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### Deprivative Recognition

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# Deprivative Recognition

Erez Aloni



## ABSTRACT

Family law is now replete with proposals advocating for the legal recognition of nonmarital relationships: those between friends, relatives, unmarried intimate partners, and the like. The presumption underlying these proposals is that legal recognition is financially beneficial to partners. This assumption is sometimes wrong: Legal recognition of relationships can be harmful to unmarried partners—a reality whose impact on policy concerning regulation of nonmarital unions has not been explored. As this Article shows, a significant number of people benefit financially from nonrecognition of their relationships. While in most cases the state turns a blind eye to this financial gain, when it comes to a particular set of benefits, the state routinely recognizes partners against their will in order to withhold or terminate benefits, a subset of ascriptive recognition that I call “deprivative recognition.”

Deprivative recognition is unjust because it is asymmetrical: It deprives couples of benefits they would receive if they were unpartnered while they nevertheless remain ineligible to receive benefits granted to married couples in similar arenas. This asymmetry is particularly troublesome because those who enjoy the benefits of nonrecognition often belong to particularly vulnerable populations, such as those who qualify for means-tested programs. This Article recognizes and provides a normative assessment of deprivative recognition and the distributive injustices it creates.

Identifying deprivative recognition, in turn, unearths a larger set of theoretical questions about the interplay between cultural recognition and distributive justice in the law of unmarried partners, including a question about what kind of law promotes both cultural recognition and distributive justice for unmarried partners. The Article builds on Nancy Fraser’s theory of recognition and redistribution as a “folk paradigm of justice,” explaining why it is essential for the law of unmarried partners to adopt both of these aspects of justice and how this can be done.

## AUTHOR

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## INTRODUCTION

Following extensive efforts by lesbian, gay, bisexual, and transgender (LGBT) organizations,<sup>1</sup> the Department of Education recently announced that eligibility for financial aid for children who live with unmarried or same-sex parents will be determined based on both parents' incomes.<sup>2</sup> Before this new rule, children of unmarried or same-sex parents could include only one parent on their financial aid application, a matter that caused some of these children to feel as though their parents' unions were second class.<sup>3</sup> Even Justice Kennedy, writing for the majority in *United States v. Windsor*,<sup>4</sup> referred to the old financial aid rule as a case in which same-sex couples would be "honored" to take on obligations toward each other if given the opportunity.<sup>5</sup> The media, LGBT organizations, and those who support the recognition of complex family forms have seen this policy change as a political victory.<sup>6</sup>

But, on second thought, this form of legal recognition will result in reduction or elimination of financial aid for the majority of applicants who have unmarried or same-sex parents.<sup>7</sup> Moreover, legally recognizing these parents as partners primarily to increase their participation in paying for their children's educa-

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1. See, e.g., Rebecca Klein, *FAFSA Changes to Recognize Same-Sex Parents by 2014*, HUFFINGTON POST (Apr. 30, 2013), [http://www.huffingtonpost.com/2013/04/30/fafsa-changes-same-sex-parents-2014\\_n\\_3185755.html](http://www.huffingtonpost.com/2013/04/30/fafsa-changes-same-sex-parents-2014_n_3185755.html) ("GLSEN has long worked to ensure that sexual orientation and gender identity are not used to discriminate against students in our nation's K-12 schools, whether that student identifies as lesbian, gay, bisexual, or transgender (LGBT), has LGBT friends, or comes from an LGBT family," said GLSEN Director of Public Policy Shawn Gaylord, per the Blade.").
  2. *Id.*
  3. See *infra* Part I.A.2.
  4. *United States v. Windsor*, No. 12-307 (U.S. June 26, 2013) (holding section 3 of the Defense of Marriage Act unconstitutional).
  5. *Id.* ("DOMA divests married same-sex couples of the duties and responsibilities that are an essential part of married life and that they in most cases would be honored to accept were DOMA not in force. For instance, because it is expected that spouses will support each other as they pursue educational opportunities, federal law takes into consideration a spouse's income in calculating a student's federal financial aid eligibility. Same-sex married couples are exempt from this requirement." (citation omitted)). In fact, by the time *Windsor* was handed down, the financial aid policy had already changed—a matter that went unmentioned by Justice Kennedy. Klein, *supra* note 1 (reporting on the change of calculating financial on April 30, 2013, almost two months before the *Windsor* decision was issued).
  6. Klein, *supra* note 1.
  7. See Troy Onink, *Department Of Education "Comes Out" on College Aid for Children of Gay Parents*, FORBES (May 6, 2013), <http://www.forbes.com/sites/troyonink/2013/05/06/departement-of-education-comes-out-on-college-aid-for-students-of-gay-parents> ("[S]tudents with parents who are not married will now have to report both parent's [sic] incomes, decreasing their aid eligibility substantially.").

tion is an economic injustice. This is so because although their parenthood is legally recognized, their relationship is not. Lacking such recognition, these couples are excluded from hundreds of tangible economic benefits that are granted only to married couples.<sup>8</sup> As noted by Justice Kennedy in *Windsor*, the financial loss that unmarried parent couples thus suffer from nonrecognition of their relationship has a direct financial effect on their parenthood.<sup>9</sup> Furthermore, this new rule applies only to parents who live together; thus, in reality, it does not affect parents per se, but only cohabitating parents. The bottom line is that recognizing couples only for purposes of withholding a benefit from them while denying other related benefits and protections leads to economic maldistribution.<sup>10</sup>

The new federal rule highlights one of the foundational misconceptions in legal scholarship surrounding domestic relationships: the dominant assumption that legal recognition of relationships is always economically beneficial to the recognized partners.<sup>11</sup> More importantly, the rule illustrates the complicated and undertheorized interplay between distributive justice and cultural recognition in the law governing unmarried partners.<sup>12</sup> Cultural recognition can

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8. See, e.g., *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 956–57 (Mass. 2003) (“[T]he fact remains that marital children reap a measure of family stability and economic security based on their parents’ legally privileged status that is largely inaccessible, or not as readily accessible, to nonmarital children. Some of these benefits are social . . . Others are material, such as the greater ease of access to family-based State and Federal benefits that attend the presumptions of one’s parentage.”).
  9. *United States v. Windsor*, No. 12–307 (U.S. June 26, 2013) (“DOMA also brings financial harm to children of same-sex couples. It raises the cost of health care for families by taxing health benefits provided by employers to their workers’ same-sex spouses. And it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security.” (citations omitted)).
  10. For an extended critique of the new financial aid rule, see Erez Aloni, *Relationship Recognition Madness*, HUFFINGTON POST (June 12, 2013), [http://www.huffingtonpost.com/erez-aloni/relationship-recognition-madness\\_b\\_3422346.html?utm\\_hp\\_ref=college&sr=College#es\\_share\\_ended](http://www.huffingtonpost.com/erez-aloni/relationship-recognition-madness_b_3422346.html?utm_hp_ref=college&sr=College#es_share_ended).
  11. See, e.g., M. V. Lee Badgett, *Variations on an Equitable Theme: Explaining International Same-Sex Partner Recognition Laws*, in SAME-SEX COUPLES, SAME-SEX PARTNERSHIPS & HOMOSEXUAL MARRIAGES: A FOCUS ON CROSS-NATIONAL DIFFERENTIALS 95, 99 (Marie Digoix & Patrick Festy eds., 2004) (“Individual same-sex couples, especially those with property or children, would have the same economic incentives as different-sex couples to desire access to the legal framework created by marriage, in addition to any other customary benefits of being married.”).
  12. It is important to note that the term “recognition” can have two meanings that sometimes intersect. “Legal recognition” is the action of the state, based on the type of relationship targeted, that has legal consequences for partners. “Cultural recognition,” discussed further in Parts II and IV, is the acknowledgment of the differences of individuals or collective groups, without the demand that they assimilate to the dominant culture.

result in economic maldistribution, and as this Article subsequently explains, redistributive economic remedies can result in cultural misrecognition.<sup>13</sup>

Indeed, the fundamental goals of the marriage equality movement have been to eliminate economic maldistribution and to foster cultural recognition of nontraditional families.<sup>14</sup> In recent decades, family law has also centered around such struggles by following a similar logic; it is now replete with suggestions that the state should recognize a variety of nonmarital relationships—friends, relatives, unmarried conjugal couples, and nonmonogamous groupings<sup>15</sup>—as worthy of protection.

Largely missing from the celebration of recognition in the law of domestic relations is the simple yet meaningful fact that legal recognition comes with a financial cost—sometimes an unjust cost.<sup>16</sup> It is difficult to overemphasize the importance of understanding this phenomenon in the project of theorizing the law of unmarried people. To put it simply, attempting to address the law of unmarried partners without taking account of this issue is unsound. This is because there is a clear correlation between the demographic characteristics of unmarried partners in the United States and the groups that gain fiscally from legal nonrecognition. That is, the largest groups of cohabitants include poor and low-income individuals who are the beneficiaries of means-

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13. Cultural recognition was one of the two main rationales behind the department's new rule. LGBT organizations fought for this policy in order to repair a cultural misrecognition that the previous policy resulted in. But for the Department of Education there were two rationales: one, reducing the cultural harm in misrecognizing unmarried parents; and two, better reflecting the financial situation of applicants and saving taxpayers money. See Libby A. Nelson, *Aid Applicants With 2 Mothers*, INSIDEHIGHERED (Apr. 30, 2013), <http://www.insidehighered.com/news/2013/04/30/fafsa-changes-recognized-many-kinds-parents>.

14. Cf. Suzanne B. Goldberg, *Why Marriage?*, in MARRIAGE AT THE CROSSROADS 224, 228–33 (Marsha Garrison & Elizabeth S. Scott eds., 2012) (explaining that marriage equality is being pursued for access to marriage's tangible goods and status equality). One may argue that cultural recognition has been the main mission of the marriage equality movement and maldistribution has been the form of tangible injury that recognition proponents have asserted. Indeed this is evident from the strong resistance to civil unions, which solve almost all the financial problems that stem from the same-sex marriage ban but do not have the cultural weight that is attendant with marriage.

15. See *infra* Part II.B (surveying the major proposals for legal recognition of nonmarital relationships).

16. As I discuss in Part II.B, the assumption that some people are not interested in recognition of their relationships is sometimes discussed in family law scholarship. See, e.g., Shahar Lifshitz, *Married Against Their Will? Toward a Pluralist Regulation of Spousal Relationships*, 66 WASH. & LEE L. REV. 1565, 1569 (2009). But there the assumption is that people are not interested in recognition because they are unready for or uninterested in commitment to each other—not because the state would recognize their union in order to withhold or terminate an existing benefit. See *id.* at 1576.

tested programs,<sup>17</sup> the elderly and divorced who may lose existing entitlements upon remarriage,<sup>18</sup> and college students who can be awarded more financial aid for higher education based on their (or their parents') nonmarital status.<sup>19</sup> This Article undertakes to provide an account of the areas in which nonrecognition can be financially rewarding. It then examines how the notion of gaining from nonrecognition has been overlooked by most legal scholarship in the area, and assesses how policies promoting legal recognition, if accepted, would affect the lives of those people currently in unrecognized relationships.<sup>20</sup>

More puzzling than the dominant assumption that legal recognition is virtually always financially beneficial to the couple is the prevalence of the belief that legal recognition is always at least partially voluntary. Proposals for legal recognition of nonmarital unions assume that only what this Article terms *partially ascriptive recognition* ever occurs—that is, they presume that the state ascribes obligations on couples only following the request of one of the partners. For example, upon the end of a nonmarital relationship, an ex-partner files a claim for equal distribution of the couple's mutual property. The state then places marital-like obligations on the couple and mandates the distribution of property. In reality, however, *purely ascriptive recognition*—cases in which the state recognizes such couples without the request of either partner—already occurs in some circumstances.<sup>21</sup> So far, legal scholarship has addressed only partially ascriptive recognition (which is generally referred to as simply ascriptive recognition), but has not recognized the subcategory of purely ascriptive recognition and its consequences.

This Article focuses in particular on one form of purely ascriptive recognition, which I term deprivative<sup>22</sup> recognition: when neither partner will benefit from recognition and yet the state still recognizes the relationship, a recognition that results in deprivation. In cases of deprivative recognition, the state or other third party (such as an ex-spouse) requests that the relationship be legally recognized ad-hoc, such that a benefit stemming from the

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17. See *infra* Part I.A.

18. See *infra* Part I.B.

19. See *infra* Part I.A.2.

20. As I discuss in Part I, gaining from nonrecognition could mean simply maintaining the status quo, such as not getting married, or could mean changing status from married to divorced, to being unrecognized by the law. What I do not discuss are the cases in which people get married only in order to gain benefits that are attached to marriage. For a discussion of such cases, see Kerry Abrams, *Marriage Fraud*, 100 CALIF. L. REV. 1 (2012).

21. See *infra* Part III (discussing the differences between partially and purely ascriptive recognition).

22. Deprivative (adjective):

tending to deprive, causing deprivation, relating to deprivation.

COLLINS ENGLISH DICTIONARY (Gerry Breslin Ed., 2011).

nonrecognition may be withheld or terminated.<sup>23</sup> For example, the cohabitation-termination rule, which has been adopted in most states, provides that upon cohabitation with a new partner, an alimony recipient loses her alimony.<sup>24</sup>

Deprivative recognition and the financial advantages of nonrecognition lie at the crossroads of family law and poverty law. The way that public policy—especially as reflected in the U.S. welfare system—affects people’s marital choices has been the subject of much debate.<sup>25</sup> But the effects of deprivative recognition and the gain from nonrecognition within the broader law and policy regarding unmarried partnerships remain virtually unexplored.<sup>26</sup>

This Article thus juxtaposes cases in which the state identifies and terminates benefits that stem from nonrecognition (for example, termination of alimony upon the recipient’s cohabitation) with cases in which the state turns a blind eye to the financial advantages of nonrecognition (such as with Supplemental Security Income, income tax, and survivor’s benefits). By comparing the benefits that are terminated upon cohabitation with the benefits that remain, this Article theorizes deprivative recognition as a selective regulatory mechanism. I argue that deprivative recognition targets what social conservatives see as immoral behaviors like cohabitation after divorce and reliance on welfare,

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23. Thus, it is not only the partner’s plea to the state that differentiates partially ascriptive and deprivative recognition. Rather, partially ascriptive recognition aims to redress an economic injustice that stems from the misrecognition of the relationships, while, as this Article shows, deprivative recognition results in the privation of essential financial resources. See *infra* Part III (defining deprivative recognition). As I discuss in Parts III and IV, it is possible that some other sort of purely ascriptive recognition will not be deprivative.

24. See *infra* Part III.A.1 (discussing the cohabitation-termination doctrine).

25. See, e.g., Leslie A. Whittington & James Alm, *The Effects of Public Policy on Marital Status in the United States*, in MARRIAGE AND THE ECONOMY 75, 76 (Shoshana A. Grossbard-Shechtman, ed., 2003) (“The U.S. welfare system has probably generated more controversy about how public policy affects human behavior than any other program.”).

