

THE MARITAL HABITUS

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ABSTRACT

The law on the books has recognized the right of cohabitants to create enforceable legal obligations with each other for half a century. Yet few seek to enforce such obligations, and their attempts almost never prevail. This article explores one possible explanation for the invisibility of their claims. Marriage is so deeply rooted in our societal consciousness that it embodies what sociologist Pierre Bourdieu has called a habitus, a “subjective but not individual system of internalized structures, schemes of perception, conception, and action common to all members of the same group or class.” A habitus takes the form of things to do or not to do, to say or not to say, determining what conduct is reasonable or unreasonable. The marital habitus is the framework through which people structure their personal relationships and comprehend all adult intimacy. It explains why courts that expressly embrace the right of intimate partners to create legal relations cannot see those relations when they are asked to recognize them. This article gathers evidence of the habitus at work in parties’ legal arguments and in scholarly proposals to recognize nonmarital relationships. It then concludes by asking what, if anything, can be done to recognize valuable adult relationships beyond marriage.

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INTRODUCTION

For decades, scholars and lawmakers have pondered the prospect of legal rights for adults in intimate relationships outside of marriage.¹ The topic has grown in importance as the number of people in nonmarital relationships has swelled to the tens of millions.² Most states have settled on a contract approach, under which partners can enter into enforceable agreements regarding their respective property rights and obligations.³ A smaller handful of states have allowed partners in sufficiently marriage-like relationships to benefit from marital property rules.⁴ Scholars have advanced even more ambitious proposals, none of which has yet been

1. See *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976). Decided 45 years ago, *Marvin* is often referred to as a watershed decision, with its forceful declaration that contracts between cohabitants not explicitly resting on sexual services should be upheld like any other agreements. See, e.g., Herma Hill Kay & Carol Amyx, *Marvin v. Marvin: Preserving the Options*, 65 CALIF. L. REV. 937, 938 (1977) (arguing that the California Supreme Court had “taken the lead in recognizing the factual existence of a variety of familial relationships” and speculating about the possibilities opened up by the decision). *Marvin* became the focus of significant scholarly inquiry. See, e.g., Ira Mark Ellman, “Contract Thinking” Was *Marvin’s Fatal Flaw*, 76 NOTRE DAME L. REV. 1365 (2001); Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1383–84 (2001) (commenting on the impact of the *Marvin* decision); Kay & Amyx, *supra*. Yet as several scholars have noted, courts had been recognizing the financial effects of nonmarital cohabitation long before *Marvin*. See, e.g., Carol S. Bruch, *Property Rights of De Facto Spouses Including Thoughts on the Value of Homemakers’ Services*, 10 FAM. L.Q. 101 (1976) (discussing the scholarly literature and case law prior to *Marvin*); Estin, *supra*, at 1396 n.85 (noting that the *Marvin* “rule” was already widely adopted).

2. See *Table AD-3: Living Arrangements of Adults 18 and over, 1967 to Present*, U.S. CENSUS BUREAU (Nov. 2021), <https://www.census.gov/data/tables/time-series/demo/families/adults.html> [<https://perma.cc/NS7G-D2R8>] (recording 20,193,000 adults living with a nonmarital partner); see also Kaiponanea T. Matsumura, *Consent to Intimate Regulation*, 96 N.C. L. REV. 1013, 1016 (2018) (noting that a similar share of the population is in committed intimate relationships but living in separate households).

3. See, e.g., *Marvin*, 557 P.2d at 110.

4. See Kaiponanea T. Matsumura, *Beyond Property: The Other Legal Consequences of Informal Relationships*, 51 ARIZ. ST. L.J. 1325, 1329 n.19 (2019) (pointing out the example of Washington and several other states).

adopted, like treating couples in marriage-like relationships as “married in fact”⁵ or long-term cohabitants “as though they were married.”⁶

Despite these attempts at innovation, only a tiny sliver of nonmarital relationships is directly governed by the law. Although we know little about the number of disputes that are filed in courts whose dockets and decisions are not reported in easily searchable commercial databases, the small number of reported decisions (fewer than one hundred per year⁷) suggests that very few nonmarital relationships give rise to enforceable legal obligations.

In this article, I explore why nonmarital relationships have been rendered invisible in the law⁸ and propose an answer. I suggest that marriage is so deeply rooted in our societal consciousness that it embodies what sociologist Pierre Bourdieu has called a *habitus*: a “subjective but not individual system of internalized structures, schemes of perception, conception, and action common to all members of the same group or class.”⁹ Marriage is not just a legal status that one chooses to enter; it is not just a collection of laws; it is not merely an outcome toward which the law channels people. It is *the* framework through which people structure their personal relationships and comprehend all adult intimacy.

The claim here is different than the conventional critique of marital supremacy, which accuses legal actors and the law more generally of propping up marriage to the detriment of other forms of intimacy.¹⁰ *Habitus*

5. Lawrence W. Waggoner, *With Marriage on the Decline and Cohabitation on the Rise, What About Rights for Unmarried Partners?*, 41 ACTEC L.J. 49, 89 (2015) (proposing that couples who are deemed “married in fact” be treated as married “for all purposes”).

6. CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 224 (2010) (treating couples who have cohabited for more than two years or have a child as married for all purposes unless they execute an agreement opting out of the status in advance).

7. See Matsumura, *supra* note 4, at 1336–37 (identifying 141 cases in a 26-month period that disputed the existence of a cohabiting or nonmarital relationship).

8. Certainly, fears that *Marvin* would open the floodgates to legal disputes between separating cohabitants, see *Marvin v. Marvin*, 557 P.2d 106, 123 (Cal. 1976) (Clark, J., concurring and dissenting) (worrying that the recognition of equitable claims would result in “unmanageable burden[s]” on the trial courts), have not come to pass.

9. PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* 86 (Richard Nice trans., 1977).

10. See, e.g., MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 5 and *passim* (1995) (criticizing the law for focusing on marriage and advocating instead for recognition of the mother-child dyad as the foundational family relationship); NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE* 2 and *passim* (2008) (arguing that the focus on marriage distracts from the recognition of other equally valuable relationship forms); Melissa Murray, *Accommodating Nonmarriage*, 88 S. CAL. L. REV. 661, 666 (2015) (criticizing efforts to assimilate nonmarriage into marriage in the pursuit of greater legal rights). My claim is also different from the closely related concept of “false consciousness,” the suggestion that “through institutional control over education, religion, media, culture, and economic systems, dominant groups in society [are] capable of spreading ideas which serve to justify inequalities of status and power.” John T. Jost, *Negative Illusions: Conceptual Clarification and Psychological Evidence Concerning False Consciousness*, 16 POL. PSYCH. 397, 398 (1995). False consciousness involves deliberate efforts by the dominant group to make the subordinate group complicit in its own subordination. That is not true of

runs deeper. It is largely invisible, depending upon the harmonization of collective experiences as well as their continual reinforcement. It takes the form of things to do or not to do, to say or not to say, determining what conduct is reasonable or unreasonable. It explains why courts that *expressly embrace* the right of intimate partners to create legal relations *cannot see those relations* when they are asked to recognize them.

To interrogate the claim, I examine two possible manifestations of marital habitus-induced blindness. First, I look at the arguments that parties have raised in contract disputes, showing that partners who bring contract claims based on domestic services articulate the value of those services as if performed in marriage. Parties (or their lawyers) lack the vocabulary to explain the exchange in any other way, predictably leading courts to question why parties who wanted marital rights would not formally marry. Second, I examine scholarly reform proposals to show how marriage structures assumptions about nonmarital obligations. Sometimes, the effect of marriage is obvious and explicit, as when a scholar proposes to extend marriage laws to similarly situated couples. But even attempts to propose new and different legal relations are moored in concepts like marital unity, marital vulnerability, and marital responsibility. Scholars therefore struggle to articulate how open-ended concepts like sharing or unjust enrichment should play out differently from what marriage would dictate.

I conclude the article by considering what it would take for members of the juridical field to comprehend adult relationships beyond the blinders of marriage. If a habitus functions as I have described, it threatens to circumscribe the very efforts to alter it. Yet a habitus is not impervious to challenge from within, given that it is the product of innumerable performances, which themselves reflect the constant renegotiation of social relationships and positions. I argue that looking to the experiences of those who cannot practically or legally claim the benefits of marriage—siblings; parents and their adult children; asexuals; committed singles; people in consensually non-monogamous relationships; friends; those too economically insecure to marry; and the like—could provide the best hope of altering the marital habitus to better accommodate nonmarital relationships.

I. INVISIBLE CLAIMS

Reviewing the landscape of cohabitant claims two decades ago, Ann Laquer Estin observed that the law was “not particularly generous[:] Only a small percentage of cohabitants will have even a possibility of legal

habitus, as I will discuss below. *See infra* note 41 and accompanying text.

recovery when their relationships end.”¹¹ Despite the widespread adoption of rules recognizing cohabitants’ right to contract following *Marvin v. Marvin*,¹² Estin noted that few decisions actually recognized claims to broadly redistribute property between cohabitants.¹³ Instead, “[r]emedies 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.”¹⁴ Indeed, when the *Marvin* case was remanded, the trial court found that Lee Marvin had not impliedly agreed to provide for Michelle Marvin’s financial needs for the rest of her life in exchange for her domestic services, and that Michelle had in fact been financially enriched during her time with Lee.¹⁵

A recent study by Albertina Antognini confirms that not much has changed in the ensuing decades. In fact, the landscape may be bleaker than previously realized. Antognini analyzes the universe of cases involving express contracts between cohabitants and finds that even in these “easier” cases—easier in the sense that courts need not infer the terms of agreements from the parties’ conduct—courts rarely award relief.¹⁶ Of these 122 reported cases, courts have only enforced contracts in 42.¹⁷

Antognini finds that courts in the vast majority of cases refuse to enforce express contracts for a several reasons. Even though *Marvin* instructs that only contracts that “rest upon a consideration of meretricious sexual services” are prohibited,¹⁸ courts sometimes conclude that the exchange of property for the performance of household duties necessarily involves sexual consideration.¹⁹ In *Smith v. Carr*, for example, the court held that the plaintiff’s “services as a ‘companion, homemaker, and social hostess’” were “inextricably intertwined with the sexual relationship.”²⁰ While holding out the possibility that the same services might be consideration if the relationship involved “true cohabitation,” the court viewed the consideration as primarily sexual because the plaintiff only lived with her partner “‘at various times’ for no longer than eleven months.”²¹ In other

11. Estin, *supra* note 1, at 1402–03.

12. 557 P.2d 106 (Cal. 1976).

