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## NONMARITAL COVERTURE

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### ABSTRACT

*How and why do courts distribute property between unmarried couples when they separate? This Article offers an answer: they follow the rules laid out by coverture. Coverture is a regime, long considered defunct, that defined the appropriate roles husbands and wives occupied in marriage. Among other consequences, it prevented the wife from accessing property based on the work she performed in the course of the relationship—the husband had property rights in any labor she undertook within the home by virtue of her duty to provide homemaking services, and any wages she earned were technically his. This Article shows that courts both rely on and perpetuate central features of coverture in contemporary nonmarital cases: courts continue to define the roles individuals ought to occupy within marriage in the nonmarital realm, and they deny the individual who engaged in homemaking services access to property. Coverture thus helps to explain why the provision of services is presumed gratuitous and to contextualize a state of affairs in which the individual who acted as a “wife” remains impoverished.*

*Beyond presenting a more complete descriptive account of the cases, revealing the role coverture plays has a number of implications. Addressing its presence directly helps to question some of the accepted rationales underlying family law—like the oft-cited goal of privatizing support—and provides a new vantage point from which to revisit the debate on whether to remunerate housework. In particular, these cases show that the choice individuals face is not whether to remain at home or go to work but rather whether to marry or not. Moreover, the rules formulated in this context impact lower-income earners, as opposed to higher-income earners, given that the latter typically marry. As such, this Article identifies a different set of consequences that emerges from not recognizing the value of housework in a nonmarital relationship. Ultimately,*

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*exposing how coverture is alive and well in the legal spaces outside of marriage is an important first step to engaging in a grounded assessment of the ways that intimate relationships and property continue to be intertwined.*

Under the centuries-old doctrine of coverture, a married man and woman were treated by the State as a single, male-dominated legal entity. As women gained legal, political, and property rights, and as society began to understand that women have their own equal dignity, the law of coverture was abandoned.

—Obergefell v. Hodges<sup>1</sup>

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<sup>1</sup> 135 S. Ct. 2584, 2595 (2015) (citation omitted).

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## INTRODUCTION

The doctrine of coverture, where a man and a woman become one upon marriage, is understood as a matter of positive law to be a relic of the past. Today, William Blackstone's oft-repeated definition of coverture sounds in an anachronistic register: "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 everything . . ."<sup>2</sup> The list of legal disabilities imposed on the wife by virtue of her coverture was lengthy and included, *inter alia*, the inability to devise land by will, the obligation to answer to her husband's "moderate correction," and the lack of capacity to sue or be sued without joining her husband in the action.<sup>3</sup> Coverture also prevented wives from acquiring property in their names or retaining any earnings they may have gained during the marriage.<sup>4</sup> Coverture was not limited to regulating the wife: it imposed concomitant duties on the husband who, given his wife's inability to own or manage property, was required to provide her with financial support.<sup>5</sup>

Needless to say, marriage no longer entails the complete erasure of a woman's legal identity. It does not require her to submit to her husband's physical chastisement nor does it strip her of her individual rights. Since the passage of the Married Women's Property Acts in the nineteenth century, a wife can also retain property in her own name.<sup>6</sup> As such, a husband is not formally required to provide his wife with support during the relationship.<sup>7</sup> When the marriage ends, all states allow spouses, irrespective of gender, to access property through equal or equitable distribution.<sup>8</sup> Moreover, marriage is no longer limited to a man and

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<sup>2</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*442.

<sup>3</sup> *Id.* at \*442-44. Blackstone explained the purpose behind these laws: "[T]he disabilities which the wife lies under are for the most part intended for her protection and benefit." *Id.* at \*445. Blackstone thus unironically concludes: "So great a favourite is the female sex of the laws of England." *Id.*

<sup>4</sup> Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2127 (1994).

<sup>5</sup> Allison Anna Tait, *The Return of Coverture*, 114 MICH. L. REV. FIRST IMPRESSIONS 99, 99 (2016).

<sup>6</sup> *Id.* at 101.

<sup>7</sup> Rather, the duty of support now applies to both spouses. See Twila L. Perry, *The "Essentials of Marriage": Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1, 33 (2003) (identifying the formal gender-neutrality of the duty of support, but arguing that "the doctrine, as presently construed, unduly restricts married couples from making choices with respect to varying traditional gender-bound spousal roles").

<sup>8</sup> While divorce is by no means a boon for wives, reform efforts have ensured that they have access to property in a way they did not under coverture, and spouses' rights and obligations are for the most part no longer gender specific. See, e.g., Herma Hill Kay, *Equality and Difference: A Perspective on No-Fault Divorce and Its Aftermath*, 56 U. CIN. L. REV. 1,

a woman as husband and wife.<sup>9</sup> It is thus mostly uncontroversial to conclude that the common law of coverture has by and large been “abandoned.”<sup>10</sup>

Numerous scholars have, however, complicated the narrative of coverture’s collapse. Jill Hasday, for instance, has shown that while the laws of coverture have “certainly not survived perfectly intact to the present day,” we must nonetheless be attuned to how “the canonical story of coverture’s demise overstates the changes that have occurred in family law over time.”<sup>11</sup> Hasday focuses on how laws regulating marriage—such as exemptions for marital rape, interspousal tort immunity, prohibitions on interspousal contracts, and the doctrine of necessities—all preserve principles embedded in the common law of coverture.<sup>12</sup> Richard Chused, in addressing the history of the Married Women’s Property Acts, has debunked the notion that the passage of such laws did anything more than effectuate “only modest adjustments in coverture law, and that these adjustments generally confirmed rather than confronted prevailing domestic roles of married women.”<sup>13</sup> And, in considering how property rights were allocated between married couples after the supposed dismantling of the regime following the passage of the “earnings statutes,” Reva Siegel has revealed how, “notwithstanding the putative abolition of coverture, women in the industrial era found themselves economically disempowered in marriage and impoverished at divorce—and still find themselves so today.”<sup>14</sup>

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85 (1987) (recognizing persistent inequality between husbands and wives post-divorce, yet expressing support of “continu[ing] the present trend begun in the nineteenth century toward the emancipation of married women, and implemented more recently by gender-neutral family laws, as well as the current emphasis on sharing principles in marital property law” (footnotes omitted)).

<sup>9</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2607-08 (2015) (requiring nationwide recognition of same-sex marriages).

<sup>10</sup> *Id.* at 2595; see Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 842-43 (2004) (identifying case books, courts, and scholars who have “announced the end of coverture”).

<sup>11</sup> Hasday, *supra* note 10, at 844.

<sup>12</sup> *Id.* at 844-48.

<sup>13</sup> Richard H. Chused, *Married Women’s Property Law: 1800-1850*, 71 GEO. L.J. 1359, 1361 (1983) [hereinafter Chused, *Married Women’s Property Law*]. Even later iterations of these property acts “did little to alter the right of husbands to control the family accounts after their wives’ wages were brought home” and were “thought to solidify the home economy, not recognize the independent status of women outside the family.” Richard H. Chused, *Family (Proper)ty*, 1 GREEN BAG 2D 121, 124 (1998). Nevertheless, Chused notes that “many women actually used the changes to enlarge their own realms of economic and, eventually, political power.” *Id.*

<sup>14</sup> Siegel, *supra* note 4, at 2131; see Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2229 (1994) (“An analysis . . . uncovers a system of property rules, unchanged since coverture, that allocates ownership of family wealth to husbands.”).

What has received markedly less attention in the literature is how coverture may be lurking *outside* of marriage—how a body of law that once regulated relationships between husbands and wives now occupies a space where marriage no longer formally reaches. Correcting that omission is the task of this Article, which details how principles underlying coverture are alive and well in courts' current treatment of nonmarital couples. Coverture's influence in the case law is twofold: courts addressing property distribution outside of marriage rely on doctrines that have their roots in coverture and, in the process, actively preserve and perpetuate the principles undergirding coverture in the nonmarital realm.<sup>15</sup>

To some, the use of coverture in this context may be inapposite because its presence is inverted—it is a condition within *marriage* whereby the wife had a duty to provide services, and the husband had a duty to support his wife. In the *nonmarital* cases this Article addresses, the *nonwife* has no formal duty to serve, nor does the *nonhusband* have a duty to provide support. Moreover, coverture imposed a wide-ranging set of consequences that prevented a wife from having any legal identity separate from that of her husband, a fact that is decidedly not true in these nonmarital cases. But a central—and disabling—consequence of coverture was that a wife was unable to access or control property after marrying.<sup>16</sup> Any property she happened to own came under her husband's control and any work the wife expended on her family, either by raising children or maintaining the home, was considered her “wifely” duty, which she owed to her husband.<sup>17</sup> In this way, the law kept the work the wife undertook separate

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<sup>15</sup> Nonmarital relationships involve the law when one of the individuals requests the court to distribute property at the relationship's conclusion. Courts also have occasion to deal with nonmarital relationships in other instances—as in deciding whether a nonmarital relationship may terminate alimony, or whether to distribute property where a nonmarital relationship is paired with marriage. *See generally* Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1 (2017) (addressing nonmarital relationships on their own, in the context of marriage and divorce between individuals, and as a reason for terminating alimony). For the purpose of this Article, the point is most cleanly made by looking at those cases that take place clearly outside of marriage—where neither party was married to the other, and there is no reliance on marriage in asserting claims to property.

<sup>16</sup> *See* Siegel, *supra* note 4, at 2127 (“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.”).

<sup>17</sup> *See* NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 54 (2000) (“Coverture expressed the legal essence of marriage as reciprocal: a husband was bound to support his wife, and in exchange she gave over her property and labor.”). And because she had no legal identity apart from her husband, she was generally unable to participate directly in the economy once married; any property she did manage to earn was formally his. Chused, *Married Women's Property Law*, *supra* note 13, at 1361 (“Personal property of a wife became the property of her husband as soon as he reduced it to possession.”); *see* *Bradwell v. Illinois*, 83 U.S. 130, 141 (1872) (Bradley, J., concurring) (upholding the denial of a woman, Myra Bradwell, from the lawyers' bar as constitutional

from the market, and any value it may have had did not accrue to her, but to her husband.

The nonmarital case law perpetuates this state of affairs: courts insulate the sphere of the home from that of the market, declare that the labor done within the former has no monetary value, and prevent the homemaker from accessing any property as a result. Here is the most glaring example of coverture, hiding in plain sight: services that take on the form of homemaking or childrearing—duties undertaken by the wife under coverture—do not lead to any attendant property rights.<sup>18</sup>

The influence of coverture in the nonmarital space is powerful: it transcends the particular approach courts take, be it equitable or contractual.<sup>19</sup> It also applies regardless of the sex of the party engaging in these services; courts gender the provision of services themselves so that “wifely” ones are considered gratuitous regardless of who is engaging in them. Indeed, coverture’s principles have been quietly at work regulating couples outside of marriage’s limelight, extending to same-sex relationships even when the individuals within them were unable to marry. In this way, the cases are more expansive than coverture was, as they encompass nonmarital couples, both different- and same-sex. While the reasoning differs depending on the jurisdiction and the particulars of each case, a review of how courts distribute property discloses that their overall effect is to gender the contributions made to the relationship and specifically devalue work done within the home.<sup>20</sup> Guided by the assumptions embedded in coverture, courts regularly find that work done by the “wife” in the course of a nonmarital relationship is “free,” or provided at a discount.<sup>21</sup> In Reva Siegel’s words, these cases continue the project of “preserving and modernizing the doctrine of marital service”—albeit outside of marriage.<sup>22</sup>

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under the Privileges and Immunities Clause, reasoning that “[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother”).

<sup>18</sup> See discussion *infra* Section I.A.

<sup>19</sup> The main exceptions to courts’ inability to value services contributed are in jurisdictions that look to intent to share property. See, e.g., *Wilbur v. DeLapp*, 850 P.2d 1151, 1153 (Or. Ct. App. 1993) (“We conclude that it was the intent of the parties that plaintiff have an interest in the house and, as a matter of equity, we hold that she is entitled to a one-half interest in the house.”).

<sup>20</sup> The one exception is when courts approach a nonmarital relationship through the lens of marriage and explicitly assess the relationship in terms of how it measures up to marriage. In that case, they are able to value the contributions made to the relationship. See discussion *infra* Section II.D.

<sup>21</sup> Cf. Siegel, *supra* note 4, at 2207 (“No court of law will assist the wife in enforcing the bargain; instead the court would declare her labor was ‘presumed gratuitous,’ ‘rendered freely,’ or given out of ‘the natural prompting of that love and affection which should always exist between husband and wife.’”).

<sup>22</sup> Siegel, *supra* note 4, at 2139.

Analyzing the cases specifically as an extension of coverture is crucial because it reveals the historical origins of the current state of affairs and the constitutive link between intimate relationships and property.<sup>23</sup> Coverture explains why courts consider homemaking services to inhere in an intimate relationship and why any value they may have does not benefit the individual performing them.<sup>24</sup> It also makes clear that the way courts distribute property outside of marriage is not caused by a few “bad” legal actors, or even by a misapplication of the available legal doctrines<sup>25</sup>—rather, it is a direct result of the ways in which the law has historically conceptualized property distribution among individuals in a marital relationship. Exposing the role coverture still plays in dictating property distribution identifies the mechanisms through which courts continue to actively separate the market from the family.<sup>26</sup> And it clarifies the distributional consequences these decisions impose: the ultimate effect of marking down the value of homemaking services is to prevent access to material wealth for the individual who engaged in housework.

Not only does marriage’s most traditional doctrine continue to figure prominently in the regulation of nonmarriage, but the nonmarital space provides courts with occasion to continue to define marriage in very traditional ways.<sup>27</sup> Nonmarriage relies on marriage to garner meaning and in so doing it gives courts an opportunity to define the parameters of marriage.<sup>28</sup> In particular, the

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<sup>23</sup> See Carol M. Rose, *Rhetoric and Romance: A Comment on Spouses and Strangers*, 82 GEO. L.J. 2409, 2413 (1994) (noting that problem with discussions of marriage and divorce “is not that there is too much property talk in explaining marriage and divorce relationships, but rather too little—far too little”).

<sup>24</sup> Competing arguments, like the claim that these types of services are especially difficult to value, are incomplete as explanatory rationales. See discussion *infra* Part III.

<sup>25</sup> As Hendrik Hartog explains in his history of marriage in America, “[j]udges and lawyers, like other participants in the legal system, had to improvise solutions to immediate and intractable conflicts, using the imperfect materials of an inherited and changing legal order.” HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 4 (2000).

<sup>26</sup> See Janet Halley, *What Is Family Law?: A Genealogy Part II*, 23 YALE J.L. & HUMAN. 189, 226 (2011) (describing how classical legal scholars created a division between market and family and explaining that “[t]he word ‘economic,’ which originally signified *only* the management of the household, gradually came to signify *only* nonfamilial market activity, while the term ‘family’ lost its reference to the master/servant relation and came to signify *only* the husband, his wife and their children”).

<sup>27</sup> In this way, this Article is attentive to Courtney Cahill’s entreaty to bring the marginal into the center and consider how “non-traditional relationships and reproductive practices constitute a vehicle through which the law attempts to articulate the ‘norm’ for everyone.” Courtney Megan Cahill, *Regulating at the Margins: Non-Traditional Kinship and the Legal Regulation of Intimate and Family Life*, 54 ARIZ. L. REV. 43, 53 (2012).

<sup>28</sup> This specific use of nonmarriage is not a new phenomenon. See Ariela R. Dubler, Essay, “*Exceptions to the General Rule*”: *Unmarried Women and the “Constitution of the Family,”* 4 THEORETICAL INQUIRIES L. 797, 816 (2003). In the mid-twentieth century, as law and society came to define marriage as a matter of choice, the regulation of single women reaffirmed that



nonmarital cases provide substantive content to what marriage entails by either distinguishing or likening the nonmarital relationship to marriage.<sup>29</sup> In both instances, they define the tit-for-tat that ought to take place in marriage in ways that very closely track how coverture defined the roles husbands and wives had to occupy.

Detailing exactly how coverture shapes the law's distribution of property among nonmarital partners thus has real descriptive value.<sup>30</sup> It also contributes to the long-held debate surrounding whether homemakers ought to be recompensed for their labor.<sup>31</sup> Considering the origins of the law's devaluation of women's work provides relevant context to assess courts' contemporary decisions that decline to distribute property for work rendered in the home. Moving the debate outside of marriage's terrain has the added benefit of including same-sex couples in the conversation, as well as men in heterosexual relationships who undertake homemaking activities. Furthermore, turning to nonmarriage provides a different set of considerations than proposals whose focus is solely on marriage, given that individuals who do not marry generally occupy lower socioeconomic classes.<sup>32</sup>

Part I sets out three central characteristics of coverture: its allocation of marital duties, its exclusion of marital services—and thus of the wife who performs them—from the market, and its denial of property to the wife. This Part does not mean to suggest that these are the only characteristics of coverture

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aspect of choice. *Id.* (“Single women . . . were to be celebrated, for their very existence marked the constitution of the family as a consensual social contract perfectly suited to a modern democracy.”).

<sup>29</sup> Courts that distribute property where a relationship was not like a marriage, courts that distribute property where the relationship looked like a marriage, and courts that do not distribute property where a relationship was not like a marriage all participate in defining marriage. *See* discussion *infra* Section II.A.

<sup>30</sup> This holds true across common law separate property states and community property states. Even though community property states presumed joint ownership of assets during marriage, the husband still retained managerial control over them. *See* D. KELLY WEISBERG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW* 232 (6th ed. 2016) (explaining that husband was “master of the household” under both common law rules and also “[p]aradoxically, the community property system . . . because statutes placed management of community property in husbands’ hands”).

<sup>31</sup> *See* Vicki Schultz, Essay, *Life’s Work*, 100 COLUM. L. REV. 1881, 1905 (2000) (identifying literature that seeks to value housework and arguing instead that “demanding work and working conditions” is the way to “give women more economic security, more political clout, more household bargaining power, and perhaps even more personal strength with which to pursue our dreams”).

<sup>32</sup> *See* SHARON SASSLER & AMANDA JAYNE MILLER, *COHABITATION NATION: GENDER, CLASS, AND THE REMAKING OF RELATIONSHIPS* 176 (2017) (“While living together often segued into engagement and marriage-planning for our middle-class couples, few of our service-class couples were progressing toward that end, or if they were it was at a much slower and bumpier pace.”).

but rather that these are the dominant ways that coverture regulated *property* ownership and distribution in the context of an intimate relationship. Part II then addresses current nonmarital case law and explains how the decisions fit squarely under the three principles of coverture. My prior work has already taken a deep dive into the cases; this Article relies on much of that empirical data, with updates to consider recent decisions, to make larger theoretical claims about how to understand their reasoning and results.<sup>33</sup> In the process, Part II shows that the most robust explanation for how courts engage in property distribution is to understand them as relying on, and actively enforcing, marital norms thought to be defunct. Formal marriage is by no means the only “vehicle through which the apparatus of the state can shape the gender order.”<sup>34</sup>

Part III concludes by considering what follows from revealing the role coverture plays in these cases. First, doing so weakens some of the accepted rationales that purport to explain the motivations behind family law writ large, such as privatizing support.<sup>35</sup> In these nonmarital cases, privatizing support regularly takes a backseat to gendering the valuation of work: where privatizing support, in the sense of distributing property to the individual seeking it, conflicts with finding that work done within the home is provided gratuitously

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<sup>33</sup> See generally Albertina Antognini, *Against Nonmarital Exceptionalism*, 51 U.C. DAVIS L. REV. 1891, 1962 (2018) [hereinafter Antognini, *Against Nonmarital Exceptionalism*] (“These exceptional cases reaffirm the role marriage plays in determining both their reasoning and their outcome.”); Antognini, *supra* note 15.

<sup>34</sup> COTT, *supra* note 17, at 3. Nonmarriage has long been understood to have a symbiotic relationship with marriage. See Antognini, *Against Nonmarital Exceptionalism*, *supra* note 33, at 1899 (identifying how nonmarriage continues to establish and perpetuate marital norms in the property distribution context and arguing that marriage and nonmarriage “cannot be separated”); Cahill, *supra* note 27, at 52 (“[T]he notion that marginal kinship is forever dominated by central kinship (think here of the ‘shadow’ metaphor) fails to account for the extent to which central forms of intimacy and family so often take shape in the shadow of their marginal counterparts.”); Dubler, *supra* note 28, at 800 (“Understanding the law’s treatment of marriage and gender in the nineteenth and early twentieth centuries . . . requires attention to the law’s treatment of single women.”); Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87, 164 (2014) (identifying “the dynamic nature of marriage and the way it is actively constructed in nonmarital spaces”).

<sup>35</sup> See, e.g., Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 LAW & CONTEMP. PROBS., no. 4, 2014, at 25, 32-35 (arguing that state family law “privileges private ordering and deploys state power only to resolve private disputes”); Susan Frelich Appleton, *Obergefell’s Liberties: All in the Family*, 77 OHIO ST. L.J. 919, 966-69 (2016) (arguing that privatization of dependency is “the essence of family law—a goal that animates the field and runs through its different elements”). Many scholars identify privatization as a central tenet of family law, even as they are critical of it. As Laura Rosenbury has forcefully argued in the public law context, “the ultimate value underlying legal recognition of family” is “private family support.” Laura A. Rosenbury, *Federal Visions of Private Family Support*, 67 VAND. L. REV. 1835, 1866 (2014).

or at a discount, courts nearly always hold in favor of the latter. Second, identifying coverture as the doctrinal foundation for the devaluation of housework—which influences any specific doctrine the court might appeal to—offers a new perspective on the perennial debate over whether to remunerate work done within the home. It also takes the conversation outside of marriage and thus to a less economically privileged space, which raises a different set of repercussions that have previously been ignored.<sup>36</sup> Moreover, considering how courts address nonmarital relationships clarifies the stakes of the debate: the choice courts provide individuals in this context is between marriage and nonmarriage, not between nonmarriage and work. That is, the question of whether to value housework is not placed against the value of seeking paid work but rather against the value of seeking marriage.<sup>37</sup> If this is the calculus being both offered and undertaken, then devaluing housework is particularly problematic. Part III ends by crystallizing the irrefutable condition that the law creates: reading these decisions together reveals that courts are erecting a legal impediment to accessing property where the labor the individual contributed was to the home—in the role of “wife”—rather than to the workforce. This overview of the law seriously questions the possibility of fostering an alternative to marriage, which nonmarriage has often been hailed to be.

#### I. COVERTURE’S CHARACTERISTICS

Coverture established the rights of both men and women upon entering marriage. Married women were, by definition, the more disadvantaged party: “[O]ur law in general considers man and wife as one person, yet there are some instances in which she is separately considered; as inferior to him, and acting by his compulsion.”<sup>38</sup> This Part focuses on the effects of coverture as a legal doctrine, but there is much that analyzing the doctrine does not reveal.<sup>39</sup> As a

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<sup>36</sup> See Sharon Sassler & Amanda J. Miller, *Class Differences in Women’s Family and Work Behaviors*, 16 WASH. & LEE J.C.R. & SOC. JUST. 349, 365-67 (2010) (finding that class differences impact whether women marry); cf. Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1287 (“[T]he partnership theory [of marriage] most directly helps women who are already privileged.”).

<sup>37</sup> Generally, when the plaintiff is a woman, courts explicitly reason that the individual seeking property should have married. See Antognini, *supra* note 15, at 52-54. Marriage is also the background against which courts address same-sex relationships or relationships where the man is the plaintiff. See Antognini, *Against Nonmarital Exceptionalism*, *supra* note 33, at 1896-99. Outside of marriage, then, the question is not just the one Vicki Schultz presents, of motivating paid work vis-à-vis housework, but also of motivating marriage vis-à-vis nonmarriage. See Schultz, *supra* note 31, at 1883 (“In my view, a robust conception of equality can be best achieved *through* paid work, rather than *despite* it.”).

<sup>38</sup> 1 BLACKSTONE, *supra* note 2, at \*444.