26. As has been recognized for almost a decade, the two fields of family law and poverty law generally operate separately. Part of this Article’s contribution is in joining the scholarship that aims to integrate them. See Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 832 (2004) (“The exclusion of welfare law from the family law canon has allowed legal authorities to avoid explaining why the law applies very different rules to govern familial rights and responsibilities in poor families.”); see also Tonya L. Brito, *The Welfarization of Family Law*, 48 U. KAN. L. REV. 229, 229 (2000) (“Family law and welfare law share a connectedness that has not been extensively addressed by scholars in either the family law or welfare law arenas.”); Janet Halley & Kerry Rittich, *Critical Directions in Comparative Family Law: Genealogies and Contemporary Studies of Family Law Exceptionalism*, 58 AM. J. COMP. L. 753, 764 (2010) (Family law, as reflected in modern family law codes, courses, bar exams, and casebooks, “begins to look like a collection of the legal issues about the formation and dissolution of formal family relationships; the legal issues affecting the ongoing life of family relationships are almost all housed in other courses! This exclusion is stunning, when you think about it.”).



while validating other kinds of assistance that they deem socially acceptable.<sup>27</sup> Further, this Article suggests that the more deprivative recognition expands, the more it will burden and impede the creation of new kinship networks because of concerns about the financial loss that may result, or about the intrusive and bureaucratic nature of deprivative recognition.<sup>28</sup>

I contend that deprivative recognition is an asymmetrical apparatus. Couples are recognized only for the purpose of terminating a benefit; they are not recognized when it is a matter of gaining most of the partnership rights that would otherwise stem from these same relationships. (Often, the law does not even ascribe legally binding financial obligations between the now-recognized partners upon their separation). In this way, deprivative recognition often leads to economic maldistribution: The deprivatively recognized couples may not support each other financially, nor are they obliged to do so—even when recognition results in cutting off an individual from a vital source of income (such as alimony or welfare).<sup>29</sup>

If, as this Article puts forward, legal recognition is not always tantamount to cultural and economic justice, and cultural recognition can result in economic injustice, what kind of law would be able to protect the needs of unmarried partners without causing misrecognition or maldistribution? Indeed, deprivative recognition reflects a very great dilemma in family law and thus invites exploration of a larger strategic problem: On the one hand, pursuing redistributive justice independently from cultural recognition, and vice versa, would result in a lack of justice for unmarried couples. Yet on the other hand, simultaneously pursuing redistribution and cultural recognition can result in one undercutting the other.<sup>30</sup>

Legal scholars have overlooked the tension inherent in simultaneously pursuing both distributive justice and cultural recognition in family law. But the interplay of the two has stood in the center of discussions in political science and moral philosophy for almost twenty years.<sup>31</sup> The history is instructive. In the 1960s, cultural recognition of differences became the primary political demand in the United States and other Western developed democracies and has remained such. Subsequently, in the 1990s, a few influential theoreticians

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27. Cf. Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129, 182 (2003) (“[T]ransfer payments to assist needy children and their caregivers are considered pathological (‘welfare as we know it’), while transfer payments for widowed and disabled persons stay respectable, a kind of insurance.” (footnote omitted)).

28. See *infra* Part III.A.3.

29. See *id.*

30. For examples of how redistributive and recognitional remedies can undercut each other in the regulation of unmarried partnerships, see *infra* Part IV.B.

31. See *infra* Part IV.A.

contended that cultural recognition is the most important aspiration for political movements to pursue. But in 1995, the prominent critical scholar Nancy Fraser challenged the adequacy of recognition as the preeminent social-justice claim.<sup>32</sup> While Fraser accepted the importance of recognition, she proposed a model of redistribution and recognition as “folk paradigms of justice.”<sup>33</sup> In order to pursue the two aspects of justice concurrently, she distinguished between transformative remedies, which aim to correct social injustice at the root, and affirmative remedies, focused only on correcting specific problems.<sup>34</sup> She asserted that nothing short of adopting transformative recognition and redistribution remedies (rather than affirmative remedies) would “meet the requirements of justice for all” while avoiding the ostensible dichotomy and contradiction between the two.<sup>35</sup>

Fraser’s insight provides a critical addition to the law of unmarried couples. Building on her work, I argue that while redistribution and recognition have, de facto, long been at the center of family law, major proposals in the field fail to encompass both components. I submit that the law of unmarried partners ought to be based on a perspective that acknowledges the importance of both cultural recognition and redistribution—in pursuing a just policy to accommodate unmarried partners, both aims are crucial, and a policy that is based on these foundations will avoid retrograde policies like deprivative recognition.

Extrapolating from Fraser’s framework, I catalogue major proposals and theories concerning recognition of nonmarital unions that arise in family law scholarship. I sort these approaches according to their remedies and evaluate which theories fail to achieve, and which succeed in achieving, the dual perspectives of cultural recognition and equitable economic redistribution. While this theoretical examination reveals significant tensions between legal policies that aim mainly to remedy cultural misrecognition and those invested mainly in redistribution, I offer an analysis, in general terms, of which proposals and policies could be reconciled and how this could be done.

This Article is organized into four Parts. Part I explores the possible financial benefits of nonrecognition. Part II lays out the argument that the rise in the

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32. See Nancy Fraser, *From Redistribution to Recognition? Dilemmas of Justice in a 'Post-Socialist' Age*, 212 NEW LEFT REV. 68, 70–74 (1995).

33. NANCY FRASER & AXEL HONNETH, REDISTRIBUTION OR RECOGNITION? A POLITICAL-PHILOSOPHICAL EXCHANGE 11 (Joel Golb et al. trans., 2003) (“[I]n their political reference . . . the terms ‘redistribution’ and ‘recognition’ refer not to philosophical paradigms but rather to *folk paradigms of justice*, which inform present-day struggles in civil society.”).

34. Fraser, *supra* note 32, at 82–86.

35. *Id.* at 93.

number of complex family structures, has resulted in dignitary harm and economic injustice to people in nonmarital unions, contra marriage exceptionalism in the United States. The Article then critiques the main theories and proposals for the treatment of nonmarital unions—which are referred to collectively as *the trend toward recognition*—for failing to take into account their impact on those who currently gain financially from being unrecognized. Part III presents the unacknowledged policy of deprivative recognition as a selective regulatory mechanism, and offers four critiques of that policy. Part IV explores social justice recognition claims more broadly, proposing a shift toward a theory of recognition and redistribution in the law governing unmarried partners.

### I. THE POTENTIAL FINANCIAL BENEFITS OF NONRECOGNITION

Joe Entwisle and his girlfriend have been together for a decade but do not get married because, if they do, Joe, who is paralyzed from the shoulders down, will lose his Medicaid benefits, which are essential to his daily life.<sup>36</sup> Hillary St. Pierre had health insurance but, like others, when she developed cancer she contemplated “Medicaid divorce” in order to get better coverage and avoid bankrupting the entire family.<sup>37</sup> Angela and David Boyter got divorced to avoid the tax “marriage penalty.”<sup>38</sup> And *US News & World Report* advises students and their families that “[t]here may be a big financial aid reward if you choose a delay [in marriage] or simply cohabitation.”<sup>39</sup> These are only a few examples of how people can benefit economically from their nonmarital status.

Who comprises the major groups that gain financially from nonrecognition, by what methods do they gain, and how pervasive is this phenomenon? These are difficult questions, and this Article cannot and does

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36. Stacy Forster, *Disability Rule Change Sought: Marrying Can Lead to Loss of Vital Medicaid Coverage*, MILWAUKEE J. SENTINEL, Jan. 2, 2008, at 1B.

37. Hillary St. Pierre, *I Considered A “Medicaid Divorce” When Cancer Began Bankrupting Me*, HUFFINGTON POST (Jan. 31, 2011), [http://www.huffingtonpost.com/hillary-st-pierre/i-considered-a-medicaid-d\\_b\\_816668.html](http://www.huffingtonpost.com/hillary-st-pierre/i-considered-a-medicaid-d_b_816668.html); see also Michael L. Olver & Christopher C. Lee, *Medicaid Divorce: An Overview*, HELSELL FETTERMAN (Dec. 2010), [www.hellsell.com/hellsell-news/medicaid-divorce-an-overview](http://www.hellsell.com/hellsell-news/medicaid-divorce-an-overview).

38. See *Boyter v. Comm’r*, 668 F.2d 1382, 1383–84 (4th Cir. 1981) (holding that the sham transaction doctrine could be applied to married taxpayers who divorce in order to avoid the marriage penalty).

39. Kim Clark, *How to Maximize Your Student’s Chances for Need-Based Aid*, US NEWS & WORLD REP. (Apr. 10, 2008), <http://www.usnews.com/education/articles/2008/04/10/how-to-maximize-your-students-chances-for-need-based-aid>.

not purport to provide exhaustive answers. Giving accurate statistics and information about the pervasiveness of the occurrence is impossible because the census (and other sources) does not examine how many of the nonmarital households gain financially from their nonrecognition.<sup>40</sup> Other difficulties in providing quantitative and qualitative accounts of the phenomenon stem from the ethics of gaining financially from nonrecognition. While for some, gaining from nonrecognition could be a side effect of an independent life choice (such as, having the relationship one wants), for others it could be a strategic behavior to avoid the financial loss that derives from legal recognition.<sup>41</sup> And it is not easy—sometimes it is even impossible—to distinguish between those who are unmarried because of their fear of financial loss attached to recognition and those who are unmarried for other reasons (and some may of course be motivated by both financial loss and other reasons).

To clarify, I am not implying that the main motivation behind living in unmarried relationships is to increase eligibility for means-tested programs or to avoid losing entitlements. The effect of welfare policies on marriage and cohabitation is a highly contested one.<sup>42</sup> But even if the decision not to get married is based solely on a desire to avoid financial loss, it does not necessarily raise an ethical problem. Some partnerships are simply unrecognized by the state, and,

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40. Moreover, until recently it was difficult to identify the range of nonmarital relationships in the United States. See Sheela Kennedy & Catherine A. Fitch, *Measuring Cohabitation and Family Structure in the United States: Assessing the Impact of New Data From the Current Population Survey*, 49 DEMOGRAPHY 1479, 1480 (2012) (explaining how, prior to 2007, the Annual Social and Economic Supplement to the Current Population Survey documented only persons who reported themselves as “unmarried partners” of the householder, and how the change since then allows the state to better identify different sorts of nonmarital unions); see also Sven Drefahl, *Do the Married Really Live Longer? The Role of Cohabitation and Socioeconomic Status*, 74 J. MARRIAGE & FAM. 462, 463 (2012) (“More and more individuals are classified as never married, widowed, or divorced, even though they are living with a partner.”).

41. Compare Kathryn Edin, *Few Good Men: Why Poor Mothers Don't Marry or Remarry*, AM. PROSPECT, Jan. 3, 2000, at 26, 31 (reporting that she has found “virtually no support for the welfare disincentives argument, since very few mothers say that they have avoided marriage or remarriage to maintain eligibility for welfare, even when asked directly”), with Maxine Eichner, *Beyond Private Ordering: Families and the Supportive Stat*, 23 J. AM. ACAD. MATRIMONIAL LAW. 305, 306 (2010) (“Social Security survivors’ benefits influence some recipients not to marry.”), and Marsha Garrison, *Reviving Marriage: Could We? Should We?*, 10 J.L. & FAM. STUD. 279, 296 (2008) (“[P]olicies that distinguish cohabitation from marriage invite evasion and contribute to the decline of formal marriage if those policies attach significant financial benefits to nonmarriage.”).

42. See, e.g., Lisa A. Gennetian & Virginia Knox, *Staying Single: The Effects of Welfare Reform Policies on Marriage and Cohabitation* 1–5 (Next Generation, Working Paper No. 13, 2003) (surveying some of the disagreements about the connection between welfare programs and motivation to marry); Whittington & Alm, *supra* note 25, at 76.

for them, the concomitant financial gain is unavoidable. If the state does not impose any mutual obligations on friends or same-sex couples, then there is nothing unethical in accepting the financial gain that accrues from these statuses.<sup>43</sup> Further, if opposite-sex couples who can get married feel that they are unready to do so, or do not want the marital status for ideological reasons, then their gain from nonrecognition is a side effect of their relationship. In fact, when partners are asked about their relationship on official forms, most often the options are “married,” “divorced,” or “single,” so they cannot declare a different status.<sup>44</sup> And those who do not get married in order to be better off financially are no different from those who get married to gain marital benefits—a legitimate and widely accepted practice.<sup>45</sup> (I refer not to the practice of getting married “fictively” solely to get marital benefits, but to the common practice of considering marital benefits in the decision to get married.) Finally, the state itself creates domestic partnerships registrations, open to elderly only, in order to allow these partners to avoid the termination of post-marital benefits, but allowing them to enjoy state protections that otherwise are reserved only to married couples. In other words, in the case of elderly population (perhaps because the group holds considerable political power) the state supports strategic behavior with regard to benefits that stem from nonrecognition.

Before I proceed, one important caveat is in order. By documenting the financial gains that stem from legal nonrecognition, this Article does not deny the cultural significance that is attached to marriage, particularly in U.S. society.<sup>46</sup> Nor does the Article disregard the financial perks that attach to marriage. Clearly, nonrecognition can come with many economic disadvantages—as has

43. See, e.g., Axel Berryhill, *FAFSA to Include Options for Reporting Same-sex Parents Starting 2014*, <http://www.dailycal.org/2013/05/01/departments-of-education-announces-that-fafsa-will-include-options-to-report-same-sex-parents-starting-2014> (last updated May 2, 2013) (telling the story of an unmarried lesbian couple's daughter who “has no way to fully tell the truth when applying for financial aid”).

44. Cf. NAT'L ORG. FOR WOMEN, *Civil Marriage v. Civil Unions* (2012), available at [http://www.now.org/issues/marriage/marriage\\_unions.html](http://www.now.org/issues/marriage/marriage_unions.html) (“Every day we fill out forms that ask us whether we are married, single, divorced or widowed. People joined in a civil union do not fit in any of those categories.”).

45. See Nancy F. Cott, *No Objections, What History Tells Us About Remaking Marriage*, BOS. REV. (Jan. 1, 2011), <http://bostonreview.net/nancy-f-cott-no-objections-history-of-marriage-same-sex-gay> (“Governments at all levels in the United States have long encouraged people to marry for economic benefit to the public as well as to themselves.”); For Many Americans, “Marriage Is an Economic Decision,” *Sociologist Says*, NPR (Sept. 29, 2010), [www.npr.org/templates/transcript/transcript.php?storyId=130218357](http://www.npr.org/templates/transcript/transcript.php?storyId=130218357) (interviewing Andrew J. Cherlin, who says that “marriage is an economic decision”).

46. Erez Aloni, *Incrementalism, Civil Unions, and the Possibility of Predicting Legal Recognition of Same-Sex Marriage*, 18 DUKE J. GENDER L. & POL'Y 105, 141 n.213 (2010) (discussing the value of marriage in American society compared to European countries).

been emphasized in almost every article and court case on the subject.<sup>47</sup> And marriage has other invaluable benefits, such as parental presumptions and decisionmaking privileges, the absence of which often requires people to go through expensive and emotionally exhausting procedures.<sup>48</sup> Instead, the argument herein is that, in some cases, the financial benefits of nonrecognition trump the other potential benefits of marriage. In addition, in a regime in which people can get married and divorced fairly easily, a couple could gain from nonrecognition and then change its status to enjoy the privileges of marriage; later, they could divorce and enjoy the value of nonrecognition.<sup>49</sup> This fluidity is available only to couples who can get married in the first place.<sup>50</sup> Finally, the benefits from nonrecognition are often time-limited; thus, in order to enjoy these benefits, individuals typically must not remain unmarried forever but rather just delay marriage. For example, welfare grants provided by Temporary Assistance for Needy Families (TANF) are limited to five years, and educational financial aid is limited to the time one pursues academic studies.<sup>51</sup>

Below, I divide the potential gain from nonrecognition into three central categories. First, nonmarital status matters in relation to programs for which applicant's eligibility and benefit level is means-tested (such as financial aid, Medicaid, TANF, and Social Security Disability Insurance).<sup>52</sup> Second, nonmarital status matters vis-à-vis entitlements that commence upon the ending of the previous marriage, and that are, in some cases, terminated upon remarriage (such as alimony and survivors' benefits). Third, marital status matters in cases in which the state or third parties treat the unmarried partners as

47. See, e.g., *Hernandez v. Robles*, 855 N.E.2d 1, 6 (N.Y. 2006) ("It is undisputed that the benefits of marriage are many.").

