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ARTICLE

Nonmarital Contracts

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Abstract. Marriage has long been a recognized limit on the right to contract. Wives were once prevented from contracting entirely, and now gender-neutral rules prevent spouses from contracting over matters that are considered integral to the marital relationship. Outside of marriage, then, scholars have generally assumed that individuals experience no similar impediments in exercising their rights to contract. In fact, the right to contract has been widely understood as an effective means of providing unmarried couples access to legal rights they otherwise lack. But there has yet to be any assessment of how such contracts actually fare outside of marriage.

This Article provides that assessment. It considers how the right to contract is construed across intimate relationships. After canvassing the body of cases addressing express contracts in the context of nonmarital relationships, it shows that—contrary to conventional wisdom—courts routinely invalidate express agreements between unmarried couples. In particular, it argues that courts restrict the right to contract outside of marriage in precisely the same ways it is restricted within marriage. Contract doctrine thereby does the work of status, insofar as it limits access to property on the basis of the relationship and refuses to recognize services rendered, like homemaking or child-rearing. Contract, however, functions more expansively and less visibly than status because these

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restrictions apply beyond marriage and other formal relationships to impact individuals in nonmarital relationships.

This inquiry matters now more than ever. At a time when the number of individuals marrying is remarkably low and there are no ex ante rules regulating the rights of nonmarital couples, it is imperative to analyze whether contract is a viable legal option. This Article shows that the right to contract is limited outside of marriage and, as currently constituted, provides at best an incomplete resolution to the problem of what rights individuals ought to have in a nonmarital relationship.

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Introduction

A curious thing is taking place. As the social institution of marriage has become more companionate,[1] the laws regulating marriage increasingly treat the relationship as being composed of individual and autonomous actors, each wholly independent from the other.[2] Marriage, once governed by the reciprocal rights and duties established by the explicitly gendered and generally lifelong statuses of husband and wife, now allows for relatively easy entry into and exit from its strictures; it also accommodates a spouse's right to contract around many of the once-sacrosanct marital obligations.[3] The general outlines of this legal evolution were already identified in 1861 by Henry Sumner Maine, whose well-worn declaration affirmed that "[t]he movement of . . . progressive societies" is marked "by the gradual dissolution of family dependency and the growth of individual obligation in its place."[4] Stated in slightly more familiar terms, the move is one from status—"those forms of reciprocity in rights and duties which have their origin in the Family"—to contract—a "social order in which all . . . relations arise from the free agreement of Individuals."[5]

Much has been written on the accuracy of Maine's statement, and many

1. D. KELLY WEISBERG & SUSAN FRELICH APPLETON, MODERN FAMILY LAW 221 (6th ed. 2016). Societal pressure to find complete satisfaction in one's spouse is also growing. *See* Hidden Brain, *When Did Marriage Become So Hard?*, NAT'L PUB. RADIO, at 13:44-13:50, 14:47-14:54 (Feb. 12, 2018, 9:00 PM ET), https://perma.cc/43HY-TWW8 ("[W]e wanted to self-actualize through our marriage. We wanted to grow into a more authentic version of ourselves. . . . [W]e're looking to our spouse, again, not only for love but also this sense of personal growth and fulfillment.").

2. "[M]arriage is now thought of as a relationship between two autonomous persons and divorce as a clean break rather than a gradual dissolution of a community." Richard H. Chused, *Family (Proper)ty*, 1 GREEN BAG 2D 121, 125 (1998).

3. *Id.* at 121; *see also* Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 70-71 (1998) (noting that premarital agreements "are enforceable when the terms of the agreement fix property rights at the end of marriage" and "increasingly . . . when they fix alimony rights").

4. HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS 168 (Legal Classics Libr. spec. ed. 1982) (1861) [hereinafter MAINE]; *see also* Brian Bix, *Domestic Agreements*, 35 HOFSTRA L. REV. 1753, 1753 (2007) ("It is a cliché, in discussions of family law and agreements, to point to Sir Henry Maine's famous quotation that society has moved 'from Status to Contract.'" (quoting HENRY SUMNER MAINE, ANCIENT LAW 141 (Geoffrey Cumberlege ed., Oxford Univ. Press 1954) (1861))).

5. MAINE, *supra* note 4, at 169. Henry Sumner Maine, however, never addressed marriage directly. *See* Janet Halley, *What Is Family Law? A Genealogy* (pt. 1), 23 YALE J.L. & HUMAN. 1, 74 (2011) (specifying that "Maine never said that *marriage itself* was shifting to contract: rather, he ignored marriage altogether, arguing instead that the replacement of the patriarchal family as the basic unit of social life and of economic production by contract was definitive of modernity").

discussions have addressed whether marriage, along with family law more broadly, can best be understood through status or contract.[6] A great deal especially has been written on how individuals today can more freely write around "background obligations by private contract, either before or during marriage."[7] Spouses have the right to alter terms that state statutes would otherwise import into their relationships and to particularize agreements to fit their specific needs.[8] They can even, in certain circumstances, sign away rights to property that would otherwise inhere in the relationship on account of their marriage.[9] The fact that married women—who were once unable to contract by virtue of the coverture imposed by marriage[10]—are now able to do so is

6. *See, e.g.*, Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COLUM. L. REV. 293, 300-01, 328, 342 (2015) (reversing the status-to-contract narrative in describing ways in which diverse family forms could gain legal recognition); Janet Halley, *Behind the Law of Marriage: From Status/Contract to the Marriage System* (pt. 1), 6 UNBOUND: HARV. J. LEGAL LEFT 1, 14-28 (2010) (arguing that status and contract exist simultaneously within marriage, nonmarriage, and civil unions); Barbara A. Atwood, *Marital Contracts and the Meaning of Marriage*, 54 ARIZ. L. REV. 11, 16-34 (2012) (discussing the extent to which the law of marriage allows individuals within that status to individualize their marriage through contract).

7. Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1460; *see also* Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204, 208 (1982) (arguing that "the rigidity of the old model of marriage is no longer acceptable" and that "contractual tools and processes can make important contributions to the achievement of . . . goals" that "lend dignity and legitimacy to today's diverse forms of intimate commitment"); Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 164 (1998) ("Family law has not journeyed nearly as far toward complete private ordering as contract law, though it does reflect in many instances Maine's shift away from status rules."); Mary Anne Case, *Enforcing Bargains in an Ongoing Marriage*, 35 WASH. U. J.L. & POL'Y 225, 226-27 (2011) (noting that "married couples . . . are freer to make enforceable contracts with one another than once they were under U.S. law" and criticizing "what remains the presumption against availability of judicial enforcement for bargains between spouses in an ongoing marriage"); Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 81-82 (2001) (turning to private business law as a model for private family law, in part based on the fact that "[f]amily law doctrine increasingly favors private ordering in matters such as entry into marriage, contractual ordering of marriage, nonmarital relationships, divorce, adoption, the use of reproductive technologies, and the privatization of domestic relations dispute resolution").

8. *See* Singer, *supra* note 7, at 1460-61.

9. *See* Silbaugh, *supra* note 3, at 77 ("Almost every court will enforce [a premarital] agreement governing only property, as long as the procedural and substantive requirements are met.").

10. Coverture is the legal doctrine that regulated marriage at common law, with distinctly debilitating consequences for the wife. 1 WILLIAM BLACKSTONE, COMMENTARIES *430-33 ("[T]he disabilities, which the wife lies under, are for the most part intended for her

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most conspicuously emphasized in cases where they have signed *away* rights to property that marriage would have granted them. Courts explain how "[s]ociety has advanced . . . to the point where women are no longer regarded as the 'weaker' party in marriage."[11] Having discarded the presumption "that women are uninformed, uneducated, and readily subjected to unfair advantage," courts insist on upholding the agreements they enter into.[12]

Certain terms, however, remain off the table. Contracts involving sex are still unenforceable.[13] So too are contracts for services provided during the marital relationship, like child-rearing or housecleaning.[14] As such, where spouses—typically wives—seek to secure rights to property for services rendered, they are unable to do so through contract.[15] The literature concedes that the status of marriage continues to function as a limit on the right to contract.[16]

While the scholarship has problematized how courts enforce contracts within marriage and the family more broadly, scholars have for the most part uncritically accepted contract as a solution to the plight of the unmarried couple.[17] Indeed, how contract has functioned in intimate relationships outside of marriage has been less studied overall—surprisingly, perhaps, given that unmarried couples have no status-based rights.[18] This Article turns to

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protection and benefit."); *see also* Albertina Antognini, *Nonmarital Coverture*, 99 B.U. L. REV. 2139, 2149 (2019) (noting that "[c]overture established the rights of both men and women upon entering marriage" although "the more disadvantaged party" was certainly the wife).

11. Simeone v. Simeone, 581 A.2d 162, 165 (Pa. 1990).

12. *Id.*

13. Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 501 (2005).

14. *Id.* at 500; Silbaugh, *supra* note 3, at 86.

15. Courts express different reasons as to why—ranging from those internal to contract law, like finding lack of consideration, to those external to contract law—but the effect remains the same. Silbaugh, *supra* note 3, at 79-92.

16. *See, e.g.*, Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 840 (2004) ("Family law's consistent refusal to enforce interspousal contracts for domestic services establishes yet another status rule."); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127, 2127-28 (1994) (arguing against the story of progress embedded in the status-to-contract narrative and "instead consider[ing] how statutory reform modernized the common law of marital status to accord with gender mores in the industrial era").

17. *See, e.g.*, *Restitution at Home: Unjust Compensation for Unmarried Cohabitants' Domestic Labor*, 133 HARV. L. REV. 2124, 2127 (2020) ("[C]ourts in nearly all states permit at least contract claims between former unmarried cohabitants."). *See generally infra* Part I.C (canvassing the literature that assumes the right to contract is widely available in the majority of states).

18. Washington is one notable exception. *See* Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1, 17 n.76 (2017) (collecting cases where Washington

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nonmarriage as a companion subject necessary to fully consider how the right to contract fares in the context of intimate relations writ large.[19]

Addressing nonmarriage head-on is therefore important because courts and scholars routinely assume, as a descriptive matter, that unmarried couples can definitively arrange their property rights at the end of a nonmarital relationship by entering into an express contract.[20] The main problem, as they characterize it, is simply that not many couples actually take advantage of this option.[21] Every so often, this descriptive claim leads to the normative one that individuals who request property at the end of a relationship *should* have made their intent explicit by entering into a contract. But this assumption works more perniciously even for those sympathetic to recognizing rights for unmarried couples, given that the option to contract offers a clear way out of the thorny questions of whether and how to provide individuals who are not married with rights against each other.

At a time when individuals are marrying far less than before, and when no ex ante rules regulate the economic rights of unmarried couples, it is imperative to analyze whether contract functions as a viable legal option.[22]

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courts applied divorce laws in resolving disputes at the end of "meretricious" relationships).

19. A few articles do, of course, address the right to contract as it pertains to nonmarriage. *See, e.g.*, Ira Mark Ellman, *"Contract Thinking" Was* Marvin*'s Fatal Flaw*, 76 NOTRE DAME L. REV. 1365, 1367 (2001) (critiquing contract as a model for intimate relations and instead proposing "[o]ld-fashioned status rules, updated as needed to shed gender-role rigidities"). These articles generally consider the feasibility or desirability of requiring such contracting or whether unmarried couples actually engage in such behavior. They do not, however, comprehensively analyze the case law or consider how and when courts are enforcing these contracts. *See infra* Part I.C.

20. *See* June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 57 (2016) (describing how "courts take their lead from the parties' formal agreements" and "unwind the parties' financial entanglements in accordance with express contract terms and the law of unjust enrichment"). Instead, the scholarship generally identifies the main problem as *implying* contracts from the parties' relationship instead of interpreting *express* contracts the parties might enter into. *See* Ira Mark Ellman, *Inventing Family Law*, 32 U.C. DAVIS L. REV. 855, 874 (1999) (arguing that "for a contract approach to succeed, it must embrace a broad view about what constitutes an agreement, inferring understandings very freely from the parties' conduct").

21. *See, e.g.*, David Westfall, *Forcing Incidents of Marriage on Unmarried Cohabitants: The American Law Institute's* Principles of Family Dissolution, 76 NOTRE DAME L. REV. 1467, 1474 (2001) ("[T]he reality probably is that express agreements between nonmarital cohabitants are relatively rare and usually are made for the purpose of negating, rather than defining, any rights based on the relationship."); Ellman, *supra* note 20, at 874 ("People don't generally make formal contracts about either the conduct of their relationship or the consequences that ought to flow in the event they end it.").

22. The Uniform Law Commission is currently considering what rules ought to regulate unmarried couples. *See Economic Rights of Unmarried Cohabitants Committee*, UNIF. L. COMM'N (2018), https://perma.cc/U8SW-4XE5.

This Article does just that and shows that contract remains wanting. In particular, this Article argues that the work done by the status-based rules of marriage is now done through contract law outside of marriage—through courts' decisions about whether to enforce agreements entered into by individuals in nonmarital relationships.[23] The right to contract is limited by an intimate relationship not only within marriage but also, significantly, outside of it. By declining to recognize certain exchanges, namely those that involve services rendered, contract law extends the impediments created by status to relations that lack any such formal marker. In this way, contract works more expansively than status—the restrictions on the right to contract have moved beyond marriage to also impact "single" individuals in nonmarital relationships.[24] Despite courts' various attempts to keep marriage and nonmarriage distinct, the way they interpret agreements outside of marriage has the effect of blurring the boundary between the two.

Part I begins by addressing the literature on how express contracts have been limited in marriage and other formal family relationships.[25] This Part situates the scholarship addressing a family member's inability to contract within the larger history of marriage. In doing so, it focuses on the doctrine of coverture as a means of exposing the legal mechanisms through which status, property, and contract have been linked. To this day, coverture colors the marital relationship both by limiting a spouse's ability to contract and by ensuring that labor performed in the home is more akin to an obligation, outside of the realm of exchange.[26] Contemporary gender-neutral rules mean that these limits apply regardless of the spouse performing the work—which, in turn, make the limits more difficult to identify.[27] The ways coverture

23. To be clear, this assertion does not rely for its veracity on a particular view of the status-versus-contract debate as played out in marriage—one can assume that marriage has elements of both contract and status, in whatever proportion one sees fit and in whatever historical way these categories arose. *See* Halley, *supra* note 5, at 2-3 (describing the "double transformation" that took place in the nineteenth century that turned "the law of husband and wife into the law of marriage, and [the law] of marriage from contract to status").

24. *See* Ariela R. Dubler, *"Exceptions to the General Rule": Unmarried Women and the "Constitution of the Family,"* 4 THEORETICAL INQUIRIES L. 797, 800-01 (2003) ("Since the law imagined marriage as infinitely powerful, single women—those who, despite marriage's vast imagined domain, lay just beyond the borders of its formal reach—constituted contested terrain in which judges and lawmakers forged the meaning of marriage itself, as well as the content of women's legal identities.").

25. *See infra* Parts I.A-.B.

26. *See* Hasday, *supra* note 16, at 840-41 (identifying widespread refusal to enforce interspousal contracts for domestic services).

27. *Cf.* Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1241, 1289 (demonstrating how the partnership theory of marriage, which conceptualizes the two spouses as equals, can nonetheless "play a role in reinforcing

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constrained a wife's role both at home and at work are important to disclose with some specificity, given that this regime provides the paradigmatic model for how the right to contract is limited in similar ways, and to similar effects, across intimate relationships.

Part I then leaves the ambit of marriage and turns to the literature on nonmarriage. The right to contract in this space is generally assumed rather than assessed, and its shortcomings as a matter of doctrine are neither raised nor questioned.[28] To be fair, such assumptions find support in broad assertions made by the cases themselves. The decisions concerning marriage proper refuse to recognize contracts for services by reasoning that they are seeking that which is constituent of the marital relation.[29] Outside of marriage, these same considerations ought to present no similar barrier. Courts state as much in the nonmarital cases, generally agreeing that the mere existence of the relationship will not impair an individual's right to enter into enforceable agreements.[30] Scholars consequently accept these pronouncements at face value, concurring in the conclusion that unmarried individuals can enter into agreements for precisely the kinds of services that spouses cannot.[31] Instead,

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traditional gender expectations, including the expectation of wifely sacrifice"). These rules also clearly have implications for the spouse in a same-sex relationship, of any gender, who does most of the housework.

28. *See infra* Part I.C.

29. Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 29-30 (1996) (describing case law holding that domestic services are not valid consideration when offered by a wife to her husband "because one cannot offer as consideration something one is already under a legal obligation to perform," and explaining that this argument continues to be effective in "avoiding" premarital agreements concerning domestic services); *see also* Gregg Strauss, *Why the State Cannot "Abolish Marriage": A Partial Defense of Legal Marriage*, 90 IND. L.J. 1261, 1270 (2015) (describing "[t]he most striking limit" on agreements as being that "some states will not enforce contracts between spouses for domestic services").

30. *See, e.g.*, Marvin v. Marvin, 557 P.2d 106, 116 (Cal. 1976) (en banc) ("[A]dults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights."), *modified on remand*, 122 Cal. App. 3d 871 (1981).

31. *See, e.g.*, Case, *supra* note 7, at 225-26 (describing marriage as "anomalous" for not enforcing bargains during the relationship, while "parties in forms of long-term sexual relationship other than marriage" have "found courts increasingly receptive to claims for enforcement of their bargains"); Singer, *supra* note 7, at 1450-51 (asserting that post-*Marvin*, "courts largely abandoned public policy objections to enforcing the private agreements of parties engaged in sexual relationships outside of marriage" and, given "the modern emphasis on private ordering," have been mostly unwilling only "to grant nonagreement-based support rights to unmarried cohabitants"); *see also infra* Part I.C (addressing scholarship accepting that contracts between willing unmarried parties will be enforced, which relies on cases involving same-sex couples or on the general assertions, rather than the holdings, made in the different-sex cases).

the problem scholars have identified is that nonmarital couples rarely formalize their intentions and often fail to put anything in writing.[32]

Part II examines whether the prevailing assumptions in the literature are borne out by looking at the cases that consider allegations of express contracts outside of marriage. This Part provides a comprehensive account of the decisions that have considered an express agreement—which contract law defines as either a written or an oral contract.[33] This Part intentionally limits itself to express contracts to focus on the "easiest" cases; it seeks to avoid any of the critiques associated with inferring contracts into a relationship, even though standard contract law routinely allows for, and recognizes, implied agreements.[34] Around 120 opinions address express contracts at the conclusion

32. *See* Courtney G. Joslin, *Autonomy in the Family*, 66 UCLA L. REV. 912, 932 (2019) (noting that "few cohabiting couples enter into these kinds of written agreements").

33. 17A AM. JUR. 2D *Contracts* § 11 (West 2020) ("A contract is express if stated either orally or in writing, and it is implied if its terms are not so stated.").

34. To keep the scope of the piece well defined, I exclude both implied-in-fact and implied-in-law agreements. "A contract implied in fact has the same legal effect as an express contract; it carries as much weight and is as binding as an express contract." *Id.* A contract implied in law is not a contract at all, but "a legal fiction": It "is an obligation imposed regardless of any actual agreement between the parties." 66 AM. JUR. 2D *Restitution and Implied Contracts* § 4 (West 2020); *see also* Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1001 (1985) ("The implied-in-law contract or quasi-contract is traditionally considered an exceptional supplement to the body of contract doctrine; its reliance on social norms to create a public obligation is traditionally viewed as a deviation from contract doctrine's focus on the facilitation of private intent."). Finding the relevant cases is more of an art than a science. I include decisions that mention "express contracts," regardless of whether they specify that the contract alleged was oral or written. *See infra* Appendix A (identifying contracts as either "oral," "written," or "unknown"). Moreover, courts are not always clear in stating whether they are interpreting an implied-in-fact or an express contract. I err on the side of including cases where they appear to consider both. *See, e.g.*, Champion v. Frazier, 977 S.W.2d 61, 64 (Mo. Ct. App. 1998) (overturning the lower court's finding of an implied-in-fact agreement but also discussing the lack of an express agreement). I omit, however, cases that use the term "express" but ultimately consider only an implied contract. *See, e.g.*, Featherston v. Steinhoff, 575 N.W.2d 6, 9-10 (Mich. Ct. App. 1997) (noting some confusion over whether the contract alleged was express or implied in fact, and in the end addressing only the latter in finding there was no implied-in-fact agreement because "[p]laintiff's performance of household services, standing alone, does not overcome the presumption that the services were gratuitous"). I also omit cases that examine agreements but are really actions in equity, rather than breach-of-contract claims. *See, e.g.*, Rehak v. Mathis, 238 S.E.2d 81, 82 (Ga. 1977) (asserting the court would not "lend its aid to either party to a contract founded upon an illegal or immoral consideration" but considering only an action in equity and not addressing the existence of a contract). Finally, I include equitable actions that explicitly address breach-of-contract claims. *See, e.g.*, Kerkove v. Thompson, 487 N.W.2d 693, 695-96 (Iowa Ct. App. 1992) (addressing the breach of an express contract in the context of an equitable action).

of a nonmarital relationship.[35] Because of the relatively small number of decisions, this Article is able to survey the entire realm of cases that address an express contract entered into in a nonmarital relationship. It finds that while most courts acknowledge that "the mere fact of nonmarital cohabitation does not destroy the parties' rights to recover from one another in accordance with their legitimate contractual rights and expectations,"[36] they tend to enforce these contracts in only a narrow set of circumstances.[37] Contract law thus emerges as a limited tool to secure rights to property across intimate relationships.

With these opinions firmly in hand, Part II details the many ways in which the right to contract is limited. It begins by examining *why* and *how*

35. To find the cases addressing express contracts I, along with the University of Arizona law librarians and my research assistant, undertook numerous searches using Westlaw as our database. The searches included the following terms and Boolean connectors in the "All States" database: adv: (nonmarital AND property) AND ("express contract") % estate; adv: (cohabitation AND property) AND ("express contract") % marriage % marital; adv: ("express contract" /30 cohabit!) % estate; adv: ("unmarried" "nonmarital") & ATLEAST5(contract!) & property. The broadest search yielded 5,443 cases, all of which I considered. I then proceeded to exclude cases that were not centrally about resolving a claim based on an express contract; that addressed a nonmarital relationship in the context of a divorce; that were essentially about whether there was an actual marriage in some form; or that raised claims of child support. I also excluded cases that involved death instead of separation. The relevant cases number well over one hundred, and all are included in the Appendices. The Appendices are organized into two sections that catalogue the cases: Appendix A includes nonmarital contracts between different-sex partners, and Appendix B includes nonmarital contracts between same-sex partners. *See infra* Appendices A, B. Each Appendix is further organized into categories setting out whether the court declined to find a contract, upheld a contract, or otherwise allowed the litigation to proceed. *See infra* Tables A.1-.5, B.1-.3.

36. Schafer v. Superior Ct., 225 Cal. Rptr. 513, 515 (Ct. App. 1986) (adding that "neither does such cohabitation confer on them any special privilege over and above those of any other civil litigants").

37. As the Appendices reveal, courts do uphold contracts—6 of the 12 cases addressing same-sex couples uphold contracts, as do 36 of the 110 cases in the different-sex context. The claim this Article advances does not, however, fail if one or even a few cases are missing, or if many more cases end up enforcing contracts, given that what matters are the rationales courts proffer in the process. The goal here is exhaustive qualitative analysis, rather than strict statistical validity, based on the reasons and distinctions articulated by the cases themselves. This Article's core argument is that courts uphold contracts in only a narrow set of circumstances: The vast majority of the cases in the different-sex context uphold a contract when the claim is based on property, as opposed to services, while in the same-sex context, courts analyze the contracts before them in the shadow of a legal regime that denied the couples marriage. The reason I append the dataset of cases is to provide the reader with the same tools I relied on to independently identify, and critically examine, how this Article reached its conclusions. Together, the Appendices capture all of the relevant cases this Article relies on, gathered from the various searches detailed in note 35 above.

courts decline to enforce express contracts in practice, even as they indicate a willingness to do so in theory. Taken on their own terms, the cases may initially appear unproblematic—the decisions present sensible reasons, finding that there was no consideration, or that the agreement was one-sided, or that the terms of the contract were vague.[38] Stepping back and considering the decisions together, however, reveals a uniform trend: Courts hold that individuals cannot contract for exchanges that inhere in the relationship itself, such as services rendered, and generally decline to uphold contracts where the relationship could have been marital.[39] That is, courts refuse to uphold contracts outside of marriage for the same reasons they refuse to do so in marriage. This is so despite the absence of the status of marriage, which is a known limit on the right to contract, and despite the general reluctance to treat unmarried couples like married ones, a central distinction courts maintain even when they distribute property outside of marriage.[40]

Importantly, the cases that decide to uphold contracts support this very point. These cases occur when the relationship could not have been marital, as with a same-sex couple in a jurisdiction that did not recognize the right to marry.[41] In the context of a different-sex relationship, courts mostly enforce contracts in situations where the contribution can be characterized as exclusively financial in nature or as addressing only a property-related interest.[42] The few jurisdictions that do in fact enforce a contract for services in a different-sex relationship are instructive in exposing the assumptions made in the routine cases about the nature of the exchanges or the expectations of the parties.[43] Part II shows that even within the cabined context of express

38. This Article focuses on the cases that provide a doctrine-based rationale for why they decline to enforce the contract. It leaves to the side those cases that find the contract fails based mostly on questions of proof. The line between the two categories is not always clear, but where the court engages in any reasoning beyond reviewing the evidence, that case is included in the analysis. *See infra* Part II.A; *see also infra* Appendix A (distinguishing between doctrinal and evidentiary decisions).

39. The exception to this mode of reasoning is where courts either accept or require a marital-like relationship; the former is true for most cases considering same-sex couples, and the latter is true for cases considering palimony claims in New Jersey. *See infra* Part II; *see also infra* Appendices A, B.

40. *See* Antognini, *supra* note 10, at 2160.

41. *See infra* Part II.B.

42. *See infra* Part II.B; *see also infra* Table A.4 (identifying 8 cases explicitly recognizing services as a basis for contract); Table A.5 (identifying 28 cases recognizing contributions only in the form of property or only considering the division of property).

43. The cases that expressly allow contracts for services arise in Pennsylvania and Nebraska. *See, e.g.*, Knauer v. Knauer, 470 A.2d 553, 566 (Pa. Super. Ct. 1983) (upholding an oral contract to share all accumulated assets during the relationship in exchange for services as a homemaker, mother, partner, and hostess); Kinkenon v. Hue, 301 N.W.2d

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agreements, the right to contract more often than not depends on the court's judgment of the relationship at stake, rather than on any inviolable principle of contract law.

Part III crystallizes the effects of the rules regulating contracts across intimate relationships. The ability to contract, once explicitly denied to married women based on their status, has been replaced with the ostensible freedom to do so. But this freedom functions in a way that continues to remove property from the hands of those who engage in "wifely" labor. While courts and commentators characterize the right to contract within nonmarital relationships as protecting the autonomy of the individuals therein,[44] the right to contract is restricted in a lopsided yet predictable way that continues to devalue work done within the home, both in and out of marriage. The effect of contract is also more encompassing than the effect of status insofar as the individuals affected are no longer only wives—they are women and men,[45] married and unmarried, in different-sex and same-sex relationships.[46] And these limits are harder to detect, as they are not based on the bright line of status but on what sound like unassailable descriptions of the relationship itself.[47]

Showing that even expressly contracting for rights does not necessarily secure access to property in a nonmarital relationship—for fundamentally the

77, 80-81 (Neb. 1981) (upholding an oral contract that exchanged services for a life estate in the house).

44. *See* Emily J. Stolzenberg, *The New Family Freedom*, 59 B.C. L. REV. 1983, 2006 (2018) (describing the law of cohabitant obligations and alimony as appearing to vindicate autonomy, even if not completely).

45. This Article relies on this gender binary given the cases that have come to court and the gendered ways in which the doctrine operates, which, importantly, do not always align with the genders of the individuals themselves. This discussion is not in any way meant to deny that individuals identify along a gender spectrum. *See* Jessica A. Clarke, *They, Them, and Theirs*, 132 HARV. L. REV. 894, 900 (2019) ("Nonbinary gender identity is not a niche concern.").

46. That said, the vast majority of individuals in a different-sex relationship who make claims to property based on an express contract continue to be women. Of the total 110 cases brought in the different-sex context, 92 involve contract claims raised by women, 17 by men, and one by both parties. *See infra* Table A.6. In same-sex relationships, the numbers are split down the middle—6 of the cases are brought in the context of a female same-sex relationship and 6 in a male same-sex relationship. *See infra* Table B.4 (containing a total of 12 cases). While the contract claim is generally a vehicle for seeking affirmative rights to property, this is not always the case. *See infra* Part II.B.2. That is, the individual seeking to enforce the contract is not always the plaintiff, and these cases also involve allegations beyond contract, like unjust enrichment, and can include competing claims for partition, ejectment, or conversion. The focus of these Tables, however, is on the gender of the individual requesting enforcement of the contract claim.

47. *See infra* Part II.A.

same reasons these contracts fail in marriage—has manifold implications. First, nonmarital couples are left in a sort of legal limbo, given that equity has also proven itself unmatched to the task.[48] Only two jurisdictions explicitly deny nonmarital couples the right to contract;[49] the reality, however, is that many more come close to doing so. Courts and scholars must therefore contend with the mismatch between what the law says and what it does—in particular, they must face the fact that the freedom to contract in this intimate space is limited in ways that reinforce the separation between market and family, with detrimental material consequences to the individual who took on a disproportionate share of the homemaking. Second, revealing the reasoning courts rely on to invalidate contracts highlights the similarities in how courts treat nonmarriage and marriage. Despite courts' efforts to keep these relationship categories distinct, they bleed into each other, a result that merits sustained attention. Third, the shortcomings of the status quo counsel in favor of recognizing a more robust right to contract in the familial space. This Article ends by considering the benefits and drawbacks of two possible paths forward—either denying a right to contract for services entirely or recognizing a right that includes services in the nonmarital sphere. While these cases might reveal limits that are endemic to contract law itself,[50] this Article nonetheless argues that if contract is to remain available writ large, then it must also be available to unmarried couples, free from the influence of a status they lack.

* * *

Courts' current refusal to enforce certain contracts cements the division between home and market and naturalizes the choice to value labor outside of the home but not within it. Considering the whole range of doctrines that continue to exceptionalize domestic labor helps expose the extent of the

48. *See* Antognini, *supra* note 10, at 2173-74. I have also argued that contract doctrines have been ineffective. *Id.* at 2173 (identifying the standard approach, which "remains consistent across the various doctrinal approaches courts employ"). Given, however, both the persistence and the prevalence of the notion that express contracts are upheld as a matter of course, and the implications surrounding such an assertion, this Article cordons off that specific topic to address it directly and methodically.

49. Strauss, *supra* note 29, at 1276-77 (identifying Georgia and Illinois as falling into this category). These jurisdictions do, however, distribute property between an unmarried couple in certain limited circumstances. *See* Antognini, *supra* note 18, at 39 (explaining that Georgia does "distribute property when it ignores the relationship's sexual, affective, or marital-like component altogether").