13. See Estin, *supra* note 1, at 1395–97.

14. *Id.* at 1384. See also *id.* at 1400–01 (further noting that reimbursement for contributions is usually based on the market rate for such services rather than any notion of shared equity or partnership).

15. See *id.* at 1382; see also *Marvin v. Marvin*, 176 Cal. Rptr. 555, 557 (Cal. Ct. App. 1981) (summarizing the trial court’s findings).

16. See Albertina Antognini, *Nonmarital Contracts*, 73 STAN. L. REV. 67, 76–77 (2021).

17. See *id.* at 76–77, 77 n.37.

18. *Marvin v. Marvin*, 557 P.2d 106, 113 (noting that the mere existence of a sexual relationship between partners does not render a contract between them unenforceable).

19. See Antognini, *supra* note 16, at 104–09.

20. *Smith v. Carr*, No. CV 12-3251-CAS (JCGx), 2012 WL 3962904, at *4 (C.D. Cal. Sept. 10, 2012) (citation omitted).

21. *Id.*

instances, Antognini points out that courts will characterize domestic services and companionship as inherently gratuitous behavior, not consideration for an enforceable agreement.²²

Of course, some courts do enforce contracts between cohabitants. Antognini finds that most of these cases involve a different type of exchange: claims “pertaining exclusively to finances contributed, or property owned, during the relationship.”²³ Antognini points to *Maddali v. Haverkamp*,²⁴ in which the court held that rather than alleging an unenforceable exchange based on “love and affection,” the plaintiff pointed to a concrete promise to repay her the money she spent in maintaining and renovating a house titled in her former cohabitant’s name.²⁵ Echoing Estin’s findings from decades ago, Antognini unearths numerous cases in which courts recognize claims based on property rather than services.²⁶

In a recent study of cases brought by cohabitants based on the theory of implied partnership or joint venture, Courtney Joslin has discovered a similar dynamic at work.²⁷ Courts refuse to imply a financial partnership based on one partner’s provision of domestic services but “are generally open to applying the usual market rules to exchanges that are not family-like in nature.”²⁸ Of course, this is small comfort to those whose contributions consist primarily of domestic labor. For them, any right to contract is an empty one.²⁹

What explains the widespread judicial refusal to enforce these claims despite the seeming embrace of the parties’ right to exchange property for domestic services?³⁰ It is highly unlikely that courts across the board are intentionally promoting outcomes that systematically favor the wealthier partner despite announcing rules that purport to modernize the law to recognize a wider range of relationships and to recognize the value of domestic services.³¹ Surely at least some judges would be motivated to rule in favor of the partner providing domestic labor, whether out of sympathy

22. See Antognini, *supra* note 16, at 113–17.

23. *Id.* at 127.

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

25. Antognini, *supra* note 16, at 128.

26. See *id.* at 129. *Cf.* Estin, *supra* note 1, at 1384.

27. Courtney G. Joslin, *Nonmarriage: The Double-Bind*, __ GEO. WASH. L. REV. __ (forthcoming 2022).

28. *Id.* at 33 (using as an example a claim for compensation by a partner who works in the other’s business without pay).

29. See Antognini, *supra* note 16, at 138.

30. Antognini notes that this discrepancy has led many scholars wrongly to proclaim the availability of a right to contract when in fact that right is significantly limited. See *id.* at 95–98.

31. See *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976) (recognizing the need to adapt to changing social mores around cohabitation to avoid “inequitable” outcomes).

for the more vulnerable party's reliance interests or a desire to promote gender-egalitarian outcomes.

It is possible that the courts issuing the decisions are attempting to undermine or narrow authority with which they disagree by paying lip service to binding authority while refusing to apply that authority faithfully.³² However, at least some of the courts declaring the pro-contract rule have the final say on the law within their jurisdictions: they have little to gain by dissembling.³³ If they disagreed with the pro-contract rule, they could easily refuse to adopt it, as the Illinois Supreme Court has repeatedly done.³⁴

The more likely explanation is that courts cannot comprehend the possibility that these relationships should have legal consequences. That is, they are open to contract claims but unable to see them. If the formal legal rule is not the cause, then perhaps the explanation is something deeper, operating on the level of perceptions and instincts. One such theory that explores the influence of social structures on individual action is sociologist Pierre Bourdieu's theory of the habitus.

II. THE HABITUS

This Part describes Bourdieu's theory of the habitus. It then explores how marriage has become the instinctual way to recognize and demonstrate commitment between intimate partners, noting in particular the role of the juridical field in reinforcing the centrality of marriage as the lens through which to perceive adult intimacy.

The habitus stems from Bourdieu's desire to construct a "theory of practice"—a means of reconciling the influence of social structures with individual action.³⁵ Previous theories effectively suggested that human behavior is *either* structurally predetermined *or* purely reflective of

32. See Richard M. Re, *Narrowing Supreme Court Precedent from Below*, 104 GEO. L.J. 921, 923–24 (2015) (noting that courts bound by precedent with which they disagree may have the incentive to “narrow the precedent from below by interpreting it not to apply, even though [they] think that the precedent is best read to apply”).

33. See, e.g., *Williams v. Ormsby*, 966 N.E.2d 255 (Ohio 2012); see also Antognini, *supra* note 16, at 154–64 (providing a table of cases in which contract claims were denied, some of which are by the jurisdiction's highest court).

34. See *Blumenthal v. Brewer*, 69 N.E.3d 834 (Ill. 2016) (reaffirming the holding in *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979), which held that contracts between cohabitants would not be enforced on public policy grounds).

35. BOURDIEU, *supra* note 9, at 72 (describing “the theory of the mode of generation of practices” as “the precondition for establishing an experimental science of the *dialectic of the internalization of externality and the externalization of internality*”). Although Bourdieu revitalized the concept of habitus, the term itself had a variety of uses, tracing back to “Aristotle’s notion of *hexis* . . . meaning an acquired yet entrenched state of moral character that orients our feelings and desires, and thence our conduct.” Loic Wacquant, *A Concise Genealogy and Anatomy of Habitus*, 64 SOCIO. REV. 64, 65 (2016).

subjective, individual dispositions.³⁶ The concept of the habitus presupposes that individuals are neither completely free to make decisions removed from social influence, nor act in a way that is completely predetermined.³⁷ It explains how social conditions constrain and shape action while simultaneously allowing for individual variation.

Bourdieu defines the habitus as a system that influences perceptions and actions.³⁸ A habitus produces a range of “objective potentialities”—“things to do or not to do, to say or not to say”—in relation to situations that people confront.³⁹ Innumerable past practices, observed since birth,⁴⁰ produce a shared history of practices that reproduce themselves unconsciously.⁴¹ Members of the same social groups effectively experience a consensus on the meaning of practices and sayings, causing them “to be immediately intelligible and foreseeable, and hence taken for granted.”⁴² Thus, a habitus is relatively invisible and experienced as second nature, akin to “a feel for the game.”⁴³ The habitus is transferrable to various realms of action (food, art, sport, etc.) within and among individuals of the same class.⁴⁴ The harmony of aesthetic tastes and ethical leanings produces a feedback loop, being “perceived as evidence of the ineffable affinities which spring from it.”⁴⁵

Importantly to Bourdieu, the habitus is not only a perceptual structure but an explanation for practical action on the bodily level. When people act, they do not refer to an objective set of disembodied rules any more than a tennis or football players rely on rules rather than internalized understandings when playing their sport.⁴⁶

Practices in turn (re)generate the habitus. People are “enmeshed in the world by an opaque relationship of ‘ontological complicity’ . . . and [are]

36. BOURDIEU, *supra* note 9, at 65, 67; *see also* Anthony King, *Thinking with Bourdieu Against Bourdieu: A ‘Practical’ Critique of the Habitus*, 18 SOCIO. THEORY 417, 417, 430 (2000); Omar Lizardo, *The Cognitive Origins of Bourdieu’s Habitus*, 34 J. THEORY SOC. BEHAV. 375, 391 (2004).

37. *See* Wacquant, *supra* note 35, at 65.

38. *See* BOURDIEU, *supra* note 9, at 72 (describing the habitus as “systems of durable, transposable *dispositions*, structured structures predisposed to function as structuring structures, that is, as principles of the generation and structuring of practices and representations”). *See also* Lizardo, *supra* note 36, at 379.

39. BOURDIEU, *supra* note 9, at 76; *see also id.* at 78.

40. *See id.* at 85, 87.

41. *See id.* at 78–79 (“The ‘unconscious’ is never anything other than the forgetting of history which history itself produces by incorporating the objective structures it produces in the second natures of habitus . . .”). *See also id.* at 72 (noting that the habitus is “collectively orchestrated without being the orchestrating action of a conductor”).

42. *Id.* at 80.

43. Menachem Mautner, *Three Approaches to Law and Culture*, 96 CORNELL L. REV. 839, 864 (2011); *see also* Kim Lane Scheppelle, *Judges as Architects*, 24 YALE J.L. & HUMANS. 345, 350 (2012).

44. *See* Wacquant, *supra* note 35, at 66.