<sup>39</sup> As Ariela Dubler elaborates: “Different married women, of course, experienced the social and economic consequences of [coverture’s] disabilities differently, as did their husbands and families.” Dubler, *supra* note 28, at 803.

general matter, describing a legal regime does not provide information on how individual actors experienced or engaged with the rules of law.<sup>40</sup> Hendrik Hartog has shown, for instance, that coverture did not necessarily mean that wives were the passive victims of their circumstances—many made use of the rules of coverture, acting either alone or with their husbands, to achieve their desired ends.<sup>41</sup> Nonetheless, the reality of coverture as the central *legal* order regulating intimate relationships is important to develop in some depth to determine whether and how its influence remains in the current regime regulating relationships. Despite potentially flattening important dissimilarities among the lived experience of individuals, this analysis reveals the ways in which gender, relationship status, and property were constituted by law, in order to set up how they continue to be linked in ways that may be startling to modern sensibilities.

Coverture had a number of wide-ranging effects, but this Part focuses on three that impacted the role married individuals assumed vis-à-vis each other and vis-à-vis the property they owned: the delineation of appropriate roles for husband and wife,<sup>42</sup> the wife's specific duty to perform services,<sup>43</sup> and the prohibition imposed on married women from owning or controlling property.<sup>44</sup> These three features of coverture are difficult to disentangle from each other: the role ascribed to the wife meant that she owed her husband services, which were thereby his and prevented her from having any rights in her labor. Additionally, her activities—either within the home or outside of it—did not result in property of her own.<sup>45</sup> These three categories are nevertheless important to keep distinct for the sake of analytic clarity and also because each highlights a different aspect of coverture: the first defines the role each individual ought to occupy in marriage; the second describes how the separate sphere of the home, which was assigned to the wife, was marked as existing outside of the market; and the third identifies the disabling condition that resulted from not allowing the wife to own or control any property.

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<sup>40</sup> HARTOG, *supra* note 25, at 135 (arguing that marital unity under coverture “was always contradictory and inconclusive in the law, radically incomplete” and that, importantly, while “[w]ives possessed the properties of wives . . . [a]nd husbands possessed them, at least some of the time . . . coverture did not turn women into things”).

<sup>41</sup> *See id.* at 127 (“In a variety of ways coverture gave wives not an absence of identity but, rather, a particular recognized identity, one that sometimes gave them certain privileges.”).

<sup>42</sup> *See* discussion *infra* Section I.A.

<sup>43</sup> *See* discussion *infra* Section I.B.

<sup>44</sup> *See* discussion *infra* Section I.C.

<sup>45</sup> Virginia Woolf made a similar point in describing the conditions necessary for a woman to write. *See* VIRGINIA WOOLF, *A ROOM OF ONE'S OWN* 1 (1957) (“A woman must have money and a room of her own if she is to write fiction.”).

A. *Corresponding Marital Duties*

The unity of marriage imposed by coverture meant that the wife's legal being vanished into that of her husband's—"[f]or this reason, a man cannot grant any thing to his wife . . . for the grant would be to suppose her separate existence."<sup>46</sup> Where she was considered independently, it was to establish a clear hierarchy in which the husband was superior.<sup>47</sup> That said, both husbands and wives had specific legal duties allocated to them upon marriage. The wife's duty was to provide services and labor—"to serve and obey her husband."<sup>48</sup> Meanwhile, the husband was required "to protect and support his wife."<sup>49</sup> Establishing the husband as provider was the flip side of instituting the wife's dependency: because the wife had no ability to retain any property in her own name upon marriage,<sup>50</sup> he had the duty to support her. The husband was "bound to provide his wife with necessaries by law, as much as himself; and if she contracts debts for them, he is obliged to pay them."<sup>51</sup>

Coverture had the aim and ultimate result of turning men and women into husbands and wives by delineating appropriate roles for each. To state the obvious, these roles were not interchangeable—the husband could only provide his end of the marital bargain and the wife hers. This "structure of reciprocity" imposed in marriage "was less a distribution of rights between husbands and wives and more a way of conceptualizing the terms of being a husband."<sup>52</sup> In particular, it sanctioned "a structure of power" in the legal form of the husband and "expressed a particular male vision of responsibility and duty and power."<sup>53</sup> The law thus identified and validated men for being "good husbands" as it

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<sup>46</sup> 1 BLACKSTONE, *supra* note 2, at \*442 (explaining that if "wife elopes, and lives with another man," then husband was no longer chargeable for necessaries).

<sup>47</sup> *Id.* at \*444.

<sup>48</sup> See COTT, *supra* note 17, at 12, 54.

<sup>49</sup> *Id.* at 12.

<sup>50</sup> It is still common practice to refer to a wife as "Mrs. His Name." See Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 795-96 (2007) (observing that even though women keep their last names as current legal default, "it is not our current social convention: women typically become Mrs. His Name anyway"). Even the change from single to married, in the form of Ms. to Mrs., is only relevant to women. See *id.* at 769-70 ("Existing social practices . . . certainly suggest that most men would balk at the idea of changing their names. Even more uniformly than their last names, men's prefixes to their names don't change through marriage: unlike women, for whom the prefix 'Mrs.' as opposed to 'Miss' signifies their marital status, men stay 'Mr.' whether single or married.").

<sup>51</sup> 1 BLACKSTONE, *supra* note 2, at \*442. There were, of course, limits imposed: "[F]or any thing besides necessaries he is not chargeable," and where "a wife elopes, and lives with another man," the husband was no longer chargeable even for those necessaries. *Id.* at \*442-43.

<sup>52</sup> HARTOG, *supra* note 25, at 165-66.

<sup>53</sup> *Id.* at 165.

identified and penalized “bad husbands.”<sup>54</sup> Similarly, coverture “transformed women into wives.”<sup>55</sup> But if the wife failed to abide by her duties and was considered a bad wife, then the husband was released from his obligations.<sup>56</sup>

The respective duties placed on husbands and wives created property rights in the labor of the wife that only the husband could claim. Marriage required the wife to give her husband rights in whatever property she owned.<sup>57</sup> It also gave him rights to the work she performed: the duties owed to the husband under coverture were in the realm of housework, but husbands also had rights to any earnings the wife acquired outside of the home.<sup>58</sup> In explaining the wife’s dual duties at the turn of the twentieth century, the Court of Appeals of New York reasoned: “By entering into the marriage contract, [the wife] impliedly agreed to render services for her husband without payment therefor; and, while she was not obliged to serve as a clerk in his office, if she did so voluntarily she could not enforce any promise of payment, however solemnly made.”<sup>59</sup> Even when her husband was not her employer, any earnings the wife acquired were technically his.<sup>60</sup> From the wife’s perspective, work she performed either within the home or outside of it was rendered gratuitous by her status; the benefit produced by her labor flowed to the husband by virtue of his.

Coverture provided content to the marital relation—but it was not limited to marriage. Indeed, coverture also implicated single women and formerly married women who were either widowed or separated.<sup>61</sup> Single women had a legal status similar to men, married or unmarried; they could contract in their own names, own property, and they were exempt from the duty to provide any

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

<sup>55</sup> *Id.* at 135.

<sup>56</sup> 1 BLACKSTONE, *supra* note 2, at \*442.

<sup>57</sup> *See* COTT, *supra* note 17, at 54.

<sup>58</sup> *See* Hasday, *supra* note 10, at 845 (“Under common law coverture, a husband had a right to his wife’s domestic services.”). While the passage of the Married Women’s Property Acts presented an opportunity to challenge this state of affairs, courts interpreted them “to prohibit interspousal contracts for domestic services.” *Id.* at 845-46.

<sup>59</sup> *In re Callister’s Estate*, 47 N.E. 268, 269 (N.Y. 1897); *see* Siegel, *supra* note 4, at 2200-01 (describing American courts’ treatment of domestic labor and marital status at time).

<sup>60</sup> This was, in fact, a central reason for passing the Married Women’s Property Acts at the turn of the century. *See* Reva B. Siegel, *Home as Work: The First Woman’s Rights Claims Concerning Wives’ Household Labor, 1850-1880*, 103 YALE L.J. 1073, 1078-79 (1994) (describing contemporary feminists’ interpretation that “earnings” statutes applied both to labor within and outside home).

<sup>61</sup> *See* Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1647 (2003) (“The terrain of marriage’s shadow is vast, and different groups of single women have inhabited disparate parts of it, by chance and by choice, for reasons ranging from the practical to the ideological.”).

specific set of services.<sup>62</sup> It would be a mistake, however, to consider them free from marriage's regulatory pull. These women were either brought under marriage's reach or treated as exceptions to the rule and therefore ignored.<sup>63</sup> As Ariela Dubler has argued, regulating single women was important to defining marriage itself: "[T]o preserve the illusion of a core, transhistorical, deeply gendered definition of marriage as a permanent union between an economically dependent woman and an economically independent man."<sup>64</sup>

Even once the Married Women's Property Acts enabled wives to own and retain property in their own names, courts interpreted these statutes to preserve the husband's property rights in the labor performed at home, albeit in a different form.<sup>65</sup> Courts marked wives' work under the new legislation, which included "raising, feeding, and clothing a family, as well as income-earning activities such as industrial piecework, dairying, keeping boarders, and taking in laundry and sewing" as uncompensable, but "economically valuable."<sup>66</sup> The wife's labor was no longer conceptualized as owned by her husband but rather as free, furnished based on the love and affection that defined the marital union.<sup>67</sup> Jurisdictions today still refuse to recognize contracts between married partners for services rendered in the home.<sup>68</sup> And, while unmarried women have the ability to form contracts—just like single women did under coverture's reign—

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<sup>62</sup> HARTOG, *supra* note 2521, at 118 ("A single woman's legal status was, for the most part, indistinguishable from the legal status of many men.").

<sup>63</sup> See Dubler, *supra* note 28, at 805 ("Having embraced marriage as the dominant legal framework for regulating women's legal rights and social status—that is, for defining femininity as coterminous with wifhood—lawmakers surreptitiously sought to deny the widespread existence of single women. To this end, judges and legislators either denied the existence of women living outside marriage or found ways to bring single women within the normative framework of marriage.").

<sup>64</sup> Dubler, *supra* note 61, at 1714. This Article considers how marriage's gendered core continues to impact "single" women and men who live their intimate lives outside of marriage.

<sup>65</sup> The wording of the statutes also preserved such distinctions, with some variation across states. See Joseph Warren, *Husband's Right to Wife's Services*, 38 HARV. L. REV. 421, 422-23 (1925) ("A common type of statute gives the wife a right to own any property, real or personal, but says nothing about earnings. This right to property has been widely held not to give her a right to her earnings." (footnote omitted)).

<sup>66</sup> Siegel, *supra* note 4, at 2144.

<sup>67</sup> See *id.* at 2205 ("In short, the discourse of marital status has evolved so that family relations originally expressed in the language of property can now be expressed in the language of affect.").

<sup>68</sup> While the roles are not as expressly gendered as they were under coverture, wives continue to perform the majority of such work. See Hasday, *supra* note 10, at 845-46 (arguing that "the law continues to protect a husband's right to his wife's domestic services" because no jurisdiction enforces contracts for domestic services between married individuals).

it is rare to find a court that will enforce such a contract when it is entered into in the context of an intimate relationship.<sup>69</sup>

B. *Marital Services Are Owed to and Owned by the Husband*

Not only were the duties neatly demarcated for husbands and wives, but in the process so too were the boundaries within which husbands and wives were expected to function. The marital services the wife provided meant she worked within the home, while the duty of support the husband contributed meant that he worked outside of it, in the marketplace.<sup>70</sup> Dividing labor this way further meant that his work was valued—by the market—while her work was not.

Because the husband under coverture had property rights in the work his wife performed—whether it was in the form of services or for wages—the work she undertook was, from the beginning, not hers.<sup>71</sup> It was her husband who received the benefits it conferred and all of its value.<sup>72</sup> The husband received the “use of her real property and [had] absolute rights in her personalty and ‘services’—all products of her labor.”<sup>73</sup> Meanwhile, his duty of support lasted only as long as the relationship did: “[I]f a wife elopes, and lives with another man, the husband is not chargeable even for necessaries . . . .”<sup>74</sup>

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<sup>69</sup> This is so even in the case of express contracts, not only implied contracts. *See* Antognini, *Against Nonmarital Exceptionalism*, *supra* note 33, at 1919-20 (showing that courts are more willing to uphold express contracts in the context of same-sex relationships than different-sex relationships).

<sup>70</sup> *See* Siegel, *supra* note 60, at 1092 (“Moreover, the development of a market economy left most wives dependent on their husbands for cash. As it became more common for men to exchange their labor for money-wages, production for use came to be identified as a distinctly female activity, associated with the social, but not economic, maintenance of family life.”).

<sup>71</sup> Given this property-in-persons analogy, it is unsurprising that the early women’s rights movement was shaped by women’s participation in the campaign to abolish slavery. *See id.* at 1098-99 (explaining origins of early women’s rights agenda and its overlaps with the antislavery movement).

<sup>72</sup> This status doctrine would eventually be updated to find that the wife’s work was rendered gratuitously. *See, e.g.,* *Hull v. Hull Bros. Lumber Co.*, 208 S.W.2d 338, 339 (Tenn. 1948) (“[The wife] was merely doing some part of the work which was required of her husband as a member of the partnership and the work was gratuitous.”). Feminists in the nineteenth century attempted to reform the marital service doctrine by claiming that a wife ought to receive joint rights in family assets. *See* Siegel, *supra* note 4, at 2130 (“To secure for wives property rights in the value of their labor, the early feminist movement claimed for wives a joint property right in family assets.”).

<sup>73</sup> Siegel, *supra* note 60, at 1082.

<sup>74</sup> 1 BLACKSTONE, *supra* note 2, at \*442-43. This exchange that defined the marital relationship was in many ways illusory, since the husband had near-total discretion to decide how much support to provide, and the wife had little recourse against him in the event that he was not contributing adequate funds. She could not bring suit against him as they were one in the eyes of the law. Even once the law recognized her separate legal identity and did away



Wives, and the homes in which they worked, were thus excluded from the market and the valuation that took place therein.<sup>75</sup> Even if the wife were to leave the home and enter the paid labor market, any wages she earned were by law her husband's. Coverture, however, functioned more perniciously by preventing wives from participating in the workforce from the outset. While the duty to serve was not necessarily mutually exclusive with the ability to work, the network of disabilities imposed by coverture made it virtually impossible for a married woman to be recognized other than in her role as wife.<sup>76</sup> In either case—as wife or worker—the woman was subject to a mode of exchange that channeled her contributions to benefit her husband. She thus reaped little value directly from her labor.

The separation between wife and worker, and home and market, that existed as a matter of law under coverture became especially pronounced as a social reality during the industrial revolution, when men began to work in factories and women remained at home.<sup>77</sup> In fact, “historians have concluded that role changes

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with marital unity, courts relied on the doctrine of marital privacy to refuse to require the husband to support his wife. *See* McGuire v. McGuire, 59 N.W.2d 336, 342 (Neb. 1953) (declining to intervene in ongoing marriage, reasoning that “[t]he living standards of a family are a matter of concern to the household, and not for the courts to determine, even though the husband’s attitude toward his wife, according to his wealth and circumstances, leaves little to be said in his behalf”).

<sup>75</sup> As Siegel has explained in considering the history of antebellum household labor, “wives’ family-based labor had considerable economic value”; thus, “any account of wives’ economic contribution to the household must include their *uncompensated* labor—the work of childcare, cooking, sewing, washing, marketing, and house maintenance that rural and urban women shared.” Siegel, *supra* note 60, at 1088.

<sup>76</sup> A married woman did not have a separate legal identity from that of her husband and could not sign contracts, own property, or bring suit in her name. *See* 1 BLACKSTONE, *supra* note 2, at \*443. The classic statement of the all-encompassing and severely limiting legal nature of being a wife is provided by Justice Bradley’s concurrence in *Bradwell v. Illinois*, 83 U.S. 130, 139-42 (1872). It is not Justice Bradley’s colorful language but his statement on the effects of coverture that is important. He identified coverture as the reason women could be denied admission to the bar or, really, any occupation: “[A] woman had no legal existence separate from her husband, who was regarded as her head and representative in the social state.” *Id.* at 141. As such, “a married woman is incapable, without her husband’s consent, of making contracts.” *Id.* Justice Bradley further explained: “This very incapacity was one circumstance which the Supreme Court of Illinois deemed important in rendering a married woman incompetent fully to perform the duties and trusts that belong to the office of an attorney and counsellor.” *Id.*

<sup>77</sup> *See* Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1499 (1983). Olsen elaborates: “The market/family dichotomy tended to exclude women from the world of the marketplace while promising them a central role in the supposedly equally important domestic sphere.” *Id.* at 1500. Moreover, “the dichotomy tended to mask the inferior, degraded position of women” while “it also

for most early nineteenth-century married women involved increased family responsibilities, not greater participation in the larger commercial and political world.<sup>78</sup> Continuing this separation between the sphere of the home—occupied by women—and of the workplace—occupied by men—perpetuated the financial dependence of wives upon their husbands.<sup>79</sup> Significantly, as Siegel has shown, by forging a dividing line between home and market, the law was able to “preserv[e] and moderniz[e] the doctrine of marital service” beyond the technical end of coverture.<sup>80</sup> That is, by interpreting the earnings statutes not to apply to the husband-wife relation, “courts ensured that wives’ work was to be performed subject to a different mode of exchange than their husbands’.”<sup>81</sup> The law progressed, then, from holding that the husband owned his wife’s services to finding that they were provided for free.<sup>82</sup>

### C. *No Rights to Property*

Coverture was explicitly a property regime. It consolidated property in the husband as the head of the household and representative of the family.<sup>83</sup> The way that coverture allotted property rights was to give the husband control or outright title to property brought into the marriage and to prevent the wife from controlling any real property she owned or from gaining title to any property acquired during the marriage.<sup>84</sup> Coverture also granted the husband property rights in his wife’s labor—any services she rendered and any wages she may have earned were his—thereby precluding the wife from accessing the value of

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provided a degree of autonomy and a base from which women could and did elevate their status.” *Id.*

<sup>78</sup> Chused, *Married Women’s Property Law*, *supra* note 13, at 1359. Charlotte Perkins Stetson depicted the prison-like predicament of being a wife, confined to the four corners of her summer home, in *The Yellow Wall-Paper*. Perkins Stetson’s story describes a housewife’s slow descent into madness as she turns into the images of the very walls that confine her. Charlotte Perkins Stetson, *The Yellow Wall-Paper*, *NEW ENG. MAG.*, Sept. 1891-Feb. 1892, at 647-56.

<sup>79</sup> See Siegel, *supra* note 60, at 1093 (“With the spheres of work and family gendered male and female, marriage was redefined as an exchange of material sustenance, for spiritual sustenance and wives were in turn defined as economic dependents of their husbands.”).

<sup>80</sup> Siegel, *supra* note 4, at 2139.

<sup>81</sup> *Id.* at 2131.

<sup>82</sup> See *id.* at 2205-06.

<sup>83</sup> At common law in England, coverture “was only a marital property regime.” HARTOG, *supra* note 25, at 120.

<sup>84</sup> See Joan C. Williams, *Married Women and Property*, 1 *VA. J. SOC. POL’Y & L.* 383, 385-86 (1994). Husbands had the right to possess, use, and receive income from wives’ real property and the right to their wives’ personal property in fee simple. See *id.* (listing property rights husbands received upon marriage and arguing that their “rights over real estate were particularly important in an agrarian society because real estate was the chief form both of ongoing self-support and of wealth”).

her work.<sup>85</sup> Marriage thus deprived the wife of exercising any rights over property she may have previously owned, property she would acquire during the marriage, or work she undertook within or outside of the home.<sup>86</sup>

The wife did receive *some* rights to property on account of her marriage, but they did not accrue until the marital unity that “covered” and protected her was broken. If the husband for some reason was unable to fulfill his duty of support, she received a settlement in her husband’s town, meaning she had access to community resources.<sup>87</sup> She also received the right to dower, which occurred after her coverture ended due to her husband’s death and the subsequent termination of the marriage.<sup>88</sup> Dower was the most important entitlement the wife was granted under the common law, and it constituted only one-third of any real property her husband had owned during marriage.<sup>89</sup> Despite dower’s practical shortcomings in granting widows sufficient funds upon death, it was successful in reinforcing the relationship husbands and wives held with regard to property, continuing “the female-dependent/male-provider model of the family” beyond the end of the relationship.<sup>90</sup>

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<sup>85</sup> See Siegel, *supra* note 60, at 1094 (“The tendency of ‘separate spheres’ reasoning was thus to reinforce the legal ordering of family life and justify a husband’s control of family assets.”); Siegel, *supra* note 4, at 2131 (explaining how “judicially enforced ‘altruism’” continued to mark work done within the home as gratuitous after passage of earnings statutes in nineteenth century).

<sup>86</sup> There was an exception for wealthy families, who had the option of placing property in an equitable trust. See Siegel, *supra* note 60, at 1082. For an account that argues that these separate estates “had real value—in practical, precedential, and theoretical terms—for married women,” see Allison Anna Tait, *The Beginning of the End of Coverture: A Reappraisal of the Married Woman’s Separate Estate*, 26 YALE J.L. & FEMINISM 165, 168 (2014).

<sup>87</sup> See HARTOG, *supra* note 25, at 128.

<sup>88</sup> See Dubler, *supra* note 61, at 1647 (“Even under coverture, a widow was indisputably a single woman in the eyes of the law. In coverture’s terms, she reassumed the status of *feme sole* as opposed to a *feme covert*.”).

<sup>89</sup> See *id.* at 1660 (“Dower constituted ‘the core of the wife’s entitlement under the old common law system.’ Incorporated into early American law, albeit with variations from colony to colony (and, later, state to state), dower generally guaranteed a widow a fixed entitlement to her deceased husband’s estate: a life interest in one-third of all the real, not personal, property of which he was seized during their marriage.” (footnote omitted) (quoting SUSAN STAVES, MARRIED WOMEN’S SEPARATE PROPERTY IN ENGLAND, 1660-1833, at 5 (1990))). Meanwhile, a widower possessed a right to curtesy, which included the rents, profits, and use of all of his wife’s property. See *id.* at 1661. Given that men tended to have more property than women, and that women tend to outlive men, dower was a much more consequential right and legal event. *Id.*

<sup>90</sup> *Id.* at 1651 (“Although their efforts in this area have been largely forgotten, members of the nineteenth-century woman’s rights movement fought for dower reform, recognizing something that more recent scholarship has overlooked: the ideological role of dower in shaping the female-dependent/male-provider model of the family, as well as women’s second-

As a property regime triggered by marriage, coverture clearly excluded those who could not marry.<sup>91</sup> In antebellum America, this latter group included slaves.<sup>92</sup> Slavery was the culmination of a property-in-persons regime that denied enslaved men and women any role other than being white men's property.<sup>93</sup> Accordingly, marriage and coverture were institutions generally associated with white, middle-class women, who were also the individuals populating the early feminist movements.<sup>94</sup> Slavery and coverture were, however, similar in that they both denied individuals under their aegis any rights to property.<sup>95</sup>

class citizenship rights." (footnote omitted)). Dubler explained how coverture and dower worked in similar ways in that they both "sought to ensure a woman's economic reliance on a particular man." *Id.* at 1652-53.

<sup>91</sup> *Id.* at 1647 n.9 ("In addition, in the antebellum era, slave women were legally excluded from marriage.").

<sup>92</sup> Coverture could also be said to exclude single women. But Dubler's work has shown repeatedly that coverture continued to be a force in defining single women, by either denying their existence or bringing them into marriage's regulatory pull. *See id.* at 1647-49; Dubler, *supra* note 28, at 810 ("[Dower] extended the ideological apparatus of coverture beyond the death of a husband, thereby preserving the legal fiction that widows were internal to the structure of marriage.").

<sup>93</sup> *See* Dubler, *supra* note 28, at 804 ("If marriage constituted the primary locus of white women's citizenship, slave women's exclusion from formal marriage powerfully marked them as non-citizens."). Slaves were prohibited from marrying given their inability to enter into any civil contract. Katherine M. Franke, *Becoming a Citizen: Reconstruction Era Regulation of African American Marriages*, 11 *YALE J.L. & HUMAN.* 251, 252 (1999) ("[Enslaved people] were incapacitated from entering into civil contracts, of which marriage was one, and were regarded as lacking the moral fiber necessary to respect and honor the sanctity of the marital vows."). Of course, this exclusion from formal marriage did not mean that slaves did not in fact have families or family relationships—they did, but without formal legal recognition. *See id.* at 252-53 (noting how norms of Black communities "were harshly punished, disciplined, and thereby domesticated by postbellum laws").