50. *See, e.g.*, Kaiponanea T. Matsumura, *Breaking Down Status*, 98 WASH. U. L. REV. (forthcoming 2021) (manuscript at 41), https://perma.cc/4HPA-GCCW ("[C]ontract doctrine bears little resemblance to the narrow, abstract and depersonalized conception with which it is often identified.").

problem.[51] Instead of allowing contract to function as a tool that widens the chasm between home and work, more powerful because it goes unnoticed, the right to contract should be used to reconstitute the links between work and property that are routinely severed on account of a relationship outside of marriage. At the very least, this Article exposes the futility of arguing that couples should just enter into contracts if they seek to set out their rights and obligations.

I. Contracts in Families

The law has long grappled with how much contracting to allow within marriage. This precise question has been considered determinative of the meaning of marriage itself: Scholars have deliberated over which rights should attach to the relationship by virtue of its status and which can be contracted around despite it. Historically, the limits on contract in marriage were coupled with the inability to own property—at least for wives.[52] Upon assuming the status of wife, a woman lost her ability to contract in her own name;[53] concomitantly, labor she performed within the home was considered part of her wifely duties and did not lead to any rights to property.[54] Thus, with the advent of the freedom to contract within marriage came the promise of more rights and, at least for wives, the ability to access property.[55]

51. That the limits on contract are not restricted to marriage indicates the importance of reconceptualizing the relationship between property and intimate relations. Some scholars are beginning this project. *See, e.g.*, Courtney G. Joslin, Nonmarriage and the Market 4 (July 28, 2020) (unpublished manuscript) (on file with author) (looking to partnership law as one of many possible models for evaluating how conduct leads to property obligations); Emily Stolzenberg, *Properties of Intimacy*, 80 MD. L. REV. (forthcoming 2021) (manuscript at 5), https://perma.cc/FA8D-FEVY (arguing in favor of a more property-focused analysis of cohabitant disputes).

52. Siegel, *supra* note 16, 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."); Antognini, *supra* note 10, at 2150 (describing the effects of coverture as "the delineation of appropriate roles for husband and wife, the wife's specific duty to perform services, and the prohibition imposed on married women from owning or controlling property" (footnotes omitted)).

53. Justice Bradley's concurrence in *Bradwell v. Illinois* makes the point abundantly clear: In agreeing to uphold Illinois's decision to deny women entry into the state's bar, he relied on the legal fact that "a married woman is incapable, without her husband's consent, of making contracts which shall be binding." 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring).

54. *See* Antognini, *supra* note 10, at 2151.

55. Having gained the ability to contract, wives could retain rights over property after marrying and could enter the market, collecting what they earned directly in their own names. *See* Siegel, *supra* note 16, at 2130-31 (describing the passage of earning statutes).

Yet the right to contract within marriage and the family more generally is still limited. Specifically, a firm divide remains between work that is recognized as value producing and work that takes place within the home, which tracks the spaces where contract does and does not reach.[56] As Richard Chused has crisply stated, "[j]obs outside the home are said to produce marital property; work inside the home has no economic value."[57]

This Part addresses the limits that continue to affect contracts entered into in marriage and the family more broadly. Because the scholarship is well developed on this point, this Part mostly considers the literature on agreements that arise between spouses and discusses only a few representative cases. It also addresses the scholarship on contracts between other family members, such as for personal services like elder care. This Part then turns to history to consider the specific barriers marriage imposed on wives' ability to contract. It adds to the existing literature by contextualizing courts' current reluctance to enforce contracts within the regime of coverture. The doctrine's outlines are important to consider in some detail so that they can be identified in courts' contemporary enforcement of contract law—which traces the same patterns coverture once imposed on the wife by virtue of her status. But given the emergence of gender-neutral rules and same-sex marriage, the inability to contract afflicts more than just women in their roles as wives. In particular, the limits once imposed by coverture now appear outside of any status-based regime and emerge as facts about a relationship rather than as the rules of a discrete legal doctrine.

Despite the known limits of contract in marriage, the literature considering nonmarriage assumes that contract is up to the task of securing unmarried individuals rights at the end of their intimate relationship. This Part ends by summarizing the relevant literature on nonmarriage and identifying the assumptions about the right to contract on which it relies.

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56. The language of contract is chameleon-like and has at times been used to privatize female dependency. *See* Ariela R. Dubler, Note, *Governing Through Contract: Common Law Marriage in the Nineteenth Century*, 107 YALE L.J. 1885, 1919 (1998) ("In the case of common law marriage, the language of private contract shielded the state from responsibility for poor women."). The underlying constant, however, is "provid[ing] jurists a tool with which to define the proper relationship between women, their potential male providers, and the state." *Id.* at 1886.

57. Richard H. Chused, *History's Double Edge: A Comment on Modernization of Marital Status Law*, 82 GEO. L.J. 2213, 2224 (1994) ("Work in the marketplace is voluntary action; performance of tasks in the home fulfills a duty. Employment produces wealth; family produces community.").

A. No Right to Contract for Services

The fact that contracts for personal services are not enforceable is standard fare in family law scholarship. Importantly, courts reject express contracts in situations where there is no question that both parties agreed to the terms. In declining to recognize these agreements, courts fashion a dividing line between the home and the market—defining the home as the absence of compensable exchanges. The result is not that family members live in a wholly altruistic realm but rather that the terms of the exchange are one-sided. Yet courts' rhetoric rejecting the market wholesale obscures the ways in which both labor and exchanges are nonetheless taking place.[58] It also obscures the fact that refusing to identify the exchange disadvantages the individual who undertook any labor as a result.

Marriage in particular is a familiar limit to contract. As Jill Hasday has laid out, "[n]o state authorizes spouses to enter into legally enforceable agreements providing that one spouse will compensate the other for domestic services performed."[59] Hasday considers this prohibition as evidence that status as opposed to contract still controls marital relations, at least more so than the current discourse admits.[60] In making this point, Hasday relies on a number of different cases ranging from those addressing work-release privileges, to requests for property upon the death of one of the spouses, to breach-of-contract claims during a divorce.[61] In each instance, the court characterizes the services rendered as part of a familial obligation, rather than as labor that can be exchanged for property, to the detriment of the individual rendering such services.

The opinion in *State v. Bachmann* provides one emblematic example. The Court of Appeals of Minnesota addressed Suzanne Bachmann's request for

58. *Cf.* Robert L. Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149, 199 (1935) ("It is perhaps fortunate, in some respects, that the courts have been blind to the fact that much of the private power over others is in fact delegated by the state, and that all of it is 'sanctioned' in the sense of being permitted.").

59. Hasday, *supra* note 16, at 840.

60. *Id.* at 841 ("[T]he status-to-contract story, now firmly entrenched in the family law canon, offers an incomplete and even misleading description of family law and its governing principles. It overstates the changes that have occurred in family law over time, concealing and excluding the evidence of the persistence of status rules."). Hasday relies on many of the same examples to make the separate point that coverture still shapes the marital union. *See id.* at 844 (arguing that numerous doctrines, including "the prohibition on interspousal contracts for domestic services," all "originated as part of common law coverture, and each continues to preserve substantial elements of the coverture regime").

61. *Id.* at 840 n.38.

work release as she served her three-month jail term.[62] Suzanne was requesting a release to complete the work of taking care of her family, including her four children and her husband, who had agreed to pay her $1.50 per hour.[63] In denying her petition, the court affirmed that "homemaking services clearly have economic value" but noted they are "generally not considered employment."[64] To support its conclusion, the court reasoned that there is an inherent distinction between maintaining a home and running a business; the former is a "sanctuary of the individual" while the latter embodies "the turmoil of industry."[65] The court located the difference between the sacred and the profane rather tautologically in the ability to acquire property. In particular, "[p]ersons engage in a trade, business, profession or occupation for profit, . . . but not so in establishing and maintaining a home."[66] The court elaborated: The "home is not established and maintained in the expectation of pecuniary gain," but rather "is solely an expense."[67] This expense does not impact all family members equally—instead, it mainly affects the individual who maintains the home, which in this case was the wife. Her services, while economically valuable, did not amount to legally cognizable work.

The court gave two reasons for denying the status of employment to Suzanne's work, both dependent upon her role within the family. First, the court noted that Suzanne was duty bound by virtue of her relationship to her children: She "ha[d] an obligation to care for her children regardless of whether she [was] paid."[68] Second, the court reasoned that despite the husband's offer to pay, no real exchange had taken place between them because of their marriage—any income received by the wife would become marital property, subject to common ownership. While Minnesota is a separate-property state, meaning that each spouse owns assets or income acquired during the marriage individually,[69] the court nonetheless found that where the agreement is between husband and wife, there can be no bargain. In this way, the court

62. State v. Bachmann, 521 N.W.2d 886, 887 (Minn. Ct. App. 1994).

63. *Id.*

64. *Id.*

65. *Id.* at 888 (quoting State v. Cooper, 285 N.W. 903, 905 (Minn. 1939)).

66. *Id.* (quoting Eichholz v. Shaft, 208 N.W. 18, 20 (Minn. 1926)).

67. *Id.* at 887 (quoting *Eichholz*, 208 N.W. at 19).

68. *Id.* at 888. The court relied on the right of children under Minnesota law to access necessities but did not address whether provisions beyond bare necessities were covered by this obligation. *Id.*

69. *See* MINN. STAT. ANN. § 518.58 (West 2010); *see also* JOSEPH WILLIAM SINGER, BETHANY R. BERGER, NESTOR M. DAVIDSON & EDUARDO MOISÉS PEÑALVER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 700 (7th ed. 2017) ("In separate property states, spouses own their property separately, except to the extent they choose to share it or mingle it with their spouse's property.").

described a state of affairs its opinion effectively created: By declining to recognize an exchange between husband and wife, the court assured that the husband had a right to the wife's labor. It thus generated a debit—but only on the wife's account.

Significantly, the husband and wife in *Bachmann* had both *agreed* to engage in an exchange that the court declined to recognize as such. In practice, courts routinely decline to enforce express agreements that involve caretaking services between willing family members and invalidate contracts "even in circumstances in which both parties wish to be bound by the agreement and performance has already occurred."[70] Nina Kohn has considered the enforcement of these agreements in the context of elder care and has canvassed administrative and court decisions regarding Medicaid eligibility determinations.[71] After surveying the legal landscape, Kohn concluded that "care work continues to be seen as largely non-economic activity" with the law "treat[ing] intra-family contracts for that care as unenforceable."[72]

Like in the husband-and-wife context, courts in the Medicaid context rely on a mixture of a pre-existing duty and the lack of any observable exchange to decline to enforce agreements.[73] In *Estate of Barnett*, for example, a Maine court faced the question whether to recognize a personal care agreement where a daughter was to provide her mother with services in return for compensation.[74] The daughter assisted her mother, who resided in a nursing home, by providing her with meals, brushing her teeth, making appointments, cleaning her hands and face, and otherwise caring for her for a total of fourteen hours per week.[75] The court reasoned that some of these services—such as those pertaining to personal hygiene as opposed to, say, making appointments—"were not measurable or verifiable."[76] Instead, the services—which were also those provided by the nursing home—were of the type "that any daughter would provide for her ailing mother without charge."[77]

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70. Nina A. Kohn, *For Love and Affection: Elder Care and the Law's Denial of Intra-family Contracts*, 54 HARV. C.R.-C.L. L. REV. 211, 244 (2019).

71. *Id.* at 213.

72. *Id.* at 249.

73. Kohn's work notes that some administrative law decisions "contained normative language about familial role expectations" and most court decisions, like the agency determinations, decided that the "care provided lacked economic value." *Id.* at 231-37.

74. Estate of Barnett v. Dep't of Health & Hum. Servs., No. 05-060, 2006 WL 1668138, at *1 (Me. Super. Ct. May 23, 2006). If the court had recognized this agreement, no penalty would have been assessed under the state's health insurance program. *Id.*

75. *Id.*

76. *Id.* at *2. The court noted that these services (assistance with meals, personal hygiene, and visitation) were also provided for by the mother's nursing home. *Id.*

77. *Id.*

The *Barnett* court's assumption that a daughter owes services to her mother relating to meals, personal hygiene, and visitation effectively transformed those services into duties that elude market valuation. Because these services were gratuitously rendered, the court concluded that they "[did] not fall within the definition of support for basic necessities for which a fair market value can be assessed."[78] While this case involved female caregiving, Kohn has found that the devaluation of family care occurs regardless of the gender of the caregiver.[79] Insofar as gender equality has progressed, "it may not have been to the benefit of women, but rather to the disadvantage of men whose care work is similarly devalued."[80]

The distinction between care work and contract is enforced even in those cases that uphold agreements entered into by family members. Courts are, for example, willing to enforce agreements, like premarital contracts, that waive an individual's right to property or alimony payments at the conclusion of a marriage.[81] While courts initially declined to recognize these agreements at all, based in part on the fear that they promoted divorce, these agreements, like divorce itself, have become so commonplace that the concern has been rendered mostly moot.[82] Yet, as Katharine Silbaugh has demonstrated, courts uphold provisions governing property distribution or alimony payments even as they persist in refusing to allow the parties to contract for "nonmonetary terms," which include the division of labor within a marriage and child custody.[83] That is, where spouses, or spouses-to-be, enter into a written contract, "courts only enforce the provisions governing money."[84]

The standard reasons courts provide for upholding this distinction are that contracts involving services either lack consideration or violate public policy.[85] The lack-of-consideration rationale depends on the assessment that nonmonetary contributions, like homemaking services, are duties established by virtue of the marital relationship itself. As Silbaugh explains, "[h]ome labor,

78. *Id.* There was also a suggestion that the daughter might have been lying. The court noted that "[t]he only evidence of these personal services is in [the daughter's] log and her employer indicating that she left work to go visit her mother." *Id.*; *see also* Antognini, *supra* note 18, at 34 (describing a court's reasoning surmising that a nonmarital relationship could lead to fraudulent claims).

79. Kohn, *supra* note 71, at 244 ("[A]dministrative law decisions lean in favor of treating all personal care services as non-monetary labor, and . . . this trend occurs with both female and male caregivers.").

80. *Id.*

81. *See, e.g.*, Silbaugh, *supra* note 3, at 72.

82. *Id.* at 72-74, 77-78.

83. *Id.* at 78-79.

84. *Id.* at 67.

85. *Id.* at 79-92.

sex, and cohabitation are considered basic legal duties of marriage," and so "there is no consideration for a return promise of money."[86] The reasoning is the habitual one courts employ across a variety of contexts—what is owed cannot be exchanged. The public policy reasons courts identify in declining to enforce contracts for services are that doing so would "debase" marriage or alter "its essential incidents."[87] According to these arguments, recognizing the economic value of services provided would "degrade the wife by making her a menial and a servant in the home where she should discharge marital duties in loving and devoted ministrations"[88] and, once again, introduce the profane into the sacred.[89]

These concerns—degrading the spouse or distorting the "essential" meaning of marriage—are not raised in the cases that, for instance, allow alimony to be waived. This is so even though alimony too originated as a duty owed by the husband to the wife[90] and even though access to property has been, and continues to be, central to the institution of marriage.[91] Indeed, the duty to provide support or distribute property can generally be signed away or otherwise contracted around.[92]

The different rationales reaffirm the singular notion that marriage, and the family more broadly, exist outside of the realm of exchange—but only insofar as care work is concerned. As such, courts continue to limit the agreements that can take place in the home—but only partially.[93] The scholarship has been attentive to the fact that housework continues to be devalued: Services cannot be contracted for, or around, while monetary contributions in the form of property or support can be.

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86. *Id.* at 80.

87. *Id.* at 81.

88. Silbaugh, *supra* note 3, at 82 (quoting Brooks v. Brooks, 119 P.2d 970, 972 (Cal. Dist. Ct. App. 1941)).

89. *See* State v. Bachmann, 521 N.W.2d 886, 888 (Minn. Ct. App. 1994) (quoting State v. Cooper, 285 N.W. 903, 905 (Minn. 1939)).

90. Silbaugh, *supra* note 3, at 84-87. Enforcing a premarital contract that includes a waiver of a spouse's right to alimony requires courts to make an assessment about what is considered "essential" to a marriage—but instead of engaging in this reasoning, courts "have only talked about a change in public policy with respect to divorce itself." *Id.* at 86.

91. *See id.* at 84 (describing that "the fact of marriage has an enormous impact on property").

92. *See id.* at 84-85.

93. Silbaugh also addresses other nonmonetary terms, like terms that regard children or the exercise of religion. *Id.* at 89-92.

B. From Coverture to Contract

The regime of coverture, which once defined the marital relationship, established specific duties for husbands and wives.[94] Not only were these duties not negotiable *by* contract, but upon marriage the wife could no longer enter *into* contracts.[95] The literature that addresses how contracts are enforced in the familial context does not, for the most part, explicitly link coverture to the current state of the rules, other than to refer to it as the origin of their evolution.[96] This Subpart thus adds a gloss to the scholarship by reading coverture between the lines. It contextualizes courts' reluctance to uphold contracts for services by turning to the history of coverture—the status-based regime that denied the wife the ability to contract and to reap any property for her labor. In the process, this Subpart shows that what was once a status-based impediment has morphed into an appraisal of the realities of love that leads to the same inability to contract.

Coverture involved an extensive network of rights and duties that positioned the husband as the legal head of the household.[97] At its core, coverture provided the husband ownership rights in his wife's labor.[98] Moreover, the legal union of marriage meant that the wife lost her separate legal identity, with numerous attendant consequences, including the inability to contract with her husband—as that "would be to suppose her separate existence"[99]—and the inability to contract with others.[100] This specific

94. Upon marriage, a husband had the duty to provide support, while a wife had the duty to provide services. *See* Antognini, *supra* note 10, at 2151.

95. *See id.* at 2155 (noting that the result was that the woman, "as wife or worker[,] . . . was subject to a mode of exchange that channeled her contributions to benefit her husband").

96. *See* Silbaugh, *supra* note 3, at 71 (mentioning coverture only as the basis for the "essential incidents of marriage" limit that continues to affect contracts within marriage). *But see* Hasday, *supra* note 16, at 845-46 (arguing against the standard narrative and noting instead how coverture influences courts to this day by, for instance, leading them to refuse to enforce contracts for services, with continuing impacts on wives).

97. The wife 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 10, at *430; *see also* Hasday, *supra* note 16, at 841-43, 846.

98. *See* Siegel, *supra* note 16, at 2200-01; Cheryl I. Harris, *Finding Sojourner's Truth: Race, Gender, and the Institution of Property*, 18 CARDOZO L. REV. 309, 353 (1996) ("White women were in some measure 'propertized' though they were not property itself; they were treated in a manner *like* property but were not treated *as* property as a matter of law as were slaves." (footnote omitted)).

99. 1 BLACKSTONE, *supra* note 10, at *430.

100. This unity imposed on the spouses by law went far beyond contract—it also prevented the wife from suing the husband for committing a tort against her, or even for raping her. *See* Hasday, *supra* note 16, at 841-46.

combination meant that the value of her work—both within and outside of the home—flowed not to her but to her husband. The wife's inability to contract was not separate from, but rather was part and parcel of, her inability to access property: Without contract she had no means of securing rights for herself.[101]

A classic example of how a wife's limited rights to contract restricted her ability to reap the value of her own labor—or to even labor at all—is the well-known case of Myra Bradwell.[102] It bears revisiting here given how clearly Justice Bradley's concurrence links Myra's status of wife with the inability to contract and disables her from accessing property in the form of income by refusing her entry into the workforce.[103] His justification for the constitutionality of Illinois's decision to deny women admission to the bar reveals precisely how being a wife rendered a woman unfit for employment and for the world of the market more generally. According to Justice Bradley's broad-strokes reasoning, marriage was the principal justification for denying women admission to, really, any occupation: "The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband."[104] At the more granular level of doctrine, the marital unity that covered the woman in her husband's identity prevented the wife from, "without her husband's consent," entering into any "contracts which shall be binding on her or him."[105] It was "[t]his very incapacity" that "render[ed] a married woman incompetent fully to perform the duties and trusts that belong to the office of attorney and counsellor."[106]

Justice Bradley relied on the disabilities imposed by coverture both to construct and to cement the conflict between the woman's status as wife and

101. Wives were unable to retain their own income until the passage of the earnings statutes in the mid-nineteenth century. *See* Siegel, *supra* note 16, at 2130-31 ("The earnings statutes conferred on wives the capacity to contract and a property right in their own labor, and so raised a possibility not contemplated at common law: that wives might contract with their husbands for the performance of household services and thereby introduce market relations into the family.").

102. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141-42 (1873) (Bradley, J., concurring). While this Article's object of study is state court decisions, this Subpart focuses on Supreme Court opinions addressing the constitutionality of restrictions on contract both to illustrate how limits on the right to contract actively define the appropriate roles ascribed to women and to elevate a phenomenon that routinely takes place "underneath" the law. *See* Martha Minow, *"Forming Underneath Everything That Grows": Toward a History of Family Law*, 1985 WIS. L. REV. 819, 819 (asserting that "[f]amily law is . . . 'underneath' other areas of the law" due to its "low status within the profession" and because "its rules about roles and duties . . . underlie other rules").

103. *Bradwell*, 83 U.S. (16 Wall.) at 141-42 (Bradley, J., concurring).

104. *Id.* at 141.

105. *Id.*

106. *Id.*

her participation in the market. His concurrence pinpointed a married woman's inability to contract as the justification for her exclusion from the marketplace. This inability, caused directly by her marriage, rendered her incapable of securing rights to property not only within, but also outside of, her relationship.[107]

Of course, the very reason the case was brought at all was that Myra Bradwell—the married woman requesting admission to the Illinois bar—straddled both worlds, as wife and aspiring lawyer, a reality that Justice Bradley's concurrence papered over. Myra was seeking a license to practice in order to "be of valuable assistance to her husband in his business."[108] Myra's lived experience thus captured the more fluid reality of the social roles husbands and wives occupied at that time, which Martha Minow has shown can be glimpsed in Justice Bradley's semantic slip from what "is" to what "should be."[109]

Nonetheless, Justice Bradley's reasoning prevented Myra from being both a wife and a worker—at law if not in reality.[110] His concurrence crystallized how the doctrine of coverture worked to create a legal cleavage between wife and worker, and in the process it defined what a woman's role "should be":

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107. *Id.* Justice Bradley's concurrence focused only on married women, dismissing the existence of single women as "exceptions to the general rule." *Id.* at 141-42; *see also* Dubler, *supra* note 24, at 799 (arguing that Justice Bradley's concurrence minimizing the existence of single women was a way of minimizing the threat they posed to marriage as the sole structure dictating women's social and political position).

108. Minow, *supra* note 102, at 847 (quoting *Myra Bradwell*, 26 CHI. LEGAL NEWS 200, 200 (1894)). That is, she was seeking entry into the legal profession to *better serve* her husband! But, as Martha Minow has shown, Myra Bradwell's "immersion in the legal interpretations of the privileges and immunities clause, her immersion in the legal norms of precedential interpretation, and her restraint in trumpeting any more expressly [show] how her life defied the separate spheres construction of women's roles" that Justice Bradley's concurrence pronounced as an inviolate maxim. *Id.* at 849.

109. *Bradwell*, 83 U.S. (16 Wall.) at 141 (Bradley, J., concurring) ("Man is, or should be, woman's protector and defender."); *see also* Minow, *supra* note 102, at 845 (arguing that Justice Bradley "in effect acknowledged the vulnerability of his claims of natural and divine authority for his views of women's role by noting the tensions in his opinion between 'is' and 'ought,' between judicial and legislative power, and between analysis of the Constitution and the recognition of social reform movements raging outside the courtroom"); Michele Goodwin, *A Different Type of Property: White Women and the Human Property They Kept*, 119 MICH. L. REV. (forthcoming 2021) (manuscript at 6-7), https://perma.cc/J5HR-JBRU (complicating the narrative of women encapsulated in *Bradwell* by "disput[ing] prior accounts that dismissed white women's involvement in capitalism generally and human commodification specifically" and "show[ing] that 19th and 20th century jurisprudence disempowering women . . . reflected paternalist norms baked into law by men for the purposes of honing and preserving male power").

110. *See* Minow, *supra* note 102, at 849 ("Finally, the denouement: Bradwell did become an honorary member of the bar, and a special act of the state legislature authorized her to keep her own earnings, even though she was a married woman.").

"The paramount destiny and mission of woman are to fulfil[l] the noble and benign offices of wife and mother."[111] Denying a woman access to the world of work ensured that she remained outside of the market—her sphere was staunchly in the home, where her labor was not her own. As wife or worker, though, the woman was subject to a different mode of exchange—she was both limited by contract and excluded from it.

Even once the wife was allowed entry into the market, her right to contract was limited. Restrictions that were based on the status of marriage morphed into restrictions based on the realities of motherhood. Take Justice Brewer's opinion in *Muller v. Oregon*, which set boundaries around a woman's right to participate in the market by limiting her rights to contract.[112] The Court in *Muller* upheld protective legislation restricting a woman's work hours to ten per day, concluding that it was not an unconstitutional infringement on her right to contract.[113] Justice Brewer justified such regulation as necessary by virtue of "woman's physical structure and the performance of maternal functions" that "place her at a disadvantage in the struggle for subsistence."[114] While Justice Bradley in *Bradwell* had relied on women's inability to contract upon assuming the status of wife, bolstered by musings on their proper sphere, the Court in *Muller* naturalized their condition by locating it in the physical differences between men and women.[115] Justice Brewer presented these "obvious" differences as "matters of general knowledge" and related as uncontroverted reality "the inherent difference between the two sexes."[116] Because a woman could always potentially be a mother, the Court reasoned, a decision that would otherwise have been between her and her employer became one of public importance—"as healthy mothers are essential to vigorous offspring, the physical well-being of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race."[117]

The limits *Muller* imposed on a woman's right to contract secured the home as her principal, if no longer her only, sphere. The dependence upon her husband was sustained, as he was able to contract much more freely than she in

111. *Bradwell*, 83 U.S. (16 Wall.) at 141 (Bradley, J., concurring). As often as those words have been quoted, they will never cease to lose their perverse appeal.

112. 208 U.S. 412, 422 (1908).

113. *Id.* at 417, 422-23.

114. *Id.* at 421.

115. *See* Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 323 (1992) (describing *Muller*'s "physiological reasoning and its repeated pronatalist themes" as "a product of the campaign to criminalize abortion as well as the interest in eugenics").

116. *Muller*, 208 U.S. at 421, 423.

117. *Id.* at 421.

the marketplace.[118] In fact, the Court took the opportunity to reaffirm the then-recently-decided case of *Lochner v. New York*, which had struck down as unconstitutional "a law providing that no laborer shall be required or permitted to work in a bakery more than sixty hours in a week or ten hours in a day."[119] *Muller* explained away the contradictory outcomes, reasoning that such a restriction "was not *as to men* a legitimate exercise of the police power of the State, but an unreasonable, unnecessary, and arbitrary interference with the right and liberty of the individual to contract in relation to his labor."[120] Simply stated, the difference between men's and women's right to contract rested on "the difference between the sexes."[121] These differences, according to the Court, lay both in "woman's physical structure" and in "the functions she performs in consequences thereof."[122]

Similar to Justice Bradley's elision of what "is" with what "should be," Justice Brewer began from a description of the ability to become pregnant—a "woman's physical structure"[123]—and ended with the social roles women are cast into as a result—those "functions she performs."[124] While the women in *Muller* could, unlike Myra, contract and therefore work, Justice Brewer effectively extended the limits on contract to include not only wives by virtue of their status but all women by virtue of their capacity to reproduce.

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118. *See id.* at 418-19, 422. This is not to imply that the freedom to contract without state regulation, if possible, is normatively desirable. *See* Robert L. Hale, *Coercion and Distribution in a Supposedly Non-coercive State*, 38 POL. SCI. Q. 470, 470 (1923) (arguing that "the systems advocated by professed upholders of *laissez-faire* are in reality permeated with coercive restrictions of individual freedom"). Moreover, the history of these workplace laws shows that they were the product of "hard-fought advocacy and leadership by a broad coalition of women's organizations on behalf of low-wage working women." Ann O'Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 11-14 (2007). The point here is only to underscore the decidedly different ways in which men and women were granted the freedom to contract and the justifications raised in the process.

119. *Muller*, 208 U.S. at 418-19 (citing Lochner v. New York, 198 U.S. 45 (1905)).

120. *Id.* (emphasis added).

121. *Id.* at 419.

122. *Id.* at 420; *see* Siegel, *supra* note 115, at 323 (describing *Muller* as embracing a "'realism' of a new sort" in which the Court "reason[ed] about women's bodies as no constitutional or common law opinion of the early nineteenth century ever did").

123. *Muller*, 208 U.S. at 420. This is not to accept this view. Men may become pregnant if they once possessed and retained the ability to do so. *E.g.*, Beatie v. Beatie, 333 P.3d 754, 755 (Ariz. Ct. App. 2014) (finding that the requested divorce was between a different-sex couple where the husband was transgender and carried three children born to the marriage).

124. *Muller*, 208 U.S. at 420; *cf.* David Fontana & Naomi Schoenbaum, *Unsexing Pregnancy*, 119 COLUM. L. REV. 309, 368 (2019) (arguing against a legal regime that reinforces female caretaking to the exclusion of male caretaking during pregnancy, noting that "[w]omen can be workers and parents, and so can men").

Women are thus defined vis-à-vis the home—first as wives and then as mothers—when their role as workers is at stake. Even once they return to their appropriate sphere, any labor they perform is for the benefit of others, rather than for themselves. While women can now work outside the home, and marriage no longer sets forth explicitly gendered duties, the limits imposed on contract reinforce a state of affairs that has more than just its roots in coverture—it continues the effects of coverture. Reva Siegel has meticulously shown how courts continued to devalue work done within the home after the official abolition of coverture by adopting the language of love in interpreting interspousal contracts for services.[125] Rather than owing any duties to the husband, "the wife works for her husband 'freely'—a description of the relationship attentive to questions of love *and* money."[126] Siegel explains the distributive consequence of how love works: "Courts invoke the discourse of altruism in order to impute to women a decision to give a husband title to marital property in which the wife is in fact claiming an interest."[127] Despite courts' declarations that love and money are mutually exclusive, their decisions allow the recipient of the love-inspired labor to retain all of its value. The inability to enter into enforceable contracts in this realm means that the wife works for free within her home, even if she no longer has any explicit duties as a wife.[128]

Courts continue to enforce the division between the home and the market—the former as a place where altruism and gratuitous labor reign—by policing the right to contract, cleansed from its explicit associations with coverture. In contrast to Justice Bradley's manifest appeals to the status of marriage, and more in line with Justice Brewer's pronouncements about inherent differences between the sexes, courts now rely on descriptions about the nature of the relationship itself. This rule by contract is also harder to identify given that courts enforce *some* contracts; they uphold a right to contract, for instance, when wives sign away rights to property that marriage would have otherwise granted them.[129] Upon closer inspection, however, it becomes clear that they do not uphold contracts addressing the provision of

125. Siegel, *supra* note 16, at 2202 ("In the market work is performed for material gain, while in the household work is performed out of a 'disinterested' sense of love and duty.").