45. BOURDIEU, *supra* note 9, at 82.

46. *See* King, *supra* note 36, at 419.

bound to others from within through the ‘implicit collusion’ fostered by shared categories of perception, appreciation and action.”⁴⁷ We are all “producer[s] and reproducer[s] of objective meaning.”⁴⁸

The foregoing description emphasizes the objective nature of the habitus, the ways in which individual action is shaped and constrained.⁴⁹ Yet the habitus also accommodates individual variation. Given the constantly changing and novel environmental contexts in which individuals find themselves, habitus cannot be rigid or context-specific.⁵⁰ To put it another way, habitus can give rise to “different lines of conduct” depending on “different strategic opportunities.”⁵¹ The possibility of some degree of individual, self-interested action makes the habitus dynamic, the product of constant renegotiation that comes from participants in the social network.⁵²

Moreover, societies consist of multiple habitus that coexist simultaneously, the boundaries of which may be overlapping or permeable. An individual’s experience is shaped by these overlapping habitus. One’s initial or primary habitus is that which is “acquired in early childhood through osmosis in the familial microcosm and its extensions.”⁵³ Yet a habitus may be acquired through life experiences like professional training.⁵⁴ Different fields, for instance, may have their own “complex system of practices and habits, categories and concepts, the practical mastery of which by any particular individual signals membership in this field.”⁵⁵

We see this with members of the juridical field—lawyers, judges, law professors. Although members of the juridical field may share the same class habitus as other professionals, the juridical field has its own habitus.⁵⁶ It consists of a “hierarchized body of professionals who employ a set of established procedures for the resolution of any conflicts,” the result of

47. Wacquant, *supra* note 35, at 68.

48. BOURDIEU, *supra* note 9, at 79.

49. Prominent scholars have disagreed over whether Bourdieu’s definition of habitus succeeds in transcending the objective/subjective divide, with some contending that the concept is irredeemably objectivist in nature. See King, *supra* note 36, at 417–18 (making the argument and citing similar arguments). To me, many of these critiques, most of which are fine-grained, do not detract from Bourdieu’s broader contributions.

50. See Lizardo, *supra* note 36, at 391–92.

51. Wacquant, *supra* note 35, at 69.

52. See King, *supra* note 36, at 421.

53. Wacquant, *supra* note 35, at 68 (labeling this the “primary habitus”). Bourdieu appears to treat this habitus as largely synonymous with the habitus of one’s social class. See BOURDIEU, *supra* note 9, at 80–86 (referring to the “class habitus”).

54. See Wacquant, *supra* note 35, at 68 (noting that these secondary habitus can be engrafted through education and other life experiences); see also Pierre Bourdieu & Richard Terdiman, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 816 (1987) (noting that the juridical field has its own habitus).

55. Scheppele, *supra* note 43, at 350.

56. See Bourdieu & Terdiman, *supra* note 54, at 816.

which is the emergence of a “transcendental” or “general opinion of professionals . . . rooted in the social cohesion of the body of legal interpreters.”⁵⁷ Within this field, the establishment of professional competence “entails the disqualification of the non-specialists’ sense of fairness, and the revocation of their naive [sic] understanding of the facts.”⁵⁸ Despite seeming disagreements over the meaning of doctrines or the advisability of legal rules, participants within this habitus come to share a particular world view,⁵⁹ especially because, as they constitute the legal order of society, they begin “to see the established order as both good and neutral.”⁶⁰ Certain practices and arguments are viewed as normal while “different practices tend to appear *deviant*, anomalous, indeed abnormal.”⁶¹

In sum, the habitus constrains perception and action without being perfectly uniform. It gives a person a “feel for the game” that accommodates individual variation up to a point. It evolves as practices shift over time, yet generally does so slowly because it results from innumerable practices rather than the dictates of a single author. In this sense, the habitus differs from the way social norms are often discussed in the legal literature, as a factor that influences individual choices,⁶² or a set of values that can be shaped by the law.⁶³ Norms are often depicted as discrete bundles of rules around particular social practices,⁶⁴ whereas habitus is a more pervasive structure that connects behavior across many realms. Through a law and economics lens, norms are rules that figure into an individual’s risk calculus, whereas, for the most part, habitus operates on the deeper level of practice rather than conscious reflection.⁶⁵

57. *Id.* at 819.

58. *Id.* at 828.

59. *See id.* at 823 (arguing that conflict between different legal actors and between different ideological positions within the law “serves as the basis for a subtle form of the *division of the labor of symbolic domination* in which adversaries, objectively complicitous with each other, fulfill mutual needs”).

60. Scheppele, *supra* note 43, at 353.

61. Bourdieu & Terdiman, *supra* note 54, at 847 (emphasis in original). In this way, the juridical habitus may influence the broader societal and class habitus.

62. *See* Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997) (defining social norms as “social regularities that individuals *feel obligated* to follow because of an internalized sense of duty, because of a fear of external non-legal sanctions, or both”) (emphasis added); *see also* Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 VA. L. REV. 1603, 1621 & *passim* (2000) (presuming that, and exploring how, social norms affect parties’ choices).

63. *See, e.g.*, McAdams, *supra* note 62, at 391–432 (exploring various ways in which the law can influence social norms).

64. *See, e.g.*, Scott, *supra* note 62, at 1638 (“Norms are both specific and soft; that is, they apply to particular environments and populations, and, even within those constraints, normative meaning changes with particular circumstances.”).

65. I will discuss the extent to which a habitus can be transformed in Part IV.

This brings us to marriage. As a matter of social practice, marriage is the foundational intimate relationship between adults. From the outset, children are simultaneously exposed to and absorb practices related to sexual identity, the socially defined vision of the sexual division of labor, and the relationship between their parents.⁶⁶ For 60% of children born today, this process includes direct exposure to their parents' marriage.⁶⁷ Even the remaining 40%, however, will soon internalize the meaning and importance of marriage. The "whole symbolically structured environment . . . exerts an anonymous, pervasive pedagogic action."⁶⁸ Children who do not internalize messages about the importance of marriage in their homes will soon encounter them in the community, in their schools, through religious groups, and in the media they consume.⁶⁹

The marital habitus is arguably the strongest amongst the wealthy and highly educated. College-educated people are more likely to marry than people with no college education⁷⁰ and much more likely to have children within marriage.⁷¹ Among this group, marriage and marital childbearing are even more common now than they were a generation ago.⁷² Sociologists have argued that marriage has become a marker of prestige, an indication that certain levels of education and financial success have been reached.⁷³ For college graduates, this milestone is still achievable. Members of the juridical field—the people who make laws, translate grievances into legal claims, and adjudicate claims—are part of this class habitus. As Bourdieu

66. See BOURDIEU, *supra* note 9, at 87, 93.

67. Close to 40% of children born in 2019 were born out of wedlock. See Joyce A. Martin, Brady E. Hamilton, Michelle J.K. Osterman & Anne K. Driscoll, *Births: Final Data for 2019*, NAT'L VITAL STATS. REPS. 6 (Mar. 23, 2021), <https://www.cdc.gov/nchs/data/nvsr/nvsr70/nvsr70-02-508.pdf> [<https://perma.cc/46VD-25W9>].

68. BOURDIEU, *supra* note 9, at 87.

69. *Cf. id.* at 85 (noting that although the sequence in which people are exposed to experiences may differ, most people in the same society do not escape the same formative experiences).

70. See Kim Parker & Renee Stepler, *As U.S. Marriage Rate Hovers at 50%, Education Gap in Marital Status Widens*, PEW RSCH. CTR. (Sept. 14, 2017), <https://www.pewresearch.org/fact-tank/2017/09/14/as-u-s-marriage-rate-hovers-at-50-education-gap-in-marital-status-widens/> [<https://perma.cc/CF6P-T44P>] (showing that 65% of adults with a 4-year degree were married by age 25, as compared to 50% of adults with only a high school education).

71. See JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* 17 (2014) (noting nonmarital birth rates of under 10% for college educated women, and under 2% for college educated white women, in comparison to rates over 50% for women with the least education).

72. See *id.* at 17–18.

73. See, e.g., Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. MARRIAGE & FAM. 848, 855 (2004) (“[Marriage] used to be the foundation of adult personal life; now it is sometimes the capstone.”); Claire Cain Miller, *How Did Marriage Become a Mark of Privilege?*, N.Y. TIMES (Sept. 25, 2017), <https://www.nytimes.com/2017/09/25/upshot/how-did-marriage-become-a-mark-of-privilege.html> [<https://perma.cc/H37J-D5YM>] (“[W]hile [marriage] used to be a marker of adulthood, now it is something more wait to do until the other pieces of adulthood are in place—especially financial stability.”).

observed, membership in this influential field makes it more likely that members' practices will come to influence the behavior of others by affecting the laws that will govern their conduct.⁷⁴ Thus, it is likely that practice of marriage by people in this field will entrench the centrality of marriage to beliefs about the relationship between law and intimacy. The ubiquity of marriage among the professional class, particularly the legal field, will have an outsized influence.

Marriage rates have declined for the less-well-educated and in communities of color, which could suggest that marriage is less important in these different habitus. Research indicates, however, that the decline in rates of marriage has little to do with the rejection of the idea of marriage. Indeed, lower-income individuals continue to believe that marriage represents the ideal form of commitment between intimate partners. As Kathryn Edin and Maria Kefalas have shown, they often cling to the dream of a lasting partnership, "one [person] for life."⁷⁵ Edin and Kefalas show, for example, that people who have children outside of marriage hope to eventually marry their partners so that their children "can have two parents as role models," knowing "how to bring up [their] family being married."⁷⁶ Although marriage rates are lower among African Americans, African Americans are more likely than the general population to agree that "society is better off if couples who want to stay together long-term eventually get married."⁷⁷ Practical obstacles to marriage may have affected marriage rates but have not dislodged the position of marriage as the ultimate form of relational commitment.