<sup>94</sup> *See* Dubler, *supra* note 61, at 1674 ("As predominantly white, middle- or upper-class women, members of the woman's rights movement no doubt perceived their meager inheritance rights—much as they perceived their minimal rights to marital assets—as insulting their natural entitlements to certain forms of wealth, property, and general economic stability.").

<sup>95</sup> This comparison is not meant to equate the two conditions in any way—slavery was the utmost denial of the humanity of an entire people through violence, force, and oppression—but rather to highlight the ways in which the two legal systems actively denied individuals property rights. It is also essential to note that it was not only white men, but also white women, who owned slaves, and women's expanding rights to property included securing their rights to slaves. *See* Cheryl I. Harris, *Finding Sojourner's Truth: Race, Gender, and the Institution of Property*, 18 *CARDOZO L. REV.* 309, 351-52 (1996) ("The improvement of white women's legal status through the recognition of white women's capacity to contract, to attain a divorce and secure marriage settlements, and to convey and inherit property was linked to recognizing white women's contractual and property rights in slaves."). Despite fundamental

The regulation of property is indisputably a *key feature* of coverture. As explained by Joan Williams, “[c]overture . . . was open in its prohibition of women from ownership of economic resources, and arguments for or against coverture rested on substantive reasons for allocating property rights.”<sup>96</sup> Given its formal demise, though, how marriage continues to enforce a particular property distribution has become harder to identify.<sup>97</sup> It is as difficult—or even more—to detect the way that coverture dictates property distribution *outside* of marriage’s formal bonds and how it persists in leading courts to deny property to the individual who is engaged in the role once occupied by the wife.

## II. NONMARITAL COVERTURE

This Part has the central task of analyzing the cases that address requests for the distribution of property at the conclusion of a nonmarital relationship by virtue of the parties’ separation.<sup>98</sup> It considers the courts’ rationales and outcomes against the three background principles that undergird coverture outlined above. As such, this Part first looks at how nonmarital cases assess the roles individuals occupy outside of marriage and in so doing define the roles husbands and wives ought to occupy within *marriage*. It then analyzes how the

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differences between coverture and slavery, overlaps were identified and relied on by feminists whose arguments were informed by their work in abolishing slavery. *See, e.g.*, Siegel, *supra* note 60, at 1148 (“In an important sense, woman’s rights advocacy was a child of the abolitionist movement, and an argument that the law of marital status amounted to a law of slavery had always played a key role in agitation for common law reform.”). Upon the abolition of slavery and the entrance of former slaves into civil society, marriage became an important institution for Black families to access as a signal of full citizenship. *See* Franke, *supra* note 93, at 276-77 (“[T]he right to marry figured prominently in the bundle of rights understood to have been denied to enslaved people, and was considered necessary to any robust conception of liberty.”). The state, however, brought marriage’s full coercive force to bear on these relationships. As Katherine Franke has shown, “for a significant number of former slaves, legal marriage was not experienced as a source of validation and empowerment, but as discipline and punishment when the rigid rules of legal marriage were transgressed, often unintentionally.” *Id.* at 256, 274-92.

<sup>96</sup> Williams, *supra* note 84, at 396; *id.* at 408 (concluding that today, “the legal definition of property excludes human capital, leaving women with disproportionately little property to own, and revealing modern property law as little more than an updated version of coverture”).

<sup>97</sup> Williams argues that coverture remains, but in a different form, in rules like “he who earns it, owns it,” which are “not even considered a part of property law,” but sound instead in “the language of entitlement to liberty and personal self-fulfillment.” *Id.* at 396. As Carol Rose has advised: “That is why we need to think about property issues in marriage and divorce more, not less.” Rose, *supra* note 23, at 2415.

<sup>98</sup> This Part excludes for the most part relationships that end in death because of different considerations that may be at play, as in the interpretation of a will or the requests of competing family members, which stray from an analysis of the parties’ arguments about their contributions to the relationship, as against each other. This Part does, however, discuss those kinds of cases when they are directly relied upon in the context of a separation.

cases assume and thereby reinforce the notion that marriage-like services are rendered for free and thus separate from the market. Finally, this Part examines how courts limit property distribution when the individual requesting it did not contribute in explicitly financial ways to the relationship, thereby denying the “wife” any rights to property. Such reasoning continues to disproportionately affect women in different-sex relationships or the lower-income earner in same-sex relationships.

To use a well-worn but particularly apt phrase, coverture is hidden in plain sight. This Part reveals just how coverture is embedded in the way courts analyze property disputes between a couple and in the tools judges rely on to decide upon a particular distribution. Coverture provides the legal basis for courts’ assumptions that services rendered within the home are “affective” and therefore “gratuitous” unless proven otherwise, given that these were services owed the husband under coverture. Coverture also explains why not a single court opinion encourages a man seeking property to have married: marriage was the relationship that provided support to the woman as a wife rather than to the man as a husband. This is not to say that judges are intentionally or self-awarely imposing coverture onto these relationships—instead, the point of this Part is to reveal why certain assumptions are so intractable and cut across different legal doctrines, jurisdictions, and genders. Outside of marriage and for the most part unremarkably, courts reflexively rely on legal doctrines that have their roots in coverture and in so doing preserve the central aspects of the regime.

Rather than ask the normative question of whether services ought to be recompensed or whether specific doctrines like unjust enrichment are the appropriate vehicle to do so,<sup>99</sup> this Part aims to demonstrate how courts assign value to certain services and not others in ways that remain consistent despite variations in jurisdictional and doctrinal approaches. To establish the persistence of coverture in the nonmarital case law, this Part brings together decisions that address different-sex and same-sex couples.<sup>100</sup> Out of necessity, this Part focuses on only a sample of all decided cases and builds upon prior research.<sup>101</sup> These cases are illustrative of the many doctrines courts employ, including claims

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<sup>99</sup> Emily Sherwin has, for instance, argued that providing cohabitants with “relief on the basis of unjust enrichment is a significant departure from both the traditional law of restitution and the framework established in the new [*Third Restatement*].” Emily Sherwin, *Love, Money, and Justice: Restitution Between Cohabitants*, 77 U. COLO. L. REV. 711, 723 (2006). In the process, Sherwin characterizes services rendered in the course of a relationship as they are characterized in the bulk of the nonmarital cases—namely, as “consensual acts of generosity, performed with no expectation of reimbursement.” *Id.* at 724.

<sup>100</sup> The majority of claims continue to be brought by a woman at the conclusion of a different-sex relationship. See Antognini, *supra* note 15, at 7-8.

<sup>101</sup> I have set out my methodology in two prior articles. See Antognini, *Against Nonmarital Exceptionalism*, *supra* note 33, at 1894-96; Antognini, *supra* note 15, at 78. I continue to rely on that methodology here and include cases that have been decided since those articles have been published.

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based on equity, contract, and property, such as a request to partition. This Part also addresses those cases that purport to reject any claims based on a nonmarital relationship. Regardless of the specific doctrine at stake, coverture guides the courts' decisions.

This Part begins by addressing the nonmarital cases that preserve and reproduce the three central characteristics of coverture. These decisions define the roles each participant ought to occupy in marriage, ensure that “wifely” services are rendered for free, or limit the property given to the plaintiff seeking it.<sup>102</sup> This Part ends by considering the small set of cases that breaks away from the pattern of denying property by explicitly considering how marriage-like the nonmarital relationship was—indeed, where the court directly invokes marriage, it is able to value services rendered and often ends up distributing property.<sup>103</sup> Ironically, at least outside of marriage proper, marriage functions as an effective shield to coverture's sword.<sup>104</sup> These cases that look to marriage explicitly are, however, in the minority. Very few jurisdictions follow an expressly comparative approach to marriage and, outside of those, courts have only taken this approach in the relatively infrequent instances where same-sex couples raised these claims before they were able to marry as a matter of right.<sup>105</sup>

#### A. *Role-Defining*

The specific roles set out by coverture were marked by gender—the husband provided support, while the wife rendered services that resulted in no property rights for her.<sup>106</sup> The cases addressed here also deny property to the individual who occupied the role of wife—courts chiefly consider whether she, or occasionally he, provided services that were “wifely” in the context of a relationship where the other party acted “husbandly.” The result of denying

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<sup>102</sup> As there is overlap among the categories of coverture and how the cases reach their decisions, some cases appear in more than one section.

<sup>103</sup> Even if the decisions ultimately decline to distribute property, they generally do so for different reasons than the cases that do not explicitly rely on the nonmarital relationship's marital characteristics. One way in which these cases can be understood as participating in the project of extending coverture is that they delineate the roles that ought to be occupied within marriage. *See* discussion *infra* Section II.A.

<sup>104</sup> While this Article focuses on the ways in which the nonmarital space constructs marriage, marriage itself also provides for the equitable distribution of assets upon divorce. Entering the legal status of marriage provides for a more egalitarian space in which spouses can access property—at least at divorce if not during the marriage—given the rise of gender-neutral rules and statutes mandating equal or equitable division of property at divorce. *See* WEISBERG & APPLETON, *supra* note 30, at 230-32. There remains, however, evidence that a different-sex marriage leaves women and children in a more financially precarious position post-divorce—while the standard of living for women and children declines, for men it increases. *See id.* at 572.

<sup>105</sup> *See* Antognini, *Against Nonmarital Exceptionalism*, *supra* note 33, at 1898-99.

<sup>106</sup> *See* discussion *supra* Section I.A.

property for services rendered outside of marriage is to promote, at least conceptually, marriage as *the* property-providing status.<sup>107</sup> As such, these cases have the effect of marking homemaking duties as those an actual wife, within marriage, should have provided.

Unlike under coverture, the role-defining aspect of the nonmarital cases—which designate services as those a wife should provide and refuse to distribute property to the individual who performed them—cuts across the gender composition of both the plaintiffs and the couples. Courts deny property to either the man or woman seeking it in the context of a different-sex relationship, and either the man or woman seeking it at the end of a same-sex relationship. One of the only instances in which courts affirm the distribution of property in a relationship and *reward* services rendered is when the plaintiff seeks property in exchange for work done in building a home. Thus, the cases that end up distributing property outside of an explicitly marriage-like analysis are generally to men who have taken on the role of provider in the form of a literal home-maker.

When courts deny access to property outside of marriage, they do so by locating the unmarried individuals who assumed those traditional roles within marriage. Courts addressing parties who occupied traditional roles either state or insinuate that they should have taken place within marriage.<sup>108</sup> By hindering access to property to wife-like plaintiffs who continue to be mostly women, courts protect marriage as the status through which to receive compensation for services rendered. While coverture was a doctrine applicable solely to marriage, marriage has become the realm—at least as defined in the nonmarital cases—where property can effectively be distributed.<sup>109</sup>

The most conspicuous examples of courts locating a couple whose relationship followed traditional roles within marriage occur in the few jurisdictions that continue to decline claims for property outside of marriage.<sup>110</sup> In Mississippi, for instance, courts distribute property based on financial contributions made to the relationship and little else.<sup>111</sup> Accordingly, a

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<sup>107</sup> It is not clear that denying property outside of marriage incentivizes individuals to marry. See Antognini, *supra* note 15, at 52-58. Nor is it clear that divorce always provides an individual with more property given the existence of premarital agreements.

<sup>108</sup> Notably, courts only explicitly advise the plaintiff to have married when the plaintiff is a woman. See, e.g., *Davis v. Davis*, 643 So. 2d 931, 936 (Miss. 1994).

<sup>109</sup> This is not to imply that marriage and divorce are in fact places where women have access to property but rather that this is how the nonmarital space constructs marriage. Divorce still generally leaves women and children worse off than men. See, e.g., WEISBERG & APPLETON, *supra* note 30, at 571-73.

<sup>110</sup> See Antognini, *supra* note 15, at 52-54 (including, in varying degrees of denial, Georgia, Illinois, Louisiana, and Mississippi).

<sup>111</sup> See, e.g., *Cates v. Swain*, 2010-CT-01939-SCT (¶ 18) (Miss. 2013), 215 So. 3d 492, 496 (affirming award of property at conclusion of lesbian relationship on basis of “readily identifiable assets (or tangible benefits) each party conferred on the other”).



relationship that involves an exchange of time or services for support leaves the plaintiff with nothing at the end; it also provides courts with an opportunity to identify marriage as the relationship status that furnishes property if these were the specific roles undertaken.

In *Davis v. Davis*,<sup>112</sup> Elvis Davis sought an equitable division of assets at the conclusion of her thirteen-year relationship with Travis Davis.<sup>113</sup> During the relationship, “Elvis concentrated on making a home for Travis, [their daughter] Tonya and the couple’s children from previous marriages.”<sup>114</sup> After building a new home together, Elvis “painted doors and hung wallpaper”; “sewed curtains and bedspreads, shirts and children’s clothes; maintained the swimming pool; took care of the yard and animals; [and] gardened and preserved homegrown vegetables.”<sup>115</sup> Meanwhile, Travis managed a number of businesses.<sup>116</sup> His net worth increased from \$850,000 at the beginning of their relationship to nearly ten times that amount by the end.<sup>117</sup> During the course of their relationship, Elvis “was always provided with whatever she needed.”<sup>118</sup>

The Supreme Court of Mississippi denied Elvis any property. In a relationship where the roles so neatly mapped onto that of a female-homemaker and male-provider model, the court relied on the fact that there had not been an actual marriage.<sup>119</sup> The court specifically noted that “Elvis rejected Travis’[s] proposals of marriage.”<sup>120</sup> To decline marriage, according to the court, had been “folly under the circumstances.”<sup>121</sup> It concluded by offering an alternative route Elvis could have taken: “When opportunity knocks,” it advised, “one must answer its call.”<sup>122</sup> Because Elvis failed to do so, “her claim is all for naught.”<sup>123</sup>

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<sup>112</sup> 643 So. 2d 931 (Miss. 1994).

<sup>113</sup> *See id.* at 932.

<sup>114</sup> *Id.* at 933.

<sup>115</sup> *Id.*; *see* Antognini, *supra* note 15, at 52-53 (addressing *Davis* in discussion of jurisdictions that deny requests to distribute property at conclusion of nonmarital relationship with goal of promoting marriage).

<sup>116</sup> *Davis*, 643 So. 2d at 932-33.

<sup>117</sup> *Id.* At the end of the relationship, Travis had \$8,300,000 in total assets. *Id.* at 933.

<sup>118</sup> *Id.*

<sup>119</sup> *See id.* at 936 (“Elvis and Travis Davis never entered into a ceremonial marriage nor was Elvis an innocent partner to a void marriage.”).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*; *see* Nichols v. Funderburk, 2002-CT-00087-SCT (¶ 13) (Miss. 2004), 883 So. 2d 554, 558 (“When a man and a woman cohabit without the benefit of marriage, they do so at their own peril insofar as resolving real and personal property disputes upon their separation.”); Malone v. Odom, 657 So. 2d 1112, 1117 (Miss. 1995) (“Patt had the opportunity to marry Sidney. Nonetheless, she chose not to. Accordingly, the facts of this case and our recent holding in *Davis* foreclose an equitable division for Patt.”).

Where, however, the relationship does not appear marriage-like in that one partner did not provide services in exchange for property or support of the other, and the request was based on money rather than services, Mississippi courts do distribute property at the end. In *Cates v. Swain*,<sup>124</sup> the Supreme Court of Mississippi held that at the conclusion of a six-year nonmarital relationship, Elizabeth Swain could recover property from Mona Cates.<sup>125</sup> In doing so, the court specifically distinguished *Davis v. Davis* on the grounds that there, “Elvis argued that, by virtue of *her* efforts in her live-in, long-term *relationship* with Travis, she was entitled to an equitable division of assets.”<sup>126</sup> In *Cates*, however, the claim was not based on the expenditure of efforts or services; rather, Elizabeth’s claim was for “unjust enrichment based upon her *monetary contributions*.”<sup>127</sup> In particular, the state supreme court in *Cates* explained that the court of appeals had erred in considering such “benefits as either investments or gratuitous gifts.”<sup>128</sup> The court clarified this was not so with monetary contributions. Where money rather than services is at stake, courts can and do engage in a distribution. It is only those services provided during the course of a relationship that looks like a marriage, as initially defined by coverture, that are not recompensed.<sup>129</sup>

Even in a jurisdiction understood to be receptive to claims for property outside of marriage, like California,<sup>130</sup> plaintiffs often fail. While courts are less direct in instructing the parties to marry, they nonetheless assess the roles each had during the relationship and often deny property in the absence of an actual marriage. In *Friedman v. Friedman*,<sup>131</sup> the California Court of Appeal addressed a request for property distribution at the end of a nonmarital relationship.<sup>132</sup> In

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<sup>124</sup> 2010-CT-01939-SCT (Miss. 2013), 215 So. 3d 492.

<sup>125</sup> *Id.* ¶ 18, 215 So. 3d at 496 (“[W]e conclude that the chancellor did not abuse his discretion in awarding Swain a refund, a form of restitution.”).

<sup>126</sup> *Id.* ¶ 13, 215 So. 3d at 495.

<sup>127</sup> *Id.* ¶ 15, 215 So. 3d at 495 (“Swain made a claim, *inter alia*, for unjust enrichment based upon her *monetary contributions* to Cates’s purchase of the Washington home and the purchase and improvement of the Mississippi home, which Cates retained after Swain moved from the residence.” (second emphasis added)).

<sup>128</sup> *Id.* ¶ 18, 215 So. 3d at 496. The court characterizes these contributions as “readily identifiable assets (or tangible benefits).” *Id.*

<sup>129</sup> As *Cates* explains, the court’s concern is that “the Legislature has not extended the rights of married persons to cohabitants.” *Id.*

<sup>130</sup> See, e.g., *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976) (in bank) (holding that nonmarital partners have legal means available to them to access property at end of relationship).

<sup>131</sup> 24 Cal. Rptr. 2d 892 (Ct. App. 1993).

<sup>132</sup> *Id.* at 895-96. This case involved a claim for support in the course of requesting equitable relief at the end of the nonmarital relationship. *Id.* at 893-94. I consider the court’s decision in some detail here, even though its focus is explicitly on the question of support,

the interim, the court had to consider an appeal brought by Elliott Friedman from a preliminary injunction granting Terri Friedman a temporary award of support pending the conclusion of the trial.<sup>133</sup> The court held that such support was unwarranted for an unmarried couple.<sup>134</sup> In doing so, it considered both the rights of unmarried couples, as set forth in *Marvin v. Marvin*,<sup>135</sup> and the specific rights that flowed from marriage. It combined these two threads in reasoning that “[t]he record discloses no conduct on the part of the parties from which it can be implied that the parties (particularly [Elliott]) intended to promise that [Terri] would be supported as if she and [Elliott] had actually been married if the relationship ended.”<sup>136</sup> The implied contract language came directly from *Marvin*, where the court had allowed a claim for support to go forward between unmarried individuals. But the *Friedman* court linked the viability of that claim to the requirement that there be a marriage. The court reasoned that holding otherwise would “resurrect common law marriages in California.”<sup>137</sup>

It is no coincidence that the court’s turn to marriage took place in the context of a relationship that possessed the markers of a traditional marriage. Elliott and Terri had been together for twenty-one years.<sup>138</sup> During that time, Elliott worked as an investigator and then, after attending law school, as an attorney.<sup>139</sup> When they first started living together, Terri worked as a waitress, but “her principal work was in contributing to [Elliott]’s career, building up and maintaining the property, and caring for their first child.”<sup>140</sup> After law school, Elliott became a practicing attorney “and did well economically”; for her part, Terri “involved herself in upgrading and maintaining their homes, cooking, cleaning, entertaining and caring for their children.”<sup>141</sup> In this context, the court considered marriage to be the appropriate status that would have led to a

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because it clearly illustrates the doctrinal points of confusion exemplified in the nonmarital case law more generally.

<sup>133</sup> *Id.* at 900 (“[T]he trial court awarded relief based on its finding that respondent would be irreparably harmed if temporary support were not awarded . . . . The court also found that damages would be inadequate because trial may be years in the future.”).

<sup>134</sup> *Id.* at 901.

<sup>135</sup> 557 P.2d 106, 122 (Cal. 1976) (in bank).

<sup>136</sup> *Friedman*, 24 Cal. Rptr. 2d at 899.

<sup>137</sup> *Id.* (“The net effect of the trial court’s findings regarding support is to resurrect common law marriages in California.”). *Marvin* had been careful to note that it was not reinstating common law marriage in recognizing rights between unmarried partners. *Marvin*, 557 P.2d at 122 n.24 (“We do not seek to resurrect the doctrine of common law marriage, which was abolished in California by statute in 1895.”).

<sup>138</sup> *Friedman*, 24 Cal. Rptr. 2d at 893.

<sup>139</sup> *Id.* at 894-95.

<sup>140</sup> *Id.* at 895.

<sup>141</sup> *Id.* Before the couple broke up, Terri had a herniated disc. She was, at the time, disabled and her ability to walk was “extremely limited.” *Id.*

temporary award of support and denied Terri any recovery for maintaining a relationship outside of it.

While *Friedman* addressed a request for support pending trial on the issue of property distribution, other courts in California have relied on it for the more general proposition that cohabitants who request property or support at the end of a relationship bearing the traditional markers of services in exchange for support receive no property when it ends.<sup>142</sup> Had the same relationship taken place under the legal auspice of marriage, California courts indicate they would have awarded the plaintiff property. In *Miller v. Garvin*,<sup>143</sup> the court considered Gari Miller's claim for one-half of the home she lived in with Peter Garvin, as well as for support.<sup>144</sup> Gari and Peter had been in a relationship for seventeen years and had one daughter together.<sup>145</sup> The court described their relationship in the familiar terms supplied by coverture: "Garvin was the family breadwinner while Miller stayed at home to care for the couple's daughter."<sup>146</sup> The court agreed with the jury's finding that there was no implied agreement for support after their relationship terminated; moreover, given that the property was titled solely in Peter's name, Gari could not receive any property interest in the home in which they had lived.<sup>147</sup>

In rejecting Gari's claims, the *Miller* court relied on *Friedman*.<sup>148</sup> It indicated that Gari had only managed to prove the existence of an agreement that required

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<sup>142</sup> See, e.g., *Smith v. Carr*, No. 2:12-cv-03251, 2012 WL 3962904, at \*4-5 (C.D. Cal. Sept. 10, 2012) (reasoning that there was no express contract because plaintiff alleged consideration based on "attention, availability, domestic services, companionship, comfort, love and emotional support," which were insufficient). *But see Hills v. Superior Court (Munoz)*, No. B174068, 2004 WL 1657689, at \*6 (Cal. Ct. App. July 26, 2004) (reasoning that female plaintiff's assertions raised triable issues of fact, including that "she gave up her career and devoted herself to performing household and other domestic services for him so as to aid his business career; . . . they had joint bank accounts; . . . they shared income, and he gave her 'unlimited spending power' with respect to the credit card accounts"). The case never made it to trial, as the parties attempted to settle. See *Hills v. Bergeron*, No. BC292975, 2005 WL 5086404 (Cal. Super. Ct. Mar. 14, 2005).

<sup>143</sup> No. A095988, 2003 WL 122784 (Cal. Ct. App. Jan. 6, 2003).

<sup>144</sup> *Id.* at \*1.

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* Like coverture, the court also limited the provision of support to the period of time in which the relationship, and thus the exchange, took place. *Id.* at \*2 ("The trial court found that the parties did have a 'tacit understanding' that Garvin would be the sole breadwinner in their relationship. The court accepted that Miller inferred from the circumstances that Garvin would love and support her indefinitely, but the court found inadequate proof of any intention or promise by Garvin to continue his support after the relationship ended."). Under coverture, if the wife left her husband to be with another man, the husband no longer had a duty to support her. See 1 BLACKSTONE, *supra* note 2, at \*442-43.

<sup>147</sup> *Miller*, 2003 WL 122784, at \*2-3.

