
CHAPTER THREE

RESTITUTION AT HOME: UNJUST COMPENSATION FOR UNMARRIED COHABITANTS' DOMESTIC LABOR

Married couples in the United States have an array of legal rights, protections, and obligations.¹ Notably, extensive rules exist for handling property division at the dissolution of a marriage.² Courts will look past which partner holds legal title to property and allow for equitable division between the spouses.³ This approach reflects a conception of marriage that understands the spouses' relationship as something akin to a commercial partnership, wherein each partner adds economically to the enterprise as a whole, which is in turn greater than the sum of each individual contribution.⁴ It also explicitly appreciates the economic reality that a spouse who contributes domestic labor to the partnership makes an integral contribution to the development of the partners' jointly produced property.⁵

The treatment of unmarried cohabitants stands in jarring contrast.⁶ Despite the growing prevalence and cultural acceptance of this form of household,⁷ and wide-ranging support for providing a more diverse

¹ See Lawrence W. Waggoner, *With Marriage on the Decline and Cohabitation on the Rise, What About Marital Rights for Unmarried Partners?*, 41 ACTEC L.J. 49, 60–61, 89 (2015) (listing many of the legal benefits of marriage, “including social security, taxation, spousal-communication-and-testimonial-privileges, obligation of support, the right to a property settlement and perhaps alimony in divorce, a large intestate share for a surviving spouse, and protection against disinheritance via a right to elect a forced share,” *id.* at 60–61 (footnotes omitted)).

² See Margaret Ryznar, *An Empirical Study of Property Divisions at Divorce*, 37 PACE L. REV. 589, 592–602 (2017) (“To facilitate fairness, property division often proceeds in two stages. The first is applying state law to determine the assets to be divided, which is generally governed by state statutory law. The second is the actual division of assets under state law . . .” *Id.* at 592–93 (footnote omitted).); see also *infra* p. 2141 (assessing property division upon divorce).

³ See Ryznar, *supra* note 2, at 597–99 (outlining which factors courts look to in dividing a divorcing couple's marital home).

⁴ See *Developments in the Law — The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2076–77 (2003) (“[E]qual division of marital property . . . reflect[s] the conception of marriage as partnership and reject[s] the notion of a patriarchal relationship.” *Id.* at 2077.).

⁵ See *id.* at 2094.

⁶ For present purposes, the term “unmarried cohabitants” should be read broadly. It includes, but is not limited to, parties in long-term sexual relationships. But an unmarried cohabitant relationship need not involve a sexual component or be lengthy. No distinction between opposite-sex couples and other arrangements is required. Therefore, two sisters living together could be considered unmarried cohabitants. In considering whether remedies in restitution are available, however, it will often be necessary to inquire into whether the manner in which the partners structured their relationship and divided responsibilities involved sufficient mutuality to give rise to a reasonable belief that both parties would share in the surpluses that they produced in the relationship. See *infra* p. 2136; *cf. infra* section C.1, pp. 2143–45 (discussing gifts).

⁷ See Waggoner, *supra* note 1, at 53–57.

menu of family-configuration choices beyond just marriage,⁸ legal protections for unmarried cohabitants are limited and largely stagnant.⁹ Unmarried cohabitants in the United States are generally considered “legal strangers,”¹⁰ meaning that any legal claims available to partners at the relationship’s dissolution must usually be the same as those that any stranger could bring.¹¹ Those who add to the partnership by working in the home rather than in the labor market are left largely defenseless.¹² In this way, the law is lagging changes in the way people are choosing to structure their family and intimate relationships, and consequently failing signally to protect the interests of millions of people.¹³ A more sedulous employment of restitution, in which the value of domestic labor is appreciated, offers some hope.

Careful consideration of this topic, and the development of appropriate legal responses, is of particular importance in light of the disadvantaged socioeconomic status of many unmarried cohabitants, as well as their sheer numbers. The number of U.S. households containing unmarried couples increased by over forty percent between 2000 and 2010.¹⁴ The increase was approximately *one thousand percent* between 1960 and 2000.¹⁵ As of 2010, the U.S. Census Bureau estimated that over fifteen million people lived together in an unmarried household;¹⁶ given the trends, that number is almost certainly higher today.¹⁷ And “persons with low income and economic status” are the most likely to cohabit without marriage — indeed, “[a] cohabitation-type relationship is referred to as a ‘poor man’s marriage.’”¹⁸ Elderly and same-sex

⁸ Courtney G. Joslin, *Autonomy in the Family*, 66 UCLA L. REV. 912, 914 (2019).

⁹ See *id.* at 926–27, 931–32.

¹⁰ *Id. passim* (“[A]s is true with all . . . legal strangers, the default rule that applies to nonmarital partners is one of no sharing.” *Id.* at 926 (emphasis omitted)).

¹¹ See *id.* at 920.

¹² See *id.* at 926.

¹³ Waggoner, *supra* note 1, at 56 fig.2 (reporting on the prevalence of unmarried cohabitation living arrangements).

¹⁴ *Id.*; see also ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 74 (10th ed. 2017).

¹⁵ Elizabeth Hodges, Comment, *Will You “Contractually” Marry Me?*, 23 J. AM. ACAD. MATRIM. LAW. 385, 386 (2010). More precisely, this increase was among only opposite-sex couples. Given the changing attitudes toward same-sex couples over that time period, including same-sex couples in the calculation would likely show an even larger increase.

¹⁶ See Waggoner, *supra* note 1, at 56 fig.2.

¹⁷ See U.S. Census Bureau Releases *CPS Estimates of Same-Sex Households*, U.S. CENSUS BUREAU (Nov. 19, 2019), <https://www.census.gov/newsroom/press-releases/2019/same-sex-households.html> [<https://perma.cc/Q8RK-ZB3L>] (estimating that nearly seventeen million people were in “unmarried partner households” in the United States as of 2019).

¹⁸ Hodges, *supra* note 15, at 387 (quoting Cynthia Grant Bowman, *Social Science and Legal Policy: The Case of Heterosexual Cohabitation*, 9 J.L. & FAM. STUD. 1, 7 (2007)).

couples also commonly choose this living arrangement.¹⁹ Racial and ethnic disparities are stark.²⁰

At the same time that the number of unmarried cohabitants has swelled, legal movements have risked further isolating these people by cementing the institutional role of marriage. The Supreme Court has now affirmed the right of same-sex couples to marry.²¹ Although the decision vindicated an important right of same-sex couples, it simultaneously emphasized, or perhaps overemphasized, the importance of marriage in the eyes of the law — indeed, the Court went so far as to say that, without marriage, one is “condemned to live in loneliness, excluded from one of civilization’s oldest institutions”²² — raising fears among some about the precarious legal position of nonmarital families.²³ Lower courts have already begun to read *Obergefell v. Hodges*²⁴ as stressing the importance of marriage in analyzing the rights of unmarried persons.²⁵ Put differently: as an unintended consequence of judicial emphasis on the importance of marriage, *Obergefell* may actually serve to erode legal protections for cohabiting couples. If, as the case stresses, marriage is the “keystone of . . . social order,”²⁶ we risk a diminution of judicial (and societal) regard for the interests of cohabitants. In that way, a milestone decision in advancing fundamental rights simultaneously nudged us toward an earlier world as regards cohabitants. At minimum, former cohabitant plaintiffs will find an obstacle in some of the *Obergefell* dicta.

¹⁹ *Id.* at 387–88.

²⁰ R. Kelly Raley & Megan M. Sweeney, *What Explains Race and Ethnic Variation in Cohabitation, Marriage, Divorce, and Nonmarital Fertility?* 1–3 (Cal. Ctr. Population Research, Working Paper No. 06-07-01, 2007).

²¹ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2604–05 (2015).

²² *Id.* at 2608.

²³ See, e.g., Kristin A. Collins, Comment, *Equality, Sovereignty, and the Family in Morales-Santana*, 131 HARV. L. REV. 170, 199–200 (2017); Clare Huntington, *Obergefell’s Conservatism: Reifying Familial Fronts*, 84 FORDHAM L. REV. 23, 28–29 (2015); Melissa Murray, Essay, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1240 (2016); cf. Helen Alvaré, *The Meaning of Marriage*, HARV. L. REV. BLOG (Dec. 1, 2017), <https://blog.harvardlawreview.org/the-meaning-of-marriage/> [<https://perma.cc/WS8A-NARU>] (“[T]he *Obergefell* Court resoundingly affirmed that by law and public regard, marriage is: a privileged place for sexual relations; associated with the right to rear children; and the ‘keystone of the Nation’s social order.’ *Obergefell* added that marriage ‘embodies the highest ideals of love, fidelity, devotion, sacrifice, and family’ and that the state therefore offers ‘over a thousand’ benefits to married couples in order to ‘protect and nourish the union.’” (quoting *Obergefell*, 135 S. Ct. at 2590, 2608)).