126. *Id.* at 2206.

127. *Id.* at 2208 (emphasis omitted).

128. *Id.* at 2196-97 ("The principles courts developed at the turn of the century to justify the prohibition on interspousal contracts for domestic labor still govern such contracts today.").

129. *See* Silbaugh, *supra* note 3, at 77, 98 (noting that "[m]en bring more wages to a marriage and women bring substantially more unpaid labor" and so in considering "the disparate treatment of wage and home labor, we are looking at the disparate treatment of men's and women's labor").

services. In this way, the limits on contract continue to prevent wives from securing rights to property for labor performed.[130] Of course, married women now work and are lawyers.[131] But the fact that wives can and do work outside of the home should not detract from how the law continues to devalue the work done *within* the home through the timeworn mechanism of limiting their rights to contract therein.

While coverture is no longer an articulated limit on contract, it provides a tangible mechanism for understanding how the devaluation of labor in the home takes place. And the reasons courts provide in the context of husbands and wives, rooted in the teachings of coverture, closely track the reasons provided in the context of other family relationships. Significantly, the devaluation of services applies beyond agreements entered into by spouses—as Kohn's work shows, it impacts other recognized family relations, as between children and their parents.[132] But the reasoning employed in these circumstances follows familiar outlines—caretaking services are duties owed to family members, which courts refuse to recognize as a valid basis for contract.[133]

For our purposes then, coverture is a, if not *the*, foundational model for understanding the instantiation of separate spheres across family relationships. Its work is currently accomplished through rationales contained entirely in

130. Wives, and women in general, are still responsible for undertaking most housework. *See* SHARON SASSLER & AMANDA JAYNE MILLER, COHABITATION NATION: GENDER, CLASS, AND THE REMAKING OF RELATIONSHIPS 67 (2017) (noting that while wives still undertake most of the housework in marriage, "gender trumps union status" given that cohabiting women also "continue to spend significantly more time in domestic labor than do cohabiting men").

131. But working conditions still make it difficult for women to be both mothers and workers. In more physically demanding jobs, "[p]regnant women risk losing their jobs when they ask to carry water bottles or take rest breaks" while "[i]n corporate office towers, the discrimination tends to be more subtle" and "[p]regnant women and mothers are often perceived as less committed, steered away from prestigious assignments, excluded from client meetings and slighted at bonus season." Natalie Kitroef & Jessica Silver-Greenberg, *Pregnancy Discrimination Is Rampant Inside America's Biggest Companies,* N.Y. TIMES (Feb. 8, 2019), https://perma.cc/M6SV-KY43.

132. Kohn, *supra* note 71, at 213 (arguing that "states are, quietly and without fanfare, adopting rules that treat contracts between family members for elder care as fundamentally different from those between unrelated parties, and elder care provided by family members as non-economic activity").

133. *See supra* Part I.A. If a reader is more convinced by the argument that homemaking and caretaking services are devalued generally, and marriage along with other intimate relations are only one specific example of this larger phenomenon, then so be it. This Article does not seek to resolve the proverbial chicken-or-egg question. It only relies on coverture as a specific and grounded explanation for how homemaking services have been devalued, and how limits based on relationship status have drifted into limits based on the nature of all relationships.

contract law rather than in status. Because courts now articulate their reasons in terms of the nature of relationships, the obligations of family members, and the requirements of love, the asymmetrical state of affairs identified in the literature remains axiomatic. Coverture's recasting further helps to explain how it appears in nonmarital relationships: In the absence of status, contract emerges as an important tool for the parties, and thus a critical doctrine for courts to apply.

C. Right to Contract in the Nonmarital Literature

While the literature on contracts in marriage and other formal family relationships includes accounts of the right's various limits, the literature on nonmarriage typically assumes that entering into an express contract adequately protects the intent, and property rights, of the respective parties. The central problem the nonmarital literature currently formulates with respect to contracting is that unmarried couples just fail to enter into these types of agreements. When the scholarship centers on contract more directly, it does so as a conceptual framework for establishing rights outside of status-based relationships. If the limits on contract are raised in this latter context, it is not as a matter of doctrine but more as an existential concern about the suitability of using contract principles to understand, and recognize, intimate relationships.

Most examinations of the right to contract in the nonmarital literature are rather cursory, given that relatively few cases involving express agreements are addressed in court.[134] When scholars do in fact consider express agreements, they generally concur, as a purely descriptive matter, that they would be upheld.[135] To be clear, such assertions are not prima facie incorrect, given that many courts indicate that they would uphold these types of contracts where alleged.[136] It takes a more rigorous analysis to notice the

134. This could be either because the agreements are effective in preventing litigation or because couples do not enter into these agreements at all. There is some evidence to support the latter view. Jennifer K. Robbennolt & Monika Kirkpatrick Johnson, *Legal Planning for Unmarried Committed Partners: Empirical Lessons for a Preventive and Therapeutic Approach*, 41 ARIZ. L. REV. 417, 436-37 (1999).

135. *See infra* notes 139-45 and accompanying text.

136. This phenomenon is captured neatly by the cases contained in the "Remanded or Dispositive Motion Denied" section of the Appendices. Most of the cases under this section are either deciding or overturning a dispositive motion, or answering a certified question, meaning they are considering questions of law. *See, e.g.*, Sheinker v. Quick, 120 N.Y.S.3d 568, 570-71 (App. Div. 2020) (reversing summary judgment in favor of the defendant because in New York "the express contract of such a couple is enforceable" and the "plaintiff pleaded the elements of a cause of action for breach of contract"). Courts that remand or otherwise continue the case for further litigation thereby affirm the legal possibility of enforcing an express contract without actually

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uneven way in which these contracts are actually enforced.[137]

The statements in the literature typically convey the basic idea that courts will uphold an express contract should they have occasion to consider one; they then rely for support on a case or two that either uphold an express contract, mostly citing to cases that address a same-sex couple before they had the right to marry, or suggest the possibility of enforcement.[138] Scholars therefore accept that "all but two American jurisdictions will enforce express cohabitation contracts"[139] or that a "[w]ritten agreement between cohabitants to share will be enforced in most states."[140] These assertions are accurate insofar as only two jurisdictions explicitly assert that they will *not* enforce even *written* contracts based on a relationship; but it is not at all clear that the other forty-eight states will uphold such contracts if faced with a request to consider them.

Practitioners mostly understand that certain agreements are on shaky foundation: Legal guides targeting unmarried couples recommend avoiding clauses that address "housecleaning, cooking, care of pets, or home decoration,"

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doing so. *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976) (en banc), *modified on remand*, 122 Cal. App. 3d 871 (1981), is perhaps the paradigmatic example of how a court can boldly outline the contours of a right without providing any substance to that right. Michelle Triola was ultimately unable to prove an oral contract, and her claim to any property was eventually overturned. *See* Ann Lacquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1381-82 (2001) ("After a three-month trial, Judge Marshall found that Lee and Michelle had never agreed to combine or share their earnings and property, that they had never agreed that Michelle would give up her career . . . [and] that Lee had never agreed to provide for her financial needs and support for the rest of her life."). Meanwhile, focusing on the cases in Appendix B, which are overrepresented in the literature, *see infra* note 138 and accompanying text, also gives the impression that express contracts are routinely enforced, given that courts are more willing to enforce contracts in the same-sex context that would fail in the different-sex context. *See infra* Parts II.A-.B; Appendices A, B.

137. This is also true of the right to contract in marriage and other recognized family relationships. *See supra* Part I.A.

138. *See, e.g.*, Strauss, *supra* note 29, at 1278 & nn.102-03 (referencing a total of three cases, two of which involve same-sex couples: *Whorton v. Dillingham*, 248 Cal. Rptr. 405, 410 (Ct. App. 1988); *Posik v. Layton*, 695 So. 2d 759, 762 (Fla. Dist. Ct. App. 1997); and *Forrest v. Ron*, 821 So. 2d 1163, 1165 (Fla. Dist. Ct. App. 2002)). The first two cases address same-sex couples; the third case involves a more attenuated claim for "bridge the gap" money in the context of an action establishing a father's financial responsibility. *Id.*; *Forrest*, 821 So. 2d at 1165; *see also* Joslin, *supra* note 32, at 931-32 (citing one of the same cases addressing a same-sex couple, *Posik v. Layton*).

139. *See* Strauss, *supra* note 29, at 1278 & n.98 (identifying Illinois and Georgia as jurisdictions that will not enforce such contracts). Gregg Strauss also notes that in the remaining jurisdictions, "these contracts are limited in several ways," including by the Statute of Frauds, or by the prohibition on contracts for sexual services, or by the refusal to enforce "provisions governing everyday life." *Id.* at 1278.

140. Joslin, *supra* note 32, at 931.

indicating that courts will not enforce them.[141] Nonetheless, scholars describe "the dominant rule" to be that courts will enforce express contracts *tout court*.[142] The literature is replete with similar claims, reaffirming the availability of contract to individuals in nonmarital relationships.[143]

The scholarship thus characterizes the central problem as the lack of express agreements to enforce, rather than as courts' reluctance to enforce such agreements.[144] While evidence suggests that this former observation is likely

141. *See, e.g.*, Strauss, *supra* note 29, at 1278 (citing Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L.J. 226, 313 (2006)). The American Bar Association also specifically warns against "pillow-talk" agreements based on statements of responsibility during moments of intimacy. VIVIANA A. ZELIZER, THE PURCHASE OF INTIMACY 63 (2005) (describing the American Bar Association's *Guide to Family Law*, which states that unmarried couples can enter agreements for "rent, mortgage, utilities, groceries, auto expenses" but not ones that entail general promises such as "I'll take care of you" (quoting AM. BAR ASS'N, GUIDE TO FAMILY LAW: THE COMPLETE AND EASY GUIDE TO THE LAWS OF MARRIAGE, PARENTHOOD, SEPARATION, AND DIVORCE 6-7 (1996))).

142. Joslin, *supra* note 32, at 931-32; *see also* Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 817-18 (2005) ("[T]he majority [of courts] now permit former cohabitants to recover based on both explicit promises made during the relationship and implicit agreements derived from conduct.").

143. *See, e.g.*, Mary Anne Case, *Commentary on* McGuire v. McGuire, *in* FEMINIST JUDGMENTS: FAMILY LAW OPINIONS REWRITTEN 37, 42 (Rachel Rebouché ed., 2020) ("[T]he laws in the United States generally give such [cohabiting] couples only such rights and duties as they affirmatively agree to, either by marrying or by entering into an express or implied, oral or written contract." (footnote omitted)); *Restitution at Home*, *supra* note 17, at 2129 ("Written agreements between unmarried cohabitants, while enforceable in most jurisdictions, are rare."); Stolzenberg, *supra* note 51, at 3, 9 (assuming that a written contract enables parties to set out their obligations but noting that contract is limited because "most cohabitants do not negotiate explicit contracts with one another"); Carbone & Cahn, *supra* note 20, at 56, 78 (describing the state of the law regarding unmarried adult couples as "impos[ing] almost no obligations without either an express agreement or evidence of combined assets" and observing that "courts will intervene in accordance with the parties' express agreements"); Strauss, *supra* note 29, at 1278-79, 1293 n.188 (addressing the obligations imposed on individuals in unmarried relationships, including the right to contract, and separately suggesting that the refusal to enforce domestic services in contracts between spouses "would not apply if the law abandoned a status-based regime of marital obligations"); Hasday, *supra* note 13, at 507, 510 (describing how the law regulating nonmarital relationships "devotes enormous energy to differentiating between relationships" and that, unlike in marriage, "contracts between unmarried sexual partners for domestic services are enforceable"). It bears mention that the aim here is not to critique any specific scholar; instead, this overview is only intended to provide a sense of how contracts outside of marriage are routinely characterized. Importantly, the references these scholars make to a couple's ability to contract are generally not central to the claims they advance, but rather asides that find superficial support in the case law.

144. Much of it also considers written contracts, to the exclusion of express contracts more generally. *See, e.g.*, Joslin, *supra* note 32, at 932 (noting that "the rule [that written agreements between cohabitants are enforced in most states] is not very helpful in

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correct,[145] it misses an essential node of the analysis—that courts might not actually enforce such contracts even if more unmarried couples entered into them.

The literature also considers contract in its conceptual dimensions—these are pieces that address contract-centered notions of autonomy and the theoretical relevance of contract doctrine to nonmarital relationships. Scholars who are worried about conscription into unwanted statuses tend to rely on contract as a more appropriate way of enforcing obligations between partners. June Carbone and Naomi Cahn, for example, have argued that a couple's decision not to join their lives in matrimony indicates their intent not to share obligations and therefore support an approach that "allows cohabitants to enter into contacts" while "stop[ping] short of implying any broader commitments from the existence of an unmarried intimate relationship itself."[146] Kaiponanea Matsumura has sought to recover a more "textured" definition of consent present in contract law, in order to ensure that obligations are being chosen by the parties to the relationship.[147] Marsha Garrison, placing stock in blanket demographic differences between married and unmarried couples, also has argued that "consent is necessary" to impose obligations on those who do not marry, even outside of an explicitly contract-based framework.[148] In espousing choice and autonomy, these scholars provide different descriptions of the current state of the law. Carbone and Cahn characterize courts as being responsive to "the parties' express agreements."[149] Garrison for the most part agrees.[150] Matsumura, on the other hand,

practice" given that "few cohabiting couples enter into these kinds of written agreements"); Stolzenberg, *supra* note 44, at 2020 (arguing that "because most cohabitants do not negotiate, let alone memorialize in writing, explicit contracts," states that recognize such contracts "do little to protect the economically weaker partner").

145. Robbennolt & Johnson, *supra* note 134, at 439 (finding in their study that only a "small number of respondents . . . entered into written agreements" and that "older and more highly educated people were more likely to have written agreements").

146. Carbone & Cahn, *supra* note 20, at 57-58.

147. Kaiponanea T. Matsumura, *Consent to Intimate Regulation*, 96 N.C. L. REV. 1013, 1022-23 (2018).

148. Garrison, *supra* note 142, at 885, 894, 896-97 (arguing for a more narrowly tailored revival of common law marriage as a way to "recognize private marital commitments").

149. Carbone & Cahn, *supra* note 20, at 78 (contrasting the "financial context" with the "child support and custody contexts," describing the former as a place where the law "respects the parties' autonomy" while in the latter the law "imposes obligations irrespective of the parties' agreements and circumstances").

150. Garrison, *supra* note 142, at 817-18 (asserting that most jurisdictions allow "former cohabitants to recover based on both explicit promises made during the relationship and implicit agreements derived from conduct").

recognizes that, at least insofar as implied contracts go, they generally "depart[] from mainstream contract doctrine, which takes a more permissive view of contract enforcement."[151]

Other scholars argue that the contract framework is inadequate to capture the nature of the agreements made in the course of an intimate relationship. Ira Ellman has identified the flaw in *Marvin v. Marvin*,[152] and other such cases, to be "contract thinking."[153] As Ellman explains, "[i]f couples do not in fact think of their relationship in contract terms, then a doctrine that directs courts to decide their disputes by looking for a contract is unlikely to find one"—be it either express or implied.[154] Ellman argues that a "successful intimate relationship is reciprocal, but not contractual," meaning that an intimate relationship does not involve a "bargained-for exchange."[155] He thus accepts that, at least under contract law, "the presumption that services are rendered 'gratuitously' is probably correct."[156] Emily Sherwin has made a similar point in the context of restitution, characterizing most exchanges that take place during the course of an intimate relationship as "consensual acts of generosity, performed with no expectation of reimbursement," or, "in other words, valid gifts."[157]

By rejecting the concept of exchange in favor of the concept of gift giving or altruism where intimate relations are concerned, the literature that finds contract principles inapposite to nonmarital couples reflects the same assumptions courts routinely make. While it may be that the individuals in an intimate relationship understand their contributions as gratuitous,[158] this

151. Matsumura, *supra* note 147, at 1020-21.

152. Marvin v. Marvin, 557 P.2d 106, 116 (Cal. 1976) (en banc) (holding "that adults who voluntarily live together and engage in sexual relations are nonetheless as competent as any other persons to contract respecting their earnings and property rights"), *modified on remand*, 122 Cal. App. 3d 871 (1981).

153. Ellman, *supra* note 19, at 1365, 1367.

154. *Id.* at 1367-68.

155. *Id.* at 1375; *see also* Strauss, *supra* note 29, at 1294 (describing couples as "often expect[ing] reciprocity and equal contributions" and "rarely pric[ing] their contributions or seek[ing] to maximize the return on those contributions"). Strauss explains that "relying on contract law [would] force[] intimates to structure the terms of their relationship to meet the demands of contract." Strauss, *supra* note 29, at 1294.

156. Ellman, *supra* note 19, at 1375. Instead, Ellman suggests a couple's obligations to each other should be determined based on their relationship's similarity to marriage. *Id.* at 1377-79.

157. Emily Sherwin, *Love, Money, and Justice: Restitution Between Cohabitants*, 77 U. COLO. L. REV. 711, 712, 724 (2006). Sherwin would characterize both property and services in the same manner. *Id.* at 724. Courts, however, do not. *See* Antognini, *supra* note 10, at 2173.

158. However, it is important to note that courts refuse to uphold contracts between parties who clearly seek that specific form of agreement. *See infra* Part II.A.

understanding is not immune from how the law characterizes the relationship. That is, not only does the law create a space in which individuals cannot bargain, given the "altruistic" label courts place on certain activities, but it also has the effect of preventing individuals from understanding that their own work has any value in the first instance.[159] In this manner, the legal presumption of gratuity makes it so—even from the perspective of the couples themselves.[160]

Courts' characterizations of labor within the home affects the social realities in which men and women function. It is perhaps easiest to see this basic point with the clarity of hindsight: Justice Brewer's reasoning in *Muller*—that a woman's work is defined by her role in the family—helps ensure that it is by limiting her right to contract at work. Because of the difficulty in disentangling the way things are from how the law says they should be, "it takes an act of critical scrutiny to discern that market relations have been systematically delimited" to stop at the home.[161]

This critical scrutiny must now be applied to the law regulating intimate relationships *outside* of marriage. Given how such contracts fare within marriage—the template for how courts address nonmarital relationships—there may be reason to question how they are interpreted in the nonmarital space. It is thus imperative to delve into the cases to see whether express agreements are in fact enforced and, if so, under what conditions.

II. Contracts in Nonmarriage

This Part takes a deep dive into the cases that consider allegations of express contracts in nonmarital relationships that end through separation. It collects insights from a comprehensive canvassing of the reasoning set forth by these decisions,[162] which are limited in number—probably a result of the combination of both the fact that unmarried couples do not often enter into express contracts, oral or written, and that such agreements are successful in

159. *Cf.* Siegel, *supra* note 16, at 2209 (noting that in marriage, "the relative infrequency of [interspousal] contract claims demonstrates the prescriptive force of the legal rule—not its inconsequentiality").

160. As Siegel has explained in the context of marriage, "the law of marital status . . . shapes family relations that never make their way into court" by ensuring that what takes place in the family stays in the family. *Id.* at 2208 ("In the market, the realm of interested exchange, the state would enforce promissory bargains. But in the home . . . exchange would be 'voluntary.'").

161. *Id.* at 2210. And the problem with this limitation is that this labor "is, with equal systematicity, expropriated from women on an ongoing basis." *Id.*

162. The cases are current through May 2020.

preventing litigation.[163] The cases span numerous jurisdictions, with New York and California leading in terms of sheer quantity.[164] These two jurisdictions are therefore especially instructive in demonstrating how courts articulate a broad willingness to recognize express contracts and yet mostly enforce them only in a narrow set of circumstances.[165]

This Part focuses on categorizing courts' reasoning. Although it is an admittedly treacherous proposition to generalize across the common law of various states, this Part does just that.[166] It begins by cataloging courts' refusals to uphold contracts outside of marriage. These decisions rely on the nature of an intimate relationship to find that no valid contract has been created; in the process, they mirror almost exactly the reasons for declining to uphold contracts within marriage. This is so even as marriage provides *the* reason for prohibiting contracts for services and even as courts insist that they are preserving the distinctions between marriage and nonmarriage.[167] This Part also addresses the substantial number of remands in the different-sex context, which are important to underscore given that they confuse the legal landscape.[168] Indeed, they function a bit like Trojan horses in that they set out a broad right that is in practice only narrowly construed. Although these decisions might benefit the specific party before the court, by potentially incentivizing a settlement, they do little to advance the state of the law.[169]

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163. Data are limited on what happens outside of the courtroom. Robbennolt & Johnson, *supra* note 134, at 418, 435-36, 457 (engaging in an empirical study "to shed light on the long-term planning practices of unmarried committed partners").

164. New York leads the 34 jurisdictions that are represented in the Appendix with 24 cases, while California is in second place with 16. Connecticut is a close third with 11, and New Jersey is in fourth place with 7. *See infra* Appendices A, B.

165. This argument is centrally about the reasons provided for upholding a contract, rather than the number of cases that do so. For instance, even though 36 cases enforce a contract in the different-sex context, *see infra* Appendix A, a number that is clearly not zero, this Part argues that the conditions under which the vast majority are enforced are restricted to financial contributions or only address property interests. *Compare infra* Table A.4 (identifying 8 cases from 4 jurisdictions), *with infra* Table A.5 (identifying 28 cases from 17 jurisdictions).

166. The analysis contained in this Part is based entirely on the cases identified in the Appendices. *See infra* Appendices A, B.

167. *Cf.* Antognini, *supra* note 10, at 2144 (arguing that marital doctrine of coverture also affects the tools courts have at their disposal in addressing property distribution claims outside of marriage).

168. *See infra* Appendix A.

169. While the decisions that allow a case to move forward do ultimately very little to collapse the division between services and property, they might help the individual seeking property in that specific case, by creating an incentive to settle. *See* Lewis Kornhauser & Robert H. Mnookin, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 997 (1979) ("Individuals in a wide variety of contexts bargain in the shadow of the law. . . . In each of these contexts, the preferences of the parties, the

footnote continued on next page

This Part then addresses those cases that uphold an express contract. Courts mostly enforce contracts in different-sex relationships where those contracts can be understood to concern purely financial interests. The few jurisdictions that uphold contracts based on services in this context reveal just how contingent the contract reasoning courts undertake in the typical case is and help question the standard justifications for refusing to do so. In the context of same-sex couples who were unable to marry during the course of their relationship, courts are more willing to uphold a wider range of contract claims, including those based on personal services.[170]

Importantly, the cases that decline to enforce contracts in the different-sex context are, in terms of absolute numbers, on par with the cases that decide to enforce them.[171] In the same-sex context, twice as many cases enforce contracts as those that decline to do so.[172] While this difference in outcomes reveals a willingness to enforce contracts when the couple was same-sex,[173] the most important distinguishing factor is not the number, or even proportion, of contracts enforced but rather the reasons proffered in the process: The failure of consideration or of other standard contract-based doctrines that is commonplace in the different-sex context does not foil the contract in a same-sex relationship.

A. Contracts Not Upheld

The nonmarital sphere reproduces the central distinctions present in the familial context writ large, despite the absence of marriage or of any formal family relationship. As already indicated, all jurisdictions except for two state

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entitlements created by law, transaction costs, attitudes toward risk, and strategic behavior will substantially affect the negotiated outcomes.").

170. The reader might notice that many of the cases upholding contracts in a same-sex relationship involve a written contract, generally drafted with the help of an attorney. *See infra* Part II.B. While proportionally more of the same-sex than the different-sex cases involve written agreements, oral agreements are upheld in the same-sex context, and written agreements fail in the different-sex context. *See infra* Appendices A, B.

171. The total number of cases that decline to enforce a contract is 50, compared to 36 cases that uphold one. However, this Article sets to the side those cases that decline to enforce contracts based on burden of proof issues and credibility determinations. It therefore takes as the relevant comparison cases that uphold a contract and cases that decline to do so on the basis of doctrine, as in there was no mutual assent or no consideration, or the agreement was against public policy. That number is more equivalent—33 cases refuse to uphold the contracts before the court while 36 do. *See infra* Appendix A.

172. *See infra* Appendix B.

173. This proportion might soon change, however, either because courts decide to enforce more contracts entered into by different-sex couples or decline to enforce more contracts entered into by same-sex couples.

that they recognize express contracts entered into by a nonmarital couple.[174] Some allow for *only* express contracts—either written or oral—to create obligations in a nonmarital relationship.[175] While the majority of contracts alleged in this space are oral rather than written,[176] the form the contract takes should not, and generally does not, change the outcome of the cases in jurisdictions that recognize oral, in addition to written, contracts.[177]

Regardless of the specific approach different jurisdictions adopt, courts routinely decline to uphold an express contract alleged in a different-sex

174. Only two jurisdictions—Georgia and Illinois—expressly state that they do not recognize even written contracts based on the relationship. Strauss, *supra* note 29, at 1278 n.98.

175. New York, for example, recognizes express contracts, which it defines as either written or oral. *See* Morone v. Morone, 413 N.E.2d 1154, 1156-57 (N.Y. 1980) (recognizing that a couple's unmarried status does not bar an express oral contract). Minnesota has "antipalimony" statutes that purportedly deny property rights between unmarried couples unless there is a written agreement, but courts have interpreted them narrowly to trigger the writing requirement only where a "sexual relationship constitutes the sole consideration for the property agreement." Obert v. Dahl, 574 N.W.2d 747, 748-49, 751 (Minn. Ct. App. 1998) (citing *In re* Estate of Eriksen, 337 N.W.2d 671 (Minn. 1983)) (overturning summary judgment in favor of the defendant to consider whether antipalimony statutes did in fact apply to preclude claims to property); *see also* Antognini, *supra* note 18, at 20 n.98.

176. Out of the total 122 cases that consider an express contract, 79 of the contracts alleged are oral; 21 are written; 19 are "unknown," meaning that the court's opinion does not specify the form; and 3 cases involve allegations of both written and oral agreements. *See infra* Appendices A, B. In the same-sex context, the number of cases alleging oral contracts equals the number alleging written contracts with each having 5, while 2 cases involve "unknown" forms of agreement. *See infra* Appendix B. In the different-sex context, the cases consider 74 allegations of oral contracts, 16 of written contracts, 3 of both oral and written contracts, and seventeen of an "unknown" form. *See infra* Appendix A.

177. There is limited evidence that courts are more likely to uphold written contracts than oral contracts, though the number of cases is too small to discern any meaningful trends. For instance, in 5 cases involving written contracts in the same-sex context, courts upheld 4 contracts and remanded one for further consideration. *See infra* Appendix B. Setting aside the remands, in the 4 cases involving same-sex oral or unknown contracts, courts upheld 2 and declined to enforce 2. *See id.* Similarly setting aside the remands and also the contracts that failed on an evidentiary basis, courts in the different-sex context upheld 9 written contracts and declined to uphold 5; meanwhile, courts upheld 26 oral or unknown contracts and declined to uphold the same amount. In the cases involving allegations of both oral and written contracts, courts upheld one such claim and declined to uphold 2. *See infra* Appendix A. Needless to say, these are modest numbers. More importantly, in none of the cases does the reasoning turn on whether the contract is oral or written. Courts uphold both oral and written contracts and decline to enforce both based on the claims raised, rather than based on the form of the agreement. *See, e.g.*, *infra* Appendix A (enforcing under the relationship-based claims one written contract and seven contracts that were either oral or unknown).

relationship.[178] Refusing to uphold an express contract is distinct from concluding that no contract existed in the first instance. Courts engage in the latter determination—namely, finding that plaintiffs did not prove the existence of a contract by relying on credibility determinations and burdens of proof.[179] The phenomenon at stake here is distinct: Courts do not dispute the facts surrounding the making of the contract but find that it fails nonetheless. Courts rely on standard contract law fare—public policy concerns, lack of consideration, mutual assent, or vagueness. The reasoning underlying these different doctrinal bases oscillates between determining that the contract was based on sex and therefore illicit; that it was based on love or affection and therefore unenforceable; or that the services rendered inhered in the relationship itself and are therefore insufficient to impose any obligations on the other party.

In many ways, Justice Peters's dissent in the pre-*Marvin* case of *Keene v. Keene*[180] still describes the law of today. He explained the dilemma before the court in the following terms: "[I]f [the woman] renders nonmarital services worth $1,000 and the man contributes $1,000 in property towards [a] fund [of $2,000] she can recover nothing."[181] That is, "the majority would say that she has furnished no 'consideration' towards the acquisition of the property that is before the court."[182] But, Justice Peters explained, "[s]ervices, of course, as well as money or property, can constitute 'consideration.'"[183]

1. Sex and services

The leading case recognizing the rights of nonmarital couples, *Marvin v. Marvin*, was foundational in part because it established that individuals who were having sex were free to contract: "The fact that a man and woman live

178. If they do, then it is generally only when tangible property is at stake or when the couple could not have married. *See infra* Part II.B.

179. *See infra* Table A.2. Some of these determinations may also be suspect and influenced by problematic assumptions about the credibility of women, who make up the majority of claimants in these cases; they are, however, nonetheless distinct from finding that a contract is unenforceable on a doctrinal basis. The cases centered on questions of proof also illustrate the availability of an alternative to finding the contract fails based on, for instance, lack of consideration—if courts remain unconvinced of the existence of the contract, then they can reach that conclusion directly.

180. 371 P.2d 329 (Cal. 1962) (en banc) (Peters, J., dissenting). This is so even though *Marvin* affirmed the dissent's reasoning. 557 P.2d 106, 121 (Cal. 1976) (en banc) (relying on Judge Peters's reasoning in setting forth the principle that "[t]here is no more reason to presume that services are contributed as a gift than to presume that funds are contributed as a gift"), *modified on remand*, 122 Cal. App. 3d 871 (1981).

181. *Keene*, 371 P.2d at 339.

182. *Id.*

183. *Id.*

together without marriage, and engage in a sexual relationship, does not in itself invalidate agreements between them relating to their earnings, property, or expenses."[184] This same assertion is repeated throughout most of the nonmarital cases, whether they enforce a contract or not.[185] Yet courts struggle to find the dividing line between a couple's sexual relationship—or the "immoral and illicit consideration of meretricious sexual services"[186]—and everything else.

While "sex" clearly counts as illicit consideration, it quickly becomes entangled with services rendered. This is true even when the provision of services predated any sexual relationship, as evinced by the early-twentieth-century case of *Lytle v. Newell*, where the plaintiff, "a young girl, presumably untaught and illiterate," sued to enforce a contract for the housekeeping services she was hired to provide the defendant.[187] She had agreed "to work for him,—to be his housekeeper, to do his cooking, washing, and other necessary housework,—for which he undertook to pay her $2 per week."[188] At some point in their relationship, the parties began having sex.[189] The court set forth the controlling rule that "the existence of an illegal relation between the parties does not render illegal an express contract for the performance of services or labor . . . when the illicit relations do not form any part of the contract."[190] On retrial, however, the jury concluded that the contract "ostensibly for labor" had in fact as "its object . . . the illegal sexual intercourse

184. 557 P.2d 106, 113 (Cal. 1976) (en banc).