<sup>148</sup> *Id.* (citing *Friedman v. Friedman*, 24 Cal. Rptr. 2d 892, 898-99 (Ct. App. 1993)).

her to be the stay-at-home parent during the relationship—not that she would receive anything in return.<sup>149</sup> Despite the Supreme Court of California’s assurances in *Marvin* that contracts can indeed be implied in the context of a nonmarital relationship,<sup>150</sup> the court in *Miller* stated that the main question was whether there had been “mutual assent.”<sup>151</sup> Here, the court reasoned that “mutual assent” was lacking—specifically, Peter had not assented to this arrangement.<sup>152</sup> The effect of narrowing the implied contract inquiry to consider mainly mutual assent is to allow the titleholder’s desires to dictate property distribution outside of marriage.<sup>153</sup> The assumption underlying the court’s decision is that in a relationship where the woman stayed at home and the man gained an income, providing services leads to no attendant rights to property unless proven otherwise.

Perhaps surprisingly, same-sex couples fare similarly—both before and after receiving the nationally recognized right to marry in 2015<sup>154</sup>—unless courts analyze the relationship explicitly in terms of marriage. Across jurisdictions, courts have refused to provide property to the individual who engaged in wife-like activities, regardless of whether that individual was a man or a woman. Illinois, which is like Mississippi in that it denies unmarried couples any property rights upon separation, applies this reasoning wholesale to same-sex relationships.<sup>155</sup> In *Blumenthal v. Brewer*,<sup>156</sup> the Supreme Court of Illinois reasoned that while something like a partition action could proceed between an unmarried couple, any claim based on the relationship itself was prohibited.<sup>157</sup>

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<sup>149</sup> *Id.* (“Even Miller’s own testimony failed to demonstrate a promise of continuing support.”).

<sup>150</sup> *Marvin v. Marvin*, 557 P.2d 106, 121 (Cal. 1976) (in bank) (“We need not treat nonmarital partners as putatively married persons in order to apply principles of implied contract, or extend equitable remedies; we need to treat them only as we do any other unmarried person.”).

<sup>151</sup> The *Miller* court relied on *Friedman* to the exclusion of *Marvin*, and made a distinction between implied-in-fact and implied-in-law contracts, asserting that the former was not at stake. *See Miller*, 2003 WL 122784, at \*2. As to the latter, the court explained it “requires mutual intentions and assent of the parties.” *Id.*

<sup>152</sup> *Id.* (“The trial court here found *mutual* assent lacking. Garvin’s testimony, together with Garvin’s maintenance of separate assets, supports that finding.”).

<sup>153</sup> With regard to the house, the court adhered to a strict title theory of ownership. It reasoned that because Peter paid for it and took sole title to it, he owned the house regardless of having found it with Gari, and having lived in the house together with their daughter. *See id.* at \*1-2.

<sup>154</sup> *See Obergefell v. Hodges*, 135 S. Ct. 2584, 2604-05 (2015).

<sup>155</sup> *See Blumenthal v. Brewer (Blumenthal II)*, 2016 IL 118781, ¶¶ 29-82, 69 N.E.3d 834, 844-59; Antognini, *supra* note 15, at 52-53.

<sup>156</sup> *Blumenthal II*, 2016 IL 118781, 69 N.E.3d 834.

<sup>157</sup> *Id.* ¶ 3, 69 N.E.3d at 839. Illinois appeared poised to change its tack in 2014, when in *Blumenthal v. Brewer*, the Appellate Court of Illinois allowed the parties in a long-term

In the context of this twenty-six year relationship between Eileen Brewer and Jane Blumenthal, during which Eileen “stayed at home with the couple’s three children while [Jane] was the family’s breadwinner,”<sup>158</sup> the court held that no rights to property accrued to Eileen.<sup>159</sup>

The fact that Jane and Eileen’s relationship was just like a marriage was central to the court’s opinion. The Supreme Court of Illinois explicitly rejected Eileen’s request to address the relationship like it would any other cohabiting relationship, as one between, for example, “roommates or siblings living together.”<sup>160</sup> The court reasoned that such a characterization “ignores the fact that their relationship—which lasted almost three decades and involved raising three children—was different from other forms of cohabitation.”<sup>161</sup> In particular, the court agreed with Jane’s argument that their relationship was “identical in every essential way to that of a married couple.”<sup>162</sup> Because Eileen, a law school graduate, abstained from earning an income in order to stay home with the kids while Jane, a doctor, financially supported the family, the couple should have married.<sup>163</sup> In so reasoning, the court drew the content of what marriage ought to look like outside of its terrain.

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lesbian relationship to bring common law claims for property at the relationship’s end. *See* Blumenthal v. Brewer (*Blumenthal I*), 2014 IL App (1st) 132250, ¶ 38, 24 N.E.3d 168, 182, *rev’d in part, vacated in part, Blumenthal II*, 2016 IL 118781, ¶ 6, 69 N.E.3d at 840 (“Brewer wants only to bring common law claims that are available to other people. We find that Brewer has the right to do so and that the trial court’s dismissal of her claims was in error.”). The Supreme Court of Illinois eventually overturned the decision. *Blumenthal II*, 2016 IL 118781, ¶ 90, 69 N.E.3d at 860.

<sup>158</sup> *Blumenthal I*, 2014 IL App (1st) 132250, ¶ 1, 24 N.E.3d at 169 (“Brewer counterclaimed for various remedies, including to receive sole title to the property so that the couple’s overall assets would be equalized after she stayed at home with the couple’s three children while Blumenthal was the family’s breadwinner.”).

<sup>159</sup> *Blumenthal II*, 2016 IL 118781, ¶ 39, 69 N.E.3d at 860.

<sup>160</sup> *Id.* ¶ 63, 69 N.E.3d at 853.

<sup>161</sup> *Id.*

<sup>162</sup> *Id.* (“Brewer herself identified in her counterclaim that her relationship with Blumenthal was not that of roommates or siblings living together but was ‘identical in every essential way to that of a married couple.’”).

<sup>163</sup> When this exchange takes place outside of marriage, in a “marriage-like relationship,” the law prohibits any property from changing hands. *Id.* ¶ 73, 69 N.E.3d at 856 (“Our decision in *Hewitt* bars such relief if the claim is not independent from the parties’ living in a marriage-like relationship . . .”). The court may also have been responding to the marriage-like quality of the relationship post-*Obergefell*. It noted that the cases granting rights to unmarried couples “were written prior to, and therefore did not consider, the fundamental change the Supreme Court decision in *Obergefell* had on legal rights of same-sex partners.” *Id.* ¶ 82, 69 N.E.3d at 859; *see* Melissa Murray, Essay, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1244 (2016) (arguing that “*Obergefell* may sound the death knell for alternative statuses”). While same-sex couples may also have to contend with courts protecting the status of marriage that is now available to them, courts’ reasoning protecting

Even when the individual supplying services is a man in a same-sex relationship, and marriage was decidedly off the table, courts refrain from valuing the services if they are too close a copy of those a wife would generally provide. California provides an apt example: courts have distributed property at the conclusion of a relationship where the services provided included “being a chauffeur, bodyguard, secretary, and partner and counselor in real estate investments,”<sup>164</sup> but not when they involved being a “homemaker, traveling companion, housekeeper and cook.”<sup>165</sup> In *Whorton v. Dillingham*,<sup>166</sup> the court specified that the former services, which had been furnished by one of the parties in a same-sex relationship, clearly had “monetary value, and [were] the type for which one would expect to be compensated unless there is evidence of a contrary intent.”<sup>167</sup> As such, they constituted valid consideration, “independent of the sexual aspect of the relationship.”<sup>168</sup> But, the latter type of services, which were similar to those a wife would have provided—and which were integral to the court finding that the same-sex couple held themselves out as though they were “in fact, married”—prevented the individual requesting property from receiving any.<sup>169</sup> Instead, the court in *Jones v. Daly*<sup>170</sup> concluded that these services are “so permeated with . . . the sexual cohabitation of the parties” that the consideration for the agreement was nothing short of “illegal.”<sup>171</sup>

Courts refuse to distribute property where one individual engaged in wife-like services, but do so where the services rendered are far afield from those a wife should provide. On this point, *Whorton* and *Jones* are in complete agreement, despite their differing outcomes: in distributing property to the chauffeur and bodyguard, the *Whorton* court reaffirmed the principle set forth in *Jones*, noting

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marriage has a long pedigree in the nonmarital case law, even in same-sex cases and even pre-*Obergefell*, as this Part shows. See Antognini, *Against Nonmarital Exceptionalism*, *supra* note 33, at 1926-30 (arguing that while *Obergefell* will certainly impact courts’ decisions in same-sex cases given availability of marriage to same-sex couples, *Blumenthal* nonetheless is “entirely consistent with the traditional approach to nonmarital relationships courts have taken pre-*Obergefell*”).

<sup>164</sup> *Whorton v. Dillingham*, 248 Cal. Rptr. 405, 409 (Ct. App. 1988).

<sup>165</sup> *Jones v. Daly*, 176 Cal. Rptr. 130, 133 (Ct. App. 1981).

<sup>166</sup> 248 Cal. Rptr. 405 (Ct. App. 1988).

<sup>167</sup> *Id.* at 409.

<sup>168</sup> *Id.*

<sup>169</sup> *Jones*, 176 Cal. Rptr. at 133. While *Jones* involved a claim after one of the individuals died, the case is especially relevant because the court relied on *Marvin* and other nonmarital case law, and did not address any competing claims raised by other parties, which can often take place in litigation over a decedent’s estate and thus muddles the question of the nonmarital cohabitation.

<sup>170</sup> 176 Cal. Rptr. 130 (Ct. App. 1981).

<sup>171</sup> *Id.* at 134 (“[I]t cannot be said that the agreement by Daly to pay for those services does not also rest upon illegal meretricious consideration.”).

that the services before it were “significantly different than those household duties normally attendant to non-business cohabitation.”<sup>172</sup>

Courts that address male plaintiffs in different-sex relationships similarly refuse to distribute property where their role has been one of caretaker.<sup>173</sup> In *Simmons v. Samulewicz*,<sup>174</sup> the Hawaii Intermediate Court of Appeals declined to provide Scott Simmons with any property at the conclusion of a seven-year relationship with his nonmarital partner, April Samulewicz.<sup>175</sup> The parties had been engaged, had “participated in a ‘spiritual wedding ceremony,’” and had “lived together as members of a family household.”<sup>176</sup> Because of this relationship, the court reasoned that any services provided “are presumed under the law to be gratuitous.”<sup>177</sup> April did not contest that she received certain benefits from Scott—among other activities, “[h]e fixed up things around the house, made some improvements, rented out the cottage, [and] dealt with the

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<sup>172</sup> *Whorton*, 248 Cal. Rptr. at 410. See *Smith v. Carr*, No. 2:12-cv-03251, 2012 WL 2343305, at \*4-5 (C.D. Cal. June 18, 2012) (finding that providing defendant with full time “attention, availability, domestic services, companionship, comfort, love, and emotional support” was insufficient consideration at conclusion of same-sex relationship; *Robertson v. Reinhart*, No. A095025, 2003 WL 122613, at \*6 (Cal. Ct. App. Jan. 8, 2003) (denying property to individual in lesbian relationship and holding that presumption that “intra-household services are motivated by affection, not money” was not rebutted because services provided were done “in exchange for . . . contemporaneous gifts and favors, not services done with the expectation of later financial reimbursement”). The only case that has suggested that *Jones* was wrongly decided is *Bergen v. Wood*, 18 Cal. Rptr. 2d 75 (Ct. App. 1993), which explained that *Marvin* had in fact allowed homemaking services to function as adequate consideration. See *id.* at 78. In that case, the court denied the female plaintiff her request for palimony because her own services were only of “social companion and hostess,” which were “inextricably intertwined with the sexual relationship.” *Id.* at 79; see Antognini, *supra* note 15, at 13 (arguing that *Bergen* court looked to marriage as marker of relationship and that here, plaintiff fell short of showing that she was sufficiently wife-like).

<sup>173</sup> They also refuse to distribute property when the man has shown himself to be an inadequate breadwinner, which is a slightly different proposition. See Antognini, *Against Nonmarital Exceptionalism*, *supra* note 33, at 1930-40 (observing that where a man has not taken on role of caretaker, but has experienced financial troubles, courts decline to distribute property); see also *Simmons v. Samulewicz*, 304 P.3d 648, 657-58 (Haw. Ct. App. 2013) (rejecting claim for compensation brought by plaintiff who transferred his interest in joint mortgage to girlfriend to avoid creditors). The *Simmons* court was mindful of April Samulewicz’s expressed reason not to marry, which was “the potential financial liability legal marriage could entail.” *Id.* at 651. In particular, April was concerned about her partner Scott Simmons’s “business and financial situation.” *Id.*

<sup>174</sup> 304 P.3d 648 (Haw. Ct. App. 2013).

<sup>175</sup> *Id.* at 650.

<sup>176</sup> *Id.* at 651, 657.

<sup>177</sup> *Id.* at 657.



landscaper.”<sup>178</sup> But given the nature of the relationship, the court reasoned that those activities did not result in any “unjust” enrichment.<sup>179</sup>

The court did, however, hold that Scott’s monetary contributions, as well as his services rendered to property owned by April *and her parents*, were recoverable.<sup>180</sup> Funds, rather than time, can be recompensed after a relationship ends, regardless of the tit-for-tat that took place during the relationship and regardless of the nature of the relationship.<sup>181</sup> Services engaged in outside of the context of the relationship itself are also recoverable, like those provided not just to April but also to her parents. Only services that are akin to those the wife would provide in the course of a marriage as initially defined by coverture are not. Men, like women, are penalized when they undertake them.<sup>182</sup>

Courts do reward a literal home-maker with property—that is, where an individual, generally a man, can prove that he built and designed a home. In *Tolan v. Kimball*,<sup>183</sup> the Supreme Court of Alaska, which considers the intent of the parties in deciding whether to distribute property in a nonmarital relationship, held that Gary Kimball should receive one-half of the property titled solely in DeAnn Tolan’s name given Gary’s “investments of labor and materials used in making extensive renovations and improvements on the property.”<sup>184</sup> Likening Gary’s contributions to that of a “homeowner,” the court granted him ownership in the property.<sup>185</sup> Similarly, in *Mason v. Rostad*,<sup>186</sup> the District of Columbia Court of Appeals held that Bernardo Rostad was entitled to the “reasonable value of services rendered and material furnished by him.”<sup>187</sup> The court found that time spent on home improvements was independent from

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<sup>178</sup> *Id.* at 656.

<sup>179</sup> *Id.*

<sup>180</sup> *Id.* at 658 (“We do not view the Rental Property as a part of the parties’ household, nor such services or expenses as being contemplated as gratuitous under *Holstein*.”).

<sup>181</sup> *Id.* (remanding to consider whether April was unjustly enriched by Scott’s contributions to mortgage payments for house titled solely in her name and for services rendered not in context of their household, but to house owned by April and her parents).

<sup>182</sup> *See also* *Costa v. Oliven*, 849 N.E.2d 122, 125 (Ill. App. Ct. 2006) (refusing to allow claims brought by stay-at-home dad after conclusion of twenty-four year nonmarital relationship where all property was titled in his girlfriend’s name, who worked full-time). In the context of a different-sex relationship, the denial of property to the man can also be interpreted as penalizing him for not adhering to his role as financial provider.

<sup>183</sup> 33 P.3d 1152 (Alaska 2001) (per curiam).

<sup>184</sup> *Id.* at 1153.

<sup>185</sup> *Id.* at 1155 (“As the trial court found, “[Tolan] encouraged him to spend hundreds of hours making improvements in the property, and allowed him to make the kind of significant planning and design decisions regarding the improvements that only a homeowner would make.”).

<sup>186</sup> 476 A.2d 662 (D.C. 1984).

<sup>187</sup> *Id.* at 663 (awarding Bernardo compensation for improvements and renovations he performed on Carol’s property in the amount of \$76,500).

his relationship with Carol Mason and thereby had value, reversing the general presumption applied to homemaking services—namely, that they are part of the normal exchange in any relationship and are rendered gratuitously.<sup>188</sup> Even where Bernardo “paid no rent” and “maintained an office” in the home of his partner Carol, and where Carol “bought the food, did the cooking and washing and paid the utility bills,” the court found that Bernardo’s services merited additional compensation beyond the relationship’s end.<sup>189</sup>

Thus, courts routinely compensate services rendered in making a home because, unlike homemaking services, they are not presumed to be a part of the relationship or gratuitous; nor does the possibility of compensating them end when the relationship does.<sup>190</sup> In fact, these construction services are compensated even in the rare case where a woman provides them. Where a woman is assuming a role that is quite distinct from that of a wife, her services no longer fall under the auspices of coverture.<sup>191</sup> As long as she is investing money, or even time, into making improvements, like remodeling a bathroom, the court values those contributions—in these situations, “[h]er money, time, and effort [is] fully adequate and lawful consideration.”<sup>192</sup>

While the majority of cases continue to be brought by women seeking property titled in the man’s name based on homemaking services the woman contributed during the course of a heterosexual relationship, the sex of the individual does not much change how courts gender the valuation of services. They assume such services are rendered gratuitously by a man or a woman, in the context of a same-sex or a different-sex relationship. Courts ensure that wifely services—defined as caring for the home or rearing children—are not valued, while monetary contributions or services expended in actually building a home are. In the process, courts identify the appropriate locale for the

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<sup>188</sup> The doctrinal basis for the award was quasi-contract. *Id.* at 665. The court explained that it allowed recovery in the context of an unmarried relationship given that not doing so “in accordance with general principles of law . . . [is] unrealistic and unresponsive to social need.” *Id.* at 666.

<sup>189</sup> *Id.* at 665 (summarizing Bernardo’s testimony).

<sup>190</sup> See *Salzman v. Bachrach*, 996 P.2d 1263, 1265 (Colo. 2000) (en banc) (recompensating male plaintiff’s “design work, construction management services, and his \$170,000 contribution” even though he lived in female defendant’s home rent free); *Bonina v. Sheppard*, 78 N.E.3d 128, 133 (Mass. App. Ct. 2017) (holding that male plaintiff could recover against female plaintiff for contributions to home under unjust enrichment theory).

<sup>191</sup> Needless to say, this valuation is not inevitable. The *Restatement (Third) of Restitution* would apply to all labor, recognizing “substantial, uncompensated contributions in the form of property or services.” RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 28 (AM. LAW INST. 2011).

<sup>192</sup> *Charlton v. Russo*, No. H039249, 2015 WL 557171, at \*4-5 (Cal. Ct. App. Feb. 10, 2015) (reasoning that the agreement “was based on their mutual financial contributions and [Plaintiff]’s contribution of her time and effort”); see *Thibeault v. Brackett*, 2007 ME 154, ¶¶ 13-23, 938 A.2d 27, 32-33 (overturning award to plaintiff for anything more than value of contributions made toward home improvements).

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traditional exchange of services for support, first sanctioned by coverture, to be marriage. Marriage remains the place where these roles ought to be assumed and where remuneration may still be possible.

B. *Services Rendered Within the Home Are Free*

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. This reasoning remains consistent across the various doctrinal approaches courts employ. If they rely on a contractual basis, then courts assume that the consideration provided by “wifely” services is invalid or inseparable from the relationship itself. If they employ a restitution-informed analysis, then courts assume “wifely” labor is provided gratuitously and has no value that the plaintiff can recover. While at first blush this result may seem sensible—why would it be problematic to deny an individual property that is not in his or her name at the conclusion of a nonmarital relationship?—it is striking given how differently these courts address other types of contributions made to that same relationship. Financial contributions, for instance, are not considered part of the give-and-take of the relationship, nor are things like physical improvements made to a home, both of which are, as we have seen, reimbursed after the relationship’s termination.<sup>193</sup>

Holding that homemaking services in particular are not compensable relies on the assumption, baked into the fabric of the law, that such services are rendered freely unless proven otherwise. A related form of reasoning is that any services provided were properly recompensed in the course of the relationship itself. Even *Marvin v. Marvin*, hailed as a turning point in granting nonmarital relationships some indicia of legal recognition, relies on the teachings inherited from coverture in delineating when property can be distributed outside of marriage.

*Marvin* was, of course, significant in holding that a plaintiff could recover property outside of marriage and that homemaking services could be “lawful and adequate consideration for a contract.”<sup>194</sup> *Marvin* was also expansive in the types of claims a plaintiff could bring, going beyond express contracts to allow recovery on the basis of quantum meruit,<sup>195</sup> and explicitly leaving the door open to “the evolution of additional equitable remedies.”<sup>196</sup> But the Supreme Court of

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<sup>193</sup> See discussion *supra* Section II.A.

<sup>194</sup> *Marvin v. Marvin*, 557 P.2d 106, 113 n.5 (Cal. 1976) (in bank).

<sup>195</sup> *Id.* at 122-23 (“Finally, a nonmarital partner may recover in quantum meruit for the reasonable value of household services rendered less the reasonable value of support received if he can show that he rendered the services with the expectation of monetary reward.”).

<sup>196</sup> *Id.* at 123 n.25.

California did very little to challenge the values undergirding the provision of services and instead continued to condone them. In particular, the court specified that where services are the basis for an equitable claim, those services must have been “rendered . . . with the expectation of monetary reward”; in addition, the amount awarded would be reached by calculating “the reasonable value of household services rendered less the reasonable value of support received.”<sup>197</sup>

*Marvin* thereby enshrines the presumption that services are rendered gratuitously and the individual who provided them bears the burden of overcoming it.<sup>198</sup> *Marvin* further specifies that even once a plaintiff proves these services merit compensation, they are worth only as much as what was not already covered by the support furnished during the relationship itself, thus linking services to support only for the duration of the relationship. By joining these two strands of reasoning, *Marvin* reinforces a presumption that the value of those services is measured by the support received and is not an independent basis for property distribution.

The presumption that these services are free finds explanation in its origins—as duties owed during marriage. And the terms of this exchange—services for support as long as the relationship lasted—is one that coverture has long sanctioned. By assuming that these services do not have monetary value, *Marvin* continues to define them as part of the relationship—that is, as duties owed, with the benefit conferred entirely onto the other partner. As such, the individual who undertook them is prevented from recovering any value they may have had. Even if she does, they are only worth whatever amount the support furnished during the relationship did not cover. These twin rules have the effect of extending the work of coverture—by denying the service provider any access to property.<sup>199</sup>

The case that *Marvin* relies on for the proposition that services ought to be presumed gratuitous unless specifically shown to have been rendered “with the

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<sup>197</sup> *Id.* at 122-23.

<sup>198</sup> There is one line in *Marvin* that could be interpreted otherwise. It reads: “There is no more reason to presume that services are contributed as a gift than to presume that funds are contributed as a gift; in any event the better approach is to presume . . . ‘that the parties intend to deal fairly with each other.’” *Id.* at 121 (quoting *Keene v. Keene*, 371 P.2d 329, 340 (Cal. 1962) (in bank) (Peters, J., dissenting)). This line was included as support for the general concept that nonmarital partners ought not to be denied remedies. *Id.* (“We need not treat nonmarital partners as putatively married persons in order to apply principles of implied contract, or extend equitable remedies; we need to treat them only as we do any other unmarried persons.”). Meanwhile, the presumption in *Marvin* of gratuity for services rendered is set forth in the court’s directions to lower courts on how to proceed. *See id.* at 122-23. These conflicting lines seem to have sowed some confusion in courts’ decisions post-*Marvin*.

