Family Choices

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I. INTRODUCTION

Families are changing. In the past, most adults in the U.S. were married,[1] and almost all children were born to married persons.[2] That is no longer the case. About half of all adults in the U.S. today are unmarried.[3] Being unmarried, however, does not necessarily mean that the person lacks a family.[4] As marriage rates have declined, cohabitation rates have increased. Today there are approximately 18 million adults in the U.S. who are living with nonmarital partners.[5] These trends are likely to continue.

Despite these demographic changes, however, the law continues to draw a stark line around marriage.[6] Hundreds of rights and obligations flow by virtue of one's status as a legal spouse.[7] Unmarried partners, in contrast, are

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1. Kaiponanea T. Matsumura, *Consent to Intimate Regulation*, 96 N.C. L. REV. 1013, 1016 (2018) ("In 1967, 70.3% of the adult population lived in married households.").

2. In 1960, only 5% of children were born to unmarried women. Susan Frelich Appleton, *Illegitimacy and Sex, Old and New*, 20 AM. U. J. GENDER SOC. POL'Y & L. 347, 364–65 (2012).

3. Stephanie Hanes, *Singles Nation: Why So Many Americans Are Unmarried*, CHRISTIAN SCI. MONITOR (June 14, 2015), https://www.csmonitor.com/USA/Society/2015/0614/Singles-nation-Why-so-many-Americans-are-unmarried [https://perma.cc/QMS4-KTNA] ("Last year, for the first time, the number of unmarried American adults outnumbered those who were married.").

4. *See, e.g.*, Courtney G. Joslin, *Autonomy in the Family*, 66 UCLA L. REV. 912, 915 (2019) ("Between 2000 and 2010, the unmarried cohabiting partner population grew by over 40 percent.").

5. Matsumura, *supra* note 1, at 1016 ("Unmarried cohabitants—over 18 million of them—now make up 7.1% of the adult population.").

6. Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277, 1279 (2015) ("Marital supremacy—the legal privileging of marriage—endures, despite soaring rates of nonmarital childbearing and a widening 'marriage gap' that divides Americans by race, wealth, and education." (footnotes omitted)).

For a critique of this marriage-based legal system, see NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE (2008).

7. *See, e.g.*, Courtney G. Joslin, *Searching for Harm: Same-Sex Marriage and the Well-Being of Children*, 46 HARV. C.R.-C.L. L. REV. 81, 98–99 n.94 (2011) (noting that hundreds of state rights, protections, and benefits and over one thousand federal rights, protections and responsibilities "are extended to people based on their marital status").

denied many of these protections.[8] One of the many ways in which spouses and unmarried partners are treated differently is with regard to property rights upon dissolution. For married couples, the default rule is one of sharing. In the absence of an agreement to the contrary, each spouse is entitled to share the assets accumulated during the marriage, regardless of who is on title or who "earned" the asset.[9] These property rules reflect both the reality and hopes for these relationships—that they involve mutual contributions and reciprocal give-and-take.

The opposite default applies to former nonmarital partners.[10] The partners have *no legal obligations* to each other unless they agree to take them on.[11] In theory, this approach treats former nonmarital partners as legal strangers.[12] As such, former nonmarital partners typically can pursue claims based on express or implied contract and, possibly, equitable theories.[13] In practice, however, former intimate partners are often entitled to *less protection* than is extended to true third parties.[14] These rules are based on the 1976 *Marvin v. Marvin* decision.[15] Almost fifty years later, *Marvin* remains the dominant approach in the U.S.[16]

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8. *See, e.g.*, Courtney G. Joslin, *Family Support and Supporting Families*, 68 VAND. L. REV. EN BANC 153, 167 (2015) ("Often these benefits are not extended to nonmarital partners.").

9. Laura A. Rosenbury, *Two Ways To End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1230 (2005) ("Although variations exist among the states, every state's default approach is now designed to effectuate an equal or equitable division of all property accumulated from wages during marriage, regardless of the title of that property." (footnotes omitted)); *see also* Erez Aloni, *The Puzzle of Family Law Pluralism*, 39 HARV. J.L. & GENDER 317, 337–38 (2016) ("In the absence of a marital contract (prenuptial, postnuptial, or divorce settlement) that modifies these default terms, the spouses will follow the financial obligations established by the state upon divorce.").

10. *See* D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 401 (6th ed. 2016) ("The majority [of states] follow[] *Marvin* in recognizing express and implied agreements as well as equitable remedies.").

There are a few exceptions to this general rule. Under the intimate committed partner doctrine, for example, Washington state applies marriage-like property distribution rules to former nonmarital partners. *See, e.g.*, Albertina Antognini, *Nonmarital Coverture*, 99 B.U. L. REV. 2139, 2183 (2019); Joslin, *supra* note 4, at 968.

11. Aloni, *supra* note 9, at 353 ("When it comes to informal relationships, most states have adopted default rules that declare that partners do not have financial obligations vis-à-vis one another unless they contract otherwise.").

12. Joslin, *supra* note 4, at 920–21.

13. *See, e.g.*, *id.* at 932. Some states, however, only allow a more limited set of claims. For example, a few states only permit claims based on express, written agreements. *Id.* at 928–29.

14. *Id.* at 936–37.

15. 557 P.2d 106 (Cal. 1976).

16. WEISBERG & APPLETON, *supra* note 10, at 401 ("The majority follows *Marvin* in recognizing express and implied agreements as well as equitable remedies."); Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309, 315 (2008)

There is lively scholarly debate about the continued vitality of this rule.[17] This debate is not just theoretical. The Uniform Law Commission recently appointed a drafting committee to address the "Economic Rights of Unmarried Cohabitants."[18] Among scholars who support the right of people to live in nonmarital families, there is a difference of opinion about whether the *Marvin* rule promotes or undermines principles of family autonomy. A number of legal scholars criticize the current approach to *inter se* economic rights of former nonmarital partners.[19] A different group of legal scholars defend the dominant approach.[20] Interestingly, scholars on both sides invoke autonomy and choice. This Article offers a new lens through which to evaluate this dialectic.

The first contribution of this Article is to demonstrate that scholars come to opposing conclusions despite a similar underlying concern because they focus on different choice or autonomy-exercising moments. Some scholars—myself included—focus on the decision to form a nonmarital family. In contrast, other scholars prioritize "choices" regarding the parties' specific rights and obligations to each other. The second contribution of this Article

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("Today, *Marvin* represents, at least in the United States, the dominant approach to cohabitant claims.").

17. *See, e.g.*, Albertina Antognini, *Against Nonmarital Exceptionalism*, 51 U.C. DAVIS L. REV. 1891 (2018); June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55 (2016); Joslin, *supra* note 4; Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425 (2017) [hereinafter Joslin, *Gay Rights Canon*]; Kaiponanea T. Matsumura, *A Right Not To Marry*, 84 FORDHAM L. REV. 1509 (2016); Matsumura, *supra* note 1; Melissa Murray, Obergefell v. Hodges *and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207 (2016); Melissa Murray, *Accommodating Nonmarriage*, 88 S. CAL. L. REV. 661, 689–90 (2015); Emily J. Stolzenberg, *The New Family Freedom*, 59 B.C. L. REV. 1983 (2018); Deborah A. Widiss, *Non-Marital Families and (or After?) Marriage Equality*, 42 FLA. ST. U. L. REV. 547 (2015).

To be clear, this debate is not limited to family law scholars. Other legal scholars, including trusts and estates scholars, have weighed in as well. *See, e.g.*, Thomas P. Gallanis, *The Flexible Family in Three Dimensions*, 28 LAW & INEQ. 291, 291 (2010) ("One of the central questions facing American family law throughout the last quarter century, and continuing today, is how to respond to the 'extraordinary growth in the rate of nonmarital cohabitation.'"); Lawrence W. Waggoner, *Marriage Is on the Decline and Cohabitation Is on the Rise: At What Point, If Ever, Should Unmarried Partners Acquire Marital Rights?*, 50 FAM. L.Q. 215, 216 (2016) (making "the case for treating cohabiting couples whose relationships show that they are (or were) deeply committed to one another as married in fact").

18. *See Economic Rights of Unmarried Cohabitants Committee*, UNIFORM L. COMMISSION, https://www.uniformlaws.org/committees/community-home?CommunityKey=5f044999-b4b3-458a-b6d4-d984885d913b [https://perma.cc/7WME-AJUL].

19. *See, e.g.*, Ira Mark Ellman, *"Contract Thinking" Was* Marvin*'s Fatal Flaw*, 76 NOTRE DAME L. REV. 1365 (2001); Joslin, *supra* note 4, at 917–18; Stolzenberg, *supra* note 17, at 2024–25.

20. *See, e.g.*, Carbone & Cahn, *supra* note 17, at 63–64; Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 884–85 (2005).

is to interrogate these different decisions as the trigger for the default rule. In so doing, this Article seeks to more clearly orient the debate and, hopefully, to push it forward in helpful ways.

II. THE DEBATE

The rules governing the economic rights of nonmarital partners at dissolution are distinctly different from those that apply to married partners. The default rule that applies to spouses is one of required sharing. In the absence of an agreement to the contrary, the court will divide the available estate either equitably or equally between the parties.[21]

In contrast, the law treats unmarried partners as legal strangers. As such, they have no sharing obligations unless they agree otherwise. Each party generally walks away with what they are on title to.[22] Indeed, the seminal case—*Marvin v. Marvin*[23]—merely removed the legal bar that had precluded nonmarital partners from making claims that were available to other legal strangers.[24]

Moreover, in practice, former intimate partners are often entitled to less protection than is extended to true third parties.[25] While true third parties may be able to seek reimbursement for the full range of services provided, states almost uniformly refuse to award compensation to former nonmarital partners for homemaking and domestic services.[26] This is true even though these homemaking and caregiving services are contributions that are

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21. *See, e.g.*, Rosenbury, *supra* note 9, at 1230.

22. Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1, 8 (2017) ("In deciding whether and how to distribute property in a relationship that is not marital, courts generally enforce a rule that recognizes title to property, over and above non-monetary contributions made to the relationship.").