In fact, for many of those who do not marry, it is precisely their respect

74. See Bourdieu & Terdiman, *supra* note 54, at 846 (noting that legal pronouncements "make[] the practical principles of the symbolically dominant style of living official," "inform[ing] the behavior of all social actors, beyond any differences in status [or] lifestyle"); see also Scheppelle, *supra* note 43, at 353 (noting that this habitus universalizes the experiences of judges and other occupants of the juridical field and imposes them on others). In addition to being more likely to marry and raise children within marriage because of their education and income level, members of the legal field are disproportionately likely to be white. See AM. BAR ASS'N, ABA PROFILE OF THE LEGAL PROFESSION 2020 33 (2020), <https://www.americanbar.org/content/dam/aba/administrative/news/2020/07/potlp2020.pdf> [<https://perma.cc/9T4L-QJV5>] (noting that 86% of all lawyers are non-Hispanic whites, and that Blacks, Asians, and Hispanics are significantly under-represented compared to their share of the general population). White American children are much more likely to be raised by married parents. See George A. Akerloff & Janet L. Yellen, *An Analysis of Out-of-Wedlock Births in the United States*, BROOKINGS INST. (Aug. 1, 1996), <https://www.brookings.edu/research/an-analysis-of-out-of-wedlock-births-in-the-united-states/> [<https://perma.cc/5GEW-22Q7>].

75. KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE 67 (2011); see also *id.* at 106–09.

76. *Id.* at 106. See also *id.* at 107 (arguing that the assumption that the marital norm is dead is "far from true").

77. Juliana Menasce Horowitz, Nikki Graf & Gretchen Livingston, *Marriage and Cohabitation in the U.S.*, PEW RSCH. CTR. (Nov. 6, 2019), <https://www.pewresearch.org/social-trends/2019/11/06/public-views-of-marriage-and-cohabitation/> [<https://perma.cc/FD39-R8K9>] (61% of Black respondents agree with the statement as compared to 53% of the general population).

for marriage and the rights that accompany it that explains their decisions. For instance, they view marriage as a lifetime commitment, one that their partners may not be able to make.⁷⁸ They also view marriage as a financial partnership, one that only makes sense if one has a modicum of financial security and confidence in one's partner's financial security.⁷⁹ The decision *not* to marry, in other words, embraces the same views about marriage that make it so attractive to the highly educated.⁸⁰

In describing marriage's continuing influence, I do not mean to downplay the fact that marriage is less obligatory than it once was,⁸¹ or the possibility that marriage may eventually lose its primacy, especially among groups experiencing widespread declines in marriage rates. For now, however, marriage remains the relationship form that embodies ultimate commitment across social groups.⁸² People who marry—including, prominently, those in the juridical field—become accomplices in the practices that signal this commitment through marriage. People who do not marry based on identical views about marriage and commitment likewise reinforce the marital habitus through their inaction. Regardless of social class, then, marriage remains the way to identify committed intimate relationships. The rise in cohabitation over the past several decades illustrates the erosion of the belief that people cannot live together outside of marriage, but not a change in the association between marriage and legal commitment.

III. MANIFESTATIONS OF THE MARITAL HABITUS

The previous Part theorized the marital habitus. It hypothesized that although society and the law now accommodate greater adult intimacy outside of marriage, marriage remains the way to denote financial unity and ultimate commitment. It continues to shape perceptions and practices, pulling certain relationships within its orbit and deterring others. Although practices may have shifted away from marriage for some groups, those in the juridical field—who will ultimately decide whether a relationship gives rise to legal consequences—show no signs of moving away from marriage.

78. See EDIN & KEFALAS, *supra* note 75, at 106–09.

79. See *id.* at 107–08.

80. To be clear, a substantial minority of cohabitants claim not to have an interest in marrying someday. See Horowitz et al., *supra* note 77 (noting that 24% of non-engaged cohabitants said they did not want to get married). It is unclear whether their opposition amounts to a rejection of marriage's importance or is based on other considerations.

81. See Cherlin, *supra* note 73, at 849–52 (describing the declining sense that marriage is obligatory or central to self-identity as well as the unraveling of norms linking marriage to procreation).

82. Sociologist Andrew Cherlin has observed that “although the practical importance of being married has declined, its symbolic importance has remained high, and may even have increased.” *Id.* at 855.

This Part looks for evidence of the marital habitus in arguments by parties and scholars advocating for greater recognition of the rights of the unmarried. It suggests that the inability to envision legally significant relationships outside of marriage's framework predictably leads courts and lawmakers to disregard these arguments.

A. Parties

Marriage shapes people's understanding of their nonmarital relationships. For many people in nonmarital relationships, this could mean two things: they might not think of their relationships as legally consequential and thus decline to pursue legal remedies during or at the end of their relationship; or they might think of their relationship in marriage-like terms despite the fact that they have not formally married.⁸³ The former group leaves no trace in courts and dockets. The views of the latter group, moderated through their lawyers, are recorded in cases and filings.⁸⁴

Partners in nonmarital relationships frequently view their conduct and its legal significance through the lens of marriage irrespective of whether the law states otherwise.⁸⁵ In *Rabinowitz v. Suvillaga*, for example, Irma Suvillaga brought a counterclaim against her wealthy former partner, Charles Rabinowitz, when he unceremoniously ended their ten-year

83. There is a third group of people who think of their relationships in contractual or equitable terms that vary significantly from, or spring independently from, marriage. As discussed above, when these contracts involve financial contributions, their contractual expectations may be legally enforceable. See Complaint, *Maddali v. Haverkamp*, No. A1701584, 2017 WL 11537866 (Ohio Ct. Com. Pleas, Mar. 21, 2017) (articulating a theory of recovery based completely on recouping financial contributions made to a shared residence). However, it is unclear whether these people believe that the commitments they make to each other are legally enforceable, and also uncertain whether they are enforceable. See, e.g., Mindy Len Catron, *To Stay in Love, Sign on the Dotted Line*, N.Y. TIMES (June 23, 2017), <https://www.nytimes.com/2017/06/23/style/modern-love-to-stay-in-love-sign-on-the-dotted-line-36-questions.html> [<https://perma.cc/RF36-NDU9>] (describing a relationship contract containing terms governing caregiving, houseguests, monogamy, and more); Jan Hoffman, *Just Call It a Pre-Prenup*, N.Y. TIMES (May 25, 2012), <https://www.nytimes.com/2012/05/27/fashion/the-background-on-relationship-agreements.html> [<https://perma.cc/Z72N-GN6Y>] (noting that couples may agree to a variety of commitments including how much time to spend together, who takes care of the pets, and more, and that most experts agree that such agreements are not legally enforceable).

84. The views expressed by parties to a lawsuit are really part of a "juridically regulated debate by professionals acting by proxy." Bourdieu & Terdiman, *supra* note 54, at 831. To varying degrees, attorneys influence the language and sentiments in a party's filing. Thus, some of the sentiments expressed by the parties may be attributed to their attorneys, more specifically, to their attorneys' assessments of the types of things they would need to say to prevail on their claims. This distinction does not matter to my argument. If one is inclined to consider the views about relationships in this section as attributable to attorneys rather than to clients, those views are evidence of how the marital habitus influences attorneys, who are important members of the juridical field.

85. See *Marvin v. Marvin*, which recognized the right of nonmarital partners to contract with each other and took pains to clarify that the partners' rights did not flow from the Family Law Act, the statute governing marriage. 557 P.2d 106, 120 (Cal. 1976) (rejecting a comparison between cohabitants and putative spouses).

relationship and asked her to leave the house.⁸⁶ According to Suvillaga's Answer and Counterclaim, the couple did not formally marry.⁸⁷ Indeed, Suvillaga remained legally married to her husband until his death in 2012, though they had separated in 2002.⁸⁸ Shortly after Rabinowitz and Suvillaga met in 2006, Rabinowitz asked Suvillaga to move in with him in Spring Valley, New York.⁸⁹ After she moved in with him, she began to cook, clean, buy groceries, and perform other "relationship duties" like "doing [Rabinowitz's] laundry . . . taking care of some of his hygienic needs, engaging in a sexual relationship with him, taking him to doctor's appointments, and handling all his medical problems."⁹⁰ They held themselves out as a couple.⁹¹ Behind the scenes, though, Suvillaga was "responsible for all of her expenses and found herself falling deeper and deeper into debt."⁹² When she purchased groceries, for instance, Rabinowitz would reimburse her but only for his share.⁹³ When Suvillaga found a job in Albany, Rabinowitz purchased an apartment there but made Suvillaga pay the rent and utilities.⁹⁴ In 2015, Rabinowitz decided to sell the Spring Valley house and move to North Carolina.⁹⁵ He told Suvillaga that she could quit her job and live at the North Carolina house forever, and that he would leave the house to her when he died.⁹⁶

Suvillaga clearly understood that she was not married to Rabinowitz. She was well aware that for the first nine years of their relationship, Rabinowitz had not offered significant financial support, pushing her into debt.⁹⁷ Thus, it might come as a surprise that her first counterclaim was that "throughout the course of [their] relationship," she and Rabinowitz had "expressly formed a contract that obligated the parties to act as if they were married."⁹⁸

To support this claim, she contended, quite contrary to the facts she just pleaded, that "[t]he parties acquired both assets and debts *together*."⁹⁹ She also claimed that they "performed certain roles in their relationship and

86. Rabinowitz v. Suvillaga, No. 17 CVS 244, 2019 WL 386853, at *2 (N.C. Super. Ct. Jan. 28, 2019).

87. Def.'s Am. Affirmative Defenses, Answer and Countercls. ¶ 3, Rabinowitz v. Suvillaga, No. 17 CVS 244 (N.C. Super. Ct. Aug. 21, 2018).

88. *Id.* ¶ 5.

89. *Id.* ¶¶ 8, 10.

90. *Id.* ¶¶ 8, 13, 15.

91. *Id.* ¶ 8.

92. *Id.* ¶¶ 9, 12.

93. *Id.* ¶ 13.

94. *Id.* ¶ 14.

95. *See id.* ¶ 16.

96. *Id.* ¶ 19.

97. *See id.* ¶¶ 12, 13. It is unclear whether Suvillaga paid rent to Rabinowitz when she lived at his Spring Valley house.

98. *Id.* ¶ 24. Suvillaga did not base the contract claim on Rabinowitz's most recent set of alleged promises.

99. *Id.* ¶ 25 (emphasis added).

