

When Cohabitation Ends (working title)

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There is little doubt that non-marital cohabitation is not just “preliminary to marriage,”<sup>1</sup> but rather an alternative to marriage for a growing number of American families. How does the law regulate this increasingly popular family form? An expanding body of literature investigates the ways that these “non-traditional” families fit – or fail to fit – into the current legal regime, identifying various shortcomings of the law in the process.<sup>2</sup> Missing, however, is an account of how the law engages with these relationships at the moment they end. That is the task of this Article. In particular, the Article examines how courts allocate property, including palimony, when cohabitation ends.<sup>3</sup>

Focusing on the end of a relationship provides insight into the relationship itself. Just as divorce helps us to better understand the law’s construction of marriage, separation helps us to better understand the law’s conception of non-marital relationships in the first instance. This line of inquiry is especially important, given that the couple’s separation is one of the few moments legal actors have to participate directly in the relationship.<sup>4</sup>

What types of relationships are included under the rubric of non-marital cohabitation? One of the challenges of engaging in this inquiry is developing a working definition of the relationships without imposing a particular vision of what the relationships ought to look like. In an attempt to address this problem, this Article examines the relationships that couples assert for themselves in seeking a particular property distribution before the court. Accordingly, the Article focuses on relationships that typically involve two partners who have lived together, at least one of whom has chosen to seek property rights

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<sup>1</sup> *Marvin v. Marvin*, 18 Cal. 3d 660, 683 (1976).

<sup>2</sup> See, e.g., Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167 (2015) (identifying the disjuncture between family life and family law and offering ways that family law can change to facilitate effective co-parenting); Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1276 (2014) (revealing the asymmetrical recognition provided non-marital cohabiting relationships, which often bear the burdens but receive none of the benefits of marital relationships, with disproportionate effects on already vulnerable populations).

<sup>3</sup> Death is another event that may occasion legal intervention. This Article focuses only on separation by choice. Other scholarship, including my own, has addressed some of the legal repercussions for a couple when one of the individuals dies. See, e.g., Laura Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227 (2005); Albertina Antognini, *Family Unity Revisited: Divorce, Separation, and Death in Immigration Law*, 66 S.C. L. REV. 1 (2014).

<sup>4</sup> They do so in deciding whether, and how, property should be divided. Custody decisions are another opportunity for courts and legislatures to engage with the relationship. Custody decisions between unmarried parents lies beyond the scope of this Article, but forms the basis of a related project I am working on.

at the end of the relationship. The relationships may be either homosexual or heterosexual, and can take the form of civil unions or domestic partnerships, although they need not receive any statutory recognition. There are, of course, obvious limits to this definition.<sup>5</sup> An important part of this Article will be to consider what those limits are, how they are imposed, and assess which relationships are excluded – those that are not sexual in nature, for instance; or those that involve more than two partners.

This Article is structured in three parts. Part I begins by canvassing the various ways that courts allocate property in deciding claims brought by separating couples.<sup>6</sup> The relevant legal responses can be categorized into three general approaches, with more than one approach possibly existing in any one state at a given time. The first response – the most “traditional” – is to impose a common law marriage on the relationship, which a number of states continue to do in varying degrees. This section will also include decisions that have refused to consider property claims between non-marital couples, based on the concern that it would essentially reinstate common law marriage by another name in states that have otherwise abolished it. The second approach is statutory. This may take the form of applying divorce rules to a non-marital couple that seeks to separate, or interpreting regulations that specifically address non-marital couples where they have been enacted. The final approach is to rely on a number of different common law doctrines to deal with non-marital partners in the absence of any regulation on the topic.

Part II then turns to whether, and how, palimony is awarded. Many states deny the award of palimony outright, a phenomenon that also takes place in the context of alimony. This discussion provides a perspective outside of the legal responsibilities imposed by marriage for exploring the traditional arguments in support of, or against, the notion of the obligation theory of partnership. It may be that courts prefer most versions of privatized support to a state support alternative.

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<sup>5</sup> It does not, for instance, capture the variety of couplings that exist outside of the legal system, such as polyamorous or polygamous relationships. This is an issue related to both the self-selecting sample of couples that decide to bring claims in court and to their desire for success – they must define themselves such that their requests have legal valence as set forth either by statute, or case law.

<sup>6</sup> There has been a proliferation of websites geared towards attempting to clarify the rights and responsibilities that arise from a cohabiting relationship. *See, e.g.*, Unmarried Couples and the Law *available at* <http://www.palimony.com>, last visited on March 21, 2015 (attempting to “provide a one-stop source of resources and information for unmarried couples (heterosexual or homosexual) who are living together as domestic couples or are considering doing so” and announcing that it was established by the law firm responsible for defending Lee Marvin in *Marvin v. Marvin*); Unmarried Equality *available at* <http://www.unmarried.org>, last visited on March 21, 2015 (asserting “that marriage is only one of many acceptable family forms, and that society should recognize and support healthy relationships in all their diversity” and providing information for a wide variety of family relationships outside of marriage).

Part III unpacks some of the consequences that follow from the law's treatment of non-marital relationships for the purpose of property division. Considering the various legal responses *in toto* reveals a number of deep-seated assumptions about how the law conceives of non-marital relationships, and the distributive consequences such assumptions further. In particular, this Part will discuss the underappreciated perils inherent in cohabitation, and identify who may be harmed by the decision not to marry.

Engaging in a more granular analysis of the law surrounding cohabitation helps identify how the legal system constructs who is part of the family, and who is excluded from that account. Dealing with the separation of non-marital couples provides the law with an occasion to be expansive in recognizing different types of relationships between consenting adults.<sup>7</sup> These moments can also, however, create spaces where traditional norms of what families ought to look like are uncritically reinforced. Assessing how the law handles decisions regarding property allocation helps identify the law's construction of adult relationships outside of marriage; it also helps define the contours of marriage itself. This project aims to contribute to the strand of legal scholarship that considers areas outside of the formal reach of marriage as essential participants in establishing its meaning.<sup>8</sup>

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<sup>7</sup> See, e.g., *Marvin*, 18 Cal. 3d 660 (recognizing the existence of cohabiting couples in the context of a separation between one such couple).

<sup>8</sup> See, e.g., Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CAL. L. REV. 87, 163-65 (2014) (discussing the dialogic relationship between marriage and nonmarital relationships and identifying “how the construction of nonmarital spaces influenced the changing contours of marriage”); Ariela Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641, 1646-47 (2003) (noting that “understanding the meaning of marriage requires further foray, beyond marriage’s margins and into the territory outside of its formal borders”); HENDRIK HARTOG, *MAN AND WIFE IN AMERICA* 1 (2000) (“It is through separations, through close examination of struggles at the margins of marital life and marginal identities, that we come to a historical understanding of core legal concepts: of wife, of husband, of unity.”).