Nonmarriage: The Double Bind

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Abstract

Nonmarital families constitute a large and growing slice of the population in the United States and around the world. Scholars and policymakers are increasingly grappling with how the law does and should regulate these relationships. Many other countries have responded to this demographic shift by adopting a "status-based approach." Under this approach, if the relationship meets various criteria, the couple is subject to family law rules. States in the United States, however, continue to resist this trend. The United States, it is said, applies a "contract-based approach" to nonmarriage. This Article offers new insights on this critically important debate.

By meticulously rereading the case law through the prism of market doctrines, this Article reveals that the law of nonmarriage in the United States follows neither approach. Instead, it places nonmarital partners in an untenable double bind: nonmarital partners are at once nonfamilies and families. Nonmarital partners are denied protection under the law of the family because they are not family. Simultaneously, they are denied protection under private law doctrines when the underlying transactions are too family-like.

The content of this double bind is also peculiar. Nonmarital partners are denied relief for their family-like bargains because the law subjects these claims—and only these claims—to heightened formality requirements, beyond those imposed on sophisticated business players. The practical result of these features is that the critical work of forming and running nonmarital families remains outside of the law's grasp. This Article concludes by employing the theoretical lens of the double bind to challenge the normative defenses of nonmarriage as autonomy and family respecting.

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Introduction

Nonmarital families constitute a large and growing slice of the U.S. population.[1] In 1960, there were fewer than 500,000 nonmarital cohabiting couples.[2] By 2017, that number had increased to over nine million.[3] How the law regulates this ever-increasing segment of the population in the United States, and indeed around the world,[4] is of increasing interest to scholars[5] and policymakers alike.[6] Many other

1 Juliana Horowitz, Nikki Graf & Gretchen Livingston, Pew Rsch. Ctr., Marriage and Cohabitation in the U.S. 15 (2019), https://www.pewresearch.org/social-trends/2019/11/06/the-landscape-of-marriage-and-cohabitation-in-the-u-s/ [https://perma.cc/6NZF-SLJ5] ("[C]ohabitation rates have increased across all age groups since 1995, though this growth has slowed in the past decade."); *see also* Courtney G. Joslin, *Autonomy in the Family*, 66 UCLA L. Rev. 912, 915 (2019) (noting that "[b]etween 2000 and 2010, the unmarried cohabiting partner population grew by over 40 percent").

2 *Historical Living Arrangements of Adults*, U.S. Census Bureau (Nov. 2021), https://www.census.gov/data/tables/time-series/demo/families/adults.html [https://perma.cc/447W-F4XQ] (select link to download "Table UC-1. Unmarried Couples of the Opposite-Sex: 1960 to Present").

3 *See* Kaiponanea T. Matsumura, *Consent to Intimate Regulation*, 96 N.C. L. Rev. 1013, 1016 (2018).

4 Anna Stepien-Sporek & Margaret Ryznar, *The Consequences of Cohabitation*, 50 U.S.F. L. Rev. 75, 89–90 (2016) (describing different approaches to cohabitation in Europe).

5 *See generally* Albertina Antognini, *Nonmarital Contracts*, 73 Stan. L. Rev. 67 (2021) [hereinafter Antognini, *Nonmarital Contracts*]; Kaiponanea T. Matsumura, *Breaking Down Status*, 98 Wash. U. L. Rev. 671 (2021); Katharine K. Baker, *What Is Nonmarriage?*, 73 SMU L. Rev. 201 (2020); Joslin, *supra* note 1; Albertina Antognini, *Nonmarital Coverture*, 99 B.U. L. Rev. 2139 (2019) [hereinafter Antognini, *Nonmarital Coverture*]; Michael J. Higdon, *While They Waited: Pre-*Obergefell *Lives and the Law of Nonmarriage*, 129 Yale L.J.F. 1 (2019); Emily J. Stolzenberg, *The New Family Freedom*, 59 B.C. L. Rev. 1983 (2018); Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. Rev. 425 (2017) [hereinafter Joslin, *Gay Rights Canon*]; Matsumura, *supra* note 3; June Carbone & Naomi Cahn, *Nonmarriage*, 76 Md. L. Rev. 55 (2016); William N. Eskridge Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 Geo. L.J. 1881 (2012); Marsha Garri-

countries—including Canada and Australia—have responded to this demographic shift by adopting a "status-based" approach.[7] Under this approach, if the relationship meets various criteria, the couple is subject to family-based rules.[8] States in the United States, however, continue to resist this trend.[9] Instead, the conventional narrative suggests, the United States applies a "contract-based" approach to nonmarriage.[10]

This Article offers new insights on this critically important debate about the legal treatment of nonmarriage.[11] By meticulously rereading the law of nonmarriage through the prism of market doctrines, this Article reveals that the law of nonmarriage in the United States follows neither approach. Instead, the law places nonmarital partners in a curious "double bind."[12] Nonmarital partners are at once nonfamilies and families. They are nonfamilies for the purposes of family law and families for the purposes of market law. In both instances, their family status (or lack thereof) is invoked for the purpose of denying them protection of the law.

The content of nonmarriage's double bind is also peculiar. Nonmarital partners are denied relief for their family-like bargains because the law subjects these claims to heightened requirements.[13] Although sophisticated business players can seek relief in the absence of compliance with formalities, nonmarital partners typically cannot do

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son, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. Rev. 815 (2005).

6 The Uniform Law Commission recently promulgated a uniform act governing the economic rights and obligations of unmarried cohabitants. *See* Unif. Cohabitants' Econ. Remedies Act (Unif. L. Comm'n, Draft July 15, 2021). I served as an observer on this project.

7 *See, e.g.*, Helen Alvaré, *U.S. Cohabitation Law: Still Separate and Unequal*, Inst. for Fam. Stud. (June 25, 2019), https://ifstudies.org/blog/us-cohabitation-law-still-separate-and-unequal [https://perma.cc/PRW9-CT83] ("More than a few nations and countries have granted marital-like rights to cohabiting couples—*if* their relationship meets several criteria. These include Australia, New Zealand, Canada, Ireland, the Scandinavian countries, and Scotland.").

8 *Id.*

9 *See infra* Section I.B.

10 *See infra* Section I.B.

11 *See, e.g.*, *Developments in the Law—Unjust Enrichment* (ch. 3), 133 Harv. L. Rev. 2124, 2127 (2020) [hereinafter *Developments in the Law*] ("For decades, scholars have argued over the economic rights of partners at the end of a cohabiting relationship. Some advocate a contract-based approach, others a status-based approach." (footnotes omitted)).

12 *See* Janet E. Halley, *Reasoning About Sodomy: Act and Identity in and After* Bowers v. Hardwick, 79 Va. L. Rev. 1721, 1748 (1993) ("In everyday language, you are in a double bind when you cannot win because your victorious opponent is willing to be a hypocrite and to 'damn you if you do and damn you if you don't.'").

13 *See infra* Section II.B.

so, at least for bargains related to quotidian details of forming and running a family.

The conventional understanding of the law of nonmarriage is as follows. Nonmarital partners are not family members. As such, former nonmarital partners are precluded from invoking family law's property division and spousal support rules.[14] This is true regardless of how long they have lived together, or whether they have children in common.[15] Nonmarital partners can, however, pursue relief under the law of the market, including contract law and business law doctrines like partnership.[16] As the California Supreme Court famously put it in its 1976 *Marvin v. Marvin*[17] decision, "adults who voluntarily live together and engage in sexual relations *are nonetheless as competent as any other persons* to contract respecting their earnings and property rights."[18] Or, as the Tennessee Supreme Court explained, "ordinary laws pertaining to partnership, not the laws of domestic relations, apply."[19]

This Article reveals, however, that this understanding is inaccurate, or at least incomplete. Although nonmarital partners generally are entitled to invoke a variety of private law doctrines, including claims sounding in contract, equity, and partnership, these doctrines are incompletely applied to them. More specifically, courts decline to

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14 *See infra* Part I.

15 *See, e.g.*, Joslin, *supra* note 1, at 917–18; *see also* Antognini, *Nonmarital Contracts*, *supra* note 5, at 72 ("[U]nmarried couples have no status-based rights.").

16 *See, e.g.*, *Developments in the Law*, *supra* note 11, at 2128–29. ("Contractual approaches start from the position that cohabitants, like all legal strangers, derive no baseline, default protections from their relationship but are nevertheless free to alter that default arrangement by contract."); IRA MARK ELLMAN, PAUL M. KURTZ, LOIS A. WEITHORN, BRIAN H. BIX, KAREN CZAPANSKIY & MAXINE EICHNER, FAMILY LAW: CASES, TEXT, PROBLEMS 935 (5th ed. 2010) ("The majority of states will recognize some contracts claims between unmarried cohabitants, as well as claims grounded in equity."); Margaret M. Mahoney, *Forces Shaping the Law of Cohabitation for Opposite Sex Couples*, 7 J.L. & FAM. STUD. 135, 159 (2005) ("In the decades since the *Marvin* case was decided, the courts and legislatures in almost all states have adopted some version of this contract doctrine."); PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03 cmt. b (AM. L. INST. 2002) ("In the United States, courts generally rely upon contract law when they conclude that cohabiting parties may acquire financial obligations to one another that survive their relationship. The great majority of jurisdictions recognize express contracts, and only a handful of them require that the contract be written rather than oral.").

17 557 P.2d 106 (Cal. 1976).

18 *Id.* at 116 (emphasis added); *see also* Joslin, *supra* note 1, at 920 ("[I]n theory, *Marvin* treats former nonmarital partners like other legal strangers."); Salzman v. Bachrach, 996 P.2d 1263, 1269 (Colo. 2000) ("[T]he court should determine—*as with any other parties*—whether general contract laws and equitable rules apply." (emphasis added)).

19 Martin v. Coleman, 19 S.W.3d 757, 761 (Tenn. 2000).

apply private law principles to ventures or exchanges that are *too family-like*.[20] In other words, nonmarital partners are denied protection under the law of the family because they are not family,[21] and, simultaneously, they are denied protection under the law governing market transactions with respect to critical bargains relating to the creation and running of their relationship.[22]

Consider *Martin v. Coleman*.[23] The case involved Robert and Delores Coleman.[24] Two years after Delores gave birth to their daughter, the parties married.[25] After ten years of marriage, the parties divorced.[26] Shortly after divorcing, however, the parties resumed living together as a couple, which they did for the next sixteen years.[27] Throughout this period of nonmarital cohabitation, the parties "held themselves out to the public as husband and wife," and "conducted their affairs as though they were married."[28] Throughout the entirety of their twenty-eight-year relationship, Delores never had outside paid employment;[29] instead, she "provid[ed] all of those amenities and benefits customarily provided by a wife."[30] Upon the conclusion of their relationship, litigation ensued to unwind their assets.[31] In the litigation, Delores sought a division of the assets accumulated during their sixteen-year nonmarital relationship.[32]

If the parties had been married during that sixteen-year period, a court likely would have awarded Delores an equitable share of all of the assets accumulated during that time.[33] The court held, however, that for purposes of that period, Delores was not a family member.[34] Delores was therefore not entitled to a family law-based remedy: "In Tennessee, marriage is controlled by statute, and common-law marriages are not recognized."[35] It was uncontroverted that the parties

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20 *See infra* Part II.

21 *See infra* Section I.B.

22 *See infra* Section II.B.

23 19 S.W.3d 757 (Tenn. 2000).

24 *Id.* at 759.

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.*

29 *Id.*

30 *Id.* at 761 (quoting the trial court order).

31 *Id.* at 759.

32 *Id.*

33 *See* TENN. CODE ANN. § 36-4-121(a)(2).

34 *See Martin*, 19 S.W.3d at 761–62.

35 *Id.* at 760; *see also* Carney v. Hansell, 831 A.2d 128, 138 (N.J. Super. Ct. Ch. Div. 2003) ("Being unmarried, plaintiff of course has no right to alimony or equitable distribution.").

were not married.[36] Accordingly, Delores was not a family partner; she was a legal stranger.

Part I begins by confirming that this conclusion in Delores's case—that nonmarital partners are not family members for purposes of family law—reflects the current state of the law around the country.[37] Thus, as the California Supreme Court declared in the seminal *Marvin v. Marvin* decision, "No language in the Family Law Act addresses the property rights of nonmarital partners . . . ."[38] Or, to use the blunter words of the Colorado Supreme Court, "cohabitation does not trigger any marital rights."[39] Hence, the first half of the conventional understanding of the law of nonmarriage is accurate.

Part II moves from the law of family law to that of the market to test the second half of the conventional understanding—that Delores *can* seek relief under other market law doctrines and can do so to the same extent as any other legal stranger.[40] Part II first surveys the range of claims that can be asserted by legal strangers. Legal strangers can, for example, invoke principles of partnership or joint venture to protect their contributions to joint endeavors.[41] To establish a partnership, the law simply requires the party to demonstrate an "intent to do the things which constitute a partnership."[42] It does not matter whether the parties had "an understanding of the legal effect of their acts."[43] Indeed, even if the parties wished to avoid the formation of a partnership, a court nonetheless can find that the parties created a partnership if they intended to do "the things" together.[44] Moreover, and importantly, the parties' failure to memorialize their intent does not preclude the court from finding the existence of a partnership.[45] In this way, even as between sophisticated parties, courts can look past the lack of formalities to find that the parties intended to and did indeed form a partnership.

Consider, again, Delores's situation. If Delores and Robert had been treated as true legal strangers, the court could have found that

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36 *Martin*, 19 S.W.3d at 760.

37 *See* Joslin, *supra* note 1, at 920.

38 557 P.2d 106, 120 (Cal. 1976).

39 Salzman v. Bachrach, 996 P.2d 1263, 1269 (Colo. 2000).

40 *See, e.g.*, *Developments in the Law*, *supra* note 11, at 2128–29.

41 *See infra* Section II.A.2.

42 Via v. Oehlert, 347 S.W.3d 224, 229 (Tenn. Ct. App. 2010).

43 *Id.*

44 *Id.*

45 *See infra* Section II.A.

they were in a joint venture or an implied partnership together.[46] The "thing" they intended to do together was to create and run a family. As is true of many more traditional "commercial" ventures, the parties joined their skills and contributions in hopes of mutual success, and they did join their skills and contributions for sixteen years. As such, each person should both be entitled to seek a share in the success of that joint venture. Had Delores and Robert not been intimate partners, the court could have awarded such relief even in the absence of a formal partnership agreement, and even if they had not understood that their joint efforts would have that legal effect.

But Part II reveals that courts—including the court in Delores's case—refuse to apply these concepts to the venture of creating and running a nonmarital family.[47] That is, when parties seek protection under the law of the market *for their family-like behavior and bargains*, courts invoke the family-like nature of these relationships to deny application of otherwise available market doctrines.[48] As one court recently put it, "to hold that the parties entered into a joint venture . . . solely because they lived together and jointly contributed to the appreciation of real property would pull the theory of implied partnership/joint venture too far from its moorings."[49] Thus, although the law authorizes recognition of informal business partnerships, the same is not true of informal family partnerships.

To be sure, the law does not preclude any and all relief to nonmarital partners. Nonmarital partners cannot seek relief for the entirety of their joint venture to create and run an informal family.[50] They can, however, seek relief based on individual transactions between the parties.[51] But a closer look reveals this, too, is only partially true. Across jurisdictions and across approaches, nonmarital partners can recover under market law principles for only some of their contributions.[52]

Courts apply and allow recovery under market law doctrines for exchanges that are commercial in nature.[53] Thus, for example, if the

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46 *See infra* Section II.A.

47 *See* Martin v. Coleman, 19 S.W.3d 757, 761–62 (Tenn. 2000) ("To hold that these retirement benefits are available as partnership assets would require this Court to expand the concept of implied partnership beyond the business relationship . . . . We decline to do so.").

48 *See infra* Section II.B.1.

49 *Via*, 347 S.W.3d at 230.

50 *See infra* Section II.B.2.

51 *See* Matsumura, *supra* note 3.

52 *See infra* Section II.B.2.

53 *See* Bass v. Bass, 814 S.W.2d 38, 43 (Tenn. 1991) ("The obvious implication to be drawn

parties started a video game machine enterprise together, the court will recognize and compensate their contributions to that venture.[54] With regard to these commercial transactions, courts can further the parties' intentions and expectations by allowing for the possibility of relief even in the absence of a written agreement, or other compliance with formalities.

Here again, courts generally alter the rules and, importantly, demand more with regard to exchanges that are too family-like.[55] For these family-like exchanges, courts apply a rule that is the opposite of that which is applied to legal strangers. As between strangers, the law presumes that services provided were done so with an expectation of compensation.[56] But the reverse presumption applies to the exchange of domestic caretaking for support as between people who are family members.[57] These services—unlike all other services—are presumed to have been provided gratuitously.[58] Thus, with regard to these family-like bargains and exchanges, compensation typically is available only where the parties formalized the agreement to provide compen-

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from the *Johnson* and *Thornton* decisions is that an individual should not be denied the opportunity to establish the existence of a *business* partnership into which they, like any other competent individual, may enter into, whether or not cohabitation exists.").

54 *Id.* ("There is no question that the Plaintiff and William Bass carried on as co-owners of a business for profit.").

55 *See infra* Section II.B.

56 *See, e.g.*, *In re* Estate of Marks, 187 S.W.3d 21, 29 (Tenn. Ct. App. 2005) ("Persons who provide valuable services to another without an agreement regarding compensation are entitled to recover the reasonable value of their services (1) when the circumstances indicate that the parties to the transaction should have understood that the person providing the services expected to be compensated and (2) when it would be unjust to permit the recipient of the services to benefit from them without payment.").

57 McLane v. Musick, 792 So. 2d 702, 705 (Fla. Dist. Ct. App. 2001) ("When a person provides services to another without a written agreement regarding compensation, a promise to pay for those services will generally be implied. However, this general rule is not applicable if the services are rendered by and for members of the same family or relatives who live together." (footnote omitted)).

