relationships that could have private support obligations attached”); Laura A. Rosenbury, *Federal Visions of Private Family Support*, 67 VAND. L. REV. 1835, 1866 (2014) (“The government affirmatively recognizes certain intimate relationships, to the exclusion of others, in order to incentivize individuals to privately address the dependencies that often arise when adults care for children and for one another.”).

<sup>410</sup> Deciding whether to terminate alimony is limited in terms of relationship recognition. See Aloni, *supra* note 26, at 1276 (criticizing “deprivative recognition” for depriving couples of benefits they would receive if they were not together, while remaining unable to receive benefits provided to married couples). The resolution of the choice in favor of privatizing support can be understood, ultimately, as conservative. See Stolzenberg, *supra* note 403, at 45 (arguing that “[m]odern alimony doctrine thus protects property rights by explicitly shifting the private-support responsibility onto the poorer spouse post-divorce, a development that shows just how profoundly neoliberalism is reconstructing the family”).

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financially independent woman is being protected from her partner's economic woes. Yet in all of these instances the court's assessment remains confined within the trappings of a traditional marriage, and the services provided outside of marriage but within the home remain free; only financial contributions, or those that can be separated from wifely duties, are remunerated. The one exception to the rule, where "wifely" contributions are valued outside of marriage, is when the court addresses the nonmarital relationship purely in terms of how marital-like it appears to be.<sup>411</sup> In this way the decisions across the nonmarital spectrum work in tandem to ensure that marriage, coded in its traditional format, remains the privileged status.

### B. Contextualizing Nonmarriage

This Article has highlighted the various ways that the law participates in defining nonmarital relationships. By deciding whether and how to distribute property at the conclusion of a nonmarital relationship, or terminate property distributions at the commencement of one, courts place these relationships within the purview of marriage or outside of it. Even in the exceptional cases, courts are valuing the work performed by the individuals in the couple and dictating what roles men and women should occupy. Relying on a close reading of the law reveals just *how* courts construct these relationship terrains that are, at the very least, contestable.

Significantly, this Article does not make any claims about the couples who are at the center of these cases independent from the courts' assessments — whether they are, for instance, more or less stable than marital couples, or whether they are in fact marriage-like.<sup>412</sup> It focuses instead on the assumptions the case law makes in

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<sup>411</sup> It is unsurprising that this reasoning most firmly took hold in the context of same-sex relationships, where marriage was not an option, and the institution was therefore not threatened by any potential equivalence.

<sup>412</sup> Other literature already addresses the demographics of the individuals in these types of relationships. These sources consider the normative question of appropriate regulation and legal recognition which can take the form of recommending more rights or fewer rights. Many scholars care about this precise question, and address how the law can better capture these choices. *See, e.g.,* Carbone & Cahn, *supra* note 4, at 93 (arguing that "more people are choosing not to get married, and the reasons they choose not to have changed" and thus asserting that "[w]e should respect nonmarriage as a separate legal status in its own right"); Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 846-47 (2005) (arguing that "the evidence fails to show that marriage and cohabitation are functionally equivalent or that the law inappropriately distinguishes between them" and thus disagreeing with the imposition of conscriptive rules on

addressing them. Relying on the case law is thus limiting insofar as the couples that go to court are those who have the assets and the wherewithal to do so, which may not be representative of many individuals who are unmarried and who break up. That said, these cases are important even for those couples, as they provide the network of rules against which all couples negotiate. Contextualizing the decisions in the realities of nonmarital relationships leads to further questioning of the decisions themselves, and of the proposals that promote nonmarriage.

With the case law firmly in mind, we can begin to sketch some lines of future inquiry. For instance, studies show that different-sex couples continue to specialize in the roles they assume during a nonmarital relationship and that women take on most of the housework.<sup>413</sup> That is, even in a world where women and men are both market participants and contribute financially to the relationship, women may continue to engage disproportionately in work within the home. Accordingly, if courts persist in taking a “hands off” approach, and decline to value labor outside of marriage, or outside of an approach that considers the nonmarital relationship as marriage-like, then women in particular will continue to be disadvantaged. It also substantiates the status of marriage as more valuable to women than men, if women are the ones who are penalized for the contributions they undertake outside of marriage. In this context then, the cost of courts’ decisions to reaffirm the gratuitous nature of this work is still borne disproportionately by women.