185. *See, e.g.*, Donnell v. Stogel, 560 N.Y.S.2d 200, 201-03 (App. Div. 1990) ("[W]e point out that a contract between parties who are living together is not unenforceable merely by virtue of the fact that their relationship had not been solemnized in a formal marriage ceremony."). *Donnell* reversed a motion to dismiss granted to the defendant and remanded to consider a written contract in which consideration was based on both "living together under the same roof as man and wife" and "contributing to the general well being of [the defendant's] business career." *Id.* For an example of a similar assertion in a case that ultimately declined to uphold a contract, see *Tompkins v. Jackson*, No. 104745/2008, 2009 WL 513858, at *12 (N.Y. Sup. Ct. Feb. 3, 2009) (recognizing "that services rendered by one paramour for the other which are non-sexual in nature and do not arise directly from such a relationship, may be deemed separable, and form the basis for compensation"). *Tompkins* declined to enforce an "alleged oral agreement to take care of plaintiff for the rest of her life in exchange for her promise to perform household duties and take care of the parties' children." *Id.* at *14.

186. *Marvin*, 557 P.2d at 112.

187. 68 S.W. 118, 118, 120 (Ky. 1902).

188. *Id.* at 118.

189. *Id.* at 119 (discussing the plaintiff's testimony that "they had no carnal intercourse" for the first two years of their relationship).

190. *Id.*

between them."[191] The mere presence of sex prevented the plaintiff from being paid for the homemaking services she was "ostensibly" hired to perform.

Modern cases coalesce around the same conclusion: Sex prevents a woman from accessing property by contract for services rendered. The reasoning now articulated collapses sex and services by presuming that they are both part of the give-and-take of any relationship.

The court in *Smith v. Carr*, decided over a century after *Lytle*, found that illicit consideration ruined the alleged contract for support.[192] It followed *Marvin*'s commitment to uphold contracts not based on meretricious consideration, but refused to recognize services that "are inextricably intertwined with the sexual relationship."[193] Before the court were only the plaintiff's "services as a 'companion, homemaker, and social hostess,'" which she had rendered during "the comparatively brief duration of both the parties' relationship and the cohabitation."[194] The court held that the "plaintiff's alleged consideration [was] inextricably intertwined with any meretricious consideration" present during their eleven-month nonmarital relationship.[195] In so doing, the court did not contest that the woman had provided "attention, availability, domestic services, companionship, comfort, love, and emotional support."[196] Instead, it conflated the provision of these services with the provision of sex.

The court in *Carr* understood *Marvin*'s reach to be limited "to situations of true cohabitation."[197] The lack of *actual* cohabitation is what led the court in *Bergen v. Wood* to conclude that the only consideration present for the oral contract to provide support was "inextricably intertwined with the sexual relationship."[198] Overturning the lower court's opinion that had concluded otherwise, the court of appeal in *Bergen* explained that the parties never cohabited during their seven-year relationship.[199] While this was not fatal in and of itself, "from cohabitation flows the rendition of domestic services,"

191. Lytle v. Newell, 74 S.W. 693, 693 (Ky. 1903).

192. No. CV 12-3251, 2012 WL 3962904, at *4 (C.D. Cal. Sept. 10, 2012).

193. *Id.* (quoting Bergen v. Wood, 18 Cal. Rptr. 2d 75, 79 (Ct. App. 1993)).

194. *Id.* (quoting the plaintiff's brief). She also claimed there was a valid contract to pay for her in vitro fertilization (IVF) procedures and to support the resulting child. *Id.* The record contained an email in which the defendant promised to support the plaintiff's IVF procedures "not just financially but spiritually as well." *Id.* at *1 n.1.

195. *Id.* at *4.

196. *Id.* (quoting the plaintiff's complaint).

197. *Id.*

198. 18 Cal. Rptr. 2d at 77-79 (finding that an oral contract for support failed for lack of consideration given that "services as a social companion and hostess are not normally compensated and are inextricably intertwined with the sexual relationship").

199. *Id.* at 76-77.

which, unlike the services provided by the plaintiff of "social companion and hostess," do "amount to lawful consideration."[200]

These cases are clearly not about prostitution—the paradigmatic sex-for-property exchange.[201] But they are also not only, or even chiefly, about sex. Rather, these cases are about sex that takes place in the course of an ongoing intimate relationship. As the court in *Smith v. Carr* explained, it found there was no bargain because the "plaintiff has not alleged she performed services *in exchange for* defendant's express promises apart from the interactions *typical of every romantic relationship*."[202] This also helps explain why the court in *Bergen v. Wood* assumed that such "services as social companion and hostess are not normally compensated,"[203] given that outside of a relationship, they would be. Not so within a relationship, where sex and services are generally understood as activities the woman, in her role as wife, provides.[204] In this way "sex" becomes a proxy for the more encompassing exchanges present in any romantic relationship, if that relationship is understood through the duties that underlie marriage. It is ultimately the relationship itself which prevents courts from recognizing an individual's right to contract.

In *Rabinowitz v. Suvillaga*, the nature of the exchanges also thwarted the oral contract alleged between Charles Rabinowitz and Irma Suvillaga, who had been together for almost ten years.[205] During their relationship, Irma took care of Charles. She "would perform 'relationship duties' which included 'doing his laundry, cooking lunch and dinner, cleaning the house, taking care of some of his hygienic needs, engaging in a sexual relationship with him, taking him to doctor's appointments, and hand[l]ing all of his medical problems.'"[206] She also shopped for groceries for the two of them, which he would reimburse, and she listed him on her health insurance plan.[207] For the most part, however, they

200. *Id.*

201. *See* Marvin v. Marvin, 557 P.2d 106, 122 (Cal. 1976) (en banc) ("To equate the nonmarital relationship of today to such a subject matter [as prostitution] is to do violence to an accepted and wholly different practice."), *modified on remand*, 122 Cal. App. 3d 871 (1981).

202. *Carr*, 2012 WL 3962904, at *4 (second emphasis added).

203. *Bergen*, 18 Cal. Rptr. 2d at 79.

204. *See* Antognini, *supra* note 18, at 40 (describing how "sex and domestic services are 'interwoven': both are duties a wife owes to her husband"); Dalton, *supra* note 34, at 1111 n.497 (explaining that the "provision of sex by the man to the woman is never suggested as the consideration for the provision of sex for the woman to the man," which implies "that women are not benefited by, or do not enjoy, the sex—but provide it for ulterior motives such as economic support").

205. No. 17 CVS 244, 2019 WL 386853, at *1, *8-9 (N.C. Super. Ct. Jan. 28, 2019).

206. *Id.* at *1 (quoting the defendant's answer).

207. *Id.*

maintained separate expenses.[208] At some point, the couple decided to move together from New York to North Carolina.[209] After Charles bought property in the latter state, Irma "packed all of the parties' belongings, travelled . . . to meet with movers and put together the parties' furniture, and began to unpack and arrange the home . . . without [Charles]'s assistance and while taking time off from work without pay."[210] During the course of the relationship, Charles promised Irma that she would never have to work again, that he would leave her money in his will, and that the home in which they lived would be hers.[211]

The court concluded that North Carolina law recognized no cause of action for the contract Irma alleged.[212] While it observed that questions related to the mutual assent of the parties and "the definite terms of that contract" would generally make the case inappropriate for a motion to dismiss,[213] here, consideration was lacking.[214] That is, agreements such as this one, which involve "illicit services," fail to "provide consideration."[215]

To be clear, North Carolina law allows for contracts between nonmarital partners but limits them to "activities *independent* from the parties' relationship."[216] Examples of the latter include contracts for "money [that] was placed in the defendant's checking account" or "compensation for . . . efforts in raising and harvesting produce for the defendant's produce business."[217] In those situations, the court clarified, "the contract was not based on 'illicit intercourse.'"[218] While Irma specifically included "a sexual relationship" in the long list of services she provided Charles, the court relied on the broader nature of the relationship to decline to enforce the agreement: It explained that the reason it could not enforce the oral contract was because Irma "alleges that the parties 'expressly formed a contract that obligated the parties to act as if they were married,'" thereby reaching "the very essence of the parties' personal relationship."[219] It was the relationship between Irma and Charles, which was

208. *Id.*

209. *Id.* at *2.

210. *Id.*

211. *Id.*

212. *Id.* at *8.

213. *Id.* at *7.

214. *Id.* at *7-9.

215. *Id.* at *7.

216. *Id.*

217. *Id.*

218. *Id.* (quoting Collins v. Davis, 315 S.E.2d 759, 762 (N.C. Ct. App.), *aff'd*, 321 S.E.2d 892 (N.C. 1984)).

219. *Id.* at *8 (quoting the defendant's answer).

marital-like in nature, that prevented the court from finding the consideration necessary to establish a viable contract claim.

Indeed, courts identify illicit sex as the offender even when they only have evidence of the relationship before them. This substitution of sex for a relationship is plainly seen in *Pfeiff v. Kelly*, where a New York appellate court invalidated a written agreement, finding that "illicit sexual relations formed the primary consideration."[220] The terms of the agreement, however, were wholly silent with regard to sex—they simply set forth that the woman was to receive certain assets based on "the parties' four-year live-in relationship."[221]

Identifying sex as the real obstacle to enforcing these contracts is mistaken for another reason: The sexual component of the relationship does not infect all transactions equally. As the court in *Rabinowitz* explained, some contracts, like those involving money or business services, can be severed from sex.[222] In particular, sex can generally be kept separate and apart from money: While services cannot be recouped in a relationship that involved sex, property can.[223] The court in *Thomas v. LaRosa* elaborated on this very distinction, noting that "legitimate business contracts," such as a contract "between men and women to deliver a certain quality of coal on a certain date and at a certain location" are cognizable, even where "the contracting parties are of the opposite sex and may have had an affair or cohabited for an extended period."[224] But "a contract between a man and woman under which the two agree to hold themselves out as husband and wife, the woman agrees to cohabit, keep house and entertain friends, while the man agrees to support the woman and take care of her for life" is invalid.[225] It is the nature of the relationship at stake—understood through the duties undergirding marriage—that is the problem.

220. 623 N.Y.S.2d 965, 966-67 (App. Div. 1995).

221. *Id.* The court notes that the man was married throughout this period, although it does not explain whether that fact is relevant to its finding that the consideration was illicit. *Id.* at 966; *see also* Rose v. Elias, 576 N.Y.S.2d 257, 258 (App. Div. 1991) (refusing to enforce a writing to buy an apartment for the plaintiff in exchange for her "love and affection," and further finding that such words where the man was married "suggest adultery, and thus illegal consideration").

222. *Rabinowitz v. Suvillaga*, No. 17 CVS 244, 2019 WL 386853, at *7 (N.C. Super. Ct. Jan. 28, 2019).

223. *See infra* Part II.B.

224. 400 S.E.2d 809, 814 (W. Va. 1990).

225. *Id.*

2. Love and affection

Even when courts leave explicit references to sex behind, and rely instead on the more chaste terms of love and affection, the presence of a romantic relationship lingers over these cases and can frustrate the enforcement of a written contract that by its terms addresses exclusively property rights.[226] The mere existence of the relationship chips away at what counts as consideration and therefore a contract.[227]

The Ohio Supreme Court's opinion in *Williams v. Ormsby* presents an especially egregious example of how the nonmarital relationship distorts consideration in a way that limits the couple's ability to contract.[228] At issue in *Williams* was a written contract between Amber Williams and Frederick Ormsby. Amber and Frederick actually entered into two different contracts during the course of their relationship, each concerning the home in which they lived.[229] While the house used to be solely in Amber's name, she decided to execute a quitclaim deed during the relationship and grant Frederick title to the property in acknowledgment of the mortgage payments he made amounting to $310,000.[230] After a disagreement between the two parties, Amber moved out; soon thereafter they signed a document—the first contract—agreeing to sell the house and to allocate the proceeds between them.[231] A few months later, the couple reconciled.[232] Amber, however, was not ready to move back in unless Frederick gave her a one-half interest in the property.[233] Frederick agreed and so they signed another document—the second contract—making them "equal partners" in the house and setting out a specific property distribution in the event that their relationship ended.[234] Less than two years later, they were living in different parts of the home.[235]

226. *See* Williams v. Ormsby, 966 N.E.2d 255, 257, 265 (Ohio 2012). Generally, identifying only property rights, instead of services, is a requirement for the court to uphold the contract. *See infra* Part II.B. The majority of cases that are "enforced" in Appendix A address financial contributions, or property-related interests, as opposed to nonfinancial contributions. *See infra* Appendix A (dividing up cases that are enforced into categories that differentiate between relationship-based and other, mostly property-based, claims).

227. This is mostly true for different-sex couples. Very few cases involving same-sex couples have declined to enforce a contract where alleged. *See infra* Appendix B.

228. 966 N.E.2d at 264-65.

229. *Id.* at 257.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *Id.*

The court of appeals ruled in Amber's favor and upheld the second contract the parties had drawn up and signed.[236] It concluded that "moving into a home with another and resuming a relationship can constitute consideration sufficient to support a contract."[237] On appeal, the sole question before the Supreme Court of Ohio was whether consideration supported the agreement.[238] The court's framing of the issue differed from the lower court's in its focus on the nature of the relationship before it: It set out to address whether "[m]oving into a home with another *and resuming a romantic relationship*" constituted consideration.[239] The court explained that consideration "may consist of either a detriment to the promisee or a benefit to the promisor."[240] Here, the court found that the written agreement was solely advantageous to Amber: It gave her an equal interest in the property while Frederick had to pay for the expenses, including insurance and taxes.[241] Given only the pro forma inclusion in the document that there was "valuable consideration" without further specification, the court concluded that said consideration could only be the "resumption of a romantic relationship with Frederick."[242] Moreover, because the court interpreted the contract to "only benefit" Amber, with no corresponding detriment, it held that the document was "based solely on the consideration of her love and affection."[243] As such, "moving into a home with another while engaging in a romantic relationship is not consideration for the formation of a contract."[244]

Even though the words "love" or "affection" were nowhere within the four corners of the document, the court read them into the text of the agreement. The court's holding relied centrally on the romantic relationship between the two contracting parties to void the existence of consideration.[245] It mattered to

236. *Id.* at 257-58.

237. *Id.* (quoting Williams v. Ormsby, 944 N.E.2d 699, 703 (Ohio Ct. App. 2010), *rev'd*, 966 N.E.2d 255 (Ohio 2012)).

238. *Id.* at 258.

239. *Id.* (emphasis added).

240. *Id.* at 259. Proof of consideration, the state supreme court explained, is the crux of the analysis and distinguishes an enforceable contract from a mere gift. *Id.* at 260.

241. *Id.* at 264.

242. *Id.* at 260, 264.

243. *Id.* at 264.

244. *Id.* at 265.

245. *See also* Slocum v. Hammond, 346 N.W.2d 485, 489, 494 (Iowa 1984) (granting the defendant's motion for a judgment notwithstanding the verdict on the existence of an oral contract where "what [plaintiff Slocum] did for defendant and what he did for her 'was all part of the love and affection and friendship' that they 'had at the time for each other'" (quoting the plaintiff's deposition testimony)).

the court's reasoning that it was not two strangers, or even two friends,[246] entering into a contract—instead, Amber and Frederick were "living together as a couple."[247]

An alternative interpretation of the contract was provided not only by the lower court but also by Judge Pfeifer, who dissented in part.[248] He did not dispute the majority's general statement that love and affection cannot be the sole basis for a contract; he disagreed, however, that they were the relevant consideration in the case.[249] Instead, Judge Pfeifer reasoned that the applicable consideration was voiding the prior agreement the couple had executed, which set out their various obligations in selling the property.[250] In particular, he clarified that depending on the amount for which the property would have sold under the first contract, Amber could have received *more* money under the first contract than under the second contract.[251] In this way, Amber had experienced a detriment. And Frederick received a number of benefits that he previously lacked—he was no longer required to vacate the property, or pay Amber to remain there, and he "gain[ed] more control over the timing of any sale of the house."[252] In exchange, "he forfeit[ed] some equity in the house."[253]

While the majority in *Williams* relied on the very fact of the relationship to void any possible consideration, the dissent would have relied on the repudiation of the prior agreement and delegated the determination of what constituted adequate consideration to the two parties. Generally speaking, contract law favors the dissent's approach, in that it concerns itself with the existence of consideration but not its adequacy—meaning courts have little

246. In the context of friends who do not live together, Ohio courts are less searching in their review of the consideration. *See* Holloway v. Moritz, No. CA2018-04-005, 2019 WL 181518, at *2, *4 (Ohio Ct. App. Jan. 14, 2019) (upholding a contract between two friends where one promised the other "to pay for his ticket and hotel room to a country music festival in 2017 in exchange for [the other] having paid for his ticket to see a country music concert in 2015").

247. *Williams*, 966 N.E.2d at 264.

248. *Id.* at 265 (Pfeifer, J., concurring in part and dissenting in part).

249. *Id.* at 265-66. Judge Pfeifer questioned whether there was even any love or affection between the couple: "The record is replete with shadings and innuendo that there was no love and affection between the parties." *Id.* at 266.

250. *Id.* at 266. Rescinding the first contract, he explained, which had entitled Amber to "specific rights," was the relevant consideration. *Id.* at 266-67.

251. *Id.* ("How can it be argued that by voiding a contract that entitled her to specific rights, Williams was not offering consideration for the June 2005 contract, which entitled her to different rights? For instance, under the March agreement, if the property sold for $650,000, Williams would be entitled to $326,000; under the June agreement, she would be entitled to $325,000. If the property sold for $1,000,000, under the March agreement, Williams would get $726,000; under the June agreement, she would get $500,000.").

252. *Id.* at 267.

253. *Id.*

problem enforcing lopsided contracts.[254] As the court in *Simeone v. Simeone* asserted in upholding a premarital contract waiving the ex-wife's right to property, "[t]raditional principles of contract law provide perfectly adequate remedies."[255] It thus rejected any "[p]aternalistic presumptions and protections that arose to shelter women from the inferiorities and incapacities which they were perceived as having in earlier times."[256] Men and women can, and do, enter into bad deals—which they are then bound by law to uphold.

3. Presumption of gratuity and lack of exchange

The love and affection that infect a contract also infect courts' characterization of the relationship in a more subtle way—by leading to the presumption that services rendered are gratuitous and therefore not the subject of an exchange. While this presumption sounds in descriptions about the nature of relationships, it is in fact importing the specific duties that define marriage into the nonmarital sphere.

The distinction between marriage and nonmarriage matters for purposes of forming a contract and, in particular, for establishing consideration. The court's opinion in *Watkins v. Watkins* illustrated exactly this when it considered a wife's request to recognize a *Marvin* agreement entered into with her husband prior to their marriage.[257] The California Court of Appeal reasoned that a contract could be implied before marriage based on the homemaking services provided by the plaintiff, Judy Dene, to the defendant, Buster Watkins.[258] The court recognized that Judy's activities as "homemaker, cook, nurse, and confidant" furnished the consideration necessary for the contract with Buster before they married.[259] To reach this conclusion, the court distinguished cases holding that such contracts were void when they took place *within marriage*. Those cases, the court explained, rightly failed to recognize contracts based on domestic services, given that they are "incidental to [the] marital status."[260] No similar impediment exists outside of that status.

254. RESTATEMENT (SECOND) OF CONTRACTS § 79 (AM. L. INST. 1981); *see also* Batsakis v. Demotsis, 226 S.W.2d 673, 675 (Tex. App. 1949) (upholding a contract that required the present exchange of $25 for an eventual payment of $2,000, reasoning that "[m]ere inadequacy of consideration will not void a contract").

255. 581 A.2d 162, 165 (Pa. 1990) ("Contracting parties are normally bound by their agreements, without regard to whether the terms thereof were read and fully understood and irrespective of whether the agreements embodied reasonable or good bargains.").

256. *Id.*

257. 192 Cal. Rptr. 54, 55 (Ct. App. 1983).

258. *Id.* at 56.

259. *Id.*

260. *Id.* (quoting Brooks v. Brooks, 119 P.2d 970, 972 (Cal. Dist. Ct. App. 1941)).

Yet these types of services still invalidate a contract in a relationship that is entirely nonmarital. In the recent case of *Barron v. Meredith*, the California Court of Appeal addressed Cheryll Barron's allegations that Roger Meredith, her nonmarital partner, had entered into an oral contract to provide for her financially for the rest of her life.[261] During their relationship, Roger had referred to Cheryll as his "life partner" and provided her with support; they also drafted and signed reciprocal wills.[262] The court, however, found that no contract existed—it reasoned there was "insufficient evidence of the requisite mutual assent, ascertainable terms, and consideration."[263] The court concluded that the agreement was one-sided because only Cheryll had "desired a secure and guaranteed financial future to be underwritten by a financial contract."[264] The court also reasoned that the terms of the alleged contract were not specific enough, given that there was no consensus on how much support would be provided or whether the exchange was contingent on living together.[265]

Finally, the court found that there was no consideration.[266] Rather than addressing Cheryll's conferral of services, whether there was a bargained-for exchange, or whether Cheryll had experienced a forbearance, the court relied on the give-and-take present in any relationship, accompanied by its tepid opinion of Cheryll's career.[267] The court noted Cheryll's decisions to move homes in order to be with Roger, to relinquish control of her time and financial decisionmaking, to give up her career, and to provide "housekeeping, cooking and companion services."[268] But it found that Cheryll had already "received benefits from the relationship, including payment of living expenses and other goods and services."[269] The court further contended that Cheryll had not necessarily renounced her career, given that "it was mere speculation that

261. No. A145849, 2017 WL 772444, at *1 (Cal. Ct. App. Feb. 28, 2017).

262. *Id.* at *1-3, *5 (adopting the lower court's reasoning throughout).

263. *Id.* at *2.

264. *Id.* at *3.

265. *Id.* at *4.

266. *Id.*

267. The point here is not to argue that the court erred in refusing to uphold the oral contract. These cases understandably raise difficult questions for courts to consider. Rather, it is to reveal how courts treat homemaking services, and what assumptions they make regarding the nature of the relationship, in determining whether a contract should be enforced. *See also* Waage v. Borer, 525 N.W.2d 96, 98 n.4 (Wis. Ct. App. 1994) (noting that a claim for an "express or implied contract for provision of housekeeping services" was dismissed because there was clearly "a 'trade-off'" during the relationship and the plaintiff admitted that "we both probably contributed and we both probably gained from that").

268. *Barron*, 2017 WL 772444, at *4.

269. *Id.*

she would have enjoyed a successful writing career if she had stayed."[270] It was the *Barron* court's particular understanding of the informal exchanges present in an intimate relationship that prevented an actual contract from being formed.

This understanding is directly informed by the duties present in marriage, which provide the template for the exchanges courts refuse to recognize outside of marriage. The result is that courts either presume that services are gratuitous or deem them entirely compensated based on the reciprocal exchanges—namely, services for support—that took place during the course of the relationship. Because they declare that the provision of services is intrinsic to the very existence of a relationship, these "duties" apply whether the relationship is marital or not. In this way, courts substitute the analysis of whether a contract existed for an analysis of what a relationship entails.

While reasoning that services were adequately compensated presupposes an exchange that is in tension with the assessment that they were rendered gratuitously, these rationales often appear alongside each other, given their common source in the marital relation. In *Breininger v. Huntley*, the plaintiff, Karen Breininger, alleged, among other theories of recovery, the existence of an oral contract with the defendant, Michael Huntley, for a one-half interest in the home they had built and lived in together.[271] Karen and Michael had been in a thirteen-year relationship and had one child; during this time, Michael bought a vacant lot on which they constructed the home.[272] The court explained that "the parties and their friends and family [did] much of the physical work on the home themselves."[273] The district court below had granted Michael's request for summary judgment, holding that Michigan's ban on common law marriages, along with the statute of frauds, prevented Karen from establishing a claim.[274] On appeal, the court took a different route in denying Karen her request. The court acknowledged that Karen had contributed her own labor in building the home.[275] But it found that she already "received the benefit of the labor she put into building the home, as the labor allowed her to reside in the home."[276] Given that Karen had already been compensated for the value of her work—by being able to reside in the home for two years—her labor could not constitute partial performance of an oral

270. *Id.*

271. No. 317899, 2014 WL 6602713, at *1 (Mich. Ct. App. Nov. 20, 2014) (per curiam).

272. *Id.*

273. *Id.*

274. *Id.*

275. *Id.* at *3.

276. *Id.*

contract. That is, the court held that whatever value her services might have had, they were adequately compensated by the support she received in return.

The court further found that summary judgment was appropriate given that the services Karen provided were "presumably gratuitous."[277] To prevail on her contract claim, Karen would have had to demonstrate the existence of an agreement "without reference to their meretricious relationship."[278] That, the court held, she was unable to do "because she understood that the home was to be for the both of them."[279] Karen testified that she had not specifically asked about payment, as "[t]hat would be like you asking your wife if she was going to pay you."[280] But she nonetheless understood their agreement to be that they would share an interest in the house—the house they built "was meant for us."[281] The court disagreed. It concluded there could be no contract recognizing her interest because "she was expecting to get married and have a beautiful home to live in."[282]

Courts at times invoke marriage as a more direct barrier to contract, by viewing agreements between unmarried couples for support as requests for relief that only marriage can provide. In *Tenzer v. Tucker*, the court could not conceptualize the plaintiff's claim for support as a request to uphold an oral contract—instead, it concluded there was no legal basis for recognizing the plaintiff's allegations unless the parties were married.[283] But the influence of marriage is often more muted: The duties present in marriage inform the exchanges that courts declare inhere in all intimate relationships. By asserting

277. *Id.* at *4.

278. *Id.*

279. *Id.* at *5.

280. *Id.* She was presumably speaking to a man in making this assertion.

281. *Id.*

282. As such, there was no mutual agreement and no bargained-for exchange. *Id.*; *see also* Champion v. Frazier, 977 S.W.2d 61, 63-64 (Mo. Ct. App. 1998) (overturning the lower court's finding of an implied-in-fact agreement because the parties "had a family relationship" and the plaintiff failed to "introduce any evidence that she expected to be paid for the services she rendered," and dismissing the allegation of an oral agreement for being "too loose or casual"); Weicker v. Granatowski, No. CV020398167, 2006 WL 932342, at *1 (Conn. Super. Ct. Mar. 21, 2006) (declining to find an express or implied agreement where the parties lived "like husband and wife" and where the plaintiff's "numerous services" like "cooking, cleaning, etc." were done without "an expectation of monetary payment").

283. 584 N.Y.S.2d 1006, 1007-08 (Sup. Ct. 1992). In *Gunderson v. Golden*, the court declined to uphold a contract to apply the laws regulating property distribution at divorce, which was entered into by the parties at the end of a twenty-five-year-long relationship. 360 P.3d 353, 354 (Idaho Ct. App. 2015). The court reasoned it would contravene the public policy of the state, which had abolished common law marriages, and so it refrained "from legally recognizing co-habitational relationships in general." *Id.* at 355. Both parties had sought enforcement of their agreement. *Id.* at 345.

that these types of exchanges are intrinsic to the very definition of a relationship, be it marital or not, courts transform homemaking services from a duty imposed by marriage to a requirement demanded by affection. The problem with doing so is that only certain characteristics of a relationship, like homemaking services and sex, are understood to inhere in a relationship—everything else can be contracted for.[284] It also leaves contracts entered into by the parties in a nonmarital relationship—contracts that courts do not deny existed[285]—especially vulnerable, dependent on courts' definitions of the relationships before them.[286] It is no longer status but the essential nature of all intimate relationships that renders contracts unenforceable.

4. Vagueness

The doctrine that might appear least tied to assumptions about the relationship and instead focus on the contract before the court is the refusal to enforce an agreement on account of vagueness. Yet vagueness targets the same underlying reasons contracts fail due to concerns over public policy, consideration, or mutual assent. The court in *Cohn v. Levy* provides an apt example.[287] There the parties had been in a sometimes adulterous relationship for a total of thirteen years.[288] The defendant had begun paying the plaintiff weekly after she divorced her husband, and she alleged that the defendant had agreed to pay her "$1,000 a week for the rest of her life, and to guarantee these payments by taking out a life insurance policy naming her as beneficiary."[289] The court, however, found that her testimony was too vague and that the agreement only provided that she would be taken care of in a "comfortable way."[290] The vagueness point was, moreover, not raised on its own; the court also concluded that any such contract failed for want of consideration.[291]

This concern over indeterminacy is similarly evinced in *Marra v. Nazzaro*, where the plaintiff was able to identify discrete monetary contributions she

284. *See generally* Silbaugh, *supra* note 3, at 83-89 (identifying a parallel move in the context of premarital contracts where the duty to support but not the duty to provide services can be contracted around).

285. Appendix A distinguishes between cases that do not uphold a contract and cases that do not find that a contract was proven. *See infra* Tables A.1-.2.

286. *See* Antognini, *supra* note 10, at 2162, 2164.

287. 725 N.Y.S.2d 376, 376 (App. Div. 2001).

288. *Id.* at 376.

289. *Id.*

290. *Id.*

291. *Id.* at 377 (concluding that the plaintiff had not relinquished any career opportunities in reliance on her relationship with the defendant).

had made over the course of the relationship.[292] The court nonetheless found that the promise by the defendant, Eric Nazzaro, to pay the plaintiff, Johanna Marra, "several thousand dollars" as reimbursement for improvements she made on the house after their breakup was "too vague to be enforced."[293] While the court had evidence of the exact cost of Johanna's improvements on Eric's house—she paid for a "fancy bathroom" in the amount of $6,900 and had some trees removed for an additional $2,500[294]—it reasoned that Johanna "happily paid for the house's improvement" given that "she was in love and so much so that she never saw the end coming."[295] That is, instead of expecting payment in exchange for these improvements, she only expected "an enduring relationship."[296] The court clarified, however, that such "dreams do not make an express contract,"[297] especially where they are one-sided: Without "mutual assent," Johanna could not expect reimbursement.[298] The court took the more unusual step of declining to reimburse not only services but also specific and identifiable monetary contributions made to the relationship.[299] Johanna's claim for the return of even her financial contributions failed.[300]

5. Remands et al.

A substantial number of cases addressing different-sex couples neither enforce nor strike down the contact before them—instead, they allow the case to move forward for further proceedings.[301] In the process, they provide a veneer or robustness to a right that is substantively limited. The saga of *Marvin*

292. No. SC-501-17/CO, 2018 WL 280097, at *1-2 (N.Y. City Ct. Jan. 2, 2018).

293. *Id.* at *3.

294. *Id.* at *1.

295. *Id.* at *1-2.

296. *Id.* at *1.

297. *Id.* at *2.

298. *Id.* at *2-3 (holding further that there was also no implied-in-fact contract given that "the financial dealings between Eric and Johanna were inseparably intertwined with their romantic relationship," which "do not translate well into contract law"). The court did find that Johanna successfully pled a claim for unjust enrichment and that Eric broke his promise to allow Johanna to live in the home rent-free for two-and-a-half months. *Id.* at *3-4.

299. *Id.* at *2; *see also* Soderholm v. Kosty, 676 N.Y.S.2d 850, 852-53 (Justice Ct. 1998) (upholding a contract for rent payments, which the court reasoned "is little different from mere college roommates agreeing to share rental costs," but not for other financial contributions to the relationship because these "vague arrangements" were the product of "cohabitation, love, bliss, 'somedays' and borrowed cars").