58 *See, e.g.*, *In re* Estate of Steffes, 290 N.W.2d 697, 703 (Wis. 1980) ("The basis for applying the presumption of gratuitous service to persons cohabiting but not related by marriage is that in the ordinary course of life persons living together in a close relationship perform services for each other without expectation of payment in the usual sense because the parties mutually care for each other's needs and perform services for each other out of a feeling of affection or a sense of obligation."); Morone v. Morone, 413 N.E.2d 1154, 1157 (N.Y. 1980) ("The major difficulty with implying a contract from the rendition of services for one another by persons living together is that it is not reasonable to infer an agreement to pay for the services rendered when the relationship of the parties makes it natural that the services were rendered gratuitously."). *Cf. Developments in the Law*, *supra* note 11, at 2130 ("[C]ourts have been less willing to embrace *Marvin*'s vision of restitutionary claims for former unmarried cohabitants who provided domestic labor in the relationship.").

sation.[59] Supporters contend that this rule—again, the flip of the usual rule—best respects the parties' autonomy and intentions.

Consider again Delores's situation. If Delores had been a true legal stranger, she could have sought compensation for her years of service in the home.[60] She could have argued, for example, that the parties had an implied contract to pay her for her services. Typically, when services are rendered and accepted, a right of compensation is implied.[61] Alternatively, Delores could have argued that she should be entitled to reasonable compensation for her services under equitable principles, including quantum meruit.[62] But because courts consider people like Delores to be family members for purposes of these claims, they lose.[63] Courts require something more of them than would be required of true third-party business bargainers.[64]

This Article offers critical new contributions to the contemporary conversation about nonmarriage. First, this Article reveals several curious features of the law of nonmarriage. The law of nonmarriage places partners in a double bind. Nonmarital partners are, at once, denied protection of the law of the family because they are nonfamilies, and, simultaneously denied protection of market law for transactions that are too family-like.[65]

The content of nonmarriage's double bind is also peculiar. Nonmarital partners are denied relief for their family-like bargains because the law subjects *these claims and only these claims* to heightened formality requirements, beyond those imposed on sophisticated busi-

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59 *See, e.g.*, Brooks v. Allen, 137 A.3d 404, 410 (N.H. 2016) ("In *Tapley v. Tapley*, we declined to allow recovery for 'domestic services' under an implied contract or in quantum meruit, adopting the view of other jurisdictions that have concluded that until their legislatures determine otherwise, they will not recognize a contract which is implied from the rendition of 'housewifely services.'" (citation omitted) (quoting Tapley v. Tapley, 449 A.2d 1218, 1219 (N.H. 1982))).

60 *See, e.g.*, Moors v. Hall, 532 N.Y.S.2d 412, 415 (App. Div. 1988).

61 *See, e.g.*, *Estate of Marks*, 187 S.W.3d at 29.

62 *See, e.g.*, *Developments in the Law*, *supra* note 11, at 2130.

63 *See, e.g.*, *Brooks*, 137 A.3d at 410; *Morone*, 413 N.E.2d at 1157–58.

64 Indeed, Albertina Antognini demonstrates that even where the parties do formalize the agreement in a writing, courts often refuse to enforce such contracts when they relate to the provision of domestic services. Antognini, *Nonmarital Contracts*, *supra* note 5, at 78.

65 In recent years, a few scholars have identified the reluctance of courts to award relief for claims arising out of the traditional family bargain. *See, e.g.*, Antognini, *Nonmarital Coverture*, *supra* note 5, at 2145 ("[S]ervices that take on the form of homemaking or childrearing—duties undertaken by the wife under coverture—do not lead to any attendant property rights."); *Developments in the Law*, *supra* note 11, at 2130 ("[C]ourts have been less willing to embrace *Marvin*'s vision of restitutionary claims for former unmarried cohabitants who provided domestic labor in the relationship."). This Article presses these important insights further by rereading these cases through the lens of market law.

ness players.[66] To put it more concretely, if the parties bought and ran a video store together, that joint endeavor can be recognized and enforced even if the parties did not memorialize their agreement, and even if they did not understand that their joint efforts could result in mutual rights and obligations.[67] But for their family-like exchanges, a distinctly different set of rules applies. For these exchanges—even as between the same two people—formalities typically are required.[68] Indeed, even compliance with the formalities may not be enough to secure relief.[69] The practical result of these features of the law of nonmarriage is that the critical work of forming and running nonmarital families remains outside of the law's grasp.

After uncovering these novel insights, Part III then uses this new theoretical lens of the double bind to challenge normative defenses of the law of nonmarriage as autonomy and family respecting. A number of scholars argue that the contemporary law respects and reflects the preferences of nonmarital partners.[70] On this account, the law of nonmarriage "recognizes and honors the individual choices that cohabitants and married couples have made. Married couples have chosen obligation; cohabitants have chosen independence. The law recognizes and honors both choices."[71]

Part III reveals, however, that this descriptive assertion of nonmarriage as autonomy protecting fails to account for the way in which the law of nonmarriage applies varied rules to different types of ventures and bargains. With respect to their "commercial" ventures, the law respects party autonomy by authorizing courts to recognize their bargains even in the absence of proof formalities.[72] The rules regarding business ventures excuse the lack of formalities, it is said, to honor the intent and expectations of the parties. But the law of nonmarriage applies a distinctly different rule to a subset of exchanges as between nonmarital partners—namely, domestic ventures and exchanges—allegedly to further the same end. Here, courts will not recognize and

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66 *See infra* Section II.B.

67 *See, e.g.*, Bass v. Bass, 814 S.W.2d 38, 43–44 (Tenn. 1991).

68 *See, e.g.*, Antognini*, Nonmarital Contracts*, *supra* note 5, at 102–03 (noting that some jurisdictions allow for only express contracts in nonmarital relationships).

69 *Id.*; *see also, e.g.*, *Bass*, 814 S.W.2d at 43.

70 *See, e.g.*, Joslin, *supra* note 1, at 941–42 ("Among scholars, the leading defense of *Marvin* sounds in the register of autonomy.").

71 Garrison, *supra* note 5, at 896; *see also* Carbone & Cahn, *supra* note 5, at 63–64, 121.

72 *See infra* Section II.A.

give effect to the mutual decision to form a family or bargains necessary to run that family in the absence of formalities, if at all.[73]

To the extent the disparate treatment of family-like exchanges is acknowledged, courts and scholars posit that this legal disjunction appropriately respects the unique importance of these contributions. On this view, presuming that family-like contributions—unlike all others—are provided gratuitously is a "crucial means by which the law . . . preserves the specialness and dignity of intimate relations."[74] The work of running a family is performed "not as a servant, with a view to pay, but from higher and holier motives."[75] Treating the provision of domestic caretaking just like other business contributions would "impoverish" these hallowed contributions.[76] To avoid doing so, the law presumes that these domestic services are provided as "gifts" or gratuities.[77]

Part III offers historical context to facilitate a more accurate evaluation of the applicability of this so-called "presumption of gratuity" to nonmarriage. This chronicle reveals useful insights. The contemporary rule finds its "roots . . . in a status discourse that gave the head of a household property rights in the 'services' of its members (that is, wife, children, servants)."[78] In other words, the providers of these household services were not entitled to compensation because the law of the family already required the bestowal of the services in exchange for the provision of support. Applied to nonmarital families, however, the rule's logic falters. As Part I teaches, no legal rights or obligations flow by virtue of a nonmarital relationship.[79] Nonmarital partners are

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73 *See, e.g.*, McLane v. Musick, 792 So. 2d 702, 704–05 (Fla. Dist. Ct. App. 2001).

74 Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 499 (2005).

75 Cropsey v. Sweeney, 27 Barb. 310, 315 (N.Y. Gen. Term 1858).

76 *See* Melvin Aron Eisenberg, *The World of Contract and the World of Gift*, 85 CALIF. L. REV. 821, 847 (1997) ("[T]he world of contract is a market world, largely driven by relatively impersonal considerations and focused on commodities and prices. The impersonal organs of the state are an appropriate means to enforce promises made in such a world. In contrast, much of the world of gift is driven by affective considerations like love, affection, friendship, gratitude, and comradeship. That world would be impoverished if it were to be collapsed into the world of contract."); *see also* Hila Keren, *Considering Affective Consideration*, 40 GOLDEN GATE U. L. REV. 165, 226–27 (2010) ("This fear is described by Eisenberg as the fear of impoverishing the non-legal world of gifts as a result of contaminating it with legal and market-born ideas.").

77 *See, e.g.*, Trimmer v. Van Bomel, 434 N.Y.S.2d 82, 85 (Sup. Ct. 1980) (describing domestic services as ones that "would ordinarily be exchanged without expectation of pay").

78 Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930*, 82 GEO. L.J. 2127, 2206 (1994).

79 *See, e.g.*, Kaiponanea T. Matsumura, *Beyond Property: The Other Legal Consequences of Informal Relationships*, 51 ARIZ. ST. L.J. 1325, 1330 (2019).

excluded from a vast array of default protections extended to legally recognized family members, and the law imposes no reciprocal duties upon them.[80] Hence, to the extent the rule retains any contemporary validity, it is inapt as applied to nonmarital partners.

I. Partners but Not Family Partners

A. The Law of the Family

At common law, the property rights of married spouses were largely defined by the doctrine of coverture. Under coverture, "[t]he husband gained his wife's property and earning power because he was legally responsible to provide for her."[81] The doctrine thus "prevented wives from holding or acquiring separate property during marriage."[82] At divorce, the spouses were awarded the property for which their respective names were on the title.[83] Given the rules governing ownership during marriage, this generally resulted in awards granting "most or all of the property to the husband."[84]

Over time, courts came to appreciate that this system often produced unjust results. As the Mississippi Supreme Court explained, this was true "especially involving cases of a traditional family where most property was titled in the husband, leaving a traditional housewife and mother with nothing but a claim for alimony, which often proved unenforceable."[85] Even in families in which "both spouses worked," it was often the case that "the husband's resources were devoted to investments while the wife's earnings were devoted to paying the family expenses or vice versa."[86] In such cases, "the same unfair results ensued."[87] Moreover, the court continued, the system "is also unable to take account of a spouse's non-financial contribution."[88]

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80 *See id.*

81 Nancy F. Cott, Public Vows: A History of Marriage and the Nation 12 (2000); *see also* Hendrik Hartog, Man and Wife in America: A History 115 (2000) ("Coverture meant that, in exchange for gaining full ownership of all of his wife's personal property and absolute control for life over her real estate, a husband was bound to support her . . . .").

82 Joanna L. Grossman & Lawrence M. Friedman, Inside the Castle: Law and the Family in 20th Century America 193 (2011).

83 *Id.*

84 *Id.*

85 Ferguson v. Ferguson, 639 So. 2d 921, 926 (Miss. 1994).

86 *Id.*

87 *Id.*

88 *Id.* (quoting Stephen J. Brake, *Equitable Distribution vs. Fixed Rules: Marital Property Reform and the Uniform Marital Property Act*, 23 B.C. L. Rev. 761, 765 (1982)).

Eventually all states—including Mississippi[89]—jettisoned a title-based approach for distributing marital property. Today, "all fifty states divide the available" estate either "equally or equitably upon divorce."[90] As a result, "regardless of the governing system, judges [generally] presume that marital property will be split more or less evenly but have some power to deviate based on equitable factors."[91]

These property division rules reflect the understanding, or at least the ideal, that the parties both contribute in important ways to the success of the marital venture and thus should both share in their collective successes.[92] "Marital partnership theory recognizes that spouses jointly contribute their labor as well as a wide range of financial and non-financial resources for the good of the marital relationship as a whole."[93] Accordingly, "the collective benefits produced by mutual efforts during marriage are conceptualized as jointly acquired and jointly owned."[94] This theoretical understanding is embraced at least to some degree in all states.[95]

This law of family dissolution allows courts to "soften the often harsh economic [gendered] consequences of divorce."[96] "Marriage gives men the opportunity, support, and time to invest in their own careers."[97] In this way, "marriage . . . builds and enhances the husband's earning capacity."[98] By contrast, marriage erodes women's earning potential.[99] Despite advancements, this gendered impact per-

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89 *Id.* at 927.

90 Joslin, *Gay Rights Canon*, *supra* note 5, at 481; *see* Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1230 ("[E]very state's default approach is now designed to effectuate an equal or equitable division of all property accumulated from wages during marriage, regardless of the title of that property." (footnotes omitted)).

91 GROSSMAN & FRIEDMAN, *supra* note 82, at 200.

92 *See* Alicia Brokars Kelly, *Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life*, 19 WIS. WOMEN's L.J. 141, 143 (2004) (expressing that "[t]he marital partnership model is centrally about recognizing a community of interests created by the individuals who have joined their lives").

93 *Id.*

94 *Id.*

95 *See* Bea Ann Smith, *The Partnership Theory of Marriage: A Borrowed Solution Fails*, 68 TEX. L. REV. 689, 696 (1990) ("Nearly every state currently embraces the community-property concept of marriage as a partnership.").

96 *Id.*

97 LENORE J. WEITZMAN, THE DIVORCE REVOLUTION 342 (1985).

98 *Id.*

99 Joan Williams, *Is Coverture Dead? Beyond A New Theory of Alimony*, 82 GEO. L.J. 2227, 2245 (1994) ("Statistics also dramatize the way marriage enhances men's market potential, while eroding women's: married men make more than single men, whereas married women earn less than single women.").

sists.[100] Women, including married women, continue to perform more of the domestic tasks related to the running of families.[101] To perform these tasks critical to the functioning of a family, the individuals performing them often "cut back on or disrupt entirely their careers."[102] "Because [the wife] has invested her human capital in the home rather than the labor market, . . . she will . . . be less well positioned [at divorce] . . . compared to her partner, who will have invested his human capital in advancing his career and improving his salary."[103] This pattern of task division in marital households often leaves the wife "significantly disadvantaged."[104] Marital dissolution principles acknowledge and seek to lessen the impact of this continued reality. One of the ways existing family law doctrine does so is by allowing spouses, including spouses who contributed primarily through domestic services, to be awarded an equal or equitable share of all property accumulated during the relationship.[105]

All fifty states also allow such spouses to seek spousal support.[106] Contemporary spousal support statutes generally authorize judges "to make 'just' or 'equitable' awards, sometimes guided by a list of relevant factors."[107] To be sure, current divorce rules remain insufficient to protect women from the negative financial consequences of divorce. Nonetheless, at least in theory, they seek to recognize the concept that both spouses are contributing to the success of the whole. Because the parties are recognized as partners in this joint endeavor, the law declares that they are entitled to share in the successes of the community, regardless of their type of contribution.

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100 Jennifer Bennett Shinall, *Settling in the Shadow of Sex: Gender Bias in Marital Asset Division*, 40 CARDOZO L. REV. 1857, 1861 (2019) ("[W]omen as a whole continue to see their finances decline after divorce.").

101 *See American Time Use Survey, Charts by Topic: Household Activities*, U.S. BUREAU LAB. STAT. (Dec. 20, 2016), https://www.bls.gov/tus/charts/household.htm [https://perma.cc/AD3K-K9K9]; *see also* Alicia Brokars Kelly, *Navigating Gender in Modern Intimate Partnership Law*, 14 J.L. & FAM. STUD. 1, 10 (2012) (explaining that, "[d]espite . . . shifts," "[w]omen still do more unpaid care work than men, and men still provide more market work and income than women"); Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1, 20 (2005) ("[R]esearchers consistently find that women spend significantly more time than men engaged in caregiving activities for children and the disabled elderly." (footnote omitted)).

102 Courtney G. Joslin, *Family Choices*, 51 ARIZ. ST. L.J. 1285, 1310 (2019).

103 Maxine Eichner, *Marriage and the Elephant: The Liberal Democratic State's Regulation of Intimate Relationships Between Adults*, 30 HARV. J.L. & GENDER 25, 49 (2007).

104 *Id.*

105 *See supra* note 90 and accompanying text.

106 *See* GROSSMAN & FRIEDMAN, *supra* note 82, at 195 ("Historically, courts in all states could award alimony to wives, in a divorce or legal separation.").

107 *Id*. at 204 (citing Mills v. Atl. City Dep't of Vital Stat., 372 A.2d 646 (N.J. 1977)).

B. Nonmarital Partners and Family Law

The law of the family does not apply to nonmarital partners. Historically, courts refused to award any relief upon the dissolution of nonmarital relationships.[108] Until the 1970s, most states criminalized nonmarital cohabitation and sex outside of marriage.[109] "Given that they were not only partners in life but also partners in crime," some reasoned that awarding any form of relief for claims arising out of their relationship "would violate [state] public policy."[110] Thus, as one early decision put it, even the enforcement of an express agreement based on "future illicit cohabitation between the parties is void."[111] Today, nonmarital cohabitation is no longer a crime.[112] States, however, still refuse to treat these partners as family members.[113] As a result, no mutual rights or obligations flow by virtue of the existence of a nonmarital relationship.[114] To use the words of the Colorado Supreme Court, "cohabitation does not trigger any marital rights."[115]

Consider the Illinois Supreme Court case *Hewitt v. Hewitt*.[116] The case involved nonmarital partners—Victoria and Robert—who separated after a fifteen-year relationship.[117] The parties began living together in 1960, around the time that Victoria became pregnant.[118] At the time, Robert told Victoria "that they were husband and wife and

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108 *See* Joslin, *supra* note 1, at 919 ("Until the 1970s, many courts refused to permit former nonmarital partners to pursue any claims for recovery upon dissolution.").

109 *See, e.g.*, CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 13–20 (2010); Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 579 (2013).

110 Joslin, *supra* note 1, at 919.

111 Wallace v. Rappleye, 103 Ill. 229, 249 (1882); *see also* Case Comment, *Property Rights upon Termination of Unmarried Cohabitation:* Marvin v. Marvin, 90 HARV. L. REV. 1708, 1713 (1977) ("The doctrine of illegality has been invoked to render an agreement unenforceable as against public policy if the parties contemplated nonmarital sexual intercourse as any part of the consideration.").

112 *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578–79 (2003) (striking down statute criminalizing nonmarital sex); Martin v. Ziherl, 607 S.E.2d 367, 371 (Va. 2005) (striking down Virginia's law criminalizing fornication); *see also* Joslin, *Gay Rights Canon*, *supra* note 5, at 479.