<sup>199</sup> *Cf.* Siegel, *supra* note 4, at 2205 (“In short, the discourse of marital status has evolved so that family relationships originally expressed in the language of property can now be expressed in the language of affect.”).

expectation of monetary reward” was decided nearly twenty-five years prior.<sup>200</sup> In *Hill v. Westbrook’s Estate*,<sup>201</sup> the Supreme Court of California addressed, for a second time, Minnie Hill’s claim against the estate of Charles Westbrook, with whom she had two children and had been “liv[ing] together as man and wife,” although not legally married, for sixteen years.<sup>202</sup> The trial court awarded her nothing—a ruling the state supreme court affirmed.<sup>203</sup> Minnie was seeking property for services she had rendered during their nonmarital relationship, which included contributions to the home and to Charles’s numerous businesses. In addition to her housework, she requested compensation for “her work in the rooming-house, in the hamburger stand, the liquor store, and her contribution that she paid over to [Charles] from her salary in the shirt factory.”<sup>204</sup> Despite evidence introduced to establish how much Minnie had worked, the trial court “believed that her contributions to [the] decedent were made gratuitously and voluntarily in contemplation of, as part of, in consideration of and as acts dependent upon the meretricious relationship.”<sup>205</sup>

The Supreme Court of California agreed, reasoning there was insufficient evidence to show that she rendered these services with the expectation of pay, given that they were presumptively gratuitous “in contemplation of their reciprocal relationship.”<sup>206</sup> The presumption of gratuity was so strong that even Minnie’s work in helping run Charles’s businesses was excluded from the realm of exchange, and Minnie received no property for her labor within or outside of the home.<sup>207</sup> While *Marvin* created a space for unmarried couples to contract separate from their “meretricious” relationship, the court preserved nearly intact the presumption set forth in *Hill*.<sup>208</sup>

To this day, cases addressing nonmarital couples rely on the abiding presumption that contributions made in the context of an intimate relationship are gratuitous. They do so, despite the plaintiffs’ claims to the contrary, by reflexively relying on the teachings inherited from coverture. In *Hall v. Lewis*,<sup>209</sup> the court refused to distribute property at the end of a same-sex relationship that

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<sup>200</sup> *Marvin*, 557 P.2d at 122-23.

<sup>201</sup> 247 P.2d 19 (Cal. 1952) (in bank).

<sup>202</sup> *Id.* at 19-20.

<sup>203</sup> *Id.* at 19.

<sup>204</sup> *Id.* at 20 (quoting Plaintiff counsel’s statement during second trial).

<sup>205</sup> *Id.* at 21.

<sup>206</sup> *Id.* at 19.

<sup>207</sup> The “reciprocal relationship” identified by the court prevented her from participating in the marketplace and from reaping any benefits from her labor. Similar to Myra Bradwell in *Bradwell v. Illinois*, the court in *Hill* relied on Hill’s relationship to deny her the ability of occupying the role of worker. *See id.* at 19; discussion *supra* Section I.B.

<sup>208</sup> *Marvin*, 557 P.2d at 113-14.

<sup>209</sup> No. A123730, 2009 WL 4549192 (Cal. Ct. App. Dec. 7, 2009).

lasted six years.<sup>210</sup> While the services were of the type courts are more willing to recompense given that they involved home renovations, the court nevertheless applied the presumption that they were motivated by love and therefore rendered for free.<sup>211</sup> It reasoned that the “expectation of compensation is the sticking point in this case.”<sup>212</sup> Because the services occurred within an intimate relationship, the court easily assumed that “they [were] ‘prompted by motives of love, friendship and kindness, rather than the desire for gain.’”<sup>213</sup>

Similarly, in *Robertson v. Reinhart*,<sup>214</sup> the California Court of Appeal denied Lynn Robertson any property on the basis of contract or quantum meruit at the end of her relationship with Leal Reinhart.<sup>215</sup> At issue once again was the value of home improvements.<sup>216</sup> Here, however, instead of presuming gratuity, the court appealed to the twin reasons set forth in *Marvin* and explained that Lynn’s services “were her attempt to pull her weight and contribute equally to the relationship in exchange for [Leal]’s contemporaneous gifts and services.”<sup>217</sup> The nature of the exchange—services for support—was what led the court to find that Lynn’s contributions were time-limited and given without “the expectation of later financial reimbursement.”<sup>218</sup> The court further rejected Lynn’s claims that there was any contract to share income and assets because Lynn and Leal treated “their expenses . . . with an intent to preserve economic independence.”<sup>219</sup> The court thus simultaneously held that the nature of the relationship made it such that services were freely provided, but money was not. That is, two parties can preserve their independent financial arrangements in an intimate relationship, even as the court assumes, and thereby enforces, altruism where nonfinancial services are concerned.

Contemporary cases, unlike some of the earlier cases such as *Hill* that prevented *any* labor from being recompensed, distinguish between homemaking services and everything else. Specifically, they insulate the home from any sort of market exchange by distinguishing *homemaking* services from *business*

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<sup>210</sup> *Id.* at \*1 (“The case was tried before the court, which determined that Hall did not have an ownership interest in the real property, but was entitled recover \$22,400 for time he spent assisting in renovations to the property. . . . We . . . reverse.”).

<sup>211</sup> *Id.* at \*4.

<sup>212</sup> *Id.* at \*3.

<sup>213</sup> *Id.* at \*4 (quoting *Schaad v. Hazelton*, 165 P.2d 517, 519 (Cal. Dist. Ct. App. 1946)).

<sup>214</sup> No. A095025, 2003 WL 122613 (Cal. Ct. App. Jan. 8, 2003).

<sup>215</sup> *Id.* at \*1.

<sup>216</sup> *Id.* (“Robertson contributed 500 or more hours of painting, carpentry, and general organization.”).

<sup>217</sup> *Id.* at \*6.

<sup>218</sup> *Id.*

<sup>219</sup> *Id.* at \*3.

services and allowing compensation for the latter.<sup>220</sup> In *Tapley v. Tapley*,<sup>221</sup> the Supreme Court of New Hampshire clarified this very point, reasoning that it denies claims for “normal domestic services” but does not “limit recovery for business and personal services . . . rendered between unmarried cohabitants.”<sup>222</sup> A New Jersey trial court elaborated on the distinction:

There is a separation between plaintiff’s role as homemaker, mother and housemate, and her role as key employee of the business. As to the former role as homemaker, claims for compensation for services rendered must fail, as she received the benefit of the bargain of her relationship with defendant. He provided for her support and those expenses which he approved, for as long as she resided with him. However, her claims for past due compensation for services rendered to defendant on account of his business, are an entirely different matter.<sup>223</sup>

Other jurisdictions, like California, express a willingness to recognize that services can provide adequate consideration for an implied or express contract. These claims, however, have still by and large failed.<sup>224</sup> The effects of the few decisions that do recognize property distribution on this basis are limited: they generally allow for only the partition—as opposed to the distribution—of property already owned jointly or reaffirm the proposition that their decisions are deviations from the norm. For instance, the Supreme Court of Arizona in *Carroll v. Lee*<sup>225</sup> asserted that homemaking services can function as adequate consideration for an agreement between unmarried partners.<sup>226</sup> The *Carroll* court described the exchange between Paul Lee and Judy Carroll in the following terms: “Paul received the cooking, cleaning and household chores he bargained for while Judy received monetary support” during their fourteen-year nonmarital relationship.<sup>227</sup> The court continued, reasoning that “Judy’s homemaking services can be valued and constituted adequate consideration for the couple’s implied agreement.”<sup>228</sup> The value ascribed to her services was, however, limited to the amount that was already in Judy’s name. That is, the court in *Carroll*

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<sup>220</sup> In this sense, there seems to have been some progress from when the *Hill* court declined to recognize any work provided, within or outside of the home. See *Hill v. Westbrook’s Estate*, 247 P.2d 19, 19 (Cal. 1952) (in bank).

<sup>221</sup> 449 A.2d 1218 (N.H. 1982).

<sup>222</sup> *Id.* at 1220.

<sup>223</sup> *Carney v. Hansell*, 831 A.2d 128, 135 (N.J. Super. Ct. Ch. Div. 2003).

<sup>224</sup> This was, of course, also the outcome reinforced by *Marvin* on remand. See *Marvin v. Marvin*, 176 Cal. Rptr. 555, 556-57 (Ct. App. 1981) (reversing rehabilitative award to Michelle Triola given that she did not plead it adequately and there was no equitable or legal basis for the award).

<sup>225</sup> 712 P.2d 923 (Ariz. 1986) (in banc).

<sup>226</sup> *Id.* at 927.

<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

agreed to Judy's request to partition the property that she and Paul held as joint tenants: "Judy has only requested partition to property which is jointly titled to her," and so the situation "is not nearly as potentially expansive as a case like *Marvin*."<sup>229</sup> It certainly was not, as the court awarded Judy property that was technically already hers, given that it was titled in *her name*.

To be clear, the *Carroll* decision and others like it mark a departure from coverture in that Judy, who occupies the role of "wife," does not lose access to property that was hers. But it does nothing to challenge the assumption that labor performed within the home, in the context of a relationship, generally does not lead to property rights. Nor does *Carroll* hold that such labor has any independent value, given that it only distributed property formally titled in Judy's name. Importantly, distributing property to an individual who provided homemaking services is not tantamount to a court actually valuing the provision of those services. In *Brooks v. Allen*,<sup>230</sup> the Supreme Court of New Hampshire affirmed the grant of property to the unmarried partner requesting it at the same time that it upheld the rule that services are rendered for free.<sup>231</sup> Rennee Brooks had requested a partition of real property; the court acquiesced to her request given her equitable interests in the property following her twenty-year relationship with Steven Allen.<sup>232</sup> It did so while affirming the long-standing rule that New Hampshire courts "will not recognize a contract which is implied from the rendition of 'housewifely services.'"<sup>233</sup>

Post-*Marvin* then, neither equitable nor contractual claims related to homemaking services have fared particularly well. The continuation of coverture insofar as services are concerned is seen even in the breach—when property is actually distributed. Partitioning property is considered sufficiently distinct from recompensing services that courts can agree to those requests.<sup>234</sup> Where, however, the claim to property is based on "housekeeping chores, including preparation of meals, laundering, care and cleaning of the home, keeping the financial books, payment of bills, banking, shopping, showing their rental property, and caring for the defendant's child on weekends," the court will generally deny it.<sup>235</sup>

The persistent influence of coverture in these cases could not be more stark—it both explains why courts continue to reason that homemaking services are free

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<sup>229</sup> *Id.*

<sup>230</sup> 137 A.3d 404 (N.H. 2016).

<sup>231</sup> *Id.* at 410 (affirming *Tapley*, which "declined to allow recovery for 'domestic services' under an implied contract or in quantum meruit").

<sup>232</sup> *Id.* at 405.

<sup>233</sup> *Id.* at 410.

<sup>234</sup> This claim to partition property was also allowed to proceed by the Supreme Court of Illinois. See *Blumenthal v. Brewer (Blumenthal II)*, 2016 IL 118781, ¶ 6, 69 N.E.3d 834, 839; *id.* ¶ 3, 69 N.E.3d at 839 ("The partition action itself presented no question under *Hewitt*. The problem arose when Brewer counterclaimed for various common-law remedies . . .").

<sup>235</sup> *Tapley v. Tapley*, 449 A.2d 1218, 1219 (N.H. 1982).



or adequately provided for during the relationship, and it creates that same state of affairs given courts' willingness to assume as much. The presumption that services rendered in the home are gratuitous ends up making them so: courts are satisfied that they were either rendered without expectation of compensation or that they were adequately compensated for with whatever financial support was provided during the relationship. While these two rationales differ insofar as one labels the activity as "free" and the other as properly recompensed, they both have their roots in coverture, with the ultimate result that these "wifely" labors do not result in any cognizable rights to property.

C. *No Rights to Property Outside of Marriage*

The overarching, and truly disabling, condition these cases impose is the lack of access to property, even in jurisdictions that indicate solicitude to claims raised by unmarried couples. By defining the appropriate role each partner ought to occupy in a relationship and marking wifely services as gratuitous, the individual who takes on a wifely role receives no property at the relationship's end. One obvious and important way these nonmarital cases differ from coverture is that there is no single legal moment—like marriage—that results in the husband gaining a set of prescribed rights over his wife's property. Instead, these cases exhibit a condition that is much more difficult to identify, as it takes place outside of the bright line of marriage and accrues incrementally throughout the course of a relationship. Although the law no longer stipulates that an individual assume duties that prevent her from owning or accessing property of her own, it still sanctions both the presumption that these services are rendered gratuitously and the ensuing result that the individual who acted as "wife" has no property rights.

As we have seen, the cases that function as exceptions to the no-rights-to-property rule by actually distributing property in a more egalitarian manner generally do so by ignoring any valuation of homemaking services. Providing each party to the relationship an equal division of the property occurs most often when the plaintiff requests a partition, which does not directly turn on an assessment of the contributions made to the relationship. For instance, the California Court of Appeal in *Abarca v. Ferber*<sup>236</sup> makes clear that its decision to partition property between individuals in an unmarried couple has nothing to do with either marriage or a "*Marvin* agreement."<sup>237</sup> Harold Ferber and Socorro Abarca lived together for fifteen years and held title to a house as tenants in common.<sup>238</sup> In deciding to evenly split the house between Harold and Socorro, the court specifically stated that it was only considering interests relevant to a partition action and "not treating this case as one involving division of community property or other assets between married persons, domestic partners,

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<sup>236</sup> No. C062049, 2011 WL 175710 (Cal. Ct. App. Jan. 20, 2011).

<sup>237</sup> *Id.* at \*2.

<sup>238</sup> *Id.* at \*1.

or persons in a *Marvin* situation.”<sup>239</sup> Similarly, the Connecticut Appellate Court upheld a partition dividing property evenly at the end of a nonmarital relationship in *DiCerto v. Jones*.<sup>240</sup> While the court addressed disagreements between the parties regarding the nature of their relationship, it did not consider the services rendered by either; it only focused on “balancing the equities” with respect to the partition.<sup>241</sup> Because the defendant had “agreed that he would pay the mortgage and the major expenses of maintaining” the property without reimbursement, the court concluded that the partition was warranted.<sup>242</sup>

In rare cases, analyzing a request to partition property may include establishing whether there was a “family relationship.”<sup>243</sup> The Supreme Court of Wyoming held, as a matter of first impression in *Hofstad v. Christie*,<sup>244</sup> that an unmarried couple who had twins and had been together for approximately ten years successfully established a “family relationship.”<sup>245</sup> Such a conclusion meant, according to the court, that even though Jerald Hofstad had contributed substantially more money to the purchase and upkeep of the home, Cathryn Christie was to be awarded a fifty-percent interest.<sup>246</sup>

Of note is that the court misinterpreted precedent from other jurisdictions in order to reach its holding. In setting out what constituted a “family relation,” the court in *Hofstad* relied on a Missouri case—*Johnston v. Estate of Phillips*<sup>247</sup>—that had initially defined the term.<sup>248</sup> In *Johnston*, the Missouri Court of Appeals found that Margaret Johnston had enjoyed a “family relation” with Holland Phillips, who was deceased.<sup>249</sup> The evidence showed that they lived together and had “a very close relationship.”<sup>250</sup> In particular, Holland provided

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<sup>239</sup> *Id.* at \*2.

<sup>240</sup> 947 A.2d 409, 412-13 (Conn. App. Ct. 2008) (holding that partition action could provide female plaintiff with half interest in property without addressing services rendered or engaging in any type of similar valuation).

<sup>241</sup> *Id.* at 411-13 (“There was . . . an agreement and understanding between the parties during their relationship and prior to their separation, that the defendant was to pay for these expenses without reimbursement from the plaintiff.”).

<sup>242</sup> *Id.* at 412.

<sup>243</sup> *Hofstad v. Christie*, 2010 WY 134, ¶ 10, 240 P.3d 816, 819 (Wyo. 2010).

<sup>244</sup> 2010 WY 134, 240 P.3d 816 (Wyo. 2010).

<sup>245</sup> *Id.* ¶ 13, 240 P.3d at 820 (“Although the term ‘family relationship’ is by no means absolute, we agree with the district court and Ms. Christie that in this case, the parties do share a family relationship, largely by way of their sharing two children.”).

<sup>246</sup> *Id.* ¶ 18, 240 P.3d at 822.

<sup>247</sup> 706 S.W.2d 554 (Mo. Ct. App. 1986).

<sup>248</sup> *Hofstad*, 210 WY 134, ¶ 10, 240 P.3d at 819.

<sup>249</sup> *Johnston*, 706 S.W.2d at 556 (“The record is clear that for several years prior to his death Phillips and Margaret conducted their joint household in the same manner as if they were married. Such a relationship, even in the absence of sexual relations, gave rise to a ‘family relation’ between Margaret and Phillips.”).

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

“transportation and . . . ‘a nice home’” while Margaret “did the yard work, cooked, washed and kept house.”<sup>251</sup> In short, “Margaret carried on the duties of a housewife for a husband.”<sup>252</sup> Accordingly, *because* a family relationship was established, the court denied her claim to property.<sup>253</sup> As the cases before it had held, “[t]he existence of the family relation . . . was fatal” to Margaret’s request.<sup>254</sup> Rather than provide a basis for awarding property, as mistakenly assumed by *Hofstad*, Margaret’s services, although “admittedly valuable,”<sup>255</sup> did not lead to any property at the end of her family relationship.<sup>256</sup>

Two jurisdictions have been noted exceptions to this rule-by-coverture: Oregon and Kansas.<sup>257</sup> Each provides an alternative to the lack of valuation that takes place in the paradigmatic case. Oregon, which turns to intent in order to establish whether the end of a nonmarital relationship calls for a property distribution, openly considers the plaintiff’s role of homemaker as part of the analysis.<sup>258</sup> In *Wilbur v. DeLapp*,<sup>259</sup> the Oregon Court of Appeals determined intent by relying on the fact that the plaintiff, Wilma Jean Wilbur, “pooled her income” when she worked outside of the home and “assumed the role of homemaker” when she did not.<sup>260</sup> Because of her activities as homemaker and worker, the court awarded Wilma half of the interest in a home titled solely in Noel Lee DeLapp’s name.<sup>261</sup> Kansas, too, explicitly considers the services

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

<sup>252</sup> *Id.* (quoting Margaret’s witness).

<sup>253</sup> *Id.* at 558-59 (“The arrangement between Margaret and Phillips was one from which each derived benefits. The trial court reasonably could have found, and apparently did find, that there was no ‘agreement or mutual understanding the claimant was to be remunerated for the services rendered.’” (quoting *McDaniel v. McDaniel*, 305 S.W.2d 461, 464 (Mo. 1957) (en banc))).

<sup>254</sup> *Id.* at 556-57.

<sup>255</sup> *Id.* at 558.

<sup>256</sup> The *Johnston* court concluded that “the mere rendition of services, admittedly valuable, did not justify allowance of the claim” for property. *Id.* at 558; *see also* *Riddell v. Edwards*, No. S-9706, 2001 WL 34818270, at \*2-3 (Alaska Oct. 10, 2001) (relying on *Johnston* and holding that services performed by a man before and during marriage, including “cooking, cleaning, care giving, maintenance, room and board, transportation, household purchases, and companionship,” could not be compensated because they “are clearly of a kind that are ordinarily rendered in a marriage” and thus gratuitous).

<sup>257</sup> They are also, importantly, exceptions that do not rely on an explicitly marital approach. *See* discussion *infra* Section II.D.

<sup>258</sup> *See* *Wilbur v. DeLapp*, 850 P.2d 1151, 1153 (Or. Ct. App. 1993) (“The primary consideration in distributing such property is the intent of the parties.”).

<sup>259</sup> 850 P.2d 1151 (Or. Ct. App. 1993).

<sup>260</sup> *Id.* at 1153.

<sup>261</sup> *Id.* (“We conclude that it was the intent of the parties that plaintiff have an interest in the house and, as a matter of equity, we hold that she is entitled to a one-half interest in the house.”).

rendered during the relationship as a reason *for* distributing property when it ends. In *Becker v. Ashworth*,<sup>262</sup> the Kansas Court of Appeals explained why: “[T]here is a deeper analysis that goes beyond which party actually paid for the property.”<sup>263</sup> In particular, “a party can help contribute to accumulating property by taking care of the home and child.”<sup>264</sup> Under this account of the exchanges that take place in a relationship, contributions that involve caring for the home or the child are part and parcel of the resulting accumulation of property and bestow rights onto the individual who engaged in that labor, beyond the duration of the relationship. As the *Becker* court explains, monetary and nonmonetary activities are equivalent: “[H]ad she not been performing those duties, [she] would have potentially been able to obtain employment and further contribute to the parties monetarily.”<sup>265</sup> The court thus reasoned that while “[i]t is difficult to assign a precise monetary value to those duties . . . they were nonetheless contributions,” thereby leading to an equal interest in the property acquired during the relationship.<sup>266</sup>

The vast majority of jurisdictions, however, continue to deny homemaking services any value. In doing so, they prevent the individual who rendered them from accessing property at the end of a relationship. Even when cases distribute *some* property, they do so by misconstruing precedent, or by relying on an account that does not address the provision of services. The overall effect of distributing little to nothing is to preserve wealth in the individual who owned more at the outset or was able to acquire more throughout the course of the relationship.<sup>267</sup> The corollary result is to impoverish the other individual in the relationship—who, in these cases, was also the one who engaged in homemaking services. This individual is still for the most part the woman in a different-sex relationship. But extending the principles of coverture outside of marriage means that it also impacts the man in a different-sex relationship who takes on the role of “wife” and the individual in a same-sex relationship who

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<sup>262</sup> No. 104,417, 2011 WL 2206635 (Kan. Ct. App. June 3, 2011) (per curiam) (unpublished table decision).

<sup>263</sup> *Id.* at \*4.

<sup>264</sup> *Id.*

<sup>265</sup> *Id.* at \*5.

<sup>266</sup> *Id.*; see *In re Relationship of Barr & Rathbun*, No. 94,787, 2006 WL 1460658, at \*1 (Kan. Ct. App. May 26, 2006) (per curiam) (unpublished table decision) (dividing house equally at conclusion of nonmarital relationship despite unequal contributions to its purchase). Interestingly, Kansas is one of the few jurisdictions that continues to recognize common law marriage. See *Antonopoulos v. Antonopoulos (In re Estate of Antonopoulos)*, 993 P.2d 637, 647 (Kan. 1999) (recognizing common law marriage where there is “(1) capacity of the parties to marry; (2) a present marriage agreement between the parties; and (3) a holding out of each other as husband and wife to the public”).

<sup>267</sup> This wealth differential is exacerbated given courts’ willingness to give back money at the end of a relationship, which courts subject to a different mode of analysis than they do services—namely, they do not presume gratuity.

engages in homemaking activities. In this way, the nonmarital case law casts a wider net than coverture. Yet, just like under coverture, it remains difficult for the individual who engaged in “wifely” services to recoup any property at all.

#### D. *Marriage-Like*

In addressing nonmarital relationships, a small number of courts consider how marriage-like a nonmarital relationship is prior to distributing property. Some of these cases arise in jurisdictions that undertake a marriage-like approach across-the-board: Washington, for example, looks at whether the nonmarital relationship was marriage-like, while Alaska looks to whether the unmarried parties intended to share property as if they were married.<sup>268</sup> Other jurisdictions consider how similar a nonmarital relationship is to marriage only in specific circumstances—in New Jersey, for example, courts used to evaluate the marriage-like nature of the relationship in addressing requests for palimony, meaning claims of support, but not requests for property division.<sup>269</sup> Finally, some of the cases that adopt a marriage-like approach are not based on the applicable legal doctrine, but rather on the composition of the individuals before the court—prior to *Obergefell v. Hodges*,<sup>270</sup> courts were more willing to liken a same-sex relationship than a different-sex relationship to marriage in deciding to distribute property.<sup>271</sup>

The cases that directly invoke marriage are able to capture the various contributions made to a relationship—including services rendered—and in this

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<sup>268</sup> See *Reed v. Parrish*, 286 P.3d 1054, 1057 (Alaska 2012) (considering whether parties “intended to share property as though married”); *Connell v. Francisco*, 898 P.2d 831, 834 (Wash. 1995) (en banc) (considering, prior to distributing property, whether nonmarital relationship is “meretricious,” defined as “stable, marital-like relationship”).

<sup>269</sup> See, e.g., *Devaney v. L’Esperance*, 949 A.2d 743, 744 (N.J. 2008) (“We hold that cohabitation is not an essential requirement for a cause of action for palimony, but a marital-type relationship is required.”). Courts in California also rely on a marriage-like analysis in cases involving requests for support. See *Antognini*, *supra* note 15, at 10-16. While these states are less explicit than, for instance, New Jersey, about their adherence to marriage in their analysis, there are some cases that rely on the marriage-like qualities of the relationship in distributing property. See, e.g., *Alderson v. Alderson*, 225 Cal. Rptr. 610, 616 (Ct. App. 1986) (holding that implied agreement existed and reasoning that consideration was based in part on female plaintiff’s acceptance “to be [defendant]’s wife and to do ‘whatever a wife does’” (quoting female plaintiff’s testimony)). The majority of cases in California, however, deny property where the relationship looked like a marriage but took place outside of one, even when they involve claims of support. See discussion *supra* Section II.B. The central difference between these cases generally is not necessarily the nature of the relationship itself, or the doctrines raised, but rather whether the court addresses the couple in terms that invoke marriage.