300. *Marra*, 2018 WL 28007, at *2.

301. *See infra* Table A.3 (listing twenty-four cases that remand or otherwise enable the case to proceed).

itself provides one example of this phenomenon—the California Supreme Court overturned the lower court's judgment in favor of the defendant on the pleadings and held that unmarried couples could enter into express and implied contracts.[302] On remand, the trial court concluded that the parties

had never agreed that Michelle would give up her career as an entertainer and singer to be Lee's full-time companion and homemaker, that Lee had never agreed to provide for her financial needs and support for the rest of her life, that Michelle had been financially enriched rather than suffering damages from her relationship with Lee, and that he had not been unjustly enriched as a result of the relationship or her services.[303]

Marvin differs insofar as the court on remand found that the contract did not exist rather than that it failed—but the general contours of this pattern are common, and worth identifying, given the less-than-obvious ways they work.

The cases that are remanded, or otherwise allowed to proceed for further consideration, are typically decisions reached as a matter of law.[304] They assert general principles like "contractually-based claims are permissible whereas cohabitation claims are not"[305] or "a cause of action based on an express contract . . . is enforceable regardless of the fact that the parties may be cohabiting illicitly."[306] These cases are significant in that they expressly allow for the possibility of enforcing contracts between cohabitants and overturn decisions that state otherwise. As such, many clarify that these contracts are not prohibited by public policy[307] and that these claims can be considered in

302. Marvin v. Marvin, 557 P.2d 106, 110, 123 (Cal. 1976) (en banc), *modified on remand*, 122 Cal. App. 3d 871 (1981).

303. *See* Estin, *supra* note 136, at 1382.

304. The procedural posture of nearly all of these cases makes it so that the court is considering the question as a matter of law: It is either answering a certified question to the court; deciding a motion to dismiss, a demurrer, or a motion for summary judgment; or hearing an appeal from one of those dispositive motions. *See infra* Table A.3.

305. Frederico v. Sullivan, No. FSTCV166029399S, 2018 WL 1137582, at *8-9 (Conn. Super. Ct. Feb. 2, 2018) (denying the defendant's summary judgment motion).

306. Stevens v. Muse, 562 So. 2d 852, 853 (Fla. Dist. Ct. App. 1990) (alteration in original) (quoting Poe v. Estate of Levy, 411 So. 2d 253, 256 (Fla. Dist. Ct. App. 1982) (per curiam)) (holding that suing for proceeds of an insurance claim and the repayment of a loan constitute lawful consideration).

307. *See, e.g.*, Boland v. Catalano, 521 A.2d 142, 146 (Conn. 1987) ("We conclude that our public policy does not prevent the enforcement of agreements regarding property rights between unmarried cohabitants in a sexual relationship."); Cook v. Cook, 691 P.2d 664, 669-70 (Ariz. 1984) (en banc) (refusing to decide "whether an agreement would be enforceable in Arizona if supported only by the consideration of what is commonly thought of as performance of cohabitants' marital functions," but holding that where an "agreement is independent, in the sense that it is made for proper consideration, it is enforceable even though the parties are in a meretricious relationship").

the first instance.[308] They might also be helpful to the party seeking relief in court by spurring a settlement.[309] Yet they perpetuate the same contested definitions about relationships made in the cases that refuse to uphold contracts, and they do not necessarily lead courts in their respective jurisdictions to enforce agreements when they have occasion to actually do so.

In deciding to allow a case to move forward, courts reinforce the distinctions present in the case law overall between love and money; they decide whether the claims are based on the relationship, and therefore unenforceable, or whether they can be separated from that relationship, and are therefore subject to contract. In *Donnell v. Stogel*, the court overturned the grant of a motion to dismiss where the consideration for the written agreement was based in part on the plaintiff's "contribut[ions] to the general well being of [the defendant's] business career."[310] The court conceded that the agreement's recitation that it was made "[i]n consideration for living together under the same roof as man and wife" might be "illegal and unenforceable," but reasoned it could nevertheless be severable from the rest of the contract addressing the licit, business-related contributions.[311] Similarly, in *Combs v. Tibbitts*, the court emphasized that it would not involve itself in agreements between nonmarital partners "where the sole consideration is based on past, present, or future sexual relations."[312] In the case before it, however, the court noted that the payments at issue could be characterized "as compensation related to the dissolution of a business relationship."[313] On remand, the court

308. *See, e.g.*, Goode v. Goode, 396 S.E.2d 430, 438 (W. Va. 1990) (answering the certified question of whether a division of property can be awarded to unmarried cohabitants on the basis of contract or equity in the affirmative).

309. The subsequent history of the cases, at least as contained in Westlaw, indicates that very few cases continued to be litigated after the court's decision. *See* Table A.3.

310. 560 N.Y.S.2d 200, 201-03 (App. Div. 1990) (reversing the dismissal of an action for breach of a written agreement because even though consideration based on the parties' living together "as man and wife" might be illegal, there could still be valid consideration where the plaintiff provided services in advancement of the defendant's career).

311. *Id.* at 203; *see also infra* Part II.B; Antognini, *supra* note 10, at 2176-77.

312. 148 P.3d 430, 435 (Colo. App. 2006).

313. *Id.*; *see also* Maddali v. Haverkamp, No. C-180360, 2019 WL 1849302, at *2 (Ohio Ct. App. Apr. 24, 2019) (overturning an affirmance of summary judgment where the plaintiff "is not seeking to enforce a contract upon the basis of love and affection" but on "the money she spent in maintaining and renovating the household and monetary loans she made to [defendant]"); McCall v. Frampton, 438 N.Y.S.2d 11, 13 (App. Div. 1981) (overturning the grant of a motion to dismiss insofar as the plaintiff's contract claims were based on "the [professional] services which she rendered to the defendant in the form of advice, promotion and public relations" where the defendant was "a 'Rock' star").

would have to determine whether the agreement had such a "lawful purpose."[314]

Even courts that acknowledge claims based on services end up reinforcing difficult-to-police boundaries. In *Frederico v. Sullivan*, the court found that the plaintiff's allegations that she had "devot[ed] her efforts to taking care of the house and child" made summary judgment inappropriate.[315] The court relied on specific evidence that showed that the services were not given solely "out of love and affection," which it accepted would have otherwise negated the contract.[316] It also drew the line between what was subject to contract and what was not by "recogniz[ing] that *contractually*-based claims are permissible whereas *cohabitation*-based claims are not."[317]

Courts that come out strongly in favor of recognizing that domestic services can provide consideration also end up limiting those holdings in later cases. New York, which has a relatively extensive set of cases that both remand and decline to enforce contracts, provides one illustration of how the two categories interact.[318] In *Morone v. Morone*, the New York Court of Appeals overturned the grant of a motion to dismiss the plaintiff's complaint alleging an express contract at the conclusion of her twenty-three year nonmarital relationship.[319] It affirmed the viability of such contracts "even though the services rendered [were] limited to those generally characterized as 'housewifely.'"[320] The court further noted that there is no reason to presume "that services of any type are more likely the result of a personal, rather than a contractual, bond."[321]

Nearly thirty years later, a New York trial court in *Tompkins v. Jackson* considered an oral contract Shaniqua Tompkins alleged she entered into with Curtis Jackson to share Curtis's earnings in exchange for receiving the benefit of Shaniqua's homemaking services.[322] The court declined to uphold the contract.[323] It found that the terms of the agreement were indefinite, and

314. *Combs*, 148 P.3d at 435.

315. No. FSTCV166029399S, 2018 WL 1137582, at *6 (Conn. Super. Ct. Feb. 2, 2018).

316. *Id.* (quoting Nevins v. Norris, No. CV 950549085S, 1996 WL 745819, at *3 (Conn. Super. Ct. Dec. 23, 1996)).

317. *Id.* at *3, *9 (emphasis added).

318. *See infra* Tables A.1, .3 (showing New York has the greatest total number of cases under the "No Contract (Doctrinal Basis)" and the "Remanded or Dispositive Motion Denied" sections).

319. 413 N.E.2d 1154, 1155 (N.Y. 1990).

320. *Id.* at 1157.

321. *Id.* at 1156.

322. No. 104745/2008, 2009 WL 513858, at *13-14 (N.Y. Sup. Ct. Feb. 3, 2009).

323. *Id.* at *14.

reasoned that because such services "arise out of" the relationship, they cannot form the basis for a contract: "The services involved—to devote time and attention to the defendant, to act as companion, to accompany him to social events and perform household duties—are of a nature which would ordinarily be exchanged without expectation of pay."[324]

Distinguishing these cases on account of the caprices of different judges would be a mistake.[325] The real difference between them is what each assumes is owed as opposed to exchanged in the context of a relationship, which dictates whether the contract before the court will be upheld. While providing "housewifely" services in an intimate relationship is presented as viable consideration in theory, it defeats the possibility of a contract in actuality. *Morone*, and cases like it, open the door to using contract; *Tompkins*, and cases like it, show just how difficult it is to have the claim succeed.[326]

B. Contracts Upheld

Courts do find and uphold contracts between unmarried individuals in a limited set of circumstances.[327] In cases involving same-sex couples, courts have enforced more contracts than they have declined.[328] The mere fact of the romantic relationship does not void the contract in these cases, and courts do not express as many qualms over doctrines like consideration. If the case

324. *Id.* at *13.

325. *Compare* Goode v. Goode, 396 S.E.2d 430, 438 (W. Va. 1990) (holding that the court may divide property accumulated "by a man and woman who are unmarried cohabitants, but who have considered themselves and held themselves out to be husband and wife" under principles of contract, "subject to the evidence presented to the trial court by the party seeking relief"), *with* Thomas v. LaRosa, 400 S.E.2d 809, 811, 814 (W. Va. 1990) (distinguishing *Goode* in reasoning that the services the appellant alleges "are typical of the services performed by most wives who are in the good graces of their husbands" and declining to find such a contract where the appellant was married).

326. *See also* Tenzer v. Tucker, 584 N.Y.S.2d 1006, 1007-08 (Sup. Ct. 1992) (addressing an oral breach-of-contract claim as a common-law-marriage claim which was abolished in New York and thus dismissing the contract claim between unmarried partners); Pfeiff v. Kelly, 623 N.Y.S.2d 965, 967 (App. Div. 1995) (rejecting as illicit a written agreement for personal property in which the consideration was a four-year relationship); Pizzo v. Goor, 857 N.Y.S.2d 526, 526 (App. Div. 2008) (voiding an agreement where the consideration was "companionship (both platonic and sexual)"); Cohn v. Levy, 725 N.Y.S.2d 376, 376-77 (App. Div. 2001) (concluding that an oral agreement to provide support in the amount of $1,000 per week and take out a life insurance policy was too vague and lacked consideration).

327. *See infra* Tables A.4-.5, B.3 (identifying cases where the contract was "Enforced").

328. *See infra* Tables B.1, .3 (showing that in the limited number of cases addressing same-sex couples, more contracts are enforced than not enforced).

addresses a different-sex couple, most of the contracts courts enforce are based on claims relating to tangible property, like earnings, expenses, or rent.[329]

The cases that uphold contracts—across different-sex and same-sex relationships—help to expose just how contingent the reasoning is that leads courts to deny such claims. They also clarify the ways in which judgments external to contract law impact the outcome—contracts are upheld in situations where the couple could not have married or where the terms of the contract can be separated from what the court defines the relationship to require.

There are, however, a few cases that buck the trend and uphold a contract in the precise scenario where most decline to do so—for domestic services provided. Even though they are exceptions to the rule, these cases are especially valuable in that they show how contract-based reasoning can function to support, rather than undermine, claims made in this context. They also poke holes in possible rationales for why courts generally decline to uphold contracts, like those they deem are based on the relationship.

1. Marital-like same-sex couples

The case of *Posik v. Layton* is commonly cited in support of the proposition that express contracts are generally upheld outside of marriage.[330] In *Posik*, the Florida District Court of Appeal enforced a written contract between a same-

329. Appendix A differentiates between cases depending on whether they recognize a contract claim for a financial contribution or a relationship-based contribution. *See infra* Tables A.4-.5 (showing that only 8 of the total 36 cases explicitly allow for nonfinancial contributions to form the basis of a contract with the remaining 28 mostly relying on a property-based claim). *But see, e.g.*, Phillips v. Oltarsh, 63 N.Y.S.2d 674, 674 (per curiam) (App. Term 1946) (reinstating a jury verdict upholding a contract to remain unmarried), *rev'g* 59 N.Y.S.2d 366 (N.Y. City Ct. 1946). The cases that allow for a contract outside of a property framework are in the minority. They are mostly from New Jersey, where the law requires a marital-like relationship to enforce a contract for palimony. *See* Kozlowski v. Kozlowski, 403 A.2d 902, 906 (N.J. 1979), *superseded in part by statute*, N.J. STAT. ANN. § 25:1-5(h) (West 2020); Gelinas v. Conti, No. A-5758-12T3, 2016 WL 885141, at *8 (N.J. Super. Ct. App. Div. Mar. 9, 2016) (per curiam); Kozikowska v. Wykowski, No. FM-09-2617-08, 2012 WL 4370430, at *12 (N.J. Super. Ct. App. Div. Sept. 26, 2012) (per curiam), *aff'd per curiam*, No. A-3338-14T1, 2017 WL 461299, at *2 (N.J. Super. Ct. App. Div. Feb. 3, 2017); Crowe v. De Gioia, 495 A.2d 889, 895-96 (N.J. Super. Ct. App. Div. 1985), *aff'd per curiam*, 505 A.2d 591, 591 (N.J. 1986). One comes from Nevada, which provides for community property by analogy. Bumb v. Young, No. 63825, 2015 WL 4642594, at *1 (Nev. Aug. 4, 2015). The remaining three cases are from Pennsylvania and Nebraska, which are notable exceptions to the general rule. *See* Knauer v. Knauer, 470 A.2d 553, 563-64 (Pa. Super. Ct. 1983); Baldassari v. Baldassari, 420 A.2d 556, 559-60 (Pa. Super. Ct. 1980); Kinkenon v. Hue, 301 N.W.2d 77, 81 (Neb. 1981).

330. *See supra* Part I.C; *supra* note 137 and accompanying text.

sex couple.[331] Nancy Layton, a doctor, and Emma Posik, a nurse, were involved in a nonmarital relationship.[332] When Nancy decided to move her practice, she invited Emma to come along with her.[333] To convince Emma to leave her job, sell her house, and care for the new home they would establish together, Nancy agreed to support them both, to make a will leaving Emma her entire estate, and to maintain certain nonprobate assets in Emma's name.[334] Moreover, the contract specified that if Nancy failed to provide adequate support, asked Emma to leave, or brought a third person into the home for more than four weeks without Emma's consent, Nancy would pay Emma $2,500 per month for the remainder of Emma's life.[335] The contract was drafted by a lawyer and witnessed.[336]

The court acknowledged that the parties had a sexual relationship.[337] It also described the contract as "couched in terms of a personal services contract."[338] But, the court noted, "it was intended to be much more."[339] In particular, the court understood it to be "a nuptial agreement entered into by two parties that the state prohibits from marrying."[340] Acknowledging that the law in Florida prevented the recognition of legal rights between cohabiting partners, the court nonetheless carved out a narrow space for these individuals to organize their private lives, affirming "their right to either will their property as they see fit [or] to privately commit by contract to spend their money as they choose."[341] The court further required that such "non-marital, nuptial-like agreements" be in writing—just like agreements made in contemplation of a marriage.[342] Because same-sex couples could not marry, and the agreement looked like the exchanges present in a marriage—services for support—the court upheld this written contract.[343]

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331. 695 So. 2d 759, 760, 763 (Fla. Dist. Ct. App. 1997).

332. *Id.* at 760 ("Emma Posik and Nancy L.R. Layton were close friends and more.").

333. *See id.*

334. *Id.*

335. *Id.*

336. *Id.*

337. *Id.* at 761.

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.* The court reasoned that the denial of marriage did not mean that the parties were also unable to make decisions about how to arrange their affairs. *Id.*

342. *Id.* at 762.

343. *Id.* at 763; *cf.* Antognini, *supra* note 10, at 2188 & n.313 (identifying cases refusing to enforce contracts in the context of different-sex couples).

The exact same services that enabled the court in *Posik* to uphold the contract are generally those that prevent courts from doing so in the context of different-sex couples based on a finding that consideration was lacking or on an assessment of the nature of the relationship.[344] In fact, the adequacy of the consideration was not a problem in *Posik*, even as the court agreed that its terms were "extremely favorable" to Emma.[345] But because there was no fraud or overreaching, the court upheld the admittedly one-sided contract.[346]

Contract doctrines like consideration are rarely a sticking point in preventing courts from upholding an express contract in the context of a same-sex couple. The trial court in *Silver v. Starrett* addressed the question of consideration directly in the case of a fourteen-year relationship between two women, Ann Silver and Barbara Starrett.[347] After separating, they entered into a written agreement, with each represented by counsel.[348] After a few years of complying with the terms of the agreement, Barbara brought suit alleging that the contract was the product of duress and lacked consideration.[349] The court dismissed the duress argument, noting that the agreement was the result "of a carefully worked out mutual negotiation," so there was "no question that on these undisputed facts [Barbara] chose to live with the agreement and to comply with it."[350] On the consideration point, Barbara argued that there was none, given that "she was the party who gave up everything and that all [Ann] did was to agree to do that which she already had a legal obligation to do."[351] The court disagreed. In doing so, it relied on the pro forma language in the contract stating that consideration was adequate—without specifying what the consideration was.[352] It further explained that "valid consideration which will support a contract need not be equal on both sides, and if a minimal yielding of a position by one side promotes an agreement, then it will be deemed enforceable."[353] It was sufficient, according to the court, that Ann had

344. *See supra* Part II.A.

345. *Posik*, 695 So. 2d at 762-63.

346. *Id.* ("Contracts can be dangerous to one's well-being. . . . In any event, contracts should be taken seriously.").

347. 674 N.Y.S.2d 915, 915-16 (Sup. Ct. 1998).

348. *Id.* at 917.

349. *Id.* at 918.

350. *Id.* at 919-20.

351. *Id.* at 920.

352. *Id.* at 920-21. Compare with the case of *Williams v. Ormsby*, where the court decided that same general statement was insufficient. *See* 966 N.E.2d 255, 264-65 (Ohio 2012); *supra* Part II.A.

353. *Silver*, 674 N.Y.S.2d at 920-21.

relinquished any claim she might feasibly have had to Barbara's property.[354] Barbara therefore "got what she bargained for."[355]

While these two cases involved lawyers, meeting with counsel is not a precondition to upholding a contract.[356] Instead, the courts' willingness to uphold such contracts stems from the similarity the relationships exhibited to marriage in a legal world where these couples could not marry.[357] And this explains exactly how the formalities adhered to, like the writing and the consultation with an attorney, matter—they begin to approach the requirements of marriage. Of course, nowhere do these cases, which consider claims of express contract, explicitly require a marital-like relation in order to uphold the validity of an alleged agreement.[358] Rather, the courts embrace the relationships' resemblance to marriage where marriage was not possible. The direct appeal to marriage where it was unavailable also means that the standard assumptions that sex renders consideration wholly illicit, or that services are provided without the expectation of pay, no longer invalidate a contract.

That said, some of the same-sex cases can be read to reinforce marriage-based distinctions that are present in the different-sex context. The court in *Whorton v. Dillingham*, for example, only recognized services that are patently not the kind a wife would provide, like being a chauffeur or a bodyguard.[359] Meanwhile, in *Anonymous v. Anonymous*, the court confirmed that "love and affection" could not be the sole consideration for a contract; it specified, however, that the written agreement between an artist and a tax attorney who had been in a relationship was supported by more than just that.[360] The court set the bar low—it explained that consideration is valid even if unequal and

354. *Id.* at 921.

355. *Id.*

356. 1 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW § 25 (11th ed. West 2020) ("The general rule is that all persons are capable of contracting, except minors, persons of unsound mind, and persons deprived of civil rights." (citations omitted)). Moreover, oral contracts created without a consultation with an attorney have also been upheld in the context of same-sex nonmarital couples. *See, e.g.*, Armao v. McKenney, 218 So. 3d 481, 483 (Fla. Dist. Ct. App. 2017) (upholding an oral contract); Whorton v. Dillingham, 248 Cal. Rptr. 405, 406 (Ct. App. 1988) (same).

357. This is not always a fail-safe approach, even in the same-sex context. *See* Jones v. Daly, 176 Cal. Rptr. 130, 134 (Ct. App. 1981) (holding that services like homemaking, cooking, and housekeeping are inseparable from illicit sexual activities).

358. New Jersey provides an example of a jurisdiction that does. *See* Devaney v. L'Esperance, 949 A.2d 743, 744 (N.J. 2008) (requiring a marital-like relationship prior to enforcing a claim for palimony).

359. 248 Cal. Rptr. at 410; *see also* Albertina Antognini, *Against Nonmarital Exceptionalism*, 51 U.C. DAVIS L. REV. 1891, 1923 (2018) (describing the case as separating wifely services from "working as a chauffeur, a secretary, a bodyguard, a business partner and [a] counselor").

360. No. 121930-2002, 2004 WL 396492, at *1, *8 (N.Y. Sup. Ct. Feb. 9, 2004).

even if, again, there was only "a minimal yielding."[361] It also acknowledged contributions made to the relationship in the form of services, concluding that the "plaintiff's lack of monetary contributions is of no moment" in upholding the contract.[362] The court thus enforced the agreement that provided for "what married couples would call a 'divorce.'"[363] Rather than defeat the contract, that was reason enough to enforce it.

2. Principally property-based claims

The cases that uphold contract-law claims in different-sex relationships depart from the same-sex ones in that they reinstate the separation between love and money.[364] In this context, courts are willing to uphold a contract as long as they can characterize the subject matter as pertaining exclusively to finances contributed, or property owned, during the relationship.[365]

Since the decision in *Williams v. Ormsby*[366] in 2012, for example, Ohio has reaffirmed rather than rejected its supreme court's reasoning. In *Maddali v. Haverkamp*, the Ohio Court of Appeals overturned the trial court's grant of summary judgment against Meena Maddali based on its conclusion that she did not have any right to the proceeds from the sale of the home she had lived in

361. *Id.* at *8 (relying on *Silver v. Starrett*).

362. *Id.*

363. *Id.* at *10.

364. They also help illustrate that the same-sex cases cannot be distinguished based on either the presence of a lawyer or of a more committed relationship.

365. *See, e.g.*, Garcia v. Venegas, 235 P.2d 89, 92 (Cal. Dist. Ct. App. 1951); Hughes v. Kay, 242 P.2d 788, 790-91 (Or. 1952); Ferraro v. Ferraro, 304 P.2d 168, 170 (Cal. Dist. Ct. App. 1956); McHenry v. Smith, 609 P.2d 855, 857-58 (Or. Ct. App. 1980); Dominguez v. Cruz, 617 P.2d 1322, 1323 (N.M. Ct. App. 1980); Lee v. Slovak, 440 N.Y.S.2d 358, 360 (App. Div. 1981); *In re* Relationship of Eggers, 638 P.2d 1267, 1269-70 (Wash. Ct. App. 1982); Holloway v. Holloway, 663 P.2d 798, 799 (Or. Ct. App. 1983); Wade v. Porreca, 472 N.Y.S.2d 482, 484 (App. Div. 1984); Wheeler v. Leifer, 1985 WL 3461, at *1, *4 (Tenn. Ct. App. Nov. 4, 1985); Hudson v. DeLonjay, 732 S.W.2d 922, 927 (Mo. Ct. App. 1987); Kerkove v. Thompson, 487 N.W.2d 693, 696 (Iowa Ct. App. 1992); Muir v. Stotler, No. 93-1321, 1993 WL 502791, at *2 (Wis. Ct. App. Dec. 9, 1993); Bryan v. Looker, No. 1-94-51, 1995 WL 73383, at *1, *3 (Ohio Ct. App. Feb. 21, 1995); Vibert v. Atchley, No. CV 930346622, 1996 WL 364777, at *1, *3 (Conn. Super. Ct. May 23, 1996); Wilcox v. Trautz, 693 N.E.2d 141, 143, 148 (Mass. 1998); Putz v. Allie, 785 N.E.2d 577, 582 (Ind. Ct. App. 2003); McBee v. Nance, No. E2003-00136, 2004 WL 170389, at *1, *5 (Tenn. Ct. App. Jan. 28, 2004); Hansing v. Carlson, No. A04-1986, 2005 WL 2429843, at *5 (Minn. Ct. App. Oct. 4, 2005); Londo v. Burns, No. E046515, 2009 WL 3748558, at *1 (Cal. Ct. App. Nov. 10, 2009); Jones v. Brown, No. 1022 MDA 2013, 2014 WL 10965437, at *3 (Pa. Super. Ct. Mar. 10, 2014); Hemingway v. Scott, 66 N.E.3d 998, 999, 1003 (Ind. Ct. App. 2016); Gilroy v. Gilroy, No. B271759, 2018 WL 992010, at *4-5 (Cal. Ct. App. Feb. 21, 2018); *see also infra* Table A.5 (identifying property-based holdings of prior cases).

366. 966 N.E.2d 255 (Ohio 2012).

with her boyfriend, Adam Haverkamp.[367] The trial court relied on *Williams* to find that no contract had been alleged.[368] In overturning the lower court's decision, the court on appeal explained that the lower court's reliance was misplaced.[369] While the appeals court affirmed *Williams*, agreeing that the contract in that case was based on "love and affection,"[370] here the court noted that the oral contract claims were based on "the money [Meena] spent in maintaining and renovating the household and monetary loans she made to [Adam] for his personal obligations."[371] Rather than presume that the loans were gratuitous or "a gift . . . made during the course of a romantic relationship," the court found there was a triable issue of fact insofar as Meena's payments were implicated.[372] The court thus remanded the case to consider the oral contract Meena had alleged.[373] The distinction the court reinforced is the familiar one between love and money—where property, as opposed to doting services, is said to be exclusively at stake, altruism is not assumed, and a contract can be established.

Connecticut cases provide additional examples of courts enforcing this dividing line in deciding which contracts to uphold. In *Vibert v. Atchley*, the court enforced a written agreement between a nonmarital couple to pay for household expenses and the defendant's long-distance phone calls, along with "any and all monies expended on his behalf."[374] It reasoned that while "cohabitation alone does not create any contractual relationship or give rise to any other rights and obligations that attend to a valid marriage," it would apply ordinary principles of contract law to nonmarital partners.[375] As such, this contract for payments was valid and enforceable.[376] Yet where a contract was based on services, like "cooking, cleaning, etc.," the court in *Weicker v. Granatowski* declined to "find that there was an expectation of monetary

367. No. C-180360, 2019 WL 1849302, at *2 (Ohio Ct. App. Apr. 24, 2019).

368. *Id.*

369. *Id.*

370. *Id.*

371. *Id.* Meena and Adam had decided to buy a home, which was titled solely in Adam's name. They "also agreed to divide the household expenses, and that [Meena] would be responsible for paying the monthly mortgage payment, which included insurance and real-estate taxes." *Id.* at *1. They further agreed to split any profits were they ever to sell the home. *Id.*

372. *Id.* at *3. The court's reasoning relied entirely on whether a contract could be alleged given the financial nature of the contributions before the court. *Id.*

373. *Id.*

374. No. CV 930346622, 1996 WL 364777, at *1, *6 (Conn. Super. Ct. May 23, 1996).

375. *Id.* at *2-3.

376. *Id.* at *3.

payment for such services."[377] Taken together, these cases clearly differentiate between household expenses, which can be reimbursed, and household services, which cannot. The latter—and only the latter—are rendered "out of a sense of love and obligation."[378]

Case after case in the different-sex context upholds an express contract where property alone is concerned.[379] Even where courts seem to break the mold and uphold contracts that acknowledge either the services or the affections present in the relationship before them, they still fall back on well-established tropes. In *Levar v. Elkins*, the court upheld the enforcement of an oral contract for services rendered in the course of a twenty-year relationship.[380] To do so, the court had to specifically conclude that the presumption that both services and property were provided gratuitously had been overcome, thereby enshrining that judgment as controlling law.[381] In *Smith v. Riley*, the court upheld two contracts, reasoning that they were supported by sufficient consideration, including the plaintiff's "love and affection."[382] While the court used the very terms that tend to negate the

377. No. CV020398167, 2006 WL 932342, at *1 (Conn. Super. Ct. Mar. 21, 2006); *see also* Nevins v. Norris, No. CV 950549085S, 1996 WL 745819, at *3 (Conn. Super. Ct. Dec. 23, 1996) (overturning the jury's determination that there was an express contract in a same-sex relationship, because the plaintiff testified at numerous points that there was none and "she performed the household jobs . . . out of love and affection and in consideration of the fact that they lived together").

378. *Cf.* Lovallo v. Guerrera, No. 093735, 1991 WL 61420, at *3 (Conn. Super. Ct. Apr. 11, 1991) (in interpreting an implied contract, the court ordered the defendant to reimburse expenses like mortgage payments, taxes, food, and clothing, but failed to recognize as compensable the services provided in nursing the defendant back to health after an accident he suffered).

379. *See, e.g.*, *In re* Relationship of Eggers, 638 P.2d 1267, 1268-69, 1271 (Wash. Ct. App. 1982) (upholding an oral contract for wages during a five-year nonmarital relationship, relying on the award of wages as "atypical of marriage," and declining to find a stable, long-term relationship); Hudson v. DeLonjay, 732 S.W.2d 922, 925-27 (Mo. Ct. App. 1987) (finding an oral contract to share assets accumulated during a relationship where the parties started two businesses and the contract was supported by valid consideration); Kerkove v. Thompson, 487 N.W.2d 693, 696 (Iowa Ct. App. 1992) (finding an express contract "d[id] not arise out of the parties' cohabitation" and instead was based on a promise to build and live together in a new home in exchange for selling a mobile house); Hansing v. Carlson, No. A04-1986, 2005 WL 2429843, at *1 (Minn. Ct. App. Oct. 4, 2005) (upholding an oral agreement that provided each party would own a one-half interest in a house); Londo v. Burns, No. E046515, 2009 WL 3748558, at *1 (Cal. Ct. App. Nov. 10, 2009) (upholding a breach of an oral contract between a nonmarital couple where the plaintiff paid money toward a mortgage and never received title to the property in exchange).

380. 604 P.2d 602, 603-04, 603 n.1 (Alaska 1980).

381. *Id.* at 604. The presumption in this case extended beyond services to also include property. *Id.* The plaintiff received a total of $15,000 on the basis of her contract claim at the end of the parties' twenty-year relationship. *Id.* at 603-04.