23. 557 P.2d 106 (Cal. 1976). Although it was decided over 40 years ago, *Marvin* remains the dominant approach in the U.S. today. WEISBERG & APPLETON, *supra* note 10, at 401 ("The majority follows *Marvin* in recognizing express and implied agreements as well as equitable remedies."); Garrison, *supra* note 16, at 315.

24. *See, e.g.*, Sands v. Menard, 2017 WI 110, ¶ 42, 379 Wis. 2d 1, 904 N.W.2d 789 (noting that the Wisconsin decision adopting the *Marvin* rule "simply provided that cohabitation between unmarried romantic partners is not a bar to an otherwise valid claim of unjust enrichment" and noting that the *Marvin* rule "d[oes] not provide that the romantic relationship created the claim for relief").

25. *See id.* at ¶¶ 42–47.

26. *See, e.g.*, Tapley v. Tapley, 449 A.2d 1218, 1219 (N.H. 1982) ("Recently this court ruled that, 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. We decline, however, to extend the holding of that case beyond recovery on a theory of express contract to include recovery for domestic services under an implied contract or in quantum meruit." (citation omitted)).

exchanged in almost all family relationships, and even though they are critical to the functioning of families and the flourishing of the individuals in them. In denying recovery to nonmarital partners for these contributions, courts reason either that these services have already been compensated, or that they are "presumed" to have been provided "gratuitously."[27] (To be clear, "husbandly" "acts of kindness and good-will" are generally compensable; it is "wifely" services that tend to be treated as "gratuitously performed."[28])

Within the debate about this approach, scholars stake out positions on both sides. A number of legal scholars, myself included, criticize the conventional approach.[29] Another group of legal scholars defend *Marvin*.[30] Interestingly, arguments for and against *Marvin* sound in the register of autonomy. For example, in *Autonomy in the Family*, I argue that "[t]he conventional approach governing the economic rights of nonmarital families impedes rather than furthers a robust vision of family autonomy."[31] Other scholars make similar arguments.[32]

A different group of scholars invoke autonomy to *defend* the conventional approach. Professors June Carbone and Naomi Cahn, for example, fall into this camp.[33] Under the existing doctrine, they contend, "courts will intervene in accordance with the parties' express agreements or, if none exist, in accordance with restitution standards that untangle the parties' respective contributions to asset acquisition."[34] This, they contend, "respects the parties'

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27. Antognini, *supra* note 10, at 2173 ("Case after case in jurisdiction after jurisdiction falls into the same pattern of reasoning: services provided by the individual requesting property are understood to be part of the give-and-take of an intimate relationship. As such, courts either presume that services are provided gratuitously or they consider whatever value they may possess to have been properly recompensed during the course of the relationship.").

28. *Tapley*, 449 A.2d at 1220 ("This holding [refusing to allow recovery for 'domestic services'] is not meant to limit recovery for business and personal services, other than normal domestic services, rendered between unmarried cohabitants."); *see also* Antognini, *supra* note 10, at 2176–77 ("Specifically, [contemporary cases] insulate the home from any sort of market exchange by distinguishing *homemaking* services from *business* services and allowing compensation for the latter.").

29. *See, e.g.*, Ellman, *supra* note 19, at 1367; Joslin, *supra* note 4, at 944; Stolzenberg, *supra* note 17, at 2051–52.

30. *See, e.g.*, Carbone & Cahn, *supra* note 17, at 63–64; Garrison, *supra* note 20, at 884–85.

31. Joslin, *supra* note 4, at 986.

32. *See, e.g.*, Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COLUM. L. REV. 293, 297 (2015) ("On this view, fundamental notions of autonomy and fairness support the claim that the liberal state should offer individuals the freedom to undertake whatever family relationships maximize their utility and then should support those families equally.").

33. Carbone & Cahn, *supra* note 17, at 78.

34. *Id.*

autonomy."[35] Marsha Garrison offers some similar arguments in support of the *Marvin* rule.[36] The *Marvin* rule, she argues, "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."[37] Rules that impose default obligations on former nonmarital partners, she continues, "run counter to . . . the ideal of individual autonomy."[38] Thus, autonomy concerns animate both critics and supporters of the *Marvin* rule. These common underlying concerns, however, take different scholars to different conclusions. Identifying the decisional fulcrum helps explain this apparent conundrum. Scholars reach different conclusions because they focus on different autonomy-exercising moments.

For example, in my critique of *Marvin*, I focus on the *decision to form a nonmarital family*. As I argue: "Once a familial relationship is formed, it should be treated for what it is: a family."[39] More specifically, I urge the adoption of rules in the adult-adult context that mirror ones that exist in the parent-child context—where the key question is "whether the parties intended to and did in fact form a family together."[40] In answering this question, neither the fact that the parties could have but failed to engage in formalities,[41] nor their understanding (accurate or not) of their rights and obligations should be dispositive.[42]

Others, however, concentrate on a different decision—the decision regarding their specific rights and obligations to each other.[43] For example, Carbone and Cahn argue that "[d]oing justice to these relationships . . . requires . . . giving them more tools for crafting express agreements, particularly with respect to financial matters."[44] The law should intervene,

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35. *Id.*
36. Garrison, *supra* note 20.
37. *Id.* at 896.
38. *Id.* at 856.
39. Joslin, *supra* note 4, at 971.
40. *Id.* at 953.
41. *See id.* at 960.
42. *See id.*
43. For an examination of the more general shift towards an individualistic, neoliberalist vision of autonomy, see Stolzenberg, *supra* note 17, at 1987 ("I identify and describe a vision of autonomy as [individual] property rights that has emerged since the early 1970s . . . .").
44. Carbone & Cahn, *supra* note 17, at 108; *see also id.* at 112 ("The legal regulation of these relationships ought to be more like that of cohabitants in financial disputes; it should respect independent actors who manage their own relationship terms."); *id.* at 109–10 ("As both men and women make choices to live together without marrying, the law no longer passes judgment on them, even when the result reflects unequal bargaining power and different preferences. These couples are treated as independent actors capable of making their own choices and dealing [with] the consequences.").

they continue, only to enforce the agreements—express or implicit—they made about their respective rights and responsibilities to each other.[45] This, they continue, "respects the parties' autonomy."[46]

In the Parts that follow, I defend my position that the critical decision—from both a constitutional and a normative perspective—is the family-formation decision. I also raise concerns about an approach that uses the opposite default and imposes obligations only when the parties mutually decide to take those on.

III. CHOICE TO FORM A FAMILY

In this Part, I explain why the critical decision for setting the default should be the decision to form a family.

Before going further, two caveats are in order. First, taking the position that nonmarital families should be recognized and respected as families does not necessarily mean they must be treated identically to married families. Considered collectively, there are some differences between marital and nonmarital families. For example, marital families tend to be more stable. Marital families are somewhat more likely to comingle their financial assets.[47] In light of these and other differences, it may not be appropriate to treat nonmarital families exactly like marital families. At least in some circumstances, doing so may work more harm than good.[48] Instead, it may be appropriate to recognize nonmarital partners but to apply rules that depart from those that apply to marital families. This is indeed how some other

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45. *Id.* at 78 ("The courts will intervene in accordance with the parties' express agreements or, if none exist, in accordance with restitution standards that untangle the parties' respective contributions to asset acquisition.").

46. *Id.*

47. Nonmarital couples are less likely than marital couples to pool their families. Nonetheless, the majority of them pool their resources and an overwhelming majority of them share their financial resources with each other. *See, e.g.*, Catherine Kenney, *Cohabiting Couple, Filing Jointly? Resource Pooling and U.S. Poverty Policies*, 53 FAM. REL. 237, 245 (2004) ("The similarity in the overall proportions of married and cohabiting couple using one or the other of these [resource sharing systems] (83.2% versus 75.3%) suggests that, at least among the low-income couples included here, marital status is less important than coresidence in determining whether resources are shared."); D'Vera Cohn, *Cohabiting Couples and Their Money*, PEW RES. CTR. (Nov. 22, 2011), https://www.pewsocialtrends.org/2011/11/22/cohabiting-couples-and-their-money/ [https://perma.cc/M93V-WBFH] ("One study of couples with young children found that 73% of married couples and 52% of cohabiting couples combine all their money; the share rises to 75% of cohabiters (and 83% of married couples) by including those who keep their money separate but split household and child expenses 50-50.").

48. Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 176 (2015) ("The difficulty is the mismatch between marital family law's rules, institutions, and norms and the particular needs of nonmarital families.").

countries address the issue.[49] A similar approach may be appropriate in the U.S. as well.

Second, although I contend that the choice to form a family should be the primary focal point, this does not mean that the parties' preferences about their respective rights and obligations, where clearly and mutually made, should be irrelevant. As is true with married couples,[50] I support rules that allow nonmarital partners to opt out of default sharing rules.[51] My point is simply that the decision to form a family should be a key consideration in setting the default rules. The current rules—which treat nonmarital families as nonfamilies—flout rather than protect that decision.

A. Liberty and Family Choice

1. Meaningful Choice in Family Form

The Due Process Clause extends special protection to "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy."[52] As the Supreme Court held in *Lawrence v. Texas*, the Court's prior cases establish that these specially protected decisions include "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education."[53] Stated another way, they include decisions about who is in one's family. For example, one has a protected liberty interest to choose one's marital partner.[54]

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49. *See, e.g.*, Anna Stepień-Sporek & Margaret Ryznar, *The Consequences of Cohabitation*, 50 U.S.F. L. REV. 75, 89–90 (2016) (describing different approaches to cohabitation in Europe, and reporting that some countries provide nonmarital partners "with some, but minimal, default protection," while other countries "offer flexibility in cohabitation rights").

50. *See, e.g.*, Barbara A. Atwood & Brian H. Bix, *A New Uniform Law for Premarital and Marital Agreements*, 46 FAM. L.Q. 313, 318–19 (2012) ("Under current law, all jurisdictions recognize the enforceability of premarital agreements concerning the economic consequences of death and divorce . . . ."); J. Thomas Oldham, *With All My Worldly Goods I Thee Endow, or Maybe Not: A Reevaluation of the Uniform Premarital Agreement Act After Three Decades*, 19 DUKE J. GENDER L. & POL'Y 83, 83 (2011) ("During the past four decades, all U.S. states have accepted the general idea that spouses may make an enforceable agreement specifying the economic consequences of divorce.").