<sup>270</sup> 135 S. Ct. 2584 (2015).

<sup>271</sup> See *Antognini*, *Against Nonmarital Exceptionalism*, *supra* note 33, at 1912-21 (discussing courts’ marriage-like approaches to same-sex relationships).

way disrupt the influence of coverture. In particular, the explicit reliance on marriage frees courts to value “wifely” contributions. That said, these decisions still contribute to the continuation of coverture insofar as they define which relationships merit recognition as marriage-like and thus establish what roles the parties ought to occupy within marriage. Courts provide content to marriage in this nonmarital sphere by adhering to very conventional roles in both different-sex and same-sex relationships. Some also contribute to enforcing coverture by denying access to property; they do so by creating an impossibly high bar for nonmarital couples to clear, essentially requiring a marriage in order to satisfy the marriage-like requirement, and thus end up denying property to the individual requesting it.<sup>272</sup>

In Washington, courts consider whether the nonmarital relationship is marriage-like; in so doing, they look beyond who has title to property in deciding how to distribute assets at its end.<sup>273</sup> To determine the marriage-like nature of the relationship, Washington courts analyze five factors, including the duration and purpose of the relationship, the continuity of the cohabitation, the intent of the parties in the relationship, and the pooling of resources.<sup>274</sup> Where the relationship satisfies these factors, courts distribute property even when it is the woman who requests it and her contribution to the relationship was in the form of services rather than money.

Washington courts find a nonmarital relationship to be marriage-like when they identify the same tit-for-tat that *prevents* courts from distributing property outside of this approach—the exchange of time and services for support.<sup>275</sup> In the recent case *In re Committed Intimate Relationship of Turner & Vaughn*,<sup>276</sup> the Washington Court of Appeals agreed with the plaintiff, Marina Turner, that she had been in a marriage-like, or “committed intimate relationship,” with the defendant, Random Vaughn, for four years.<sup>277</sup> The court considered the five factors and concluded that Marina and Random “held themselves out as husband

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<sup>272</sup> See Antognini, *supra* note 15, at 59 (“[T]he metric of marriage results in making recovery difficult for nonmarital couples where the relationship veers in any way from what marriage ought to look like according to the court, including not actually being legally married.”).

<sup>273</sup> Nevada also looks at whether the couples acted married and applies community property laws by analogy. See *Hay v. Hay*, 678 P.2d 672, 674 (Nev. 1984) (“Where it is alleged . . . and proven that there was an agreement to acquire and hold property as if the couple was married, the community property laws of the state will apply by analogy.”); *Castillo v. Castillo*, No. 69691, 2016 WL 4737167, at \*1 (Nev. Ct. App. Sept. 6, 2016) (affirming principle).

<sup>274</sup> *In re Committed Intimate Relationship of Turner & Vaughn*, No. 50190-2-II, 2018 WL 1920072, at \*3 (Wash. Ct. App. Apr. 24, 2018).

<sup>275</sup> See discussion *supra* Section I.A.

<sup>276</sup> No. 50190-2-II, 2018 WL 1920072 (Wash. Ct. App. Apr. 24, 2018).

<sup>277</sup> *Id.* at \*1.

and wife, raised a child, and lived together as a family during that time.”<sup>278</sup> The court also relied on a finding that they “pooled resources”: “[T]he couple had a joint bank account, joint assets, and both parties contributed time, energy, and resources to the relationship, and to raising their children.”<sup>279</sup> The division of labor among them was clear: Random managed his marijuana business, while Marina “stopped working and cared for their child.”<sup>280</sup> The court specifically noted that Marina “contributed time, energy, and resources by raising their child and keeping up their home.”<sup>281</sup> Concluding that the five factors were satisfied, the court interpreted their relationship to be marriage-like.<sup>282</sup>

In Alaska, courts turn to the parties’ intent to decide whether to distribute property; the specific intent they consider is whether the couple shared property “as though married.”<sup>283</sup> To answer that question, courts address a set of nonexclusive factors as proxies, like whether the couple held themselves out as husband and wife, whether they reared children together, or whether they “made joint financial arrangements.”<sup>284</sup> Where the relationship involves a series of decisions that look like the type made in the course of a marriage—with one party taking care of the children and the other continuing to work—courts tend to distribute property at the end. In *Reed v. Parrish*,<sup>285</sup> the Supreme Court of Alaska distributed property at the conclusion of a twelve-year relationship between Anthony Reed and Stephanie Parrish.<sup>286</sup> The court reasoned that the parties had created a domestic partnership and shared property as though they had been married.<sup>287</sup> The court relied on evidence that showed that Stephanie and Anthony both contributed financially to the household and to the upkeep of the house, and they referred to each other as husband and wife in public.<sup>288</sup> Stephanie and Anthony did not, however, have any joint accounts, nor did they

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<sup>278</sup> *Id.* at \*5.

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at \*2.

<sup>281</sup> *Id.* at \*4; *id.* at \*1 (indicating that each party initially paid half the rent).

<sup>282</sup> *Id.* at \*5.

<sup>283</sup> *Reed v. Parrish*, 286 P.3d 1054, 1057 (Alaska 2012).

<sup>284</sup> *Id.* (quoting *Bishop v. Clark*, 54 P.3d 804, 811 (Alaska 2002), *abrogated by* *Tomal v. Anderson*, 426 P.3d 915, 923 n.15 (Alaska 2018)).

<sup>285</sup> 286 P.3d 1054 (Alaska 2012).

<sup>286</sup> *Id.* at 1055 (“The superior court found that the parties were in a domestic partnership and intended to acquire property as though married. It then proceeded to equally divide the property. . . . [W]e affirm the superior court.”).

<sup>287</sup> *Id.* at 1058.

<sup>288</sup> *Id.* at 1057 (“Not only did they make significant joint financial decisions, but throughout the relationship both parties contributed to the household. . . . Their friends thought they were married and they referred to each other as husband and wife in public.”).

file joint tax returns.<sup>289</sup> While evidence of “joint financial arrangements”<sup>290</sup> is important to the court’s decision to distribute property, the type of exchange at issue here—in which Stephanie had “quit her job to care for the children”—eclipsed the fact that “Stephanie and Anthony had not formalized their [financial] arrangements.”<sup>291</sup> The court found that the nature of the relationship, which included adopting roles akin to those occupied in a marriage, meant that Anthony and Stephanie had “intertwined financial decision-making.”<sup>292</sup> The court thus divided the property acquired during the relationship evenly, including a home that was titled solely in Anthony’s name.<sup>293</sup>

In New Jersey, courts used to consider whether the nonmarital relationship was “a marital-type relationship” in determining whether to award support.<sup>294</sup> Specifically, courts affirmed the possibility of support where the relationship mimicked the exchanges present in a marriage. In *Maeker v. Ross*,<sup>295</sup> the Supreme Court of New Jersey reversed the appellate court’s decision, which had declined to recognize a woman’s request for support, or palimony, because it was “based entirely upon the provision of homemaking services and companionship to defendant.”<sup>296</sup> The state supreme court relied on that very fact in allowing the plaintiff’s claim to move forward: William Ross financially supported Beverly Maeker, while she “performed all of the duties requested of

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<sup>289</sup> *Id.* at 1056 (noting that parties “had separate bank accounts” and that Anthony listed Stephanie as a dependent on his taxes).

<sup>290</sup> *Id.* at 1057.

<sup>291</sup> *Id.* at 1058.

<sup>292</sup> *Id.* The court also considered other evidence that they “intended to share property as though married,” like the fact that the parties had “signed a health insurance domestic partnership affidavit” and had looked for housing together. *Id.* at 1057.

<sup>293</sup> *Id.* at 1055. The court noted that part of the reason why the home was titled solely in Anthony’s name was that he received a “favorable loan through his Native corporation.” *Id.* at 1056. In the reverse situation, where the man requests property from the woman, Alaska has inferred intent from homemaking activities, which quite literally entail designing and making physical improvements to a home as opposed to rendering services. See discussion *supra* Section II.A; see also *Tolan v. Kimball*, 33 P.3d 1152, 1153 (Alaska 2001) (per curiam) (“Kimball cites his investments of labor and materials used in making extensive renovations and improvements on the property. These improvements include replacement of a collapsed porch with an enclosed addition, and construction of a shed, a greenhouse, decks, a wood workshop, and a two-car garage.”); Antognini, *Against Nonmarital Exceptionalism*, *supra* note 33, at 1931-35 (noting ways in which courts address male plaintiffs and arguing that even when “courts generally refuse to remunerate homemaking services, services rendered in actually making a home are compensable”).

<sup>294</sup> *Maeker v. Ross*, 99 A.3d 795, 797 (N.J. 2014).

<sup>295</sup> 99 A.3d 795 (N.J. 2014).

<sup>296</sup> *Maeker v. Ross*, 62 A.3d 310, 320 (N.J. Super. Ct. App. Div. 2013), *rev’d*, 99 A.3d 795 (N.J. 2014).



her, including cooking, cleaning, companionship, homemaker and confidant.”<sup>297</sup> It thus held that Beverly had sufficiently pled that she and William “were in a marital-type relationship and cohabitating for a number of years” and that William had “induced her to remain in that relationship and make sacrifices on a promise of support.”<sup>298</sup> Similarly, in *Crowe v. De Gioia*,<sup>299</sup> a New Jersey appeals court found there was an oral contract in which Sergio De Gioia, the defendant, promised to support Rose Crowe, the plaintiff.<sup>300</sup> The court concluded there was “ample consideration” for such a contract given that Rose had “provided a home, cooked for [Sergio] and was his social companion” for twenty years.<sup>301</sup>

The reverse was also true: where the relationship appeared less like a marriage because the individuals failed to occupy the role of “husband” and “wife,” courts in New Jersey declined to award palimony. In *Devaney v. L’Esperance*,<sup>302</sup> the Supreme Court of New Jersey considered a claim for support raised by Helen Devaney against Francis L’Esperance, Jr. at the end of their twenty-year relationship.<sup>303</sup> During that time, Francis was married to another woman, and he and Helen never lived together.<sup>304</sup> The court denied Helen palimony. It found that Helen had only provided companionship and some assistance with personal and business-related matters; without more, these were insufficient given that her contributions “were not similar to those a wife would make in a marriage.”<sup>305</sup> Indeed, what was missing from the facts before the court was the familiar *quid pro quo* that established the marital nature of the other relationships—there was little evidence that Helen had engaged in the type of services, like homemaking or childrearing, that lay the foundation for a successful palimony suit.<sup>306</sup>

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<sup>297</sup> *Maeker*, 99 A.3d at 798.

<sup>298</sup> *Id.* at 805.

<sup>299</sup> 495 A.2d 889 (N.J. Super. Ct. App. Div. 1985).

<sup>300</sup> *Id.* at 892.

<sup>301</sup> *Id.* at 895.

<sup>302</sup> 949 A.2d 743 (N.J. 2008).

<sup>303</sup> *Id.* at 745.

<sup>304</sup> *Id.* at 744-45; *id.* at 750 (elaborating further that “the parties did not live together; they did not spend significant periods of time together; they did not commingle their property or share living expenses; and they did not hold themselves out to the public as husband and wife”).

<sup>305</sup> *Id.* at 745 (“The judge also found that although defendant did visit with plaintiff’s family, the parties did not hold themselves out to the public as husband and wife and plaintiff did not attend social gatherings with defendant’s friends, family, or colleagues.”).

<sup>306</sup> The court explained that cohabitation between the parties, which was missing, was not essential to the claim, but that “whether the parties cohabited is a relevant factor in the analysis of whether a marital-type relationship exists, and in most successful palimony cases, cohabitation will be present.” *Id.* at 750. Washington also establishes what constitutes a sufficiently marriage-like relationship. See *In re Meretricious Relationship of Caldwell & Hanselman*, No. 67734-9-I, 2013 WL 3946224, at \*3 (Wash. Ct. App. July 29, 2013)

The final category of cases that appeal explicitly to marriage—same-sex couples before they had the right to marry—is not jurisdictional, but factual. Courts were more willing to extend the principles of marriage to nonmarital relationships where marriage was not an available legal status. In this context, regardless of the specific jurisdictional approach courts typically took, the decisions mapped the contours of the relationship onto marriage and ended up valuing nonfinancial contributions in situations where they would not have otherwise.<sup>307</sup> In Florida, for example, where courts hold that “no legal rights or duties flow from mere cohabitation,”<sup>308</sup> some have nonetheless recognized claims between same-sex partners and likened them to marriage in the process.<sup>309</sup> In *Posik v. Layton*,<sup>310</sup> the court upheld a contract between two women that set out a property division in the event of a separation, reasoning that “[t]hey contracted for a permanent sharing of, and participating in, one another’s lives.”<sup>311</sup> The court described their arrangement as “very similar to a[n] ‘until death do us part’ commitment.”<sup>312</sup> While engaging in comparisons between trial court cases is always a fraught proposition given the vagaries of the facts and the dispositions of individual judges, similar language has decidedly not been used in the context of different-sex couples. In fact, two subsequent cases that relied on *Posik* in addressing different-sex couples denied the plaintiffs the property they were seeking.<sup>313</sup> Meanwhile, the sole case after *Posik* that

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(declining to find committed intimate relationship where female plaintiff had contributed to home and household only at initial stages of relationship and parties did not share mutual intent).

<sup>307</sup> See Antognini, *Against Nonmarital Exceptionalism*, *supra* note 33, at 1918-21 (identifying jurisdictions that characterize same-sex, but not different-sex, nonmarital relationships in marital terms).

<sup>308</sup> See, e.g., *Castetter v. Henderson*, 113 So. 3d 153, 154 (Fla. Dist. Ct. App. 2013).

<sup>309</sup> See, e.g., *Posik v. Layton*, 695 So. 2d 759, 762 (Fla. Dist. Ct. App. 1997) (placing weight on same-sex couple’s intention to live with each other for remainder of their lives).

<sup>310</sup> 695 So. 2d 759 (Fla. Dist. Ct. App. 1997).

<sup>311</sup> *Id.* at 762.

<sup>312</sup> *Id.*

<sup>313</sup> It is important to note that the existence of a written contract may have changed the outcome; but the way in which the court uses marital analogies distinguishes it from the cases that address different-sex couples, which also decline to distribute any property. See *Castetter*, 113 So. 3d at 154 (reasoning that female plaintiff made no contributions to properties purchased by her nonmarital partner with whom she had a child and therefore received nothing at end of relationship); *Dietrich v. Winters*, 798 So. 2d 864, 867 (Fla. Dist. Ct. App. 2001) (per curiam) (declining to partition property that was solely in man’s name at conclusion of five-year relationship that resulted in one child, but remanding for plaintiff to present arguments for receiving property through “some other means”).

addressed a plaintiff in a same-sex couple fared better, as the court affirmed the existence of an oral contract.<sup>314</sup>

The foregoing cases provide examples of courts valuing “wifely” contributions in the course of a nonmarital relationship based on their explicit reliance on marriage. Locating these cases directly under marriage’s authority allows courts to provide property to the plaintiff in a relationship akin to marriage. In so doing, courts eschew the more egregious consequences of coverture present in the case law generally—which is to deny the individual who engaged in homemaking services any access to property. That said, these cases still restrict access by making recovery outside of a legal marriage very difficult. In Washington, courts impose exceedingly high standards on couples to appear marital prior to distributing property, relying even on the lack of an actual marriage to deny recovery.<sup>315</sup> Meanwhile, in New Jersey, where palimony actions were predicated on the appearance of a traditional marriage, the legislature has since 2010 required a written agreement between the parties, hinging recovery on a more formal process.<sup>316</sup> In this way then, even courts that recognize access to property for nonfinancial contributions end up limiting it to cases involving an actual marriage or other type of more formalized arrangement. And, post-*Obergefell*, same-sex couples may find courts begin to impose stricter requirements on them, too, given the availability of marriage.<sup>317</sup>

Importantly, these cases still uphold the role-defining aspect of coverture insofar as they are actively involved in setting out the substance of what it means to be marriage-like, and thus a marriage, in the first instance. According to most

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<sup>314</sup> See *Armao v. McKenney*, 218 So. 3d 481, 483 (Fla. Dist. Ct. App. 2017) (relying on testimony by one party that “[t]hey agreed to move in together, to be a couple, and take care of each other financially and emotionally, ‘just like a married couple’”). The case was initiated in 2013, before *Obergefell*. *Id.*; see also Antognini, *Against Nonmarital Exceptionalism*, *supra* note 33, at 1920 (reporting that court found “an oral contract between Anthony Armao and Russell Turnbull had been established during their forty-six year long relationship”).

<sup>315</sup> See Antognini, *supra* note 15, at 16-18 (arguing that analysis Washington courts follow to determine whether relationship is marriage-like can veer into requiring actual marriage); see also *In re Meretricious Relationship of Caldwell & Hanselman*, No. 67734-9-I, 2013 WL 3946224, at \*3 (Wash. App. Ct. July 29, 2013) (finding that three-year live-in relationship was not a “committed intimate relationship” even though there was evidence that female plaintiff contributed to relationship and to her partner’s business, but “did not claim that her labor increased the value of any asset”).

<sup>316</sup> Since 2010, claims for palimony have been covered by New Jersey’s statute of frauds and must be in writing. N.J. STAT. ANN. § 25:1-5(h) (West 2010) (referring specifically to “non-marital personal relationship[s]”).

<sup>317</sup> See Antognini, *Against Nonmarital Exceptionalism*, *supra* note 33, at 1969 (“[T]he ability of same-sex couples to marry post-*Obergefell* matters in the following way: courts at the end of a nonmarital relationship may be more reluctant to subsume the same-sex relationship into marriage, and courts in the alimony context will more widely terminate payments on account of that relationship.”).

courts, a marital relationship involves an exchange of household services for support—the content of marriage initially provided by coverture. Courts search for this exchange in defining what is “marital-like” and enforce that definition by siphoning off those relationships that do not follow such a pattern by declining to distribute property when they end. This also means that, at times, courts may impute onto the relationship *more* financial sharing than there actually was given the marriage-like exchange they identify.<sup>318</sup>

To be clear, these cases are not operating in a vacuum: courts are responding to the relationships entered into by the parties themselves. In fact, the genesis of much of this litigation is in no small part a result of the wealth disparity engendered by the reality that one party was not an income producer, thereby rendering a claim for property at the relationship’s end more of a necessity. Even accepting this state of affairs as descriptively accurate, courts are nonetheless engaged in defining what constitutes marriage by adhering to traditional markers—the very same markers that prevent courts from distributing property outside of an approach that openly compares the relationship to marriage.

### III. WHY NONMARITAL COVERTURE MATTERS

Addressing the nonmarital case law as both relying on and reinforcing rules that find their doctrinal origins in coverture has real explanatory value: it provides a comprehensive account for how the majority of courts determine whether property should be distributed at the conclusion of a relationship. It also explains why courts do not distribute property when they use the common law tools at their disposal—regardless of the doctrinal approach they take—and why some do—generally when they can avoid valuing homemaking services entirely.

This Part begins by bolstering the claim that coverture is doing the work the prior section argues it is by considering other possible reasons for the cases and identifying their respective weaknesses. Some rationales are provided by scholars—like privatizing support—while others are offered by courts—like their stated goal of promoting marriage. Each rationale leaves open questions that coverture answers.

If one agrees that coverture has explanatory force, then this conclusion holds additional implications. Specifically, nonmarital relationships present a novel context to engage with the long-running conversation of whether to remunerate work done within the home—it moves the conversation outside of marriage, legally, and to a less economically privileged space, demographically. This Part ends by looking to the rare decisions that establish rights to property based on homemaking services, separate and apart from how similar the relationship is to marriage, as a way of highlighting some alternative paths forward.

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<sup>318</sup> That is, more sharing than they would otherwise, given the importance courts generally place on financial sharing. *See, e.g.*, *Reed v. Parrish*, 286 P.3d 1054, 1057 (Alaska 2012); *supra* text accompanying notes 285-293 (discussing court’s finding of “marital-like” relationship and distribution of assets despite lack of joint accounts).

A. *Inapplicability of Other Rationales Underlying Family Law*

Considering the nonmarital cases as both products and examples of coverture provides the most complete explanation for how courts decide the claims before them, regardless of the facts of the relationships or the specific doctrinal bases they raise. Other potential rationales have, however, been advanced by scholars attempting to explain the theoretical and ideological underpinnings of family law generally, or of the nonmarital case law specifically. Courts themselves have also provided rationales for their decisions in the nonmarital cases, which tend to rely on promoting marriage.

Many scholars have convincingly argued that privatization of support undergirds the whole of family law.<sup>319</sup> In the nonmarital context, however, this rationale does not seem to hold as much weight. Indeed, legal scholarship that addresses nonmarital couples mostly agrees with the descriptive point that the cases do not distribute much property overall. It differs, however, on whether such an outcome is normatively desirable.<sup>320</sup> The smaller slice of scholarship that identifies potential reasons for the outcomes in the nonmarital context circles around questions of choice, autonomy, and other critiques that sound in the language of contract.<sup>321</sup> While these are all important contributions, this Article argues that they are incomplete, on their own, to function as explanations of the case law: they either do not account for all of the approaches courts employ, like when courts actually distribute property, or they do not address the

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<sup>319</sup> See discussion *infra* Section III.A.1.

<sup>320</sup> See, e.g., June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 56 (2016) (characterizing approach of regulation as “accept[ing] the autonomy of such couples with respect to financial matters and impos[ing] almost no obligations without either an express agreement or evidence of combined assets”); Courtney G. Joslin, *Autonomy in the Family*, 66 UCLA L. REV. 912, 924 (2019) (arguing against lack of sharing in current nonmarital case law while identifying nonmarital parentage cases and “interstitial marriage cases” as possible guides); Kaiponanea T. Matsumura, *Consent to Intimate Regulation*, 96 N.C. L. REV. 1013, 1039-51 (2018) (criticizing current approaches to nonmarital property and suggesting context-dependent analysis of consent as a concept to help courts determine when to impose obligations); Murray, *supra* note 163, at 1244-49 (supporting legal regime that acknowledges nonmarital couples, including in distributing property at conclusion of relationship, and arguing that “*Obergefell* may sound the death knell for alternative statuses—and the promise of a more pluralistic relationship-recognition regime”); Emily J. Stolzenberg, *The New Family Freedom*, 59 B.C. L. REV. 1983, 2018-32, 2050-53 (2018) (describing law of cohabitant obligations as vindicating autonomy over sharing and suggesting moving beyond neoliberal principles).

<sup>321</sup> See, e.g., Ira Mark Ellman, “*Contract Thinking*” Was Marvin’s *Fatal Flaw*, 76 NOTRE DAME L. REV. 1365, 1367 (2001) (arguing that “contract is a poor model for intimate relations”); Joslin, *supra* note 320, at 925 (critiquing law’s current definition and promotion of autonomy); Matsumura, *supra* note 320, at 1013 (identifying consent as both the problem and the solution); Stolzenberg, *supra* note 320, at 1984 (identifying tension between privatization of support and choice theory).

explicitly gendered aspects of the decisions. To be sure, most of these scholarly projects are not principally concerned with providing a comprehensive account of the case law, which is a motivating goal of *this* Article.

Courts themselves also articulate reasons for their decisions. Some, as we have seen, expressly rely on the presumption that services are gratuitous. Others rely on the marriage-promotion rationale in differentiating between property distribution at divorce and at separation. Finally, an underlying—if not always explicitly stated—concern in these cases is courts’ inability to accurately value contributions made on the basis of time or services rendered as opposed to financial ones, the latter of which courts suggest are more easily quantifiable.