382. No. E2001-00828, 2002 WL 122917, at *3 (Tenn. Ct. App. Jan. 30, 2002).

presence of any consideration, the contracts it upheld only assigned interests in specific parcels of property.[383]

Courts also uphold contracts where the man in a different-sex relationship is requesting that an agreement be recognized. To state the obvious, the vast majority of the different-sex cases involve a female partner seeking to enforce a contract against her male partner.[384] There are, however, a not-insignificant number of cases that uphold a contract where requested by the male partner—not only to secure his interest in property, but also to protect his interest from his partner.[385] This phenomenon is worth noting not only because of the rarity of having a male partner raise a contract claim before the court, but also because of courts' willingness to enforce these contracts notwithstanding the presence of sexual relations or the presumed nature of the intimate relationship.

The "illicit" nature of the nonmarital relationship does not necessarily foil an agreement for property where the man is seeking it. In *Wheeler v. Leifer*, Allen Leifer sued JoAnn Wheeler for part of the proceeds of a home she sold, relying on a written contract they had signed.[386] The court openly acknowledged that "their entire dealings grew out of the illicit love affair" and that "[t]he entire arrangement was to benefit both of them."[387] While these types of assertions are often raised as reasons to decline to enforce an agreement,[388] the court here upheld the contract granting Allen a share of the proceeds from the sale of the property.[389] Neither the nature of the

383. *Id.* at *1.

384. *See infra* Table A.6 (showing that in the different-sex context, 92 cases involve requests by women seeking to enforce a contract, 17 cases involve requests by men, and one case addresses claims by both).

385. Six of the total cases that uphold contracts in the different-sex context do so in response to the male partner's request. *See infra* notes 386-98. There are many ways of contextualizing these numbers. One is to set them against the total number of contracts enforced, which is 36; another is to compare them to the total number of cases involving requests for enforcement of contracts by men, which is 17. *See infra* Table A.6. Another yet is to compare them to the figures involving women. While 29 cases reject a contract on a doctrinal basis for women and 30 uphold them, for men, 3 cases reject a contract on the basis of doctrine while 6 uphold them. *See id.* These numbers are, of course, too small to make any comparison carry much weight, but what is worth noting is the small proportion of men relative to women who bring contract claims in a different-sex relationship and the reasons courts employ in upholding those contracts.

386. 1985 WL 3461, at *1 (Tenn. Ct. App. Nov. 4, 1985).

387. *Id.* at *3.

388. *See supra* Parts II.A.1-.2.

389. *Wheeler*, 1985 WL 3461, at *4.

relationship, nor the adequacy of consideration, was an impediment to enforcing the contract.[390]

Courts also uphold contracts where the female partner gives up rights to property and thus *prevents* any property from being distributed.[391] In *Wilcox v. Trautz*, Carol Wilcox and John Trautz had been in a twenty-five-year-long relationship.[392] When Carol discovered that John had become involved with another woman, John asked her to sign an agreement his attorney had drafted, which in effect provided that they would each keep their property separate.[393] He advised her to consult an attorney of her own and informed her that if she did not sign it, he would leave her.[394] At the time, John had numerous assets to his name, while Carol had very few.[395] The court noted that the parties, "both adults, had the capacity to contract."[396] Carol had not been coerced, and she had gainful employment.[397] The court therefore upheld the agreement.[398]

The ability to point to an interest in property that secures consideration in the different-sex context also establishes consideration in cases involving same-sex couples—although the inquiry is somewhat less searching. In *Gonzalez v. Green*, Steven Green and David Gonzalez entered into a written contract when their relationship, which had included a marriage in Massachusetts, ended.[399] The relationship began when Steven, "a person of considerable assets and income," asked David, "a student with little or no

390. *See also* McBee v. Nance, No. E2003-00136, 2004 WL 170389, at *1, *5 (Tenn. Ct. App. Jan. 28, 2004) (upholding a contract that required a woman to sell her home to repay a loan the defendant provided her with, reasoning that it is unnecessary that "the consideration . . . must equal the amount of indebtedness" and the loan was not a gift); Hemingway v. Scott, 66 N.E.3d 998, 1003-04 (Ind. Ct. App. 2016) (finding that a female partner breached a contract, which was not void as against public policy despite having a no-cheating clause, resulting in the male partner receiving her interest in the property).

391. Two of the cases involving male plaintiffs involve explicit requests to protect property they own from their partner. *See* Wilcox v. Trautz, 693 N.E.2d 141, 143 (Mass. 1998); Holloway v. Holloway, 663 P.2d 798, 798-99 (Or. Ct. App. 1983).

392. *Wilcox*, 693 N.E.2d at 143.

393. *Id.* at 143-44, 144 n.1.

394. *Id.* at 144. Carol did not consult an attorney. *Id.* at 148.

395. *Id.* at 144.

396. *Id.* at 147.

397. *Id.* at 148.

398. *Id. Wilcox* involved a written agreement, as did *Wheeler*. *See supra* notes 386-90; *infra* Table A.6. We have already seen that a writing is not determinative of the outcome of a case. *See supra* note 177. Moreover, nonwritten contracts have also been upheld. *See* Holloway v. Holloway, 663 P.2d 798, 799-800 (Or. Ct. App. 1983) (upholding an oral agreement whereby the plaintiff agreed she would not claim an interest in the defendant's ranch before they started living together).

399. 831 N.Y.S.2d 856, 857 (Sup. Ct. 2006).

income at the time," to move in with him.[400] During the course of the relationship, Steven provided David with "expensive gifts," which included two cars and a ski house, titled in David's name.[401] After living together for four years, they decided to separate.[402] Steven and David entered into an agreement drafted by Steven's lawyer, which divided their real and personal property and provided David with a lump sum payment of $780,000, which he was paid shortly thereafter.[403]

Four months after they signed their separation agreement, David filed for divorce.[404] Steven counterclaimed, arguing that they were never married under New York law.[405] He further sought to rescind their written contract on various grounds, including lack of consideration and mutual mistake.[406] While the court found that the marriage entered into in Massachusetts was void, the court affirmed the proposition that unmarried partners can contract with each other.[407] It explained that although a nonmarital relationship "does not give rise to the property and financial rights which normally attend the marital relation," neither does it "disable the parties from making an agreement within the normal rules of contract law."[408] The court specified that where a contract "concerns their personal property and . . . monetary obligations," it would be enforced.[409]

The court in *Gonzalez* followed the regular rules of contract law to conclude that there was consideration. It noted that the standard language of the contract stated as much, relying on *Silver v. Starrett* for support.[410] It further found that the tangible property Steven received as a result of the agreement—in particular, the transfer of title from David to Steven of the ski house—constituted consideration.[411] The court reasoned that "[t]his valuable consideration is more than sufficient to support the enforceability of the Agreement."[412] It was of little import that the property was originally a gift—

400. *Id.*
401. *Id.*
402. *Id.*
403. *Id.*
404. *Id.* at 857-58.
405. *Id.* at 858.
406. *Id.*
407. *Id.* at 858-59.
408. *Id.* at 859 (quoting Morone v. Morone, 413 N.E.2d 1154, 1156 (N.Y. 1980)).
409. *Id.* (quoting Singer v. Singer, 690 N.Y.S.2d 621, 622 (App. Div. 1999)).
410. *Id.* at 859-60 (citing Silver v. Starrett, 674 N.Y.S.2d 915, 920-21 (Sup. Ct. 1998)).
411. *Id.* at 860.
412. *Id.*

that is, the ski house transferred to Steven by the agreement was originally bought by Steven himself.[413]

In upholding a claim "insofar as it concerns the[] [couple's] personal property and . . . monetary obligations,"[414] the court in *Gonzalez* arguably narrowed the universe of what could be contracted for. Recall *Morone v. Morone*, decided some years prior, where the New York Court of Appeals had recognized the use of express contracts "in relation to personal services, including domestic or 'housewifely' services."[415] It explained that "[t]he difficulties attendant upon establishing property and financial rights between unmarried couples under available theories of law other than contract" make this doctrine so important in acknowledging services that are "generally characterized as 'housewifely.'"[416]

The court in *Morone* had cleared a space for personal services to function as the basis for an express contract; subsequent cases like *Gonzalez* and *Tompkins v. Jackson*[417] have shrunk that space to focus more strictly on the exchange of tangible property.[418] But the seeds of this narrowing might have been planted all along—even those opinions that recognize the ability to expressly contract for homemaking services limit other contract law doctrines available to nonmarital couples. The court in *Morone*, for example, preserved the presumption that services are rendered gratuitously by not allowing them to form the basis of an implied contract.[419] The justification the court articulated followed from its characterization of the nature of the relationship at stake: "[I]t is not reasonable to infer an agreement to pay for the services rendered when the relationship of the parties makes it *natural* that the services were

413. *Id.* at 857, 860.

414. *Id.* at 859 (quoting *Singer*, 690 N.Y.S.2d at 622).

415. 413 N.E.2d 1154, 1156 (N.Y. 1980).

416. *Id.* at 1157.

417. For a discussion of this case and others like it, see Part II.A.5 above.

418. *See also* Tenzer v. Tucker, 584 N.Y.S.2d 1006, 1007-08 (Sup. Ct. 1992) (declining to recognize an unmarried woman's allegation of an oral contract whereby her unmarried partner agreed to support her and her child in exchange for child-rearing and homemaking on a full-time basis because "[t]he Court's research did not uncover any officially reported cases in New York, or a provision in the Domestic Relations Law or the Family Court Act[,] authorizing the Court to order maintenance or support to a person who is admittedly not married under any common-law application or statutory interpretation").

419. 413 N.E.2d at 1157-58. New York is not alone. *See, e.g.*, Carnes v. Sheldon, 311 N.W.2d 747, 750-53 (Mich. Ct. App. 1981) (rejecting an implied contract claim where the "plaintiff's services to defendant were only of a household nature"); Tapley v. Tapley, 449 A.2d 1218, 1219 (N.H. 1982) ("We adhere to the view of those jurisdictions that have concluded that until their legislatures determine otherwise, they will not recognize a contract which is implied from the rendition and acceptance of 'housewifely services.'").

rendered gratuitously."[420] Relying on *Marvin v. Marvin* for support, the court turned to "human experience,"[421] echoing the musings of Justice Bradley in his *Bradwell* concurrence about the way things are and the ruminations of Justice Brewer in *Muller* on "matters of general knowledge."[422] The "human experience" set forth in *Morone* is, however, oddly specific: "[P]ersonal services will frequently be rendered by two people living together because they value each other's company or because they find it a convenient or rewarding thing to do."[423]

Once again, the "ought" slips into the "is," and what the law requires becomes what nature dictates—services are *naturally* gratuitous because they are *legally* defined as part of the relationship.[424] These obligations are, however, no longer enforced by virtue of the relationship's status but rather by dint of contract's reach. This result is not inevitable. In fact, the small number of different-sex cases—from Nebraska and Pennsylvania—that uphold contracts for services demonstrates this point clearly.

3. Relationship-based or service-based contract claims

Courts in Nebraska have been as receptive to claims of contract based on services as they have been to those based on property. In *Kinkenon v. Hue*, the Supreme Court of Nebraska upheld an oral contract between an unmarried couple that had been together for six years.[425] The bargain they had agreed to was for Betty Kinkenon to provide Percy Hue with "homemaking and other domestic services, as well as business skills" in exchange for his "providing for her daily needs and her future security."[426] The court relied on the evidence,

420. *Morone*, 413 N.E.2d at 1157 (emphasis added).

421. *Id.*

422. For a discussion of these cases, see Part I.B above. *See also* Bradwell v. State, 83 U.S. (16 Wall.) 130, 139-42 (1873) (Bradley, J., concurring); Muller v. Oregon, 208 U.S. 412, 421-22 (1908).

423. *Morone*, 413 N.E.2d at 1157 (citing Marvin v. Marvin, 557 P.2d 106, 117 n.11 (Cal. 1976) (en banc), *modified on remand*, 122 Cal. App. 3d 871 (1981)).

424. Moreover, the reasons provided for refusing to recognize such implied contract claims are similar, according to *Morone*, to those that motivated the New York legislature to abolish common law marriage: "There is . . . substantially greater risk of emotion-laden afterthought, not to mention fraud, in attempting to ascertain by implication what services, if any, were rendered gratuitously and what compensation, if any, the parties intended to be paid." *Id.* at 1157-58; *see also* Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 964 (2000) (arguing that a contributing factor to the abolition of common law marriage was "a vision of a dangerous femininity, of conniving and gold digging women preying on the goodwill of innocent men (or their estates) through false performances of wifely conduct").

425. 301 N.W.2d 77, 78-81 (Neb. 1981).

426. *Id.* at 79.

which was not in dispute, that Betty had "cleaned the house, washed clothes, cooked the meals, ran errands for the appellant, cared for the lawns and garden, canned food, cared for appellant's father while he was alive, did the bookkeeping for appellant's business and farm operations, and provided nursing services to appellant while he was convalescing."[427] Because Betty had performed her side of the bargain, the court held Percy to his.[428] In the process, the court made no distinction between contributions made to the business and contributions made to the relationship—they were all part of the exchanges that gave rise to Betty's claim.

The ability to recognize services in addition to property for the purpose of establishing a contract is also a consistent feature of the decisions rendered in Pennsylvania. Courts, for instance, are willing to recognize contracts that require a sharing of assets accumulated during the relationship where the plaintiff agreed to "live with [the defendant] and act as 'a homemaker, a mother to his children, a partner, a hostess.'"[429] Rather than defeating the ability to contract in this space, these activities form the basis for it.[430] In *Knauer v. Knauer*, the court specifically rejected the arguments that the terms of such a contract "were too vague, that the only consideration promised was sexual services, or that no breach was proven."[431] It further rejected the idea that the plaintiff had "suffered no damages"; it calculated the amount to be half of the assets accumulated during the relationship.[432] In this particular context, the court's following assertion finally rings true: "[T]wo adults not married to each other, who agree to establish a financial and economic relationship based on adequate consideration which is not predominantly based on sexual consideration," are fully capable of creating "an agreement cognizable and binding in law."[433]

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427. *Id.*

428. *Id.* at 79-81. In the context of an action in equity, another Nebraska case similarly upheld a verbal agreement that the plaintiff would perform wifely services and the defendant would take care of her for life. *See* Wolf v. Mangiamele, No. A-97-284, 1998 WL 902572, at *3 (Neb. Sept. 15, 1998) (relying on *Kinkenon*, the court concluded that the defendant "agreed to 'take care' of [plaintiff] for the rest of her life and that her role was to perform 'wifely duties,' which included domestic services" (quoting trial testimony)).

429. Knauer v. Knauer, 470 A.2d 553, 558, 561-64, 566 (Pa. Super. Ct. 1983) (quoting appellee's trial testimony).

430. *See also* Baldassari v. Baldassari, 420 A.2d 556, 558-60 (Pa. Super. Ct. 1980) (upholding an agreement between unmarried parties to provide a home and family environment in exchange for leasing a residence for a forty-year period).

431. 470 A.2d at 566.

432. *Id.*

433. *Id.* Given this background, the cases that are remanded carry more bite. *See* Mullen v. Suchko, 421 A.2d 310, 311-12 (Pa. Super. Ct. 1980) (holding that the agreement was not void as against public policy because it was not based on sexual intercourse and was

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Nebraska and Pennsylvania provide a different approach in that they recognize a wider range of activities that can be subject to contract between intimates. Clearly in the minority, they nonetheless serve to question the set of assumptions courts make in the standard case—that services are irremediably tainted by sex, that they are provided entirely out of love and affection, that they are presumed gratuitous or fully compensated during the relationship itself, and that the terms of such agreements are too vague to be enforced. Instead, these decisions acknowledge the existence of the relationship, without defining it in ways that alter the analysis of the contract claim.

It bears particular mention that Nebraska and Pennsylvania both differ in important ways from states that rely on the relationship itself as a requirement for establishing the existence of a contract. This latter approach has been adopted by New Jersey, which allows claims for support, or palimony, only in the context of a "marital-like" relationship.[434] The New Jersey Supreme Court in *Kozlowski v. Kozlowski* blurred together express and implied claims in addressing requests for palimony—"[w]hether we designate the agreement reached by the parties . . . to be express, as we do here, or implied is of no legal consequence."[435] But what is of legal import is that a marriage-like relationship exist. In *Devaney v. L'Esperance*, the New Jersey Supreme Court affirmed that a marital-like relationship was in and of itself consideration for a contract to provide support.[436] This acknowledgment crystallized into a precondition in

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only "'collaterally conducive' to divorce, overturning a dismissal, and remanding); Stephenson v. Szabo, 20 Pa. D. & C.4th 97, 97, 100-02 (Ct. C.P. 1992) (denying preliminary objections to a contract in which one party would take care of the household while the other would "provide for [her] for the rest of her life and . . . marry her" (first alteration in original)).

434. Kozikowska v. Wykowski, No. FM-09-2617-08, 2012 WL 4370430, at *11-12 (N.J. Super. Ct. App. Div. Sept. 26, 2012) (per curiam) (holding that a marital-type relationship is required before enforcing a claim for palimony), *aff'd per curiam*, No. A-3338-14T1, 2017 WL 461299, at *2 (N.J. Super. Ct. App. Div. Feb. 3, 2017). Nevada has adopted a similar approach, which applies "community property by analogy" if unmarried parties "agree to acquire and hold property as if the couple is married." Bumb v. Young, No. 63825, 2015 WL 4642594, at *1 (Nev. Aug. 4, 2015). The court in *Bumb* arguably expanded the scope of this doctrine in using it to uphold "an express and implied contract" whereby the man provided the woman "with a permanent home in exchange for [the woman's] companionship, partnership, and business and personal assistance" even though "the agreement [did] not concern the parties holding property as if they were married." *Id.*

435. 403 A.2d 902, 906, 908 (N.J. 1979), *superseded in part by statute*, N.J. STAT. ANN. § 25:1-5(h) (West 2020) (prohibiting oral palimony agreements).

436. 949 A.2d 743, 749-51 (N.J. 2008). The concurrence expressed a desire to expand what could count as consideration in future cases. *See id.* at 751-52 (Long, J., concurring) (joining the majority to the extent that it applied "an entirely correct paradigm in an implied contract case," but suggesting that in a case involving an express contract, "plaintiffs who have acted in reliance on an express promise for support and who have

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the course of the court's opinion—the court in *Devaney* declined to find such a contract where "the marital-type relationship that informs the basis of a valid contract was lacking."[437] In this way, the nature of the relationship and its similarity to marriage explicitly shape the court's contract analysis—by becoming a requirement to satisfy rather than a characteristic to avoid. While New Jersey courts turn the reasoning of those cases that decline to uphold contracts on its head, they similarly focus on the relationship rather than on the contract before them in deciding whether to enforce the agreement alleged.

* * *

These various cases that uphold express contracts help reveal the contestable nature of the assertions made in those opinions that deny their enforcement. Services can indeed function as the basis for a legally recognized exchange in certain situations. They tend to be adequate where the couple was unable to marry at the time. Where marriage was available, courts generally only recognize a contract when financial contributions, or interests in property, are squarely presented, which they can separate from the exchanges that otherwise make up the relationship. And the very few jurisdictions that enforce a contract for services help unravel the reasoning both internal and external to those cases that refuse to do so.

III. Consequences of a Restricted Right to Contract

This Part steps back to gather theoretical and practical insights from the case law. In particular, it argues that courts continue to limit the right to contract in ways that reproduce the status-based consequences of marriage. It further considers the implications of limiting the right to contract in this space—courts expand the effects of marriage to couples living outside of marriage and, in the process, redraw the line between the market and the family. Despite courts' protestations about keeping marriage and nonmarriage distinct, marriage directly informs how they address nonmarital couples' agreements and exchanges. This elision belies the separation between the family forms courts are intent on upholding and suggests that these relationships are more similar than they are distinct. As such, if denying rights to these couples is not justified by upholding differences between marriage and nonmarriage, then providing them with rights generally available emerges as an equally viable option. Finally, this Part addresses potential ways out of this

provided consideration other than conformance with marital roles are nevertheless entitled to recover").

437. *Id.* at 750; *see also* Gelinas v. Conti, No. A-5758-12T3, 2016 WL 885141, at *8 (N.J. Super. Ct. App. Div. Mar. 9, 2016) (per curiam) (upholding a palimony agreement where "the parties lived together in a marital-type relationship" for twelve years).

quandary; it proposes to collapse the family–market dichotomy by firmly introducing contract into the family.

A. Contract as Status

The right to contract is categorically limited in the nonmarital space. Courts continue to reinforce the division between the home and the market in ways that clearly disadvantage the homemaker. The vehicle courts exclusively rely on is contract, rather than status, which means that the phenomenon extends beyond marriage in ways that are diffuse and difficult to identify. Moreover, courts' rhetoric and reasoning naturalize the state of affairs by employing a definition of the relationship that links homemaking services to sex and prevents either from being secured by contract. But contract is more capacious than the familial context admits. It is thus imperative to separate how things are from how they "should be."[438]

Women have long had limited rights to contract. The history of coverture clearly shows how the regulation of an intimate relationship—marriage—impacted a woman's role at work, thereby merging the two spheres in an attempt to keep them separate. Now that women can freely contract in the workforce, and much of the marital relationship is subject to contract,[439] it is harder to identify just how contract is thwarted in the intimate sphere in ways that still harm the "wife." Even as marriage has come under the microscope, nonmarriage has largely evaded inspection. But the shield that once covered marriage has unmoored itself from that status to cover all intimate relationships and all sexes.[440]

Denying individuals the right to contract by relying on the nature of intimate relationships produces the very reality courts purport simply to describe—but only for some relationships and only for some contracts. This irregularity calls into question the tension courts assume between contract and couples, markets and families. The pattern of reasoning courts fall into—namely, that the basic building blocks of contract are lacking in this context—mostly foils agreements in relationships that could have been marital. This simple fact reveals that courts' reasoning is entirely contingent and neither inherent in the nonmarital relationship nor in the courts' contract-based

438. *See* Bradwell v. State, 83 U.S. (16 Wall.) 130, 141 (1873) (Bradley, J., concurring) ("Man is, or should be, woman's protector and defender."); *supra* Part I.B.

439. *See* Singer, *supra* note 7, at 1460-61 ("Even where state-imposed marital obligations remain as the background legal regime, spouses today have considerable freedom to alter those background obligations by private contract, either before or during marriage.").

440. *See* Antognini, *supra* note 10, at 2207 ("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.").

reasoning. As Part II has detailed, contract claims escape their dead-end fate in relationships that had no possibility of becoming marriage, like in the context of same-sex couples before *Obergefell*,[441] or where finances rather than services are at stake. The two jurisdictions that recognize the ability of an unmarried couple to contract for exactly those things that typically frustrate an agreement further question the conclusion that consideration necessarily fails in this intimate context or that the terms of these contracts are impossible to ascertain. There is no need to leave the realm of intimate relationships to see how courts treat consideration differently, and how it waxes and wanes based on the characteristics of the relationship, rather than on the terms of the exchanges undertaken by the individuals.

But leaving the realm of the family and turning to contract law more generally only advances this point: The Restatement of Contracts defines consideration merely as a "bargained for" exchange.[442] The Restatement explains that the parties to a bargain are "free to fix their own valuations" and, in particular, can engage in unequal exchanges.[443] In addition, *"[o]rdinarily*," courts will not "inquire into the adequacy of consideration," especially in situations "when one or both of the values exchanged are uncertain or difficult to measure."[444] Rather than establishing the nonmarital space as hostile to contract's purview, the Restatement positions the nonmarital space, where services—which may be difficult to value—are provided, as *the* precise locus of contract law. This is not to suggest that the Restatement is free from inconsistencies and interpretative problems of its own.[445] It is only to underscore a different path offered by contract law itself—which some courts have operationalized by upholding contracts that rely on services just as they do for those that rely on some form of property.

The family is not entirely absent from the Restatement, which specifically addresses the influence of marriage on contract. Section 190 allows for contracting between married individuals but voids a contract "if it would change some essential incident of the marital relationship in a way detrimental to the public interest in the marriage relationship."[446] The plainly stated reason

441. Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

442. RESTATEMENT (SECOND) OF CONTRACTS § 71 (AM. L. INST. 1981) (noting that a bargained for promise or performance is "sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise").

443. *Id.* § 79 cmt. c.

444. *Id.* (emphasis added).

445. *See* Dalton, *supra* note 34, at 1094 (concluding that "the area of contract doctrine we identify as being about consideration and reliance is in fundamental conflict over the question whether consideration should be viewed as a formal or a substantive requirement").

446. RESTATEMENT (SECOND) OF CONTRACTS § 190.

for limiting contract in this realm is status: "Many terms of the relationship are seen as largely fixed by the state and beyond the power of the parties to modify."[447] While the Restatement nowhere defines an "essential incident," it reaffirms the ability of married persons to enter into "contracts between themselves for the disposition of property, since this is not ordinarily regarded as an essential incident of the marital relationship."[448] Leaving aside the fact that the Restatement perpetuates the divide between property and services, and that property has been core to how marriage has been defined at least since coverture, the Restatement really has only one specified exception to contract between individuals in intimate relations—for married couples, based on the *status* of their relationship.[449] Courts, however, have extended this cabined carve-out to all intimate relationships.[450]

As we have seen, the explicit absence of a status, and thereby of a status-based limit, does not lead courts to interpret contracts in the nonmarital sphere straightforwardly; as importantly, it does not even influence courts to provide alternative justifications for the limits they impose on contracting outside of marriage.[451] Given courts' partial descriptions of both contracts and the couples before them, they are not forced to confront the effects of their decisions, which are perfectly intelligible—they construct a sphere that is subject to contract as they forge one alongside it that is not; they define certain labor as economic in nature and therefore subject to exchange as they characterize other labor as gratuitous and therefore not. The flip side of the

447. *Id.* § 190 cmt. a.

448. *Id.*

449. Chapter 8, which deals with agreements unenforceable on account of public policy, includes Topic 3, titled "Impairment of Family Relations." It addresses "the freedom of unmarried persons to marry (§ 189), the integrity of the relationship between married persons (§ 190), and the protection of custodial rights of children (§ 191)." RESTATEMENT (SECOND) OF CONTRACTS ch. 8, topic 3, intro. note.

450. *See supra* Part II. This is so even where the Second Restatement discarded the First Restatement's section 589, which declared that "[a] bargain in whole or in part for or in consideration of illicit sexual intercourse" was illegal. RESTATEMENT (FIRST) OF CONTRACTS § 589 (AM. L. INST. 1932). The breadth and "vagueness of this rule gave the courts considerable discretion in the enforcement of [nonmarital] agreements, because most of them *could* be characterized by an unsympathetic judge or jury as having been made in 'contemplation' of a relationship involving sex." Case Comment, *Property Rights upon Termination of Unmarried Cohabitation:* Marvin v. Marvin, 90 HARV. L. REV. 1708, 1713 (1977) (arguing that the effect of *Marvin* on section 589 and the general "doctrine of illegality" was to "limit[] the discretionary nonenforcement of contracts to those which are inseparably and explicitly founded on sexual services").

451. Clare Dalton's critique of contract law details a similar phenomenon. She shows how it fails to "reflect directly on the concrete aspects of social life that create the disputes and shape their resolution in an area where there is startling lack of consensus" and instead opts to "covertly translate those aspects into the presence or absence of consideration, the presence or absence of implied contract." Dalton, *supra* note 34, at 1003.

market-family divide is, obviously, the market part of the equation, defined as a matter of law by opposition to the family: While "[p]articipation in wage labor organized through contract has been one defining feature of free labor, . . . free labor also has been constituted through opposition to and distinction from subordinated categories of slaves, paupers, and housewives."[452] Relying on this definition by dichotomy also obscures the relational aspects of labor recognized as such—"the market itself involves more emotional value than is suggested by our current conceptions."[453] Indeed, "many people love their jobs, and many people perform their jobs because they are providing for loved ones."[454]

Intimacy and work regularly interact. As a matter of social fact, there is little dispute regarding the existence of economic exchanges within relationships. Viviana Zelizer has richly documented how "all of us use economic activity to create, maintain, and renegotiate important ties—especially intimate ties—to other people."[455] Households—defined without reference to marriage as "two or more people who share living quarters and daily subsistence over substantial periods of time"[456]—are replete with economic activity and include the "production, distribution, consumption, and transfers of assets."[457] Zelizer explains that "the mixture of caring and economic activity within households takes place in a context of incessant negotiation, sometimes cooperative, other times full of conflict."[458]

The existence of these exchanges—across family and work—does not, of course, resolve the specific cases that come before courts. As Zelizer notes in discussing various types of couplings, from friends to romantic partners, "participants unquestionably mingle intimacy and economic transactions" but

452. Noah D. Zatz, *Working at the Boundaries of Markets: Prison Labor and the Economic Dimension of Employment Relationships*, 61 VAND. L. REV. 857, 930 (2008) (footnote omitted). Noah Zatz elaborates on the distinctions these divisions presume and enshrine: "Ascribed race and gender differences help mediate the distinction between the competent, independent citizens of free labor and incompetent, dependent others." *Id.* at 930-31.

453. Silbaugh, *supra* note 29, at 84.

454. *Id.* Individuals also engage in work that is intimate. *See* Naomi Schoenbaum, *The Law of Intimate Work*, 90 WASH. L. REV. 1167, 1169-70 (2015) (defining "intimate work" as "involv[ing] the paid provision of services entailing intimacy to a range of consumers" and arguing "for a new unified field of intimate work law to protect the circumstances under which intimate workers labor and the public as consumers receive critical services").

455. VIVIANA A. ZELIZER, THE PURCHASE OF INTIMACY 3 (2005).

456. *Id.* at 213.

457. *Id.* at 216.

458. *Id.* at 165.

"they do not do so indiscriminately."[459] The undeniable presence of such transactions, however, the fact that "[m]oney cohabits regularly with intimacy, and even sustains it,"[460] effectively erodes the reasoning courts currently espouse, which obscures the very question before them. Beginning from a more accurate description of the issue squarely posed in these cases leads to a different analysis: Will the law enforce a contract where an individual contributed services during an intimate relationship outside of marriage? Defaulting to trite declarations on the difference between love and contract does not provide an acceptable answer.

Identifying how courts continuously reinforce this artificial divide is the first step toward deciding whether we want to exclude contract as a way of structuring relations between individuals in an intimate relationship. Breaking down the mechanisms through which the market and the family are actively kept apart reveals the multiple ways they are actually connected.[461] Rather than existing as separate spheres, the market and the family are each fundamentally a part of the other. That is, they do not exist side-by-side; nor do they exist on a spectrum where on one end lies the "family" and on the other the "market." They are mixed together in a way that makes them inextricable: Labor and intimacy straddle both market and home.[462]

There has been no particular progression from status to contract. Quite the opposite, in fact: We have remained in the same place, *extending* the effects of status *through* contract. Given the explicit lack of status, we can only see its silhouette take shape from the discrete ways in which contract fails. But status is still driving these decisions—in that courts are making judgments about the

459. *Id.* at 101-02, 105, 107.

460. *Id.* at 28.

461. Zelizer sets forth the many and varied ways in which connections are created and individuated, explaining that "people create connected lives by differentiating their multiple social ties from each other, marking boundaries between those different ties by means of everyday practices, sustaining those ties through joint activities (including economic activities), but constantly negotiating the exact content of important social ties." *Id.* at 32-35. Accepting the existence of these continual renegotiations, the point here is to show that legal rules construct an alternative reality—one of separation between market and family—that obscures the question posed by these cases and misdirects the ensuing analysis.