²⁴ 135 S. Ct. 2584.

²⁵ See, e.g., *Blumenthal v. Brewer*, 69 N.E.3d 834, 858 (Ill. 2016); *Hawkins v. Grese*, 809 S.E.2d 441, 448 (Va. Ct. App. 2018).

²⁶ *Obergefell*, 135 S. Ct. at 2590.

For decades, scholars have argued over the economic rights of partners at the end of a cohabiting relationship.²⁷ Some advocate a contract-based approach,²⁸ others a status-based approach.²⁹ On the judicial front, courts in nearly all states permit at least contract claims between former unmarried cohabitants.³⁰ The Uniform Law Commission has recently commissioned a uniform law in an attempt to address this difficult issue more systematically across state legislatures.³¹

A related strand of scholarship has contended that unjust enrichment offers an appealing doctrinal supplement.³² In 2011, the Restatement (Third) of Restitution and Unjust Enrichment (Restatement (Third)) endorsed a version of this “modern view” that “a partner in a marriage-like relationship may recover in unjust enrichment from the one who left with jointly created assets.”³³

²⁷ This Chapter will refer to “ending” the nonmarital relationship. It should be mentioned briefly that any rights at the end of a relationship exist both at the time of a lifetime separation and at the time of a partner’s death (as a claim against the decedent’s estate).

²⁸ 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, 1469–70 (2001).

²⁹ See, e.g., Douglas NeJaime, *Marriage Equality and the New Parenthood*, 129 HARV. L. REV. 1185, 1197–98 (2016); Deborah A. Widiss, *Non-Marital Families and (or After?) Marriage Equality*, 42 FLA. ST. U. L. REV. 547, 565 (2015). Status-based approaches are far from uniform. Of particular note, different approaches place more or less emphasis on preserving a unique role for marriage versus providing alternative legal structures (less than married, more than strangers). See generally PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 35–38 (AM. LAW INST. 2002).

³⁰ See Joslin, *supra* note 8, at 927–29. Georgia, Illinois, and Louisiana, however, “permit no or only a very limited set of claims as between unmarried cohabitants.” *Id.* at 929 & nn.91–93. In times past, courts generally would not honor contracts between cohabiting couples, reasoning that such contracts were against public policy. See Robert C. Casad, *Unmarried Couples and Unjust Enrichment: From Status to Contract and Back Again?*, 77 MICH. L. REV. 47, 48, 51–52 (1978).

³¹ See *Economic Rights of Unmarried Cohabitants Committee*, UNIFORM LAW COMMISSION (2018), <https://www.uniformlaws.org/committees/community-home?communitykey=5f044999-b4b3-458a-b6d4-d084885d913b&tab=groupdetails> [<https://perma.cc/Q7RT-S6W4>].

³² See, e.g., HANOCH DAGAN, *THE LAW AND ETHICS OF RESTITUTION* 164 (2004); Casad, *supra* note 30, at 51–52.

³³ Candace Saari Kovacic-Fleischer, *Cohabitation and the Restatement (Third) of Restitution & Unjust Enrichment*, 68 WASH. & LEE L. REV. 1407, 1408 (2011). Note that the Restatement (Third) takes a narrower view of unmarried cohabitants than does this Chapter, restricting it to only those in “marriage-like relationship[s].” *Id.* This Chapter’s analysis is not similarly circumscribed. As a result, it is perhaps in conversation more directly with section 27 (“Claimant’s Expectation of Ownership”) of the Restatement (Third), which states that plaintiffs can recover in restitution for value contributed to property “that the [plaintiff] reasonably expects to retain or to acquire,” regardless of the nature of the relationship between the parties. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 27 (AM. LAW INST. 2011); see also *id.* § 28 cmt. b (“Because the claim described in this section [28] depends on the previous existence of a relationship resembling marriage, it is not available between persons who have merely lived together for extended periods — for example, between siblings who might be described literally as ‘cohabitants.’ A claim alleging a comparable form of unjust enrichment in such circumstances would be subject to the stricter test of § 27, which requires that the claimant have acted in the reasonable expectation of future ownership.”).

But the Restatement (Third)'s description of jointly created assets explicitly excludes the value provided by traditional domestic labor.³⁴ Accordingly, “unmarried cohabitators who contribute domestic services are entering into a much riskier venture than partners entering into marriages with similar divisions of labor.”³⁵ Women disproportionately bear the responsibilities and costs of domestic labor and are more likely to work inside the home.³⁶ Accounting for the disadvantaged socioeconomic status of unmarried cohabitants more broadly, this means that underprivileged women are most harmed by the Restatement (Third)'s approach.³⁷

This Chapter argues that although unjust enrichment offers a suitable legal framework for vindicating unmarried intimate partners' economic rights and preventing unjust enrichment while respecting individuals' choices regarding family formation, it must accommodate the value from partners' contributions of domestic labor to fulfill its promise. Currently, courts use two dueling approaches to resolve cases between former cohabitants: contract-based and status-based approaches. Section A reviews them. Section B argues for including the value of domestic services in the measure of a remedy in restitution. Section C adds some complications to the analysis and addresses key counterarguments, such as that domestic services are better understood as gifts (for which restitution would be unavailable). A brief conclusion follows.

A. Current Doctrine

An overview of the ways in which courts address the problem of untangling property rights at the dissolution of a nonmarital relationship is warranted. Although these approaches vary widely, they can be split broadly into two categories: contractual and status-based.

1. *Contractual Approaches.* — Contractual approaches start from the position that cohabitants, like all legal strangers, derive no baseline, default protections from their relationship but are nevertheless free to

³⁴ See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 28 cmt. d (AM. LAW INST. 2011) (“Claims to restitution based purely on domestic services are less likely to succeed, because services of this character tend to be classified among the reciprocal contributions normally exchanged between cohabitants whether married or not.”).

³⁵ Waggoner, *supra* note 1, at 68.

³⁶ Renata Forste & Kiira Fox, *Household Labor, Gender Roles, and Family Satisfaction: A Cross-National Comparison*, 43 J. COMP. FAM. STUD. 613, 613–17 (2012). Women in nonmarital relationships experience nonpecuniary harms as well. For example, by some estimates, “women in cohabiting relationships are nine times more likely to be murdered by their partner than are women in marital relationships.” Todd K. Shackelford, *Cohabitation, Marriage, and Murder: Woman-Killing by Male Romantic Partners*, 27 AGGRESSIVE BEHAV. 284, 284 (2001) (reporting on a study using national Canadian homicide data).

³⁷ See *supra* p. 2125.

alter that default arrangement by contract.³⁸ As with contracts outside of family law, agreements between cohabitants can generally be either written or oral.³⁹ Written agreements between unmarried cohabitants, while enforceable in most jurisdictions,⁴⁰ are rare.⁴¹ More typically, a plaintiff alleges that a former partner has breached an oral contract.⁴² Of course, as a threshold matter, proving to a court that an oral contract exists is often quite difficult.

(a) *Description.* — The leading early case establishing contract-based rights of recovery for unmarried domestic partners was *Marvin v. Marvin*.⁴³ Prior to this case, courts, inspired in part by the background social mores of an earlier time, refused to enforce contracts between unmarried cohabitants on the theory that such agreements were void as against public policy because they involved entering into an agreement for illicit sexual relations.⁴⁴ *Marvin*, recognizing and drawing on changes in social norms, broke significant new ground by holding that an express contract between cohabiting partners was enforceable.⁴⁵ The resulting payments due to the former cohabitant are sometimes referred to colloquially as “palimony.”⁴⁶ Importantly for present purposes, the *Marvin* court actually did not limit itself to express written and oral contracts.⁴⁷ Rather, the decision went on to leave open the possibility of allowing recovery in restitution, including for domestic labor:

Our opinion does not preclude the evolution of additional equitable remedies to protect the expectations of the parties to a nonmarital relationship in cases in which existing remedies prove inadequate; the suitability of such

³⁸ See Joslin, *supra* note 8, at 926.