#### 1. Prevailing Scholarly Theories: Privatizing Support or Contract-Based Theories

Scholars have long argued that privatizing support is “the essence of family law.”<sup>322</sup> The claim is both a description of how the law regulates families and a commentary on the normative commitments of family law.<sup>323</sup> Identifying the private family, instead of the state, as the locus for supporting dependencies often means, as Anne Alstott has lamented, that “family law is one of the most depressing courses in law school.”<sup>324</sup> One counterintuitive effect of saddling families with this function is that, in certain instances, it may lead to the legal recognition of a more diverse set of relationships.<sup>325</sup> As Susan Appleton has predicted, “those who have pushed for affirmative legal recognition of

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<sup>322</sup> See, e.g., Alstott, *supra* note 35, at 32-35 (arguing that state family law “privileges private ordering and deploys state power only to resolve private disputes”); Appleton, *supra* note 35, at 966-69 (arguing that privatization of dependency is “the essence of family law—a goal that animates the field and runs through its different elements”); Rosenbury, *supra* note 35, at 1866 (arguing that in the public law context, “the ultimate value underlying legal recognition of the family” is “private family support”).

<sup>323</sup> See Melissa Murray, *What’s So New About the New Illegitimacy?*, 20 AM. U. J. GENDER SOC. POL’Y & L. 387, 431 (2012) (“As a number of scholars have noted, the neoliberal political project has, since the 1960s (but with greater fervor since the 1980s), focused on dismantling the social safety net erected in the wake of the New Deal and the Great Society. As an alternative to this system of public support, the neoliberal agenda has advocated a politics that emphasizes public deregulation, the assumption of private responsibility, and the family as a core site for the privatization of dependency.” (footnote omitted)).

<sup>324</sup> Alstott, *supra* note 35, at 33 (“Failed marriages, dysfunctional parents, and neglected children sprawl across a thousand pages in a typical family-law casebook. Most of the stories sound a familiar theme: When individuals destroy their lives and their families, they must bear the consequences, and there is little or nothing the state can do to help.”).

<sup>325</sup> Rosenbury, *supra* note 35, at 1866-67 (“The government affirmatively recognizes certain intimate relationships, to the exclusion of others, in order to incentivize individuals to privately address the dependencies that often arise when adults care for children and for one another.”).

polygamy, of friendship, and of other intimate connections that could supply new private obligations just might succeed in their efforts.”<sup>326</sup>

The nonmarital case law directly implicates the decision to privatize support by addressing the question of whether to impose obligations on another individual at the end of a relationship.<sup>327</sup> In deciding whether to distribute property, courts can either impose obligations on the nonmarital partner, require that the individual rely on his or her own resources, or rely on the safety net provided by the state.<sup>328</sup> In the nonmarital context, privatizing support—which is also generally understood in the scholarship as a reason for expanding family membership—would entail imposing an obligation on the ex-partner.<sup>329</sup> As we have seen, however, courts are loathe to do so. Nonmarital relationships therefore provide an instance where the goal of privatizing support seems to have less of a motivating or explanatory force.<sup>330</sup>

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<sup>326</sup> Appleton, *supra* note 35, at 978-79 (footnotes omitted).

<sup>327</sup> This Article adopts the working definition of privatization as “the transfer of public goods and services to the private sphere of the family.” Brenda Cossman, *Contesting Conservatism, Family Feuds and the Privatization of Dependency*, 13 AM. U. J. GENDER SOC. POL’Y & L. 415, 419-20 (2005) (arguing that American family law has experienced only a “partial privatization” and identifying at least two other competing definitions of privatization which are “the transfer of public goods and services to the private sphere of the family,” including “the shift from public norms to private choice” and “a return to the ‘traditional family’ and the sanctity of marriage”); see Maxine Eichner, *The Privatized American Family*, 93 NOTRE DAME L. REV. 213, 215-16 (2017) (arguing that “the privatized-family model is taking a significant toll on American families” and that instead, “the state must temper the effects of market forces on families”).

<sup>328</sup> If the court makes a wrong decision, support could theoretically fall to the state in all instances.

<sup>329</sup> See, e.g., Appleton, *supra* note 35, at 978 (arguing that legal recognition “of other familial relationships, beyond marriage, would advance the project of keeping dependency private”); Rosenbury, *supra* note 35, at 1866 (arguing that “ultimate value in underlying legal recognition of family” is “value of private family support”); Stolzenberg, *supra* note 320, at 1987 (addressing tension between “choice about obligations” and “private support imperative, which attaches financial obligations to family relationships to avoid demands on the public fisc”).

<sup>330</sup> Brenda Cossman has identified this phenomenon as the “partial privatization” of family law and argues that it results from “contesting conservatisms”—“fiscal conservatism, libertarianism and social conservatism.” See Cossman, *supra* note 327, at 432. Cossman characterizes one of the differences between the types of conservatisms in the following way:

Both fiscal conservatives and libertarians can support a broader definition of family, with fiscal conservatives doing so on the basis of broadening the web of private responsibilities, while libertarians would do so on the basis of respecting private choice and individual autonomy. Social conservatives, by contrast, would categorically oppose any departure from the traditional family.

*Id.* at 438.

Instead, privatizing support regularly takes a backseat to gendering the valuation of work: where privatizing support conflicts with finding that work done within the home is provided gratuitously or at a discount, courts nearly always hold in favor of the latter. That is, courts generally favor imposing values associated with coverture—i.e., delineating appropriate roles within marriage, rendering “wifely” work done in the course of the relationship “free,”<sup>331</sup> and denying the “wife” any rights to property—more than they favor ensuring that support is privatized.<sup>332</sup> The overall effect is to inscribe marital values that have their roots in coverture in relationships that fall outside of marriage. Rendering another individual, as opposed to the state, responsible for support becomes subordinate to defining and devalorizing work done within the home.<sup>333</sup>

The decision of whether to privatize support within the family does not inherently or necessarily conflict with the principles of coverture wholesale. Privatizing support can in theory be consistent with, for instance, monitoring the roles assumed by each party in a relationship. Where the court distributes property at the end of a nonmarital relationship by likening it to a traditional marriage, courts are arguably privatizing support at the same time that they are delineating appropriate roles. Washington’s status-based approach is one example: courts consider whether a relationship is marriage-like and, if so, they distribute property.<sup>334</sup> Even where courts do not apply an explicitly status-based

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<sup>331</sup> Siegel, *supra* note 4, at 2127 (“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.”).

<sup>332</sup> This point stands regardless of whether the individuals would literally request support from the state. Rather, privatization is used here as other scholars have relied on it—as a way of broadly understanding how the law allocates fiscal responsibility as between the state and the family, which in some instances has resulted in the expanded recognition of certain family relationships. For example, Appleton has explained that in the context of the same-sex marriage litigation, “marriage emerges as an ideal vehicle for operationalizing the principle that the needs of dependents must be met through private sources of support.” Appleton, *supra* note 35, at 968. This general principle holds true whether or not the same-sex couples who marry will actually need public support.

<sup>333</sup> Cossman has argued a similar point in federal regulation of the family. *See* Cossman, *supra* note 327, at 421. As she explains:

The privatization of support obligations has occurred only to the extent that it can be made consistent with the social conservative vision of the family. . . . [W]here these visions diverge (same-sex marriage), the continuing discursive power of the social conservative vision of privatization has precluded any such expansion.

*Id.*

<sup>334</sup> *See* Connell v. Francisco, 898 P.2d 831, 835 (Wash. 1995) (en banc) (“Once a trial court determines the existence of a meretricious relationship, the trial court then: (1) evaluates the interest each party has in the property acquired during the relationship, and (2) makes a just and equitable distribution of the property.”); Antognini, *supra* note 15, at 10-23 (identifying cases that rely on marriage-like qualities of nonmarital relationships to distribute property).



approach, but consider a same-sex or different-sex relationship through the lens of marriage, they also end up privatizing support.<sup>335</sup> This tack does, however, conflict with one of coverture's key legacies—denying the “wife” access to property. Appealing to marriage's authority explicitly enables nonmarital relationships to escape at least some of the most detrimental consequences of coverture's reach.

If privatizing support does not provide a complete explanatory rationale for these cases, then perhaps what is at stake is its conceptual opposite—ensuring that an individual's choice is protected in situations in which he or she has not married. Under this view, obligations should not be imposed at the termination of a nonmarital relationship because doing so would run roughshod over an individual's autonomy.<sup>336</sup> The conflict in these cases between privatizing support and promoting some vision of autonomy has been identified by Emily Stolzenberg.<sup>337</sup> In particular, Stolzenberg explains that “the problem is more fundamentally one of competing neoliberal principles: whether to respect the new family freedom by refusing to impose ex post family-based obligations on the richer party, or to privatize a poorer party's dependency by granting recovery.”<sup>338</sup> Stolzenberg characterizes the case law that addresses obligations between nonmarital partners as one that “appears to vindicate autonomy,”<sup>339</sup> but which has the ultimate effect of requiring “each former partner to support herself.”<sup>340</sup> These cases can indeed be accurately described as requiring each individual to support principally herself, given courts' general refusal to distribute property.<sup>341</sup> The self-support theory does not, however, identify what exactly is being devalued or address the gendered way these decisions operate. Injecting coverture into the analysis helps reveal who exactly must support himself or herself: the individual who contributed time, rather than money, and

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<sup>335</sup> See discussion *supra* Section II.A (discussing courts' analysis of whether relationship is marriage-like by examining relationship and roles of individuals in relationship).

<sup>336</sup> See Kaiponanea T. Matsumura, *Choosing Marriage*, 50 U.C. DAVIS L. REV. 1999, 2009 (2017) (identifying choice as way of ensuring each individual's autonomy in nonmarital relationship is protected).

<sup>337</sup> See Stolzenberg, *supra* note 320, at 1984 (“But as more people conduct their intimate lives outside these legal institutions, choice about obligations increasingly collides with [a] more fundamental[] family law principle: the imperative to ‘privatize dependency’ . . .”).

<sup>338</sup> *Id.* at 2019.

<sup>339</sup> *Id.*

<sup>340</sup> *Id.* at 2031.

<sup>341</sup> Self-support is, of course, the ultimate form of privatization, but under this form of privatization the unit of the family loses its relevance. The uneasy reliance on self-support here may be the result of competing “privatizations”: “[P]rivatization as restoring the traditional family would oppose any effort by privatization as the transfer of once public goods to the family to expand the scope and content of family law to non-marital, non-heterosexual couples as a way of broadening private responsibility and reducing government responsibility.” Cossman, *supra* note 327, at 439.

who engaged in “wifely” services that are presumed to be, and ultimately are, gratuitous. Moreover, considering the legacy of coverture outside of marriage explains why courts in some cases do in fact decide to distribute property, in contravention of the overall trend holding that individuals in a nonmarital relationship should be self-supporting. These are the cases where courts can ignore homemaking services entirely, like in the request for a partition, or where courts expressly require the relationship to be marriage-like and can thus compensate these “wifely” services.

Much of the legal scholarship addressing the nonmarital case law focuses on some aspect of the choice half of the equation. Ira Ellman, for instance, identifies the “fatal flaw” in these cases as contract-thinking, which he argues does not reflect the reality of most relationships: in short, “people do not think of their intimate relationships in contract terms.”<sup>342</sup> As such, Ellman suggests that courts ought to consider whether the “nonmarital relationship shares with marriage those qualities which lead us to impose legal duties as between husbands and wives.”<sup>343</sup> Other scholars identify the contract-based approach as problematic for differing reasons. Courtney Joslin argues that the cases that deny property distribution because of concerns over autonomy are premised on a thin vision of autonomy,<sup>344</sup> while Kaiponanea Matsumura maintains that although these cases rely on the concept of consent, they fail to adequately operationalize it as they “hold litigants to stringent standards, expecting either that every contingency be expressly bargained for or that the parties have made ‘marriage-like commitments.’”<sup>345</sup> Meanwhile, June Carbone and Naomi Cahn are more receptive to what they characterize as the autonomy-protecting nature of the cases that decline to distribute property based on anything other than financial contributions.<sup>346</sup>

This Article does not contest the validity of any of these accounts, but rather proposes that coverture fills the gaps they leave open. Understanding the role coverture plays shows exactly what follows from courts’ adherence to choice or autonomy principles—namely, that work done within the home, and nothing else, is devalued. The contract-focused narrative is also, by its very nature, incapable of grappling with why or how courts in some instances engage in

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<sup>342</sup> Ellman, *supra* note 321, at 1373 (“We surely do think of successful marriages and marriage-like relationships as reciprocal, which can easily seem like ‘contractual.’ But contract involves more than reciprocity; it involves a bargained-for exchange.”).

<sup>343</sup> *Id.* at 1377.

<sup>344</sup> See Joslin, *supra* note 320, at 965-66.

<sup>345</sup> See Matsumura, *supra* note 320, at 1020-21, 1072-75 (arguing that a more contract-based theory of consent would aid courts in resolving *inter se* claims between nonmarital couples).

<sup>346</sup> See Carbone & Cahn, *supra* note 320, at 78 (characterizing courts’ willingness to disentangle “the parties’ respective contributions to asset acquisition” as “respect[ing] the parties’ autonomy”).

restitution, which is similarly a losing proposition for the plaintiff, or in partitioning property, which at times results in an egalitarian distribution of property. And, at least as an explanatory rationale, it mostly fails to account for the gendered reasoning and outcomes the cases produce.<sup>347</sup>

The legacy of coverture supplies the reason why courts deny requests to distribute property when it requires them to value homemaking services, just as it helps to explain the overall gendered impact of the cases. It does not supplant prevailing scholarly theories, but rather supplements them with an explanation of how coverture continues to regulate intimate relations and establish access to property within them.

## 2. Courts' Rationales: Promotion of Marriage or Problems with Valuation

Courts themselves also offer rationales in support of their decisions. Taking seriously the reasons courts provide means addressing their sometimes stated and other times implied goals of marriage promotion. It also means contending with the potential limitations of their institutional competence, such as their presumed inability to engage in accurate determinations of worth insofar as services are concerned.

Courts that allow, and courts that deny, property distribution at the conclusion of a nonmarital relationship all promote marriage as a status worth preserving.<sup>348</sup> Even in *Marvin*, the Supreme Court of California emphasized that its decision allowing for the distribution of property in a nonmarital relationship should in no way undermine the inimitable status of marriage.<sup>349</sup> Courts that refuse to distribute any property on the basis of a nonmarital relationship perhaps most

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<sup>347</sup> The point here is only that the account itself cannot explain this phenomenon; many scholars who focus on the autonomy- and choice-related implications of the decisions directly address the gendered effect of the cases. *See, e.g.*, Joslin, *supra* note 320, at 937 (noting that “denial of recovery for these services is not felt equally by all nonmarital partners” and that, in particular, “[w]omen are the primary losers”); Matsumura, *supra* note 320, at 1067-68 (“[M]any of the laws that classify on the basis of marriage promote family structures based on gender norms that some may find offensive and that, at any rate, no longer describe the way that a majority of households operate.”).

<sup>348</sup> *See* Antognini, *supra* note 15, at 52-58 (“While the jurisdictions that decline to recognize rights seek to incentivize the woman to marry, the jurisdictions that liken the relationship to a marriage are more concerned with removing incentives for the man not to propose.”).

<sup>349</sup> *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976) (in bank) (“Lest we be misunderstood, however, we take this occasion to point out that the structure of society itself largely depends upon the institution of marriage, and nothing we have said in this opinion should be taken to derogate from that institution. The joining of the man and woman in marriage is at once the most socially productive and individually fulfilling relationship that one can enjoy in the course of a lifetime.”); *see* Carbone & Cahn, *supra* note 320, at 65 (“[The] court’s decision on claims brought by unmarried cohabitants did not in any way undercut the strong state policy supporting marriage.”).

explicitly rely on marriage promotion as a central reason for doing so.<sup>350</sup> In *Hewitt v. Hewitt*,<sup>351</sup> the Supreme Court of Illinois refused to distribute any property at the conclusion of the nonmarital relationship, explaining that doing otherwise “contravenes the [Illinois Marriage and Dissolution of Marriage] Act’s policy of strengthening and preserving the integrity of marriage.”<sup>352</sup> The *Hewitt* court did not clarify just how denying property outside of marriage incentivizes a couple to marry.<sup>353</sup> But generalizing from *Hewitt* to every case denying property could support an argument that distributing less property overall to couples outside of marriage is best explained by courts’ decisions, either express or implied, to privilege marriage.

To serve effectively as a rationale for these cases, however, one would have to assume that the various approaches courts employ—be they contractual or restitutionary, status-based or property-based—are all influenced by the desire to promote marriage.<sup>354</sup> This is, of course, a crude way to engage with the different doctrinal bases courts employ—to reduce them to vehicles through which to promote marriage, without assessing the ways in which they differ. Even accepting such a reduction, this rationale does limited work by failing to account for the distinctions courts make between different types of contributions—financial or otherwise. Why would courts be willing to return money contributed to a mortgage but not account for services during a relationship? How would these distinctions be adequately explained by the

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<sup>350</sup> See discussion *supra* Section II.A (explaining courts’ view that marriage is the appropriate place for exchange of support and services).

<sup>351</sup> 394 N.E.2d 1204 (Ill. 1979).

<sup>352</sup> *Id.* at 1209.

<sup>353</sup> It may be the case, in fact, that couples are *less* likely to marry if they can enter a relationship that results in no property obligations when it ends. This exact reasoning is found in cases that decide to distribute property on the theory that doing so prevents couples from avoiding marriage, which imposes obligations on the individuals who choose to marry. See, e.g., *Kozlowski v. Kozlowski*, 403 A.2d 902, 908 (N.J. 1979) (“The value of a stable marriage remains unchallenged and is not denigrated by this opinion. It is not realistic to conclude that this determination [to award palimony] will ‘discourage’ marriage for the rule for which defendant contends can only encourage a partner with obvious income-producing ability to avoid marriage and to retain all earnings which he may acquire. One cannot earnestly advocate such a policy.”), *superseded by statute*, Act of Jan. 18, 2010, ch. 311, 2009 N.J. Laws 2322 (codified at N.J. STAT. ANN. § 25:1-5(h) (West 2010)), *as recognized in Maeker v. Ross*, 99 A.3d 795 (N.J. 2014).

<sup>354</sup> Of course, in doing so, courts would be privileging divorce rather than marriage. There is little discussion of the reasons why someone would want to marry in the first instance, and whether those reasons are related to the default property distribution available at divorce. See Antognini, *supra* note 15, at 52-58.

general goal of promoting marriage?<sup>355</sup> And how would this objective explain when courts decide to distribute property in an egalitarian manner, which does occur in limited circumstances? The marriage-promotion rationale also obscures who these cases affect—mostly women, or the individuals who engaged in “wifely” services. Accordingly, promoting marriage is neither a finely parsed nor a particularly comprehensive rationale even in those instances where courts expressly rely on it.

Taking courts’ institutional perspective leads to one other critique that could feasibly serve as an alternative explanation to coverture—namely, that judges lack the expertise to properly quantify things like services provided during the course of a relationship. This argument would be more convincing if courts did not routinely quantify such services. Courts regularly engage in determining whether contributions to a nonmarital relationship have increased the value of property, or whether certain activities create rights to property, as long as the relationship was coupled with marriage at some point—before marriage, in between multiple marriages, or after marriage.<sup>356</sup> As Joslin has argued, the very existence of “[t]hese cases demonstrate[s] that courts are capable of figuring out how to . . . account for periods of nonmarital cohabitation.”<sup>357</sup> Courts also quantify services when they involve making a home, although not caring for a home, separate from any money that was also potentially expended in the process. And they are able to link property to the provision of services in those cases where courts analogize the relationship to marriage. The point here is not to advocate for any specific approach, but rather to demonstrate that there are numerous examples of courts actually awarding property as a direct result of services rendered.<sup>358</sup>

Moreover, the cases accept, if not always assess, that services have value, as when courts decide that alimony should be terminated given the initiation of a

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<sup>355</sup> Even mortgage payments are not always a sure bet, however. *See Richards v. Brown*, 2009 UT App 315, ¶ 40, 222 P.3d 69, 81 (finding no unjust enrichment because payments made toward mortgage were equivalent to what would have been paid in rent).

<sup>356</sup> *See Antognini, supra* note 15, at 18-21, 48-52 (addressing different approaches courts take when nonmarriage is coupled with marriage); Joslin, *supra* note 320, at 975-76 (arguing that interstitial marriage cases provide a model for how courts can distribute property in nonmarital cases).

<sup>357</sup> Joslin, *supra* note 320, at 976.

<sup>358</sup> There are further examples of courts engaging in difficult questions of valuation beyond this particular context, like in tort cases addressing loss-of-consortium or loss-of-life claims. *See Ann Laquer Estin, Love and Obligation: Family Law and the Romance of Economics*, 36 WM. & MARY L. REV. 989, 1025-27 (1995) (addressing loss-of-consortium claims for homemakers and critiquing how the law currently values loss); Eric A. Posner & Cass R. Sunstein, *Dollars and Death*, 72 U. CHI. L. REV. 537, 543-49 (2005) (describing how common law tort system values noneconomic damages in loss of life cases).

new nonmarital relationship.<sup>359</sup> The California Court of Appeal in *Leib v. Leib (In re Marriage of Leib)*<sup>360</sup> made this very point in terminating June Leib's alimony payments on account of her nonmarital relationship with Leonard Elbaum: "June has the undoubted right to gift her services, which have substantial value on the open market, to Leonard—but we are satisfied she has no right to ask a court to collect for her from her former husband spousal support."<sup>361</sup> Courts thus have little difficulty recognizing the quantifiable value of services rendered where terminating property, rather than awarding it, is at stake.<sup>362</sup> Even if *Leib* itself did not engage in a valuation of these services, the very fact that courts recognize their value, but do not attempt to engage in any determination of their worth, is problematic.

More importantly, the reasoning behind the difficult-to-value argument is based on the selfsame assumptions that undergird coverture. Of course, reasoning that homemaking services are difficult to value is different than holding that they are owed to the husband or that they are rendered freely.<sup>363</sup> But the line the nonmarital cases draw between assets contributed, which they are willing to disentangle, and services, which they are not, relies on an assumption that the former can be separated from the relationship, while the latter cannot. Courts across the board recognize claims regarding assets owned or contributed as opposed to "claims that arose from the basis of the relationship."<sup>364</sup> The

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<sup>359</sup> See Antognini, *supra* note 15, at 21-30 ("In these cases, courts are surprisingly willing to rely on the mere presence of sex to end support; and, courts easily liken a nonmarital relationship to marriage in the process.").

<sup>360</sup> 145 Cal. Rptr. 763 (Ct. App. 1978).

<sup>361</sup> *Id.* at 642 (emphasis added). The court terminated alimony despite finding that "each maintained separate names, bank and all other accounts, managed severally their separate properties, and in all social and other contacts maintained separate legal identities." *Id.* at 633. But the court also found that June "provides to him the identical services a nonworking wife is expected to and generally does furnish to a working husband." *Id.* at 640.

<sup>362</sup> See Antognini, *supra* note 15, at 61 ("The law regularly inflicts a penalty on the woman in a nonmarital relationship—either she cannot receive a property distribution as the plaintiff in a nonmarital relationship that has ended, or she stops receiving alimony payments as the defendant in a termination of alimony case for having entered a nonmarital relationship.").

<sup>363</sup> As mentioned above, this reasoning ignores the various tools courts have at their disposal—even if they are limited by the principles of coverture in adequately applying them. And the result in both instances is similar in that the services are deemed valueless.

<sup>364</sup> Carbone & Cahn, *supra* note 320, at 65, 61-69 (noting that other courts would "typically distinguish[] between property claims and claims for support"). Carbone and Cahn identify the trend addressed in this Article: courts are willing to disentangle ownership of assets, but not what parties "owe each other." *Id.* at 67 ("Therefore, they most emphatically have not treated unmarried cohabitants equally with married couples who are seen as promising each other a duty of support and who stand in a fiduciary obligation with respect to each other."). This dividing line means that services rendered do not receive any quantification or remuneration, given that they are not considered "assets." *Id.* at 67-68 (examining example

Supreme Court of Mississippi, for instance, awarded property at the end of a nonmarital relationship when the plaintiff's claim was based on "monetary contributions," and not "*her* efforts in her live-in, long-term *relationship*."<sup>365</sup> While at first blush this distinction may seem logical, it is problematic in that it assumes as a given the conditions instituted by coverture—that services are somehow a part of, and therefore internal to, the relationship, while assets are external to it. Both are contributions made to the relationship, separate from the relationship itself—unless we still understand services to be part of the core duties that define a relationship, a state of affairs that has its roots firmly in coverture.<sup>366</sup> This exact reasoning also explains why courts are willing to return the value of assets contributed, but not the value of services, beyond the duration of the relationship—services have no independent existence, and therefore no independent value, from the relationship itself while money and services that are not those a wife would provide clearly do.