48. For example, in the absence of marriage, a partner who wants to have medical decisionmaking prerogatives needs either to have a power of attorney, or, in a minority of states, to register with the state. See NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* 160–61 (2008). Without parental presumption, the nonbiological parent must go through adoption procedures. See Clare Huntington, *Negative Family Law*, in *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* ch.4 (forthcoming 2014).

49. See Abrams, *supra* note 20, at 46. ("The possibility of 'divorce on demand' created the potential for the widespread instrumental use of marriage as a vehicle for opting into particular benefits of marriage and then opting out before the burdens became oppressive.").

50. Thus, for instance, if a college student couple benefits from their nonmarital status by receiving more financial aid, they can get married upon graduation and enjoy the marriage-tax bonus.

51. Brenda Cossman, *Contesting Conservatism, Family Feuds and the Privatization of Dependency*, 13 AM. U. J. GENDER SOC. POL'Y & L. 415, 469 (2005) ("TANF established a five-year lifetime limit on welfare assistance and significantly toughened work requirements.").

52. FREDERICK HERTZ, *COUNSELING UNMARRIED COUPLES: A GUIDE TO EFFECTIVE LEGAL REPRESENTATION* 67, 195–96 (2011).

separate economic units for the purpose of realizing potential liability (rather than assistance, as in category one), while the married are treated as one economic unit (such as income tax, bankruptcy,<sup>53</sup> and joint liability for shared debts<sup>54</sup>). I elaborate briefly on all broad categories but not on every possible benefit within each category.<sup>55</sup> I look more fully at the first category (means-tested programs) because it is most relevant for the population that typically lives in nonmarital unions in the United States. The second category, post-marital entitlements, is markedly relevant to the lives of unmarried partners too, but I explore it further in Part III.A.1 in the context of deprivative recognition. The third category, involving tax, bankruptcy, and joint liability, represents an important venue of fiscal gain, but it is less correlated with the profile of U.S. cohabitants, so I present it only briefly.<sup>56</sup>

#### A. Means-Tested Assistance

Generally, eligibility for means-tested assistance is calculated on the basis of the means possessed by the applicant (income and assets).<sup>57</sup> When the law recognizes the applicants' relationship, the state considers the partner's wealth as part of the overall family wealth in determining eligibility and benefit level.<sup>58</sup>

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53. Filing for joint bankruptcy is limited to spouses. 11 U.S.C. § 302(a) (2006). Often, filing jointly is an advantage because it can save the costs and fees of filing two separate claims, and because consolidation is financially beneficial. See A. Mechele Dickerson, *To Love, Honor, and (Oh!) Pay: Should Spouses Be Forced to Pay Each Other's Debts?*, 78 B.U. L. Rev. 961, 975–87 (1998). But being treated as married could be a disadvantage because the “means test” includes income from nearly any source to the debtor or the debtor's spouse. 11 U.S.C. § 101(10A) (2006).
  54. HERTZ, *supra* note 52, at 93–100.
  55. For a more comprehensive—but not exhaustive and not updated—list of possible financial advantages for nonmarried couples, see Wendell E. Primus & Jennifer Beeson, *Safety Net Programs, Marriage, and Cohabitation*, in JUST LIVING TOGETHER: IMPLICATIONS OF COHABITATION ON FAMILIES, CHILDREN, AND SOCIAL POLICY 170, 176–81 (Alan Booth & Ann C. Crouter eds., 2002).
  56. To suffer the marriage penalty, a couple needs to be “dual earning, middle income.” This is less typically the profile of cohabitants in the United States. In addition, the marriage penalty could be balanced by other benefits provided by marriage that are more typical for those in the upper middle class, such as the estate-tax exemption. But for elderly couples, one of the main groups of cohabitants in the United States, joint liability as a result of marriage can be very important. See John R. Schleppensbach, *Strange Bedfellows: Why Older Straight Couples Should Advocate for the Passage of the Illinois Civil Union Act*, 17 ELDER L.J. 31, 40 (2009) (“Older individuals who contemplate remarriage may also be justifiably concerned about protecting their individual wealth and avoiding the liabilities of a potential spouse.”).
  57. In the case of financial aid for college, it is sometimes the wealth of the parents that matters. See *infra* Part I.A.2.
  58. In other programs—like food stamps and Section 8 assistance—eligibility is calculated based on household income, regardless of marital status. HERTZ, *supra* note 52, at 197–98. For

Depending on the partner's income level, not being recognized as a family unit may or may not be advantageous. Usually, because eligibility is restricted to the poorest, the addition of even the smallest income could render someone unqualified. For example, under the 2013 federal guidelines, the poverty level for one person is \$11,490 per year, while for a household of two it is \$15,510. Thus, often, adding the wealth of another person increases the assets owned together and eliminates eligibility.<sup>59</sup> Other times, however, especially if the nonapplicant partner is poorer, not including the partner's income may result in a loss because the total household income would not be divided by the actual number of family members.

Eligibility for means-tested assistance is very relevant to many nonmarital households in the United States—there is a correlation between the population eligible for means-based assistance and the demographic of people in nonmarital unions. Looking at shared income earned in the years 2006–2008, close to 11 percent of households composed of nonmarital unions lived below the poverty line.<sup>60</sup> Since this calculation is based on the income of both partners—which is not calculated in most means-tested programs—it thus reflects lower numbers than the actual percentage of cohabiting couples who are likely to rely on means-based programs.<sup>61</sup> A different and more traditional calculation in 2009 found that among cohabitants without college degrees, 31 percent lived below the poverty line (compared with 9 percent of married adults without college degrees).<sup>62</sup> There is, thus, a solid correlation between living in nonmarital households and eligibility for means-tested programs in the United States.

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this reason, I do not discuss these programs below. But even in these cases, being unmarried can be helpful, as some women live with “a ‘shadowed’ cohabiting partner, who unofficially occupies the home as a contributing member but whose presence is concealed from housing and public assistance authorities.” Marya Leroy Dantzer, *Place, Face, Space: How Housing Assistance and Household Composition Shape Low-Income Mothers’ Access to Resources* 158 (Apr. 2012) (unpublished Ph.D. dissertation, Northeastern University) (on file with author), available at <http://hdl.handle.net/2047/d20002467>.

59. See CYNTHIA GRANT BOWMAN, *UNMARRIED COUPLES, LAW, AND PUBLIC POLICY* 108 (2010); cf. Kennedy & Fitch, *supra* note 40, at 1485 (“Including cohabiting partner incomes in family poverty measurements more completely accounts for the economic resources available in cohabiting families and thus substantially reduces estimated poverty rates.”).

60. Kennedy & Fitch, *supra* note 40, at 1493.

61. John Iceland, *Measuring Poverty With Different Units of Analysis*, in *HANDBOOK OF MEASUREMENT ISSUES IN FAMILY RESEARCH* 221, 222–23 (Sandra L. Hofferth & Lynn M. Casper eds., 2007).

62. Richard Fry & D’Vera Cohn, *Living Together: The Economics of Cohabitation*, PEW SOCIAL & DEMOGRAPHIC TRENDS (June 27, 2011), <http://www.pewsocialtrends.org/2011/06/27/living-together-the-economics-of-cohabitation/2/#i-prevalence-and-growth-of-cohabitation>.



The other prominent group of cohabitants that is linked to means-tested assistance is students in higher education, who can use their relationship status (or their parents') to increase their eligibility—not only for financial aid from the federal government, but for other support from the university and for external grants. Below, I examine more thoroughly two of the programs that can benefit the unrecognized.

### 1. Supplemental Security Income and Medicaid

Title XVI of the Social Security Act establishes Supplemental Security Income (SSI), a means-tested program that assists people over sixty-five years old, or who are blind or disabled and do not have sufficient income and resources to maintain a standard of living at the established federal minimum-income level.<sup>63</sup> In many states, if a person is eligible for SSI, she is automatically qualified for Medicaid.<sup>64</sup> Since Medicaid provides free access to a variety of expensive medical treatments, often it is essential to preserve SSI eligibility in order to ensure access to Medicaid.<sup>65</sup>

Being in unrecognized relationships can be substantially advantageous for the purpose of eligibility for SSI.<sup>66</sup> First, in the case of spouses who live together, if one spouse is ineligible for SSI, the Social Security Administration deems a portion of that spouse's income or assets as part of the claimant's income.<sup>67</sup> Second, the amount that is granted to two eligible spouses is smaller than the amount granted to two eligible individuals. Thus, in 2014, the monthly payment that eligible married couples received from the federal government was \$1082.<sup>68</sup> If partners were unmarried and both were eligible for SSI, each individual received \$721 a month, a combined amount of \$1442.<sup>69</sup> In both cases, these are solid financial enticements for low-income people.

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63. 42 U.S.C. § 1381 (2006).

64. *Understanding Supplemental Security Income (SSI): SSI and Eligibility for Other Government and State Programs*, SOCIAL SECURITY ADMIN., <http://www.ssa.gov/ssi/text-other-ussi.htm> (last visited Oct. 19, 2013) [hereinafter *Understanding Supplemental Security Income*].

65. James R. Sheldon, Jr. & Diana M. Straube, *Disability, Divorce, SSI, and Medicaid: Using Creative Alimony, Child Support and Property Settlements to Maximize SSI, Ensure Medicaid Eligibility, and Create Funding for Assistive Technology*, (Nat'l Assistive Tech. Advoc. Project, Neighborhood Legal Services Inc., Buffalo, N.Y.), Sept. 2008, available at <http://www.nls.org/files/Disability%20Law%20Hotlines/National%20AT%20Advocacy/DisabilityDivorce.pdf>.

66. Robert E. Rains, *Disability and Family Relationships: Marriage Penalties and Support Anomalies*, 22 GA. ST. U. L. REV. 561, 566–68 (2006) (explaining the marriage penalty for married couples who receive Supplemental Security Income (SSI)).

67. 20 C.F.R. § 416.1802(a)(1) (2008).

68. *Understanding Supplemental Security Income*, *supra* note 64.

69. *Id.*

The state is not entirely blind, however, to the possibility that a nonspouse is supporting the applicant. The Social Security Administration defines income as “anything you receive in cash or in kind that you can use to meet your needs for food and shelter.”<sup>70</sup> Accordingly, if an applicant’s unmarried partner is paying the rent, for example, the Administration may count part of that payment in determining the applicant’s benefit eligibility.<sup>71</sup> In addition, to prevent “fraud,”<sup>72</sup> the Code of Federal Regulations determines that the parties do not have to be legally married to be considered spouses for the purposes of SSI eligibility—they only need to hold themselves out as a married couple.<sup>73</sup> Accordingly, a claimant for SSI benefits who states on her application that she is unmarried and is living in the same household with an unrelated, opposite-sex person could be deemed married if the couple “lead[s] people to believe that [they] are each other’s husband and wife.”<sup>74</sup> But most nonrecognized partners do not fall under the definition of “holding themselves out” as husband and wife as interpreted by the Social Security Administration, and thereby still enjoy the benefits of the unmarried status for purposes of SSI and Medicaid.<sup>75</sup>

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70. 20 C.F.R. § 416.1102 (2008).

71. 20 C.F.R. § 416.1131 (2008).

72. *Smith v. Shalala*, 5 F.3d 235, 239 (7th Cir. 1993) (holding that the goal of the “deemed married” provision is, inter alia, the prevention of fraud).

73. 20 C.F.R. § 416.1816 (2008).

74. 20 C.F.R. § 416.1826(c)(2) (2008).

75. For the Social Security Administration to determine whether the couple holds itself out as husband and wife, the applicant needs to answer the following questions: what names the two are known by; whether they introduce themselves as husband and wife, or, if not, how they are introduced; what names are used on the mail for each of them; who owns or rents the place where they live; and whether any deeds, leases, time payment papers, tax papers, or any other papers show the couple as husband and wife. 20 C.F.R. § 416.1826(c)(1)(i)–(v) (2008). The Social Security Administration is not bound by a state’s definition of “marriage” for this purpose; and “deemed married” is not limited to a state’s definition of “common law marriage” (which is recognized only in a minority of states). Barbara Samuels, *Basic Social Security Retirement and Basic SSI Eligibility Requirements*, 143 PRACTICING LAW INSTITUTE NEW YORK LAW 41 N1 (2004) (“‘Holding out’ is a concept unique to SSI. It has no relationship to the concept of common law marriage.”). But the above-listed questions, which are written into the regulation, are, indeed, similar to those required for proof of valid common law marriage. See GÖRAN LIND, COMMON LAW MARRIAGE: A LEGAL INSTITUTION FOR COHABITATION 511–14 (2008). Notably, the definition of “holding themselves out as a married couple” seems to present a high bar for proving such behavior: to be deemed as holding themselves out as a married couple, the couple should use a single last name, introduce themselves as husband and wife, and so on—practices that seem less typical for most cohabitants today than in the past. See *id.* at 913–14. Indeed, one of the reasons that common law marriage is hard to prove is that most people do not “present themselves as husband and wife” today. See *id.* at 564–65.

No wonder, then, that the only reported court decision that upheld the Social Security Administration’s decision to deem an unmarried couple as married includes a unique set of facts in which the couple demonstrated that they held each other out as married: the wife

Similarly, nonmarital households can gain significantly from nonrecognition with respect to their eligibility for Medicaid. One example is the way informal partners are financially privileged (compared to recognized couples) when one of them requires nursing-home services. Since long-term care is very expensive, Medicaid has become a common source to fund nursing-home care.<sup>76</sup> According to the spousal impoverishment provisions of the Medicare Catastrophic Coverage Act of 1988,<sup>77</sup> “all of a couple’s resources are considered in determining Medicaid eligibility regardless of whether the assets are jointly or separately held.”<sup>78</sup> The institutionalized spouse can qualify for Medicaid if the couple “spends down” their assets on the hospitalization—for example, if the couple spends their money until the appropriate asset limit is reached.<sup>79</sup> Theoretically, if the partners are unmarried and keep their finances separate,<sup>80</sup> the noninstitutionalized person can keep her personal assets yet have Medicaid pay for the hospitalization of her partner.<sup>81</sup>

The valuable advantages for unmarried couples described above have induced a noticeable number of couples to engage in “Medicaid divorce,” since the medical costs of one spouse can force the couple to deplete its assets, leaving the other spouse impoverished.<sup>82</sup> While statistical studies about the size of this phenomenon do not exist, the observable amount of anecdotal evidence—from court cases, legal guides for lawyers on how to handle such divorces, and newspaper articles—testifies that this is not a marginal occurrence.<sup>83</sup> Medicaid di-

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wrote on the SSI application that, while they are not married, “they hold themselves out to the community as husband and wife,” and on a variety of other occasions they presented themselves as husband and wife. *Smith v. Sullivan*, 767 F. Supp. 186, 187–88 (C.D. Ill. 1991). In the second reported case, in which the court rejected the Social Security Administration’s finding that deemed a couple as married, the court noted that cohabitation “is not a dispositive factor to be considered in the analysis.” *Brown v. Apfel*, No. 98-CIV-2915-HB, 1999 WL 144515, at \*1, \*3 (S.D. N.Y. Mar. 16, 1999).