³⁹ For clarity, this section will analyze only express contracts. Nevertheless, a contract implied in fact would be subject to a substantially similar analysis, insofar as such a contract represents a “true” contract, or an agreement with all the contractual prerequisites, but which was not reduced to the formal contract form. Given the potential for conceptual confusion between implied contracts and restitution, however, implied contracts will not be the focus of the discussion.

⁴⁰ See Joslin, *supra* note 8, at 931. Indeed, written arrangements are required in some jurisdictions (meaning that oral contracts are not enforceable). See *id.* at 928.

⁴¹ Judith T. Younger, *Lovers’ Contracts in the Courts: Forsaking the Minimum Decencies*, 13 WM. & MARY J. WOMEN & L. 349, 354 (2007).

⁴² Waggoner, *supra* note 1, at 69; see, e.g., *Thomas v. LaRosa*, 400 S.E.2d 809, 810 (W. Va. 1990) (presenting a woman’s oral contract claim against her former partner).

⁴³ 557 P.2d 106 (Cal. 1976) (en banc).

⁴⁴ See Waggoner, *supra* note 1, at 70 (“The principal obstacle to recovering for breach of an express oral contract, other than the necessity of proving the contract, was what the courts call the ‘meretricious’ nature of such a relationship . . .”).

⁴⁵ *Marvin*, 557 P.2d at 122 (“The mores of the society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many.”).

⁴⁶ See, e.g., Ruth Lee Johnson, *Palimony: Getting Alimony Without the Marriage*, PSYCHOL. TODAY (Feb. 7, 2018), <https://www.psychologytoday.com/us/blog/so-sue-me/201802/palimony-getting-alimony-without-the-marriage> [<https://perma.cc/88ME-FFLH>].

⁴⁷ *Marvin*, 557 P.2d at 122.

remedies may be determined in later cases in light of the factual setting in which they arise.⁴⁸

Thus, after *Marvin*, the stage was set for recovery for former unmarried cohabitants on contract-theory grounds. Moreover, there appeared to be momentum toward recognizing restitutionary claims, including those for domestic services.

In the intervening years since *Marvin*, courts and commentators have embraced this contract-based approach. In a recent article, Professor Courtney Joslin conducted a survey of the state-level post-*Marvin* landscape regarding the economic rights of former unmarried cohabitants.⁴⁹ Joslin concluded that “*Marvin* remains the dominant approach to nonmarital property division claims in the United States,” although there is “some state-to-state variation in its application.”⁵⁰ Regrettably, courts have been less willing to embrace *Marvin*’s vision of restitutionary claims for former unmarried cohabitants who provided domestic labor in the relationship.⁵¹

(b) *Critique*. — If a truly valid contract regarding the division of property exists between an unmarried couple, a respect for individual autonomy and general principles of contract law necessitate state enforcement. But the law falls short to the extent that it makes the *lack* of a contract dispositive. The nonexistence of a contract does not bar a claim in unjust enrichment.⁵² And “because ‘couples do not in fact think of their relationship in contract terms,’ a rule that ‘directs courts to decide their disputes by looking for a contract is unlikely to find one.’”⁵³ One would expect a contract to exist where the benefits of the contract

⁴⁸ *Id.* at 123 n.25. The *Marvin* court further explained the following as regards domestic labor: “[A] nonmarital partner may recover in quantum meruit for the reasonable value of household services rendered less the reasonable value of support received if he can show that he rendered services with the expectation of monetary reward.” *Id.* at 122–23 (emphasis added). At first, the “expectation of monetary reward” language might appear to undercut the court’s argument. But if one takes “monetary reward” to include future appreciation of economic benefit stemming from the relationship (the frustrated expectation that gives rise to the claim in restitution, see *infra* p. 2136), this language can accommodate a broader scope of behavior.

⁴⁹ Joslin, *supra* note 8, at 925–31.

⁵⁰ *Id.* at 927.

⁵¹ See *id.* at 934.

⁵² See JOHN P. DAWSON, UNJUST ENRICHMENT 112–13 (1951) (“[Restitutionary remedies] are not confined to contracts, or gifts, or wills, or decedents’ estates, or the legal and equitable wrongs. Problems of restitution can arise in any field.”); see also *id.* at 14 (lamenting the “confusion of contract with restitution, from which we are even yet not wholly free”). But see Emily Sherwin, *Love, Money, and Justice: Restitution Between Cohabitants*, 77 U. COLO. L. REV. 711, 718 (2006) (noting that restitution may be unavailable if a plaintiff could have bargained for payment through a contract).

⁵³ DAGAN, *supra* note 32, at 170 (quoting Ira Mark Ellman, “Contract Thinking” Was Marvin’s Fatal Flaw, 76 NOTRE DAME L. REV. 1365, 1368 (2001)).

outweigh its costs.⁵⁴ Given the observed lack of contracting between unmarried cohabitants,⁵⁵ despite a lack of the traditional barriers to contracting,⁵⁶ it would appear that most unmarried cohabitants find the costs to the relationship of bargaining over such a contract are high, at least in comparison to the perceived benefits if the relationship dissolves (if they even think of contracting at all).⁵⁷ The law should not make the bearing of these costs a prerequisite to legal protection.

Furthermore, contracts between cohabitants present many practical problems that ought to caution courts against unreflective enforcement. Even in the presence of a bargained-for exchange, problems of disparate bargaining power leave the result of the bargain vulnerable to manipulation by the more powerful partner.⁵⁸ Thus, many “contracts” between cohabitants may be little more than expressions of the desires of that one partner.

In sum, a contract model often does not fit a personal relationship with reciprocal feelings and obligations that evolve over time and were not, and likely could not have been, resolved in an arm’s-length negotiation at the outset.⁵⁹

2. *Status-Based Approaches.* — Status-based approaches seek to protect individuals’ relationship choices by giving formal legal recognition to nonmarital families, even where there is no contract (marriage or otherwise).⁶⁰ Some such approaches insist that the law should understand any marriage-like living arrangement — whether solemnized by marriage or not — as equivalent to marriage.⁶¹ Thus, the argument goes, if these relationships are equivalent to marriage, equivalent

⁵⁴ See STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 293, 325 (2004).

⁵⁵ See Waggoner, *supra* note 1, at 68–69.

⁵⁶ See Aziz Z. Huq, *The Function of Article V*, 162 U. PA. L. REV. 1165, 1196–97 (2014) (highlighting impediments to successful low-cost bargaining).

⁵⁷ See Casad, *supra* note 30, at 49 (“[M]ost couples do not consider the economics of their relationship paramount when their relationship begins. In fact, many fear that even mentioning such mundane matters would debase other, more important, non-economic aspects of their association.”).

⁵⁸ See Waggoner, *supra* note 1, at 68–69. Part of the disparity in bargaining power comes precisely from the fact that subordinate parties lack legal rights on which to fall back. See *id.* at 68. Because the next best outside option is effectively nothing (that is, no legal rights), they have little leverage in a negotiation. *Id.* See generally John F. Nash, Jr., *The Bargaining Problem*, 18 ECONOMETRICA 155 (1950).

⁵⁹ That said, it is worth reemphasizing that, in an appropriate situation, a contract should be honored in an effort to effectuate the intent of the parties (if that intent is truly expressed in the contract form).

⁶⁰ See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 28 cmt. a (AM. LAW INST. 2011) (“Such a [status-based] regime, to a greater or lesser extent, assimilates the economic obligations of unmarried cohabitants to those imposed by law as incidents of marriage; so that on dissolution of the relationship, the law may enforce a division of assets, an obligation of support, or other remedies . . .”).

⁶¹ See Sherwin, *supra* note 52, at 721–22.

legal protections are owed.⁶² Other approaches prefer to distinguish a wider set of marriage-*lite* arrangements, where some (but not all) of the rights and obligations of marriage attach to certain relationships, depending on the degree of commitment or the similarity of the relationship to marriage.⁶³

(a) *Description.* — Perhaps the most familiar of the status-based approaches, and certainly one with a long lineage, is the common law marriage. Common law marriage represents a legal recognition that if a couple has structured and carried out its relationship with the intent that it be a marriage, the lack of an officially sanctioned marriage will not cause the arrangement to be disregarded.⁶⁴ Therefore, the use of a common law marriage approach to questions of property division employs a “status-based” analysis by grafting the hardwired default rules of marriage dissolution onto nonmarital living arrangements. But common law marriage has been legislatively abolished in all but a handful of jurisdictions in the United States.⁶⁵ Concerns over fraud and over the potential for erosion of traditional marriage, along with a desire to constrain interracial marriage, were some of the precipitating factors in its decline.⁶⁶ Although some scholars continue to favor common law marriage,⁶⁷ it is more of an anachronism than a ready solution for contemporary cohabitants.