[she] provided support to [Rabinowitz] in many ways, including those [services] listed above.”¹⁰⁰ The only label that Suvillaga could impose on these checkered facts was “marri[age].”¹⁰¹

Suvillaga is not alone in turning to marriage to explain the nature of the agreements that cohabitants allegedly entered. In *Isenburg v. Isenburg*, Elizabeth Isenburg sought to obtain a share of income and assets acquired by her partner Matthew Isenburg during their 14-year relationship.¹⁰² When they met, Elizabeth was a 39-year-old social worker with two small children, and Matthew was a 70-year-old car dealer and art collector.¹⁰³ Although they held themselves out as husband and wife, they did not marry, nor could they have: Matthew had been married to another woman for decades and remained married to her throughout his relationship with Elizabeth.¹⁰⁴ Elizabeth alleged that Matthew expressly proposed that they “jointly contribute all of their time, efforts, talents and resources to his household and his various businesses” in exchange for which they would “share equally in all of their income and in the ownership of all assets as would be acquired thereafter.”¹⁰⁵ Matthew allegedly persuaded Elizabeth to abandon her career to secure “her undivided attention to his home and his various businesses,” naming her as a signatory to joint checking accounts and making her part of his “extravagant lifestyle.”¹⁰⁶ Elizabeth’s characterization of the relationship as a full partnership extending to both Matthew’s household and business affairs is indistinguishable from the financial partnership that marriage imposes. The remedy she proposes, the equal division of income and assets acquired during the relationship, is consistent with the law governing marital dissolution.

One might question whether the parties in these cases are casting their relationships in marital drag to improve their chances of prevailing on their claims. There are reasons to think this is not the case.

First, for decades, courts have signaled that agreements in which the consideration is market-type transactions rather than domestic services of the type provided by spouses will stand a better chance of being enforced.¹⁰⁷ Commentators and practice guides have clearly summarized these

100. *Id.*

101. *Id.* at ¶¶ 24, 48.

102. *See* *Isenburg v. Isenburg*, 177 A.3d 583, 586 (Conn. App. Ct. 2017).

103. Brief of Def.-Appellee at 2, *Isenburg v. Isenburg*, 177 A.3d 583 (Conn. App. Ct. 2017).

104. *See id.* at 2 n.2.

105. Pl.’s Revised Compl. ¶¶ 7–8, *Isenburg v. Isenburg*, No. HHD-CV-13-6049156-S, (Conn. Super. Ct. Jan. 13, 2015).

106. *Id.* ¶¶ 8–11.

107. *See, e.g.,* *Whorton v. Dillingham*, 248 Cal. Rptr. 405, 410 (Ct. App. 1988) (distinguishing an unenforceable contract in which the domestic services were inextricable with the sexual nature of the parties’ relationship from the agreement in the instant case, in which one partner provided services as a chauffeur, bodyguard, and secretary in exchange for monetary compensation).

distinctions,¹⁰⁸ giving parties the opportunity to shape their arguments accordingly. Moreover, at least in some jurisdictions, the law is very clear. For example, Michigan law states that “[s]ervices rendered during a meretricious relationship are presumptively gratuitous,” but “[a]greements . . . with respect to money or property will be enforced if the agreement is independent of the illicit relationship.”¹⁰⁹ Even in the shadow of this rule, which encourages allegations of exchanges regarding specific sums or property, Karen Breininger testified in her deposition that “she did not expect any compensation” from her partner of thirteen years for work she performed on the house held in his name.¹¹⁰ “That would be like *you asking your wife* if she was going to pay you,” she said.¹¹¹ “He was my significant other. He told me [the house] was meant for us, so *why would I expect him to pay me . . . ?*”¹¹² This self-defeating testimony shows how marriage shapes partners’ very perceptions of their relationships.

Second, parties’ (or their lawyers’) first instincts are often to describe their relationships in marriage-like terms, changing their tune only later in the litigation. *Isenburg* is one such example of a case in which the plaintiff initially brought a claim premised on a marriage-like exchange, only to later attempt to recast the relationship in business-like terms.¹¹³ Another recent example of this phenomenon is *Smith v. Carr*, in which the plaintiff, Tracey Smith, initially brought a contract claim against her partner, Gregory Carr, for breach of an express agreement to provide her lifetime financial support in exchange for her giving up her job, cohabiting with Gregory, and “providing Gregory with full time attention, availability, domestic services, companionship, comfort, love and emotional support.”¹¹⁴ After the case was removed to federal court, Smith “restyle[d]” her implied contract claim as a promise to pay for the living expenses of a child that she conceived during

108. See, e.g., 1 WILLIAM P. HOGOBOOM ET AL., THE RUTTER GROUP: CALIFORNIA PRACTICE GUIDE—FAMILY LAW §§ 20:14.1, 14.2 (1993) (warning that “where the various services are of a type that would ‘naturally flow’ from sexual cohabitation (e.g., lover, companion, homemaker, and traveling companion), the agreement is likely to be . . . completely unenforceable,” but “where the agreement rests on contemplated services of the type that have a readily-ascertainable monetary value and for which one would expect to be compensated absent evidence of a contrary intent,” there is a better chance of enforcement); Kristin Bullock, Comment, *Applying Marvin v. Marvin to Same-Sex Couples: A Proposal for a Sex-Preference Neutral Cohabitation Contract Statute*, 25 U.C. DAVIS L. REV. 1029, 1047–48 (1992) (noting the above distinctions).

109. *Breininger v. Huntley*, No. 317899, 2014 WL 6602713, at *4 (Mich. Ct. App. Nov. 20, 2014) (citation omitted).

110. *Id.* at *5.

111. *Id.* (emphasis added).

112. *Id.* (emphasis added).

113. On appeal, Elizabeth recharacterized the nature of their relationship as a joint business venture; the appellate court declined to address the argument because it was not presented to the trial court. See *Isenburg v. Isenburg*, 177 A.3d 583, 591 (Conn. App. Ct. 2017).

114. Compl. *Smith v. Carr*, No. BC479519, ¶¶ 30–37 (Cal. Super. Ct. Feb. 23, 2012) (setting forth claims for breach of express contract and breach of implied contract).

the relationship through in-vitro fertilization.¹¹⁵ Smith apparently did so to shore up deficiencies in her initial claim, namely, concerns about whether her performances were inextricably tied to meretricious conduct.¹¹⁶

Judges are embedded in the marital habitus. Predictably, marriage—or its conspicuous absence—informs the courts' decisions in these cases. In *Breining v. Huntley*, for example, the trial court equated the plaintiff's contract claim to the rights that flow from a divorce, something to which she was clearly not entitled because she had not married:

[t]he facts of this case are an everyday event throughout Michigan and the United States of adult people freely choosing to live together without the benefit of marriage and that's fine But, if you want the *benefits of a divorce*, you have to live with the burdens of a marriage, and that didn't happen.¹¹⁷

The appellate court was content to rely on Breining's own testimony that, *like a wife*, she did not view the services she provided as part of a bargained-for exchange.¹¹⁸ Similarly, in *Rabinowitz v. Suvillaga*, the court held that Suvillaga's own characterization of her services as "'relationship duties' defeats the conclusion that they were not performed gratuitously."¹¹⁹ The court in *Smith v. Carr* came to a similar conclusion, holding that "providing 'attention, availability, domestic services, companionship, comfort, love and emotional support'" was "not normally compensated" and is "inextricably intertwined with the sexual relationship."¹²⁰ These decisions are consistent with others in which courts rule against cohabitants out of a reluctance to recognize faux-marriage.¹²¹

These cases show that parties routinely express their relationships in marriage-like terms regardless of the extent to which those relationships resemble ideal marriages. This suggests the influence of marriage in shaping perceptions of what a socially valuable and legally cognizable relationship looks like. Marriage also explains the thousands of cases the law *doesn't*

115. *Smith v. Carr*, No. CV-12-3251-CAS (JCGx), 2012 WL 3962904, at *5 (C.D. Cal., Sept. 10, 2012).

116. *See id.* at *5–6.

117. 2014 WL 6602713, at *2 (emphasis added) (citation omitted).

118. *See id.* at *5–6 ("When asked if she had an agreement with the defendant . . . plaintiff responded, 'That would be like you asking your wife if she was going to pay you.'").

119. *Rabinowitz v. Suvillaga*, No. 17 CVS 244, 2019 WL 386853, at *9 (N.C. Super. Ct. Jan. 28, 2019).

120. *Smith v. Carr*, No. CV-12-3251, 2012 WL 3962904, at *4 (C.D. Cal. Sept. 10, 2012) (quoting *Bergen v. Wood*, 14 Cal. App. 4th 854, 859 (1993)).

121. *See, e.g., Tompkins v. Jackson*, 2009 WL 513858, at *13 (N.Y. Sup. Ct. Feb. 3, 2009) ("Providing loving care . . . does not transform [the] relationship to a [sic] one founded upon contract. To conclude otherwise would transform the parties' personal, yet informal relationship *to that of a marriage.*") (emphasis added).

see: those relationships that end with partners walking away without pursuing legal relief because they do not believe that their relationships are legally consequential.

B. *Scholars*

I now examine ways that the marital habitus may affect scholarly proposals to recognize intimate partnerships outside of marriage. First, I discuss the reform proposals that advocate for the extension of marital rights and obligations to people in nonmarital relationships. These proposals assume that the benefits of marriage outweigh the costs; in other words, that marriage is desirable. These writings contain statements revealing that the authors naturalize marriage, evidence of the habitus at work. Second, I show that even proposals to replace contract with other relational regimes, whether inspired by equity, partnership, or other models of co-ownership, struggle to imagine a form of sharing that differs from what marriage would prescribe. Third, I look at the ways in which some scholars conceptualize the state of living together outside of marriage as a choice not to marry. By attributing decisive significance to a “decision” not to marry, these writings, too, reveal a commitment to the distinctiveness of marriage. Although these scholars disagree sharply with each other, they share an assumption about when the law should perform an accounting between the partners—at the relationship’s end—that bears marriage’s unmistakable imprint.