113 *See, e.g.*, Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1, 16 (2017) (noting that only two states—Washington and Nevada—"apply the rules regulating property distribution at divorce to the end of a nonmarital relationship"). In many states, a party is entitled to some family-law protections under the putative spouse doctrine if they had a good faith belief they were in a valid marriage. *See, e.g.*, Hewitt v. Hewitt, 394 N.E.2d 1204, 1210 (Ill. 1979). The vast majority of nonmarital partners, however, are well aware they are not married.

114 *See, e.g.*, Sands v. Menard, 904 N.W.2d 789, 801 (Wis. 2017) (noting that while "cohabitation between unmarried romantic partners is not a bar to an otherwise valid claim of unjust enrichment[,] . . . the romantic relationship [itself does not] create[] [a] claim for relief").

115 Salzman v. Bachrach, 996 P.2d 1263, 1268–69 (Colo. 2000).

116 394 N.E.2d 1204 (Ill. 1979).

117 *Id.* at 1205.

118 *Id.*

would live as such, no formal ceremony being necessary."[119] Robert also promised Victoria that he would "share his life, his future, his earnings and his property."[120] Thereafter, the parties "held themselves out" to others, including their own families, as a married couple.[121] Like many married couples, Victoria and Robert pooled their efforts for the joint benefit of the family.[122] For example, "in reliance on [Robert's] promises [Victoria] devoted her efforts to his professional education and his establishment in the practice of pedodontia."[123] Victoria also "obtain[ed] financial assistance from her parents" to support Robert's professional pursuits.[124] After Robert established his dental practice, Victoria assisted in the office.[125] Had they married, Victoria would have been entitled to an equitable share of the assets accumulated during their relationship.[126] She also would have been entitled to seek spousal support.[127]

But because they did not formalize their relationship through marriage, those rules did not and could not be applied to Victoria.[128] Even though they had lived like a married couple, and even though Victoria had contributed finances and her services to further Robert's assets and his earning capacity, Victoria was not entitled to an equitable share of the parties' jointly accumulated assets, or to request an award of spousal support under the state's domestic relations laws.[129] To entitle her to do so, the court concluded, would violate the legislature's intent and state public policy.[130]

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119 *Id.*

120 *Id.*

121 *Id.*

122 *See id.*

123 *Id.*

124 *Id.*

125 *Id.*

126 *See In re* Marriage of Hamilton, 128 N.E.3d 1237, 1249 (Ill. App. Ct. 2019) ("The distribution of assets must be equitable in nature.").

127 As noted above, all fifty states allow spouses to seek spousal support. *See, e.g.*, GROSSMAN & FRIEDMAN, *supra* note 82, at 195 ("Historically, courts in all states could award alimony to wives, in a divorce or legal separation."). Given the length of their relationship, the very unequal earning capacities of the parties, and because Victoria helped develop Robert's earning capacity, a court very well may have awarded Victoria spousal support had they been married. *See, e.g.*, J. Thomas Oldham, *Changes in the Economic Consequences of Divorces, 1958–2008*, 42 FAM. L.Q. 419, 432 (2008) (noting that courts are more willing "to award indefinite term alimony when parties are divorcing after a marriage of long duration, the parties' incomes are quite different, and the recipients cannot realistically be retrained").

128 *See Hewitt*, 394 N.E.2d at 1210.

129 *See id*.

130 *Id.* at 1211 ("We accordingly hold that plaintiff's claims are unenforceable for the rea-

Like Illinois, other states refuse to apply the law of the family to nonmarital partners.[131] The law declares that these parties are legal strangers, not family members. As such, they fall outside the scope and protection of the doctrine of family law. In this way, the U.S. approach is distinctly different from the trends seen in other countries around the world. A growing number of other countries apply family law rules to nonmarital couples upon dissolution or death.[132]

But while nonmarital partners are precluded from invoking the law of the family, almost all states have since abandoned *Hewitt*'s purported "no recovery" model.[133] Instead, it is said, nonmarital partners can now invoke other private law doctrines that regulate relationships between legal strangers.[134] These doctrines include contract law, equitable principles, and business law principles like partnership and joint venture.[135] The California Supreme Court led this shift in its famous 1976 *Marvin v. Marvin* decision.[136] *Marvin* affirmed the principle that nonmarital partners could *not* pursue family law remedies.[137] The court, however, simultaneously declared that former nonmarital partners were not without any remedy. *Marvin* established that nonmarital partners should be entitled to seek the remedies available to other legal strangers.[138] As the *Marvin* court put it, "adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights."[139] Or, to use the words of the Wisconsin Supreme Court, "neither public policy nor the abolition of common-

son that they contravene the public policy . . . disfavoring the grant of mutually enforceable property rights to knowingly unmarried cohabitants.").

131 "[O]ne or two states extend married-like rights and protections based on proof of a sufficiently committed, interdependent nonmarital relationship." Joslin, *supra* note 1, at 930; *see also* Antognini, *supra* note 113, at 16 (identifying two states).

132 *See, e.g.*, Stepien-Sporek & Ryznar, *supra* note 4, at 89–90.

133 *See* Joslin, *supra* note 1, at 919–20; *see also* Marvin v. Marvin, 557 P.2d 106, 122 (Cal. 1976) ("[O]ur courts should by no means apply the doctrine of the unlawfulness . . . to the instant case.").

134 *See, e.g.*, Joslin, *supra* note 1, at 920–21.

135 *See* Stepien-Sporek & Ryznar, *supra* note 4, at 92.

136 557 P.2d 106 (Cal. 1976).

137 *Id.* at 110 ("We conclude: (1) The provisions of the Family Law Act do not govern the distribution of property acquired during a nonmarital relationship; such a relationship remains subject solely to judicial decision."); *see also* Salzman v. Bachrach, 996 P.2d 1263, 1268–69 (Colo. 2000) ("[C]ohabitation does not trigger any marital rights.").

138 *See Marvin*, 557 P.2d at 116.

139 *Id.*; *see also Salzman*, 996 P.2d at 1268–69 ("[T]he court should determine—as with any other parties—whether general contract laws and equitable rules apply.").

law marriage prohibited an unmarried cohabitant from asserting a contractual or quasi-contractual claim against another cohabitant."[140]

II. Partners but Not Business Partners

A. The Law of the Market

The *Marvin* court's rule represents the conventional understanding of the law of nonmarriage: nonmarital partners are not partners for purposes of family law, but they may be partners for purposes of private law remedies, including those sounding in contract law, equity, or business law principles.[141] As the *Marvin* court explained, they are "as competent as any other persons to contract respecting their earnings and property rights."[142]

Numerous commentators critique this approach to nonmarriage. Critics argue that this body of law is not well suited to the regulation of nonmarital relationships. A core defect with this approach, it is said, is that "couples do not in fact think of their relationship in contract terms."[143] Others note that this approach fails adequately to account for unequal bargaining power that is often at play in intimate relationships.[144] Elsewhere, I also argue that "the current regime does a poor job of recognizing and protecting individual's decisions or choices to form a family."[145]

This Part approaches the law of nonmarriage from a different perspective. Specifically, this Part tests whether and under what circumstances the law indeed treats nonmarital partners as being as "competent as any other persons" to pursue relief under market doctrines.[146] Ultimately, this Part finds that the problem runs much deeper than critiques noted above that focused on the inapt fit be-

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140 Sands v. Menard, 904 N.W.2d 789, 798 (Wis. 2017).

141 *See, e.g.*, Matsumura, *supra* note 79, at 1329.

142 *Marvin*, 557 P.2d at 116.

143 Ira Mark Ellman, *"Contract Thinking" Was* Marvin*'s Fatal Flaw*, 76 Notre Dame L. Rev. 1365, 1367 (2001) [hereinafter Ellman, *Contract Thinking*]; *see also* Matsumura, *supra* note 3, at 1040 ("[A]s critics of *Marvin* have pointed out, '[p]eople don't generally make formal contracts about either the conduct of their relationship or the consequences that ought to flow in the event they end it.' They might be uninterested in arms-length bargaining or incapable of achieving that self-interested distance." (alteration in original) (footnote omitted) (quoting Ira Mark Ellman, *Inventing Family Law*, 32 U.C. Davis L. Rev. 855, 874 (1999))).

144 *See, e.g.*, Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. Rev. 1125, 1163 (1981) ("[T]he cohabitants' unequal bargaining power leads to unjust results under contract theory.").

145 Joslin, *supra* note 1, at 915.

146 *See Marvin*, 557 P.2d at 116.

tween nonmarital partners and contract principles.[147] This Part shows that these partners are subjected to formalities and requirements beyond those imposed on true third-party bargainers. For true third-party bargainers, courts are authorized to look beyond a lack of formalities to give effect to the contributions that have in fact been exchanged. But as between nonmarital partners, more is required, at least for their family-like exchanges.

But, first, a review of those market doctrines is necessary.

1. Exchanges

One body of private law frequently invoked in the context of nonmarital relationships is the law of contracts.[148] This body of law has long been viewed as "the core of the private law system."[149] Contract law, and a variety of equitable doctrines that serve as gap-filling functions, facilitate the provision of compensation in exchange for the provision of valuable services. Under basic contract doctrine, where parties expressly mutually assent—that is agree—to enter into a bargain to which they each contribute consideration, a contract has been formed.[150]

Moreover, even where this agreement was not in writing, a court can find an implied agreement if the parties' conduct reveals this is indeed what the parties intended; the fact that the parties failed to express their intent in writing or orally does not preclude the court from finding that intent.[151] As the Wisconsin Supreme Court put it in 1911,

> The general rule is that if a person performs valuable services for another at that other's request, the law implies, as matter of fact, the making of a promise by the latter and ac-

147 *See, e.g.*, Ellman, *Contract Thinking*, *supra* note 143, at 1367.

148 *See, e.g.*, PRINCIPLES OF THE L. OF FAM. DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03 cmt. b (AM. L. INST. 2002) ("In the United States, courts generally rely upon contract law when they conclude that cohabiting parties may acquire financial obligations to one another that survive their relationship.").

149 Danielle Kie Hart, *Contract Formation and the Entrenchment of Power*, 41 LOY. U. CHI. L.J. 175, 185 (2009).

150 *Id.* at 200 (noting that "[m]utual assent and consideration are still all that are needed to form a valid, traditional contract"); *see also* RESTATEMENT (SECOND) OF CONTS. § 17(1) (AM. L. INST. 1981) ("[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.").

151 1 RICHARD A. LORD, WILLISTON ON CONTRACTS § 1:5 (4th ed. 2004) ("Just as assent may be manifested by words, so intention to make a promise may be manifested in language or by implication from other circumstances, including the parties' course of dealing or course of performance, or a usage of trade.").

> ceptance thereof by the former to pay the one performing the service the reasonable value thereof. . . . [T]he burden of proof is upon the recipient of the service to rebut such presumption if he would escape from rendering such equivalent.[152]

In this way, the law allows courts to find consent based on the parties' conduct, even in the absence of compliance with formalities.[153]

Historically, though, when there was no meeting of the minds, persons seeking relief were often "without a remedy" under common law.[154] Eventually, this situation was viewed as creating "inequitable" results.[155] "To correct this inequitable situation the remedy of implied in law contract came into being . . . ."[156] Under this doctrine, "the courts invent[] the fiction that the two had entered into a contract, even though the beneficiary never expected to reimburse the plaintiff and indeed even where he deliberately intended the contrary."[157] The doctrine has its "foundation in natural justice" and is understood to be necessary in order to prevent "the unjust enrichment of one party at the expense of another."[158]

Today, courts use a variety of phrases to refer to this basic principle: quasi-contract, implied in law contract, constructive contract, and quantum meruit.[159] While the words may vary, "[t]hey are all legal fictions created by courts of law to provide remedies which prevent unjust enrichment and thereby promote justice and equity. Their purpose is to provide the injured party with the fair value of the work and services rendered and thus prevent unjust enrichment to another."[160] Hence, even without an agreement, a person is entitled to recover the "reasonable value of their services (1) when the circumstances indicate that the parties to the transaction should have understood that

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152 Wojahn v. Nat'l Union Bank, 129 N.W. 1068, 1077 (Wis. 1911) (citations omitted).

153 *See, e.g.*, Orit Gan, *The Many Faces of Contractual Consent*, 65 DRAKE L. REV. 615, 622–23 (2017) ("This objective manifestation test . . . relies exclusively on the outward manifestations of intent, as measured objectively from the point of view of the other contracting party, and with what is known as the 'reasonable person' standard." (footnote omitted)).

154 Comment, *Quasi-Contracts—Relationships Raising Presumption of Gratuity*, 6 FORDHAM L. REV. 417, 417 (1937) [hereinafter *Quasi-Contracts*].

155 *Id.*

156 *Id.*

157 *Id.* at 418 (footnote omitted); *see also* 1 LORD, *supra* note 151, § 1:6 ("[A] quasi or constructive [contract] . . . does not require mutual assent but is imposed by a fiction of the law, to enable justice to be accomplished, even when no contract was intended by the parties.").

158 *Quasi-Contracts*, *supra* note 154, at 417–18.

159 *See, e.g.*, Wright v. Pennamped, 657 N.E.2d 1223, 1229 (Ind. Ct. App. 1995), *decision clarified on denial of reh'g*, 664 N.E.2d 394 (Ind. Ct. App. 1996).

160 *Id.* (citation omitted).

the person providing the services expected to be compensated and (2) when it would be unjust to permit the recipient of the services to benefit from them without payment."[161]

Indeed, "[b]ecause a contract implied in law is not really a contract at all, it may even be imposed in the face of a clearly expressed contrary intent if justice so requires."[162]

To fairly compensate parties for the provisions of valuable services rendered and accepted, courts can award recovery even in the absence of express agreements. This principle applies even if the provider of the services was a sophisticated party familiar with the law of contracts.[163]

2. Joint Endeavors

Contract law and equitable theories allow parties to recover compensation for services that they provided from those who accepted and benefitted from those services. Other private law doctrines allow parties not only to recover the value of the services provided, but also to share in the success of the parties' combined efforts. Like with the contract- and equity-based doctrines described above, these doctrines allow for the recognition of the joint efforts, and an award of recovery based on evidence of the joint endeavor itself, even when the parties failed to formalize their agreement.[164]

One such doctrine is the law of business partnership. If parties expressly agree to form a partnership, that agreement will be recognized and enforced, subject to certain limitations set forth in law.[165]

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161 *In re* Estate of Marks, 187 S.W.3d 21, 29 (Tenn. Ct. App. 2005).

162 1 LORD, *supra* note 151, § 1:6; *see also* DCB Constr. Co. v. Cent. City Dev. Co., 965 P.2d 115, 119 (Colo. 1998) ("[T]he [unjust enrichment] claim arises, 'not from consent of the parties, as in the case of contracts, express or implied in fact, but from the law of natural immutable justice and equity.'" (quoting DCB Constr. Co. v. Cent. City Dev. Co., 940 P.2d 958, 962 (Colo. App. 1996))).

163 *See* Cablevision of Breckenridge, Inc. v. Tannhauser Condo. Ass'n, 649 P.2d 1093, 1097 (Colo. 1982) (holding that a cable company was entitled to payment for services in the absence of an express agreement because "it would be inequitable to allow its use without payment for its value").

164 Other scholars explore whether family law doctrine should import the standards that apply to business partnership. *See, e.g.*, Jane Rutheford, *Duty in Divorce: Shared Income as a Path to Equality*, 58 FORDHAM L. REV. 539 (1990); Jennifer A. Drobac & Antony Page, *A Uniform Domestic Partnership Act: Marrying Business Partnership and Family Law*, 41 GA. L. REV. 349 (2007); Larry E. Ribstein, *Incorporating the Hendricksons*, 35 WASH. U. J.L. & POL'Y 273 (2011).

165 *See, e.g.*, UNIF. P'SHIP ACT § 105(a) (1997) (UNIF. L. COMM'N, amended 2013) ("Except as otherwise provided in subsections (c) and (d), the partnership agreement governs: (1) relations among the partners as partners and between the partners and the partnership; (2) the

Moreover, a business partnership can arise out of the parties' conduct, *even in the absence of a formal agreement* and even if the parties do not realize that their conduct might result in the creation of a legally recognized joint endeavor.

These principles are well established. Almost all fifty states follow the Uniform Partnership Act ("the UPA" or "the Act")—either the original 1914 version, or the 1997 revision.[166] The UPA sets forth default rules that apply to a business partnership in the absence of an agreement. Under the Act, a business partnership can be established without any formal action.[167] Moreover, the partnership can arise without the knowledge or realization of the partners.[168] As the comment to section 202 of the Act explains: "a partnership is created by the association of persons whose intent is to carry on as co-owners a business for profit, regardless of their subjective intention to be 'partners.' Indeed, they may inadvertently create a partnership despite their expressed subjective intention not to do so."[169] In other words, "subjective intent and subjective awareness are probative but not dispositive."[170] The critical question is whether the *mutual endeavor* itself was "voluntary and consensual."[171] Or, as courts have put it, "[i]t is the intent *to do the things* which constitute a partnership that determines whether individuals are partners, regardless [of whether] it is their purpose to create or avoid the relationship."[172] Again, the critical intent is the intent to do the project together. This can create the implied business partnership regardless of whether the parties had any clear intentions about how to split the profits or whether they had any conversations about or understandings of the legal implication of that joint project.

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business of the partnership and the conduct of that business; and (3) the means and conditions for amending the partnership agreement.").

166 Drobac & Page, *supra* note 164, at 386 & n.173 (stating that nearly all fifty states apply the UPA); Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67, 120 (1993) (stating that "[t]he UPA codifies the law of partnership in forty-nine states").

167 *See* Drobac & Page, *supra* note 164, at 389.

168 *See id.*

169 UNIF. P'SHIP ACT § 202, cmt.; *see also* Barry E. Adler, *The Accidental Agent*, 2005 U. ILL. L. REV. 65, 65 ("When parties agree to share profits and control of a business venture, they are deemed under law to have formed a partnership even if the parties have never expressly provided for such a result.").