51. Joslin, *supra* note 4, at 968.

52. Lawrence v. Texas, 539 U.S. 558, 574 (2003) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).

53. *Id.* at 573–74.

54. *See, e.g.*, Obergefell v. Hodges, 135 S. Ct. 2584, 2604 (2015) ("These considerations lead to the conclusion that the right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment

One also has a protected liberty interest about whether or not to bring children into one's family.[55] In addition, it is clear that individuals have a constitutionally protected right to form and be in nonmarital relationships.[56] These decisions are entitled to heightened constitutional protection because they are profound decisions that affect one's conception of self and one's life course. As the Court explains, "[b]eliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State."[57]

One also, I argue, has a protected liberty interest to form a nonmarital family *that is recognized and respected as a family*.[58] To be sure, neither the *Lawrence* Court nor the *Obergefell* Court expressly addressed whether "the government must give formal recognition" to nonmarital relationships.[59] But this conclusion follows from the Court's decisions. *Lawrence* was a step in this direction.[60] The *Lawrence* Court declared that people have the right to form intimate relationships, including intimate relationships outside of marriage, without the threat of criminal prosecution.[61] As the *Obergefell* Court explained, however, simply removing the possibility of criminal prohibitions for nonmarital relationship does not sufficiently protect the full extent of the liberty and freedom at stake: "while *Lawrence* confirmed a dimension of freedom that allows individuals to engage in intimate association without criminal liability, it does not follow that freedom stops there. Outlaw to outcast may be a step forward, but it does not achieve the

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couples of the same-sex may not be deprived of that right and that liberty."); Loving v. Virginia, 388 U.S. 1, 12 (1967) ("The Fourteenth Amendment requires that the freedom of choice to marry not be restricted by invidious racial discriminations. Under our Constitution, the freedom to marry or not marry, a person of another race resides with the individual and cannot be infringed by the State.").

55. *See, e.g.*, Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

56. *Lawrence*, 539 U.S. at 558.

57. *Id.* at 574 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992)).

58. For an argument that the decision to be a parent—including a parent unconnected to a child through either marriage or biology—is of constitutional magnitude, see Douglas NeJaime, *The Constitution of Parenthood*, 72 STAN. L. REV. (forthcoming 2020) (manuscript at 11) (on file with author) (arguing that "[f]amily law authorities have furnished interpretations of key constitutional decisions that, rather than support a biological approach to parenthood, affirmatively support the recognition of nonbiological parents").

59. *Lawrence*, 539 U.S. at 578; *see Obergefell*, 135 S. Ct. at 2584.

60. *Lawrence*, 539 U.S. at 578 ("The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives.").

61. *Id.* ("The State cannot demean their existence or control their destiny by making their private sexual conduct a crime.").

full promise of liberty."[62] To do so, the state must accord dignity, respect, and recognition to those decisions once they are made.

Moreover, for individuals to have meaningful choice in family relationships, they must have options from which to choose. If the choice is simply between being in family (which requires marriage) or to being in a nonfamily (which encompasses every configuration other than marriage), that is not a meaningful choice in family form. This, however, is the very choice people have under the current regime.[63] There may be persuasive reasons to treat nonmarital families differently from marital ones in some respects. But it is not appropriate to deny their very existence.

2. Basic Reasons for Protection

This conclusion—that the full promise of liberty requires the state to accord recognition and respect to nonmarital families—is bolstered by the Court's decision in *Obergefell v. Hodges*.[64] In *Obergefell*, the Supreme Court identified four basic reasons why the decisions of whether and whom to marry are of constitutional importance.[65] Many nonmarital relationships share these basic characteristics.[66]

First, the choice of whether and whom to marry is one of "life's momentous acts of self-definition."[67] In this way, the relationship can "shape an individual's destiny."[68] Likewise, "[f]or some, the decision to form and remain in a nonmarital family form is among the 'most intimate' decisions he or she has made."[69] Moreover, as is true for many marital partners, many individuals exercise a range of other constitutionally protected liberties in these nonmarital relationships—including the right to engage in sexual

62. *Obergefell*, 135 S. Ct. at 2600.

63. *See, e.g.*, Salzman v. Bachrach, 996 P.2d 1263, 1269 (Colo. 2000) ("A court should not decline to provide relief to parties in dispute merely because their dispute arose in relationship to cohabitation. Rather, the court should determine—as with any other parties—whether general contract laws and equitable rules apply."); W. States Constr., Inc. v. Michoff, 840 P.2d 1220, 1224 (Nev. 1992) ("We therefore adopted, in *Hay*, the rule that unmarried cohabitants will not be denied access to the courts to make property claims against each other merely because they are not married.").

64. 135 S. Ct. 2584.

65. *Id.* at 2589–90.

66. For a more in-depth analysis of this argument, see Joslin, *Gay Rights Canon*, *supra* note 17, at 466–72.

67. *Obergefell*, 135 S. Ct. at 2599.

68. *Id.*

69. Joslin, *Gay Rights Canon*, *supra* note 17, at 467.

intimacy[70] and the right to make decisions about whether to bear or beget a child.[71]

Another "basic reason" why choices about marriage are of constitutional importance is because that relationship form "safeguards children and families."[72] Marriage certainly is a site of much child caring and rearing. Historically, the vast majority of all child rearing occurred within marital relationships.[73] Increasingly, however, much childbearing and rearing occurs outside of marriage. Today close to half of all children in the U.S. are born to unmarried women.[74] Many of these women have and raise these children in the context of nonmarital relationships. According to the U.S. Census Bureau, "38% of all cohabiting couples" "had at least one biological child in the household."[75] Thus, these nonmarital families fulfill an increasing share of the safeguarding of children and other family members.[76]

Choices about whether and whom to marry are also constitutionally protected because marriage is a "keystone of our social order."[77] To be sure, marriage was and remains a critically important institution. Historically, most

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70. Lawrence v. Texas, 539 U.S. 558 (2003).

71. Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) ("If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.").

72. *Obergefell*, 135 S. Ct. at 2600.

73. *See, e.g.*, Courtney G. Joslin, *The Evolution of the American Family*, 36 HUM. RTS. 2, 3 (2009); *see also* Gretchen Livingston, *The Changing Profile of Unmarried Parents*, PEW RES. CTR. (Apr. 25, 2018), https://www.pewsocialtrends.org/2018/04/25/the-changing-profile-of-unmarried-parents/ [https://perma.cc/5KUT-PSP4] (noting that in 1968, only 7% of parents living with their children were unmarried).

74. *See, e.g.*, JOYCE A. MARTIN, BRADY E. HAMILTON, MICHELLE J.K. OSTERMAN, ANNE K. DRISCOLL & PATRICK DRAKE, NATIONAL VITAL STATISTICS REPORTS, BIRTHS: FINAL DATA FOR 2017, at 5 (2018), https://www.cdc.gov/nchs/data/nvsr/nvsr67/nvsr67_08-508.pdf [https://perma.cc/L4FD-YWNC] ("The percentage of all births to unmarried women was 39.8% in 2017, unchanged from 2016 and the lowest level since 2007. The percentage of all births to unmarried women peaked in 2009 at 41.0%." (endnote omitted)).

75. FIONA ROSE-GREENLAND & PAMELA J. SMOCK, *Living Together Unmarried: What Do We Know About Cohabiting Families?*, *in* HANDBOOK OF MARRIAGE AND THE FAMILY 257 (Gary W. Peterson & Kevin R. Bush eds., 3d ed. 2013).

76. *See* Scott & Scott, *supra* note 32, at 302 ("Much has changed since [the 1960s]. To begin, the proportion of families based on marriage has declined. A recent Pew survey found that barely fifty percent of American adults were married, the lowest rate ever reported. Meanwhile, the percentage of couples living together in nonmarital unions has increased steadily, as have the number of children born to unmarried mothers, often cohabiting (at birth) with their children's fathers." (footnote omitted)).

77. *Obergefell*, 135 S. Ct. at 2601 ("Fourth and finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order.").

intimate couples married,[78] and other family forms were very rare. As recently as 1968, "[o]nly 0.1 percent of 18- to 24-year-olds and 0.2 percent of 25- to 34-year-olds lived with an unmarried partner, according to the Current Population Survey."[79]

Marriage is increasingly joined by other family forms. According to the U.S. Census Bureau, "[f]or some young adults, living together has become a more common option than marriage."[80] This shift is not limited to younger Americans. "[A]n increasing number of Americans ages 50 and older are [also] in cohabiting relationships."[81] Thus, marriage is "no longer at the center of family life for increasingly large swaths of the American public."[82] Along with marriage, these nonmarital relationships are now *also* "keystone[s] of our social order."[83] In the past, when most adults married, it may have seemed natural and appropriate to accord government respect solely to that family structure. But, as the Court explains, "new insights and societal understandings can reveal unjustified inequality within our most fundamental institutions that once passed unnoticed and unchallenged."[84]

Moreover, as was true with same-sex relationships, decriminalization alone is insufficient to accord equal liberty to this often life-shaping personal decision.[85] Instead, the government must extend dignity, respect, and protection to these relationships that are so important to millions of Americans. By treating nonmarital families as nonfamilies, the *Marvin* rule flouts these principles.

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78. In 1960, for example, there were only approximately 400,000 cohabiting couples. U.S. CENSUS BUREAU, UNMARRIED PARTNERS OF THE OPPOSITE SEX, BY PRESENCE OF CHILDREN: 1960 TO PRESENT, tbl.UC-1 (2011).

79. Benjamin Gurrentz, *Living with an Unmarried Partner Now Common for Young Adults*, U.S. CENSUS BUREAU (Nov. 15, 2018), https://www.census.gov/library/stories/2018/11/cohabitaiton-is-up-marriage-is-down-for-young-adults.html [https://perma.cc/5GJD-K4V3].