Scholars who propose treating cohabiting couples like married couples do so based on the view that marriage law is the natural default for committed adult relationships.¹²² For example, Grace Ganz Blumberg has argued that long-term cohabiting relationships should be treated like marriage based on the belief that they involve economic integration: “the economic behavior generally associated with married persons” like the pooling of income, division of responsibilities to maximize social and economic well-being, and, ultimately, the expansion of “the boundaries of self . . . to include the needs and interests of another.”¹²³ Blumberg views economic integration as normatively desirable in contrast to “[i]ts antithesis, economic individualism,” which she describes as “inimical to the economic interests of the family unit, the interests of the parties in sustaining their relationship, and the social interest in preserving intimate sexual relationships.”¹²⁴

122. My claim is not that they seek to promote marriage or view it as a Platonic good. Rather, they simply accept it as a package of rights that should apply to these types of relationships.

123. Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1133–34 (1981).

124. *Id.* at 1136.

Ira Ellman has likewise equated “justice” between unmarried cohabitants with marital remedies.¹²⁵ He suggests that marital remedies produce fair outcomes in situations where partners make reciprocal sacrifices.¹²⁶ Thus, he assimilates both relational conduct and legal consequences to marriage, arguing that reciprocal relationships are basically marital in nature and should be treated accordingly.¹²⁷

Unlike Blumberg and Ellman, Cynthia Bowman is more overtly ambivalent about the value of marriage. She openly critiques marriage’s oppressive and exclusionary past.¹²⁸ She also blames the United States’ failure to provide a universal safety net for making marriage matter as much as it does.¹²⁹ Yet Bowman also believes that marital remedies are adequately protective¹³⁰ and produce just outcomes.¹³¹ She shares the view that women who cohabit without marriage are denied legal protections they *deserve*—the protections of marriage, as opposed to some other set of legal protections.¹³² Justice, in Bowman’s view, requires that a cohabitant shares in her partner’s property as well as all of the other governmental benefits, like Social Security, that flow from marriage.¹³³ She gives no indication that the package of marital rights and duties is anything other than appropriate, even ideal.¹³⁴

I do not mean to minimize the validity of these scholars’ concerns. Blumberg’s views reflect her deep commitment to enforcing gender equality: anything less would allow men to exploit “gender-related wage differentials, gender-related family roles and female susceptibility to pregnancy.”¹³⁵ Bowman similarly observes that women often find

125. See Ellman, *supra* note 1, at 1372 (2001) (suggesting that contract remedies would not “work justice at the dissolution of cohabiting relationships” but that marriage remedies would).

126. See *id.* at 1375–77 (noting that husbands and wives often consider their performances, whether providing greater domestic labor or working longer hours in the workforce, as “fair” even though they are clearly not equal).

127. See *id.* at 1377.

128. See Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 780 (1996) (noting marriage’s unequal treatment of women and exclusion of same-sex couples).

129. See BOWMAN, *supra* note 6, at 222.

130. See Bowman, *supra* note 128, at 711 (arguing that withholding of those remedies is harmful).

131. See *id.* at 755 (arguing that the denial of those specific remedies is unjust).

132. See, e.g., BOWMAN, *supra* note 6, at 43 (criticizing unjust enrichment awards as “effectively . . . unavailable” or “trivial” in comparison to marital remedies); see also Waggoner, *supra* note 5, at 84 (proposing to treat people in “ideal-marriage-like” relationships as married for all purposes and identifying such traits as monogamy, emotional and financial commitment, and joint childrearing as relevant to that determination (emphasis omitted)).

133. See Bowman, *supra* note 128, at 774; see also *id.* at 711 (using the example of a client who, because she was not married, was not allowed to collect Social Security survivor’s benefits); BOWMAN, *supra* note 6, at 222 (arguing that long-term cohabitants should be treated as married “for all purposes”).

134. See Bowman, *supra* note 128, at 774, 779 (describing marriage as “comprehensive” and the exclusion from marriage as harmful and inequitable).

135. Blumberg, *supra* note 123, at 1160 (footnotes omitted).

themselves in the more vulnerable position at a relationship's end because their partners are the primary wage earners or hold the property in their names.¹³⁶ They may also be misled into believing that they will be supported indefinitely.¹³⁷

Yet these scholars barely question that marriage law is the best way to remedy these ills.¹³⁸ In Blumberg's case, at least, the source of her beliefs is deeply personal. Her motives, she says, relate to the fact that she is

a long-married spouse and parent who has had the better part of a lifetime to reflect on the family and its myriad legal incidents and, consequently, to feel concern for others who live in . . . circumstances indistinguishable from those of my family but . . . may nevertheless be denied the protective cover of the lawfully constituted family.¹³⁹

Blumberg's personal experiences have led her to view marriage as superior to other alternatives, something to be reproduced for others. The easy acceptance of the appropriateness of marital remedies is a manifestation of the marital habitus.

In a break from the previous group of scholars, who propose extending marriage to other relationships, some scholars have attempted to propose alternative models of relational obligation. These attempts, however, highlight the ineluctability of the marital habitus by reproducing marital assumptions.

For example, Courtney Joslin has made the compelling argument that rather than indicating a repudiation of marriage, the mere state of not having formalized a cohabiting relationship could still be consistent with the "choice to form a family."¹⁴⁰ Joslin observes that the choice to form a family may not justify the imposition of marriage-like obligations. Instead, it could involve "rules that depart in some respects from the rules that apply to

136. See Bowman, *supra* note 128, at 755.

137. See *id.* at 756–57.

138. Naomi Cahn and June Carbone have cautioned that it is no longer safe to assume that most nonmarital relationships "fit the stereotype of dependent wom[a]n, wealthier man," and to premise nonmarital regulation "on an assumption of inequality." Naomi Cahn & June Carbone, *Blackstonian Marriage, Gender, and Cohabitation*, 51 ARIZ. ST. L.J. 1247, 1253 (2019). Moreover, although a wage gap still persists between men and women, it does not do so equally at all income and education levels. Working class women are more likely to earn as much or more than their male partners and to fear being held back by marriage. See *id.* at 1273–74; see also Claire Cain Miller & Quoc Trung Bui, *Equality in Marriages Grows, and so Does the Class Divide*, N.Y. TIMES (Feb. 27, 2016), <https://www.nytimes.com/2016/02/23/upshot/rise-in-marriages-of-equals-and-in-division-by-class.html> [<https://perma.cc/W54F-AEA4>] (noting that men in service jobs earn less than their wives).

139. Grace Ganz Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 NOTRE DAME L. REV. 1265, 1271 (2001).

140. Courtney G. Joslin, *Autonomy in the Family*, 66 UCLA L. REV. 912, 917 (2019) (emphasis omitted).

married couples.”¹⁴¹ Emily Stolzenberg has likewise criticized the law’s existing approach, which “analogizes unmarried partners to either spouses or strangers.”¹⁴² She argues that marital property rules are sometimes a poor fit for cohabitants because they would impose marriage’s “community-minded egalitarianism” on partners whose relationships do not embody that ethos.¹⁴³ Yet such partners may still exhibit great interdependence around specific resources, necessitating a different set of dissolution rules.¹⁴⁴

The challenge is in identifying those rules. Joslin refers approvingly to several examples, most of which virtually replicate marriage law. For instance, she points to Washington’s “intimate committed partnership[s],” which impose “marriagelike property sharing rules.”¹⁴⁵ Washington courts have stated that the property consequences of such relationships are analogous but not identical to marriage.¹⁴⁶ Yet the consequence of intimate committed partnerships is that courts will divide what “would have been characterized as community property *had the parties been married*.”¹⁴⁷ The difference—relatively minor—is that when couples have been married, Washington law also allows courts to consider *separate* property when determining whether property distribution is just and equitable.¹⁴⁸

Joslin also looks approvingly to Hawai’i’s premarital economic partnership rule as an alternate approach.¹⁴⁹ Instead of analogizing to marriage, that rule expands the reach of Hawai’i’s property division rules upon divorce to periods of premarital cohabitation that are marked by economic partnership.¹⁵⁰ It too essentially assimilates cohabitation to marriage.

Joslin mentions in passing one model that could depart most significantly from marriage: the approach of Sweden and Norway to allow cohabitants to divide the family home and household goods but no other assets.¹⁵¹ This approach could produce starkly different outcomes than marriage, for

141. *Id.* at 967–68.

142. Emily J. Stolzenberg, *Properties of Intimacy*, 80 MD. L. REV. 627, 683(2021).

143. *Id.* at 687.

144. *See id.*

145. Joslin, *supra* note 140, at 982.

146. *See id.* at 968 n.346.

147. *Connell v. Francisco*, 898 P.2d 831, 836 (Wash. 1995) (emphasis added).

148. *See, e.g., In re Marriage of Doneen*, 391 P.3d 594, 598 (Wash. Ct. App. 2017). Although Washington allows for the division of separate property, many states will only divide marital or community property. *See* Emily J. Stolzenberg, *The New Family Freedom*, 59 B.C. L. REV. 1983, 2024 (2018). Thus, the property rules governing intimate committed partnerships matches marital rules in many states.

149. *See* Joslin, *supra* note 140, at 983.

150. *See Collins v. Wassell*, 323 P.3d 1216, 1225–26 (Haw. 2014).

151. *See* Joslin, *supra* note 140, at 968 (citing Anna Stepien-Sporek & Margaret Ryznar, *The Consequences of Cohabitation*, 50 U.S.F. L. REV. 75, 93–94 (2016) (describing the relevant portions of Sweden’s cohabitant’s act)).

instance, in relationships where one or both partners earn significant incomes but do not purchase a family home. It could also signify a reorientation around the shared residence rather than a couple's economic partnership. Despite, or perhaps because of, the fact that it differs most significantly from marriage, this alternative remains unexplored.