170 Drobac & Page, *supra* note 164, at 389–90.

171 *See id.*

172 Via v. Oehlert, 347 S.W.3d 224, 229 (Tenn. Ct. App. 2010) (emphasis added).

If the endeavor is treated as a business partnership, then the law of partnership provides the applicable rules. The basic default "[p]artnership doctrine incorporates the ideal that partners are equal, enjoying equal rights to share in the profits and to control and manage partnership property."[173]

Moreover, while the parties retain the right to alter or opt out of some of these default rules by agreement, there are limits on their ability to avoid their fiduciary obligations to other partners.[174] In sum, under this doctrine, the law imposes mutual legal rights and obligations on parties to a joint business endeavor even if they did not intend to take those on and even if they did not understand that their actions might cause that result. Again, this concept is well established and indeed applies in almost all fifty states.[175]

Consider *Wyatt v. Brown*.[176] The case involved a lawsuit against two people—Dearing and Brown—alleging that they had breached a contract with the plaintiff to dig a well which would provide potable water.[177] The question was whether Dearing and Brown had a partnership and were, therefore, both liable for the breach of the contract.[178] The trial court held both parties liable, but the suit against one of them—Brown—was dismissed by the intermediate appellate court.[179]

On appeal to the Tennessee Court of Appeals, Brown argued that the finding that there was no partnership should be affirmed on the ground that "there was no intent to form a partnership and that no partnership can result without such intent."[180] While there was indeed some evidence of such an intent in the case, the court took pains to clarify that "[i]t is not essential that the parties actually intend to become partners."[181] "[N]or," the court continued, "is it essential that the parties have knowledge of the legal effect of their acts."[182] Instead, the critical inquiry is whether they intended "to do a thing"—the joint

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173 Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 104 (2001); *see also* Rutheford, *supra* note 164, at 555 ("[P]artnership law expressly favors sharing and equality. For example, the UPA provides for partners to share profits and losses equally, share the management of the business equally, and share partnership property equally." (footnotes omitted)).

174 Drobac & Page, *supra* note 164, at 387.

175 *See id.* at 386 & n.173.

176 281 S.W.2d 64 (Tenn. Ct. App. 1955).

177 *Id.* at 66.

178 *Id.*

179 *Id.*

180 *Id.* at 67.

181 *Id.* (internal citations omitted).

182 *Id.* (internal citations omitted).

project—that constitutes the partnership.[183] And that intent to do the thing together governs, even if they did not want to take on the rights and obligations that flow from the joint venture. In determining whether the parties indeed intended to do the thing—the joint venture—courts emphasize the importance of joint contributions, the sharing of decision making, and joint benefits from the endeavor.[184]

A closely related concept is that of joint venture or joint adventure. While some courts use the phrase "joint venture" interchangeably with business partnerships, in other jurisdictions, the concept is used to refer to a narrower undertaking.[185] In any event, this common law concept is now widely recognized. Like partnerships, a joint venture or adventures is "[a]n undertaking on the part of two or more persons to combine their property or labor in the conduct of a particular line or general business, for joint profit."[186] Where this is found, the conduct of the parties "creates the status of a partnership."[187] Whether or not there are some distinctions between the entities, "[p]artnership law *generally* applies to joint ventures."[188] As Sarath

183 *Id.* (internal citations omitted).

184 *See In re* Thornton's Estate, 499 P.2d 864, 868 (Wash. 1972) ("[The parties] jointly contributed their labor to the cattle and farming enterprise; . . . they shared in the decision making concerning the enterprise; and . . . they benefited jointly from the profits thereof."); *see also* Bass v. Bass, 814 S.W.2d 38, 43 (Tenn. 1991) ("The parties pooled their money to purchase 'food and things,' to pay bills and, most importantly, to lease the restaurant. . . . When asked about who kept up with the financial aspect of the businesses, Linda Bass stated that 'mostly, we took care of it together.'").

185 *See, e.g.*, O.K. Boiler & Welding Co. v. Minnetonka Lumber Co., 229 P. 1045, 1047 (Okla. 1924) ("The principal distinction between a partnership and a joint adventure is that the latter may relate to a single transaction."); *see also* Sarath Sanga, *A Theory of Corporate Joint Ventures*, 106 CALIF. L. REV. 1437, 1449 (2018) ("A few states admit idiosyncratic differences between partnership and joint venture law.").

Some scholars contend this position that the entities are "distinct legal form[s]" is legally incorrect. Robert Flannigan, *The Joint Venture Fable*, 50 AM. J. LEGAL HIST. 200, 200 (2008–2010) ("It recurrently is assumed that a joint venture is a distinct legal form. That is not a valid assumption. The joint venture claim materialised [sic] only aberrantly in the nineteenth century. A remedial distinction within partnership law led to, or was the springboard for, the assertion that the ' joint venture' had a legal identity different from every other form of commercial association.").

186 *O.K. Boiler & Welding Co.*, 229 P. at 1047.

187 *Id.*

188 Sanga, *supra* note 185, at 1448 (footnote omitted); *see also id.* at 1450–51 ("Thus, . . . in Texas and Maryland, joint venture and partnership are legally equivalent; in all other states, case law has approximately equated the two."); Goss v. Lanin, 152 N.W. 43, 45 (Iowa 1915) ("[A]lthough courts in modern times do not treat a joint venture as identical with a partnership, it is so similar in its nature and in the contractual relationships created by such adventure that the rights as between themselves are governed practically by the same rules that govern partnerships.").

Sanga explains, "The reasoning behind this typically revolves around a simple inference: joint ventures are, by legal definition, similar to partnerships; therefore, partnership law should apply."[189]

The basis for finding a joint venture is similar to the requirements for an implied business partnership:

> To constitute a joint adventure the parties may combine their property, money, efforts, skill or knowledge in some common undertaking, and their contribution in this respect need not be equal or of the same character, but there must be some contribution by each joint adventurer of something promotive of the enterprise.[190]

Joint venture can be found even in the absence of an express agreement; it can "be implied, in whole or in part, from the conduct of the parties."[191] A joint venture can be found even if "one adventurer owns all the property used in the joint adventure."[192] And "while a provision for sharing losses is important in construing an agreement for a joint enterprise, it is not essential, and neither an agreement to share profits nor losses is conclusive in the construction of the contract."[193] Ultimately what matters is "the intention of the parties."[194]

These widely accepted principles—recognizing and compensating valuable exchanges in the absence of express agreements or compliance with formalities—are regularly applied even when the parties are relatively sophisticated business players. Take the recent case of *Houle v. Casillas*.[195] The lawsuit "stemmed from difficulties that arose from a real estate investment and renovation project that failed to pan out as planned."[196] This was intended to be a for-profit business project. The men had some sophistication regarding business projects and concepts. For example, the men decided to "form a limited liability corporation (LLC) [for the purpose of] purchas[ing] the Pershing Property."[197] But despite their business acumen and their knowledge

189 Sanga, *supra* note 185, at 1448.

190 Rhodes v. Sunshine Mining Co., 742 P.2d 417, 421 (Idaho 1987); *see also* Pittman v. Weber Energy Corp., 790 So. 2d 823, 827 (Miss. 2001).

191 *Rhodes*, 742 P.2d at 421; *see also* Lane v. Nat'l Ins. Agency, 37 P.2d 365, 368 (Or. 1934) ("The rule of law that a contract of joint adventure may be implied from the conduct of the parties, permits and requires a consideration not only of the testimony directly indicating that there was such a contract, but also of the evidence which shows the course of dealing . . . .").

192 *Rhodes*, 742 P.2d at 421.

193 *Id.*

194 *Id.*

195 594 S.W.3d 524 (Tex. App. 2019).

196 *Id.* at 532.

197 *Id.* at 533.

about compliance with formalities, they left other aspects of their business arrangement unmemorialized.[198]

When the business venture began to flounder, one of the men—Houle—sued the other and the LLC. Among other things, Houle argued the parties had formed an implied business partnership and that Casillas had violated the implied duty of "good faith and fair dealing."[199] In response, "Casillas argued that a partnership was not formed, primarily because the parties did not sign a written agreement to that effect."[200] Applying the well-settled rules of business partnership, the court rejected this argument: "The fact that a written agreement was not signed, however, is not dispositive of the question of whether a partnership was actually formed . . . ."[201] Moreover, the facts that the parties could have memorialized *and* knew how to memorialize their joint business venture but failed to do so, did not bar a finding of an implied partnership. As the court put it, "The fact that the parties agreed to form an LLC to effectuate their agreement does not preclude the possibility that the parties already had a pre-existing—and continuing—partnership."[202]

Indeed, courts have even found implied partnerships among people who really should know how to memorialize their agreements—lawyers. *Beckman v. Farmer*[203] involved two lawyers who practiced together, but who "never executed a contract defining the nature of their association and respective rights and duties."[204] When a third lawyer later joined the group, he too never executed a "formal agreement defining his status."[205] The group eventually sought to disentangle their relationships. One of the men, Farmer, sued alleging that the other two had breached their fiduciary duties to him—duties that arose, he argued, by virtue of an implied partnership between the parties.[206] Here too, the court said that the key issue is whether the parties intended "to do *the acts* that in law constitute partnership."[207] Ultimately, the court concluded that the parties may have entered into

198 *Id.* at 547.

199 *Id.* at 543.

200 *Id.* at 547.

201 *Id.*

202 *Id.*

203 579 A.2d 618 (D.C. 1990).

204 *Id.* at 623.

205 *Id.*

206 *Id.* at 625–26.

207 *Id.* at 627 (emphasis added) (quoting ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON PARTNERSHIP § 2.05(c) (1988)).

an implied partnership, even though they failed to formalize such an intent.[208]

B. Nonmarital Partners and Market Law

The conventional narrative recognizes that nonmarital partners are excluded from the law of the family. The narrative suggests, however, that nonmarital partners are entitled to market law protections. This Section shows that this description is inaccurate or at least incomplete. It is true that most states allow the parties, at least in theory, to assert a range of claims that are available to other legal strangers, including claims arising in contract or equitable theories, as well as various business concepts.[209] A closer examination of the law of nonmarriage, however, reveals that courts do not uniformly apply the law of the market to these families. Instead, at the same time the law denies the very existence of these families, it also invokes their familial nature to deny consistent application of well-established market doctrines to some ventures and exchanges between them. The result is that their family-like ventures and bargains are subjected *to more stringent formality requirements* than those that are imposed on sophisticated business partners.

As between true legal strangers, the law authorizes courts to recognize joint business partnerships or ventures that exist in fact, even in the absence of formalities, express agreements, or even an understanding of the consequences of the parties' conduct. But courts refuse to apply these principles equally to recognize and give effect to the joint endeavor of starting and running a family. Instead, for this venture alone, formalities are required.[210]

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208 *Id.* at 628–29.

209 *See supra* Section II.A.

210 *See, e.g.*, Sands v. Menard, 904 N.W.2d 789, 801 (Wis. 2017) ("*Watts* [*v. Watts*] simply provided that cohabitation between unmarried romantic partners is not a bar to an otherwise valid claim of unjust enrichment. It did not provide that the romantic relationship created the claim for relief." (citing Watts v. Watts, 405 N.W.2d 303 (Wis. 1987))); Salzman v. Bachrach, 996 P.2d 1263, 1268–69 (Colo. 2000) ("We find these authorities persuasive and agree that cohabitation and sexual relations alone do not suspend contract and equity principles. We do caution, however, that mere cohabitation does not trigger any marital rights.").

In this way, the law of nonmarriage is another example of family law exceptionalism. I explore other types of family law exceptionalism elsewhere. *See, e.g.*, Courtney G. Joslin, *Federalism and Family Status*, 90 IND. L.J. 787, 794 (2015); Courtney G. Joslin, *The Perils of Family Law Localism*, 48 U.C. DAVIS L. REV. 623, 627 (2014); Courtney G. Joslin, *Modernizing Divorce Jurisdiction: Same-Sex Couples and Minimum Contacts*, 91 B.U. L. REV. 1669, 1673 (2011).

1. *Business Endeavors but Not Family Endeavors*

This Section considers how business law concepts are—or are not—applied to the joint venture *to create and run a family and to exchanges that allow that joint venture to function*. Recall the basic theory of partnership:[211] the partnership is recognized when the parties combined their "money, assets, labor, or skill . . . with the understanding that" the successes of the partnership "will be shared between them."[212] This basic idea aptly describes what happens in many nonmarital families; the parties mutually decide to pool their resources, their labor, and their skills for the purpose of forming a joint venture—a family—with the expectation that they will both benefit from and share the fruits of this collaboration.

Indeed, courts in a few states recognize this core similarity. In Washington State, for example, courts are authorized to distribute property that was acquired by unmarried partners as a result of their joint efforts.[213] The rule recognizes that nonmarital families typically involve a pooling of resources and skills for the collective benefit.[214] As is true in the context of joint business ventures, the law acknowledges that the refusal to divide the property that was acquired as a result of those joint efforts in furtherance of the common venture would result in unfairness.[215]

As is true in the context of joint commercial ventures, not all intimate endeavors are indeed family partnerships. Accordingly, in deciding whether to impose a sharing obligation on the parties, Washington courts are directed to consider a number of factors: "continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties."[216] These factors are similar to the factors that are relevant to determining the existence of an implied business partnership or joint venture.[217] Recall that to determine whether an implied business partnership exists, courts are directed to assess whether "it appears that the individuals involved have entered into a business relationship for profit, combining their property, labor, skill, experience, or

211 *See supra* Section II.A.

212 Bass v. Bass, 814 S.W.2d 38, 41 (Tenn. 1991).

213 *See, e.g.*, Connell v. Francisco, 898 P.2d 831, 834–35 (Wash. 1995).

214 *See, e.g.*, *id.* at 834.

215 *See, e.g.*, *id.* at 836 ("[T]he property acquired during the relationship should be before the trial court so that one party is not unjustly enriched at the end of such a relationship.").

216 *Id.* at 834.

217 *See supra* Section II.A.

money."[218] Then, as is true with regard to implied business partnerships, if the court determines the parties did indeed form a family relationship, the court is directed to "make[] a just and equitable distribution of [the partnership's] property."[219]

A small minority of other jurisdictions follow a similar approach. For example, in *Beal v. Beal*,[220] the Oregon Supreme Court announced a rule that allows the court to distribute the assets accumulated by the joint family venture if the parties either expressly or, importantly, *impliedly* "intended to pool their resources for their common benefit during the time they lived together."[221] The *Beal* court concluded the parties intended to pool their resources for their common benefit.[222] The court reached this conclusion by looking to facts common of many relationships: "Neither party," the court explained, "made any effort to keep separate accounts or to total their respective contributions for reimbursement purposes, and, although they had separate checking accounts, they had a joint savings account. Finally, the living arrangement itself is evidence that the parties intended to share their resources."[223] Where this type of joint living and pooling of resources is evident, Oregon courts are authorized to treat the endeavor as a partnership and to distribute the partnership's property consistent with the "express or implied intent of those parties."[224]

A more recent case involved a couple who lived together for twenty-one years, during which time they raised three children together.[225] As the court explained, during their twenty-one years together, they pooled their labor and resources together for the benefit of the joint endeavor—the running of their family:

> Petitioner[, Ronald Joling,] worked outside the home as a general contractor. Respondent[, Jackie Joling,] maintained the parties' home, raised the children, and, for a time, homeschooled them. Respondent testified that her work at home included cooking, cleaning, laundry, shopping, gardening, and helping to build the family home. She did "everything" when it came to household chores.[226]

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218 Bass v. Bass, 814 S.W.2d 38, 41 (Tenn. 1991).

219 *In re* Marriage of Pennington, 14 P.3d 764, 770 (Wash. 2000).

220 577 P.2d 507 (Or. 1978).

221 *Id.* at 510.

222 *Id.*

223 *Id.*

224 *Id.*

225 *See In re* Domestic P'ship of Joling, 443 P.3d 724, 726 (Or. Ct. App. 2019).

226 *Id.*

Ronald filed an action seeking a dissolution and for child custody.[227] Jackie counterclaimed, alleging "breach of a claimed contract of marriage."[228] Ultimately, the court applied the *Beal* rule to the parties' relationship. To determine whether Jackie was entitled to relief under the rule, the court said the critical question was whether the parties' intended to pool and share their common resources.[229] In assessing this issue, the court identified a number of relevant factors, including:

> [T]heir pooling of their resources for their common benefit; their financial arrangements that indicated a sharing of resources, which included a joint saving account; and their combined living arrangements. We also consider as relevant to the parties' implicit intent, "among other things, whether the parties held themselves out to the community as married, how title to the property was held, and the parties' respective financial and nonfinancial contributions to their assets."[230]

Like the concept of joint venture or implied business partnership, if the parties intended to do the thing together—here, the creation and running of a family—that intent creates the joint relationship. Once found, the court can distribute the assets accumulated by virtue of the joint venture. As with joint "business" ventures, the distribution of the "domestic" partnership's assets need not be an equal distribution; it is based on the parties' intentions and their respective contributions.

Nevada courts follow a similar approach. The seminal Nevada case involves a couple who were first married for about seven years.[231] "Almost immediately after their divorce," however, "they resumed cohabitation and continued to live together" for another twenty-four years.[232] During the course of their life together, the couple had three children.[233] After their separation, the woman, Virginia, brought an action seeking a distribution of the property acquired during the course of their nonmarital relationship. "Her complaint alleged that during the course of their relationship, she and respondent had been holding themselves out as husband and wife and had 'pooled all monies earned . . . as if they were a marital community or a general part-

227 *Id.* at 727.

228 *Id.*

229 *Id.* at 729.

230 *Id.* (citations omitted) (quoting *In re* Domestic P'ship of Staveland & Fisher, 433 P.3d 749, 754 (Or. Ct. App. 2018)).

231 Hay v. Hay, 678 P.2d 672, 673 (Nev. 1984).

232 *Id.*

233 *Id.*

nership.'"[234] The court held that Virginia's allegations were "sufficient to state a cause of action."[235]

These decisions apply a rule that is similar to the rule of implied business partnerships. Like with implied business partnerships, the question is whether they intended to do the thing—here that "thing" being the pooling their assets, skills, and resources to create and run a family for their mutual benefit. As is true with regard to implied business partnerships, in the rules described above, courts can "ascertain" that intent by looking to "the acts of the parties."[236] Like with implied business partnerships, it is not "necessary that the parties have an understanding of the legal effect of their acts."[237] Where they intend to do that thing, the court can treat the parties as being partners and, accordingly, divide the assets of the partnership.[238] And, as with joint business ventures, in these jurisdictions, courts can recognize the decision to pool resources, skills, and assets for the purpose of forming and running a domestic partnership, even in the absence of a formal agreement.