Arguments for a status-based regime were particularly salient prior to *Obergefell*.⁶⁸ For decades, progressives had used a variety of legal means in an attempt to lift same-sex relationships up to the same level

⁶² See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 37–38 (AM. LAW INST. 2002).

⁶³ See, e.g., Cynthia Grant Bowman, *Legal Treatment of Cohabitation in the United States*, 26 LAW & POL'Y 119, 146–47 (2004) (advocating “a multi-status system,” *id.* at 146, that would make marriage or domestic partnership available to all couples, with associated rights to “property distribution and support upon dissolution of the relationship,” *id.* at 147).

⁶⁴ See Waggoner, *supra* note 1, at 73–74.

⁶⁵ Common law marriage remains in some form in only nine states (Colorado, Iowa, Kansas, Montana, New Hampshire (for purposes of intestacy only), Oklahoma, Rhode Island, Texas, and Utah) and the District of Columbia. *Id.* at 73; *Alabama Abolishes Common-Law Marriage*, AP NEWS (Jan. 1, 2017), <https://apnews.com/b6b0bd99592f4dca920b63cd89d14207> [<https://perma.cc/RRW3-6UGC>]; Jeffrey Collins, *South Carolina Supreme Court Abolishes Common Law Marriage*, U.S. NEWS & WORLD REP. (July 24, 2019, 6:22 PM), <https://www.usnews.com/news/best-states/south-carolina/articles/2019-07-24/south-carolina-supreme-court-abolishes-common-law-marriage> [<https://perma.cc/7MAF-C2KW>].

⁶⁶ See Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 750 (1996) (“[T]he reasons given by courts for the abolition of common law marriage included urbanization, which eliminated the ‘frontier conditions’ rationale for informal marriage; fears of fraud in the transmission of property; a desire to protect marriage and the family against alternative forms of sexual unions; racism and eugenics; the movement to maintain vital statistics and enforce various health-related requirements for marriage through the licensing process; and administrative and judicial efficiency.”).

⁶⁷ See generally *id.* at 731–54 (tracing the decline of common law marriage and calling for its return).

⁶⁸ See, e.g., Bowman, *supra* note 63, at 119–21, 129, 132 (“[M]ost status-based cohabitation regimes in the United States have been created in response to the pressure for same-sex marriage.” *Id.* at 132.).

of recognition as that of “traditional” marriage.⁶⁹ A consequence of this approach was that marriage was entrenched more deeply as the ideal to which courts assumed nontraditional families could and should aspire.⁷⁰ Since the Court’s recognition of the right of same-sex couples to marry, there has been a reinvigorated focus on proposals designed to provide people with more options for legal arrangements that suit their particular choices regarding family formation.⁷¹ Indeed, some family law scholars have openly challenged more broadly the traditional understanding of the centrality of marriage as a social institution.⁷²

(b) *Critique.* — A status-based approach falls short as a theoretical basis for resolving nonmarital property disputes. Just as unmarried parties, in reality, generally do not bargain for a discernible set of tailored contractual rules governing the division of property, so too in contemporary society, with no-fault divorce and marriage equality, contemporary cohabiting couples often (or at least sometimes) do not intend to enter a full-fledged legal marriage.⁷³ A status-based approach by its nature creates an externally imposed rule set as to the division of property upon termination of the relationship. The external nature of the rule set, while to a degree simplifying the process and perhaps introducing an element of certainty as to outcome, is inherently formulaic and exogenous to the particular circumstance and intent (if any) of the parties to the relationship.⁷⁴ Whether a “marriage-like” status, which attempts to graft marriage dissolution rules, or one of a series of potential “marriage-lite” statuses, any regime is bound to miss the mark in dealing with cases as unique and knotty as intimate partnership and

⁶⁹ See, e.g., Adam Serwer, *The Beginning of the End for the Anti-Marriage Equality Movement*, MOTHER JONES (Nov. 7, 2012), <https://www.motherjones.com/politics/2012/11/same-sex-marriage-wins-three-states> [<https://perma.cc/DF4N-45K2>].

⁷⁰ Cf., e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) (“[T]he right to marry is fundamental because it supports a two-person union unlike any other in its importance to the committed individuals.”).

⁷¹ See Albertina Antognini, *Against Nonmarital Exceptionalism*, 51 U.C. DAVIS L. REV. 1891, 1893–94 (2018).

⁷² See, e.g., Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, 6 UNBOUND 1, 3 (2010) (“Marriage as status is conservative not only in the sense that it commits legal thought to using the institution to preserve tradition, but also in the sense that it provides an inlet into contemporary legal thought about marriage for classical legal ideas. The very idea that marriage is anything — anything at all — is symptomatically classical.”).

⁷³ But see Joslin, *supra* note 8, at 972 (pointing to research suggesting that the decision not to marry is often driven by male partners’ preferences, in part because women tend to expect a marriage proposal to be initiated by men). Moreover, under this Chapter’s broad definition of unmarried cohabitant, some cohabitants — siblings, for example — would have a hard time arguing that their living arrangement was either marriage-like or marriage-lite.

⁷⁴ See Kaiponanea T. Matsumura, *Consent to Intimate Regulation*, 96 N.C. L. REV. 1013, 1019 (2018) (“Imperfectly calibrated entrance requirements to relationship-based statuses will sweep too broadly, dragging in people who had no intention of assuming legal obligations, or too narrowly, thereby excluding people who stood to benefit from those protections.”).

family formation. Moreover, status-based approaches disrespect the freedom of the parties to craft arrangements of their own design. In its distinctiveness, each nonmarital family is ultimately unclassifiable. And bad default rules are particularly harmful in the family law setting.⁷⁵ These issues present fundamental challenges for any status-based approach.

3. *Restitution for Unjust Enrichment.* — As discussed elsewhere in this *Developments in the Law*, the law of restitution is concerned with defendants who have been unjustly enriched (at the plaintiff's expense).⁷⁶ The central goal of restitution, therefore, is preventing the defendant's unjust enrichment. Any remedy a court crafts in restitution focuses on restoring fairness and rebalancing such unjust enrichment rather than on redressing losses incurred by the plaintiff. In the words of the Restatement (Third):

Restitution is concerned with the receipt of benefits that yield a measurable increase in the recipient's wealth. Subject to that limitation, the benefit that is the basis of a restitution claim may take any form, direct or indirect. It may consist of services as well as property. A saved expenditure or a discharged obligation is no less beneficial to the recipient than a direct transfer.⁷⁷

(a) *Description.* — One of the overarching objectives of this Chapter is to locate with some precision restitution for unjust enrichment within the contemporary law of unmarried cohabitants. In the context of unmarried cohabitants, courts have used restitution for decades as a means by which to reapportion the value of assets that were created during and through the partnership that end up in the hands of only one partner.⁷⁸ Former unmarried cohabitants are able to bring claims in restitution in many states,⁷⁹ but courts almost invariably deny recovery based on the value of domestic labor,⁸⁰ sometimes directly invoking the Restatement (Third).⁸¹ Instead, courts have traditionally focused on *identifiable* and *substantial* contributions to the acquisition,

⁷⁵ Cf. Rebecca Aviel, *Family Law and the New Access to Justice*, 86 *FORDHAM L. REV.* 2279, 2282 (2018).

⁷⁶ See *supra* Introduction, p. 2062.

⁷⁷ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. d (AM. LAW INST. 2011).

⁷⁸ See Casad, *supra* note 30, at 51; see also, e.g., *Levar v. Elkins*, 604 P.2d 602, 603–04 (Alaska 1980); *McMahel v. Deaton*, 61 N.E.3d 336, 345–46 (Ind. Ct. App. 2016); *Neibert v. Perdomo*, 54 N.E.3d 1046, 1053–54 (Ind. Ct. App. 2016); *Porter v. Zuromski*, 6 A.3d 372, 376–79 (Md. Ct. Spec. App. 2010); *Bonina v. Sheppard*, 78 N.E.3d 128, 132 (Mass. App. Ct. 2017); *Cates v. Swain*, 215 So. 3d 492, 496–97 (Miss. 2013); *Harman v. Rogers*, 510 A.2d 161, 165 (Vt. 1986).