76. Andrew D. Wone, *Don’t Want to Pay for Your Institutionalized Spouse? The Role of Spousal Refusal and Medicaid in Funding Long Term Care*, 14 ELDER L.J. 485, 490–501 (2006).

77. 42 U.S.C. § 1396r-5 (2006).

78. *McNamara v. Ohio Dep’t of Human Servs.*, 744 N.E.2d 1216, 1219 (Ohio Ct. App. 2000).

79. But the noninstitutionalized spouse retains a small part of the couple’s resources without affecting the eligibility of the institutionalized spouse.

80. *Cf. HERTZ*, *supra* note 52, at 196.

81. On the other hand, the status of “married” can be beneficial because it exempts jointly owned homes from the spend-down requirement—a noteworthy advantage that nonmarital partners cannot enjoy. Most unmarried partners, however, do not need this exemption in the first place.

82. *Cf. Olver & Lee*, *supra* note 37 (“Since recent changes to Medicaid rules in May 2006, the ‘Medicaid divorce’ has been resurrected as a planning tool.”).

83. Lawmakers did not ignore this phenomenon, constantly stating that “using a divorce proceeding to accelerate Medicaid . . . violates public policy in general and the underlying policy of the Medicaid Act.” *H.K. v. Div. of Med. Assistance and Health Servs.*, 878 A.2d 16, 19 (N.J. Super. Ct. App. Div. 2005).

orce presents a slightly different ethical question because it requires changing a status rather than merely maintaining the status quo of staying unmarried.<sup>84</sup> For the purposes of this Article, it is sufficient to focus on the way that unmarried couples (rather than those who get divorced to achieve eligibility) can gain from Medicaid.

## 2. Financial Aid for Higher Education

Eligibility for financial aid in postsecondary education is determined by the Federal Student Aid, an office of the U.S. Department of Education. To qualify for financial aid and determine the level of support that she is eligible for, a student is required to fill out the Free Application for Federal Student Aid form (FAFSA).<sup>85</sup> The more financially needy the student is, the more aid the student receives (up to a maximum level). The FAFSA is often also used by colleges and universities to determine eligibility for nonfederal scholarships and is required by virtually every U.S. college and university.<sup>86</sup>

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84. Ethically speaking, Medicaid divorce presents a slightly different situation than those that were previously discussed, such as SSI and financial aid. The difference is that here couples who may already be responsible to one another, and may have enjoyed some protections of marriage, get divorced to avoid financial loss. While such an action can, in some cases, be unethical, I do not think that it should be categorically perceived as unethical. The question of ethics here should be examined case by case, according to the specific couple and the specific circumstances. If the couple was economically and emotionally interdependent, there may be a reason to view such act as unethical; but, in other cases, marriage status does not mean that the couple had obligations that warrant combining their assets. In any event, the ethical question is not material for purpose of this article. For a discussion of the ethics of Medicaid divorce, see Randy Cohen, *Get A Divorce*, N.Y. TIMES, July 28, 2002, ("Ultimately, the question is who should pay for your husband's care: Medicaid or you, the late-in-life spouse? To me the answer is both. You should assist him but should not be utterly impoverished. And Medicaid should be reformed so as to spare you this painful dilemma. Medicaid rules envision a couple in a lifelong economic partnership. While this is true of many couples, it is not the case for those like you who marry late in life."); see also Abrams, *supra* note 20, at 56–58 (arguing that marriage is a poor proxy for eligibility for benefits and entitlements because marital status does not necessarily reflect interdependency).

85. See *Forms and Worksheets*, FEDERAL STUDENT AID, <http://studentaid.ed.gov/PORTALSWebApp/students/english/forms.jsp> (last visited Nov. 4, 2013). Using the information provided on the Free Application for Federal Student Aid form (FAFSA), Federal Student Aid calculates the student's financial need based on his financial situation and the tuition costs of the schools to which he is applying. Caroline Waldner, *In Defense of College Savings Plans: Using 529 Plans to Increase the Impact of Direct Federal Grants for Higher Education to Low- and Moderate-Income Students*, 11 FLA. TAX REV. 97, 128 n.101 (2011).

86. CROSBY BURNS, CTR. FOR AM. PROGRESS, UNEQUAL AID: DISCRIMINATORY TREATMENT OF GAY AND TRANSGENDER APPLICANTS AND FAMILIES HEADED BY SAME-SEX COUPLES IN THE HIGHER EDUCATION FINANCIAL AID PROCESS 5 (2011).

In evaluating financial need, Federal Student Aid divides students into two statuses: “dependent” on or “independent” of their parents for their tuition. Dependent students must report their parents’ income and assets, as well as their own, on the FAFSA.<sup>87</sup> Federal student aid programs are based on the concept that a dependent student’s parents have the primary responsibility for paying for their child’s education.<sup>88</sup> Family status could benefit the student in two ways: First, if the student is dependent and her parents are unmarried, it may reduce the total expected family contribution. Second, if the student is independent, she would benefit by nondisclosure of her partner’s income.<sup>89</sup>

Until the 2013–14 academic year, financial aid was one of the venues in which unmarried students and students with unmarried parents could gain from nonrecognition. But even under the new federal regulation discussed in the introduction, students whose unmarried parents do not live together still enjoy a significant financial advantage over similarly situated students with married parents. Additionally, the change in the rule has not eliminated the possible advantage of independent (from their parents) unmarried partners.

For purposes of determining the expected family contribution of the student’s unmarried parents—whether the parents are divorced or were never married—the dependent student should include on the FAFSA information about the parent with whom she lived longer during the twelve months before the date she completes the application. Thus, in many cases, if the legal parent informally lives with another person who is not the legal parent of the applicant and not married to the applicant’s parent, the other partner’s income would not be calculated, which would thus increase the student’s likelihood of eligibility significantly. But, as stated before, if the applicant’s legal parents are unmarried and share residency, both incomes will be calculated and will decrease the likelihood of eligibility and benefit level.

To demonstrate, consider the following scenario: Sylvia, Lori’s mother, lives informally with Ari, who is not Lori’s father. Although Sylvia and Ari are economically and emotionally interdependent, under the rules, because

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87. 2011–2012 FSA HANDBOOK WITH ACTIVE INDEX, FEDERAL STUDENT AID AVG-21 (2011), *available at* <https://ifap.ed.gov/ifap/byAwardYear.jsp?type=fsahandbook&cawardyear=2011-2012>.

88. *Id.*

89. Of course, for the purposes of federal student aid, being married is beneficial for some couples. According to the FAFSA, married couples, even those under twenty-four years old, are considered independent, which is most often an advantage. *Id.* In another scenario, the student applicant could have a spouse with an income lower than hers, which would increase the household’s total income but also increase the family’s household size.

they are unmarried,<sup>90</sup> Ari's income and presence in the household would not be included on the application. That could inflate Lori's financial aid package significantly.<sup>91</sup> Now assume that Ari and Sylvia are married (but still, Ari has not legally adopted Lori or assumed other legal responsibility for her expenses and well-being). Since information about stepparents, even with an existing prenuptial agreement, is considered on the application,<sup>92</sup> Lori will need to report both incomes, thus arriving at a higher income, with three recognized persons in her household.

In another scenario, Lori is a graduate student with no income, under independent status because graduate students are automatically considered independent.<sup>93</sup> Lori is engaged to Tom, whose annual income is \$100,000. They have been dating for ten years and Tom has been very financially supportive of Lori.<sup>94</sup> Under the rules, much of Tom's support would be considered "in-kind support," which is not included on the application form.<sup>95</sup> In sum, Lori's status as unmarried would probably increase the chances of her being eligible for financial aid.

It is thus safe to say that, even under the new rule, in an unknown number of cases, living in informal relationships or having unmarried parents (who do not share residence) is financially beneficial to people applying for student financial aid. Because, as stated before, students are a major group of cohabitants and so are those in post-marital unions (parents of the students), financial aid is a consequential instance in which nonrecognition is beneficial.<sup>96</sup>

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90. And assuming Ari does not contribute to more than half of Sylvia's finances.

91. BURNS, *supra* note 86, at 8–11.

92. 2011–2012 FSA HANDBOOK WITH ACTIVE INDEX, *supra* note 87, at AVG-29 ("A stepparent is treated like a biological parent if the stepparent has legally adopted the student or if the stepparent is married, as of the date of application, to a student's biological or adoptive parent whose information will be reported on the FAFSA. There are no exceptions. A prenuptial agreement does not exempt the stepparent from providing information required of a parent on the FAFSA." (emphasis omitted)).

93. *Id.* at AVG-22.

94. Lori may need to report part of Tom's support as "untaxed income" but not as spousal income. *Id.* at AVG-20. For example, if her name is listed on the apartment's lease and Tom pays the rent, she needs to include this sum as support. But if her name is not on the lease, she should not disclose the financial support. *Id.* If she is in a state that recognizes common law marriages and, under the terms of the state, she is in such a union, then she is considered married. But only a minority of states recognize common law marriage, and even in those, it seems that Lori's relationship might not be considered common law marriage—either because the couple does not introduce themselves as spouses or because their time living together would be considered a trial period, a premarital stage. See LIND, *supra* note 75, at 796–97.

95. 2011–2012 FSA HANDBOOK WITH ACTIVE INDEX, *supra* note 87, at AVG-21.

96. Indeed, universities in the United States have recognized that "financial aid at universities is often distorted for students with certain family circumstances," and some universities employ their

## B. Post-Marital Entitlements

People who were previously married are one of the major groups who live outside of marriage in the United States. In 2008, out of the total number of households with nonmarital unions, almost 28 percent were such that both partners were divorced, and 50 percent were such that at least one partner was divorced.<sup>97</sup> Divorced and widowed people can gain from being in an unrecognized relationship in four main areas: spousal support, Medicare, survivor's benefits, and Social Security retirement benefits. (In the case of spousal support, however, there is a good chance that even without remarriage the benefits will be terminated. I discuss this further in Part III.A.1.)

When a worker covered by Social Security dies, her surviving spouse (or her ex-spouse, provided that they had been married for at least ten years) is entitled to survivor's benefits.<sup>98</sup> But if the recipient remarries before she is sixty years old, or fifty if she is disabled, then she loses the entitlement.<sup>99</sup> Similarly, the former spouse of an insured person who is entitled to retirement benefits under the Social Security Act may be eligible for benefits as a divorced spouse (if they were married at least ten years).<sup>100</sup> Nonetheless, upon her remarriage, a divorced spouse typically cannot collect benefits on her former spouse's record.<sup>101</sup> Correspondingly, if the insured ex-spouse is alive, remarriage of the uninsured at any age precludes eligibility for Social Security and Medicare.<sup>102</sup> Several recent studies confirm that eligibility for Social Security is decidedly influential in the decisions of divorced and widowed people regarding their living arrangements.<sup>103</sup>

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own systems that try to fix these problems. Andrew Giambrone, *Yale Resists Financial Aid Distortions*, YALE DAILY NEWS (Nov. 4, 2011), <http://www.yaledailynews.com/news/2011/nov/04/yale-resists-financial-aid-distortions>.

97. Kennedy & Fitch, *supra* note 40, at 1491.

98. See 42 U.S.C. § 402(e) (2006) (awarding survivor's benefits). In order to be eligible, the spouses had to have been married for at least ten years. 42 U.S.C. § 416(d)(2) (2006).

99. 42 U.S.C. § 402(e)(1)(A)–(B) (2006).

100. 42 U.S.C. § 402(b) (2006) (divorced wife); 42 U.S.C. § 402(c) (2006) (divorced husband).

101. 42 U.S.C. § 402(b)(1)(C) (2006) (divorced wife); 42 U.S.C. § 402(c)(1)(C) (2006) (divorced husband). The divorced can regain eligibility if their most recent marriage ends either by death, divorce, or annulment. See RS 00202.046 *Entitlement of a Divorced Spouse After Termination of Subsequent Marriage – Policy*, SOCIAL SECURITY ADMIN., <https://secure.ssa.gov/poms.nsf/lnx/0300202046> (last updated Feb. 12, 2013).

102. 42 U.S.C. § 402(b)(1)(H) (2006) (divorced wife); 42 U.S.C. § 402(c)(1)(H) (2006) (divorced husband); *Hospital Insurance*, <http://treasury.tn.gov/oasi/PDFs/MEDICARE-Information.pdf>.

103. See generally Gary V. Engelhardt, *Social Security and Elderly Homeownership*, 63 J. URBAN ECON. 280 (2008) (concluding that reductions in Social Security benefits would significantly alter the elderly homeownership rate, especially for widowed people); Gary V. Engelhardt,

### C. Marriage Penalty

Because of marital status alone, some married couples pay more income tax than they would if they were unmarried, while others pay less. These policies are known respectively as the “marriage penalty” and the “marriage bonus.” Marriage penalties and bonuses result from tax code provisions that treat a married couple as one taxable unit and an unmarried couple as two taxable units.<sup>104</sup> Because of this, sometimes—depending on a variety of such factors as the gap in income between the partners, the number of children, etc.—nonmarital partners pay less income tax by virtue of their “single” or “head of household” filing status.<sup>105</sup> Indeed, a body of research shows that “taxes have a small but statistically significant effect on the decision whether to marry.”<sup>106</sup>

Inquiry into the complexities of the federal rate-tables and the various ways that partners could gain or lose as a result of their nonmarital status exceeds the scope of this Article.<sup>107</sup> For the purposes of this Article, as a general principle, if the spouses’ incomes are fairly similar, then their tax liability will be greater as joint filers than if they were not married and filed separately.<sup>108</sup> In other words, the tax system penalizes mainly dual-earner couples whose incomes are somewhat equal.<sup>109</sup> Generally speaking—except for the extreme case in which a couple obviously divorces to file taxes as separate individuals and then remarries—the state does not target people who strategically do not

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Jonathan Gruber & Cynthia D. Perry, *Social Security and Elderly Living Arrangements*, 40 J. HUM. RESOURCES 354 (2005).

104. I.R.C. § 6013(a) (West 2011) (“A husband and wife may make a single return jointly of income taxes under subtitle A, even though one of the spouses has neither gross income nor deductions . . .”); I.R.C. § 1 (West 2011) (creating four filing statuses: married filing jointly, married filing separately, single, or head of household). The lack of marriage neutrality is also the result of progressive rather than proportional tax rates. See Whittington & Alm, *supra* note 25, at 82–83.

105. See HERTZ, *supra* note 52, at 117–26.

106. Stephanie Hunter McMahon, *To Have and to Hold: What Does Love (of Money) Have to Do With Joint Tax Filing?*, 11 NEV. L.J. 718, 749 (2011).

107. For a general list of possible tax advantages for unmarried couples, see Lauren J. Wolven, *Estate Planning for Unmarried Adults*, ST042 ALI-ABA 575 (2012).

108. Abrams, *supra* note 20, at 15–16.

109. Nevertheless, even low-earner couples can benefit from not being married. A study based on data from the 2002 National Survey of America’s Families found that about half of unmarried cohabitants would have owed more taxes if they were married. Gregory Acs & Elaine Maag, *Irreconcilable Differences? The Conflict between Marriage Promotion Initiatives for Cohabiting Couples With Children and Marriage Penalties in Tax and Transfer Programs*, NEW FEDERALISM: NAT’L SURVEY OF AM.’S FAMILIES 3 (Urban Inst. Ser. No. B-66, 2005). But the study predicted that, due to some changes in provisions such as the Earned Income Tax Credit, by 2008, the percentage of low-income taxpayers (unmarried couples with children) facing marriage tax penalties would fall to 10.5 percent. *Id.* at 4.



get married or who strategically divorce just to avoid the tax penalty.<sup>110</sup> Obviously, this description does not purport to find all the tax loopholes that unmarried couples can use—they are numerous, cannot easily be recognized, and change every year.