But, critically, the approach described above represents a *distinct minority approach* in the United States. The total number of jurisdictions that follow this approach can be counted on one hand.[239] Instead, courts in the overwhelming majority of jurisdictions categorically refuse to apply rules that would authorize them to recognize and protect the mutual joint endeavor of pooling resources, skills, and labor to create and run a family in the absence of formalities.[240]

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234 *Id.*

235 *Id.* at 674.

236 Montgomery v. Montgomery, 181 S.W.3d 720, 726 (Tenn. Ct. App. 2005) (discussing the standards for finding an implied business partnership with regard to for-profit ventures).

237 *Id.* at 727 (citing Roberts v. Lebanon Appliance Serv. Co., 779 S.W.2d 793, 795–96 (Tenn. 1989)).

238 Under the rules governing implied business partnerships, a finding that the partnership exists does not necessarily mandate a fifty-fifty split. *See, e.g.*, *id.* at 729 ("We certainly agree with Defendant that the contributions of the partners may be important when determining how much of an interest each partner has in an implied partnership.").

239 These jurisdictions include Oregon, Nevada, and Washington. *See supra* notes 213- 235. Some scholars include some but not all of these states in this category. *See, e.g.*, Antognini, *supra* note 113, at 16 & n.69 ("A limited number of states—two[, Washington and Nevada]—apply the rules regulating property distribution at divorce to the end of a nonmarital relationship.").

240 *See, e.g.*, Kozlowski v. Kozlowski, 403 A.2d 902, 905 (N.J. 1979) ("The contract between the parties . . . was not a partnership or a joint venture entitling plaintiff to a share of defendant's accumulated assets."); Martin v. Coleman, 19 S.W.3d 757, 761–62 (Tenn. 2000) ("To hold that these retirement benefits are available as partnership assets would require this Court to expand the concept of implied partnership beyond the business relationship now conceded by the parties. In essence, we would be required to hold that unmarried couples may create an implied partnership simply by their continued cohabitation. We decline to do so.").

An illustrative case is one encountered earlier—*Martin v. Coleman*.[241] As described earlier, the case concerned Robert and Delores Coleman. The parties divorced after ten years of marriage.[242] Thereafter, however, the parties continued to cohabitate together, with their child in common, for another sixteen years.[243] Throughout their relationship, "Delores Coleman did not work outside the home."[244] Instead, she "indirectly contributed . . . by providing all of those amenities and benefits customarily provided by a wife."[245] Robert's contributions to the family venture were to serve as "the family's sole provider."[246] The parties' conduct indicated that they intended to form a family, and that they, at least implicitly, decided to pool their efforts to support the running of that unitary family for the benefit of both of them. Delores' work in the home allowed Robert to focus on his work outside the home. In turn, Robert's income not only supported the family but allowed the family to accumulate assets.

At the conclusion of their cohabitation, Robert filed a lawsuit seeking "to have the couple's jointly-held accounts and home conveyed to him in his name."[247] In response, Delores argued that the parties' relationship constituted an implied partnership and, accordingly, sought a fifty percent division of all of the asserts of the partnership.[248] Despite the fact that the parties clearly combined their labor and skills to run a family together, the Supreme Court of Tennessee rejected this argument. "In essence," the court explained, "we would be required to hold that unmarried couples may create an implied partnership simply by their continued cohabitation."[249] This, the court continued, "[w]e decline to do."[250]

Under private law doctrines, courts can recognize the reality of joint endeavors. Nonetheless, even though the law formally declares nonmarital partners to be legal strangers, courts and legislatures in the United States almost uniformly refuse to allow for the possibility that the creation and running of a nonmarital family could constitute a

241 19 S.W.3d at 757.

242 *Id.* at 759.

243 *Id.*

244 *Id.*

245 *Id.* at 760 (quoting trial court decision).

246 *Id.* at 759.

247 *Id.*

248 *Id.* at 759–60.

249 *Id.* at 761–62.

250 *Id.* at 762; *see also* Kozlowski v. Kozlowski, 403 A.2d 902, 905 (N.J. 1979) ("The contract between the parties . . . was not a partnership or a joint venture entitling plaintiff to a share of defendant's accumulated assets.").

joint venture entitling the contributors to share in the venture's success. Those business principles, courts declare, cannot be applied to the joint endeavor of creating and running a nonmarital family. As a Tennessee court put it in *Via v. Oehlert*,[251] "to hold that the parties entered into a joint venture . . . solely because they lived together and jointly contributed to the appreciation of real property would pull the theory of implied partnership/joint venture too far from its moorings."[252]

If two business partners had engaged in the similar conduct for the purpose of making money—if, for example, they started and ran a bed and breakfast and divided the tasks in similar ways, with one performing primarily "domestic" aspects of the venture and the other performing the more "business-like" parts—the joint venture could be recognized. It could be recognized even if the parties failed to memorialize the joint nature of the venture and even if the parties did not understand their actions would have that legal effect. Where the venture is viewed as a commercial one between business partners, courts are authorized to find and give effect to a joint venture that exists in fact. But because the conduct was engaged in for the purpose of creating and running their own family, these rules did not and could not be applied.

2. Business Exchanges but Not Family Exchanges

Although the law declines to recognize the joint nature of the family creation project itself in the absence of formalization, the parties are permitted to assert and, if proven, to recover based on *individual transactions* that occur during the course of that overall joint endeavor.[253] Here too, however, relief is incomplete. And here too the law applies a different rule to family-like transactions. Courts are generally open to applying the usual market rules to exchanges that are not family-like in nature. For example, if one partner worked in the other partner's business without pay, they may be able to recover for their unpaid market labor even where no express agreement was exe-

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251 347 S.W.3d 224 (Tenn. Ct. App. 2010).

252 *Id.* at 230; *see also Martin*, 19 S.W.3d at 761–62 ("To hold that these retirement benefits are available as partnership assets would require this Court to expand the concept of implied partnership beyond the business relationship . . . . We decline to do so.").

253 *See, e.g.*, *Developments in the Law*, *supra* note 11, at 2134–35 ("Instead, courts have traditionally focused on *identifiable* and *substantial* contributions to the acquisition, preservation, or enhancement of a specific asset owned by the defendant (categories that exclude domestic labor)."). For scholarship arguing in favor of rules that allow courts to parse and enforce distinct agreements between nonmarital partners, see Matsumura, *supra* note 3, at 1025.

cuted.[254] The same, however, cannot be said for suits to recover for "domestic" services.[255]

Consider *Story v. Lanier*.[256] The case involved claims between unmarried partners—Mary Story and Malcolm Lanier—who lived together for thirty years.[257] Ms. Story alleged that "during the course of their thirty year relationship, she and Mr. Lanier purchased both real and personal property together, and that through her contributions to the relationship Mr. Lanier was able to amass substantial funds in his bank accounts."[258] The property in dispute included a fifty-eight-acre farm that was originally owned by Ms. Story that she later transferred to Mr. Lanier;[259] a restaurant owned by Mr. Lanier in which Ms. Story worked "without compensation";[260] and a bank account titled only in Mr. Lanier's name, into which was deposited income from the farm and the restaurant.[261]

With respect to the individual exchanges that occurred between the parties, the court awarded Ms. Story relief with respect to her "business" contributions but refused to grant recovery for her domestic contributions. Specifically, the trial court found "that the parties engaged in an implied business partnership when they purchased the restaurant."[262] This finding was challenged on appeal. The appellate court affirmed, applying the usual rules of implied business partnerships.[263] The court thus explained that the lack of a written agreement was not dispositive. Instead, the court clarified that an implied busi-

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254 *See, e.g.*, Carney v. Hansell, 831 A.2d 128, 136 (N.J. Super. Ct. Ch. Div. 2003) (awarding woman "quantum meruit recovery" for "some fifteen" years of labor in the towing business developed during their relationship).

255 *See, e.g.*, Joslin, *supra* note 1, at 934 ("Finally, under whatever theory, implied contract or equitable doctrines, the law almost uniformly undervalues or denies value altogether to 'domestic' or 'wifely' contributions."); *see also Developments in the Law*, *supra* note 11, at 2134 ("Former unmarried cohabitants are able to bring claims in restitution in many states, but courts almost invariably deny recovery based on the value of domestic labor . . . ." (footnote omitted)); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 28 cmt. d (AM. L. INST. 2011) ("Claims to restitution based purely on domestic services are less likely to succeed, because services of this character tend to be classified among the reciprocal contributions normally exchanged between cohabitants whether married or not.").

256 166 S.W.3d 167 (Tenn. Ct. App. 2004).

257 *Id.* at 170.

258 *Id.*

259 *Id.* at 171–72.

260 *Id.* at 172.

261 *See id.* at 172–73 (stating that "[t]he profits from the restaurant went solely into Mr. Lanier's bank account" and that "the accountant for the farming business . . . paid Mr. Lanier directly").

262 *Id.* at 175.

263 *Id.* at 178.

ness partnership can be established in the absence of a written agreement.[264] Where there is no written agreement,

> no one fact or circumstance may be pointed to as a conclusive test. . . . If the parties' business brings them within the scope of a joint business undertaking for mutual profit—that is to say if they place their money, assets, labor, or skill in commerce with the understanding that profits will be shared between them—the result is a partnership whether or not the parties understood that it would be so.[265]

The court affirmed the holding that the parties had an implied business partnership with respect to the restaurant specifically because Ms. Story's contributions were of a business rather than a purely "domestic" nature: "We disagree with Mr. Lanier's assertion that the only possible justification for the trial court finding an implied partnership in the restaurant was the parties' cohabitation."[266] Instead, Ms. Story presented evidence "that she worked for free [in the restaurant]" and that she "was responsible for keeping the books for the restaurant."[267]

The same court, however, affirmed the holding that the parties did not have an implied business partnership with respect to the farm or Mr. Lanier's bank account.[268] On these issues, the court explained:

> While we are mindful of Ms. Story's contributions to the relationship following [the transfer of the ownership of the farm from Ms. Story to Mr. Lanier], we are directed to focus our attention upon the facts as they relate to the parties' decision to enter this particular transaction, not the facts as they relate to domestic matters.[269]

That is, the usual rules applied to any commercial bargains between the parties, but not to bargains involving domestic contributions. Indeed, in an earlier case, the Tennessee Supreme Court was even clearer. With respect to business transactions between former nonmarital partners, "ordinary laws pertaining to partnership, not the

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264 *Id.* at 176.

265 *Id.* (quoting Bass v. Bass, 814 S.W.2d 38, 41 (Tenn. 1991)).

266 *Id.* at 178.

267 *Id.*; *see also Bass*, 814 S.W.2d at 44 ("[T]he ordinary laws pertaining to partnership, not the laws of domestic relations, apply in a situation such as this where a *business* partnership can be implied from the facts and circumstances, a meretricious relationship notwithstanding. The fact that the parties may be involved socially should not, and does not, slam shut the courthouse doors to a claimant such as Linda Bass who invests time, money, labor, and energy into establishing a profit producing enterprise.").

268 *Story*, 166 S.W.3d at 178–79.

269 *Id.* (citing Martin v. Coleman, 19 S.W.3d 757, 761–62 (Tenn. 2000)).

laws of domestic relations, apply."[270] But while the rights and obligations of parties are generally governed by these "ordinary laws" of the market, market law cannot be applied to "domestic matters" that are transacted between the parties.[271]

Thus, at the very same time that the law denies that the partners are family members, the law also refuses to apply private law doctrines equally to the "family"-based or family-like exchanges that occur in these relationships. Instead, additional requirements or burdens are imposed on these bargains and these alone. These heightened formality requirements are imposed most obviously and directly in those states that purport to shut the door entirely on claims between former nonmarital cohabitants. Three states—Minnesota,[272] New Jersey,[273] and Texas[274]—have statutory provisions that expressly impose requirements not imposed on true third parties. The statutes purport to deny any recovery to former cohabitants *in the absence of a written contract*.[275] As the Senate sponsor of the Texas legislation explained, the statute was intended to "do away with palimony lawsuits."[276]

Despite these apparently sweeping bars to relief, courts in these states *do* award relief for business-like contributions between the former cohabitants and will do so consistent with the usual rules. Hence for these business-like contributions, courts will award relief for such

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270 *Martin*, 19 S.W.3d at 761.

271 *See id.* at 761–62.

272 MINN. STAT. § 513.075 (2021); *see also id.* § 513.076 ("Unless the individuals have executed a contract complying with the provisions of section 513.075, the courts of this state are without jurisdiction to hear and shall dismiss as contrary to public policy any claim by an individual to the earnings or property of another individual if the claim is based on the fact that the individuals lived together in contemplation of sexual relations and out of wedlock within or without this state.").

273 N.J. STAT. ANN. § 25:1-5(h) (West 2010) (providing that "[a] promise by one party to a non-marital personal relationship to provide support or other consideration for the other party, either during the course of such relationship or after its termination" is not enforceable "unless the agreement or promise, upon which such action shall be brought or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or by some other person thereunto by him lawfully authorized," and, further, that "no such written promise is binding unless it was made with the independent advice of counsel for both parties").

274 TEX. BUS. & COM. CODE ANN. § 26.01 (West 2021) (providing that "[a] promise or agreement" made on "consideration of nonmarital conjugal cohabitation" is "not enforceable unless . . . it, is (1) in writing; and (2) signed by the person to be charged with the promise or agreement").

275 Thus, while other legal strangers can assert claims arising in implied contract or based on equitable theories, the statute purports to provide that such claims between cohabitants are barred.

276 Zaremba v. Cliburn, 949 S.W.2d 822, 826 (Tex. App. 1997) (quoting from the Second and Third Floor Readings of S.B. 281 on the Floor of the Senate, 70th Leg., Reg. Sess., (Tex. 1987)).

contributions *even in the absence of a written contract*. But, for family-like contributions, as the statute directs, a "writing"[277] or a written "contract"[278] is required. Take the recent Minnesota case of *Tiedke v. Tiedke*.[279] As noted above, Minnesota is one of the three states that, by statute, purports to bar relief between former cohabitants in the absence of a written agreement. The parties—Kathleen Marie Freitag and Alex Lee Tiedke—cohabited for two years prior to their marriage.[280] During that two-year premarital cohabitation period, they "collaborated in various ways in the acquisition, renovation, and renting of four residential properties."[281] "They also acquired, renovated, and rented two additional residential properties during their marriage."[282] Importantly, "[t]he parties generally did not enter into written agreements to govern their enterprise, did not attempt to identify and maintain their respective interests in the properties, and did not consistently maintain accounting records for the properties."[283] In the divorce proceeding, the parties disputed their respective interests in their properties, including the ones purchased during the parties' cohabitation.[284] The trial court held that Freitag had an interest in the four properties acquired during their cohabitation.[285]

On appeal, Tiedke argued that no relief was permissible because the parties had not entered into a written agreement regarding the properties, as required by the anti-palimony statute.[286] That statute provides that

> a contract between a man and a woman who are living together in this state out of wedlock . . . is enforceable as to terms concerning the property and financial relations of the parties only if . . . the contract is written and signed by the parties . . . .[287]

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277 TEX. BUS. & COM. CODE ANN. § 26.01 (providing that "an agreement made . . . on consideration of nonmarital conjugal cohabitation" is "not enforceable unless . . . it, is (1) in writing; and (2) signed by the person to be charged with the . . . agreement").

278 MINN. STAT. § 513.075 (2021).

279 No. A18-1492, 2019 WL 3545816 (Minn. Ct. App. Aug. 5, 2019) (unpublished opinion).

280 *Id.* at *1.

281 *Id.*

282 *Id.*

283 *Id.*

284 *Id.* at *1–2.

285 *Id.* at *3.

286 *Id.* at *4 ("On appeal, Tiedke contends that, because the parties did not have a written agreement concerning the four properties, Freitag's claims to property interests in the four properties should be barred by the so-called anti-palimony statutes.").

287 MINN. STAT. § 513.075 (2021); *see also id.* § 513.076 ("Unless the individuals have executed a contract complying with the provisions of section 513.075, the courts of this state are

The court, however, rejected Tiedke's argument and held that the written contract requirement did not bar Freitag's request for recovery regarding the premarital properties.[288] The court agreed, instead, with Freitag who argued that the statute did not bar claims based "on the existence of an implied agreement *arising from a business partnership between the parties*."[289] Thus, even in states with apparently sweeping statutes, courts treat market and family bargains differently. For business transactions, the usual rules apply, and courts can grant relief even in the absence of formalities, like a written contract.[290] The atypical absolute requirement of a written contract applies only to claims that arise out of the quotidian exchanges of running a family.

This result is not anomalous. As previously stated, New Jersey also has a statute requiring any agreements between cohabitants to be in writing.[291] New Jersey takes this position even a step farther by requiring the written agreement to have been entered into *with the advice of counsel for both parties*.[292] Here too, however, it turns out that despite the unqualified language in the statute, this extraordinarily stringent set of requirements only applies with regard to the provision of domestic services in exchange for something else. To the extent the parties participated in a "business" transaction, the usual rules apply; bargains can be enforced in the absence of such formalities.

An illustrative case is *C.N. v. S.R.*[293] "[T]he parties resided together for a substantial period and had a child in common."[294] During the course of their relationship, "[t]he parties comported their behavior in a manner akin to that of a married couple—cohabitating; sharing household expenses and responsibilities; and co-parenting."[295]

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without jurisdiction to hear and shall dismiss as contrary to public policy any claim by an individual to the earnings or property of another individual if the claim is based on the fact that the individuals lived together in contemplation of sexual relations and out of wedlock within or without this state.").

288 *Tiedke*, 2019 WL 3545816, at *4.

289 *Id.* (emphasis added); *see also id.* at *5 ("Thus, the district court did not err by ruling that the so-called anti-palimony statutes do not bar Freitag from asserting a claim to property interests in the four residential rental properties that the parties acquired before their marriage.").

290 *See id.* at *4; *see also In re* Estate of Eriksen, 337 N.W.2d 671, 674 (Minn. 1983) ("Potvin's claim is similar to the claim made by a joint venturer or partner, as the probate court noted in its memorandum. Sections 513.075 and 513.076 and the cases dealing with division of property between an unmarried cohabiting man and woman are not apropos.").