Stolzenberg proposes an “asset-restricted cause of action for recovery of some property acquired during the relationship but titled in the other partner's name.”¹⁵² In theory, this proposal approaches Sweden's and Norway's in approach if not in rationale: rather than dividing all property acquired during the relationship, courts should consider “those assets that concretely furthered an unmarried couple's life together,” and “those assets that were actually used, labored, or relied upon in furtherance of the relationship.”¹⁵³ Stolzenberg analogizes to property rights in derogation of title, such as easements and rights of way; rights created by proximity and use.¹⁵⁴ The couple's pattern of use might extend to a residence, household goods, or vehicle, but not to a partner's business interests or retirement account.¹⁵⁵

Stolzenberg argues that property law principles—and not “family law's traditional conception of intimacy”—can ground this functional analysis.¹⁵⁶ I am not so sure, at least when it comes to partners who have significant disparities in wealth. For instance, where the wealthier partners' assets lie in their income, retirement accounts, and human capital, one can imagine that distributing a share of the household goods will often be unsatisfying. Stolzenberg suggests as much when she allows that “[household] [l]abor that contributes to the value of a concrete asset would bring that asset into the cohabital estate.”¹⁵⁷ Moreover, she argues that “labor combined with reliance, i.e., cutting back on work hours or quitting a job to raise joint children or to enable one's partner to succeed in a ‘greedy’ profession, would justify conceiving of the supported partner's earned income and increased human capital as shared assets.”¹⁵⁸ This sounds like marriage. It could be the case that this marriage-like outcome depends entirely on marriage-neutral property concepts, although under partnership law, cooperation regarding one venture never automatically spills over into another.¹⁵⁹ But I suspect that this is less an example of convergent evolution

152. Stolzenberg, *supra* note 142, at 685. Stolzenberg also proposes that states implement a “menu of family forms” approach but devotes less attention to those options. *See id.* at 684.

153. *Id.* at 686.

154. *See id.* at 685.

155. *See id.* at 686.

156. *Id.*

157. *Id.* at 687.

158. *Id.*

159. *But see* Katharine K. Baker, *The Polyamorous Threat to Nonmarriage*, __ FAM. CT. REV. __

than the marital habitus at work.¹⁶⁰ The marital habitus shapes even those proposals that self-consciously attempt to break with marriage.

Lastly, assumptions about marriage have an impact even for those scholars who would decline to recognize obligations between partners based on the failure to formally enter a marriage. For these scholars, the failure to formally opt into marriage is tantamount to the rejection of marriage and the embrace of singleness. Marsha Garrison, for example, has criticized approaches that impose *inter se* property obligations between cohabitants based on the duration of cohabitation or birth of a common child because they “risk the imposition of obligations on individuals who lack marital understandings or—worse—who have affirmatively chosen to avoid marital obligations by remaining single.”¹⁶¹ Marriage in this context functions to transform relationships of various stripes into singleness, effectively erasing their different qualities. Katharine Baker also equates the state of not being married with the choice to avoid the types of property commitments that accompany marriage.¹⁶² Baker recognizes that the delineation between married and unmarried people will fail to compensate partners who provide a disproportionate share of uncompensated services, but she identifies this as an inevitable consequence of not opting into marriage or a comparable status.¹⁶³ Through its formal absence, marriage effectively answers questions about the legal treatment that such partners should receive.

(forthcoming 2022).

160. One indication that marriage is influencing Stolzenberg’s proposal comes from the timing of these legal interventions. Stolzenberg notes that property mediates relationships between people related by virtue of their connection to valuable resources. *See* Stolzenberg, *supra* note 142, at 669. Neighbors, for instance, must coexist in a state of mutual vulnerability. *See id.* at 668. As such, the law encourages cooperation and sharing during *ongoing* relationships in the form of easements, adjustments of record boundaries, limits on spite fences, and the like. *See id.* at 669–70. The rules that Stolzenberg proposes governing property distribution between unmarried partners, however, kick in when the relationship ends, similar to marriage. *See id.* at 685–87. Like the law of divorce, they promote a clean break between partners in the form of “severance” payments and “post-relationship transfer payments.” *Id.* at 687.

161. Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 *FAM. L.Q.* 309, 325 (2008); *see also* Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 *UCLA L. REV.* 815, 843 (2005) (equating cohabitation with the choice to remain single).

162. *See* Katharine K. Baker, *What Is Nonmarriage?*, 73 *SMU L. REV.* 201, 216 (2020) (“[T]he answers to ‘why did you cohabit?’ and ‘why didn’t you marry?’ are often the same. Not wanting to commit . . . is an answer to both questions.”).

163. *See id.* at 236–48 (arguing that private law remedies cannot replicate marital remedies). Baker points to the availability of domestic partnerships and other statuses in at least some jurisdictions as a potential alternative to marriage, which she argues allows couples to escape a marriage/nonmarriage binary. *See id.* at 232. She argues that these options mean that the law cannot presume a couple would have opted into marriage or one of these other options instead. *See id.* She recognizes, however, that these alternatives to marriage, with the exception of Colorado, are substantially similar to marriage. *See id.* at 235 (noting that they “just provide slight variations on marriage’s normative path”). Moreover, the option to register for one of these marriage alternatives is only available in nine states and the District of Columbia. *See id.* at 230.

IV. LOOKING FORWARD

The examples in the previous Part show that marriage indeed produces a range of “objective potentialities”—“things to do or not to do, to say or not to say”¹⁶⁴—for adult intimacy and, more particularly, for those who give that intimacy legal effect. Members of the juridical field, especially legal scholars, are not all invested in promoting marriage. When it comes to addressing dependency between intimate partners broadly defined, however, marriage shapes expectations about what types of dependency are significant and what legal tools should be brought to bear. Consequently, lawyers, courts, and scholars—as well as members of the general public—struggle to identify possibilities outside of marriage’s mold. This Part concludes the article by considering whether it is possible to comprehend adult intimacy without marriage as a referent.

Remember that Bourdieu intended for habitus to reconcile the influence of objective structures with the potential for individual action.¹⁶⁵ Scholars have questioned his success in that regard. Specifically, they suggest that Bourdieu’s work gives short shrift to the process by which individuals can challenge and transform the habitus.¹⁶⁶ Indeed, if habitus operates on a largely unconscious level and constrains the range of conceivable reactions to a situation, any attempt to transform the habitus could reflect the habitus itself: those very moves could be preordained.¹⁶⁷

Yet this overly objective and deterministic account conflicts with the reality that the habitus does change over time as people negotiate their social relations.¹⁶⁸ Although much of this negotiation may be implicit or unconscious, people also consciously seek to change their positions.¹⁶⁹ This

164. BOURDIEU, *supra* note 9, at 76.

165. *See supra* notes 35–37 and accompanying text.

166. *See, e.g.,* Craig Calhoun, *Habitus, Field, and Capital: The Question of Historical Specificity*, in BOURDIEU: CRITICAL PERSPECTIVES 61, 75–82 (Craig Calhoun, Edward LiPuma & Moishe Mostone eds., 1993) (considering the effect of multiple overlapping fields and large-scale self-regulating systems on the continuity of the habitus); Trevor George Gardner, *Police Violence and the African American Procedural Habitus*, 100 B.U. L. REV. 849, 861 (2020) (“Bourdieu’s conceptualization of the habitus has been criticized for its failure to address whether the social actor can consciously engage with her own habitus.”) (citing SABA MAHMOOD, *POLITICS OF PIETY: THE ISLAMIC REVIVAL AND THE FEMINIST SUBJECT* 138–39 (2005) (critiquing Bourdieu’s explication of the unconscious process by which habitus is acquired for omitting the conscious pedagogical process that surely contributes to its development)); King, *supra* note 36, at 417, 424, & *passim* (accusing habitus of “relaps[ing]” into the objectivism that Bourdieu rejects); Greg Noble & Megan Watkins, *So, How Did Bourdieu Learn to Play Tennis? Habitus, Consciousness and Habituation*, 17 CULTURAL STUDS. 520, 524 (2003) (observing that “habitus tends to be deterministic”).

167. *See* King, *supra* note 36, at 427 (noting that if habitus were purely objective, “social change would be impossible,” and arguing that such a rigid view would be at odds with Bourdieu’s intentions).

168. *See id.* at 428.

169. *See id.* (“[E]ven if individuals are not explicitly seeking to renegotiate their relations (as they often are), each subsequent exchange builds on the entire series of exchanges and, thereby, subtly

has led some scholars to conclude that habitus is reshaped, however slowly, through a pedagogical process.¹⁷⁰ The first step in the process is to raise awareness of the largely “unconscious, routinized activity” that marks the habitus.¹⁷¹ This result may be achieved through a process of reflection in which people “consider [their] behaviour and its principles, which involves the monitoring of conduct which can be brought to discourse.”¹⁷² Awareness of the principles motivating their behavior can prompt a process of conscious change, whereby people can attempt to “refine, rework, or transform the habitus.”¹⁷³

Trevor Gardner provides an example of this transformational process when he considers how a conformist version of “The Talk”—a conversation that parents have with their African American children about responding to police detention—could be replaced by a nonconformist version that disrupts the dynamic of racial profiling and police violence.¹⁷⁴ Gardner proposes that African Americans often react deferentially when subjected to a race-based stop.¹⁷⁵ That reaction may be an unconscious and internalized response to “mental and corporeal schemata.”¹⁷⁶ When an African American parent considers how to minimize the risk to her child during a police stop, she may reflect upon and recognize elements of the conformist habitus.¹⁷⁷ At this point, she may realize that she has a choice. She can teach her child to be nonconfrontational and deferential, perpetuating the conformist habitus. But she could instead make a conscious decision to recommend a different reaction, thereby replacing the conformist habitus with a new model designed to hold police officers administratively accountable for the perceived transgression.¹⁷⁸

My sense is that it will not be easy to raise awareness of the contours of the marital habitus.¹⁷⁹ As discussed above, having successfully marginalized competing models for so long, marriage is especially entrenched in law. The law by nature “ties the present continuously to the

transforms the meaning of those past exchanges . . .”).