⁷⁹ See Joslin, *supra* note 8, at 927–28.

⁸⁰ See *id.* at 926–27.

⁸¹ See, e.g., *Darling v. Crow*, No. 2014-431, 2015 WL 2383835, at *3 (Vt. May 14, 2015) (“[Plaintiff’s household] expenses were incidental to the parties’ long-term romantic relationship and were not above and beyond the normal expenditures characteristic of a cohabitation relationship.”).

preservation, or enhancement of a specific asset owned by the defendant (categories that exclude domestic labor).⁸² The case law also displays a reluctance on the part of courts to extend restitutionary claims too generally, in part because of evidentiary problems and also for fear of interfering with private relationships by peering too closely into them.⁸³

In the setting of former unmarried cohabitants, unjust enrichment is best understood as a *complement* to the contract-based approach, not as a replacement — a complement with significant implications for how courts should handle contractual claims. If a valid contract exists,⁸⁴ it should be enforced. If such a contract is absent (as is most often the case), however, restitution is available to plaintiffs as a means of preventing the unjust enrichment of the defendant. Extending this line of reasoning, one sees that unjust enrichment is actually most directly in conflict with the various status-based approaches: neither unjust enrichment nor the status-based approaches attempts to topple or to supersede contract law, but each offers a different remedial mechanism in the absence of a valid contract.

Moreover, the availability of restitution ought to leave courts more willing to scrutinize and potentially refuse to enforce problematic contracts.⁸⁵ Similarly, because unjust enrichment is an alternative to (not a replacement for) contract law, an approach that makes only contract claims⁸⁶ available between former unmarried cohabitants — which is the method some states employ⁸⁷ — is inapposite. Finally, unjust enrichment provides unmarried cohabitants background legal rights that

⁸² RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 28 reporter's note cmt. d ("The prospects for restitution [for unmarried cohabitants] are most favorable where the imbalance in the parties' reciprocal contributions is manifest, and where the claimant has made readily quantifiable contributions to some identifiable and subsisting asset in the hands of the defendant. Conversely, a claim based on unjust enrichment will not succeed if it requires the court 'to sort through terminated personal relationships in an attempt to nicely judge and balance the respective contributions of the parties.'" (quoting *Slocum v. Hammond*, 346 N.W.2d 485, 491–92 (Iowa 1984))).

⁸³ See, e.g., *Morone v. Morone*, 413 N.E.2d 1154, 1157 (N.Y. 1980) ("For courts to attempt through hindsight to sort out the intentions of the parties and affix jural significance to conduct carried out within an essentially private and generally noncontractual relationship runs too great a risk of error. . . . There is, therefore, . . . risk of emotion-laden afterthought, not to mention fraud, in attempting to ascertain by implication what services . . . were rendered gratuitously and what compensation . . . the parties intended to be paid."); see also *Joslin*, *supra* note 8, at 932–33.

⁸⁴ A valid contract must be free of duress, fraud, mistake, and the like. Cf. *infra* section C.1, pp. 2143–44 (examining the validity of gratuitous transfers).

⁸⁵ The judicial approach here may be similar to that used in analyzing antenuptial agreements, which are valid but whose validity courts scrutinize closely on both procedural and substantive grounds. See generally Judith T. Younger, *Antenuptial Agreements*, 28 WM. MITCHELL L. REV. 697, 698–716 (2001).

⁸⁶ That is, contract claims but *not* restitution claims.

⁸⁷ See *Joslin*, *supra* note 8, at 927–30 (noting that New York is one jurisdiction that allows for claims in contract only).

can aid in providing parity between the parties in contractual bargaining.⁸⁸

(b) *Why Restitution?* — Discerning the precise source of an obligation in unjust enrichment presents something of an “intractable question.”⁸⁹ The Restatement (Third) suggests that one such source is a party’s “reasonable expectation”⁹⁰ that “expenditures to maintain, improve, or add value to property” would lead to gaining rights to the property.⁹¹ By that reasoning, one could conceive of a former unmarried cohabitant’s claim in unjust enrichment as arising from contributions to the partnership that were made with an expectation of participation in the relationship’s future economic benefits. Thus, where instead only one partner retains the property from the relationship, that partner is unjustly enriched.⁹²

The normative argument for using unjust enrichment as a backstop doctrinal safeguard starts from the position that the law should honor and further parties’ autonomous choices with respect to private and intimate relationships and support a broader set of choices in that regard.⁹³ This goal is a direct corollary to the understanding that individuals are in the best position to make decisions regarding their lives. Restitution allows this freedom of choice without demanding in return the surrendering of all rights and protections. Moreover, it does not impose artificial formalities that are unlikely to be followed or out-of-the-box default rules that are unlikely to fit. Rather, it allows for a tailored solution in the event of dissolution, without requiring negotiation between the parties ahead of time. The parties lead; the law follows. Finally, because a restitutionary remedy looks to gains to defendants, not losses to plaintiffs, any remedy will be naturally scaled (albeit loosely) to the value of the couple’s assets.⁹⁴

⁸⁸ See *supra* note 58 and accompanying text.

⁸⁹ See *supra* ch. I, p. 2099.

⁹⁰ See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 27 cmt. g (AM. LAW INST. 2011).

⁹¹ *Id.* § 27.

⁹² See generally Kovacic-Fleischer, *supra* note 33, at 1422–23 (“Perhaps people are not wise to assume that their marriage-like relationships will continue, but love and intimacy do not always correlate with wisdom. By the time wisdom is acquired in hindsight, one partner may be unjustly enriched at the expense of the other.” *Id.* at 1423.).

⁹³ See, e.g., June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 108–09 (2016) (presenting an account of cohabitation as an option for couples that allows them to “create their own relationships on their own terms,” *id.* at 109); cf. Joslin, *supra* note 8, at 941 (“Among scholars, the leading defense of *Marvin* sounds in the register of autonomy.”).

⁹⁴ See *infra* section C.4, p. 2146.

*B. The Role of Restitution
and Compensation for Domestic Labor*

As discussed above, courts and commentators, even when exhibiting a willingness to work within the framework of restitution for unjust enrichment in settling claims between former unmarried cohabitants, generally see fit to limit its applicability to contributions deemed substantial.⁹⁵ This section argues that such an approach hamstrings courts from properly considering the totality of the arrangements of the parties and risks substantial injustice among the most vulnerable cohabiting partners. More specifically, the value of domestic labor contributions should be included in a full calculation of any restitution-based nonmarital property division.

I. The Current Status of Restitution for Domestic Services. — *Cressy v. Proctor*⁹⁶ is illustrative of the current approach's shortcomings. In that case, Ronald Cressy brought an action against his former romantic partner, Kevin Proctor.⁹⁷ Cressy had worked substantial hours without compensation at the advertising business that Proctor owned and operated.⁹⁸ In addition, "Cressy contributed to the household and farm chores."⁹⁹ In considering the defendant's motion for summary judgment,¹⁰⁰ the court addressed several claims, including in contract, before turning to Cressy's unjust enrichment claim.¹⁰¹ Revealingly, the United States District Court for the District of Vermont allowed Cressy's claim of unjust enrichment with respect to work performed at the business to proceed, but dismissed his claim related to work performed at the family home.¹⁰² The court stated that "it is undisputed that Cressy contributed to household maintenance at [the couple's home] — *perhaps significantly* — but he also received the benefits of these contributions, as he lived on the property."¹⁰³ Thus, the court concluded, without analyzing the particulars, that the benefit of living in the home compensated Cressy for his work therein. But it chose not to assume the same regarding the work performed outside the home. A principled reason for

⁹⁵ See Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1384 (2001) ("Remedies available to cohabitants are largely limited to untangling shared property interests and reimbursing *extraordinary* contributions made by one partner to the other's business or property interests. Under these rules, most cohabitants have no rights or obligations that arise by virtue of their shared life." (emphasis added)).

⁹⁶ 22 F. Supp. 3d 353 (D. Vt. 2014).

⁹⁷ See *id.* at 356.