291 N.J. STAT. ANN. § 25:1-5(h) (West 2010).

292 *Id.*

293 230 A.3d 1003 (N.J. Super. Ct. Ch. Div. 2020).

294 *Id.* at 1008.

295 *Id.*

One of the assets in dispute was a home in which they all lived.[296] Despite the fact that both parties contributed financial funds, skills, and other resources to the property, the home was titled in only S.R.'s name.[297]

The court found that the man's claim to an interest in the house was not barred by New Jersey's anti-palimony statute. Despite the statute, the court held that the home constituted a "joint venture," and, thus, under the usual rules such a claim could be recognized and an award could be granted even though the joint venture was "not memorialized in writing."[298] With respect to this "business" transaction, the question was simply whether the parties "create[d] an interest in the singular venture."[299] Such an intent could be "inferred by the parties' conduct" even though they failed to formalize that intent in writing.[300] "Accordingly," the court concluded that "*even in the absence of a writing*, C.N. is entitled to partition of the shared residence as this equitable remedy survived the enactment of Subsection (h), for unmarried, cohabitating intimates engaged in a joint venture."[301]

Despite its seemingly all-encompassing language, it is thus only when the person who has been laboring in the home seeks compensation that this unusual rule requiring extremely heightened formality requirements—a signed written contract entered into with the advice of counsel—applies. For all other transactions between the parties—exchanges that involve more traditional "business" ventures—the usual rules of the market apply.

Although this approach—imposing heightened formalities on family-like bargains between nonmarital cohabitants—is not expressed in codified law, a similar pattern emerges in states that purport to bar all claims between cohabitants as a matter of case law, including Illinois. Illinois's rule was first declared by the Illinois Supreme Court in 1979.[302] In that famous or infamous case—*Hewitt v. Hewitt*—the court declared: "We accordingly hold that plaintiff's

296 *Id.* at 1005.

297 *Id.*

298 *Id.* at 1008.

299 *Id.*

300 *Id.*

301 *Id.* (emphasis added); *see also* Maeker v. Ross, 62 A.3d 310, 320–21 (N.J. Super. Ct. App. Div. 2013) (holding that whether or not a claim between unmarried cohabitants is governed by the anti-palimony statute depends on whether the claim is "for services rendered to [the] defendant on account of the business" or for "the provision of homemaking services and companionship" (quoting Carney v. Hansell, 831 A.2d 128, 135 (N.J. Super. Ct. Ch. Div. 2003))), *rev'd on other grounds*, 99 A.3d 795 (N.J. 2014).

302 Hewitt v. Hewitt, 394 N.E.2d 1204, 1211 (Ill. 1979).

claims are unenforceable for the reason that they contravene the public policy, implicit in the statutory scheme of the Illinois Marriage and Dissolution of Marriage Act, disfavoring the grant of mutually enforceable property rights to knowingly unmarried cohabitants."[303] And lest one think that this decision has become anachronistic and no longer applicable, the Illinois Supreme Court reaffirmed the rule in the 2016 case of *Blumenthal v. Brewer*.[304] "When considering the property rights of unmarried cohabitants," the court explained, "our view of *Hewitt*'s holding has not changed."[305] As explained by the court, under the *Hewitt* rule "individuals can enter into an intimate relationship, but *the relationship itself* cannot form the basis to bring common-law claims."[306]

Importantly, however, the rule does not bar cohabiting parties from "mak[ing] express *or implied* contracts with one another . . . if they are not based on a relationship indistinguishable from marriage."[307] Lest one miss the import of this language, the case law makes it clear. To the extent that a cohabitant is seeking compensation for *labor in the home*—like Eileen Brewer and Victoria Hewitt were—the usual rules do not apply; instead, the claim is barred.[308] If, however, the party is seeking recovery for a transaction not involving a traditional family-like bargain of domestic labor or future support, the opposite is true, even in states like Illinois that purport to bar all claims between cohabitants.[309] For example, in *Spafford v. Coats*,[310] the court held that the plaintiff was entitled to equitable relief with respect to a number of vehicles she paid for during her relationship but which were titled solely in her partner's name.[311] The court distinguished the claim from the one asserted in *Hewitt*:

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303 *Id.*

304 69 N.E.3d 834 (Ill. 2016).

305 *Id.* at 853.

306 *Id.* at 859 (emphasis added).

307 *Id.* at 860 (emphasis added).

308 *See id.* at 852 ("In rejecting Victoria's public policy arguments, this court recognized that cohabitation by the unmarried parties may not prevent them from forming valid contracts about independent matters, for which sexual relations do not form part of the consideration and do not closely resemble those arising from conventional marriages. However, that was not the type of claim Victoria brought; thus, her claim failed." (citation omitted)).

309 *See, e.g.*, Spafford v. Coats, 455 N.E.2d 241, 244–45 (Ill. App. Ct. 1983) ("[P]laintiff asserts that since the claim to property is not founded simply upon proof of cohabitation or the plaintiff's performance of domestic services, appropriate restitutionary remedies may be used to prevent unjust enrichment in property disputes between the cohabitants.").

310 455 N.E.2d 241 (Ill. App. Ct. 1983).

311 *Id.* at 245–46. As the *Blumenthal* court explained: "Spafford had actually paid for the motor vehicles herself. Because Spafford's claims had an economic basis independent of the

> The plaintiff's claims in *Hewitt* for one-half of defendant's property were *based primarily upon her services as housekeeper and homemaker* . . . . However, where the claims do not arise from the relationship between the parties and are not rights closely resembling those arising from conventional marriages, we conclude that the public policy expressed in *Hewitt* does not bar judicial recognition of such claims.[312]

Moreover, for these commercial-like bargains, not only are they not barred, but the usual private law rules apply. Relief is therefore available even in the absence of an express agreement.[313]

A similar pattern emerges in states that follow the *Marvin* rule. Again, to restate the usual market rules recounted earlier, "[o]rdinarily and without more, where one person renders services for another which are known to and accepted by him, the law implies a promise on his part to pay therefor."[314] This usual rule is applied to market transactions between nonmarital partners. But where the service provided is of a domestic nature, the usual rules do not apply. Instead, a heightened standard applies, and the person seeking relief must overcome the presumption that these services were provided gratuitously.[315]

Consider New Jersey. Today, New Jersey has a statutory provision regulating agreements between nonmarital partners.[316] But before this statute was enacted in 2010, New Jersey followed a variation of the *Marvin* decision. An illustrative case is *Carney v. Hansell*.[317] The case involved a different-sex couple—Joann Carney and Christopher Hansell—who lived together as a nonmarital family for over sixteen years.[318] Joann "maintained the house, did the laundry, food shopping, cooking and was responsible for the primary care of their son."[319] Although Christopher "paid for most expenses connected with the home, [Joann] spent her disability check each month

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nonmarital, cohabiting relationship, she was permitted to recover those independent contributions." *Blumenthal*, 69 N.E.3d at 854 (citation omitted).

312 *Spafford*, 455 N.E.2d at 245 (emphasis added).

313 *See Blumenthal*, 69 N.E.3d at 860 (holding that the *Hewitt* rule does not bar cohabiting parties from "mak[ing] express *or implied* contracts with one another . . . if they are not based on a relationship indistinguishable from marriage" (emphasis added)).

314 Scully v. Scully's Ex'r, 28 Iowa 548, 550–51 (1870).

315 *Id.* at 551.

316 N.J. STAT. ANN. § 25:1-5(h) (West 2010).

317 831 A.2d 128 (N.J. Super. Ct. Ch. Div. 2003).

318 *Id.* at 130.

319 *Id.* at 131.

for groceries, toiletries and clothes for their son."[320] In addition to this traditional domestic exchange, "the parties [also] began to build [a] towing business" during their relationship.[321] Along with Joann's disability check, this towing business was a primary source of income for the family.[322] "The business was built from the ground up and both parties contributed substantially to its success."[323] Joann handled many of the administrative tasks associated with the business. She "handled much of the paperwork," she "wrote and paid many of the business bills," "[s]he went to court to prosecute bad checks, she picked up parts from auto parts dealers, and she prepared monthly invoices."[324] As a result of their joint efforts, this key source of income for the family "prospered."[325]

When their over sixteen-year relationship came to an end, all the assets accumulated during their relationship were titled in Christopher's name.[326] Joann then filed a lawsuit seeking a share of these jointly accumulated assets based on all of her contributions to the relationship—those in and out of the home. But, again, the market/home distinction appears. Her "business" services could be recognized and compensated under existing market doctrines.[327] The court also concluded these services were not provided gratuitously; instead, the court found she provided them with the expectations that she would be able to share in the fruits of those efforts.[328] As the court put it, "plaintiff did not gratuitously donate her work, time, effort, enthusiasm and zeal for this business enterprise for some 15 years for nothing. She felt the business and her relationship with defendant represented her future financial security. She clearly expected to be compensated for her efforts."[329]

This assumption (or presumption) that business contributions were not provided gratuitously is consistent with the usual rules of the market. In sharp contrast, however, the court flatly refused to provide Joann any relief for her almost twenty years of domestic contributions. That claim, the court said, "must fail."[330] Although the court con-

320 *Id.*
321 *Id.*
322 *See id.* at 131–32.
323 *Id.* at 131.
324 *Id.* at 131–32.
325 *See id.* at 132.
326 *See id.* at 132–33.
327 *See id.* at 135.
328 *See id.*
329 *Id.*
330 *Id.*

cluded that Joann had not already received the benefit of her bargain with respect to her business contributions, the same court, with regard to the very same parties and the very same relationship, concluded that she had already "received the benefit of the bargain" with regard to her domestic contributions.[331]

The law in other *Marvin* jurisdictions is similar.[332] Commercial exchanges are governed by the usual rules. By contrast, claims "based entirely upon the provision of homemaking services and companionship" are "barred."[333] Moreover, as these cases illustrate, inconsistent rules are applied even as to claims between the very same people, arising out of the same relationship. Indeed, courts in some states, like New Hampshire, have adopted a blackletter rule to this effect. New Hampshire allows nonmarital parties to pursue claims under the law of the market.[334] Thus, "upon the dissolution of a non-marital living arrangement, either party may seek a judicial determination of the equitable rights of the parties in particular property."[335] This rule allows the parties to seek relief under implied contracts, various partnership and joint venture doctrines, and equitable theories. At the same time, New Hampshire courts have repeatedly and expressly declined "to extend the holding of that case . . . to include recovery for domestic services" absent an express contract.[336]

This Section reveals a curious feature of nonmarriage. With respect to endeavors or exchanges of a commercial nature, courts do indeed apply private law doctrines. This is true across jurisdictions and across jurisdictional approaches. Even jurisdictions that are described as denying all relief for nonmarital partners generally allow relief for business-like services.[337] These traditional business-like endeavors and

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331 *Id.*; *see also* Maeker v. Ross, 62 A.3d 310, 320 (N.J. Super. Ct. App. Div. 2013) (concluding that commercial exchanges were "an entirely different matter" from those in which a person is seeking relief for domestic contributions (quoting *Carney*, 831 A.2d at 135)), *rev'd on other grounds*, 99 A.3d 795 (N.J. 2014).

332 *See* Schwegmann v. Schwegmann, 441 So. 2d 316, 325 (La. Ct. App. 1983) ("Our jurisprudence appears settled to the effect that predicated upon equitable principles, the claims of a paramour and concubine will be recognized and enforced with respect to joint or mutual commercial ventures, provided such enterprises arose independently of the illicit relationship." (quoting Guerin v. Bonaventure, 212 So. 2d 459. 461 (La. Ct. App. 1968))).

333 *Maeker*, 62 A.3d at 320–21.

334 *See* Tapley v. Tapley, 449 A.2d 1218, 1219 (N.H. 1982).

335 *Id.*

336 *Id.*; *see also* Brooks v. Allen, 137 A.3d 404, 410 (N.H. 2016) (noting that the New Hampshire Supreme Court has refused "to allow recovery for 'domestic services'" (quoting *Tapley*, 449 A.2d at 1219)).

337 Tyranski v. Piggins, 205 N.W.2d 595, 596 (Mich. Ct. App. 1973) ("While the parties illicitly cohabited over a period of years, that does not render all agreements between them

exchanges will be recognized and protected even when the parties failed to comply with formalities. As the West Virginia Supreme Court explained, with respect to traditional business-like exchanges between the parties, courts "scrutinize such cases carefully and to enforce legitimate business expectations whenever the business part of a contract between cohabiting or romantically attached partners can be separated from the personal part."[338]

But across jurisdictions and approaches, courts apply different, more onerous rules to exchanges involving the provision of "family" services. Although formalities are not required with respect to commercial transactions, they are where the person is seeking compensation for family-like services.

III. Challenging Nonmarriage's Double Bind

Part II identifies two curious features of the law of nonmarriage. The conventional narrative posits that although nonmarital relationships are outside the ambit of family law, they are entitled to market-based protections. A comprehensive account of the case law, however, reveals this is only partially true. Market law applies to commercial ventures and bargains, but not to family-like ones. The second peculiarity is the content of the law that applies to these two different types of exchanges. To the extent nonmarital partners contribute business-like services, the usual rules of the market apply.[339] But to the extent the services were related to the creation of and day-to-day running of a family, the usual rules are jettisoned. Here, the law presumes that these services have been provided gratuitously; because the provider simply finds these tasks to be a "rewarding thing to do."[340] To be compensated for *these services*, formalities are required.

This Part uses this uncovered disjunction to evaluate two primary defenses of the current law of nonmarriage: autonomy in the family and respect for the family.

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illegal. Professor Corbin and the drafters of the Restatement of Contracts both write that while bargains in whole or in part in consideration of an illicit relationship are unenforceable, agreements between parties to such a relationship *with respect to money or property* will be enforced if the agreement is independent of the illicit relationships." (emphasis added)).

338 Thomas v. LaRosa, 400 S.E.2d 809, 813 (W. Va. 1990).

339 *See* Scully v. Scully's Ex'r, 28 Iowa 548, 550–51 (1870).

340 *Tapley*, 449 A.2d at 1219–20 (quoting Morone v. Morone, 413 N.E.2d 1154, 1157 (N.Y. 1980)).

A. Autonomy Protecting(?)

A primary defense of the contemporary law of nonmarriage "sounds in the register of autonomy."[341] On this account, the current doctrine respects the deliberate choices of the parties.[342] As Marsha Garrison puts it, *Marvin* "recognizes and honors the individual choices that cohabitants and married couples have made. Married couples have chosen obligation; cohabitants have chosen independence. The law recognizes and honors both choices."[343] This theoretical claim, however, fails to account for the fact that the law subjects different exchanges to different rules.

Dichotomous rules apply even though these ventures and bargains share a number of key features. As is true of commercial joint ventures, nonmarital partners have chosen to combine their skills, resources, and assets in the hopes that the collaboration will result in mutual benefits. Although financial gain may not be the sole or primary reason for forming nonmarital family unions,[344] financial considerations are not absent altogether.[345] Moving in and consolidating households can mean that the parties may save money—that is, they may "profit." Moreover, by consolidating households, they can also combine their efforts and their skills for the benefits of the collective union.[346] Indeed, anthropologists have found that such exchanges "involve[] at least implicit bargaining and self-interest in addition to altruism."[347] With respect to nonmarital unions specifically, many people cite *financial issues* as relevant to their family formation decisions.[348] Not only are family-related choices shaped by financial con-

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341 Joslin, *supra* note 1, at 941.

342 Carbone & Cahn, *supra* note 5, at 78 (arguing that the *Marvin* rule "respects the parties' autonomy").

343 Garrison, *supra* note 5, at 896.

344 For example, "love is cited more than any other reason for why [respondents] decided to get married or to move in with their partner: 90% of those who are married and 73% of those living with a partner say love was a major factor in their decision." HOROWITZ ET AL., *supra* note 1, at 31.

345 *E.g., id.* at 31–32 "(About four-in-ten cohabiting adults say moving in with their partner made sense financially (38% say this was a major reason why they decided to move in together) or that it was convenient (37%).").

346 Erez Aloni, *The Marital Wealth Gap*, 93 WASH. L. REV. 1, 24 (2018) (noting that "[u]nmarried couples who live together, as well as nonconjugal partners who cohabit and are economically and emotionally interdependent, all enjoy, to different degrees, such advantages [of economies of scale]").

347 Hasday, *supra* note 74, at 497.

348 *See, e.g.*, HOROWITZ ET AL., *supra* note 1, at 7 (reporting that "about four-in-ten cohabiters also say finances and convenience were important factors in their decision [to move in together]").

siderations, they also have financial consequences. As Erez Aloni explains, "Wealth ownership and family structure are highly correlated."[349]

On the flip side, although financial considerations often motivate commercial ventures and bargains, other considerations may be at play there as well.[350] The parties may decide to work together because they enjoy working together. But there, the fact that the parties considered factors in addition to profit does not prevent the court from applying the relevant doctrines to their collaborative commercial efforts.

These bargains—bargains which share important qualities—are treated differently under the law of nonmarriage. Courts are authorized to recognize unformalized commercial ventures between nonmarital cohabitants.[351] They are willing to do so even though the facts may be muddy and messy, and the parties may dispute whether there was an agreement or a joint intent to do the "thing." Courts can and do sort through and resolve such claims. But the same is not true with respect to unformalized family-related endeavors.[352] Instead, with regard to these bargains, even as between the same two people, different, heightened requirements are imposed, allegedly in the name of protecting party autonomy.

This is curious, however, since a key goal of the market doctrines that courts are reluctant to apply to these family-like exchanges are themselves about furthering party choice. Indeed, a "central aim[] of contract law" is "to enforce the reasonable expectations of parties to a contract."[353] With regard to commercial bargains, the law furthers this goal by enforcing the bargains even when they are not memorialized, and even where they lack definiteness.[354] Indeed, in this context, the

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349 Aloni, *supra* note 346, at 16.

350 *Cf.* Allison Anna Tait, *Corporate Family Law*, 112 Nw. U. L. Rev. 1 (2017) (exploring family businesses).