80. *Id.*

81. Renee Stepler, *Number of U.S. Adults Cohabiting with a Partner Continues To Rise, Especially Among Those 50 and Older*, PEW RES. CTR. (Apr. 6, 2017), https://www.pewresearch.org/fact-tank/2017/04/06/number-of-u-s-adults-cohabiting-with-a-partner-continues-to-rise-especially-among-those-50-and-older/ [https://perma.cc/FT9Z-W3UV]; *see also id.* ("In fact, cohabiters ages 50 and older represented about a quarter (23%) of all cohabiting adults in 2016.").

82. Huntington, *supra* note 48, at 168.

83. Obergefell v. Hodges, 135 S. Ct. 2584, 2601 (2015) ("Fourth and finally, this Court's cases and the Nation's traditions make clear that marriage is a keystone of our social order.").

84. *Id.* at 2603.

85. Indeed, the denial of rights and protections is part of the constitutional injury. *Id.* at 2602 ("Under the Constitution, same-sex couples seek in marriage the same legal treatment as opposite-sex couples, and it would disparage their choices and diminish their personhood to deny them this right.").

As noted above, others defend the *Marvin* rule on autonomy grounds. These scholars argue that *Marvin* protects choices the partners made *about their respective legal rights and obligations to each other*.[86] While the decision to form a family is constitutionally protected, preferences about the default economic rules that apply to individuals in this relationship are not typically treated as protected liberty interests. Indeed, at the same time that the Supreme Court declared in *Obergefell* that same-sex couples have a constitutionally protected right *to decide to marry*, it reaffirmed that "the States are in general free to vary the benefits they confer on all married couples."[87] Many years earlier in *Zablocki v. Redhail*, the Court made a similar distinction. The Court explained:

> By reaffirming the fundamental character of the right to marry, we do not mean to suggest that every state regulation which relates in any way to the incidents of or prerequisites for marriage must be subjected to rigorous scrutiny. To the contrary, reasonable regulations that do not significantly interfere with decisions to enter into the marital relationship may legitimately be imposed.[88]

The state is accorded discretion to vary the benefits and the rules applicable to families because it too has important interests at stake—the well-being of families and the people in them. As noted above, family formation decisions are protected in part because families are sites of critical caretaking and support. This caretaking is essential for the development of autonomous citizens and, in turn, a flourishing society.[89] The state furthers these goals through rules that foster family-based support and care.[90] A few of the many examples one could point to include: intestacy protections for surviving family members when a person dies without a will;[91] Social Security benefits to family members upon the death or disability of a spouse

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86. *See, e.g.*, Carbone & Cahn, *supra* note 17, at 109–10.

87. *Obergefell*, 135 S. Ct. at 2601; *see also* Loving v. Virginia, 388 U.S. 1, 7 (1967) ("[T]he state court is no doubt correct in asserting that marriage is a social relation subject to the State's police power.").

88. Zablocki v. Redhail, 434 U.S. 374, 386 (1978).

89. MAXINE EICHNER, THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA'S POLITICAL IDEALS 1 (2010).

90. *See* Maxine Eichner, *Principles of the Law of Relationships Among Adults*, 41 FAM. L.Q. 433, 436 (2007) ("Imposing such rights and responsibilities help to ensure important public goods of equality and fairness in these relationships, as well as to foster care taking.").

To be clear, while I think the state has an important role to play here, I certainly do not think it always does a good job in this respect. The child welfare system is one example of a system that has been shown to tear many families apart, rather than support their continued existence. *See, e.g.*, DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE (2002).

91. Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 206 (2001).

or parent;[92] workers' compensation benefits for spouses or children upon the death or disability of a worker;[93] a range of military benefits to surviving family members upon the death of a servicemember.[94] A key factor under these rules is the existence of a recognized family relationship. Where that relationship exists, the benefits are extended to assist those family members, particularly in times of crisis.

Sometimes the state establishes waivable default rules. One example is the property division rules that apply to married couples. As noted above, all fifty states apply a default sharing rule upon divorce.[95] This default rule reflects the reality that sharing occurs in most families.[96] The rule also seeks to compensate both spouses for their contributions to the relationship.[97] At the same time, this rule also communicates a norm that healthy marriages should be based on sharing and cooperation.[98] The parties, however, can enter into an enforceable agreement to reject these default rules.[99]

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92. *See, e.g.*, 42 U.S.C. § 402(d) (2005) (providing that a dependent child may be entitled to children's social security benefits if a wage-earner parent becomes disabled, retires, or dies); Cynthia Grant Bowman, *The New Illegitimacy: Children of Cohabiting Couples and Stepchildren*, 20 AM. U. J. GENDER SOC. POL'Y & L. 437, 454 (2012) ("Widows or widowers, including common law widows or widowers, and even divorced spouses who were married to the wage earner for ten years and have not remarried are all entitled to survivors benefits for themselves and also for 'mother's insurance benefits' as well.").

93. Bowman, *supra* note 92, at 458 ("Workers' compensation benefits are paid by the employer, not the government, but they are administered by the state and give benefits to dependents upon the death or disability of an employee in a workplace accident according to a set schedule.").

94. *See, e.g.*, John T. Meixell, *Death on Active Duty*, GPSOLO, Jan.–Feb. 2005, at 30–31 (discussing various benefits for surviving spouse and unmarried minor children upon the death of a servicemember).

95. Rosenbury, *supra* note 9, at 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)).

96. *See, e.g.*, Kenney, *supra* note 47, at 243 (reporting that "73% of married couples said that they put all of their money together").

97. Shari Motro, *Labor, Luck, and Love: Reconsidering the Sanctity of Separate Property*, 102 NW. U. L. REV. 1623, 1632 (2008) ("The normative version of the partnership theory imposes a shared-earnings rule on the parties regardless of whether they would have agreed to it based on a moral, restitutionary 'return-of-contribution' notion.").

98. For an in-depth examination of norms in marriage, see Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1910 (2000) ("Commitment norms express, as general standards of behavior, what each spouse can expect of the other, as well as guidelines for self-management. Often, these broad norms also are particularized in concrete behavioral rules.").

99. *See, e.g.*, Atwood & Bix, *supra* note 50, at 318–19 ("Under current law, all jurisdictions recognize the enforceability of premarital agreements concerning the economic consequences of death and divorce . . . ."); Oldham, *supra* note 50, at 83 ("During the past four decades, all U.S. states have accepted the general idea that spouses may make an enforceable agreement specifying the economic consequences of divorce.").

In other instances, the state creates family-based default rules that cannot be waived. For example, all states have statutes that set forth which family members inherit if a person dies without a will.[100] Generally, the parties can override these default rules by writing a will.[101] Sometimes, however, the state limits the parties' choices. The state may do so to protect family members. For example, all but one state prevent a person from completely disinheriting their spouse.[102] As the drafters of the Uniform Probate Code explain, the forced or elective share provisions reflect "the contemporary view of marriage as an economic partnership."[103]

Some may argue that applying a default sharing rule to nonmarital couples violates their "autonomy" at least in a normative sense[104] and involves in inappropriate state intervention into the lives of families.[105] As an initial matter, it is important to acknowledge that the choice is not between state regulation and no state regulation.[106] The state already regulates these families. It does so by treating them as legal strangers.

More fundamentally, the debate is about *waivable* default rules. Should the decision to form a family trigger a default family-based sharing rule unless they jointly agreed otherwise? Or should the default be to treat nonmarital families as legal strangers unless the more vulnerable party can prove that the parties mutually agreed otherwise? Choice is available under both frameworks. The critical question is whether to start with a default that treats them as a family or as a nonfamily.

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100. Foster, *supra* note 91, at 206 ("The rules of intestate succession—the default rules that apply in the absence of a will—provide rigidly for inheritance by status. The decedent's closest relatives by blood, adoption, or marriage automatically inherit, irrespective of their actual relationship with the decedent." (footnotes omitted)).

101. Adam J. Hirsch, *Inheritance on the Fringes of Marriage*, 2018 U. ILL. L. REV. 235, 240 (2018) ("Intestacy statutes establish default rules that a party is free to override by executing a will that supersedes them.").

102. *Id.* at 237–38 ("In all but one jurisdiction in the United States, a surviving spouse becomes entitled to a share of the decedent spouse's estate whether the decedent wishes to provide it or not.").

103. UNIF. PROB. CODE art. II, pt. 2, gen. cmt. (amended 2010), 8 U.L.A. 140 (1968).

104. For a critique of this vision of autonomy, see Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 10 (1989) ("Among critics of liberalism one can hear the phrase 'autonomous individuals' uttered with the contempt meant to express the absurdity of conceiving of individuals in isolation from one another."). *See also* Milton C. Regan, Jr., *Spouses and Strangers: Divorce Obligations and Property Rhetoric*, 82 GEO. L.J. 2303, 2347–48 (1994) (discussing Nedelsky's theory of autonomy).

105. *See, e.g.*, Carbone & Cahn, *supra* note 17, at 55; Garrison, *supra* note 20, at 816.

106. *See, e.g.*, CLARE HUNTINGTON, FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS xvii (2014).

B. Equality and Family Choice

The choice to be in a nonmarital family is of constitutional import. To adequately protect the extent of the liberty interest at stake, the state must accord meaningful respect and recognition to this family formation. Doing so also furthers equality concerns. These equality concerns are grounded in both constitutional and normative principles.

1. Inequality Between Different Family Forms

As the Court explained in *Obergefell*, its conclusion that the denial of marriage choices to same-sex couples was rooted in not only due process concerns, but also equality concerns:

> The right of same-sex couples to marry that is part of the liberty promised by the Fourteenth Amendment is derived, too, from that Amendment's guarantee of the equal protection of the laws. The Due Process Clause and the Equal Protection Clause are connected in a profound way, though they set forth independent principles.[107]

Here too, these synergistic principles of liberty and equality support the conclusion that nonmarriage must be entitled to state respect, recognition, and, importantly, protection.

Individuals should have the right to marry the person of their choice, without regard to race, sex, or sexual orientation. Individuals also should be able to reject that institution if they so choose. This is particularly true in light of its history. Marriage is an institution rooted in a history of discrimination and inequality.[108] Enslaved people were precluded by law from marrying.[109] Even after the Civil War, many states continued to bar and even to criminalize interracial marriage.[110] Marriage was also deeply rooted in and perpetuated

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107. Obergefell v. Hodges, 135 S. Ct. 2584, 2602–03 (2015).