⁹⁸ See *id.* at 357–58.

⁹⁹ *Id.* at 359.

¹⁰⁰ *Id.*

¹⁰¹ See *id.* at 359–61.

¹⁰² *Id.* at 362–63.

¹⁰³ *Id.* at 363 (emphasis added).

this distinction in treatment is difficult to deduce, and the court did not make clear its logic.

Although *Cressy* concerned a same-sex couple,¹⁰⁴ it is commonly a woman in an opposite-sex relationship who brings these types of claims.¹⁰⁵ On average, women are paid less in the labor market, and women disproportionately shoulder the responsibilities of domestic labor.¹⁰⁶ The result is that women “tend to accumulate fewer financial assets in their names during nonmarital relationships, and they tend to contribute more of the services that are undervalued or devalued altogether under the current doctrine.”¹⁰⁷

For many years, some commentators have argued that these services are already compensated as part of the natural give and take of a relationship.¹⁰⁸ The woman did the work at home, but she also got a place to stay and three meals a day. Professor Hanoach Dagan, for example, argues forcefully that allowing for restitutionary claims between former unmarried cohabitants only for “extraordinary” contributions (which implicitly excludes domestic labor) protects against disrupting the natural give and take of private relationships and obviates the need for complex inquiries into donative intent and the quantification of domestic labor.¹⁰⁹ He suggests that this distinction is a normatively appealing way to allow community reciprocity to flourish without state interference.¹¹⁰

Others see far more pernicious forces at play. Gendered notions of the role of women in relationships may lead courts to demean and devalue women’s contributions — often, even modern courts go so far as to refer to homemaking as “housewifely.”¹¹¹ In a recent article, Professor Albertina Antognini argues that the law’s reluctance to compensate for domestic labor echoes back, and indeed can be traced back, to historical notions of coverture, whereby a husband owned all marital property, including his wife’s labor.¹¹² She asserts that this archaic principle has

¹⁰⁴ See *id.* at 356.

¹⁰⁵ Joslin, *supra* note 8, at 937.

¹⁰⁶ *Id.* at 937–38.

¹⁰⁷ *Id.* at 938.

¹⁰⁸ See, e.g., DAGAN, *supra* note 32, at 172–73 (“Because it is difficult to quantify and compare . . . mutual benefits with any precision, it makes sense to look for extraordinary benefits . . .” *Id.* at 172.); Casad, *supra* note 30, at 56 (asking, rhetorically, “without a contract or unconscionable conduct . . . how could [one partner], when the relationship ends, call the other’s enrichment unjust?”).

¹⁰⁹ DAGAN, *supra* note 32, at 172–73.

¹¹⁰ See *id.*

¹¹¹ Joslin, *supra* note 8, at 934 (quoting *Brooks v. Allen*, 137 A.3d 404, 410 (N.H. 2016)).

¹¹² Albertina Antognini, *Nonmarital Coverture*, 99 B.U. L. REV. 2139, 2145–46, 2173–79 (2019); see also Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 869 (2004) (“[S]ubstantial evidence within family law documents the persistence of principles and rules from common law coverture. No state, for example, will enforce an interspousal contract for domestic

carried forward to inform the current “state of affairs” in nonmarital cases:

[C]ourts insulate the sphere of the home from that of the market, declare that the labor done within the former has no monetary value, and prevent the homemaker from accessing any property as a result. . . . [S]ervices that take on the form of homemaking or childrearing — duties undertaken by the wife under coverture — do not lead to any attendant property rights.¹¹³

Zooming out from the scholarly debate briefly, it is worth underscoring that the problems that the current doctrine presents are not of merely academic concern. Under the present model, partners who do not labor outside the home are systematically made vulnerable, left without remedy or redress. Therefore, the onus should rightly be on the defenders of the status quo to explain why its persistent application is tolerable. Nevertheless, this Chapter will now turn to explaining how expanding restitution to compensate former unmarried cohabitants for the domestic labor they provided to the relationship would be a clear step in the right direction.

2. *Including the Value of Domestic Labor in Unjust Enrichment.* —

This Chapter’s proposed doctrinal refinement can be stated simply: in considering restitutionary claims from former unmarried cohabitants, courts should include the value of domestic labor in determining if and to what degree one partner has been unjustly enriched. This section provides an example illustrating how this would operate in practice.

Return to the case of *Cressy*. There, the court refused to consider the value of domestic labor, but it simultaneously allowed a claim based on the value of market labor.¹¹⁴ The court presumed that the domestic labor was functionally compensated (by the right to live in the other partner’s house) but that the value of the market labor may not have been.¹¹⁵ For present purposes, let us assume that there were only three sources of value relevant to the case: the domestic labor, the market labor, and residing in the home. Under a more complete approach, the court would do an accounting of each of the three pieces. Algebraically, the formula would be $Value_{Domestic\ Labor} + Value_{Market\ Labor} - Value_{Residing\ in\ the\ Home} = Amount\ Due\ in\ Restitution$.¹¹⁶

Although admittedly stylized, this result is generalizable. Intriguingly, the formula shows that a partner need not contribute *exclusively* domestic labor for that labor to be considered in crafting a remedy

labor, which might allow a woman to accumulate separate economic assets during marriage that could help support her after divorce.” (footnote omitted).

¹¹³ Antognini, *supra* note 112, at 2145.

¹¹⁴ *Cressy v. Proctor*, 22 F. Supp. 3d 353, 362–63 (D. Vt. 2014).

¹¹⁵ *Id.*

¹¹⁶ But see *infra* section B.3, pp. 2140–43, for an assessment of whether the retention of the value of residing in the home necessarily constitutes unjust enrichment.

in restitution. Thus, even if both partners worked outside the home, one partner could still raise a claim in restitution resulting from domestic labor contributions.¹¹⁷

This approach appears unlikely to lead to the problems imagined by critics, such as that it will require courts to value what cannot be valued; that it will force a determination of donative intent; and that it will mean that courts will improperly interfere with informal community reciprocity.¹¹⁸ The method may indeed involve valuing at least two additional items in the typical case: the value of the domestic labor and the value of residing in the home. But in the context of a messy, multifaceted case that involves valuing potentially dozens of forms of property and labor, two additional valuations should not prove overly onerous. As will be discussed below, there are methods for valuing domestic labor — indeed, courts must handle a form of these issues in the context of divorce.¹¹⁹ Furthermore, courts could apply a rebuttable presumption that the domestic services were *not* given as a gift. Such a presumption would be appropriate in a reciprocal domestic relationship¹²⁰ and would eliminate the need to inquire into donative intent in many, if not most, cases. Finally, even if one has concerns about courts peering too deeply into private personal arrangements and disrupting informal social institutions, it is not clear why domestic labor offers an appropriate line at which to end the inquiry. Private law, by its essential nature, must look into personal arrangements to some degree in order to do justice¹²¹ — any attendant disruption must be balanced against the benefits of the inquiry. Where, as here, those benefits are manifest, the law need not hesitate.

3. *Valuation of Domestic Services.* — To be sure, valuation of the enrichment from domestic services would vary across each unique cohabitation arrangement and would of necessity involve a series of idiosyncratic assessments. Nevertheless, there are several general methods that courts could look to employ.

As shown above, in the prototypical case, the revised remedy calculation could require courts to value two additional items that they would not value under the current doctrine: domestic labor and residing

¹¹⁷ Of course, not all partners who provide domestic labor live rent-free in the home. Therefore, the value of residing in the home is also malleable. That is, it may be adjusted down if some rent was paid.

¹¹⁸ See DAGAN, *supra* note 32, at 172–73.

¹¹⁹ See *infra* section B.3, pp. 2140–43.

¹²⁰ See *supra* note 6 (defining “unmarried cohabitant” in terms of mutuality and future expectations).

¹²¹ See generally John C.P. Goldberg, *Introduction: Pragmatism and Private Law*, 125 HARV. L. REV. 1640, 1640 (2012) (defining private law, in its broadest form, as a court-aided attempt to determine “rights and duties of individuals and private entities as they relate to one another”).

rent-free in the home.¹²² The former would add to the amount of recovery in restitution; the latter would subtract. Looking at the two pieces in tandem might be easier in some cases, but for now let us analyze each in turn.