351 *See* Bass v. Bass, 814 S.W.2d 38, 43 (Tenn. 1991) ("[A]n individual should not be denied the opportunity to establish the existence of a *business* partnership into which they, like any other competent individual, may enter into, whether or not cohabitation exists.").

352 Indeed, Albertina Antognini shows that courts frequently refuse to enforce agreements even when they are express. Antognini, *Nonmarital Contracts*, *supra* note 5, at 78.

353 Paul M. Altman & Srinivas M. Raju, *Delaware Alternative Entities and the Implied Contractual Covenant of Good Faith and Fair Dealing Under Delaware Law*, 60 Bus. Law. 1469, 1476 (2005); *see also* E. Allan Farnsworth, *Disputes over Omission in Contracts*, 68 Colum. L. Rev. 860, 860 (1968) ("It is a commonplace that, absent some overriding public policy, courts are to enforce contracts in accordance with the 'expectations of the parties.'").

354 Melanie B. Leslie, *Enforcing Family Promises: Reliance, Reciprocity, and Relational Contract*, 77 N.C. L. Rev. 551, 557 (1999) ("[C]ourts have become increasingly willing to enforce indefinite agreements in the commercial context."); *see also id.* at 555 n.11 (noting that scholars

law has "move[d] toward enforcing all commercial promises, even those that appear gratuitous."[355] These principles are illustrated by *Wyatt*,[356] *Houle*,[357] and *Beckman*.[358] The fact that true third-party business partners did not enter into a formal agreement does not preclude courts from recognizing and compensating the parties for their valuable contributions. On the flip side, the lack of sophistication of the parties is also not a bar to recognizing and giving effect to their intentional conduct. For example, a court can recognize the existence of an implied business partnership even where the parties did not "understand[] . . . the legal effect of their acts."[359]

Again, courts are willing to apply these principles to nonmarital partners—but only so long as the endeavor is of a business nature. Hence, the "commercial" venture between Linda and William Bass,[360] first to start a restaurant and then to start a video game business, could be recognized and enforced even though it was not formalized.[361] As the court explained, it was "of little or no consequence that" they "did not formally regard themselves as 'partners.'"[362] The partnership, the court continued, may be implied from circumstances that show the parties entered into a relationship by "combining their property, labor, skill, experience, or money."[363] That, the court said, was "precisely what the parties involved in this case did."[364]

The law allows for recognition of commercial bargains unmarked by formalities even though the very types of ventures involved—for profit business ventures—are ones that typically result from "rationality, clarity, hard-headed bargaining from self-interest."[365] In other words, these are the very types of transactions in which we might be more inclined to require the parties to follow the rules rigidly to protect their own interests. The parties are more likely to have back-

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"Daniel Farber and John Matheson argue that, even absent reliance, courts enforce gratuitous promises made in business contexts").

355 Eisenberg, *supra* note 76, at 833.

356 281 S.W.2d 64 (Tenn. Ct. App. 1955).

357 594 S.W.3d 524 (Tex. App. 2019).

358 579 A.2d 618 (D.C. 1990).

359 Montgomery v. Montgomery, 181 S.W.3d 720, 727 (Tenn. Ct. App. 2005).

360 Although Linda and William briefly married, most of their relationship was nonmarital. *See* Bass v. Bass, 814 S.W.2d 38, 40 (Tenn. 1991).

361 *Id.* at 44.

362 *Id.*

363 *Id.*

364 *Id.*

365 Terry A. O'Neill, Response, *Reasonable Expectations in Families, Businesses, and Family Businesses: A Comment on Rollock*, 73 IND. L.J. 589, 590 (1998).

ground knowledge about business transactions, and they are more likely to have engaged in arm's length transactions under which it is more reasonable to expect that the parties know they need to look out for their own interests. Yet, although the law does allow them to negotiate the terms of their relationship, it does not leave them without protection in the event they fail to do so.

But although "courts are typically willing to forego formalistic rules of contracting to enforce contracts in the commercial context,"[366] the same is not true of bargains of a family-like nature. Instead, the law of nonmarriage imposes heightened requirements on bargains of a family-like nature.

This is true even though decades of experience reveals that few nonmarital partners comply with formalities with respect to their exchanges with regard to the forming and running of their family.[367] "[F]ew couples (married or unmarried) . . . make express contracts at all, much less comprehensive contracts intended to capture what their relationship is all about."[368] There are a host of reasons why family members are unlikely to enter into express contracts about their mutual rights and obligations.[369] As compared to parties engaged in primarily for-profit ventures together, family members are less likely to be familiar and comfortable with formal legal documents, like contracts or other legal instruments that might clarify and protect their nonprofit joint venture. More fundamentally, even when family members are knowledgeable about contracts, they are unlikely to enter into contracts regarding their family relationships. Some do not understand it is necessary; they think the law protects them in the absence of a written agreement.[370] Some do not want to think about, much less plan for, the possibility that the relationship might come to an end. Some assume that in the—unlikely, they hope—event the relationship ends, they will treat each other fairly.[371] Some may have

366 Deborah Zalesne, *The Contractual Family: The Role of the Market in Shaping Family Formations and Rights*, 36 CARDOZO L. REV. 1027, 1062 (2015).

367 Almost twenty years ago, Ira Mark Ellman explained that requiring contracts in this area is the wrong approach. *See* Ellman, *Contract Thinking*, *supra* note 143, at 1367.

368 *Id.*

369 *See* Matsumura, *supra* note 3, at 1018 (noting that "[w]ritten agreements between nonmarital partners also appear to be rare").

370 *See, e.g.*, SHARON SASSLER & AMANDA JAYNE MILLER, COHABITATION NATION: GENDER, CLASS, AND THE REMAKING OF RELATIONSHIPS 153 (2017) (stating that some of the respondents who rejected marriage "noted that getting married wouldn't add anything to their relationships").

371 *See* Barbara A. Atwood & Brian H. Bix, *A New Uniform Law for Premarital and Marital Agreements*, 46 FAM. L.Q. 313, 320 (2012) ("Most people are poor at thinking clearly about

concerns about the possible results at the time of dissolution but are uncomfortable raising the issue.[372] For these and many other reasons, as compared to partners in a for-profit venture—where it may be more reasonable to expect that each side will understand that they need to proceed with caution—this expectation is much less reasonable in a family setting.[373]

B. Family Respecting(?)

This Section interrogates the other justification offered in this realm: family respect. The family respect theory *does* account for the disjunction between commercial and family bargains. This legal dichotomy makes sense, it is said, because these bargains are different in kind. The tasks of forming and caring for families are performed "not as a servant, with a view to pay, but from higher and holier motives."[374] That being the case, it is reasonable to presume that these services—unlike all others—are performed primarily out of love and altruism;[375] they are "gifts" not work.[376] Indeed, the argument continues, treating domestic caretaking services just like other services would "impoverish" these hallowed contributions.[377]

This line of reasoning appears in many nonmarriage cases.[378] The idea of singling out domestic tasks and excluding them from the rules

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events in the distant future, especially if it involves contingencies contrary to our idealist assumptions.").

372 *See* SASSLER & MILLER, *supra* note 370.

373 *See, e.g.*, Judith T. Younger, *Perspectives on Antenuptial Agreements*, 40 RUTGERS L. REV. 1059, 1061 (1988).

374 Cropsey v. Sweeney, 27 Barb. 310, 315 (N.Y. Gen. Term. 1858).

375 *See, e.g.*, Morone v. Morone, 413 N.E.2d 1154, 1157 (N.Y. 1980) ("[I]t is not reasonable to infer an agreement to pay for the services rendered when the relationship of the parties makes it natural that the services were rendered gratuitously.").

376 *See, e.g.*, Trimmer v. Van Bomel, 434 N.Y.S.2d 82, 85 (Sup. Ct. 1980) (describing domestic services as ones that "would ordinarily be exchanged without expectation of pay").

377 Eisenberg, *supra* note 76, at 847 ("[T]he world of contract is a market world, largely driven by relatively impersonal considerations and focused on commodities and prices. . . . In contrast, much of the world of gift is driven by affective considerations like love, affection, friendship, gratitude, and comradeship. That world would be impoverished if it were to be collapsed into the world of contract."); *see also* Keren, *supra* note 76, at 226–27 ("This fear is described by Eisenberg as the fear of impoverishing the non-legal world of gifts as a result of contaminating it with legal and market-born ideas."); Hasday, *supra* note 74, at 499 (noting that some argue that the presumption of gratuity is a "crucial means by which the law . . . preserves the specialness and dignity of intimate relations"); Viviana A. Zelizer, *The Purchase of Intimacy*, 25 LAW & SOC. INQUIRY 817, 823–24 (2000) (noting that "[o]n the one hand, [some] see money as the means for self-interested rational economic transactions [and] [o]n the other, they see erotic relations as the means for mutuality and emotional fulfillment").

378 *See, e.g.*, *Morone*, 413 N.E.2d at 1157.

that apply to all others, however, has a much longer and deeper genealogy. This Section traces that lineage. To the extent the singling out of family-like exchanges from the usual rules of the market today seems "natural" and appropriate, it is important to understand that "[t]he law has shaped the very expectations and understandings of family life that it claims to reflect."[379]

As Reva Siegel,[380] Albertina Antognini,[381] and others have identified, the rule presuming that domestic services are provided gratuitously finds its roots in the deeply gendered doctrine of coverture.[382] Wives, courts reasoned, could not enter into enforceable agreements with their husbands to be paid for their domestic service, because that service was owed to and owned by their husbands.[383] Hence, any such agreement was without consideration. Of course, the legal relationship between husbands and wives has been altered over time. Women are no longer under the "cover" of their husbands. But rather than resulting in an abandonment of the rule, this legal change resulted in an evolved justification for it. To treat the provision of domestic services like other types of commercial exchanges would denigrate their sacred nature.[384] Or, to put it another way, these domestic services and exchanges are treated differently not because they "are less important than bargain promises, but because they are more important."[385] This evolution is an example of what Siegel refers to as "preservation-through-transformation."[386] "[W]hen an existing legal regime is successfully challenged so that its rules and reasons no longer seem persuasive or legitimate, defenders may adopt new rules and reasons that

379 Siegel, *supra* note 78, at 2207.

380 *Id.*

381 Antognini, *Nonmarital Coverture*, *supra* note 5.

382 1 WILLIAM BLACKSTONE, COMMENTARIES *442 ("By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs every thing . . . .").

383 *Id.*

384 Hasday, *supra* note 74, at 500 ("[Courts] stress that they are upholding the separation between marriage and the market to respect and safeguard the specialness of the marital relation.") *See also* Eisenberg, *supra* note 76, at 847 ("To begin with, the world of contract is a market world, largely driven by relatively impersonal considerations and focused on commodities and prices. The impersonal organs of the state are an appropriate means to enforce promises made in such a world. In contrast, much of the world of gift is driven by affective considerations like love, affection, friendship, gratitude, and comradeship. That world would be impoverished if it were to be collapsed into the world of contract.").

385 *See* Eisenberg, *supra* note 76, at 849.

386 *See* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117, 2178–87 (1996).

preserve elements of the challenged regime."[387] Recovering this hidden history, however, raises questions about whether this concept—even accepting its continued applicability in some contexts—is aptly applied to nonmarital partners.

Under the common law doctrine of coverture, wives were legally obligated to serve their husbands.[388] Not only were wives' services required under the law,[389] but their services were not their own; husbands owned their wives' labor.[390] In the mid-1800s, states began the slow process of chipping away at the doctrine of coverture. One area of change related to women's rights to their own earned income. At the same time that states enacted laws to achieve this end, however, courts and legislatures simultaneously strove mightily to insulate a subset of wives' labor from change: the labor wives performed *for their husbands*. As Siegel explains, "courts proceeded cautiously in recognizing wives' rights to earnings under the reform statutes, lest they unduly encroach upon a husband's continuing property rights in his wife's services."[391]

Some early Married Women's Property Acts expressly protected husbands' rights to their wives' service to them. Illinois's 1869 statute is one such example. The act declared that "a married woman shall be entitled to receive, use and possess her own earnings."[392] The very same statute, however, clarified that "this act shall not be construed to give to the wife any right to compensation *for any labor performed for her minor children or husband*."[393] Other Married Women's Property

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387 Douglas NeJaime & Reva B. Siegel, *Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics*, 124 YALE L.J. 2516, 2553 (2015).

388 COTT, *supra* note 81, at 54 ("Coverture expressed the legal essence of marriage as reciprocal: a husband was bound to support his wife, and in exchange she gave over her property and labor.").

389 G.A. ENDLICH & LOUIS RICHARDS, THE RIGHTS AND LIABILITIES OF MARRIED WOMEN, CONCERNING PROPERTY, CONTRACTS AND TORTS, UNDER THE COMMON AND STATUTE LAW OF PENNSYLVANIA, § 17, at 19 (1889) ("Her services and the comfort of her society are deemed an equivalent for the obligations the law imposes upon the husband because of the marital relation, and her obligation to render family services is held to be co-extensive with that of the husband to support her in the family.").

390 Siegel, *supra* note 78, at 2127 ("For centuries the common law of coverture gave husbands rights in their wives' . . . earnings . . . .").

391 *Id.* at 2168.

392 Act of Mar. 24, 1869, § 1, 1869 Ill. Laws 255.

393 *Id.* (emphasis added); *see also* Act of Apr. 17, 1857, ch. 59, 1857 Me. Laws 49 ("Any married woman may demand and receive the wages of her personal labor, *performed other than for her own family*, and may hold the same in her own right against her husband or any other person, and may maintain an action therefor in her own name." (emphasis added)); Minn. Stat., ch. 69, § 6 (1866) ("The wages of any married woman, earned after or before marriage by her

Acts were drafted more broadly. For example, the 1860 New York law declared, without qualification, that "[a] married woman may . . . perform any labor or services on her sole and separate account, and the earnings of any married woman, from her trade, business, labor or services, shall be her sole and separate property."[394]

Where legislatures failed to expressly protect a husband's right to his wife's labor for him, courts stepped in to do so. Thus, for example, the New York high court considered the scope of the 1860 law in *Brooks v. Schwerin*.[395] In the case, the court explained that although the statute did alter women's rights over their earnings arising out of labor *for others*, it did nothing to abrogate the wife's common law obligation to provide "services . . . in the household in the discharge of her domestic duties."[396] Such duties, the court declared, "still belong to the husband."[397]

In this way, newly enacted laws allowing women to maintain ownership and control over their market labor did not alter the essential, defining bargain of marriage. A treatise written during this period explained:

> It does not seem open to doubt that the Act of 1887 [allowing women ownership and control over their wages], far from destroying the duties devolving upon the wife as an incident of the marriage and family relations, leaves her, in this respect, where it found her, i.e., owing her time and services, in the first instance, to the family, subject to the direction of the husband, as its head and representative.[398]

Over time, husbands' right to their wives' earnings and services *for them* was curbed to some degree. Eventually, wives gained control over all of their labor *outside the home*, whether it was on behalf of their husbands or not.[399] Under this new legal regime, courts recognized that a wife's labor outside the home "was a fungible market commodity that a wife or any other person might supply."[400] Having gained ownership rights in her outside market labor, courts recog-

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personal labor *performed for any other person than her husband*, shall be paid and held to her sole and separate use . . . ." (emphasis added)).

394 Act of Mar. 20, 1860, ch. 90, 1860 N.Y. Laws 157.

395 54 N.Y. 343, 348–49 (1873).

396 *Id.*

397 *Id.*

398 ENDLICH & RICHARDS, *supra* note 389, § 105, at 131.

399 *See* Siegel, *supra* note 78, at 2178 ("Wives' claims for earnings in family business enterprise did, however, begin to find legitimacy in the courts—on grounds the federal court plainly foresaw.").

400 *Id.* at 2180.

nized that she could "validly contract with [her] husband for services *outside the purely domestic ones*."[401]

This critical principle—that a *wife's labor in the home was not hers*—was reinforced in a number of ways. Poignantly, if a woman was unable to perform this household labor as a result of an injury, any tort claim arising out of the injury belonged not to her but to her husband.[402] The lost labor was labor owed to the husband's property. Hence, any right to sue belonged to him. Relying on similar logic, courts refused to enforce agreements by a husband to pay his wife for those domestic services.[403] The labor was his to begin with; the wife had a preexisting legal obligation to provide her labor to her husband in exchange for his support for her. A bargain to pay her wages for that labor—labor that was already owed to him—was therefore void for lack of consideration. She had offered nothing in the bargain; the labor, even though done by her, was not hers to give.[404]

For wives, that remains the law today. Married women are entitled to enter into enforceable agreements providing compensation *for their market labor*.[405] But, to this day, wives cannot enter into enforceable contracts with their husbands to receive compensation *for their domestic services*.[406] This absolute ban on agreements to pay for domestic services applies only to spouses. But the idea of exempting do-

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401 Recent Case, 10 TEX. L. REV. 241, 241 (1932) (emphasis added).

402 *See, e.g.*, Blair v. Seitner Dry Goods Co., 151 N.W. 724, 727 (Mich. 1915) ("[Despite changes in the law, the legislature] has not, however, put her domestic duties and labor, performed in and about her home for her family upon a pecuniary basis, nor meant to classify such duties as services, nor to permit her to recover damages for loss of ability to perform them.").

403 *See, e.g.*, Church v. Church, 630 P.2d 1243, 1250 (N.M. Ct. App. 1981).

404 *Id.* ("[A] wife has a duty to provide household services to her husband and the husband has a duty to support his wife. . . . Having a duty to provide the services of a wife, those services are not a basis for relief for fraud, or breach of contract, or for an equitable award based on unjust enrichment.").

405 *See* Hasday, *supra* note 74, at 500.