Bringing class differences into the fold exacerbates the problem of not valorizing services provided mainly by women. While “[w]omen now account for nearly half of civilian employees,” and nonmarital arrangements have increased in popularity, a growing class divide exists between women who marry and women who do not.<sup>414</sup> In particular, highly educated women are more likely to marry and remain married, which allows them to access their partners’ economic

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cohabiting relationships).

<sup>413</sup> See, e.g., Teresa Ciabattari, *Cohabitation and Housework: The Effects of Marital Intentions*, 66 J. MARRIAGE & FAM. 118, 119 (2004) (noting that “even though cohabiting women are spending less time on housework than married women are, they are spending more time than cohabiting men” and thus “the gender gap in in housework . . . does persist”); Elizabeth F. Emens, *Admin*, 103 GEO. L.J. 1409, 1412, 1414 (2015) (identifying the distributional costs that fall on mostly women due to the admin work they take on, which “includes the work we do to administer our own individual lives and also, for many people, the lives of others”).

<sup>414</sup> Sharon Sassler & Amanda J. Miller, *Class Differences in Women’s Family and Work Behaviors*, 16 WASH. & LEE J. CIV. RTS. & SOC. JUST. 349, 349-51 (2010).

resources and either better negotiate shared household responsibilities, or outsource those duties.<sup>415</sup> By contrast, women with lower levels of education are more likely to be in cohabiting nonmarital relationships; they are also more likely to have difficulty finding employment.<sup>416</sup> As such, decisions that do not recognize these women's contributions outside of marriage may lead to entrenching their lack of access to material wealth.

The reverse different-sex cases are, however, egalitarian in one sense: neither men nor women are recompensed for engaging in housework outside of a marital relation. But men's behavior is still read through the lens of support — as when courts look to whether the man is supporting his girlfriend in determining whether the alimony payments supporting *him* ought to be terminated<sup>417</sup> — and it is rewarded at the conclusion of a nonmarital relationship — by distributing property for services that involve not homemaking, but actually making a home.<sup>418</sup> Moreover, marriage is not a status that courts recommend a man enter into if he seeks property at the conclusion of a relationship.<sup>419</sup> Combined with evidence that women still seem to expect men to propose,<sup>420</sup> these decisions grant men the power to define not only the nature of their relationship, but also the success of subsequent requests for property when it ends.

The nonmarital case law also has specific implications for same-sex relationships. An open question is whether the ability to marry will negatively impact how courts address the legal recognition and regulation of nonmarital same-sex relationships. Although some scholars have identified a recent shift in the legal landscape,<sup>421</sup> it is

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<sup>415</sup> *Id.* at 352-53.

<sup>416</sup> *Id.* at 366.

<sup>417</sup> See *Waters v. Boney*, No. 2008-CA-00127, 2009 WL 321295, at \*5 (Ohio Ct. App. Feb. 9, 2009); see also discussion *supra* notes 395-400 and accompanying text.

<sup>418</sup> See *Salzman v. Bachrach*, 996 P.2d 1263, 1269 (Colo. 2000) (en banc); see also discussion *supra* notes 221-29 and accompanying text.

<sup>419</sup> When women in a different-sex nonmarital relationship are the plaintiffs, courts recommend marriage as a way of obtaining property when the relationship ends. See Antognini, *supra* note 6, at 53-54 (identifying court decisions that explicitly counsel the woman to marry in order to receive property at the end of a relationship).

<sup>420</sup> Even though “cohabitation appears to be an arena where normative gender roles can be contested,” there is evidence that shows that “men continue to play dominant roles in both initiating whether couples become romantically involved and in formalizing these unions via proposing.” See Sharon Sassler & Amanda J. Miller, *Waiting to Be Asked: Gender, Power, and Relationship Progression Among Cohabiting Couples*, 32 J. FAM. ISSUES 482, 501 (2011) (concluding that “cohabitation mainly served to reinforce rather than challenge extant gender norms”).