Valuing domestic labor presents challenges, in part because there is no available market in which to observe prices.¹²³ Furthermore, domestic labor has traditionally been devalued, both by those who do not pay for it and in the labor market.¹²⁴ Nevertheless, other areas of the law, including tort law and divorce law, have come to recognize and to grapple with the pecuniary value of this labor.¹²⁵ Similarly, economists of many stripes have been interested in the problem for some time.¹²⁶

Take the example of asset division in the context of divorce. Consideration of domestic services in dividing marital assets has been standard practice for decades.¹²⁷ Driven by the conception of the family as an economic partnership, divorce law promotes the *equitable* division, which some states presume to mean *equal* division, of all marital property.¹²⁸ Accordingly, the homemaker is treated “as an ‘equal partner’ in a marriage.”¹²⁹ Divorce law thus flips the valuation inquiry on its head: rather than bifurcating the partners and individually assessing each partner’s contribution, the law accepts the inadequacy of such an exercise and tries to apply a rubric more suited to the realities of family life.

A remedy in restitution, based on gains by the unjustly enriched partner,¹³⁰ should not ignore these trends in divorce law. An immediately obvious benchmark might appear to be the cost that the defendant avoided by not having to hire someone to perform the homemaking

¹²² A court would already assess the third item, unpaid market labor, under the current doctrine.

¹²³ Ann Laquer Estin, *Love and Obligation: Family Law and the Romance of Economics*, 36 WM. & MARY L. REV. 989, 994 (1995) (“[I]t is easier to collect information on market transactions than to estimate the productive value of work in the home.”).

¹²⁴ See Anna Kerregan, *Welfare Reform & the Devaluation of Women’s Work*, DEPAUL J. FOR SOC. JUST., Summer 2019, at 1, 10. There is a vast feminist literature, often using Marxist methods, that grapples with these issues. See generally, e.g., Usha Menon, *Women and Household Labour*, SOC. SCIENTIST, July 1982, at 30, 30–39; Lise Vogel, *Domestic Labor Revisited*, 64 SCI. & SOC’Y 151, 152 (2000).

¹²⁵ Estin, *supra* note 123, at 995.

¹²⁶ See generally Therese Jefferson & John E. King, “*Never Intended to Be a Theory of Everything*”: *Domestic Labor in Neoclassical and Marxian Economics*, 7 FEMINIST ECON. 71 (2001) (surveying the analyses regarding domestic labor of multiple schools of economics).

¹²⁷ See Estin, *supra* note 123, at 995 (“In divorce law, rules for property division now require consideration of all contributions made by husband and wife, including ‘the contribution of a spouse as homemaker.’” (quoting UNIF. MARRIAGE AND DIVORCE ACT § 307(A) (amended 1973), 9A U.L.A. 39 (1970))).

¹²⁸ See *id.* at 1052–54.

¹²⁹ *Id.* at 1053 (quoting *In re Marriage of Smith*, 427 N.E.2d 1239, 1244 (Ill. 1981)).

¹³⁰ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 cmt. d (AM. LAW INST. 2011) (pointing out that restitution “strip[s] [the] wrongdoer of all profits gained”).

services that the plaintiff provided.¹³¹ The Indiana court in *Turner v. Freed*¹³² — one of the rare cases (perhaps the *only* case) in which a plaintiff recovered the value of domestic labor in restitution — seemed to use such a method, although the trial court’s “specific finding about how it arrived at [the plaintiff’s] recovery”¹³³ was somewhat obscure.¹³⁴

Although such a method is not without merit and may be appropriate in certain settings, it could fail to capture the wide array of support services that a domestic partner provides, and it would ignore the devaluation of domestic services in the labor market. Partners who work in the home not only do valuable domestic labor, but also contribute indirectly to the career of the partner who participates in market labor. For instance, the unjustly enriched partner may have been free during the relationship to devote more time and energy to pursuing market labor opportunities, fostering business relationships, or pursuing education or training because of the burden eased by the other partner’s domestic labor.¹³⁵ For the partner who labors at home, both forms of work (direct and indirect) are erased. And domestic services are further devalued through our narrow definitions of what constitutes “work.” Even if, say, cooking is considered “real” work (that is, work worthy of a wage), other work — including emotional support — that might be performed by domestic laborers, and contribute meaningfully to the partnership as a whole, is overlooked. Ultimately, looking to market prices fails for the same reason that the contract-based approach is incomplete: it attempts to impose the rules of arm’s-length transactions in an altogether different setting. Moreover, although avoided cost can at times be an appropriate benchmark from which to craft a remedy in restitution,¹³⁶ in this setting looking to but-for cost of labor fails to undo the defendant’s unjust enrichment. Stretching an analogy, the partners baked a valuable pie together; it would be unjust for one partner to keep the whole pie, and paying the pie-less person the going rate for a baker’s time doesn’t disgorge the value of the pie from the other party.

¹³¹ Assuming that the person the defendant would have hired would have demanded the federal minimum wage, worked forty hours per week, and worked fifty weeks per year, that person would have been paid \$14,500 per year. See 29 U.S.C. § 206(a)(1)(C) (2012) (setting federal minimum wage at \$7.25 per hour for all work starting after July 24, 2009). In a jurisdiction with a higher minimum wage, that amount could be significantly higher.

¹³² 792 N.E.2d 947 (Ind. Ct. App. 2003).

¹³³ *Id.* at 951 n.4.

¹³⁴ *Id.* at 949–51 & 951 n.4.

¹³⁵ Cf. *Watts v. Watts*, 405 N.W.2d 303, 306–07, 313–15 (Wis. 1987) (discussing the plaintiff’s argument that her contribution of “both property and services,” *id.* at 314, increased the parties’ assets).

¹³⁶ See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 reporter’s note cmt. b (AM. LAW INST. 2011) (“A person may be unjustly enriched not only where he receives money or property, but also where he otherwise receives a benefit. He receives a benefit where his debt is satisfied *or where he is saved expense or loss.*” (emphasis added) (quoting *Blue Cross of Cent. N.Y., Inc. v. Wheeler*, 461 N.Y.S.2d 624, 626 (App. Div. 1983))).

For these reasons, a more appropriate remedy in restitution would value the contribution of the person working at home at something close to half of the property generated during the relationship. Just as in marriage and divorce, the family economic unit jointly created the wealth, and it is unjust for it all to remain with only one partner.

Courts may also need to estimate the value of residing at the home. Here, as before, we look to the gain appreciated by the stay-at-home partner, not the loss experienced by the homeowner. Two complications immediately arise. First, there is perhaps an enrichment, but is it unjust (or unjustified)? That is not clear. All of the relevant analysis outlined above would need to be revisited and applied anew: Was this a gratuitous transfer? And if not, what exactly was the frustrated expectation of the defendant (that is, what did he expect, but not receive, in return)? Why didn't the parties contract, particularly given the prevalence of roommate and subletting agreements?

Second, even if there is unjust enrichment to which the doctrine of restitution is relevant, the gain to the partner working at home would be expected to be minimal given that the partner could likely (at least in many cases) have found low-cost living at a different residence. In fact, given this likelihood, courts may be better off dismissing this inquiry altogether, perhaps preferring a rebuttable presumption that the defendant's offer to stay in his home was a gift to the plaintiff — similar to the current presumption for domestic services, but (1) rebuttable and (2) justified by the circumstances of the typical case. Such an approach would also have the advantage of judicial economy.

C. Complications and Counterarguments

Numerous commentators, and even the Restatement (Third), have posited limitations and objections to the full-blooded deployment of restitution for unjust enrichment in the nonmarital cohabitant context.¹³⁷ Although a full treatment of these various points would necessarily be the subject of a more in-depth discussion, a brief treatment is in order.

1. *Gifts.* — Restitution is not and should not be available to undo a valid, freely offered gift.¹³⁸ Gifts are an integral part of a property-based liberal order.¹³⁹ The law must honor transfers that are truly the product of full donative intent.

But family living arrangements constitute much more than a series of gifts. In the setting of relationships between cohabitants, married or

¹³⁷ See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 28 cmt. b (AM. LAW INST. 2011).

¹³⁸ *Id.* cmt. c.

¹³⁹ See Sherwin, *supra* note 52, at 723–24. Indeed, the law actively promotes gift-giving, including through the tax code. See, e.g., I.R.C. § 170 (2012). The tax code specifically encourages gift-giving between married couples by providing an unlimited marital deduction for estate and gift tax purposes. See *id.* §§ 2056(a), 2523(a).

unmarried, the division of labor and responsibilities is not intended as, and does not constitute, a reciprocal gift between the partners. Rather, it is based on household needs and requirements, economic and otherwise.