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This short and nonexhaustive summary illustrates that family law must address the potential financial benefit that stems from being unrecognized, both because there are several areas in which this status is beneficial, and because there is significant evidence—anecdotal and otherwise—that many people are affected by these benefits. The account also shows that, for the most part, vulnerable populations are those who benefit financially from nonrecognition: elderly, higher education students, and the poor. But, as I show in Part II, the separation between poverty law and family law has rendered these segments of the population invisible to family law—the ways in which recognition of these relationships can harm people are given scant attention in the legal scholarship.

## II. THE TREND TOWARD RECOGNITION AND ITS EFFECT ON THE CURRENTLY UNRECOGNIZED

Here, I give an account of the current legal landscape for nonmarital unions in the United States. My primary aim is to explore the potential ramifications of legal recognition of currently unrecognized relationships, in particular for those populations discussed above.

In order to understand both the existing law and policy that govern unmarried partners as well as proposals for legal reform, it is imperative first to comprehend the hurdles that nonrecognized partners face. I start by providing a brief analysis of the legal issues associated with the proliferation of nonmarital arrangements in the United States. Specifically, I break down the injuries from legal nonrecognition to the resultant economic and dignitary inequities. Then, in Part II.B, I introduce the trend toward recognition by presenting both the existing legal terrain and major proposals for policy

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110. In response to a tax-motivated divorce, the sham-transaction doctrine could be applied so that the divorced couple would be deemed to have filed their taxes returns as “married.” *Boyter v. Comm’r*, 668 F.2d 1382 (4th Cir. 1981). But since the sham-transaction doctrine is limited only to those who remarry after divorce, tax-motivated divorce is still an option for those who do not remarry, whether or not they continue to live together. *Abrams*, *supra* note 20, at 25–27; I.R.S. Priv. Ltr. Rul. 78-350-76 (June 1, 1978).

change. In Part II.C, I consider the ways in which the trend toward recognition can harm those who currently enjoy financial benefits from non-recognition.

**A. How Marriage Exceptionalism Results in Cultural and Economic Injustices**

Despite the prevalence of various family arrangements, the law does not provide unmarried partners the protections they need or an efficient supportive framework around which to organize the legal issues that stem from their relationships.<sup>111</sup> The difficulty is that the law of domestic relations is strongly focused on the married couple as the unit that deserves the law's respect and protection, to the exclusion of others. This is what can be called marriage exceptionalism. The forfeit that is caused to families that fall outside the scope of the law can be significant. During their relationship, unmarried partners are ineligible for hundreds of rights, benefits, and protections that are granted to married couples by the state (including the federal government) and by third parties.<sup>112</sup> Examples include tax breaks and immigration benefits from the federal government, eligibility for health insurance, and sick days from employers.<sup>113</sup> Upon the end of their relationships—either due to death or breakup—unmarried couples cannot claim exemptions from the estate tax nor claim intestate inheritance rights.<sup>114</sup> Additionally, the law imposes default obligations on spouses vis-à-vis each other during and upon the end of the relationship, such as a duty of support (during the relationship) and division of property and alimony (at the end of the relationship).<sup>115</sup> Similar obligations are not automatically prescribed for unmarried partners.<sup>116</sup>

Deprived of state protection, people in nonmarital unions can suffer economic injustice and dignitary-cultural harm—two injuries that occasionally intersect, though neither is merely an effect of the other. The classic case often goes as follows: An unmarried, opposite-sex couple lived in a common residence, had children, and developed economic and emotional

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111. See Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 587 (2013).

112. *Id.*

113. *Id.*

114. See, e.g., *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 955–56 (Mass. 2003) (listing the protections and benefits that stem from marriage).

115. *Id.*

116. In Washington state, partners are presumed to have obligations toward one another in terms of property distribution. See *infra* note 141 and accompanying text.

interdependency.<sup>117</sup> Upon the end of the relationship, the woman partner (often) is left without rights in the once-shared property or rights to financial support because cohabitation does not automatically bring with it those legal obligations on the part of her partner.<sup>118</sup> In such case, the economic injustice is quite clear. The weaker party, who invested in domestic work and raised the children while providing the partner the opportunity to invest in his career, is left with few or no resources.<sup>119</sup> The economic injustice in this case also reflects a devaluation of domestic work and child rearing, work which is traditionally done by women; the injustice is often further exacerbated by existing inequalities in the employment market.<sup>120</sup> The dignitary harm results from the fact that only marriage is respected and recognized as a relationship worthy of state protection. Further, by not recognizing nonmarital relationships, the state devalues people's autonomy to choose the family structure they want. The state imposes a framework (marriage) that may be undesirable for some and stigmatizes nonmarital relationships by treating them as inferior.<sup>121</sup> To illuminate, were the partners married, the economic and cultural harms would have been prevented, as the law imposes financial duties on the partners upon divorce (unless they have opted-out by signing prenuptial agreement), and the marital status is respected by the state.

Similarly, nonrecognition of nonconjugal relationships could also generate economic injustice and dignitary-cultural harm. I use the example of nonrecognition of friendships to illustrate. By not recognizing friendships, the state withholds from friends a variety of economic benefits—for example, eligibility to inherit each other's estates under state intestacy rules, and standing to sue for negligent infliction of emotional distress caused by a friend's death.<sup>122</sup> As for the dignitary aspect, the state creates a hierarchy of relationships that favors domestic caregiving and intimate relationships over others. Such a system generates stigma and even loneliness for those who live in nonsanctioned relationships, eventually leading some people to feel that being unmarried is

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117. Cf. Alicia Brokars Kelly, *Actualizing Intimate Partnership Theory*, 50 FAM. CT. REV. 258, 263 (2012) ("The harms caused are especially acute for cohabitants, for women, and for same-sex couples. Caregivers, who are usually women, tend to disproportionately bear earning power disadvantages produced by communal choices.").

118. This is, of course, provided that the couple did not sign a cohabitation agreement that secures these rights (and would be generally enforced in all but three states).

119. MILTON C. REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY 155 (1993); cf. Martha Albertson Fineman, *Why Marriage?*, 9 VA. J. SOC. POL'Y & L. 239, 267–68 (2001).

120. See, e.g., Alicia Brokars Kelly, *Rehabilitating Partnership Marriage as a Theory of Wealth Distribution at Divorce: In Recognition of a Shared Life*, 19 WIS. WOMEN'S L.J. 141, 162 (2004).

121. See, e.g., REGAN, *supra* note 119, at 93.

122. See Laura A. Rosenbury, *Friends With Benefits?*, 106 MICH. L. REV. 189, 204–05 (2007).

being a failure.<sup>123</sup> Marriage exceptionalism also entrenches the symbolic harm of marriage and the harm of being single by signaling that the path to success necessarily follows marriage.<sup>124</sup> Having more than one state-sanctioned relationship might eliminate some of this dignitary injury both by reducing the significance of any one type of relationship and by elevating the status of particular alternative relationships as well.<sup>125</sup> This legal structure also adversely affects predominantly women because the state directs people to choose only one comprehensive domestic relationship, in which an extensive amount of domestic care is expected. Since women are still more likely to be the main caregiver, this structure maintains traditional gender roles.<sup>126</sup>

Responding to the growing number of nonmarital arrangements and the harm caused by their legal maltreatment, scholars, courts, and policy makers have long contemplated the proper policy approach. The following Subpart surveys a few of them and analyzes the different, sometimes contradictory, legal doctrines, proposals, and theories.

## B. The Trend Toward Legal Recognition

In this Subpart, I sketch the complicated terrain of legal recognition of nonmarital unions in the United States.<sup>127</sup> My aim is to establish that legal recognition of nonnuclear families is on the rise. At the same time, I indicate how in practice, legal recognition of nonmarital unions is quite limited.

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123. Cf. Katherine M. Franke, *Longing for Loving*, 76 FORDHAM L. REV. 2685, 2689 (2008) ("The normative centrality and, indeed, priority of the institution of marriage establishes the standard by which all other forms of kinship, family, friendship, temporary alliance, and love are both rendered legible and assigned value. In this, and in most societies, marriage is the measure of all things. Thus, affective associations that lie outside the formal paling of marriage are evaluated and understood by virtue of their likeness to, or dissimilarity from, marriage.").

124. See, e.g., JOHN SCANZONI ET AL., *THE SEXUAL BOND: RETHINKING FAMILIES AND CLOSE RELATIONSHIPS* 72 (1989); Rosenbury, *supra* note 122, at 217, 228.

125. Rosenbury, *supra* note 122, at 228 ("Explicit legal recognition of friendship could soften the effects of the state's current, implicit regulation of friendship by signaling that friendship is worthy of state support. Such signaling might eliminate some of the stigma experienced by people living outside of state-sanctioned coupling, because other personal relationships would be recognized by the state.").

126. See *id.* at 191.

127. It is a complicated terrain for two reasons. First, it includes different players who are pushing in different directions: courts, scholars, policy makers, and the affected people themselves. Second, often the doctrine itself does not adequately describe the reality; for example, the implied contract doctrine that is supposed to "protect" cohabitants in reality provides very little protection.

Acknowledging the harm to unmarried families caused by marriage exceptionalism, legal scholars have offered a variety of proposals to reduce it. With strikingly few exceptions,<sup>128</sup> the remedy to this injustice is pinned to legal recognition of relationships.<sup>129</sup> More recognition includes more types of familial relationships—such as friendships,<sup>130</sup> relatives,<sup>131</sup> cohabiting conjugal couples,<sup>132</sup> caregiving relations,<sup>133</sup> and nonmonogamous relationships<sup>134</sup>—and more types of legal institutions. In the following, I discuss a select, nonexhaustive list of suggested and existing policies that are indicative of the general trend.<sup>135</sup>

In the zone of cohabiting couples, at least on the surface, there is an increasing recognition and enforcement of obligations between intimate unmarried couples. Following a ruling of the California Supreme Court in 1977 in the case of *Marvin v. Marvin*,<sup>136</sup> most states enforce contractual financial obligations between

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128. See Franke, *supra* note 123, at 2703 (“Some of the recent scholarship urging the legal regulation of friendship strikes me as radically wrongheaded. Unfortunately, this work indulges the misplaced view that, if something important is at stake, law should regulate it.” (citation omitted)); see also Abrams, *supra* note 20, at 6 (“[W]e should isolate and disaggregate the various state interests in marriage and then reconfigure marriage to retain those features relevant to salient interests and to discard those relating to interests that would be better dealt with elsewhere.”); Elizabeth F. Emens, *Regulatory Fictions: On Marriage and Countermarriage*, 99 CALIF. L. REV. 235, 263–66 (2011) (imagining a world in which the state refuses to enforce contracts between romantic partners, and, while arguing that such regime is very unlikely, providing some reasonable justifications for such policy).
  129. Elsewhere, I divided the proposals into four groups: traditionalism, which advocates maintaining marriage’s special status because it is the best framework to organize and privatize support between family members; abolitionism, which urges the abolition of marriage and a shift to a contractual regime; functionalism, which promotes legal recognition of relationships according to the family’s function rather than its status; and a menu-of-options approach, which supports the creation of a plurality of state-sanctioned institutions for recognition of relationships. See Aloni, *supra* note 111, at 594–606.
  130. See *infra* notes 154–156, 158 and accompanying text (discussing a few proposals for inclusion of friendships in family law).
  131. See *infra* notes 164, 274, 305 and accompanying text (discussing Nancy Polikoff’s proposal).
  132. See *infra* notes 146–147, 149, 175–176 and accompanying text (discussing Cynthia Bowman’s proposal and ALI proposal).
  133. See *infra* note 165 and accompanying text (discussing Martha Fineman’s approach).
  134. See, e.g., Adrienne D. Davis, *Regulating Polygamy: Intimacy, Default Rules, and Bargaining for Equality*, 110 COLUM. L. REV. 1955 (2010) (advocating for recognition of polygamy to the extent that it is effectively regulated).
  135. Because “[s]cholarly literature over the last several decades has been flooded” with theories to legally recognize nonmarital unions, I will have to limit the discussion to a small number of major theories, while neglecting many of them. Alicia Brokars Kelly, *Explaining Intuitions: Relating Mergers, Contribution, and Loss in the ALI Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL’Y 185, 186 (2001).
  136. See *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976) (holding that contractual obligations between unmarried partners are enforceable in California). *Marvin* also specifically approved the use of equitable remedies when warranted by the circumstances presented by the case.

unmarried couples upon dissolution of the relationship.<sup>137</sup> In reality, however, a *Marvin*-type remedy provides very little protection to unmarried couples because some courts enforce only written contracts or demand clear and convincing evidence in order to find obligations between the partners.<sup>138</sup> Courts also tend to ascribe obligations mostly in cases in which there was explicit financial contribution by the claimant (for example, if the party invested some amount in the property or in other mutual expenses).<sup>139</sup>

In addition, but more rarely, status-based recognition is also sometimes available for cohabitants. At least one state (Washington) offers more robust protection to unmarried couples because the court holds just division of property as a rebuttable presumption if the cohabitants at stake behaved in a married-like fashion.<sup>140</sup> In 2002, the American Law Institute (ALI) suggested a somewhat similar model.<sup>141</sup> According to the ALI's Principles of the Law of Family Dissolution, couples who either maintain a common household for a state-defined period or raise a child together will be presumed "domestic partners."<sup>142</sup> Domestic partners are then treated as married in terms of

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*Id.*; see also BOWMAN, *supra* note 59, at 38–45 (surveying equitable remedies for unmarried couples and criticizing their inadequacy).

137. Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1383 (2001) ("[M]ost states' courts routinely enforce express agreements and recognize various equitable claims between unmarried partners, particularly where they share a business or property."). Only four states (Illinois, Mississippi, Georgia, and Louisiana) do not enforce contracts between nonmarital couples at all. See Aloni, *supra* note 111, at 587.

138. See BOWMAN, *supra* note 59, at 50–52; HERTZ, *supra* note 52, at 12–14.

139. See Estin, *supra* note 137, at 1384.

140. See, e.g., *Olver v. Fowler*, 168 P.3d 348, 350 (Wash. 2007) (establishing the term "law of committed intimate relationships"); *Vasquez v. Hawthorne*, 33 P.3d 735, 739 (Wash. 2001) (Sanders J., concurring) ("Relevant factors establishing a meretricious relationship include, but are not limited to: continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties."); HERTZ, *supra* note 52, at 13–14.

141. AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS (2002). Elizabeth Scott offered a more moderate approach. According to her proposal, cohabiting couples who share a child or live together for five years would assume financial marital-like obligations upon separation unless they opt out. See Marsha Garrison & Elizabeth S. Scott, *Legal Regulation of Twenty-First-Century Families*, in MARRIAGE AT THE CROSSROADS, *supra* note 14, at 303, 317.