108. *See, e.g.*, NANCY COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 3 (2000) ("The whole system of attribution and meaning that we call *gender* relies on and to a great extent derives from the structuring provided by marriage. Turning men and women into husbands and wives, marriage has designated the ways both sexes act in the world and the reciprocal relation between them.").

109. *See, e.g.*, *id.* at 32 ("African American slaves could *not* marry legally; their unions received no protection from state authorities."); *see also id.* at 33 ("The denial of legal marriage to slaves quintessentially expressed their lack of civil rights.").

110. *See, e.g.*, *id.* at 99 ("As a result of white fears[,] . . . states rushed to pass or solidify legislation criminalizing marriage across the color line [after the Civil War]. More laws of this sort were passed during the Civil War and Reconstruction than in any comparably short period.").

sex inequality. Upon marriage, women lost their legal identity[111] and, along with it, many important rights.[112] While most of the expressly discriminatory marriage rules have been struck down or repealed, remnants of this past carry forward. To give but one example, Jill Hasday shows how the legacy of coverture continues to be reflected in the contemporary legal treatment of marital rape.[113] Cultural patterns rooted in this legal history, including gendered roles within marriage, persist.[114] Individuals should be able to choose to form families outside of marriage. When they do, the law ought not to deny recognition and respect to that chosen family form.

Changing demographic patterns raise another equality concern. In the past, marriage rates were high across all socioeconomic groups.[115] This is no longer the case. "Marriage, once universal, . . . has emerged as a marker of the new class lines remaking American society."[116] In other words, "family form is [now] strongly correlated with socioeconomic status."[117] Marriage rates continue to be high among the most privileged. In contrast, nonmarriage is becoming the norm among individuals with lower levels of education and

111. *See, e.g.*, 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 430–31 (1765); *see also* COTT, *supra* note 108, at 11 ("[T]he common law turned the married pair legally into one person—the husband. . . . This legal doctrine of marital unity was called *coverture* . . . .").

112. *See, e.g.*, Kerry Abrams, *Citizen Spouse*, 101 CALIF. L. REV. 407, 415–16 (2013) ("The legal effects of coverture on married women were extensive: wives could not enter into contracts without their husbands' consent, enter a profession, sue or be sued, make a will, or testify for or against their husbands.").

113. Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1375 (2000) ("At common law, husbands were exempt from prosecution for raping their wives. Over the past quarter century, this law has been modified somewhat, but not entirely. A majority of states still retain some form of the common law regime . . . .").

114. Deborah A. Widiss, *Changing the Marriage Equation*, 89 WASH. U. L. REV. 721, 723 (2012) ("Gender norms have also changed far less than feminist reformers expected. Despite more than thirty years of formal equality, the vast majority of different-sex marriages still follow to some extent traditional gender roles.").

115. HUNTINGTON, *supra* note 106, at 28 (2014) ("In the past, marriage rates tended not to differ depending on socioeconomic status—marriage rates were relatively high across all income groups—but that has changed.").

116. JUNE CARBONE & NAOMI CAHN, MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY 19 (2014).

117. Huntington, *supra* note 48, at 186.

fewer financial resources.[118] "Marriage rates also differ by race."[119] As a result, our family law system is increasingly a "dual" one.[120] The only form the law recognizes as a family—marriage—is increasingly correlated with privilege. Everyone else is relegated to a status that is treated in law as a nonfamily.

Broadly speaking, this legal system imposes harms on nonmarital families—families that are more likely to be comprised of lower-income people of color—in a number of ways. Families contribute in powerful ways to the well-being of the people in them. (And, indeed, this is part of why decisions to enter into these relationships are constitutionally protected.)[121] Among other things, families are essential in "meeting the dependency needs that must be met for citizens themselves and our society to flourish."[122] "Families care for dependent children, prepare them for citizenship, and educate them to be productive members of society. Not every family provides necessary or adequate care to its dependent members, of course, but collectively families perform extraordinarily valuable social functions."[123]

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118. "50 years ago there was virtually no difference by socio-economic status in the proclivity to marry: 76% of college graduates and 72% of adults who did not attend college were married in 1960. By 2008, that small gap had widened to a chasm: 64% of college graduates were married, compared with just 48% of those with a high school diploma or less." PEW RESEARCH CTR., THE DECLINE OF MARRIAGE AND THE RISE OF NEW FAMILIES 23 (2010), https://www.pewsocialtrends.org/2010/11/18/the-decline-of-marriage-and-rise-of-new-families/ [https://perma.cc/LW8M-U8YJ]; *see also* Courtney G. Joslin & Lawrence C. Levine, *The Restatement of Gay(?)*, 79 BROOK. L. REV. 621, 639 (2014).

119. HUNTINGTON, *supra* note 106, at 28 ("The marriage rate for non-Latino whites has declined from 74 percent in 1960 to 55 percent in 2010; but the decline for African Americans is even more steep, from 61 percent in 1960 to 31 percent. The marriage rate for Latinos is in between, at 48 percent (down from 72 percent in 1960)." (footnotes omitted)).

120. For an early discussion of the ways in which different families have been subjected to different family law systems, *see* Jacobus tenBroek, *California's Dual System of Family Law: Its Origins, Developments, and Present Status* (Pts. I–III), 16 STAN. L. REV. 257 (1964), 16 STAN. L. REV. 900 (1964), 17 STAN. L. REV. 614 (1965).

121. *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2590 (2015) ("A third basis for protecting the right to marry is that it safeguards children and families.").

122. EICHNER, *supra* note 89, at 3; *see also* Maxine Eichner, *Marriage and the Elephant: The Liberal Democratic State's Regulation of Intimate Relationships Between Adults*, 30 HARV. J.L. & GENDER 25, 36 (2007) [hereinafter Eichner, *Marriage and the Elephant*] ("The state has an important interest in these relationships because of its interest in the dignity of its citizens, not to mention their health and well-being."); Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 230 (2004) [hereinafter Scott, *Collective Responsibility*] ("The government recognizes the useful role of families through direct and indirect subsidies, programs that support particular family functions, and policies that benefit families (or particular types of families)."); Scott & Scott, *supra* note 32, at 297 ("Families serve the critically important functions of raising children, caring for elderly persons, and otherwise satisfying society's dependency needs.").

123. Scott & Scott, *supra* note 32, at 304.

Because families are so important to the individuals in them and to society more broadly, from a normative perspective, the state has an important role to play in developing rules that allow families to flourish[124] and thrive.[125] "A normatively compelling vision of the family-state relationship," Eichner explains, "must pay specific attention to promoting conditions in which families will flourish . . . ."[126]

The law's general approach to nonmarital families runs contrary to this goal. Government recognition and protection is extended only to marital families.[127] Financial benefits that are automatically extended to married spouses "includ[e] social-security survivor benefits, estate-tax exclusions, and health-insurance benefits for government employees, as well as the opportunity to protect property from creditors."[128] These protections promote stability and, thus, the family and the people in it.[129] These types of financial benefits typically are not extended to nonmarital family members[130]—people who often have fewer financial resources to start with. Nonmarital family members are also often denied other protections that are intended to enable family members to care for each other. For example, the federal Family and

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124. I borrow the word "flourish" from Clare Huntington. HUNTINGTON, *supra* note 106, at xiii.

125. EICHNER, *supra* note 89, at 10 ("Specifically, given the significant role that dependency plays in the human condition, the state must seek to expand its purposes to support caretaking and human development."); *see also id.* at 11 (arguing that "the state has an integral role in supporting families").

126. *Id.* at 11; *see also* Maxine Eichner, *The Privatized American Family*, 93 NOTRE DAME L. REV. 213, 259 (2017) ("It is time to return to the social understanding that once undergirded the welfare state: that we are a society that accepts both the benefits and burdens that come with market society, but that government will support the conditions that families need to thrive.").

127. *See, e.g.*, Courtney G. Joslin, *Federalism and Family Status*, 90 IND. L.J. 787, 818 (2015) ("People who are considered 'spouses' are extended hundreds of protections because they are spouses.").

128. Scott & Scott, *supra* note 32, at 306; *see also* Joslin, *supra* note 127, at 818 ("Among many other rights, spouses get property protections in the event of divorce or the death of a spouse, and the right to access a spouse's Social Security benefits in the event of the death or disability of a spouse." (footnotes omitted)).

129. *See, e.g.*, Scott, *Collective Responsibility*, *supra* note 122, at 243 ("The package of substantive legal obligations that goes with the formal status of marriage serves independently to promote stability in the relationship.").

130. *See, e.g.*, Courtney G. Joslin, *Family Support and Supporting Families*, 68 VAND. L. REV. EN BANC 153, 167 (2015) ("In terms of benefits for adult-adult caretaking, however, marriage continues to be a prerequisite for many family-based subsidies. Legal spouses, for example, may have access to spousal health insurance to help them provide medical treatment for a sick partner. Many workers have a right under the federal Family Medical Leave Act ("FMLA") to take leave from work to care for spouses with serious medical needs. Legal spouses are often able to use pre-tax earned income to pay for a spouse's uncovered medical expenses. These are just a few of the many examples one could point to. Often these benefits are not extended to nonmarital partners." (footnotes omitted)).

Medical Leave Act allows spouses—but not nonmarital partners—to take time off of work to care for a seriously ill partner.[131] This exclusionary rule makes it harder for nonmarital partners to care and support each other and, in turn, undermines their stability.[132]

The specific rule at issue here—economic rights at dissolution—also imposes harm on nonmarital families. By treating nonmarital partners as legal strangers, the contemporary rules convey the message that nonmarital relationships are unworthy of equal dignity and respect.[133] The current rule also communicates a message about behavior norms that run counter to the well-being of these families and the people in them. As noted above, absent an agreement, nonmarital partners generally have no legal duties or obligations to each other. Moreover, courts almost uniformly deny recovery for mutual caretaking and support that occurred in these relationships.[134] This is true even when that kind of work was performed over long periods of time. The absence of default reciprocal legal obligations and the possibility for recovery for critical caretaking and homemaking services reinforces social norms that do not "encourage cohabiting parties to act toward one another in ways that reinforce the relationship."[135] In this way, these rules perpetuate a belief that individuals in these nonmarital families do not and should not engage in mutual caretaking;[136] nonmarital partners should only look out for themselves.