<sup>421</sup> See discussion *supra* Section I.A.

worth noting that the cases post-*Obergefell* do not much alter the overall trajectory of the nonmarital case law pre-*Obergefell*. In fact, the Illinois Supreme Court's decision in *Blumenthal* is not appreciably different than what had already been taking place in the context of nonmarital relationships generally: the decision draws the line to exclude remuneration for contributions made inside the home, rendered outside of marriage. Courts routinely consider only financial contributions to the relationship, which ends up harming the lower-earner where there was role specialization in a same-sex relationship.

That said, the ability of same-sex couples to marry post-*Obergefell* matters in the following way: courts at the end of a nonmarital relationship may be more reluctant to subsume the same-sex relationship into marriage, and courts in the alimony context will more widely terminate payments on account of that relationship.<sup>422</sup> The reasons for doing so are not new, and track the age-old motivations for why courts have been more hesitant to do so in the context of a different-sex relationship — the prioritization of the marital relationship. Now that same-sex couples can marry, it is a status worth preserving and promoting over nonmarriage. And, those jurisdictions that rely on the ability to marry to terminate alimony will now likely apply their reasoning to same-sex couples. There is, however, evidence that same-sex couples are less likely to assume specialized roles in their relationships;<sup>423</sup> if true across the board, then the impact of these decisions promoting marriage as the principal status that provides property may be more limited. The channeling effect of marriage is less salient when property rights cannot be used as either a stick or a carrot.<sup>424</sup>

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<sup>422</sup> See discussion *supra* Section III.A. Murray also identifies the normative undercurrent of preferring marriage over nonmarriage in *Blumenthal II*: “Not only is the state under no obligation to recognize and respect nonmarriage on par with marriage, when the option is available — and now it is widely available — individuals *should* pursue marriage over nonmarriage.” See Murray, *Nonmarriage Inequality*, *supra* note 2, at 1248.

<sup>423</sup> See Lisa Giddings et al., *Birth Cohort and the Specialization Gap Between Same-Sex and Different-Sex Couples*, 51 *DEMOGRAPHY* 509, 530 (2014) (“Same-sex couples are less likely than their different-sex counterparts, both married and unmarried, to specialize in market and domestic spheres. Relative to both married and unmarried different-sex couples, same-sex couples are generally more likely to have both partners participating in the labor force, more likely to have both partners working full-time, and differ less in hours worked between spouses/partners.”). The study notes, however, that the “specialization gap” between same-sex and different-sex couples is narrowing across birth cohorts, and that the gap is also smaller between same-sex couples and unmarried different-sex couples. *Id.*

<sup>424</sup> *But see* Ben-Asher, *supra* note 15, at 1355-56 (arguing against the “myth that

Race also runs through these relationships — both same-sex and different-sex — albeit imperceptibly in the cases given that the opinions do not address the race of the individuals in court. While marriage rates have fallen among all racial groups, the decrease has been most sharp among black families.<sup>425</sup> Put another way, African-Americans are “the most unmarried of any group in the country.”<sup>426</sup> These nonmarital families tend to be “disproportionately poor and headed by females.”<sup>427</sup> In the different-sex context then, the law as currently structured may especially disadvantage black women, if they are responsible for housework in addition to paid work. The men would also have a difficult time reaping anything from the relationship if they were unable to contribute financially.<sup>428</sup>

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same-sex couples are egalitarian” and relying on studies showing instead “that income disparity and gender stereotyping lead higher earners in same-sex couples to traditionally masculine chores, and lower earners to traditionally feminine chores”). Moreover, it is far from clear that these decisions in fact function as a way to promote marriage. See Antognini, *supra* note 6, at 52-58 (arguing that courts have inconsistent rationales in promoting marriage and critiquing the effectiveness of each).