142. See AM. LAW INST., *supra* note 141, § 6.03. While the ALI principles leave it to the legislature to decide what the required cohabitation period is, the principles seem to recommend, based on other countries' experiences, that the cohabitation period for couples with a common child will be two years and for couples without a common child, three years. See *id.* § 6.03 cmt. d. The principles also add factors that can rebut the presumption created by the length of cohabitation. The same factors can be used to establish the presumption in cases in which the cohabitation time was shorter than required by the statute.

maintenance and distribution of property upon separation.<sup>143</sup> Couples who want to opt out of this default need a prior written agreement. This proposal, however, has not been adopted by any state,<sup>144</sup> and has been widely criticized for being too inclusive because it may impose marital obligations on people who may be uninterested in taking on such obligations.<sup>145</sup>

In any event, even under the ALI proposal, unmarried partners are still deprived of a variety of rights and benefits that are provided by the state and third parties to married partners during their relationships. Thus, Cynthia Bowman suggests that relationships of unmarried opposite-sex couples who share the same residence (for more than two years) or have a common child (regardless of the time they share a residence) should be recognized by the state and third parties as “quasi-married.”<sup>146</sup> That means that the couple’s obligations toward each other would be similar to those of married couples, and the state and third parties would treat the couple as married for all purposes.<sup>147</sup>

While this proposal is considered by some to be improbable as a candidate for adoption,<sup>148</sup> the states that recognize common law marriage—a minority of states—already do deem some couples as married for all purposes even if they have not formally entered into marriage. This is, of course, a very different landscape because, contrary to Bowman’s proposal, couples need to hold themselves out as married in order to be recognized as such—a much more demanding requirement than merely two years of sharing a residence.<sup>149</sup> Despite the national trend to repeal common law marriage, Utah recently enacted common law marriage.<sup>150</sup> The reason for such enactment was to prevent polygamists from using the welfare system in a “fraudulent manner.”<sup>151</sup> The

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143. *See id.* § 6.0.

144. *See* BOWMAN, *supra* note 59, at 3.

145. *See, e.g.,* Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 250, 262–63 (2004); Franke, *supra* note 123, at 2697 (“Thus, the law opts them into a marriage-like regime whether or not they reached a mutual explicit agreement that they desired or intended to acquire this status. . . . The intended effect of the ALI Principles is to enlarge marriage law’s shadow.”). The ALI proposal has also been criticized by conservative commentators because they view it as weakening the marriage institution.

146. BOWMAN, *supra* note 59, at 221–24.

147. *See id.*

148. *Cf.* Aloni, *supra* note 111, at 603–06 (criticizing Bowman’s proposal because it is, in essence, another path into marriage).

149. BOWMAN, *supra* note 59, at 5–6 (contending that common law marriage is an inadequate remedy for the treatment of unmarried couples because even married people today do not necessarily present themselves as husband and wife, but rather as partners).

150. Utah Code Ann. § 30-1-4.5 (2007).

151. *See* Abrams, *supra* note 20, at 29.

concern was that in a polygamist's household, in which the man officially is married only to one woman but in practice cohabits with more, the unmarried women would receive welfare benefits as if they were single.<sup>152</sup>

As stated before, legal recognition claims are not limited to intimate partnerships. Surprisingly, even though family law has only recently concerned itself with the issue of friendships, it appears that this subject has already gained popularity in scholarship (as evidenced by the number of articles that discuss it).<sup>153</sup> Commentators who ask for legal regulation of friendships take different stands in terms of the type of legal recognition they suggest. David Chambers advocates the creation of a "designated friends" registry that would offer friends a limited number of privileges and responsibilities relating to the care of each other.<sup>154</sup> Laura Rosenbury "calls for explicit state recognition of friendship" based on the "principles of nonexclusivity and fluidity."<sup>155</sup> Her general approach would have the state provide an individual the opportunity to designate more than one person for state protections and benefits. She rejects, however, a friendship registry as the sole solution, and even rejects a dual registry (one that would allow designation of both a best friend and an intimate partner) because they require people to choose only one friend and would privilege one type of relationship over others. More theoretically, Katherine Franke suggests that because friendship can take many shapes, is very flexible, and "occupies a social space largely unregulated by law," friendship (rather than marriage) can serve as a paradigm for "our reasoning about sexual and affective liberty."<sup>156</sup> Ethan Leib, on the other hand, proposes lighter regulation of friendships.<sup>157</sup> In short, he proposes that friends should be able to take medical leave to help sick friends, have standing to sue for wrongful death, be eligible for tax deductions for their care of friends, and be treated as holding fiduciary duties in cases of economic transition between friends.<sup>158</sup>

While the recognition of nonintimate partners in the manner that is proposed by these scholars seems far away, a few states have started to recognize nonintimate unions for particular purposes. Recently, for instance, California

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152. *See id.*

153. *See infra* notes 154–158 and accompanying text.

154. *See* David L. Chambers, *For the Best of Friends and for Lovers of All Sorts, a Status Other Than Marriage*, 76 NOTRE DAME L. REV. 1347, 1353–55 (2001); *see also* Aloni, *supra* note 111, at 607–13 (suggesting a relationship registration scheme that would also be open to friends).

155. Rosenbury, *supra* note 122, at 229.

156. Franke, *supra* note 123, at 2702–03.

157. ETHAN J. LEIB, FRIEND V. FRIEND: THE TRANSFORMATION OF FRIENDSHIP—AND WHAT THE LAW HAS TO DO WITH IT 78–107 (2011).

158. *Id.*



passed a law that exempts unmarried partners who co-own property in joint tenancy from reassessment of property tax when their property changes hands after the death of a partner.<sup>159</sup> According to its terms, this law could be applied to nonintimate couples who share a residence. Other states and federal programs have also changed their rules so that benefits are available to nonconjugal partners.<sup>160</sup> In addition, two states, Hawaii and Vermont, provide a registration scheme for nonconjugal partners that confers a limited panoply of rights and benefits. In Hawaii, the registration is open to everyone who is prohibited from marriage (same-sex couples and nonintimate partners, including friends and relatives),<sup>161</sup> but in Vermont the registration is open only to people with familial relationships.<sup>162</sup> These two legal institutions have not proven widely popular and very few nonintimate partners have registered.<sup>163</sup>

Two other prominent models that shift the focus from marriage to the functional family are those posited by Nancy Polikoff and Martha Fineman. In the shortest version, Polikoff's account calls for valuing all families. She asks that families be recognized by their function rather than by marriage or by any status. Her three key principles are: preferring the needs of children and their caretakers over other adult relationships, supporting the children's needs in all types of families, and acknowledging adult interdependency.<sup>164</sup> Fineman asserts that protections and support should essentially be directed to vertical (intergenerational) caregiving relationships rather than to traditional horizontal relationships between adults (spouses).<sup>165</sup>

Finally, another influential approach in the trend toward recognition is the pluralistic policy, also known as the menu-of-options proposal.<sup>166</sup> Proponents of this approach advocate the creation of a variety of state-supported legal mechanisms for recognition of different types of relationships.<sup>167</sup> Shahar Lifshitz, for instance, proposes a pluralist theory that emphasizes the state's

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159. See CAL. REV. & TAX. CODE § 62.5 (West 2012).

160. For example, until 2006, an inherited pension could be exempted from tax if the spouse rolled the fund into her own retirement account. In 2006, the U.S. Congress passed a bill that allows any beneficiary to move the fund without paying tax. See POLIKOFF, *supra* note 48, at 191.

161. See HAW. REV. STAT. §§ 572C-1 *et seq.* (2011).

162. See VT. STAT. ANN. tit. 15, § 1303 (2011).

163. Aloni, *supra* note 111, at 592–93 (“These statutes are thus very limited in their scope and do not provide alternatives for opposite-sex couples in conjugal relationships, nor, in Vermont, do they provide such alternatives for non-intimate partners. It is no wonder, then, that the number of registrations is extremely small.”).

164. See POLIKOFF *supra* note 48, at 137–38.

165. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 6–8 (1995).

166. *Id.* at 599–601 (explaining the pluralistic approach and criticizing it for lack of coherence).

167. See Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1772 (2005).

obligation to create a range of legal institutions that offer meaningful choices to individuals in organizing their relationships.<sup>168</sup> In particular, he asserts that such an approach needs to attach different consequences to marriage than to nonmarital unions. In fact, a feeble menu of options has already emerged in some places: Civil unions and other somewhat similar legal institutions—some of them also open to opposite-sex couples—already exist in several states.<sup>169</sup> But like the previously discussed registration schemes in Hawaii and Vermont, the existing legal institutions have not as of yet been endorsed by the public.<sup>170</sup>

In sum, the movements back and forth toward recognition and away from recognition still comprise a very lively and developing area of the law. Legal scholarship has generally been supportive of the expansion of recognition to include more family structures.<sup>171</sup> Courts, at least when it comes to the recognition of nonmarital unions, have been more reluctant to afford protections to unmarried couples. Legislatures are moving between more recognition and restricting recognition. As acknowledged by Eskridge, “[f]or most states, the menu of relationship regimes has developed haphazardly and without a systematic public debate about the effects of the menu.”<sup>172</sup> Notwithstanding the various directions supported by different state and private agents, the enterprise of expanding recognition is already a fact.<sup>173</sup> Development is proceeding in a strong overall direction—toward more recognition.

Almost completely ignored by the celebration of recognition is the range of arenas in which people can benefit financially from nonrecognition. The

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168. See Lifshitz, *supra* note 16. William N. Eskridge proposes that some menus of options already exist for the U.S. family because most states offer ex-post recognition of cohabiting couples and some offer civil unions or additional state-sanctioned legal institutions. See William N. Eskridge Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881 (2012).

169. See Aloni, *supra* note 111, 591–94 (surveying the different registration schemes that exist).

170. See *id.* at 592–93. One of the reasons that these legal institutions have not shown success is that they were created as compromises to block or delay the legalization of same-sex marriage. As such, they are perceived as inferior to marriage; and, commonly, when same-sex marriage is legalized, these institutions are abolished. Notwithstanding this pessimistic description, I have elsewhere argued that these institutions have a potential to develop into meaningful marriage alternatives. *Id.* at 627–28.

171. The main exception to the trend toward more recognition is traditionalists’ opposition to the expansion of legal recognition of nonmarital families. Traditionalists argue that marriage is the best framework for raising children and should be treated differently from other family structures. See, e.g., Amy L. Wax, *The Family Law Doctrine of Equivalence*, 107 MICH. L. REV. 999 (2009).

172. Eskridge, *supra* note 168, at 1891.

173. *Id.* at 1889.

following Subpart asks how the existence of this significant phenomenon pertains to the trend toward recognition.

### C. Recognizing Nonrecognition

Legal scholarship has failed to engage with the question of how increasing legal recognition might affect the lives of those who gain financially from nonrecognition. On the most basic level, this shortcoming is expressed by legal scholars' widespread failure to even consider this phenomenon and the way it may affect their theories. Perhaps this neglect is correlated to family law's separation from poverty law and the former's tendency to address the entrance to and exit from relationships to the exclusion of addressing ongoing family life.<sup>174</sup> This Subpart begins filling in this serious gap in the scholarship.

Bowman's proposal to recognize all cohabiting couples as quasi-married after two years of cohabitation or having a child is an example of a theory more focused on subjects that traditionally have been considered part of family law—here, the vulnerability of women upon the ending of relationships—rather than on those that have been excluded by family law, such as poor families.<sup>175</sup> (The proposal is similar in its effect to Utah's recognition of common law marriage, which, as stated above, meant specifically to prevent use of the welfare system.) Bowman briefly discusses the possibility that under her proposed regime some people will lose assistance from states' social welfare programs. She does not consider, however, other types of forfeits under her regime, such as the loss of post-marital benefits (survivor's benefits) or financial aid.<sup>176</sup> With regard to the potential loss of welfare grants, Bowman contends that in cases in which the cohabiting man is working, the fact that these couples will be treated as married for all other purposes compensates for the possible ending of welfare for them—for example, by extension of employer-based health insurance.<sup>177</sup> Otherwise, she adds, a study found that unmarried women from poor backgrounds are aware of the risks of living with unproductive men

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174. See Halley & Rittich, *supra* note 26, at 764.

175. See BOWMAN, *supra* note 59, at 244 (concluding that when she envisions remedies for the legal treatment of cohabitants, she has in mind a woman who tries to leave her abusive husband, and explains how her remedy is suitable to handle such a case).

176. *Id.* at 240–41. In a footnote, and without further discussion, Bowman refers to an article that suggests the option of creating a “statewide civil union” as a solution to the problems associated with elderly who could lose their post-marital entitlements and benefits. See John R. Schleppenbach, *Strange Bedfellows: Why Older Straight Couples Should Advocate for the Passage of the Illinois Civil Union Act*, 17 ELDER L.J. 31, 51–53 (2009).

177. BOWMAN, *supra* note 59, at 240–41.

and are determined to protect themselves;<sup>178</sup> further, Bowman states that the division of property at the end of the relationships will protect the women.

Bowman's argument, however, is not entirely convincing because cohabitation is very common among low-income groups. Low-income partners would be unlikely to enjoy the benefits of property distribution or estate tax exemptions (people at the poverty level typically do not own significant property) or the extension of health insurance (if they are unemployed, or if their employer does not provide health insurance).<sup>179</sup> In many instances the couple would be better off with access to Medicaid, SSI, food stamps, housing, welfare, and the like.<sup>180</sup>

Less inclusive proposals—those that impose obligations only at the end of nonmarital relationships—could also, in time, be harmful to couples who gain financially from nonrecognition. This is because such proposals do not contemplate whether ascribing obligations between the partners would someday result in more state control over the partners, especially regarding more vulnerable populations. That is, when the state ascribes obligations between the partners, it could (at least theoretically) enforce obligations for other matters, such as support during the relationship (and thus reduce or eliminate eligibility for means-tested programs).

To illustrate, consider Lifshitz's pluralistic approach and the ALI recommendations. According to Lifshitz, the state should treat cohabitation and marriage as completely distinct legal institutions; and, within cohabitations, different legal consequences should be applied to "regular cohabitation" (short-term cohabitation) and "relational cohabitation" (longer-term cohabitation).<sup>181</sup> Such an approach does not provide answers to a few fundamental questions concerning the duties that result from recognition.<sup>182</sup> In particular,

178. *Id.* at 240 (referring to KATHRYN EDIN & MARIA KEFALAS, *PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE* (2005)).

179. Even under the Patient Protection and Affordable Care Act, employers who have fewer than fifty employees do not have to insure their employees.

180. The concern is that as a result of calculating in the income of the man—who may not even contribute to the household—eligibility would be jeopardized or benefit levels reduced. If the affected women want to protect themselves from this consequence, according to Bowman's suggestion they could either avoid living with these men—which may not be what they want—or register as domestic partners—something that is unlikely that they would do, and that could also have other ramifications, as I explain below. *Id.*

181. Lifshitz, *supra* note 16, at 1604–07.

182. For example, should the fact that one of the partners gains economically from nonrecognition affect their mutual obligations at the end of the relationship? Similarly, Lifshitz's theory gives heavy weight to the types of relationships and to the way that the type of relationship matters for purposes of determining the legal consequences of the dissolution. Maybe, then,

the scheme does not indicate what exactly the relationship between the couple and third parties, including the state, should be. This is problematic because if the state mandates that some relationships carry the legal consequence of equal division of property at the end of the relationships, it may create a property right on behalf of both partners even before the separation. (For example, in a common law state, a presumption of tenancy by the entirety could be established, if parties meet the criteria that establish a status or presumption.) It thus makes sense that the state would recognize these mutual obligations vis-à-vis other duties, such as mutual responsibility for Medicaid eligibility. If married couples need to spend-down their assets when partners apply for Medicaid, there are no compelling reasons for the state to treat differently cohabitants who have legal obligations toward each other.<sup>183</sup> This is even more apparent with regard to the ALI proposal, which creates a couple's status after a few years of their living together. If a domestic partnership status is established after a specific time, then when one individual applies for welfare and lives with another person longer than the term that establishes the partners' status—a status that raises a presumption of mutual obligations—then it makes some sense to treat these partners as one unit in a way that could reduce eligibility for means-tested programs.<sup>184</sup>

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economic gain as a motivation changes couples' classification; for example, from "regular cohabitants" to "relational cohabitants."