What we know about families, however, is that "[a]dult-adult relationships are, at their best, marked by what might be called 'reciprocal dependency,' in which each person sometimes performs caretaking activities for the other and meets the other's dependency needs; in turn, the other partner does the same for that person at other times."[137] This sort of day-to-day reciprocal caretaking

131. *See* 29 U.S.C. § 2612(a)(1)(C) (2018) (providing that "an eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period . . . [i]n order to care for the spouse, or a son, daughter, or parent, of the employee, if such spouse, son, daughter, or parent has a serious health condition").

132. Nonrecognition, however, is sometimes economically beneficial. This is explored in more detail in Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1276, 1276–98 (2014).

133. HUNTINGTON, *supra* note 106, at 60–61 ("State recognition of an adult romantic relationship also brings significant intangible benefits. The idea that the relationship matters to others, and is privileged by the state, confers tremendous dignity on the relationship."). *See also* Wendy A. Bach, *Flourishing Rights*, 113 MICH. L. REV. 1061, 1080 (explaining that "[o]ne of Huntington's most important contributions is revealing the many ways in which legal institutions accord support, protect against incursion, and confer dignity on some families.")

134. *See, e.g.*, Antognini, *supra* note 10, at 2189; Joslin, *supra* note 4, at 935.

135. Scott, *Collective Responsibility*, *supra* note 122, at 245.

136. *See, e.g.*, Stolzenberg, *supra* note 15, at 2041 (noting that the conventional rules conceive obligations between nonmarital family members "as discrete and calculated market transactions").

137. Eichner, *Marriage and the Elephant*, *supra* note 122, at 36.

strengthens the relationships themselves. It is also often beneficial for the recipient. "Family members are often best positioned to provide this essential care and many people would prefer to be cared for by a family member."[138]

Because this mutual caretaking behavior fosters healthy families and healthy individuals, the law should and, in other contexts, does promote and facilitate it.[139] One example mentioned above is work-place family leave policy. Family-leave policies facilitate and enable marital spouses to care for each other. The majority of the U.S. adult population support such policies.[140] Another particularly relevant example are rules governing division of marital property. All fifty states apply a default sharing rule to spouses upon divorce. Alicia Brokars Kelly explains that this rule reflects the kind of cooperative behavior that is expected in marital families:

> 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. This cooperative conduct is the basis for sharing property at divorce: the collective benefits produced by mutual efforts during marriage are conceptualized as jointly acquired and jointly owned. The marital partnership model is centrally about recognizing a community of interests created by the individuals who have joined their lives.[141]

Not only does the law recognize this reality of joint contributions, it promotes and incentivizes this type of communal behavior by compensating the contributions of both spouses.[142] These rules also communicate a norm to the parties to the society at large that "marriage is a shared economic

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138. Joslin, *supra* note 130, at 164–65.

139. *Cf.* HUNTINGTON, *supra* note 115, at xv (arguing that "structural family law should encourage long-term commitment between parents—commitment to each other or at least commitment to the shared work of raising children"). As I state elsewhere, "[t]he notion of privatizing dependency is often given a negative valence." Joslin, *supra* note 130, at 164. But it is not the provision of care by family members that itself is the problem. The problem arises when family members are left to provide this caretaking *without adequate support*, either from the government or other sources. *Id.* at 165.

140. JULIANA MENASCE HOROWITZ ET AL., PEW RESEARCH CTR., AMERICANS WIDELY SUPPORT PAID FAMILY AND MEDICAL LEAVE, BUT DIFFER OVER SPECIFIC POLICIES (2017), https://www.pewsocialtrends.org/2017/03/23/americans-widely-support-paid-family-and-medical-leave-but-differ-over-specific-policies/ [https://perma.cc/5T8U-X7FR].

141. 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).

142. To be sure, many argue that marital property distribution law has not succeeded in sufficiently compensating all contributions to the union. *See, e.g.*, Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 739 (1991).

enterprise."[143] By contrast, this type of behavior—behavior that strengthen families—is *disincentivized* by the conventional approach applicable to nonmarital couples, under which it is very difficult for a party to be compensated for this critical caretaking.[144]

2. Inequality within Families

The current rules regarding the economic rights of nonmarital cohabitants can also exacerbate inequality *within* these relationships.[145]

Historically, the institution of marriage was premised on and reinforced gender inequality. It did so in numerous ways, including through the rules governing property ownership and distribution. Under coverture, a married woman lost her separate legal identity.[146] As a result, women were legally precluded from accumulating property during marriage.[147] Anything that a wife owned prior to her marriage became her husband's,[148] as did any earnings she acquired during the relationship.[149] Through the enactment of Married Women's Property Acts, wives gained control of their own property, and later their own earnings.[150] Even after these legal changes, however,

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143. HUNTINGTON, *supra* note 106, at 64.

144. *See* Antognini, *supra* note 10, at 2179.

145. *Cf.* Herma Hill Kay, *Commentary: Toward a Theory of Fair Distribution*, 57 BROOK. L. REV. 755, 760 (1991) ("In my view, a marital regime that treats each spouse as a separate entity whose primary obligation to the other during marriage is limited to the (typically unenforceable) provision of essential support, and that refuses to acknowledge the contributions of both spouses to the acquisitions of either is inconsistent with the widely held concept of marriage as a partnership and with the societal ideal of equality between women and men.").

146. BLACKSTONE, *supra* note 111, at 430. ("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 . . . .").

147. Antognini, *supra* note 10, at 2150 (describing a key feature of coverture as the prohibition "on married women from owning or controlling property").

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

149. *Id.* ("For centuries the common law of coverture gave husbands rights in their wives' property and earnings, and prohibited wives from contracting, filing suit, drafting wills, or holding property in their own names.").

150. *Id.* at 2141 ("Generally, reform began with the passage of married women's property acts that allowed wives to hold property in their own right; sometimes these statutes conferred on wives limited dispositional powers over the property to which they now had legal title. A second wave of reform legislation, which I have referred to as 'earnings statutes,' allowed wives to assert property rights in their labor and granted wives various forms of legal agency respecting their separate property, including the capacity to contract and file suit." (footnote omitted)).

women continued to be subjected to "economic inequalities" in the family.[151] Married women continued to earn (usually much) less than their husbands.[152] This was due in part to the fact that wives typically devoted significant labor to homemaking and caretaking within the home.[153] Family assets continued to be titled largely in the husband's name. Divorce rules preserved this inequality. At divorce (which, admittedly was quite rare historically),[154] most states distributed marital property by title.[155] This property division rule often "resulted in unjust distributions, 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."[156]

In recognition of this unfairness, all fifty states[157] have now jettisoned a system of property distribution at divorce based on title.[158] But the title-theory

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151. *Id.* at 2127 ("Yet the married women's property acts and earnings statutes did not fully emancipate wives from the common law of marital status.").

152. *See* Niall McCarthy, *What Percentage of U.S. Wives Earn More than Their Husbands?*, FORBES (Nov. 19, 2015, 8:12 AM), https://www.forbes.com/sites/niallmccarthy/2015/11/19/what-percentage-of-us-wives-earn-more-than-their-husbands-infographic/#13dab5845736 [https://perma.cc/396X-2Q88] ("According to data compiled by the Bureau of Labor Statistics, 29.3 percent of wives earned more than their husbands in 2013 (in families in which both wives and husbands have earnings).").

153. *See, e.g.*, Reva B. Siegel, *Home As Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073, 1092 (1994) ("In the nineteenth century, ... [g]rowing numbers of men had begun to work outside the household, but wives continued to work in the family setting, and . . . their work increasingly appeared an indistinguishable part of 'family life.'").

154. *See, e.g.*, HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY 72 (2000) ("[T]he presence of legislative divorces through the first half of the nineteenth century also underscores both the political character of divorce and the perception of divorce as extraordinary relief that public authorities would only make available under usual circumstances.")

155. Katharine K. Baker, *Homogenous Rules for Heterogeneous Families: The Standardization of Family Law When There Is No Standard Family*, 2012 U. ILL. L. REV. 319, 332 (2012) ("The majority of U.S. states adopted the English common-law system of title [governing distribution at divorce]." (footnote omitted)).

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

157. Rosenbury, *supra* note 9, at 1230 ("Although variations exist among the states, every state's default approach is now designed to effectuate an equal or equitable division of all property accumulated from wages during marriage, regardless of the title of that property." (footnotes omitted)).

158. Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1, 56–57 (1987) ("Particularly in the common law states, observers began to insist that new financial provisions were needed to accompany the no-fault laws in order to protect women and children. A debate emerged over whether property should be divided equally or distributed in equitable shares following divorce." (footnotes omitted)); *see also* Mary Ziegler, *An Incomplete Revolution: Feminists and the Legacy of Marital-Property Reform*, 19 MICH. J. GENDER & L. 259, 266–67 (2013) (arguing that while feminists did not play a leading

approach still reigns for nonmarital couples. As was true for marital partners in the past, applying this rule to nonmarital couples can result in inequity and inequality.[159] "The interdependent nature of intimate relationships between adults, particularly when they are long-term, can create large economic inequities and imbalances of power in the absence of state recognition and regulation of these relationships."[160] Women often bear the brunt of this inequality. "The design of [the current] default rules [for nonmarital couples]—no automatic obligations without contractual agreement—favors the . . . economically stronger party," who is most commonly the male.[161] In this way, the conventional rule perpetuates and exacerbates inequality within nonmarital relationships.

There were hopes that nonmarital families would be more gender egalitarian as compared to marital families. Scholars hypothesized that cohabiting relationships were more likely to be equitable in terms of earnings and household contributions as compared to marital relationships. If that were

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role with regard to the introduction of no-fault divorce rules, "women's concerns and women's groups did play a significant part in divorce reform, especially in regard to rules governing alimony and the distribution of marital-property").