Even if, under the circumstances of a particular cohabitation arrangement, the provision of certain goods or services were made with the requisite donative intent, further inquiry is necessary. In many instances, a gift is not just a gift. Gifts made in the face of duress, undue influence, or mistake are not honored, for good, autonomy-enhancing reasons.¹⁴⁰ Many nonmarital cohabitation living arrangements have all the warning signs of duress and undue influence — from partnerships involving domestic violence to more subtle inequalities of bargaining power.¹⁴¹ Even in the absence of duress, there may be mistake — many cohabiting partners mistakenly believe that they are in common law marriages.¹⁴² Finally, as the Restatement (Third) notes, gifts from unmarried cohabitants “may be made in the expectation that the donor will share . . . in the resulting benefits.”¹⁴³ In other words, they are conditional gifts, conditioned on sharing in the future fruits of the relationship.

It seems reasonable to infer that transfers of resources between unmarried cohabitants are generally not gifts. Yet courts tend to take a different, indeed opposite, view. They often presume that exchanges between unmarried cohabitants are gifts.¹⁴⁴ In fact, that presumption can be conclusive.¹⁴⁵ In this way, misconceptions about gift-giving in the context of unmarried cohabitants, coupled with a rigid approach to restitutionary claims, leads to an antimajoritarian presumption that is sometimes nonrebuttable. And, of course, the predictable effect of all this is disproportionate harm to women.¹⁴⁶

2. *Availability of Contract Alternative.* — In commercial and other nonmarital contexts, restitution is normally unavailable if the parties had an opportunity to negotiate and enter into a contract for payment.¹⁴⁷ The question arises, therefore: Why shouldn't the same prerequisite apply in the nonmarital cohabitant context? As noted above, however,

¹⁴⁰ See DAGAN, *supra* note 32, at 199.

¹⁴¹ See *supra* p. 2131 and note 36.

¹⁴² See Bowman, *supra* note 66, at 711 & n.6 (highlighting the prevalence of misconceptions regarding common law marriage).

¹⁴³ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 28 cmt. c (AM. LAW INST. 2011).

¹⁴⁴ See Joslin, *supra* note 8, at 935–36 (addressing the presumption in the context of compensation for domestic labor).

¹⁴⁵ *Id.*

¹⁴⁶ See Peter Linzer, *Rough Justice: A Theory of Restitution and Reliance, Contracts and Torts*, 2001 WIS. L. REV. 695, 705 (“[A] presumption that services within a household are given gratuitously . . . [is] heavily loaded against women.”).

¹⁴⁷ Sherwin, *supra* note 52, at 724–25.

family relationships are not bargained-for exchanges. Even in the context of formal marriages, only a small minority of parties choose to enter into prenuptial agreements.¹⁴⁸

To interpose a requirement of bargaining as the *sine qua non* for granting restitution exalts formalism and wrongly shoehorns commercial requirements into an utterly dissimilar setting. Contracts present an imperfect (or at least incomplete) framework for determining the rights of former unmarried cohabitants; the availability of contract law should not and need not thwart the use of restitution in this setting.

3. *Challenges in Adjudication.* — The Restatement (Third) raises the specter that allowing unmarried cohabitants to bring claims in restitution may yield piecemeal and uncertain results “[b]ecause a conclusion about unjust enrichment is potentially influenced by all of the circumstances both of the parties’ cohabitation and of its termination, [and therefore] outcomes cannot be safely predicted apart from the facts of a particular case.”¹⁴⁹ Although one could make an analogous statement in connection with the adjudication of any dispute, it surely need not preclude using restitution in the context of unmarried cohabitants. The reality that a factual record of the economic relations of the parties would be a prerequisite to the development of a remedy in restitution does not mean that such a remedy should not be fashioned. Courts exist to establish factual records and do justice; administrative challenges should not act as a definitive bar to their doing so. Furthermore, such determinations are a staple of property division in divorce;¹⁵⁰ the tools exist in the judicial workshop and should be put to work on this job. Finally, much of the division could likely be dealt with through informal property settlements outside the courts, reducing the need for judicial resources. But this informal bargaining is possible only if former unmarried cohabitants ultimately have a background right. Absent such a right, they are left without any bargaining chips.

4. *Risk of Harm to People from Unprivileged Socioeconomic Backgrounds.* — A subtle yet important concern relates to potential harms to disadvantaged *defendants*. If courts start allowing claims in restitution for domestic labor, might we unwittingly end up in a position where defendants, themselves disproportionately marginalized, end up

¹⁴⁸ Heather Mahar, *Why Are There So Few Prenuptial Agreements?* 1 (Harvard Law Sch., John M. Olin Ctr. for Law, Econ., and Bus., Discussion Paper No. 436, 2003), <https://pdfs.semanticscholar.org/f9d4/a7b31e93ee06577697058be3fd5da376a49.pdf> [<https://perma.cc/VZ4V-Y5F9>] (“Legal commentators and practitioners estimate that only 5–10% of the population enter into prenuptial agreements, and one study suggests that only 1.5% of marriage license applicants would consider entering into such agreements.” (footnote omitted)).

¹⁴⁹ RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 28 cmt. c (AM. LAW INST. 2011).

¹⁵⁰ See Suzanne Reynolds, *The Relationship of Property Division and Alimony: The Division of Property to Address Need*, 56 FORDHAM L. REV. 827, 915–16 (1988).

bearing inordinate debts? A valuation approach that looks to then-existing assets at the time of the dissolution could mitigate this problem. By dividing only what assets are available, defendants will escape undue liabilities.¹⁵¹

A hypothetical may help clarify this point. Imagine that partners *A* and *B* end their ten-year relationship, during which *A* worked at home while *B* earned a modest salary. At the end of the relationship, the two parties have accumulated \$1000 in assets, all of which *B* holds. The worry would be that *B* (who has limited means) could end up owing *A* significantly more than \$1000, perpetuating, and in fact exacerbating, *B*'s economic disadvantages. An approach to damages that looks to undo unjust enrichment by dividing wealth that exists at the end of the relationship, however, would result in at most a \$1000 payment from *B* to *A*.

Of course, this also means that *A* may not receive full compensation for prior services rendered — there exists an unavoidable tradeoff between not overburdening *B* and fully compensating *A*.¹⁵² And because unmarried cohabiting relationships are common among members of disadvantaged socioeconomic classes,¹⁵³ there will be many occasions where there simply are not enough, or any, assets to divide. In such a situation, the domestic services of one partner (*A*) would have still led to unjust enrichment of the other partner (*B*), but that partner may have nothing with which to repay the other. Zero divided by two is still zero. It is worth acknowledging forthrightly that this result is a limitation of this Chapter's proposal.

CONCLUSION

Private law is tasked with the vital, and frequently difficult, responsibility of providing background legal structures that enable individuals to carry out their lives as they choose.¹⁵⁴ Currently, the law has failed on this front when it comes to former unmarried cohabitants. In the process, it has left potentially millions of individuals without necessary protections. Restoring a more robust doctrine of unjust enrichment offers hope. But the doctrine cannot meet its promise if courts stop short of doing justice. Courts must be willing to do the work of ascertaining

¹⁵¹ This approach could incentivize would-be defendants to spend down assets in anticipation of dissolution. Additional restitutionary claims may be available in those cases.

¹⁵² At least if these matters are dealt with only *ex post*.

¹⁵³ See *supra* p. 2125.

¹⁵⁴ See generally Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395, 1400–10 (2016) (laying out competing conceptions of private law, from the traditional view that emphasizes freedom and equality to the critical, functionalist view held by a diverse patchwork of thinkers, and presenting an alternative, relational explanation of private law as “address[ing] our interpersonal relationships as private individuals rather than as citizens of a democracy or patients of the welfare state’s regulatory scheme,” *id.* at 1410).

the enrichment generated from domestic labor contributed to a partnership. As our society has evolved, unmarried cohabitation has largely lost its stigma. But other biases remain — and they leave us inattentive to the needs of many marginalized members of society. Fortunately for former unmarried cohabitants, a doctrinal solution exists to prevent unjust enrichment. All that remains is for courts across the country to recognize that it is available and to wield it appropriately.