170. See Gardner, *supra* note 166, at 861.

171. See *id.* at 862.

172. Noble & Watkins, *supra* note 166, at 531.

173. Gardner, *supra* note 166, at 862.

174. See *id.* at 862–65.

175. See *id.* at 862.

176. *Id.* (footnote omitted).

177. *Id.*

178. *Id.* at 863.

179. Cf. PIERRE BOURDIEU, *THE STATE NOBILITY: ELITE SCHOOLS IN THE FIELD OF POWER* 219 (Lauretta C. Clough trans., 1996) (“The categories of perception that agents apply to the social world are the product of a prior state of this world.”).

past.”¹⁸⁰ It also “makes the practical principles of the symbolically dominant style of living official, . . . *inform*[ing] the behavior of all social actors.”¹⁸¹

Adding to the difficulty of the challenge, the audience for this article is the very group whose practices regarding adult intimacy have been universalized and codified into law. That fact may complicate the process of recognizing the marital habitus (being in harmony with their experiences) and also undermine any motivation to transform it.¹⁸²

So how can lawyers, legal scholars, and judges (along with everyone else) envision potentialities beyond marriage? I propose a variation of what Mari Matsuda has called “looking to the bottom.”¹⁸³ Matsuda argues that “[w]hen notions of right and wrong, justice and injustice, are examined not from an abstract position but from the position of groups that have suffered through history, moral relativism recedes and identifiable normative priorities emerge.”¹⁸⁴

Instead of looking to the bottom for specific legal interventions, I propose looking to the bottom for the purpose of identifying the contours of the marital habitus, akin to what Devon Carbado has called “voice,”¹⁸⁵ and Katharine Bartlett has called “positionality.”¹⁸⁶ The bottom can provide perspectives to initiate the pedagogical process through which we begin to challenge the marital habitus.¹⁸⁷ The voices at the bottom provide a form of “knowledge based on experience,” revealing, for example, “certain things about exclusion: its subtlety; its masking by ‘objective’ rules and constructs; its pervasiveness; its pain; and the need to change it.”¹⁸⁸

180. Bourdieu & Terdiman, *supra* note 54, at 845.

181. *Id.* at 846 (emphasis in original).

182. See *supra* note 139 and accompanying text (featuring Professor Blumberg’s own statement about marriage’s benefits). Moreover, as Mari Matsuda has observed, “[t]here is a strong incentive for academics to believe that poor and working people have little of value to say about law, social life, or politics.” Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763, 1778 (1990).

183. Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 324 (1987).

184. *Id.* at 325 (proposing that scholars look to the experiences of people of color in America as an epistemological source).

185. Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283, 1304–05 (2001).

186. Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 880 (1990).

187. Carbado notes that looking to the bottom for *solutions* is not an easy task because “it is difficult to know precisely where on the bottom to look and how to make sense of what one sees.” Carbado, *supra* note 185, at 1305. Such an approach has to answer whose voice counts, and whether that voice speaks for others. Looking to the bottom for voices, in contrast, “is an effective way to capture what people of color are saying about their social realities,” and corrects “an epistemological dominance problem: White people speaking for and definitively about people on the bottom.” *Id.*

188. Bartlett, *supra* note 186, at 880 (talking about the understandings a woman’s experience with exclusion can reveal). Like Carbado, Bartlett is skeptical that any one group has “special access to knowledge,” a view she associates with standpoint epistemology. See *id.* at 875. Bartlett argues that positionality demands that “other perspectives be sought out and examined,” checking “the characteristic tendency of all individuals . . . to want to stamp their own point of view upon the world.” *Id.* at 882. By

In this context, the bottom takes the form of people whose meaningful relationships go unrecognized by the law in ways that leave them unprotected from avoidable struggle or harm: siblings,¹⁸⁹ parents and adult children,¹⁹⁰ asexuals,¹⁹¹ committed singles,¹⁹² people in consensually non-monogamous or plural relationships,¹⁹³ friends,¹⁹⁴ as well as those too economically insecure to marry.¹⁹⁵ These individuals experience what it is like not to be able to obtain health insurance for a partner, to take a personal day rather than bereavement leave when a loved one passes, to be rendered invisible on a 1040 form, or to have to jump through hoops to establish parentage.

Some of this work has already begun. As the sources cited in the previous paragraph show, legal scholars are attending to the experiences of those on the bottom. Some of this work involves firsthand interviews or original surveys,¹⁹⁶ and all of it is grounded in research conducted by social scientists. My own article on plural relationships, for example, synthesizes a descriptive account of plural relationships from the work of sociologists and anthropologists for the purpose of determining whether there are legal rules that would benefit people in plural relationships universally.¹⁹⁷

In many instances, however, the perspective adopted is still top-down. The question asked is whether or how to provide these groups with marriage-like rights and protections. Or the subject population is defined based on its constituents' resemblance to married couples.¹⁹⁸

focusing on the potential of voices on the bottom to illuminate the borders of the habitus rather than as a source of an alternative normative vision, my proposal avoids the concerns that Bartlett and Carbado raise.

189. See, e.g., John G. Culhane, *After Marriage Equality, What's Next for Relationship Recognition?*, 60 S.D. L. REV. 375, 386–87 (2015).

190. See, e.g., Naomi Cahn, Clare Huntington & Elizabeth S. Scott, *Family Law for the One-Hundred-Year Life*, __ YALE L.J. __ (forthcoming 2023) (on file with the author) (describing relationships between older adults and their adult children).

191. See, e.g., Elizabeth F. Emens, *Compulsory Sexuality*, 66 STAN. L. REV. 303, 350–53 & *passim* (2014).

192. See, e.g., Naomi R. Cahn, *Families of One* (unpublished manuscript on file with the author).

193. See, e.g., Kaiponanea T. Matsumura, *Beyond Polygamy*, __ IOWA L. REV. __ (forthcoming 2022).

194. See, e.g., Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189 (2007).

195. See, e.g., Eleanor Brown, Naomi Cahn & June Carbone, *The Price of Exit*, 99 WASH. U. L. REV. __ (forthcoming 2022) (examining how financial precarity deters marriage); Mary Charlotte Y. Carroll, Note, *When Marriage Is too Much: Reviving the Registered Partnership in a Diverse Society*, 130 YALE L.J. 478, 488–98 (2020) (examining the phenomenon of Medicaid impoverishment).

196. See, e.g., CYNTHIA GRANT BOWMAN, *LIVING APART TOGETHER: LEGAL PROTECTIONS FOR A NEW FORM OF FAMILY* 37–51 (2020); Culhane, *supra* note 189.

197. See Matsumura, *supra* note 193.

198. In her study of people living apart in committed relationships, for example, Cynthia Bowman notes that the category could include “[y]ounger persons who are not yet economically independent of their parents [who] live separately because of schools or jobs in different locations, . . . or because they live with their family of origin and cannot afford a place of their own.” BOWMAN, *supra* note 196, at 3. She notes that some scholars have cordoned off these “living apart together” relationships (LATs) as

Not only do these types of inquiries risk becoming what Matsuda calls an “abstract consideration of the position of the least advantaged,”¹⁹⁹ they limit the answers one is likely to find by presupposing the value of marriage and marriage-like solutions.

An alternate vision must come from asking what types of legal interventions would ease people’s lives from day to day without starting from the body of rules that currently constitute family law.²⁰⁰ The answers to the questions might sound in tax credits, health care policy, and workplace reforms, rather than rules governing property distribution or inheritance.²⁰¹ They might concern harmful social norms rather than state-sponsored discrimination; private perquisites as much as government benefits. I hesitate to speculate further for fear of prejudging the outcome.

Consciousness-raising is only the first step, to be followed by the processes of deliberation and change.²⁰² Yet consciousness-raising is where legal scholarship and pedagogy can make an immediate impact.

“dating LATs” and have “decide[d] that they are not really LATs at all.” *Id.* at 26 (citation omitted). Bowman does not take that position, but none of her qualitative interviews feature young LATs, nor do her policy proposals take that group’s concerns into account. My interpretation of this omission is that Bowman makes an implicit assumption that these relationships are not serious, perhaps because the partners are under the age when people typically marry, and they therefore need not be considered. In another example, Bowman analyzes gay male LATs as “couples” (one chapter of her monograph is devoted to “Gay Male Couples and LAT”) even though “[a]lmost all the gay male couples interviewed for this study were in some kind of open relationship.” *Id.* at 86. The choice to proceed from the assumption that the relationships are essentially dyadic when they involve additional persons suggests the influence of marriage.

199. Matsuda, *supra* note 183, at 325 (This “abstract consideration” substitutes the perspectives of elites for “‘organic intellectuals,’ grass roots philosophers who are uniquely able to relate theory to the concrete experience of oppression.” (footnotes omitted)).

200. The act of questioning the content and focus of family law is not new. *See, e.g.*, Jacobus tenBroek, *California’s Dual System of Family Law: Its Origin, Development, and Present Status*, 17 STAN. L. REV. 614 (1965) (examining the regulation of families through public assistance laws); Janet Halley, *What Is Family Law?: A Genealogy Part I*, 23 YALE J.L. & HUMAN. 1 (2011) (questioning the content of family law as a legal category).

201. This is the direction in which some scholars are headed. *See, e.g.*, MAXINE EICHNER, THE FREE MARKET FAMILY: HOW THE MARKET CRUSHED THE AMERICAN DREAM (AND HOW IT CAN BE RESTORED) 176–94 (2020) (analyzing the interrelationship between family outcomes and social welfare benefit programs); Naomi Cahn & June Carbone, *Uncoupling*, 53 ARIZ. ST. L.J. 1, 7 & *passim* (2021) (arguing that it makes little sense to continue to tie family security to marriage and employment and exploring the ways in which the law could uncouple benefits from both statuses); Kaiponanea T. Matsumura, *Breaking Down Status*, 98 WASH. U. L. REV. 671, 696–709 (2021) (identifying the features of statuses like marriage and employment that lead toward obsolescence and calling for a reexamination of those statuses).

202. *See supra* notes 171–179 and accompanying text.