462. *See* Zatz, *supra* note 452, at 917 ("[A]ll of us use economic activity to create, maintain, and renegotiate important ties—especially intimate ties—to other people." (quoting ZELIZER, *supra* note 455, at 3)); Schoenbaum, *supra* note 454, at 1170 ("Workers—doctors, nurses, divorce lawyers, hairstylists, and bartenders—have long engaged in the intimate aspects of life."); Marion Crain, *Arm's-Length Intimacy: Employment as Relationship*, 35 WASH. UNIV. J.L. & POL'Y 163, 169-70 (2011) ("The law . . . draws a clear distinction between employment (waged labor) and intimate (for love) relationships. . . . Yet the lived experience of most people belies this artificial divide.").

nature of intimate relationships based on the content supplied by marriage—and limiting contract accordingly.[463]

B. Marriage and Nonmarriage

Perhaps the most curious effect of failing to provide a robust right to contract outside of marriage is the conflation of marriage with nonmarriage. The similarities in how courts regulate marriage and nonmarriage undermine the distinctions they are so intent on upholding. Not only are courts treating domestic services alike across these different relationship terrains, but marriage is *the* reason why courts are deciding these contract claims the way they are: Courts import the specific exchanges that underlie marital unions into nonmarriage and decline to enforce contracts for what could have been achieved through marriage. The result is to limit the availability of contract in the same way, for similar reasons, in both relationships.[464]

Decisions addressing nonmarriage are replete with claims about the specialness of marriage. Courts that recognize rights for unmarried couples join courts that decline to do so on this unassailable point of agreement: Marriage is unique.[465] This is no coincidence. As scholars have noted, "the law of marriage is centrally concerned with distinguishing marriage from other

463. Of course, contract and status are not necessarily or inherently clashing constructs. *See* Halley, *supra* note 6, at 15 ("I hope to show that these supposed opposites [status and contract], these supposed points of origin and destinations, are instead *supplements* in the Derridean sense." (citing JACQUES DERRIDA, *That Dangerous Supplement*, *in* OF GRAMMATOLOGY 141, 141-62 (Gayatri Chakravorty Spivak trans., 1997))). There is, however, value in pointing out the direct ways in which the status of marriage impacts the status-free realm of nonmarriage. Instead of remaining stuck on the nomenclature, the goal is to consider the effects of such reasoning. As Janet Halley has concluded from her sustained engagement with the status/contract distinction, "the real normative issue is not whether marriage is or should be status or contract, but whether marriage and its alternatives distribute in ways that we think are just." *Id.* at 58.

464. The clear exception to this is New Jersey, which requires a marital-like relationship prior to enforcing a contract. *See supra* Part II.B.3 (identifying New Jersey's specific approach).

465. This rings true from *Marvin* to *Blumenthal*. *See* Marvin v. Marvin, 557 P.2d 106, 122 (Cal. 1976) (en banc) (stressing that the court "[took] this occasion to point out that the structure of society itself largely depends upon the institution of marriage, and nothing [it has] said in this opinion should be taken to derogate from that institution," despite the court's conclusion that judicial barriers that prevent "the fulfillment of the reasonable expectations of the parties to a nonmarital relationship should be removed"), *modified on remand*, 122 Cal. App. 3d 871 (1981); Blumenthal v. Brewer, 69 N.E.3d 834, 858 (Ill. 2016) ("It is well settled that the policy of the Marriage and Dissolution Act gives the state a strong continuing interest in the institution of marriage and the ability to prevent marriage from becoming in effect a private contract terminable at will, by disfavoring the grant of mutually enforceable property rights to knowingly unmarried cohabitants." (citing Hewitt v. Hewitt, 394 N.E.2d 1204, 1211 (Ill. 1979))).

relationships";[466] in fact, "one of the best ways" to do so "is to proclaim marriage's separation from the market and to refuse enforcement to certain economic exchanges between husbands and wives."[467] Yet the line between marriage and nonmarriage on this exact axis is fuzzy to the point of blurring the two indistinguishably. Indeed, were courts to follow their own assertions and in fact uphold the whole spectrum of agreements nonmarital couples enter into, then perhaps "the enforceability of contracts between unmarried sexual partners for domestic services" would actually "contrast[] sharply with the law's refusal to enforce such contracts between spouses."[468] But courts' current treatment of nonmarriage diminishes their separateness. In particular, domestic services are regulated in identical ways across the marital–nonmarital divide.[469]

The standardization of marriage and nonmarriage across contract law has a number of implications for both conceptualizing and regulating nonmarriage.[470] One of the most important insights that follows from revealing the specific impediments individuals face in contracting outside of marriage is that courts prevent unmarried couples from organizing their relationships outside of the paradigmatic relationship of marriage—even in situations where they expressly write around it. Scholars and advocates who rely on contract as a means of securing an individual's rights outside of marriage must contend with this reality. June Carbone and Naomi Cahn, for example, promote a vision of nonmarriage as "a new legal status" that "implies the freedom to contract on a continuum of terms" and for which "greater autonomy is possible."[471] This is, however, a far cry from how contract functions in the nonmarital space; rather than reflect a reality in which "courts take their lead from the parties' formal agreements and their actions in commingling their assets,"[472] the cases show that courts are still indisputably influenced by the specter of marriage. Courts thus supplant, rather than support, the decisionmaking and autonomy

466. Hasday, *supra* note 13, at 507.

467. *Id.*

468. *Id.* at 510.

469. *See* Antognini, *supra* note 10, at 2149, 2154; *supra* Part II.

470. There may also be implications for marriage, although that is not the focus of this Article. For instance, if courts were to take seriously the marriage prioritization theory, which is a central rationale for retaining nonmarriage as a second-class status with fewer rights and obligations attached to it, then why not punish divorce more harshly or provide additional disincentives to divorce? For a critique of the marriage-promotion rationale, see Antognini, *supra* note 10, at 2197-201.

471. Carbone & Cahn, *supra* note 20, at 121.

472. *Id.* at 56-58.

of the parties before them.[473] This documented limit on parties' right to contract should also be taken into account by scholars who embrace the preservation of a space for relationships outside of marriage.[474] As currently constituted, nonmarriage does not offer a true alternative.

The limits imposed on the right to contract show that nonmarriage is not sufficiently differentiated from marriage, nor is contract a strong enough right to resolve the dilemma of nonmarriage. The similar, rather than distinct, ways that courts treat marriage and nonmarriage raise the fundamental question: If courts consider these relationships similar enough to treat them similarly, then why not also provide these couples with similar rights?[475]

C. Possible Reforms

The undeniable fact is that the right to contract is severely restricted—by marriage—for individuals who are not married. What now? There are a number of possible options. The first is to remain within the current state of affairs, where the right to contract is available in principle but paltry in practice. The drawbacks of this approach have been discussed throughout this Article—in addition to being confused and contradictory, the crux of the problem is that courts are concealing judgments about relationships behind the guise of contract. One alternative, based on how courts presently address the right to contract in nonmarriage, is to more cleanly embrace the status quo and explicitly deny the ability to contract with regard to services.[476] A second—and

473. This is not to deny the fact that entering into contracts might be useful in guiding behavior outside of court; the focus here is on how courts prevent those agreements from having the force of law. As Jana Singer notes, "wholly apart from enforcement by courts, many scholars, marriage counselors and manuals urge couples to use contracts or contract-like structures to govern the details of their relationship." Singer, *supra* note 7, at 1461.

474. *See* Melissa Murray, Obergefell v. Hodges *and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1209-10, 1242, 1244, 1248 (2016) (expressing the fear that "[i]n nationalizing marriage equality, *Obergefell* may sound the death knell for alternative statuses—and the promise of a more pluralistic relationship-recognition regime").

475. The project of rationalizing rights provided to unmarried couples is often imposed on those who critique the current state of affairs—meaning it is up to the objectors to justify why rights should be granted across statuses. Given the current ways in which they are treated equivalently, the task is better directed to those who are claiming that the two are in fact distinct to offer reasons why they ought to be treated differently. *Cf.* Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1506 (1983) (noting that "'interference' is not a simple description of state action or inaction, but rather a way of condemning state policies, usually those aimed at changing the status quo" and explaining how "[t]he status quo itself is treated as something natural and not as the responsibility of the state").

476. Because the status quo recognizes contracts in certain situations, I do not propose abolishing contract entirely. Moreover, that would be an especially harsh outcome for unmarried couples who lack access to any status-based rights. *But see* Silbaugh, *supra*

footnote continued on next page

modest—alternative is to recognize the right to contract robustly across the board, including contracts for services, and have courts correct course by applying contract doctrine as they would without regard to marriage or its looming possibility. While these two alternatives do not occupy the entire field of potential responses, they are both attainable and tethered to the issues raised by contract in particular.

The first option—unequivocally denying the right to contract with regard to services—has the obvious benefit of clarity.[477] Parties can bargain in the shadow of fixed legal rules, knowing that marriage is the only status through which they can secure rights based on nonfinancial contributions to the home if their relationship also involves a romantic or sexual component—subject, of course, to contract.[478] One of the central problems with this approach is the continued instantiation of separate spheres. Declining to uphold contracts addressing housework effectively excludes that work from a system of valuation and shields the home from economic relations that are nonetheless plainly in operation. The distributive consequences of limiting contract are also clear—they affect the homemaker outside of marriage in both different-sex and same-sex relationships. Because domestic services are off the table in marriage too, contract law treats services, and nonfinancial contributions more generally, in an exceptional way across relationships—as something that contract, or the market, cannot touch. While not as obfuscating as the status quo, refusing to recognize contracts for services continues to be problematic specifically for the individual who engages in such work.

Moreover, preventing the enforcement of contracts does not mean that individuals will not bargain in this sphere—it only means that the law will not recognize such bargains.[479] It could also have the effect of limiting an individual's right to contract based on the intimacy of the relationship—under this regime, a contract between roommates would not suffer from the same

note 3, at 69 n.6, 122-23, 135 ("In order to treat the monetary and nonmonetary aspects of marriage equally, we should not enforce monetary premarital agreements.").

477. This very point has been made in the context of divorce. *See* Kornhauser & Mnookin, *supra* note 169, at 978-79 ("Uncertainty has several important effects on the relative bargaining power of the parties. As suggested earlier, if there is substantial variance among the possible court-imposed outcomes, the relatively more risk-averse party is comparatively disadvantaged.").

478. A recurrent problem in marriage "is that wage earners can protect and preserve their labor as their own using a contract, whereas houseworkers cannot." *See* Silbaugh, *supra* note 3, at 34-36.

479. *See* Hasday, *supra* note 13, at 497 ("The law . . . does not always abide by social practices and customary understandings. Intimates may be constantly exchanging economic assets as a matter of social practice and individual negotiation. . . . The agreements intimates make between themselves may be unenforceable in a court of law, and this unenforceability may in turn influence the frequency and nature of such agreements.").

infirmities.[480] Leaving aside the unfairness of such a result,[481] its primary effect might only be to make the source of the litigation a moving target—by incentivizing individuals to argue that the relationship was not intimate enough to bar the claim from going forward in the first instance.

Allowing parties to contract for home labor is a better alternative insofar as the exceptionalization argument goes: Recognizing the right to contract for services takes some steps toward toppling the barrier erected between housework and other types of work. The right to contract would directly address the inequities imposed on the homemaker and the devaluation imposed on homemaking. Its real weakness may be that it suffers from the defect identified generally in the nonmarital literature—that not many couples in fact enter into these agreements. That said, the dialogic relationship between law and society might work to change this state of affairs—foregrounding contract as a feasible tool could, in turn, affect how individuals conceive of their own contributions, as subject to contract, and thereby increase the frequency of nonmarital agreements.[482]

But still, contract may ultimately be too limiting a frame. Contract doctrine leads to a preordained set of discussions and answers—namely, reducing all questions to center on the market. As Frances Olsen has shown, reform efforts on this front are stuck between two poles: "[R]eforms that make the family more like the market and the market more like the family . . . do not

480. Doing otherwise, and rejecting contract claims between any individuals, would be a more monumental task and create larger inroads into the right to contract.

481. This result might even be unconstitutional—it could be problematic insofar as it burdens an individual's right to choose to engage in intimate relations. *See* Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253, 1257, 1298-301 (2009) (reading *Eisenstadt v. Baird* and *Lawrence v. Texas* as "creating a space where some acts are not subject to either criminal law's or family law's governance").

482. The corollary would be to consider the effect that barring contracts has had; in the context of marriage, the absence of suits to enforce interspousal contracts has been understood as a testament to "the prescriptive force of the legal rule—not its inconsequentiality." Siegel, *supra* note 16, at 2208-09 ("The bar on interspousal contracts for household labor thus delimits and defines both market and family relations."). This change in enforceability could be especially relevant for groups that do not generally contract. As Twila Perry has examined, while cohabitation has become less stigmatized for Black families, they are still "unlikely to enter into a formal written cohabitation contract unless the assets that could become the subject of dispute are sufficient to justify the transaction costs of the contracting process." Twila L. Perry, *Race Matters: Change, Choice, and Family Law at the Millennium*, 33 FAM. L.Q. 461, 466-67 (1999). Expanding the type of assets that have value and that would be worth subjecting to dispute, and doing so through private as opposed to public means, might go some way toward instituting change. *Id.* at 472 ("While many people in this country have increasing freedom to make choices about family life, the family lives of Black people, especially poor Black people, seem to be characterized more and more by public regulation than by private ordering.").

overcome the dichotomy between market and family, but presuppose it."[483] Instead of collapsing the divide, Olsen argues, the effect is "simply to reproduce in each sphere the failures as well as the successes of the other."[484] Thus, while injecting the market into the family means injecting a degree of "freedom and equality" that is mostly absent from this sphere,[485] the equality achieved is only equality at law, "which at best is inadequate and at worst legitimates the unequal results that characterize marketplace equality."[486] And the attendant result "discounts communal ties and promotes isolation."[487]

Yet contract is already present in this space. The problem is that courts uphold only some contracts, and not others, in ways that reproduce marriage outside its bounds. The question then is not whether courts ought to recognize contract as a matter of principle, but rather how to go about doing so given that contract is already firmly fixed in this sphere. Acknowledging this baseline, enforcing contracts for services can function as an important corrective to the reasoning and results that lead to the artificial divide between love and money. Significantly, in this specific context, at this precise time, contract is one of the only vehicles available through which to recognize sharing to any degree.[488]

That this contract-based reform relies explicitly on the market helps reveal the labor taking place within the home. Indeed, denaturalizing the family created by law is a worthy project.[489] Introducing contract into the family productively muddles the separation upheld in the case law by firmly introducing the market into the home: Altruism is not a shield to contract law, and love does not negate the presence of labor. Contract further provides a mechanism to value such work, mostly unavailable in our current legal system:

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483. Olsen, *supra* note 475, at 1529-30.

484. *Id.* at 1530.

485. *Id.*

486. *Id.*

487. *Id.*

488. The nonmarital context upends the standard critique of contracts in intimate relations. Resorting to contract in the context of marriage has been deemed problematic because it prioritizes autonomy and individualism in lieu of collaboration and sharing. *See* Barbara Ann Atwood, *Ten Years Later: Lingering Concerns About the Uniform Premarital Agreement Act*, 19 J. LEGIS. 127, 154 (1993) (critiquing the Uniform Premarital Agreement Act for "elevat[ing] contractual autonomy above notions of responsibility and contribution"). Those same problems are absent outside of marriage; quite the opposite, contract becomes an essential tool through which sharing can be recognized.

489. The scope of the problem is described by Olsen: "Each succeeding political change seems to leave the family a more *natural* entity, a freer expression of human impulses. . . . Insofar as people consider that the family exists only to serve human emotional wants, that it lacks practical purpose, they believe that it is becoming more pure and family-like." Olsen, *supra* note 475, at 1566-67.

"As long as we give significant legal consequence to work that produces economic value, we need to see that housework fits our description of productive work."[490]

A more practical critique of the proposal to rely on the right to contract is that it may be inadequate to prevent judgments about a particular relationship from affecting a more inclusive contract analysis. As we have seen, assumptions about the typical exchanges present in a romantic relationship lead courts to draw subjective and hard-to-parse lines; and these judgments might become more widespread now that same-sex couples can also marry.

An ongoing illustration of how judgments about the relationship might impact contracts qua contracts is provided by one of the Uniform Law Commission's recent proposals.[491] The Draft Act from September of 2020 offered a number of different avenues for recognizing rights—contract, equity, and also a status-based option.[492] Focusing on the provision addressing express contracts provides some insight into how this version of the Draft Act falls into the problematic patterns already evinced by courts. Under Section 7, the Draft Act provided for the recognition of an express agreement, either written and signed or oral.[493] Section 7 further followed standard contract law in recognizing implied-in-fact contracts between cohabiting couples.[494] Yet the Draft Act differentiated among these contracts by imposing different burdens of proof for implied-in-fact and oral contracts on the one hand and written contracts on the other. It provided that the former must be proved by clear and convincing evidence, the latter only by a preponderance.[495]

The stated goal of the Draft Act was to "affirm[] the capacity of each cohabitant to contract with and, upon termination of the relationship, . . . claim

490. Silbaugh, *supra* note 29, at 26-27, 84-85 ("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.").

491. The Uniform Law Commission is currently poised to pass a law regulating the economic rights of cohabitants for adoption by states. *See Economic Rights of Unmarried Cohabitants Committee,* UNIF. L. COMM'N, https://perma.cc/4AGA-3RPJ (archived Dec. 3, 2020). In September of 2020, the draft of the Act set forth a heightened burden of proof for oral and implied-in-fact contracts. *See* ECON. RTS. OF UNMARRIED COHABITANTS ACT (UNIF. L. COMM'N, Draft Sept. 12, 2020) [hereinafter ERUCA Draft (Sept. 12, 2020)]. It has since been discarded in the superseding drafts offered for consideration in November of 2020. *See* ECON. RTS. OF UNMARRIED COHABITANTS ACT (UNIF. L. COMM'N, Version 1 Draft Nov. 6-7, 2020); ECON. RTS. OF UNMARRIED COHABITANTS ACT (UNIF. L. COMM'N, Version 2 Draft Nov. 6-7, 2020) (not specifying any burden of proof).

492. *See* ERUCA Draft (Sept. 12, 2020), *supra* note 491, § 5 (governing law); *id.* § 11 (equitable claims); *id.* § 12 (equitable division of property).

493. *See id.* § 7 (cohabitation agreement).

494. *Id.*

495. *Id.* § 9 (burden of proof).

a remedy against the other cohabitant *without regard to any intimate relationship* that exists between them."[496] Yet the Draft Act set up an additional impediment. Not only did it traffic in problematic assumptions about why fraudulent claims would be especially frequent in this context,[497] but it also made it *more difficult* to prove the existence of a contract where the contract was oral or implied in fact.[498] The decision to increase the burden of proof for contracts solely between unmarried couples relies on unfounded speculations about the nature of these relationships and provides more leeway for judgments about the characteristics of the relationship to replace considerations about the particularities of the agreement. As such, extracontractual considerations sneak into even the decision of which burden of proof to apply.

This pragmatic critique shades into an existential one: Contract law might not be up to the task.[499] That is, relying on reforms to the doctrine might only lead to the "false assurance that our concerns can be met—that public can be reconciled with private, manifestation with intent, form with substance."[500] The exceptional cases that arise in the family context reveal something deeply unexceptional about contract's core—and resorting to doctrine only obscures "underlying issues of power and knowledge" and buries "the startling lack of consensus" that lies beneath the legal rules.[501] Being clear eyed about contract law's structural constraints does not necessarily mean abdicating contract

496. *See id.* prefatory note (emphasis added).

497. These same fears of fraud and female dissemblance motivated the demise of common law marriage. *Compare* Dubler, *supra* note 424, at 1000 ("[C]ourts in common law marriage jurisdictions 'open[ed] the door to fraud and perjury, and . . . expos[ed] every estate to the rapacity of designing adventurers.'" (alteration in original) (quoting Sorensen v. Sorensen, 100 N.W. 930, 934 (Neb. 1904))), *and id.* (explaining that common law marriage "favors the harlot and the adventuress and paves the way for them to claim the rights of common-law widow upon the death of some man of wealth" (quoting Errol Clarence Gilkey, Note, *Validity of Common-Law Marriages in Oregon*, 3 OR. L. REV. 28, 46 (1923))), *with* Morone v. Morone, 413 N.E.2d 1154, 1157 (N.Y. 1980) ("There is . . . substantially greater risk of emotion-laden afterthought, not to mention fraud, in attempting to ascertain by implication what services, if any, were rendered gratuitously and what compensation, if any, the parties intended to be paid.").

498. RESTATEMENT (SECOND) OF CONTRACTS § 4 (AM. L. INST. 1981) ("Contracts are often spoken of as express or implied. The distinction involves, however, no difference in legal effect, but lies merely in the mode of manifesting assent."). In setting forth the burden of proof, the Draft Act decided not to defer to whatever the enacting jurisdictions' burdens might be. *See* ERUCA Draft (Sept. 12, 2020), *supra* note 491, § 9.

499. *See* Matsumura, *supra* note 50, at 39-40 (describing how "virtually every aspect of contract doctrine expresses normative views about the law's proper purposes and the ways in which the parties should interact within a given relationship").

500. Dalton, *supra* note 34, at 1109-10.

501. *See id.* at 1003, 1106-07.

entirely.[502] It does, however, mean being vigilant about how the doctrine presents contested opinions as truths about consideration and cloaks legal constructs in the language of facts.

Given the limits of relying on contract law as the proposed solution, discarding contract is perhaps preferable. This would not mean denying the right to contract for services but would instead entail leaving the infirmities of contract law altogether by turning to status. Status-based reforms could feasibly address some of the problems with relying on contract—though this option too has a number of pitfalls. A thorough examination of the question is beyond the scope of this Article, which has focused exclusively on contract doctrine. There are, however, two problems worth noting. First, status still suffers from the pull of marriage: The question under status regimes continues to center on whether the relationship was marital-like.[503] Second, turning to status leaves the limits on the right to contract intact—limits that have historically plagued wives' access to property and that currently prevent individuals across intimate relationships from securing rights to material wealth based on contributions that appear "wifely."[504]

While focusing on contract has its shortcomings, it affords courts the distinct possibility of valuing nonfinancial contributions and at least offers them the opportunity to exchange judgments about the relationship for judgments about the types of agreements unmarried couples might have in fact entered.[505]

Conclusion

The Cut, a younger, hipper spin-off of *New York Magazine* marketed to women, recently published an article titled "My Boyfriend Wants Me to Sign a Prenup Before I Move into His House."[506] The piece takes the form of an advice column, where a woman writes into the magazine hoping to receive some

502. But it certainly may in some circumstances. *See, e.g.*, Silbaugh, *supra* note 3, at 69 n.6, 122-23, 135 (arguing that because nonmonetary terms are not enforced in premarital agreements, then "courts should not enforce premarital agreements that govern monetary issues, or should at least review them with extreme skepticism").

503. *See* Antognini, *supra* note 18, at 10, 16-18, 59.

504. The broader question is whether status can function outside of the hierarchies that plague its presence in the family.

505. This Article heeds Olsen's exhortation: "Both sets of strategies—reforming the family and reforming the market—will sometimes meaningfully improve the lives of women, but none of these strategies should be advocated without qualification: none is adequate for creating democratic, sharing relations among people." Olsen, *supra* note 475, at 1560.

506. Charlotte Cowles, "*My Boyfriend Wants Me to Sign a Prenup Before I Move into His House*," THE CUT (Dec. 20, 2019), https://perma.cc/V5VQ-NU37.

guidance on whether to sign the "cohabitation agreement" her boyfriend presented her with before moving into his house.[507] The letter and resulting article are notable for two reasons. First, they move seamlessly between prenuptial agreements, which predate marriage, and cohabitation agreements, which do not. Second, they directly address how to manage one's intentions with regard to property ownership in a nonmarital relationship, which may or may not predate marriage. The absence of marriage, coupled with conflicting desires over property ownership, collide in ways that defy a simplistic resort to assumptions about what is owed, or owned, in an intimate relationship.

The Cut clearly targets a readership with means, just like the case law addresses couples who own at least some assets. But these problems transcend class, as they do race.[508] For example, the gendered division of wealth and labor is characteristic of unmarried working-class couples,[509] and Black families "are the most unmarried group of any in the country."[510] While contract is decidedly limited as a response, showcasing the unequal ways it currently characterizes contributions in establishing who has a claim to property helps interrogate the conditions in which many unmarried individuals live. Indeed, these questions do not fall away where the reality is that "most unmarried mothers are both full-time caregivers *and* breadwinners."[511] These issues will only become more pressing as time goes on and as parties persist in coupling and commingling their lives outside of marriage.

The freedom to contract continues to be constrained by mechanisms that go unnoticed because they take place outside of the recognized status of

507. *Id.*

508. *Cf.* Karl N. Llewellyn, *Behind the Law of Divorce* (pt. 1), 32 COLUM. L. REV. 1281, 1284 n.5 (1932) ("That the rules of divorce are patterned to the bourgeois marriage does not of course mean that the non-bourgeois are not affected by such rules, nor that they are not making use of them.").

509. In the different-sex context, the negative impact is still felt by women. Despite the heterogenous reasons one might cohabit, and "despite theoretical reasons and attitudinal differences suggesting a different outcome," there is still evidence that shows that among working-class unmarried couples, "traditionally gendered behaviors remain deeply entrenched." Amanda Jayne Miller & Sharon Sassler, *The Construction of Gender Among Working-Class Cohabiting Couples*, 35 QUALITATIVE SOCIO. 427, 428 (2012).

510. R.A. Lenhardt, *Black Citizenship Through Marriage? Reflections on the Moynihan Report at Fifty*, 25 S. CAL. INTERDISC. L.J. 347, 355-56, 361 (2016) ("A focus on ensuring the flourishing of *all* families, whether they comport with traditional marriage norms or not, could go a long way toward advancing black civil rights and belonging in the twenty-first century."). "For better or worse," Robin Lenhardt argues, "dealing with the reality of nonmarriage could do more to secure black citizenship and belonging in our post-Ferguson twenty-first century world than marriage ever did." *Id.* at 350.

511. Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 172 (2015) (arguing for "a more inclusive family law, better suited to the needs of both marital and nonmarital families").

marriage. Revealing just how contract is restricted is essential in bringing to the fore a number of crucial questions: how we define family, how we value caretaking, and who we are excluding in the process. As long as our legal system is structured around the twin pillars of freedom of contract, it is imperative to question how it can function in a more egalitarian manner.

Appendix A: Nonmarital Contracts Between Different-Sex Partners[512]

Table A.1

No Contract (Doctrinal Basis)

Case	Type	Jurisdiction	Outcome
Lytle v. Newell, 74 S.W. 693, 693 (Ky. 1903)	Unknown[513]	Kentucky	Invalidating a contract for services because it facilitated "illegal sexual intercourse between" the parties.
Wellmaker v. Roberts, 101 S.E.2d 712, 713 (Ga. 1958)	Oral	Georgia	Holding that an agreement for a one-half interest in property was based on "illegal and immoral" consideration.
Hewitt v. Hewitt, 394 N.E.2d 1204, 1208 (Ill. 1979)	Oral	Illinois	Holding that a contract based on cohabitation was void, but the parties could still contract for "independent matters."
Trimmer v. Van Bomel, 434 N.Y.S.2d 82, 83 (Sup. Ct. 1980)	Oral	New York	Holding contract terms to be unenforceable for vagueness at the end of a relationship between "an elderly wealthy widow" and her "constant companion."
Schwegmann v. Schwegmann, 441 So. 2d 316, 322 (La. Ct. App. 1983)	Oral	Louisiana	Interpreting an agreement to be for a partnership that was required by statute to be in writing and finding that it failed in any event "because it [was] a meretricious one."
Slocum v. Hammond, 346 N.W.2d 485, 494 (Iowa 1984)	Oral	Iowa	Affirming a directed verdict that declined to find an oral contract where the parties performed their services out of "love and affection and friendship."
Mechura v. McQuillan, 419 N.W.2d 855 (Minn.	Oral & Written	Minnesota	Applying Minnesota's antipalimony statute, which does not recognize

512. Appendix A separates decisions that declined to enforce contracts for *doctrinal reasons*, such as lack of consideration, from those that did so for *evidentiary reasons*, such as failure to meet the burden of proof. This distinction is imperfect, and there are borderline cases in each category, but it is useful to emphasize the different reasons courts deploy in refusing to recognize contract claims. Appendix B does not highlight this distinction because of the negligible number of cases that have declined to uphold a contract.

513. The term "unknown" is used throughout the Appendices to denote instances where the court's opinion did not specify whether the contract in question was written or oral (or both).