To be sure, the current marital property distribution rules are far from perfect. Wives continue to fare worse financially after divorce as compared to husbands. Ziegler, *supra* at 264 ("Although family court practices have become somewhat more just over the past twenty years, women still tend to suffer a substantial decrease in standard of living after divorce. Estimates of the decrease range from 15 to 27%." (footnotes omitted)); *see also* Deborah Dinner, *The Divorce Bargain: The Fathers' Rights Movement and Family Inequalities*, 102 VA. L. REV. 79, 83 (2016) (arguing that "the advent of sex neutrality within private family law [particularly alimony and child custody rules] has reinforced gender and class inequalities").

For an argument that the state should take steps to further equality within the family, see LINDA C. MCCLAIN: THE PLACE OF FAMILIES: FOSTERING CAPACITY, EQUALITY, AND RESPONSIBILITY 5, 117–154 (2006).

159. Maxine Eichner, *Beyond Private Ordering: Families and the Supportive State*, 23 J. AM. ACAD. MATRIM. LAW. 305, 325 (2010) ("In addition, in a regime of contract, those in a weaker bargaining position–traditionally women–may negotiate less favorable terms for themselves that will lead to inequality both in the course of the relationship and also if and when it ends.").

160. Eichner, *supra* note 90, at 436; *cf.* Alicia Brokars Kelly, *The Marital Partnership Pretense and Career Assets: The Ascendancy of Self over the Marital Community*, 81 B.U. L. REV. 59, 72 (2001) (arguing that the partnership model "creates a means for recognition of the contribution of the dependent spouse, who may have sacrificed his or her own career potential for the sake of the other or for the marriage itself. . . . [In so doing, the model] seeks to ensure that each estate is compensated fairly for its investment in the marriage").

161. Aloni, *supra* note 9, at 356. Scholars also explore how other contractual rules applicable to families tend to favor male partners in different-sex relationships. *See, e.g.*, Atwood & Bix, *supra* note 50, at 319–20 (noting "[s]everal observers" who "have raised gender equity concerns regarding pre-marital agreements, arguing that the enforcement of these agreements tends systematically to work against the interests of women" (citing Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229 (1994); Judith T. Younger, *Lovers' Contracts in the Courts: Forsaking the Minimum Decencies*, 13 WM. & MARY J. WOMEN & L. 349 (2007))).

indeed the case, applying a title theory would not generally produce unfair results. The available empirical evidence, however, suggests that these hopes were too optimistic. While it is true that women are more likely to be participating in the paid labor force than they were fifty years ago,[162] women still earn less than men.[163] "In 2018, women earned 85% of what men earned, according to a Pew Research Center analysis of median hourly earnings of both full- and part-time workers in the United States."[164] Indeed, in recent years, progress to reduce the wage gap has stalled.[165] The wage gap is particularly large for women of color.[166] Because they make less earned income, women tend to accumulate fewer assets in their own name as compared to men.[167]

In addition to making less money and having fewer assets, women continue to perform more of the homemaking and caretaking.[168] This is true

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162. Alison Burke, *10 Facts About American Women in the Workforce*, BROOKINGS NOW (Dec. 5, 2017), https://www.brookings.edu/blog/brookings-now/2017/12/05/10-facts-about-american-women-in-the-workforce/ [https://perma.cc/75N3-PX4G] ("Women's labor force participation has increased substantially in the U.S. over the second half of the 20th century, yet this growth has stagnated and reversed since 2000.").

163. Nikki Graf, Anna Brown & Eileen Patten, *The Narrowing, but Persistent, Gender Gap in Pay*, PEW RES. CTR. (Mar. 22, 2019), https://www.pewresearch.org/fact-tank/2019/03/22/gender-pay-gap-facts/ [https://perma.cc/96RA-APBA] ("The gender gap in pay has narrowed since 1980, but it has remained relatively stable over the past 15 years or so.").

164. *Id.*

165. *See, e.g.*, Anna North, *America Has Stalled on Equal Pay*, VOX (Apr. 2, 2019, 10:40 AM), https://www.vox.com/2019/4/2/18290763/equal-pay-day-2019-usa-womens-national [https://perma.cc/HWQ6-PHLQ] ("After relatively swift progress in the 1980s, the wage gap has been stagnating for years. And women of color face especially large disparities.").

166. *Id.*

167. Danaya C. Wright, *Disrupting the Wealth Gap Cycles: An Empirical Study of Testacy and Wealth*, 2019 WIS. L. REV. 295, 316 (2019) ("Numerous important studies have found female wealth is around 80% that of male household wealth . . . ." (footnote omitted)); *see also* JP Morgan Chase, *The Gender Wealth Gap Is Even More Concerning than the Wage Gap. Here's Why.*, WP BRANDSTUDIO (Sept. 7, 2019), https://www.thelily.com/brandstudio/the-gender-wealth-gap-is-even-more-concerning-than-the-wage-gap-heres-why/ [https://perma.cc/4N3Q-6BJJ] ("According to the findings, women have 20 percent lower liquid assets and higher debt burdens than men.").

168. *American Time Use Survey, Charts by Topic: Household Activities*, U.S. BUREAU OF LAB. STATS. (last modified Dec. 20, 2016), https://www.bls.gov/tus/charts/household.htm [https://perma.cc/6CEP-J3NT]; *see also* Alicia Brokars Kelly, *Navigating Gender in Modern Intimate Partnership Law*, 14 J.L. & FAM. STUD. 1, 10 (2012) ("Women, especially mothers, have increased their paid market work and men do more family work than in the past. Despite these shifts, . . . [however, w]omen still do more unpaid care work than men, and men still provide more market work and income than women." (footnotes omitted)); Gillian Lester, *A Defense of Paid Family Leave*, 28 HARV. J.L. & GENDER 1, 20 (2005) ("Although estimates vary somewhat across studies, researchers consistently find that women spend significantly more time than men engaged in caregiving activities for children and the disabled elderly." (footnotes omitted)).

even when women are involved in full-time paid employment,[169] and even when they are the co- or primary-wage earner for their families. These patterns are cyclical. To perform this caretaking and homemaking—tasks that are necessary for the functioning of the family—individuals often cut back on or disrupt entirely their careers.[170] Women are more likely to do this than men. For example, the Pew Research Center found that

> [a]bout four-in-ten working mothers (42%) say that at some point in their working life, they had reduced their hours in order to care for a child or other family member, while just 28% of working fathers say they had done the same; almost as many working mothers (39%) say they had taken a significant amount of time off from work for one of these reasons, compared with about a quarter (24%) of working fathers. And mothers are more likely than fathers to say they quit their job at some point for family reasons, by 27% to 10%.[171]

Cutting back at work or quitting one's job altogether negatively affects one's salary at the time. It also often reduces that person's earning capacity and their lifetime earnings.[172] As Maxine Eichner explains, this pattern:

> leaves the primary caretaker, who has generally received fewer earnings than the breadwinner or no earnings (depending on whether she also worked outside of the home), significantly disadvantaged by her contribution to the family. Because she has

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169. Lester, *supra* note 168, at 21 ("Even when they are working full time, women still invest considerably more time than men caring for their children and disabled parents.").

170. Family Caregiver All., *Caregiver Statistics: Work and Caregiving*, NAT'L CTR. ON CAREGIVING (2016), https://www.caregiver.org/caregiver-statistics-work-and-caregiving [https://perma.cc/82L2-UWH3] ("Working female caregivers may suffer a particularly high level of economic hardship due to caregiving. Female caregivers are more likely than males to make alternate work arrangements: taking a less demanding job (16% females vs. 6% males), giving up work entirely (12% females vs. 3% males), and losing job-related benefits (7% females vs. 3% males)." (citing National Alliance for Caregiving and AARP (2009). Caregiving in the U.S.)); *see also* Kim Parker, *Despite Progress, Women Still Bear Heavier Load than Men in Balancing Work and Family*, PEW RES. CTR. (Mar. 10, 2015), https://www.pewresearch.org/fact-tank/2015/03/10/women-still-bear-heavier-load-than-men-balancing-work-family/ [https://perma.cc/THX4-DWYW] ("[W]omen are much more likely than men to experience a variety of family-related career interruptions.").

171. Parker, *supra* note 170.

172. Wright, *supra* note 167, at 316 ("Women live longer and earn less over their lifetimes, which reduces their total wealth. Women also tend to defer investments in their own human capital, thus reducing their lifetime earnings potential, through childrearing and caretaking of parents. Women's childbearing falls directly at the age when a professional worker is broadening her experience and making contacts that will set her on a trajectory to being a higher-paid worker. By missing those crucial years from ages 30–45, a woman will have difficulty maximizing her earning potential in later years." (footnotes omitted)).

> invested her human capital in the home rather than the labor market, and the skills she develops are not easily transferable outside of that realm, she will also be less well positioned to rejoin the labor market compared to her partner, who will have invested his human capital in advancing his career and improving his salary.[173]

In addition, this caretaking labor—labor that reduces their earning capacity—is almost uniformly un- or at least under-compensated under the existing rules applicable to unmarried couples.[174] In this way, women often experience a double disadvantage. First, women earn less than men. As a result, they accumulate fewer assets than men.[175] Thus, women often fare worse under a rule that distributes property by title. Second, women continue to provide the majority of the caregiving services that, while essential to the functioning of families, remain largely uncompensated under the existing rules.

For these and other reasons, women are disproportionately harmed at dissolution by the existing rules. Although "cohabiting women contribute more relative income than married women to the household . . . . These characteristics, however, do not adequately protect women when cohabitation ends."[176] At dissolution "[c]ohabiting men's well-being is affected modestly, whereas [cohabiting] women experience dramatic declines."[177] More specifically, after dissolution

> poverty levels [for nonmarital male partners] stay fairly constant at approximately 20%, though their level of household income dips by roughly 10%. In contrast, women experience a much greater loss of household income (33%) and also have a significantly higher level of poverty following the end of a cohabiting relationship (almost 30%).[178]

More recent research finds that the situation is getting worse, not better for formerly cohabiting women. Laura Tach and Alicia Eads recently reported that

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173. Eichner, *Marriage and the Elephant*, *supra* note 122, at 49.