<sup>425</sup> PEW RES. CTR., THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES 2, 9 (2010), <http://www.pewsocialtrends.org/files/2010/11/pew-social-trends-2010-families.pdf> (“Blacks (32%) are much less likely than whites (56%) to be married, and this gap has increased significantly over time.”). Black couples are also most likely to have cohabited. *Id.* at 85 (“Some 47% of blacks say they have cohabited, compared with 44% of whites and 39% of Hispanics.”). As already mentioned, however, socioeconomic issues cut across race: “the lowest income adults are more likely than the highest income adults to be currently in an unmarried partnership.” *Id.*

<sup>426</sup> R.A. Lenhardt, *Marriage as Black Citizenship?*, 66 HASTINGS L.J. 1317, 1320, 1356 (2015) (proposing nonmarriage as an alternative for black families instead of “setting traditional marriage as the lodestar for all black affective relationships”).

<sup>427</sup> *Id.* at 1320 (noting the difference between white and black unmarried family configurations, and identifying the marginalization of the latter given that they “are disproportionately poor and headed by females”). The problem of race also interacts with concerns over gender. In the context of alimony, Twila Perry has already warned that questions of justice and equality “should also consider the implications . . . on the many women in this society who will never have the option to become full-time homemakers, to work part-time, or to otherwise slow down their careers to provide more care for their husbands or children.” Twila L. Perry, *Alimony: Race, Privilege, and Dependency in the Search for Theory*, 82 GEO. L.J. 2481, 2497 (1994). A more robust theory of alimony that could ease inequalities for divorcing women may nonetheless result in reifying racial and class hierarchies among all women, given that white women and wealthier women are awarded alimony at greater rates than black women and poorer women. *Id.* at 2483 (identifying evidence that shows that black women and poor women are awarded alimony in fewer numbers than white women and women who exit higher income marriages).

<sup>428</sup> Caretaking by men is also less valued by law, which may have race-based implications. See CLARE HUNTINGTON, FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS 42 (2014) (noting that in the context of parenting, “African



Questions of race raise distinct concerns in the context of same-sex couples. Evidence shows that African-American same-sex couples on average make less than African-American different-sex couples.<sup>429</sup> When considered by gender, however, women in same-sex couples make slightly more than women in different-sex couples.<sup>430</sup> These statistics suggest that legal rules that fail to consider non-financial contributions to the relationship may be less detrimental if both individuals contribute assets, in the absence of role-specialization.<sup>431</sup> These rules may also be less relevant, if the couples have fewer assets to distribute.<sup>432</sup>

While the nonmarital case law involves couples with sufficient means to go to court, the reality of nonmarital relationships is decidedly more varied. Many questions have yet to be answered, or even formulated, given the direction nonmarital relationships are taking. It is, however, essential to understand the remarkably consistent and completely conventional ways that the law continues to define nonmarital relationships.

#### CONCLUSION

The law regulating marriage is changing. Whether the inclusion of same-sex couples into the institution of marriage will disrupt its gendered norms, or provide yet another vehicle through which they are reproduced, remains to be seen. The topic is, and will be, the subject of much debate. But one point is certain: how the law regulates nonmarriage is integral to the conversation about marriage, given the inextricable relationship between the two.

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American fathers who [did] not live with their children [were] more likely to be involved with their children than Latino or white fathers . . . [and were] more likely to maintain better co-parenting relationships with the mothers”).

<sup>429</sup> THE WILLIAMS INST., *LGBT AFRICAN-AMERICANS AND AFRICAN-AMERICAN SAME-SEX COUPLES* 5 (2013), <https://williamsinstitute.law.ucla.edu/research/census-lgbt-demographics-studies/lgbt-african-american-oct-2013/>. That said, it is difficult to make generalizations, given “how African-American couples fare compared to their different-sex counterparts varies significantly depending on the gender of the couple and whether the couple is raising children.” *Id.* at 6.

<sup>430</sup> *Id.* at 5.

<sup>431</sup> That said, women who are raising children seem to be struggling financially and also “report[] lower rates of social characteristics that may ultimately affect their families, such as insurance coverage for both partners.” *Id.* at 6.

<sup>432</sup> Or they may be more relevant, given the individuals’ limited means.