As the *Marvin* court raised, but did not quite operationalize: "There is no more reason to presume that services are contributed as a gift than to presume that funds are contributed as a gift; in any event the better approach is to presume . . . 'that the parties intend to deal fairly with each other.'"<sup>367</sup> The difficult-to-value rationale is yet another example of the extent—and continuing vitality—of coverture's influence.

B. *Whether to Remunerate Housework: Taking the Conversation Outside of Marriage*

At a very basic level, this Article is concerned with exposing how a regime steeped in coverture continues to erect legal impediments to accessing property where the labor she, or sometimes he, contributed to the relationship was to the home rather than the workforce. This fundamental point raises the intractable question upon which self-proclaimed feminists disagree: whether and how to remunerate housework. The concerns with doing so fall into two categories: that

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where man could get restitution for "direct contributions he made to properties," but not compensation for services he performed).

<sup>365</sup> *Cates v. Swain*, 2010-CT-01939-SCT (¶ 13) (Miss. 2013), 215 So. 3d 492, 495; *id.* ¶ 18, 215 So. 3d at 496 ("[T]he chancellor focused on readily identifiable assets (or tangible benefits) each party conferred on the other, which, if retained by that party, would, under the circumstances, inequitably benefit (or unjustly enrich) that party.").

<sup>366</sup> *Cf.* Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 Nw. U. L. REV. 65, 79-81 (1998) (noting contemporary law governing premarital contracts considers "[h]ome labor, sex, and cohabitation" to be "basic legal duties of marriage" and therefore inadequate consideration for a contract).

<sup>367</sup> *Marvin v. Marvin*, 557 P.2d 106, 121 (Cal. 1976) (in bank) (quoting *Keene v. Keene*, 371 P.2d 329, 340 (Cal. 1962) (in bank) (Peters, J., dissenting)).

it will disincentivize women to engage in paid work,<sup>368</sup> or that it will exacerbate differences between women across racial and class lines.<sup>369</sup>

The discussions surrounding the topic of compensating housework have typically taken place in the context of a relationship that involved a marriage and subsequent divorce. Moving the conversation outside of marriage leads to a different series of questions and possible responses. As an initial matter, these nonmarital cases show that the choice presented to women is not between whether they ought to remain at home or go to work, but rather whether they ought to marry. Moreover, given the demographics of the couples who are not married, the rules courts fashion would impact mainly lower-income earners, as opposed to higher-income earners, given that the latter typically marry.<sup>370</sup> Further, courts' treatment of same-sex couples, and of men in different-sex couples who engage in housework outside of marriage, is instructive in revealing what is at stake in these decisions. It is not only, or necessarily, about the gender of the parties before the court, but rather about how courts gender the work itself and ensure that it remains gratuitous. In this sense, considering the effects of coverture outside of marriage challenges some of the assumptions embedded in the standard debate over whether to remunerate work done within the home.

One of the central critiques raised against valuing housework is the tension it would create with women's ability to engage in paid work. Vicki Schultz has identified this very conflict between "paid work" and "housework," encouraging women to engage in the former as opposed to, rather than in addition to, the latter.<sup>371</sup> Schultz argues that one way to reconcile the incompatibility between these two types of work is to convert housework into paid work—literally, by turning it into employment for others—in order to "provide[] jobs for many

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<sup>368</sup> Schultz, *supra* note 31, at 1883-84 (arguing against feminist proposals that value housework over paid work and proposing that "a robust conception of equality can be best achieved *through* paid work, rather than *despite* it").

<sup>369</sup> Twila L. Perry, *Alimony: Race, Privilege, and Dependency in the Search for Theory*, 82 GEO. L.J. 2481, 2483-84 (1994) (addressing criticisms leveled against theories of alimony from both feminist legal theory and racial critique of feminist legal theory).

<sup>370</sup> SASSLER & MILLER, *supra* note 32, at 2-3 ("For college-educated cohabitators . . . cohabitation frequently leads to marriage within a few years. For the less privileged, the sequence is more varied and often bumpier. These cohabitators face a much greater likelihood of having children, often unintentionally, breaking up before a wedding, or divorcing if they do tie the knot."). These rules also, obviously, impact couples who go to court. These are generally couples who have a wealth disparity that makes going to court relevant. Barring serious acrimony, which may also be a strong motivator for going to court, couples who are both breadwinners or who have relatively similar assets may decide it is not worth litigating any claims they may have.

<sup>371</sup> See Schultz, *supra* note 31, at 1883-84 ("Family-wage thinking has left us with a mythologized but misleading image of women as creatures of domesticity—and not of paid work.").



people who need them” and “also free[] those who provide unpaid family labor to pursue more fully for pay the work that suits them best.”<sup>372</sup>

Looking at the nonmarital case law reveals a different choice at the core of these cases: the alternative that courts present to an individual who seeks property is not paid work, but marriage. Gender still matters insofar as the option to marry is most explicitly brought up when the plaintiff is a woman.<sup>373</sup> But the point is that courts encourage individuals who engage in housework to marry, not to go to work, by demarcating marriage as the source of strong property rights at the conclusion of a relationship.

A deeper flaw in setting up this tension between paid work and housework is that it is not at all clear that remunerating housework would, as a matter of fact, encourage women to stay at home. Women have engaged in housework since the days of coverture without receiving any property or pay as a result.<sup>374</sup> The law has long had a problem valuing housework, so the reason why women remain within the home cannot principally lie in the fact that the law has appraised this type of work over and above other work.<sup>375</sup> Instead, structural forces beyond these *inter se* rules must be responsible. As such, continuing to devalue housework does not seem to be an effective corrective if what we care about is having women leave the sphere of the home. In this context then, the perceived tension between housework and paid work is mostly illusory.<sup>376</sup>

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<sup>372</sup> *Id.* at 1901 (“By transforming at least some forms of household work into paid employment, we could more easily protect those who do the work from discrimination, unfair labor practices, wage and hour violations, adverse working conditions, health and safety threats, and other problems on the job.”); see Jane R. Bambauer & Tauhidur Rahman, *The Quiet Resignation: Why Do So Many Female Lawyers Abandon Their Careers?*, U.C. IRVINE L. REV. (forthcoming 2019) (manuscript at 1), <https://ssrn.com/abstract=3335481> [<https://perma.cc/E6DS-BDDD>] (addressing phenomenon of professional women choosing to leave workforce, thereby recreating traditional roles whereby men work and women take care of the home).

<sup>373</sup> See Antognini, *Against Nonmarital Exceptionalism*, *supra* note 33, at 1935-40 (explaining that main focus of cases with male plaintiff is “whether the man seeking property failed in his traditional role of breadwinner”).

<sup>374</sup> See Siegel, *supra* note 4, at 2209-10 (describing historical conditions that have led to married women “find[ing] themselves economically disempowered during the life of the marriage and impoverished at divorce”).

<sup>375</sup> Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 4 (1996) (showing how “a wide range of legal doctrines treat women’s home work as if it were not value-producing labor” but “as solely an expression of affection, the currency of familial emotions”).

<sup>376</sup> This is not to contest that there are other, larger structural forces at play that dictate the division of labor whereby women may take on more of the housework. It is only to clarify that housework does not occur to the exclusion of paid work *because* it has been so highly prized by the law. See Bambauer & Rahman, *supra* note 372 (manuscript at 47) (identifying phenomenon of professional women choosing their families over their careers and proposing that “perverse cultural acceptance” is to blame).

Instead, awarding property as a way to acknowledge the value of household labor could be useful in addressing the resulting poverty of women, rather than influencing their decision to engage in such work in the first place.

The inclusion of unmarried couples in the conversation of whether to remunerate housework also raises a new set of possible consequences, given the different demographics implicated by unmarried couples compared to their married counterparts. While the question of remunerating housework in a marriage or at divorce generally impacts white, middle-class and wealthier individuals,<sup>377</sup> remunerating housework outside of marriage would impact Black and Hispanic individuals of lower socioeconomic statuses.<sup>378</sup> As it turns out, homemaking inequality is starker for unmarried couples than for married couples; and, within unmarried couples, it is especially unequal among working-class as opposed to middle-class individuals.<sup>379</sup> Data show that in different-sex couples, “cohabiting women continue to spend significantly more time in domestic labor than do cohabiting men” and that upon moving in with a partner, men’s housework decreases while women’s increases.<sup>380</sup> There are some rare cases where men are doing the lion’s share of the housework—which also tends to occur among the working-class couples.<sup>381</sup>

Revealingly, individuals in the couples themselves identify these nonfinancial contributions as valuable and acceptable replacements for the provision of funds.<sup>382</sup> Men who are the recipients of such contributions, and women who provide these services, discuss housework as an alternative to participating financially, meaning that both men and women find that these contributions

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<sup>377</sup> See Perry, *supra* note 369, at 2484 (critiquing marriage paradigm in discussions of alimony upon divorce as having “little relevance to the realities faced by most poor women of color and that, accordingly, most of the approaches to alimony based on it have little practical relevance to the lives of these women”).

<sup>378</sup> In particular, Black women have lower odds of expecting marriage than white or Hispanic women. See Wendy D. Manning & Pamela J. Smock, Research Note, *First Comes Cohabitation, and Then Comes Marriage?*, 23 J. FAM. ISSUES 1065, 1074, 1082 (2002) (“Our results suggest that male disadvantage deters marriage plans, and to the extent that Black men are disproportionately disadvantaged, cohabitation may be a terminal union more often among Blacks than ethnic groups with more advantaged men.”).

<sup>379</sup> SASSLER & MILLER, *supra* note 32, at 88 (explaining disparity partly because “middle-class men were far more apt to compromise than were service-class men”).

<sup>380</sup> *Id.* at 67 (“Even when couples arrive at egalitarian arrangements, doing so is not without consequences. Studies of couples who have managed to create relatively equal unions, where work outside the home and inside are shared, find that such unions can be difficult to sustain.”).

<sup>381</sup> *Id.* at 85-86 (“Men in the counter-conventional group often described themselves as neat freaks or attributed their cleaning habits to how they were raised.”).

<sup>382</sup> *Id.* at 87 (explaining that individual being “primarily responsible for the domestic work” did not necessarily appreciate it, but their partners do).

provide a quantifiable benefit.<sup>383</sup> Importantly, however, the satisfaction reaped from providing domestic services differs depending on the gender of the individual performing them. Men in different-sex couples still view their primary role as provider, even if their nonfinancial contributions are important to the relationship: “Whereas conventional women often viewed domestic work as a means of ‘making up’ for their lesser financial contributions, several men in counter-conventional couples were more grudging, viewing their housekeeping roles as temporary rather than a way to substitute for lower earnings.”<sup>384</sup>

One of the most powerful criticisms of the reforms focused on eradicating coverture—that they almost exclusively benefited white, propertied women<sup>385</sup>—holds less weight in considering whether to remunerate housework outside of marriage. Valuing housework would have a very different set of implications in this nonmarital context—it would impact lower-class women and some men, rather than middle-class women and men, who tend to marry and to divide housework more equally. In particular, it would provide an additional basis for women to claim property rights, even if they are also working outside of the home, rather than take anything away from them. This scenario would also prove true when men assume more of that housework—there seems to be no defensible reason why housework performed by either gender should be denied value. In fact, the law could serve an important function if it were to affirm that such labor has value, regardless of who is performing it.<sup>386</sup>

But one important retort to adopting a view that values housework is that it may end up devaluing the work of an individual who works both within the home *and* outside of it. A related problem is that the valuation of this type of work is

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<sup>383</sup> In explaining his role as provider, one of the interviewees reasoned that his partner contributes by doing more of the housework: “But she, she contributes so much in other ways and I remind her all the time how valuable she is, you know? So she does her fair share and she makes up for a lot of things, for stuff at home that I don’t [do].” *Id.* at 78.

<sup>384</sup> *Id.* at 87.

<sup>385</sup> See Dubler, *supra* note 28, at 804-05 (“[H]istories of the slave family and its legacy as well as histories of coverture’s powerful role in legal constructions of gender have reinforced the very ideological premise that coverture itself sought to enshrine within the law: that white women’s intimate lives were organized exclusively around marriage and that the traditional family constituted the sole building block of white, American, democratic society.”); Perry, *supra* note 369, at 2493 (“Approaches seeking to establish a theory of alimony are based on the paradigm of a husband who is, at least relatively, economically powerful and a wife who has had the option of staying home or slowing down her career in support of the family. Because the paradigm marriage does not fit most Black marriages, the theories of alimony based on it are, for the most part, inapplicable to most Black marriages.”).

<sup>386</sup> The way that different-sex couples react to the work also appears to be gendered; findings show that “the performance of domestic work is less valued than income-producing work, regardless of who performs it.” *Id.* at 87.

inevitably based on the wealth of the individual from whom property is being sought, thus exacerbating differences across class.

Laura Rosenbury has described at some length the resulting devaluation that occurs when both types of work are undertaken: “[T]he partnership theory [of marriage] values care work the most when the spouse performing that work does not also engage in market work” because “a wife who earns as much as her husband yet also does most of the housework and child-care coordination . . . will be completely unvalued.”<sup>387</sup> Similarly, “in the rare situations where a husband earns as much as his wife and also does the bulk of care work, the husband’s care work will be completely unvalued.”<sup>388</sup> Once again, this concern is most applicable to a married couple, rather than to an unmarried one. This critique is on point in addressing the partnership *theory* of marriage—but that theory is not applicable to the nonmarital context. Courts do not assume partnership outside of marriage but instead engage in an assessment of what type of work was in fact contributed to the relationship. As such, contributions rendered in a nonmarital relationship can—at least under the current system—be assessed rather than assumed. Only an individual who actually engaged in housework would be able to claim anything based on proof of said activity.

A related concern—that the wealth of the individual who does not engage in housework determines its worth—is endemic to how wealth is distributed in society at large. Focusing on this specific issue in declining to distribute property in the nonmarital context may work a more egregious injustice given the dimension of the problem outside of marriage. For instance, Black women, who generally work both within and outside of the home, tend to be worse off at the end of a nonmarital relationship.<sup>389</sup> Specifically, data reveal that “the end of a cohabiting relationship leaves women much worse off than their male counterparts, rendering African American and Hispanic women particularly vulnerable.”<sup>390</sup> In this context, raising the point about structural wealth inequality is not particularly responsive to the very real problem of not having access to assets at the end of a relationship, even when those assets are distributed unequally *across* relationships. Of course, there may not be many assets to divide among some of these couples—which is one of the downsides

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<sup>387</sup> Rosenbury, *supra* note 36, at 1283-84 (footnote omitted).

<sup>388</sup> *Id.*

<sup>389</sup> Sarah Avellar & Pamela J. Smock, *The Economic Consequences of the Dissolution of Cohabiting Unions*, 67 J. MARRIAGE & FAM. 315, 322 (2005) (“At postdissolution, White women have the highest personal incomes (\$13,028), trailed by African American women (\$8,031).”).

<sup>390</sup> *Id.* Moreover, “a woman’s economic well-being appears to be more reliant on having a partner than on her personal characteristics.” *Id.* at 325.

of privatizing support.<sup>391</sup> But denying housework value does not become less problematic because some couples have few assets. Instead, the signaling function of holding that housework has value may be enough to change the conditions under which these unmarried couples bargain and under which women in general live and work.<sup>392</sup> Indeed, having courts both declare and determine the value of the work being performed can directly affect the entitlements created by law.<sup>393</sup>

Not only does the nonmarital sphere include Black and Hispanic women, but it also encompasses same-sex couples. To state the obvious, same-sex individuals have had relationships outside of marriage for a longer period of time than they have within marriage. Incorporating same-sex couples into the discussion of housework is important because it shows that the question is not just about incentivizing *women* in *different-sex* relationships to enter the work force. Rather, the question is how the law does, or does not, recognize a particular type of contribution performed across relationships, genders, and classes. If men and women in same-sex relationships, and men in working-class relationships, are undertaking housework, then it harms the men and women who engage in this labor to devalue their contributions.

Shifting the landscape to include nonmarriage provides a novel set of reasons for excising the effects of coverture which continue to lead to the determination, nearly axiomatic, that housework is provided for free.<sup>394</sup> At the very least, considering the reasons for *not* awarding property to an unwed homemaker results in a different set of consequences than has previously been identified.

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<sup>391</sup> Most divorces also have little property to distribute when the marriage ends. See JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 203 (2011) (noting that “most divorces occur early in marriage, and the net value of most marital estates is relatively small”). This fact has not, however, taken away from the importance of equalizing property distribution upon divorce. See *id.* at 192-93 (noting “dramatic shift” in law of divorce during twentieth century).

<sup>392</sup> Katharine Silbaugh’s work “considers how the legal treatment of women’s unpaid labor disadvantages women” and shows that “[w]hen housework is denied the status of work in one context, denial in other contexts is reinforced.” Silbaugh, *supra* note 375, at 6-8 (arguing that “denying the productive nature of housework harms those who do the work”).

<sup>393</sup> See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 *YALE L.J.* 950, 950 (1979) (addressing “the impact of the legal system on negotiations and bargaining that occur *outside* the courtroom”). Of course, more work needs to be undertaken to establish just how such rules would change the status quo.

<sup>394</sup> What is less novel, of course, is the devaluation of housework that occurs across legal fields—as Silbaugh has noted, “[a] view of housework as implicating familial relations should not conflict with an understanding of the economic value of the work, but in the eyes of the law, it does.” Silbaugh, *supra* note 375, at 85.

C. *Possible Alternatives?*

This Article is clearly critical of the reasons courts decline to distribute property and of the circumstances that are reinforced as a result. The fact that the doctrine of coverture provides a comprehensive explanation for how courts, to this day, distribute property outside of marriage is problematic. Accordingly, this Article calls for a fundamental reexamination of the decision to deny homemakers access to property, one of the central legacies of coverture. Rather than now provide a full-throated account of exactly how homemaking services ought to be remunerated—a question that merits its own sustained attention—this Part instead ends by focusing on a jurisdiction whose courts have broken away from coverture’s control.<sup>395</sup>

Those cases that explicitly consider contributions to the relationship and value them on the same footing as financial ones outside of an approach that relies explicitly on marriage are very rare.<sup>396</sup> One of the most consistent examples of courts doing so is provided by Kansas. In Kansas, courts undertake “a deeper analysis that goes beyond which party actually paid for the property.”<sup>397</sup> In particular, the Kansas Court of Appeals acknowledges that “a party can help

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<sup>395</sup> This Article has attempted to lay the foundations for why housework ought to be valued, given the reasons it is currently denied value. The question of *how* that value should be calculated is an entirely different project, but should now be informed by the legacy of coverture. Scholars are currently considering the question of how to impose obligations outside of marriage—whether the law should follow marriage-like responsibilities as long as certain requirements are satisfied, whether the reasoning should follow partnership law, or whether it should be based on sharing principles embedded in property law. *See, e.g.*, Cynthia Grant Bowman, *Social Science and Legal Policy: The Case of Heterosexual Cohabitation*, 9 J.L. & FAM. STUD. 1, 3-4 (2007) (proposing that cohabitants who have been together for two or more years, or who have a child together, be treated as though they were married); Courtney G. Joslin, *Conduct-Based Obligations 1* (unpublished manuscript) (on file with author) (looking to partnership law as one of many different possible models for valuing conduct that leads to obligations); Emily J. Stolzenberg, *Properties of Intimacy 1* (Aug. 12, 2019) (unpublished manuscript) (on file with author) (arguing for a more property-focused analysis of cohabitant disputes).

<sup>396</sup> As we have seen, some jurisdictions are able to award property at the end of a nonmarital relationship by ignoring the relationship that gives rise to such requests. Relying on a claim to partition is the most common way of doing so. *See, e.g.*, *Burt v. Skrzyniarz*, 526 S.E.2d 848, 849 (Ga. 2000) (reporting plaintiff filed complaint for statutory partitioning of jointly owned property); *Blumenthal v. Brewer (Blumenthal II)*, 2016 IL 118781, ¶ 82, 69 N.E.3d 834, 840; Antognini, *supra* note 15, at 39-40 (“[The court] awarded property at the conclusion of a nonmarital relationship. It did so without any discussion of the nature of the relationship, relying solely on the doctrine of tenancy in common.”).

<sup>397</sup> *Becker v. Ashworth*, No. 104,417, 2011 WL 2206635, at \*4 (Kan. Ct. App. June 3, 2011) (per curiam) (unpublished table decision).

contribute to accumulating property by taking care of the home and child.”<sup>398</sup> That is, rather than discount those contributions or value them at much less than half of the total amount of property accumulated throughout the relationship, the court explains that they lead to “an ownership interest in the property equal” to the individual who had title over the property.<sup>399</sup> Even if, as the court reasons, “[i]t is difficult to assign a precise monetary value to those duties,” it holds that “they were nonetheless contributions.”<sup>400</sup> Otherwise, the court asks, “[s]hould a party who contributes . . . expendable, perishable items be given nothing when the relationship is dissolved?”<sup>401</sup>

Kansas thus provides an illustration of how a court can eschew marriage, and all of its markers, as a template for awarding property. It discards the legacy of coverture in favor of recognizing the worth of nonfinancial contributions and distributing property to the person who engaged in that type of work.

Valuing contributions outside of marriage may further provide a way out of the “unsettling choices” family law scholars increasingly face.<sup>402</sup> As Susan Appleton has queried: If privatizing dependency leads to a more inclusive definition of the family, are we willing to accept it, in lieu of arguing in favor of a more robust set of state benefits and support?<sup>403</sup> Looking to the nonmarital case law may imply that this unsavory exchange is not the only option. It need not be that marriage alone leads to property rights, whomever that marriage happens to include; rather, property could result from a relationship in which contributions take on many different forms. Accordingly, rather than identify marriage or the marital family as the sole site of support, support would instead result from active contributions made to an intimate relationship. If the law expands to allow benefits to accrue outside of marriage, and distributes them in

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<sup>398</sup> *Id.* (relying on cases which “exemplify that in dividing the property of unmarried couples, there is a deeper analysis that goes beyond which party actually paid for the property”).

<sup>399</sup> *Id.* at \*5.

<sup>400</sup> *Id.*

<sup>401</sup> *Id.* The court notes that had these duties not been performed, the homemaker “would have potentially been able to obtain employment and further contribute to the parties monetarily.” *Id.*

<sup>402</sup> Appleton, *supra* note 35, at 978-79 (“If family law norms and values continue to shape constitutional law and if affirmative recognition of other familial relationships, beyond marriage, would advance the project of keeping dependency private, new ‘positive rights’ under the banner of constitutional liberty should not come as a surprise.”).

<sup>403</sup> *Id.* at 979 (“If neoliberalism will produce more inclusive legal notions of family, do we want to pursue that path? Or would we be willing to let go of expanding family recognition in the hopes of achieving a more generally ‘supportive state’? *Obergefell* certainly does not mark the beginning of conversations about these questions, nor should it signal the end.” (footnote omitted)).

ways that are unrelated to that status, then marriage loses its vanguard position without necessarily eliminating other means of support.<sup>404</sup>

#### CONCLUSION

The vitality of coverture is largely due to its stealth. This Article has attempted to reveal its persistence and the extent of its influence. The nonmarital space is saturated with marriage: nonmarriage functions as a place where marital norms are regularly reinforced, and otherwise-discarded rules remain in force. Coverture explains why courts fail to distribute property in some instances, why they choose to distribute property in others, and what conditions are established as a result. In a very real sense, this is only the beginning—reform proposals must consider how to confront coverture effectively, at its roots, and thereby succeed in breaking away from the gendered patterns it continues to impose.

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<sup>404</sup> These claims would still be limited insofar as they continue to be *inter se*, and do not address claims brought against a third party, like the state. Yet, as Courtney Joslin has argued, “the extension of these *inter se* rights can be a step towards greater access to third-party rights and benefits.” Joslin, *supra* note 320, at 978.