183. The difference between the two situations is that marriage is a clearly registered status, while in Lifshitz's proposal the status could be established only upon the dissolution of the bond.

184. An additional problem in the menu-of-options approach is the assumption that state registrations (for domestic partnership or civil unions) would likely not be recognized by the federal government, including for purposes of eliminating benefits. A common suggestion in legal scholarship is that state registration is the solution for the elderly. See Barry Kozak, *Civil Unions in Illinois: Issues That Illinois Attorneys Should Consider*, 25 CBA Rec. 30, 34 (2011).

Indeed, three states (Washington, California, and New Jersey) open their registration to couples who are over sixty-two, for the same reason. See HERTZ, *supra* note 52, at 209 n.3. The rationale behind this policy is that the elderly would want to have a way to arrange their mutual lives (having medical decisionmaking privileges, for example) but without risking their eligibility for Medicare and Medicaid.

But it is far from clear that the federal government will ignore registered unions of the elderly for purposes of calculating benefits and eligibility. As we have seen, in Medicaid, the state deems couples who hold themselves out as married as, indeed, married, and there is no better sign of being a couple than being registered as a couple. Moreover, due to a recent decision of the IRS to treat opposite-sex couples under civil unions in Illinois as married for the purpose of filing joint tax returns, it is really an unresolved question if the current situation (in which the federal government does not withhold benefits based on state registration) will continue. Letter from Pamela Wilson Fuller, Senior Technician Reviewer, Internal Revenue Serv., to Robert Shair, Senior Tax Advisor, H&R Block (Aug. 30, 2011), <http://law.scu.edu/blog/samesextax/file/IRS%20Civil%20Union%20letter.pdf>. Similarly, there is no reason to believe that low-income and poor people will register if there is a risk

The assumption that the adoption of the above-mentioned proposals will harm more vulnerable populations and will be used by the state to further privatize mutual support between unmarried couples is not without empirical support. Rather, the experience of other countries that have adopted progressive policies that recognize unmarried couples teach that legal recognition is for better and for worse.

In Australia, for example, partners (opposite- or same-sex) who live together, are over the age of consent, and are not in a prohibited relationship are recognized as “de facto partners.”<sup>185</sup> The criteria for “de facto relationships” include the time the partners lived together, their reputation, and financial interdependency.<sup>186</sup> Recognition as de facto partners provides a handful of important rights and benefits but also considerable obligations, including possible reductions in social welfare grants. Acquiring “de facto partners” status is not based merely on the partners’ definitions of their relationships; rather, recognition can be involuntary, based on the decision of the Australian Department of Human Services.<sup>187</sup> That is, even “[i]f people do not tell Centrelink [a division of Australian’s Social Security] about their circumstances, it is possible that Centrelink may investigate and find that there is a relationship and then raise a debt against the persons involved and possibly prosecute them.”<sup>188</sup> If a couple falls under the definition of de facto partners, the partners’ incomes and assets will be calculated together for eligibility for welfare, which might result in the reduction of welfare grants or even the elimination of grants that are restricted to singles (such as welfare grants to single parents).

In what sounds like a relevant warning to the U.S., a booklet provided by the (Australian) National Welfare Rights Network and the Illawarra Legal Centre explains that “[t]he laws have changed to eliminate discrimination

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that their SSI or Medicaid eligibility will be revoked. More generally, status change has consequences, even under state laws, that needs to be taken into account.

For instance, state law creates obligations between the partners, such as joint liability for debt, which can cause some people not to register. Or even more relevant, as I explain in Part III, in Temporary Assistance for Needy Families (TANF) it is the state that defines the assistance unit. Therefore, for some people, it is uncertain that registration schemes would have a positive effect.

185. Australian Government, *Guide to Social Security Law, Section 2.2.5.10 Determining a De Facto Relationship*, [http://guidesacts.fahcsia.gov.au/guides\\_acts/ssg/ssguide-2/ssguide-2.2/ssguide-2.2.5/ssguide-2.2.5.10.html](http://guidesacts.fahcsia.gov.au/guides_acts/ssg/ssguide-2/ssguide-2.2/ssguide-2.2.5/ssguide-2.2.5.10.html) (last updated May 3, 2010).

186. See POLIKOFF, *supra* note 48, at 116–17.

187. It is different from deprivative recognition, because partners in de facto relationships are recognized for benefits and responsibilities, rather than only for responsibilities like in deprivative recognition.

188. NAT’L WELFARE RIGHTS NETWORK & ILLAWARRA LEGAL CENTRE, *RELATIONSHIPS AND CENTRELINK: FREQUENTLY ASKED QUESTIONS* 5 (2009).

towards same sex couples; however the impact in the area of Social Security is causing problems for many couples who do not want to be public about their relationships.”<sup>189</sup>

The Australian experience thus should serve as a caution to the legal scholarship that advocates the adoption of progressive and functional policies for recognition of nonmarital unions. In fact, in the United States, partners are already recognized against their will—solely for the withholding of grants—even without the accompanying progressive policy of recognizing unmarried partners for purposes of benefits. Part III explores those cases.

### III. PIERCING THE VEIL OF NONRECOGNITION

The inadequate engagement of legal scholarship with the duties that are attached to legal recognition results in part from an incomplete understanding of ascriptive recognition. In this Part, I first parse out the different types of ascriptive recognition. In particular, I distinguish between *purely ascriptive recognition* and *partially ascriptive recognition*. Partially ascriptive recognition is a phenomenon that is already recognized in the scholarship—but is referred to simply as ascriptive—in which the state ascribes marital-like obligations to couples at the end of relationships, upon the request of one of the partners.<sup>190</sup> I argue that the cases in which a partner petitions for economic rights as against the other partner upon separation should be treated as partially ascriptive—legal recognition in those cases simply results from the request of one of the parties. In other words, the state merely takes one side as a response to a dispute between the parties. Conversely, I discuss purely ascriptive recognition: cases in which the state recognizes partners without a request by either party.

Importantly, purely ascriptive recognition does not have to be deprivative. In the future, it is plausible that the state would decide to define a family unit without the partners’ request, but in a way that would not result in deprivation. For example, under Bowman’s plan, some people who would be recognized by the state incur benefits and duties at the same time. Such

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189. *Id.*

190. Marsha Garrison calls the mechanism of providing ex-post marital-like obligations on couples upon separation “conscriptive” rather than “ascriptive” in order “to emphasize the fact that the obligations imposed by laws of this type are both compulsory and involuntary.” Garrison, *supra* note 41, at 324 n.88. But whether you call this legal fiction conscriptive or ascriptive, the economic rights in these cases are being requested by one of the partners, unlike the cases I discuss in which the recognition is conferred by the state when neither party is interested in having that status.

policy, for some people, will not be deprivative—the involuntary recognition will not result in economic maldistribution. Similarly, the Australian approach described above (recognizing partners against their will for terminating benefits that stem from nonrecognition) is not necessarily deprivative, because the parties can be recognized for purposes of protections and benefits as well. This Part, however, focuses exclusively on one subcategory of purely ascriptive recognition: deprivative recognition—the only existing policy that defines partners as a unit against the will of both parties and results in deprivation.

And among deprivative recognition policies, we can distinguish two kinds. The first is the traditional policy of deprivative recognition—in which the state merely recognizes the partners for the purpose of taking away a benefit but has no interest in the cultural recognition of the partners. The best examples of such policy are the termination of alimony and welfare. In the second category, unintended deprivative recognition policies, the state has some interest in the cultural recognition of the partners, but by recognizing the partners it creates an economic injustice. Below, I start with defining and exploring traditional deprivation, then discuss unintended deprivation.

#### A. Exploring Traditional Deprivative Recognition

The state regularly allows people to enjoy the economic gain that stems from the nonrecognition of their relationships (or tries to prevent it only in rare and extreme cases). Part I provided examples—in the context of SSI and the marriage penalty—in which the state infrequently tries to recognize unmarried couples against their will in order to withhold or terminate a benefit that stems from nonrecognition.<sup>191</sup> The same is true about post-marital entitlements and benefits—those are terminated upon remarriage, but not upon cohabitation. Nonetheless, in other particular contexts—social welfare and alimony—some states have developed more aggressive tools to pierce the veil of nonrecognition and to eliminate the gains that stem from it. This is traditional deprivative recognition.

I call this regulatory mechanism deprivative recognition because the recognition is against the partners' will and deprives them of essential resources.

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191. As another example, an unmarried partner can be considered an “insider” in bankruptcy proceedings for the purpose of avoiding alleged preference. See *In re Levy*, 185 B.R. 378 (Bankr. S.D. Fla. 1995). Ironically, unmarried couples who resemble married couples may not file a joint case, regardless of whether the debtors have incurred joint debts or have obtained joint assets. See *In re Malone*, 50 B.R. 2 (Bankr. E.D. Mich. 1985); *In re Clem*, 29 B.R. 3 (Bankr. D. Idaho 1982); *In re Coles*, 14 B.R. 5 (Bankr. E.D. Pa. 1981).



Deprivative recognition can be initiated by third parties or by the state, but it is always the state that ultimately pierces the veil of nonrecognition. Deprivative recognition results in a financial loss to at least one member of the newly recognized partners.

Importantly, in deprivative recognition, it is not the financial change (that may result from having a partner) that induces the recognition; rather, it is a change in family status.<sup>192</sup> The state has different ways to calculate funding from external sources (for example, in the welfare area, income from any external source is calculated as an in-kind contribution or unearned income and will be dealt with according to the regular rules). But in deprivative recognition it is the partnership that is recognized, rather than merely the financial change that it may cause.

Traditional deprivative recognition is probably the oldest mechanism for legal recognition of people in nonmarital unions. While partially ascriptive recognition was first established in 1977 (that is, ascribing ex-post marital-like obligations on a couple vis-à-vis each other upon the request of one of the partners), the first statute that created deprivative recognition dates to 1934.<sup>193</sup> Significantly, deprivative recognition is markedly different than common law marriage because, in the latter, the couple is recognized as married for all purposes—with all the obligations and benefits.<sup>194</sup> In deprivative recognition, on the other hand, the partners are recognized ad hoc, for an immediate purpose only. Below, I examine the two most established and common cases of traditional deprivative recognition: termination of spousal support and termination or reduction of social welfare benefits.

### 1. The Cohabitation-Termination Rule

This Subpart focuses on the cohabitation-termination doctrine: the rule that spousal support is terminated, modified, or suspended upon a recipient's cohabitation, sometimes only with a person of the opposite sex,<sup>195</sup> and occasionally even without the need to prove that the new relationship creates economic

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192. The termination of the benefit or entitlement, in some cases, as I explain below, could be rebutted by a show of no financial change, but first and foremost it is family status that matters.

193. J. Thomas Oldham, *Cohabitation by an Alimony Recipient Revisited*, 20 J. FAM. L. 615, 621 (1982).

194. Abrams, *supra* note 20, at 27.

195. Absurdly, if an ex-partner cohabits with a person of the same sex, in some states this relationship will not bring the termination of the benefits. See Jill Bornstein, *At a Cross-Road: Anti-Same-Sex Marriage Policies and Principles of Equity: The Effect of Same-Sex Cohabitation on Alimony Payments to an Ex-Spouse*, 84 CHI.-KENT L. REV. 1027 (2010) (analyzing some cases that held post-marital cohabitation with same-sex partner will not affect alimony).

interdependency between the cohabitants or financial change in the lives of the alimony recipient.

The legal rule of cohabitation-termination originates from the long-standing principle that remarriage of alimony recipients triggers termination of spousal support, or is a *prima facie* case for such termination.<sup>196</sup> The rationale behind this principle is that alimony is the continuation of the duty of support imposed by marriage.<sup>197</sup> Accordingly, when a new husband marries the maintenance recipient, he assumes the duty to support her.<sup>198</sup> Termination thus prevents the “double support” that would otherwise be provided by the two spouses (the “ex” and the current).<sup>199</sup>

Seemingly, the cohabitation-termination rule applies a similar rationale to that of terminating alimony upon remarriage. Accordingly, if a spousal-support recipient is now cohabiting with a new partner, the ex-partner should not continue to support the recipient. The duty of support should now transfer to the new partner. Further, the alimony recipient’s financial condition may have changed and the recipient may no longer be in need of spousal support.<sup>200</sup> Moreover, some contend that the policy of terminating alimony only upon remarriage, but not upon cohabitation, discourages people from remarrying—and marriage is an important state interest.<sup>201</sup> Others suggest that it is

196. See Cynthia Lee Starnes, *One More Time: Alimony, Intuition, and the Remarriage-Termination Rule*, 81 IND. L.J. 971, 973 (2006).

197. LESLIE JOAN HARRIS, JUNE CARBONE & LEE E. TEITELBAUM, FAMILY LAW 521 (4th ed. 2010).

198. Twila L. Perry, *The “Essentials of Marriage”: Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1, 25–26 (2003).

199. Lois Ullman, *Alimony Modification: Cohabitation of Ex-Wife With Another Man*, 7 HOFSTRA L. REV. 471, 480 (1979) (describing court cases that justify the remarriage-termination rule as preventing double support). A different view is that alimony in the no-fault era is based upon the woman’s need for support after divorce. Accordingly, if the woman remarries, her need is assumed to have changed, and, as a result, alimony should be terminated. Starnes, *supra* note 196, at 987–91. This rationale does not justify the automatic termination of alimony because not every marriage changes the woman’s need. See *id.* at 990 (“Even if a need-based model could convincingly explain alimony, it cannot explain the remarriage-termination rule.”). Some scholars view alimony as an entailment, a result of the partner’s contribution to the household and to the family’s financial growth, which entitles the recipient to an equitable share upon divorce. Additional justification for alimony, which is designated by one scholar as a “postmodern” approach, views alimony as an entitlement—the recipient is entitled to compensation for time served and investments made, such as in raising the children, etc. But if alimony is an entitlement, why should it be terminated upon remarriage or cohabitation? See, e.g., *id.* at 991–94 (defining “postmodern alimony rationales” and claiming that they cannot explain the remarriage-termination rules).

200. See HOMER H. CLARK JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 463 (1968).

201. See, e.g., Oldham, *supra* note 193, at 638.

immoral to allow the maintenance recipient to spend her ex-spouse's money on her new partner.<sup>202</sup> Another justification is that cohabitation allows unmarried partners to enjoy double benefits, while easily hiding their new financial and personal situation.<sup>203</sup>

Nevertheless, nonmarital relationships are different from marriage in ways that call into question the rationales of the termination-cohabitation rule. First, not all unmarried partners support each other financially during the relationship, and a duty of support is not a mutual legal obligation in nonmarital unions, as it is in marriage.<sup>204</sup> Second, because nonmarital relationships are not formalized, it is hard to penetrate them and determine their nature: Are the partners roommates, friends, or intimate? It could be even more challenging to determine effectively the economic relationships within them.<sup>205</sup>

States have taken three different approaches to the issue of spousal-support recipients who cohabit. Some states have mandated the termination of alimony upon proof of cohabitation, regardless of the economic implications of the new partnership on the alimony recipients (that is, without proof that the financial situation of the alimony recipient has improved as a result of the relationship).<sup>206</sup> A second approach has been to use a rebuttable presumption that cohabitation causes a financial change that justifies termination or modification of alimony.<sup>207</sup> Importantly, the establishment of presumption shifts

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202. *Northrup v. Northrup*, 373 N.E.2d 1221, 1225 (N.Y. 1978) (Wachtler, J., dissenting) ("Today's decision leaves the courts powerless to relieve the former husband of the obligation of subsidizing his former wife's affairs no matter how unfair this may be under the circumstances.").