174. *See, e.g.*, Antognini, *supra* note 10, at 2179; Joslin, *supra* note 4, at 919.

175. *See, e.g.*, *infra* notes 163–167 and accompanying text.

176. Sarah Avellar & Pamela J. Smock, *The Economic Consequences of the Dissolution of Cohabiting Unions*, 67 J. MARRIAGE & FAM. 315, 325 (2005).

177. *Id.*

178. *Id.* at 324; *see also* Laura M. Tach & Alicia Eads, *Trends in the Economic Consequences of Marital and Cohabitation Dissolution in the United States*, 52 DEMOGRAPHY 401, 428 (2015) (finding that "trends in the extent and economic costs of cohabitation dissolution may have contributed to rising income instability in this subset of the population").

> [t]he economic losses [for women] following cohabitation dissolution grew in the . . . two decades [after the 1980s], and by the 2000s, mothers' household incomes declined by about 45% in the month of the cohabitation dissolution and recovered only about 15 percentage points of that loss by one year after dissolution.[179]

To be sure, some evidence suggests that the income decline for cohabiting women at dissolution is less than the income decline for recently divorced women. Other research suggests, however, that there are two key factors that affect the smaller overall decline in income for formerly cohabiting women. First, married women's household incomes are higher than the household incomes of cohabiting women.[180] As a result, divorced wives experience a more significant overall income drop upon dissolution. Second, formerly cohabiting women are more likely to move in with other family members after dissolution as compared to married women.[181] This buffers their income drop post-dissolution.

The results are even worse for women of color.[182] "[T]he end of a cohabiting relationship appears to be quite detrimental to the economic standing of Hispanic and African American women, leaving them extremely economically vulnerable."[183]

C. Equal Liberty and Family Choice

From a constitutional and from a normative perspective, the critical focal point should be the decision to form a family. The decision to enter into a family—whether it be marital or nonmarital—is often a profound one that deeply affects one's identity and life course. Many individuals who form families are also choosing to bring children into those relationships. Families, whether they be marital or nonmarital, are crucial sources of support and caretaking. For these reasons, the decision to form of a family is of constitutional import.

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179. Tach & Eads, *supra* note 178, at 414; *see also id.* at 418 ("In contrast [to the results regarding divorced mothers], the economic consequences of cohabitation dissolution worsened over time. In the 1980s, household incomes had returned to predissolution levels one year after the dissolution, but by the 2000s, they remained 30% lower.").

180. Avellar & Smock, *supra* note 176, at 323 ("Because of their higher predissolution household incomes, married women experience a steeper decline of 58.3% compared to a 33.1% decline for cohabiting women.").

181. *See* Tach & Eads, *supra* note 178, at 425.

182. Avellar & Smock, *supra* note 176, at 323 ("Most broadly, our analyses reveal the greater economic vulnerability of women compared to men, African Americans and Hispanics to Whites, and cohabitors to the married.").

183. *Id.* at 324.

This conclusion to focus on the family formation decision is supported by consideration of equality concerns. Family form is increasing correlated to socioeconomic status. Refusing to recognize and protect the decision to form a nonmarital family means that that profound decision is more likely to be recognized and protected for those with the most resources, and rendered invisible for those who are most vulnerable. This has real tangible and intangible consequences. In this way, the current regime exacerbates existing inequality between marital and nonmarital families, and between the members of nonmarital families.

To be sure, devising a system that accurately identifies when one has chosen to form a nonmarital family is not simple. Unlike marriage, there is no clear moment at which a nonmarital family is created. Moreover, there is wide variation among nonmarital families.[184] That said, the creation of such a scheme is clearly possible. Indeed, many other countries around the world currently recognize and protect nonmarital families. These countries include Australia, Canada, New Zealand, and some parts of Europe.[185] Even here in the U.S., courts have experience recognizing informal families. Courts do this regularly in the context of parent-child relationships.[186] In addition, increasing numbers of states recognize informal family relationships when they are followed by marriage—what I call interstitial relationships. Courts also do it in the context of claims to terminate alimony,[187] and with regard to a range of third-party claims.[188] The fact that the solution may be challenging is not a sufficient reason to abandon a project that is sorely needed.

IV. A PARTING CAUTION FOR THE UNPERSUADED

Even if one remains unpersuaded that it is the family formation decision that should be the fulcrum for setting the property sharing default, there are nonetheless reasons to be wary of the conventional approach. Supporters of the *Marvin* rule argue that it reflects and protects choices the parties' made

184. *See, e.g.*, Carbone & Cahn, *supra* note 17.

185. *See, e.g.*, Helen Alvaré, *U.S. Cohabitation Law: Still Separate and Unequal*, INST. FOR FAMILY STUDIES (June 25, 2019) https://ifstudies.org/blog/us-cohabitation-law-still-separate-and-unequal [https://perma.cc/J247-BEZF] ("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."); *see also* Grace Ganz Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 NOTRE DAME L. REV. 1265, 1299–1302 (2001).

186. Joslin, *supra* note 4, at 969–71.

187. *See, e.g.*, Antognini, *supra* note 22, at 22 ("Jurisdictions have formulated a number of approaches to determine when cohabitation should terminate alimony.").

188. *See, e.g.*, Kaiponanea T. Matsumura, *Beyond Property: The Other Legal Consequences of Informal Relationships*, 51 ARIZ. ST. L.J. 1325, 1338–46 (2020).

about how to divide their property upon dissolution. If the parties enter into an agreement, the court will enforce that agreement.[189] If there is no agreement (which is most often the case), the current rules properly (it is argued) recognize the parties' (presumed) choice to have no obligations to each other. Even if one believes that the default should hinge on the parties' beliefs about their respective rights and obligations, there are reasons to question whether the existing default accurately reflects these understandings.

Currently, the default is one of no sharing. Obligations arise only if the parties entered into an agreement to share their assets in some way. Thus, the conventional doctrine treats the failure to enter into an agreement to share as a "choice" to have no obligations to each other. Empirical research, however, provides a basis for questioning that logic.

Few intimate partners—married or unmarried—enter into mutual, clear, deliberate decisions about their respective legal rights and obligations upon dissolution. This is true for married spouses. In general, individuals in intimate relationships tend to think (or at least hope) that their relationship will last.[190] As a result, there is no need to discuss what should happen if that is not the case. Moreover, individuals think (or at least hope) that if that "unlikely" eventuality occurs, they will deal fairly with each other. Some individuals avoid the subject because they assume protective rules will apply to them at dissolution.[191] Finally, even for those who may be worried about the longevity of their relationship and the possible results at dissolution, discussing financial issues is often an uncomfortable subject.

All of this is also true for nonmarital partners. Anecdotal evidence suggests that few nonmarital couples enter into clear agreements about what should happen upon dissolution. This is not surprising given that many of the individuals in these couples simply do not discuss the future of their relationships at all. For example, Sharon Sassler and Amanda Miller found that among the nonmarital couples they interviewed, "most" did not even begin "to discuss the possibility of a long-term future together prior to establishing a shared residence."[192] And "quite a few" of these couples still

189. Carbone & Cahn, *supra* note 17, at 62; Garrison, *supra* note 20, at 817–18.

190. Atwood & Bix, *supra* note 50, at 320 ("Most people are poor at thinking clearly about events in the distant future, especially if it involves contingencies contrary to our idealist assumptions.").

191. *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").

192. *Id.* at 151.

had not broached the topic even after moving in together.[193] Instead, a number of the individuals they interviewed reported that they were just taking things day-by-day.[194]

Even where nonmarital partners do talk about the future of their relationship, the conversation or what results from that conversation may not reflect a mutual agreement about their relationship and any rules that apply to it. Evidence suggests this is true with regard to decisions marriage transition, for example. Marriage requires the consent of both parties. If one party does not consent, then the parties remain unmarried. In other words, while one's status as a married couple requires the consent of both parties, one's unmarried status need not. Thus, even with regard to those nonmarital couples who do expressly discuss whether to transition to marriage, their failure to do so may not be the result of a mutual decision. Moreover, research suggests that men's preferences on this issue continue to carry more weight.[195]

Like decisions about whether to transition to marry, decisions to enter into a property distribution agreement require the consent of both parties. If the person with the most assets or financial power does not want to share, there will be no agreement. This is true even if the other partner has a different position on the matter. In other words, even for those couples who do discuss their economic rights upon dissolution, the lack of an agreement need not reflect a mutual decision to have no obligations to each other.

In sum, even for those who think the critical focus should be on decisions the parties make about their respective economic rights and obligations, it is not clear the existing rule does a good job reflecting mutual decisions on those matters.

V. CONCLUSION

The dominant approach in the U.S. today treats nonmarital families as nonfamilies. In the context of property division, this means former nonmarital partners have no rights or obligations to each other unless they agree to take them on. There is lively debate about the continued wisdom of this rule.

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193. *Id.* at 154.

194. *Id.* at 154 (reporting that several respondents stated that they preferred to "live in the now").

195. *Id.* at 149 ("There is perhaps no step in heterosexual romantic relationships where men have more power than in proposing marriage."); *see also* Penelope M. Huang et al., *He Says, She Says: Gender and Cohabitation*, 32 J. FAM. ISSUES 876, 879 (2011) ("[M]en's preferences for the future of the relationship carry more weight that women's.").

Scholars on both sides of this debate invoke concerns about family autonomy and choice. This Article seeks to make sense of this conundrum.

First, this Article demonstrates that this common concern leads scholars to different conclusions because different scholars rely on different decisions. Some scholars focus on the decision to form a nonmarital family. In contrast, other scholars prioritize protecting the choices the partners made with respect to their specific rights and obligations to each other. Second, this Article explains why the critical choice in need of protection is the former—the choice to form a family. That decision is the one that is of constitutional dimension. Moreover, the current rules exacerbate inequality between and within families. By identifying and critiquing the different decision-making moments upon which the rules could turn, this Article seeks to more clearly orient this important debate about the legal regulation of nonmarital families and to push it forward in helpful ways.