Case	Type	Jurisdiction	Outcome
Ct. App. 1988)			cohabitation agreements unless they are in writing and signed, and holding that joint tenancy did not count as a writing.
Kurokawa v. Blum, 245 Cal. Rptr. 463, 471 (Ct. App. 1988)	Oral	California	Affirming the dismissal of a contract claim as time barred and reasoning that consideration was lacking because the promise of support "was gratuitous."
Thomas v. LaRosa, 400 S.E.2d 809, 814 (W. Va. 1990)	Oral	West Virginia	Distinguishing between contracts "to deliver a certain quality of coal on a certain date" and contracts "to cohabit, keep house and entertain friends, while the man agrees to support the woman and take care of her for life," the latter of which were invalid contracts of common law marriage.
Rose v. Elias, 576 N.Y.S.2d 257, 258 (App. Div. 1991)	Written	New York	Finding an agreement between a married man and his female companion under which he promised to buy her an apartment "in return for the 'love and affection' she provided to him" void for lack of consideration and as against public policy.
Tenzer v. Tucker, 584 N.Y.S.2d 1006 (Sup. Ct. 1992)	Oral	New York	Declining to uphold an oral contract and declaring that one of the only exceptions to the general rule barring unmarried people from court-ordered temporary maintenance was common law marriage, which had been abolished in New York and was not alleged.
Bergen v. Wood, 18 Cal. Rptr. 2d 75 (Ct. App. 1993)	Oral	California	Finding no consideration because the woman acted as a social companion and hostess, which the court found was inseparable from the sexual aspects of her relationship with the man.
Pfeiff v. Kelly, 623 N.Y.S.2d 965 (App. Div. 1995)	Written	New York	Holding that a signed agreement entered into at the end of a relationship—which gave the girlfriend her choice of personal furniture and assets as a result of their four-year relationship—lacked consideration and violated public policy because of illicit

Case	Type	Jurisdiction	Outcome
			sexual relations.
Soderholm v. Kosty, 676 N.Y.S.2d 850, 852-53 (Justice Ct. 1998)	Oral	New York	Holding that a verbal agreement to reimburse certain expenses was too "vague" but a verbal agreement to share rent was enforceable and, "given the vagaries of love and love lost," concluding it is "against the public policy of this state to attempt enforcement of the plaintiff's other claims."
Champion v. Frazier, 977 S.W.2d 61, 64 (Mo. Ct. App. 1998)	Oral	Missouri	Affirming the lower court's opinion declining to find an oral contract because the statement conveying real estate was too casual, and overturning the lower court's finding of an implied-in-fact contract because of the "family relationship" between the parties and the lack of "evidence that [the plaintiff] expected to be paid for the services she rendered."
Weathers v. Maslar, No. CV 990088674, 2000 WL 157543 (Conn. Super. Ct. Jan. 31, 2000)	Oral	Connecticut	Holding that the defendant's promise to take care of the plaintiff for life was unenforceable under Connecticut's Heart Balm Act and that encouraging the plaintiff to retire did not produce any resulting obligation.
Cohn v. Levy, 725 N.Y.S.2d 376 (App. Div. 2001)	Oral	New York	Holding that the plaintiff's testimony that the defendant agreed to take care of her was too vague and that the agreement to provide support also lacked valid consideration.
Clausen v. Jenkins, No. C4-02-1306, 2003 WL 1480460 (Minn. Ct. App. Mar. 25, 2003)	Oral	Minnesota	Holding that an antipalimony statute that requires a writing for contracts between unmarried, cohabiting intimate parties applied because the agreement did not fall under the exception for an individual seeking only to protect his separate property.
L'Esperance v. Devaney, 2005 WL 3092849 (N.J.	Oral	New Jersey	Finding no consideration for a promise to convey real estate to a nonmarital

Case	Type	Jurisdiction	Outcome
Super. Ct. App. Div. Nov. 21, 2005) (per curiam)			partner in the absence of a marital-like relationship and where testimony showed it was made after the twenty-year relationship ended.
Weicker v. Granatowski, No. CV020398167, 2006 WL 932342, at *1 (Conn. Super. Ct. Mar. 21, 2006)	Oral	Connecticut	Finding no evidence of an express or implied contract, and concluding that the "numerous services" the plaintiff undertook were not done with the expectation of monetary payment.
Pizzo v. Goor, 857 N.Y.S.2d 526 (App. Div. 2008)	Unknown	New York	Holding that consideration was based on companionship, platonic and sexual, and the contract was therefore unenforceable.
Devaney v. L'Esperance, 949 A.2d 743 (N.J. 2008)	Oral	New Jersey	Holding that while cohabitation was not required for a palimony claim, a marital-type relationship was.
Tompkins v. Jackson, No. 104745/2008, 2009 WL 513858, at *14 (N.Y. Sup. Ct. Feb. 3, 2009)	Oral	New York	Finding no contract for services that "would ordinarily be exchanged without expectation of pay" in a case involving the rapper Curtis Jackson III (also known as 50 Cent).
Sebastian v. Brackeen, No. 1 CA-CV 08-0244, 2009 WL 551222 (Ariz. Ct. App. Mar. 5, 2009)	Written	Arizona	Holding a written contract too vague to overrule a statutorily authorized request for partition based on deed.
Williams v. Ormsby, 966 N.E.2d 255 (Ohio 2012)	Written	Ohio	Holding that the resumption of a romantic relationship between cohabitants could not function as consideration in a contract allocating rights to property.
Smith v. Carr, No. CV 12-3251, 2012 WL 3962904, at *4 (C.D. Cal. Sept. 10, 2012)	Oral & Written	California	Applying California law to hold that services tied to a sexual relationship could not constitute valid consideration and that there was no exchange other than "the interactions typical of every romantic relationship."
Breininger v. Huntley, No. 317899, 2014 WL 6602713, at *5 (Mich. Ct. App. Nov. 20, 2014) (per	Oral	Michigan	Affirming a finding that the plaintiff was unable to rebut the presumption that services rendered outside of marriage were gratuitous and that there

Case	Type	Jurisdiction	Outcome
curiam)			was "no bargained-for exchange" or mutual agreement between the parties.
Gunderson v. Golden, 360 P.3d 353, 354-55 (Idaho Ct. App. 2015)	Written	Idaho	Refusing to uphold contracts between unmarried couples "in contravention of clearly declared public policy" based on the abolition of common law marriage, and refraining "from legally recognizing co-habitational relationships in general."
Barron v. Meredith, No. A145849, 2017 WL 772444 (Cal. Ct. App. Feb. 28, 2017)	Oral	California	Holding that there was no mutual assent, certainty, or consideration, and reasoning that a party's decision to move residences, relinquish decisionmaking autonomy, and leave the workforce did not constitute consideration.
Isenburg v. Isenburg, 177 A.3d 583, 590-91 (Conn. App. Ct. 2017)	Oral	Connecticut	Affirming a holding that there was no contract between the plaintiff and the defendant during their fourteen-year relationship given that the "defendant supported the plaintiff financially while they were together without undertaking any obligation to support her in the future."
Marra v. Nazzaro, No. SC-501-17/CO, 2018 WL 280097, at *3 (N.Y. City Ct. Jan. 2, 2018)	Oral	New York	Finding that there was no meeting of the minds and no expectation that the plaintiff would be reimbursed for costs she incurred during the relationship and holding that after the relationship, the defendant's promise to pay her thousands of dollars was "too vague to be enforced."
Rabinowitz v. Suvillaga, No. 17 CVS 244, 2019 WL 386853 (N.C. Super. Ct. Jan. 28, 2019)	Oral	North Carolina	Holding that illicit activities could not serve as consideration.
In re Domestic Partnership of Joling, 443 P.3d 724 (Or. Ct. App. 2019)	Oral	Oregon	Holding that an oral agreement based on vows to support the respondent were not an express promise to provide her with sole title to the former family home, and

Case	Type	Jurisdiction	Outcome
			remanding to consider the parties' intent in distributing the property in the absence of an express agreement.

Table A.2
No Contract (Evidentiary Basis)

Case	Type	Jurisdiction	Outcome
Warren v. Warren, 579 P.2d 772 (Nev. 1978)	Oral	Nevada	Affirming the trial court's factual determination that there was no oral agreement to pool funds.
Hill v. Ames, 606 P.2d 388 (Alaska 1980)	Oral	Alaska	Affirming the trial court's decision that the plaintiff failed to prove by clear and convincing evidence the existence of an oral contract to convey real property in exchange for the plaintiff's log house construction.
Crawford v. Cantor, 440 N.Y.S.2d 661, 663 (App. Div. 1981)	Oral	New York	Finding "no fact pleaded or alleged sufficient to toll the operation of the applicable statute of limitations" in a contract dispute between two parties after a fifteen-year relationship.
Carnes v. Sheldon, 311 N.W.2d 747 (Mich. Ct. App. 1981)	Oral	Michigan	Affirming the trial court's determination that the plaintiff did not satisfy her burden of proving that the defendant promised to share the property accumulated during the nonmarital relationship.
Tourville v. Kowarsch, 365 N.W.2d 298 (Minn. Ct. App. 1985)	Unknown	Minnesota	Affirming the trial court's determination that no agreement existed between the parties.
Baron v. Jeffer, 515 N.Y.S.2d 857 (App. Div. 1987)	Oral	New York	Subjecting an oral agreement for property and palimony in exchange for household services to the Statute of Frauds and not recognizing part performance.

Case	Type	Jurisdiction	Outcome
Hustin v. Holmes, 508 So. 2d 535 (Fla. Dist. Ct. App. 1987)	Unknown	Florida	Overturning the lower court's property distribution and finding that there was no evidence to prove an express or implied agreement that all property acquired during the relationship would be jointly owned.
Moltkau v. Torre, No. CV 88 25 18 46, 1990 WL 290123, at *2 (Conn. Super. Ct. Aug. 22, 1990)	Unknown	Connecticut	Finding no "evidence that the parties agreed by words or conduct to share all real and personal property acquired through their joint efforts during the time of their cohabitation."
Aehegma v. Aehegma, 797 P.2d 74 (Haw. Ct. App. 1990)	Unknown	Hawai'i	Holding that neither cohabitation nor a joint account proved the existence of an agreement for property distribution after the relationship ended.
Wood v. Collins, 812 P.2d 951 (Alaska 1991)	Unknown	Alaska	Affirming the lower court's decision that the appellant did not meet her burden of proving an agreement whereby appellee would take care of her housing needs upon separation.
Ng v. Wong, No. H023323, 2003 WL 122633 (Cal. Ct. App. Jan. 14, 2003)	Oral	California	Affirming the trial court's determination that there was no oral agreement to pool assets.
Buttacavoli v. Killard, No. 7450/04, 2004 WL 3164077 (N.Y. Civ. Ct. Nov. 22, 2004)	Oral	New York	Finding that the plaintiff alleging an oral contract for repayment of expenses did not satisfy her burden of proof, and noting that even if there had been an oral contract, it would have failed under the Statute of Frauds.
Filip v. Soare, No. CV054010580, 2006 WL 1359930 (Conn. Super. Ct. May 5, 2006)	Unknown	Connecticut	Finding that the plaintiff did not meet the preponderance-of-the-evidence standard for proving the existence of a contract granting her an interest in property owned by the defendant.
Fjoslien v. Masterson, No. B194985, 2008 WL 484299 (Cal. Ct. App. Feb. 25, 2008)	Oral	California	Finding that the plaintiff did not introduce sufficient evidence to prove the existence of an oral contract providing that he held a condominium jointly with the defendant.

Case	Type	Jurisdiction	Outcome
Sands v. Menard, 887 N.W.2d 94, 109 (Wis. Ct. App. 2016)	Unknown	Wisconsin	Affirming summary judgment against a contract claim given that the plaintiff "failed to allege a valid and enforceable contract" for the provision of business services.
Barr v. Larkin, No. KNLCV156024578S, 2017 WL 5930379 (Conn. Super. Ct. Nov. 7, 2017)	Oral	Connecticut	Finding that the plaintiff did not meet the burden of proof in seeking to establish the existence of an agreement about co-ownership of a boat.
Meyer v. Jeffries, No. EO70773, 2019 WL 6710854 (Cal. Ct. App. Dec. 10, 2019)	Oral	California	Affirming the trial court's conclusion that the plaintiff did not satisfy his burden of proving an agreement to share property in the defendant's name.

Table A.3
Remanded or Dispositive Motion Denied

Case	Type	Jurisdiction	Outcome
Latham v. Latham, 547 P.2d 144 (Or. 1976) (en banc), *modified*, 574 P.2d 644 (Or. 1978)	Unknown	Oregon	Overturning the lower court's decision to sustain a demurrer and holding that an agreement was not void where consideration was not restricted to sexual intercourse but also contemplated the burdens and comforts associated with married life.
Marvin v. Marvin, 557 P.2d 106 (Cal. 1976) (en banc), *modified on remand*, 122 Cal. App. 3d 871 (1981)	Oral	California	Overturning a judgment on the pleadings and holding that cohabitation was insufficient to invalidate the parties' agreement.
Mullen v. Suchko, 421 A.2d 310, 312 (Pa. Super. Ct. 1980)	Unknown	Pennsylvania	Overturning a dismissal because an agreement to exchange services for financial support was not automatically void if (1) meretricious sexual services did not form the sole consideration for such agreement or (2) such agreement was merely "collaterally conducive to" rather than facilitative of divorce.

Case	Type	Jurisdiction	Outcome
Morone v. Morone, 413 N.E.2d 1154 (N.Y. 1980)	Oral	New York	Overturning a dismissal because services were valid consideration for an oral contract but such contracts could not be implied from the relationship between an unmarried cohabiting couple.
McCall v. Frampton, 438 N.Y.S.2d 11 (App. Div. 1981)	Oral	New York	Holding that whether an oral contract for employment services could be severed from a relationship should be addressed at trial and not dismissed on the pleadings as violating public policy.
Cook v. Cook, 691 P.2d 664 (Ariz. 1984) (en banc)	Unknown	Arizona	Vacating the lower courts' decisions and remanding to apply the correct legal principles because cohabitation and failed expectations of marriage did not negate an agreement's enforceability so long as the relationship itself was not the consideration.
Boland v. Catalano, 521 A.2d 142, 146 (Conn. 1987)	Oral	Connecticut	Holding that ordinary contract principles were not suspended for cohabitants and that "public policy [did] not prevent the enforcement of agreements regarding property rights between unmarried cohabitants."
Stevens v. Muse, 562 So. 2d 852 (Fla. Dist. Ct. App. 1990)	Unknown	Florida	Holding that agreements between cohabitants were not categorically unenforceable as a matter of public policy.
Goode v. Goode, 396 S.E.2d 430 (W. Va. 1990)	Oral	West Virginia	Answering certified questions by holding that a court could order a division of property on the basis of an express or implied contract, or constructive trust, if properly alleged.
Donnell v. Stogel, 560 N.Y.S.2d 200 (App. Div. 1990)	Written	New York	Overturning a dismissal and holding that a cohabitation contract did not promote adultery or divorce and was enforceable if valid consideration was present.
Stephenson v. Szabo, 20 Pa. D. & C.4th 97 (Ct.	Oral	Pennsylvania	Overruling a demurrer because agreements between cohabitants are not

Case	Type	Jurisdiction	Outcome
C.P. 1992)			automatically void by virtue of their sexual relationship.
Crossen v. Feldman, 673 So. 2d 903, 903 (Fla. Dist. Ct. App. 1996)	Oral	Florida	Reversing the dismissal of an oral contract claim for support during pregnancy and for a reasonable time thereafter because "enter[ing] into a contract for support . . . is something that [the parties] are legally capable of doing."
Obert v. Dahl, 574 N.W.2d 747 (Minn. Ct. App. 1998), *aff'd mem.*, 587 N.W.2d 844 (Minn. 1999)	Oral	Minnesota	Overturning a grant of summary judgment in favor of the defendant and remanding because there was an issue of fact as to whether consideration was solely based on a sexual relationship where the plaintiff had contributed money toward the purchase of a house.
Cochran v. Cochran, 89 Cal. App. 4th 283 (Ct. App. 2001)	Oral	California	Reversing the lower court's holding that no *Marvin* agreement for lifetime support existed, and remanding to consider whether the parties cohabited.
Combs v. Tibbitts, 148 P.3d 430 (Colo. App. 2006)	Written	Colorado	Holding that cohabiting couples could contract with each other so long as sexual relations were only incidental to the agreement, and remanding for the lower court to consider whether the parties' contract was enforceable for a lawful purpose.
Maeker v. Ross, 99 A.3d 795 (N.J. 2014)	Oral	New Jersey	Overturning a dismissal of the plaintiff's palimony claim and holding that the 2010 amendment to the Statute of Frauds did not apply retroactively to the creation of those agreements.
Browning v. Poirier, 165 So. 3d 663, 666 (Fla. 2015)	Oral	Florida	Answering a certified question by holding that a contract between cohabitants for lottery winnings that "could have possibly been performed within one year" was not subject to the Statute of Frauds.
Wittner v. Phillips, No. A15-1681, 2016 WL	Oral	Minnesota	Overruling a dismissal because an oral contract between an unmarried couple

Case	Type	Jurisdiction	Outcome
2842997 (Minn. Ct. App. May 16, 2016)			concerning housing and other living expenses was not based on sexual relations and therefore was not barred.
Frederico v. Sullivan, No. FSTCV166029399S, 2018 WL 1137582, at *6 (Conn. Super. Ct. Feb. 2, 2018)	Oral	Connecticut	Declining to grant summary judgment in favor of the defendant because the contract between cohabitants was not inherently unenforceable, especially where it was not based only on love and affection or "in consideration of the fact that [the parties] lived together."
Pearce v. Allen, No. B269744, 2018 WL 897054, at *6 (Cal. Ct. App. Feb. 15, 2018)	Oral	California	Remanding a case on account of inconsistent verdicts and instructing the plaintiff to "define the consideration for her *Marvin* claim and the specific services for which she seeks recompense under her quantum meruit claim."
Baron v. Suissa, 90 N.Y.S.3d 220, 223 (App. Div. 2018)	Oral	New York	Overturning a dismissal because an oral agreement to exchange domestic and legal services for support and sharing of business profits was not "per se required to be in writing."
Maddali v. Haverkamp, No. C-180360, 2019 WL 1849302 (Ohio Ct. App. Apr. 24, 2019)	Oral	Ohio	Overturning a grant of summary judgment in favor of the defendant because contracts between unmarried cohabitants were enforceable where money, not love and affection, was the consideration.
Sheinker v. Quick, 120 N.Y.S.3d 568 (App. Div. 2020)	Oral	New York	Overturning a grant of summary judgment in favor of the defendant because New York recognizes express contracts and the plaintiff sufficiently pled the elements of a cause of action for breach of contract.
Vacula v. Chapman, No. 775 MDA 2019, 2020 WL 1057290 (Pa. Super. Ct. Mar. 5, 2020)	Oral	Pennsylvania	Overturning a dismissal because the Statute of Frauds did not bar a request for damages based on an alleged oral contract.

Table A.4
Contract Enforced (Relationship- or Service-Based Claims)

Case	Type	Jurisdiction	Outcome
Kozlowski v. Kozlowski, 403 A.2d 902 (N.J. 1979), *superseded in part by statute*, N.J. STAT. ANN. § 25:1-5(h) (West 2020)	Oral	New Jersey	Enforcing an agreement to support the plaintiff for life in the context of a marital-like relationship.
Baldassari v. Baldassari, 420 A.2d 556 (Pa. Super. Ct. 1980)	Written	Pennsylvania	Upholding a contract in which the plaintiff gave $1 and pledged to provide a home environment for the couple's four children in exchange for a forty-year lease of the defendant's home because there was consideration other than a future sexual relationship.
Kinkenon v. Hue, 301 N.W.2d 77, 80 (Neb. 1981)	Oral	Nebraska	Upholding an express agreement exchanging "domestic services, business aid, and nursing skills" for the ability to live in the former cohabitant's house.
Knauer v. Knauer, 470 A.2d 553 (Pa. Super. Ct. 1983)	Oral	Pennsylvania	Holding that mere cohabitation did not void an otherwise valid agreement for sharing wealth accumulated during a relationship, including one based on personal services.
Crowe v. De Gioia, 495 A.2d 889 (N.J. Super. Ct. App. Div. 1985), *aff'd per curiam*, 505 A.2d 591 (N.J. 1986)	Oral	New Jersey	Enforcing an oral promise by the defendant to support the plaintiff for the rest of her life where the court found that the parties cohabitated and that sexual services were not the basis for the agreement.
Kozikowska v. Wykowski, No. FM-09-2617-08, 2012 WL 4370430 (N.J. Super. Ct. App. Div. Sept. 26, 2012) (per curiam), *aff'd per curiam*, No. A-3338-14T1, 2017 WL 461299 (N.J. Super. Ct. App. Div. Feb. 3, 2017)	Oral	New Jersey	Upholding a palimony agreement between a couple who was in a marital-like relationship for twenty years.

Case	Type	Jurisdiction	Outcome
Bumb v. Young, No. 63825, 2015 WL 4642594, at *1 (Nev. Aug. 4, 2015)	Unknown	Nevada	Upholding an express and implied contract between an unmarried couple under Nevada's "community property by analogy" doctrine.
Gelinas v. Conti, No. A-5758-12T3, 2016 WL 885141 (N.J. Super. Ct. App. Div. Mar. 9, 2016) (per curiam)	Oral	New Jersey	Upholding express and implied promises to support the plaintiff in exchange for consideration in the context of a marital-like relationship.

Table A.5
Contract Enforced (Principally Property-Based Claims)

Case	Type	Jurisdiction	Outcome
Trutalli v. Meraviglia, 12 P.2d 430 (Cal. 1932) (en banc)	Unknown	California	Holding that unlawful cohabitation does not prevent the establishment of a lawful agreement to acquire property jointly based on contributions to a relationship.
Phillips v. Oltarsh, 63 N.Y.S.2d 674 (App. Term. 1946) (per curiam), *rev'g* 59 N.Y.S.2d 366 (N.Y. City Ct. 1946)	Oral	New York	Upholding an oral contract whereby the defendant promised to pay the plaintiff to remain unmarried.
Garcia v. Venegas, 235 P.2d 89 (Cal. Dist. Ct. App. 1951)	Oral	California	Enforcing an oral agreement for property accumulation, but overturning the trial court's compensation of the plaintiff for her services, finding there was no oral or implied agreement.
Hughes v. Kay, 242 P.2d 788 (Or. 1952)	Oral	Oregon	Affirming an oral agreement for the partition of property.
Ferraro v. Ferraro, 304 P.2d 168 (Cal. Dist. Ct. App. 1956)	Oral	California	Holding that an oral agreement to pool work and earnings and share equally in property accumulated was not based on illicit consideration.
Levar v. Elkins, 604 P.2d 602 (Alaska 1980)	Oral	Alaska	Affirming the jury's findings that an oral contract existed between the parties for property in exchange for

Case	Type	Jurisdiction	Outcome
			services and that the presumption that services rendered were gratuitous had been overcome.
McHenry v. Smith, 609 P.2d 855, 857 (Or. Ct. App. 1980)	Oral	Oregon	Holding that cohabiting individuals were allowed to secure economic arrangements for their cohabitation, as distinguished from "illicit meretricious consideration."
Dominguez v. Cruz, 617 P.2d 1322 (N.M. Ct. App. 1980)	Oral	New Mexico	Upholding an oral agreement to jointly hold property accumulated during the relationship.
Kinnison v. Kinnison, 627 P.2d 594 (Wyo. 1981)	Oral	Wyoming	Holding that an oral contract for the settlement of claims the plaintiff would have otherwise brought for unjust enrichment and quantum meruit was valid.
Lee v. Slovak, 440 N.Y.S.2d 358 (App. Div. 1981)	Oral	New York	Enforcing an oral agreement for a business partnership between the parties because they commingled funds, owned jointly deeded property, and engaged in joint business decisionmaking.
In re Relationship of Eggers, 638 P.2d 1267 (Wash. Ct. App. 1982)	Oral	Washington	Upholding an oral contract for the payment of wages and finding that the existence of such a contract supported the lack of a stable, marriage-like relationship between the unmarried partners.
Holloway v. Holloway, 663 P.2d 798, 799 (Or. Ct. App. 1983)	Oral	Oregon	Upholding the plaintiff's promise not to "take [the] ranch" away from the defendant even once the ranch was sold when the parties otherwise intended to share their property equally.
Wade v. Porreca, 472 N.Y.S.2d 482, 483 (App. Div. 1984)	Unknown	New York	Enforcing an agreement for "assets and earnings" acquired during the relationship.
Wheeler v. Leifer, 1985 WL 3461 (Tenn. Ct. App. Nov. 4, 1985)	Written	Tennessee	Upholding a written contract granting unwed individuals rights to reimbursement for investments made in a home, and holding that proceeds

Case	Type	Jurisdiction	Outcome
			from the sale of said home must be divided equally.
Hudson v. DeLonjay, 732 S.W.2d 922 (Mo. Ct. App. 1987)	Unknown	Missouri	Upholding an agreement to share assets accumulated during the relationship where the cohabitants started two businesses together.
Kerkove v. Thompson, 487 N.W.2d 693, 696 (Iowa Ct. App. 1992)	Oral	Iowa	Enforcing a contract that did "not arise out of the parties' cohabitation" but entailed the defendant's promise to live in a new house if the plaintiff sold her mobile home and helped build the new house.
Muir v. Stotler, No. 93-1321, 1993 WL 502791, at *2 (Wis. Ct. App. Dec. 9, 1993)	Written	Wisconsin	Upholding an agreement between the couple to divide their property equally after a relationship in which each contributed assets, money, labor, and services because "consideration . . . was independent of the parties' agreement to cohabitate."
Bryan v. Looker, No. 1-94-51, 1995 WL 73383 (Ohio Ct. App. Feb. 21, 1995)	Oral	Ohio	Upholding agreements in favor of the defendant where the plaintiff lived with the defendant rent free in exchange for later placing the defendant on the deed of property purchased with the plaintiff's savings from living rent free.
Vibert v. Atchley, No. CV 930346622, 1996 WL 364777 (Conn. Super Ct. May 23, 1996)	Written	Connecticut	Upholding a written agreement where the defendant promised to pay the plaintiff his share of household expenses.
Wilcox v. Trautz, 693 N.E.2d 141 (Mass. 1998)	Written	Massachusetts	Enforcing an agreement that kept property separate and stated that any services rendered in a twenty-five-year relationship were voluntary, and holding that unmarried cohabitants could contract for property, finances, and other matters related to their relationship.
Smith v. Riley, No. E2001-00828, 2002 WL 122917 (Tenn. Ct.	Written	Tennessee	Upholding two agreements regarding the sale and assignment of property to the plaintiff because their terms stated

Case	Type	Jurisdiction	Outcome
App. Jan. 30, 2002)			nominal consideration, were further supported by the plaintiff's love and affection, and were not breach-of-promise-to-marry claims but rather claims seeking to enforce interests in property.
Putz v. Allie, 785 N.E.2d 577 (Ind. Ct. App. 2003)	Written	Indiana	Affirming the trial court's decision to uphold an agreement that provided the plaintiff with payments based on the parties' commingling of funds and the plaintiff's contribution of services to the defendant's business.
McBee v. Nance, No. E2003-00136, 2004 WL 170389 (Tenn. Ct. App. Jan. 28, 2004)	Written	Tennessee	Enforcing a promissory note whereby the plaintiff agreed to secure a $15,000 loan from the defendant with her home because loans were not presumed gifts and consideration was adequate, even if it was unequal.
Hansing v. Carlson, No. A04-1986, 2005 WL 2429843 (Minn. Ct. App. Oct. 4, 2005)	Oral	Minnesota	Affirming a finding of the existence of a contract giving the plaintiff a one-half interest in the house on which the plaintiff had made mortgage payments.
Londo v. Burns, No. E046515, 2009 WL 3748558 (Cal. Ct. App. Nov. 10, 2009)	Oral	California	Affirming a finding of the existence of a contract for the plaintiff to recover the cost of payments made toward the mortgage of a house titled solely in the defendant's name.
Jones v. Brown, No. 1022 MDA 2013, 2014 WL 10965437 (Pa. Super. Ct. Mar. 10, 2014)	Oral & Written	Pennsylvania	Upholding two agreements for the division of an antiques collection that the couple had invested in during their relationship.
Hemingway v. Scott, 66 N.E.3d 998, 1003 (Ind. Ct. App. 2016)	Written	Indiana	Holding that an agreement that reconveyed title of property to the male plaintiff was not void based on a no-cheating clause, and concluding that the agreement was breached by his girlfriend because she did not contribute to the upkeep of the house, reasoning that the court would not "distinguish between married and unmarried cohabitants when evaluating

Case	Type	Jurisdiction	Outcome
			the parties' rights in situations where an express contract exists."
Gilroy v. Gilroy, No. B271759, 2018 WL 992010, at *5 (Cal. Ct. App. Feb. 21, 2018)	Oral	California	Upholding the parties' "express agreement governing their relationship and various assets."

Table A.6
Gender Breakdown (Party Seeking to Enforce Contract)

	Women	Men	Both
No Contract (Doctrinal Basis)	29	3	1
No Contract (Evidentiary Basis)	11	6	0
Remanded or Dispositive Motion Denied	22	2	0
Contract Enforced (Relationship- or Service-Based Claims)	8	0	0
Contract Enforced (Principally Property-Based Claims)	22	6	0

Appendix B: Nonmarital Contracts Between Same-Sex Partners

Table B.1

No Contract (All Bases)

Case	Type	Jurisdiction	Outcome
Seward v. Mentrup, 622 N.E.2d 756 (Ohio Ct. App. 1993)	Unknown	Ohio	Affirming a grant of summary judgment because there was no evidence of written or other agreements governing the parties' relationship.
Nevins v. Norris, No. CV 950549085S, 1996 WL 745819, at *3 (Conn. Super. Ct. Dec. 23, 1996)	Unknown	Connecticut	Overturning a jury determination that there had been a breach of an express contract because the plaintiff "herself[] testified on several occasions that there was no express agreement or contract between the two and that she performed the household jobs . . . out of love and affection in consideration of the fact that they lived together."

Table B.2

Remanded or Dispositive Motion Denied

Case	Type	Jurisdiction	Outcome
Doe v. Burkland, 808 A.2d 1090 (R.I. 2002)	Oral	Rhode Island	Overturning a dismissal because services, earnings, and business consulting constituted valid consideration for an agreement between a cohabiting, unmarried, same-sex couple.
McArthur v. Page, No. CV095031975S, 2010 WL 1050661 (Conn. Super. Ct. Feb. 11, 2010)	Oral	Connecticut	Holding that unmarried cohabiting parties could enter into an express, including oral, or implied contractual agreement and that such an agreement could be evidenced by the parties' conduct.

Case	Type	Jurisdiction	Outcome
Dee v. Rakower, 976 N.Y.S.2d 470, 475 (App. Div. 2013)	Oral	New York	Overturning a dismissal because the alleged agreement was supported by valid consideration, which included forbearance of career, inability to save for retirement, and maintenance of household, concluding "[t]he fact that the alleged agreement was made by an unmarried couple living together does not render it unenforceable."
Bobbitt v. Hanna, No. 920, 2019 WL 5405649 (Md. Ct. Spec. App. Oct. 22, 2019)	Written	Maryland	Remanding for further factfinding because there was arguably consideration for a contract to split proceeds from the property in exchange for not opposing the sale of the property.

Table B.3
Contract Enforced (All Bases)

Case	Type	Jurisdiction	Outcome
Whorton v. Dillingham, 248 Cal. Rptr. 405, 410 (Ct. App. 1988)	Oral	California	Holding that consideration based on services like chauffeuring and bodyguarding—which were distinct "from those normally incident to the state of cohabitation itself" and could be severed from the sexual component of the relationship—was valid.
Posik v. Layton, 695 So. 2d 759, 762 (Fla. Dist. Ct. App. 1997)	Written	Florida	Enforcing unmarried, same-sex adults' written, "nuptial-like" cohabitation agreement.
Silver v. Starrett, 674 N.Y.S.2d 915, 921 (Sup. Ct. 1998)	Written	New York	Upholding an agreement because consideration was valid even if it was not equal on both sides, as there was "no need to measure the relative weight of the consideration provided by each party."

Case	Type	Jurisdiction	Outcome
Anonymous v. Anonymous, No. 121930-2002, 2004 WL 396492, at *8 (N.Y. Sup. Ct. Feb. 9, 2004)	Written	New York	Upholding an agreement to share property as tenants in common because "[v]alid consideration . . . need not be equal on both sides" and the contract was not based "solely on love and affection."
Gonzalez v. Green, 831 N.Y.S.2d 856 (Sup. Ct. 2006)	Written	New York	Upholding an agreement between the parties that involved the transfer of property because such an agreement was not per se invalid on grounds that a couple was unmarried or of the same sex.
Armao v. McKenney, 218 So. 3d 481, 483 (Fla. Dist. Ct. App. 2017)	Oral	Florida	Affirming the trial court's finding that the unmarried parties had entered into an oral cohabitation agreement in the context of a relationship that was "just like a married couple."

Table B.4
Gender Breakdown (Party Seeking to Enforce Contract)

	Women	Men
No Contract (All Bases)	2	0
Remanded or Dispositive Motion Denied	2	2
Contract Enforced (All Bases)	2	4