406 *See, e.g.*, *id.* ("[I]nterspousal contracts for domestic services [remain] unenforceable."); *see also* Mays v. Wadel, 236 N.E.2d 180, 183 (Ind. App. 1968) ("It is the law of this State that between husband and wife, while they are living together as such in a common household, that there can be no express or implied contract for compensation or payment for any services or acts performed or rendered in and about the home by either of them in the common support of that household."); Borelli v. Brusseau, 16 Cal. Rptr. 2d 16, 20 (Ct. App. 1993) ("Personal performance of a personal duty created by the contract of marriage does not constitute a new consideration supporting the indebtedness alleged in this case."); *Church*, 630 P.2d at 1250 ("It is the duty of the wife to reverence her husband, and to serve him. These duties grow out of the mere act of marriage. The husband may not present a bill against his wife for board and clothing, nor the wife present to her husband a bill for presiding over the household. The law will not imply a contract to pay such bills." (quoting Keister's Adm'r v. Keister's Ex'rs, 96 S.E. 315, 322 (Va. 1918) (J. Burks, concurring))).

mestic services from usual market doctrines seeped beyond the boundaries of the spousal relationship. Hence, as is true with husbands and wives, "commercial" transactions between other family members are evaluated under traditional market rules. But their exchanges with respect to the provision of domestic services are treated differently. Unlike other services, these services are presumed to have been given freely, out of love and affection. To overcome this presumption, the law requires proof of compliance with formalities. Importantly, though, coverture provided the frame even in these cases involving other family members.

Many early cases involving exchanges between family members other than husbands and wives involved married women who cared for other family members in their home. Often these wives were caring for their mothers-in-law. When these married women sued, seeking compensation for their services, they often lost. Here too, the legal obligations of husbands and wives offered the logic to the analysis. Consider *Coleman v. Burr*.[407] A husband agreed to pay his wife $5.00 per week to care for his mother who was paralyzed.[408] Thereafter, the wife cared for her mother-in-law for eight years.[409] Later, a judgment creditor sought to set aside a conveyance, "the only consideration [for which] being the amount due [to the wife] under said agreement."[410] The New York high court held that the agreement between the husband and the wife to pay her for her domestic services to others in the home was invalid.[411] She could not enter into a valid agreement to be paid for those services because "in rendering them she simply discharged a marital duty which she owed to him[, her husband]."[412]

In contrast to these cases involving daughters-in-law, *husbands* who provided care for their mothers-in-law often were awarded compensation. The disparate results could be explained by the different inherent legal obligations of husbands and wives. When a wife was providing services for her in-law, "[t]he services she rendered were for her husband, and were in the line of household duties."[413] As re-

407 93 N.Y. 17 (1883).

408 *Id.* at 18.

409 *Id.*

410 *Id.*

411 *Id.* at 29.

412 *Id.*; *see also* Reynolds v. Robinson, 64 N.Y. 589, 593 (1876) ("[The wife] was engaged in no business or service on her own account. She was in charge of his household, and, as part of her household duties, rendered the services to a person in her husband's house[, specifically, her adopted father] . . . . She was then working for her husband, and not for herself, or on her own separate account.").

413 Hensley v. Tuttle, 46 N.E. 594, 595 (Ind. App. 1897).

counted above, these household duties were ones that she was already obligated to provide to her husband. In contrast to their wives, labor of husbands was and always had been their own. Husbands did not owe any duties to care for their mothers-in-law. Accordingly, husbands were entitled to be paid for their valuable labor.[414] "[T]he law," the court explained, "implies a promise to pay [the son-in-law] the reasonable value of his services."[415]

In early cases like *Coleman*, some courts concluded that wives were *absolutely* barred from entering into enforceable agreements to be paid for services in the home, including services provided to people other than her husband.[416] It was understood that *all* of those services were services due to her husband. Because they were duties already owed, the provision of them could not constitute consideration to support a valid agreement.

The absolute bar on compensation continues to apply to services provided *to the husband*. Over time, however, the law evolved with respect to domestic services provided by a wife to people *other than their husband*. Here, as the law evolved to recognize wives' ownership and control rights over their labor, the absolute bar against compensation was removed when the wife was performing domestic tasks in the home for people other than her husband. Take *Farmers Loan & Trust Co. v. Mock*.[417] In affirming an award to a married woman who sought compensation for her care and labor on behalf of her father-in-law, the court noted two important legal principles. First, the court noted that "[t]he law did not cast upon appellee any family or legal duty to render decedent services by reason of the fact that she was his daughter-in-law."[418] Second, the court explained that by virtue of the state's Married Women's Property Act, "the earnings and profits of a married woman accruing to her for service and labor, other than labor for her husband or family, are her sole and separate property."[419]

But while wives were no longer barred absolutely from receiving payment for domestic services provided in the home to people other than their husbands, these services were still singled out for different legal treatment. Although the law generally presumes that services provided and accepted were extended with an expectation of pay-

414 *See, e.g.*, *id.*

415 *Id.*

416 *See Coleman*, 93 N.Y. at 20.

417 2 N.E.2d 235 (Ind. App. 1936).

418 *Id.* at 236.

419 *Id.* at 237.

ment,[420] when the wife was performing services in the home for someone other than her husband, the law presumed that the services were provided on behalf of her husband. This presumption could be rebutted, however, with evidence to the contrary.

Morgan v. Bolles[421] is a useful illustration. In the case, the wife lived with and cared for her husband's mother.[422] At the time, Connecticut law provided that the wife's separate earnings were her separate property.[423] Nonetheless, the court held that in the absence of evidence to the contrary, the wife was presumed to have cared for her mother-in-law *on behalf of her husband*.[424] As the court explained, the wife "*may be* the equitable owner of any indebtedness accruing for such personal services."[425] "Still," the court continued, "the *service of the wife presumptively belongs to the husband*, and [hence] . . . service rendered to [his] mother would ordinarily be presumed to be rendered in behalf of the husband."[426]

Over time, this "presumption" of no compensation was extended beyond the husband-wife relationship. But here too, the law carried over coverture's basic family-market divide. When a family member provides *nondomestic* services, the usual rule applies. Accordingly, a New Jersey court explained in 1926 that the presumption of gratuity had "no application" in a case in which a son worked on his father's farm for six years.[427] A Kentucky court stated the rule more broadly: "It is well settled in this state that for services rendered that are not

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420 *See, e.g.*, Cropsey v. Sweeney, 27 Barb. 310, 315 (N.Y. Sup. Ct. 1858) ("True, the law will not presume that work or labor performed *as a servant or laborer*, was voluntary, and performed without any view to compensation; but the law cannot presume that the domestic and household work and services of a wife for a husband are performed with the view to pay as a servant or laborer. The law . . . compels us to infer and hold, that these services were performed not as a servant, with a view to pay, but from higher and holier motives . . . .").

421 36 Conn. 175 (1869).

422 *Id.* at 175.

423 *Id.* at 176.

424 *Id.*

425 *Id.* (emphasis added).

426 *Id.* (emphasis added).

427 Waker v. Bergen, 132 A. 669, 670 (N.J. 1926) ("We think that this rule is limited to household services, and has no application to the present case. The services which plaintiff sought to be compensated for were not such as are ordinarily and usually rendered by one member of a family or household to another."); *see also In re* Estate of White, 303 N.E.2d 569, 571–72 (Ill. App. Ct. 1973) (explaining that the presumption of gratuity does not apply to "[e]xtraordinary services certainly not incident to any normal domestic relationship"); J.E. Keefe, Jr., Annotation, *Recovery for Services Rendered by Member of Household or Family Other than Spouse Without Express Agreement for Compensation*, 7 A.L.R. 2d 8, § 10 (1949) ("It has been held that the rule that there is no implication of a promise to pay for services rendered between members of a household is limited in application to household services.").

personal, an implied contract will arise to pay for them even in favor of one occupying family and domestic relationship."[428] Accordingly, courts can and regularly do award compensation for nondomestic services rendered between family members, even in the absence of an express agreement to that effect.[429] But, if the services are of a domestic nature, the opposite presumption applies. The services are presumed to have been provided gratuitously, and additional proof is necessary to overcome the presumption.[430]

Eventually, this anomalous rule was extended to nonmarital partners as well. As Albertina Antognini explains, "To this day, cases addressing nonmarital couples rely on the abiding presumption that [domestic] contributions made in the context of an intimate relationship are gratuitous."[431] As a result, relief typically will be denied where the requested relief is for "housewifely services" such as "housekeeping chores, including preparation of meals, laundering, care and cleaning of the home, keeping the financial books, payment of bills, banking, shopping, showing their rental properly, and caring for the defendant's infant child on weekends."[432]

In recent years, some scholars have argued that rules singling out domestic exchanges for differential legal treatment are anachronistic and harmful. As such, the general rule ought to be abandoned.[433] For

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428 Cheatham's Ex'r v. Parr, 214 S.W.2d 95, 98 (Ky. 1948).

429 Kellum v. Browning's Adm'r, 21 S.W.2d 459, 466 (Ky. 1929) ("It is also held that a recovery may be had by a near relative on a contract implied in law where the services were not personal to the decedent, such as washing or mending or making clothes, and other similar nonpersonal services, exclusive of board and nursing."); *see also* Durr v. Durr, 82 S.W. 581, 582 (Ky. 1904) ("[W]e do not think that such extraordinary and menial services as were performed by the appellee Mary Durr during the last year of the life of the intestate ought to be regarded as household work appertaining to the domestic duties of the wife, and which she is bound to perform for her husband to another without compensation, and we are therefore of opinion that for the last year's services rendered the intestate she ought to receive just compensation."); Garner v. McKay, 15 S.W.2d 908, 909 (Mo. Ct. App. 1929) ("As to money furnished for the purpose of building upon or improving the property, the presumption of voluntary service which would ordinarily follow furnishing board and lodging, does not prevail."); Gayheart's Adm'r v. Gayheart, 155 S.W.2d 1, 3 (Ky. 1941) ("[W]here the services are of an extraordinary and menial character and extend over a long period, there is no presumption they were rendered gratuitously and the law will imply a contract to pay therefor.").

430 *See* Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129, 183 (2008).

431 Antognini, *Nonmarital Coverture*, *supra* note 5, at 2175.

432 Tapley v. Tapley, 449 A.2d 1218, 1219 (N.H. 1982).

433 *See generally* Hasday, *supra* note 74; Jonathan S. Henes, Note, *Compensating Caregiving Relatives: Abandoning the Family Member Rule in Contracts*, 17 CARDOZO L. REV. 705 (1996); *see also* Tate, *supra* note 430, at 184 ("In recent years, commentators have argued that the presumption of gratuitousness in the context of eldercare is outdated and needs to be reformed or rejected entirely.").

example, Katharine Silbaugh argues that "by treating housework as indistinguishable from other private family matters while treating paid labor as relevant to legal doctrine, law participates in the process of devaluing housework as work."[434] These rules, as Silbaugh puts it, "turn[] [domestic] labor into love."[435] The people who disproportionately feel the impact of this mandate are women.[436]

Although I share these concerns,[437] my point here is different: this is another example of the double bind the law imposes on nonmarital partners. As detailed in Part I, the law declares that these parties are legal strangers to each other. This is true for purposes of marital property division and spousal support. It is also true for purposes of hundreds of other rights and protections.[438] The law, however, simultaneously applies family-based doctrines—here the presumption of gratuity—for the purpose of denying relief to which they would otherwise be entitled.

There is a tendency to naturalize expectations about the provision of domestic services. Unlike other types of services and contributions, family members who provide services in the home are presumed to provide these services out of love and affection and to have no expectation of compensation. But as demonstrated above, these contemporary intuitions are shaped by the law. The rule finds its roots in legal doctrines which imposed preexisting reciprocal legal obligations on certain family members. Hence, the rule that wives are not entitled to payment for their domestic services in their own home grows out of

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434 *See, e.g.*, Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 26 (1996) [hereinafter Silbaugh, *Labor into Love*]; *see also* Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 100 (1998) ("Legal rules tend to ignore the productive nature of household labor altogether, excusing the labor from entitlement based on its intimate context, on the assumption that the emotional context of home labor cannot be sustained if that labor is understood to lead to the kinds of entitlements associated with wage labor.").

435 Silbaugh, *Labor into Love*, *supra* note 434, at 32–33.

436 Janet Halley, *What Is Family Law?: A Genealogy Part II*, 23 YALE J.L. & HUMANS. 189, 265–66 (2011).

437 Others, of course, disagree. *See, e.g.*, Eisenberg, *supra* note 76, at 823 ("In this Article, I will show that . . . the world of gift would be impoverished if simple donative promises were placed into the world of contract . . . ."); Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 799 (1941) (arguing that the bases favoring enforceability of contracts do not support the enforcement of donative promises); Melvin Aron Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 1–2 (1979); Richard A. Posner, *Gratuitous Promises in Economics and Law*, 6 J. LEGAL STUD. 411, 416–17 (1977).

438 *See, e.g.*, Courtney G. Joslin, *Family Support and Supporting Families*, 68 VAND. L. REV. EN BANC 153, 166–67 (2015) (discussing some such benefits).

their preexisting legal obligation to provide those services for their husbands.

The rules applicable to other family combinations find a similar history. Thus, in cases where the family members in question did not owe each other reciprocal legal duties, courts were less likely to apply the presumption of gratuity.[439] Take *Sargent v. Foland*.[440] In the case, a stepson brought suit seeking compensation for services he provided on his stepfather's farm.[441] After leaving home, the stepfather—who had become blind—wrote to the stepson asking him to return home to care for him.[442] "The relation of parent and child of itself creates reciprocal rights and duties," the court explained.[443] In contrast, "the relation of stepfather and stepchild does not of itself impose any duty upon one to the other or create any right assertable by one against the other."[444]

> If, however, a stepfather receives a stepchild into his family and treats the child as a member of his family he places himself in loco parentis, and the reciprocal rights and duties of parent and child are thus created and will continue to exist as long as the stepfather continues to stand in that position.[445]

In such cases—where there are reciprocal legal duties between the parties—the presumption of gratuity applies:

> If the stepson lives with the stepfather as a member of his family and by reason of that fact the stepfather stands in loco parentis to the stepchild, then it necessarily follows that in such circumstances the stepchild is required to allege and prove an express contract, or its equivalent, for the same reason that a child is required to allege and prove such a contract.[446]

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439 To be sure, one certainly can find cases in which courts rather blindly restate and apply the presumption of gratuity to a range of family members, including family members who did not owe each other reciprocal duties. *See, e.g.*, Farris v. Faris' Estate, 212 S.W.2d 71, 75 (Mo. Ct. App. 1948) (applying presumption in case involving care provided by "a cousin of the deceased's husband").

440 207 P. 349 (Or. 1922).

441 *Id.* at 350.

442 *Id.*

443 *Id.* at 352.

444 *Id.*

445 *Id.*

446 *Id.*; *see also* Morris v. Retz, 413 S.W.2d 544, 549 (Mo. Ct. App. 1967) (explaining that "[t]he term 'family'" for purposes of the presumption of gratuity refers to those "persons under one head and one domestic government, 'who have reciprocal, natural, or moral duties to support and care for each other'" (quoting Offord v. Jenner's Estate, 189 S.W.2d 173, 176 (Mo. Ct. App. 1945))).

But where the person is not a family member with reciprocal rights and obligations, the usual rules apply: acceptance of services provided "implie[s] a contract to pay," and the burden lies on the person who received the services "to prove that the services were rendered gratuitously."[447] Thus, even as applied to other combinations of family members, the rule singling out domestic exchanges for differential treatment was rooted in the preexisting mutual rights and obligations imposed by law on the parties.

This brings us back to where we began: unlike legally recognized family members, nonmarital partners have no mutual rights or obligations to each other by virtue of their relationships. They are not family members at all.[448] This basic principle is reflected in hundreds of other laws and policies.[449] Nonmarital partners, for example, have no default rights to share property acquired during their relationships.[450] They are not entitled to intestate succession.[451] They are not entitled to protections upon the death or disability of the other based on the existence of their relationship.[452] They are not responsible for the other's debt, nor can they be required to provide for the necessary care of the other. Yet, here again, courts rhetorically invoke their family-like nature to squeeze the double bind.[453] They are at once not family members, but family members, their family-like status—or lack thereof—being invoked to deny them the protection of the law.

Conclusion

The legal treatment of nonmarital families is an increasingly important question. Nonmarital families constitute a large and growing slice of the population here in the United States and around the world.[454] Many other countries have responded to this demographic shift by shifting to a status-based approach.[455] Under this approach, if the relationship meets various criteria, the couple is treated like a

447 *Morris*, 413 S.W.2d at 550.

448 *See infra* Section I.B.

449 *See, e.g.*, Joslin, *supra* note 438.

450 *See, e.g.*, Joslin, *supra* note 1, at 920 (surveying state approaches).

451 *See* Matsumura, *supra* note 79, at 1330.

452 *See id.*

453 Halley, *supra* note 12, at 1748.

454 *See supra* note 1; *see also* Margaret Ryznar & Anna Stepien-Sporek, *Cohabitation Worldwide Today*, 35 Ga. St. U. L. Rev. 299, 299 (2019) (noting an "increase in cohabitation around the world").

455 *See, e.g.*, Alvaré, *supra* note 7 ("More than a few nations and countries have granted marital-like rights to cohabiting couples—*if* their relationship meets several criteria. These include Australia, New Zealand, Canada, Ireland, the Scandinavian countries, and Scotland.").

married couple.[456] For example, in Canada and Australia, nonmarital couples are treated like married spouses. States in the United States continue to resist this trend.[457]

This Article offers new insights on this critically important debate between the status-based and market-based approaches to nonmarriage.[458] This Article reveals that the law of nonmarriage in the United States follows neither approach. Instead, it places nonmarital partners in an untenable double bind. Nonmarital partners are denied protection under the law of the family because they are not family. Simultaneously, they are denied protection under market law when their underlying transactions are too family like. This Article also reveals the curious content of this double bind. Nonmarital partners are denied relief for their family-like bargains because the law subjects these claims and only these claims to *heightened formality requirements*, beyond those imposed on sophisticated business players.

This Article concludes by employing the theoretical lens of the double bind to challenge the normative defenses of the current U.S. approach to nonmarriage as autonomy and family respecting. In so doing, this Article offers critical new insights that can aid scholars, policymakers, and courts as they grapple with the question of how the law can best value, respect, and protect these relationships and the critical work that occurs within them. Elsewhere, I argue in favor of treating these families as families. At the very least, however, the law ought not to leave them in a lose-lose situation.

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456 *Id.*

457 *See supra* note 16 and accompanying text.

458 *See, e.g.*, *Developments in the Law*, *supra* note 11, at 2127 ("For decades, scholars have argued over the economic rights of partners at the end of a cohabiting relationship. Some advocate a contract-based approach, others a status-based approach." (footnotes omitted)).