203. *E.g.*, *Scharwath v. Scharwath*, 702 So. 2d 1210, 1211 (Miss. 1997) ("The parties who live in cohabitation can easily and purposely keep their condition of mutual financial support concealed from the paying spouse, as well as from courts seeking only financial documentation before it will grant a modification.").

204. *Perry*, *supra* note 198, at 12–13. Furthermore, even if the cohabiters do support each other, the level of that support may be different between partners; and it is clear that even if economic interdependency exists, such is not created immediately, as it is upon marriage.

205. Furthermore, the assumption that the alimony should be terminated because the recipient has a new partner who can support her is problematic because, as demography indicates, after two years most cohabitations either end or have converted into marriage. *See Aloni, supra* note 110, at 581. Even more fundamentally, because all states allow for unilateral no-fault divorce, and some states have repealed their doctrines of necessities, the idea that an alimony recipient's new spouse is going to support her is based on dated notions.

206. ALA. CODE § 30-2-55 (Supp. 2011) ("Any decree of divorce providing for periodic payments of alimony shall be modified by the court to provide for the termination of such alimony upon petition of a party to the decree and proof that the spouse receiving such alimony has remarried or that such spouse is living openly or cohabiting with a member of the opposite sex."); 750 ILL. COMP STAT. ANN. 5/510 (West 2013).

207. CAL. FAM. CODE § 4323(a)(1) (West 2013).

the burden of proof to the alimony recipient who needs to demonstrate that there is no financial change that justifies the termination of maintenance. And still other states have taken a third approach: They demand proof of change in the recipient's financial situation due to the cohabitation.<sup>208</sup> In many states, the rule is codified in statute; in some others, it is court-created.

Besides the three approaches noted above, variations exist in what is considered a cohabiting couple for the purposes of termination or modification of spousal support. For example, New York authorizes termination of alimony if the recipient "habitually" lives with a person.<sup>209</sup> Under this regime, the Supreme Court of the State of New York, Appellate Division, disapproved termination of alimony for a woman whose relationship with her partner was described as "intermittent intimacy with the same male, being more than a 'brief encounter' and perhaps a 'liaison dangereuse.'"<sup>210</sup> In another case, a different court held that termination was not warranted when a recipient was merely sharing an apartment with another man in the manner of a housemate, because sexual relations are a required component.<sup>211</sup> Other states have been more explicit about the need for a sexual relationship between the partners. For example, Illinois specifically demands that the relationship be "conjugal."<sup>212</sup>

A different approach has been adopted in the Massachusetts Alimony Reform Act of 2011, which has been characterized as "an about-face that could reverberate across the country"<sup>213</sup> and is the most contemporary model to deal with alimony termination.<sup>214</sup> Among a few interesting issues that the

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208. See, e.g., CONN. GEN. STAT. § 46b-86(b) (2009) ("[T]he Superior court may . . . suspend, reduce or terminate the payment of periodic alimony upon a showing that the party receiving the periodic alimony is living with another person under circumstances which the court finds should result in the modification, suspension, reduction or termination of alimony because the living arrangements cause such a change of circumstances as to alter the financial needs of that party."); *In re Marriage of Dwyer*, 825 P.2d 1018 (Colo. App. 1991) (holding that in Colorado mere cohabitation was not sufficient to terminate alimony to cohabiting ex-wife, and stating that cohabitation that diminishes or eliminates the wife's need for support could warrant a modification or termination of alimony).

209. N.Y. DOM. REL. LAW. § 248 (McKinney 2010).

210. *Watson v. Watson*, 331 N.Y.S.2d 730, 731 (N.Y. App. Div. 1972).

211. See *Citron v. Citron*, 398 N.Y.S.2d 624 (N.Y. App. Div. 1977).

212. 750 ILL. COMP. STAT. ANN. 5/510 (West 2013) ("if the party receiving maintenance cohabits with another person on a resident, continuing conjugal basis"); cf. TEX. FAM. CODE ANN. § 8.056 (2006).

213. See Jess Bidgood, *Alimony in Massachusetts Gets Overhaul, With Limits*, N.Y. TIMES, Sept. 27, 2011, at A11.

214. A similar (but not identical) reform is currently being discussed in Connecticut. See H.R. 5509, 2012 Gen. Assemb., Feb. Sess. (Conn. 2012).

regime raises,<sup>215</sup> the statute does not specifically mention that sexual conduct between the cohabitants is required in order to show that the “persons” maintain a common household.<sup>216</sup> Thus, one could ask whether a relationship between an alimony recipient and her best friend, who live together in a way that produces a “benefit in the life of either or both”<sup>217</sup> and creates some emotional and economic dependency, would be cause for termination or suspension of alimony. Similarly, the statute could rationally be interpreted as allowing alimony termination for a recipient who lives with and is supported by her parents.

To clarify, the cohabitation-termination rule is no longer a private matter arising between divorced persons. Rather, it is a rule enforced by the state, and its alleged purpose is to prevent or stop cases of unjust enrichment by virtue of nonformalized unions. As noted, in numerous states the termination-cohabitation rule shifts the burden of proof to the cohabitant to show that the cohabitation does not create economic interdependency; other states order automatic termination upon showing of mere cohabitation. Moreover, alimony is a state-created legal obligation that is granted by a court decree. Conceptually, if a spouse does not support his ex- or current partner, the burden of support

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215. The Massachusetts statute is a prime example of the problems associated with attempts to ascribe marital-like obligations to non-registered partners. According to the statutes, the “persons” at stake are deemed to maintain a common household “when they share a primary residence together with or without others.” MASS. ANN. LAWS ch. 208, § 49(d)(1) (LexisNexis 2011). This definition raises the question of whether couples who do not share residency but who might create their financial interdependency should be exempted from alimony termination. In addition, the arbitrary nature of the rule is evident by the requirement of three months living before termination of alimony is warranted, a time that does not necessarily bear out the premise that the cohabitation generates economic dependency. Moreover, the ambiguous statutory language that leaves full discretion to the courts to determine whether someone is part of a couple encourages litigation and often necessitates private investigators to dig into private lives in order to prove the nature of the relationships.

216. The statute authorizes the court to suspend, reduce, or terminate alimony if the payer shows “that the recipient spouse has maintained a common household . . . with another person for a continuous period of at least 3 months.” MASS. ANN. LAWS ch. 208, § 49(d) (LexisNexis 2011). According to the statutory language, “[p]ersons are deemed to maintain a common household when they share a primary residence together with or without others.” *Id.* § 49(d)(1). The statute then provides some factors that *may be* considered by the court to determine “whether the recipient is maintaining a common household.” The factors the court can examine are: “(i) oral or written statements or representations made to third parties regarding the relationship of the persons; (ii) the economic interdependence of the couple or economic dependence of 1 person on the other; (iii) the persons engaging in conduct and collaborative roles in furtherance of their life together; (iv) the benefit in the life of either or both of the persons from their relationship; (v) the community reputation of the persons as a couple; or (vi) other relevant and material factors.” *Id.*

217. *Id.* § 49(d)(1)(iv).

moves to the state.<sup>218</sup> The cohabitation-termination rule is, thus, a regulatory mechanism to recognize partnerships outside of the partners' commands.

## 2. Social Welfare

In the welfare context, deprivative recognition is less prevalent and is currently used in only a minority of states. In the rest of the states, mere cohabitation with a partner does not change the definition of the family unit.<sup>219</sup> To clarify, in many states, living with an unrelated adult may change eligibility for welfare because in-kind assistance is calculated in determining eligibility. But in states that apply deprivative recognition in the welfare context, additional support to the family is not the determinant factor; rather, the relevant factor is the cohabitation—and the impact of considering in-kind assistance is different than that of including the income of an additional person.

A reasonable explanation for the limited use of deprivative recognition in this area lies in notorious earlier regulations that are commonly known as “man in the house” rules or “substitute father” rules.<sup>220</sup> These laws aimed to eliminate access to funds under Aid to Dependent Children (the older welfare regime)<sup>221</sup> by women who cohabited with men. One of the rationales for the rule<sup>222</sup> was that if there was a man in the home he was considered the breadwinner, and thus his income had to be included in the means test—which resulted in elimination of the recipient's welfare benefits.<sup>223</sup> The enforcement of man-in-the-house rules was accompanied by unscheduled visits by social workers and even midnight raids to catch unmarried cohabitants.<sup>224</sup> The practice ended in 1968 when the U.S. Supreme Court invalidated Alabama's substitute father

218. Cf. Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 969 (2000) (“By declaring a woman to be a man's wife or widow at common law, courts shielded the public fisc from the potential claims of needy women, effectively deflecting those claims inward to a particular private, family unit.”).

219. See Robert A. Moffitt et al., *Cohabitation and Marriage Rules in State TANF Programs*, at ix (RAND Labor & Population Working Paper Series, Paper No. WR-585-1, 2009) (“[M]ost states disregard unrelated cohabitor vendor and cash payments to the TANF recipient and her children.”).

220. See generally Charles A. Reich, *Midnight Welfare Searches and the Social Security Act*, 72 YALE L.J. 1347 (1963).

221. See Social Security Act of 1935, ch. 531, §§ 401–406, 49 Stat. 620, 627–29 (establishing Aid to Dependent Children). In 1962, an amendment to the Act changed the program's name to “Aid and Services to Needy Families with Children.” *King v. Smith*, 392 U.S. 309, 311 n.1 (1968).

222. Another rationale was the alleged immorality of these arrangements, and these rules and their concomitant enforcement practices targeted mainly African Americans. Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 649 (2009).

223. *Id.*

224. *Id.* at 649–50.

regulation.<sup>225</sup> Since then “welfare offices devoted markedly less attention to the men involved in the lives of women receiving welfare.”<sup>226</sup>

Yet even today a few states still use deprivative recognition in order to disqualify unmarried partners from eligibility to Temporary Assistance for Needy Families (TANF), or to reduce the benefit.<sup>227</sup> TANF is a federal assistance program that provides support to needy children and their families.<sup>228</sup> The states, not the federal government, individually define the “family unit.”<sup>229</sup> Eligibility for the program is limited to families with children.<sup>230</sup> Most interesting for this Article’s purpose is the way that states treat households with cohabiting unmarried partners when one of the partners is not the child’s legal parent.

Unsurprisingly, California, always a “leader in . . . punitive approaches to welfare reform,”<sup>231</sup> still has a policy that recognizes cohabitation for purposes of reducing the welfare amount.<sup>232</sup> According to the unrelated-adult-male rule, the state imposes a duty on an unrelated adult male to make a minimum financial contribution to the family equal to the amount that it would cost him to provide living expenses for himself (amazingly, “unrelated female adults” are exempted and are not required to make any contribution).<sup>233</sup> This sum is reduced from the welfare grant and could result in a significant decrease in benefits.<sup>234</sup> The regulations are limited to conjugal partners only. While there is no specific mention of sexual activity, the regulations exclude “roomer

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225. See *King* 392 U.S. at 333–34.

226. Gustafson, *supra* note 222, at 651.

227. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, §§ 401–02, 110 Stat. 2105, 2113–15 (codified as amended at 42 U.S.C. §§ 601–02 (2006)).

228. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, 110 Stat. 2105 (reauthorized and revised by the Deficit Reduction Act of 2005, Pub. L. No. 109–171, 120 Stat. 4 (2006)).

229. See Primus & Beeson, *supra* note 55, at 196.

230. See *id.* at 196–97.

231. Gustafson, *supra* note 222, at 644, 659 (describing California as “one of the most aggressive states . . . in investigating and prosecuting welfare fraud cases”).

232. See CAL. WELF. & INST. CODE, § 11351.5 (West 2001); *Russell v. Carleson*, 111 Cal. Rptr. 497 (Ct. App. 1973) (affirming the constitutionality of the law).

233. *CalWORKs Handbook: Unrelated Adult Male*, COUNTRY OF SANTA CLARA §§ 20.1.2, 20.4 (Feb. 5, 2007), <http://www.sccgov.org/ssa/afdc/afchap20.pdf>.

234. See Moffitt et al., *supra* note 219, at 10. Similarly, in calculating eligibility for General Assistance (support to the very poor who do not qualify for other public assistance), California reduces aid to recipients who share housing with relatives or nonrelatives who have no duty to support them. CAL. WELF. & INST. CODE, § 17000.5 (West 2011); PUBLIC BENEFITS HANDBOOK: GENERAL ASSISTANCE, GENERAL RELIEF, BENCHMARK INST. 3/5, available at [http://benchmarkinstitute.org/our\\_training/\\_PBChapter3.pdf](http://benchmarkinstitute.org/our_training/_PBChapter3.pdf).

and boarder” from responsibility.<sup>235</sup> To be exempt, the unrelated adult male “must have separate sleeping facilities which could be considered a rental unit.” The regulation provides specific examples of such a unit, including “a separate bedroom or porch.” The regulation warns, however, that “the couch in the living room is not considered a rental unit.”<sup>236</sup> Nonintimate partners who share residency (for example, housemates) need to provide an affidavit with appropriate evidence in order to be exempted (such as a rent receipt or evidence that they share different rooms).<sup>237</sup>

Only two other states use such an aggressive method of deprivative recognition. In Oklahoma, unrelated partners’ incomes are deemed fully part of the household income, thus very likely to reduce TANF eligibility.<sup>238</sup> Likewise, in 2011, Kansas revised its regulation so that income of a “cohabiting boyfriend or girlfriend” will be considered in determining TANF eligibility and benefits.<sup>239</sup> The purpose of the policy is to “treat cohabiting couples similar to married couples.” Friends are specifically exempted but need to file a statement to be excused.<sup>240</sup> Three other states (Minnesota, North Dakota, and Wyoming) automatically reduce a recipient’s grant when she lives in the same residence with another adult. And one state, South Dakota, reduces a recipient’s grant when another adult living in the home pays any amount toward shelter costs (it seems that this regulation could, in fact, be applied to nonintimate partners).<sup>241</sup>

It is hard to predict if deprivative recognition in this arena will get more pervasive. A study found that from 1993 to 2006 five states modified their policies to target unmarried partners, while two others (Oregon and Virginia) have changed their laws in the opposite direction (not to recognize these couples in regard to responsibilities).<sup>242</sup>

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235. See *CalWORKs Handbook: Unrelated Adult Male*, *supra* note 235, § 20.1.5.

236. *Id.*

237. *Id.* § 20.2.

238. Moffitt et al., *supra* note 219, at 10–12. Interestingly, to encourage marriage with someone who is not the father’s child, Oklahoma deems only half of the income of the stepfather relevant to eligibility. *Id.* at 11–12.

239. Memorandum from Kathe Decker to Econ. & Emp’t Support Program Adm’rs 5 (Oct. 25, 2011), available at [http://content.dcf.ks.gov/ees/keesm/implement\\_memo/11-1-11%20implementation%20memo.pdf](http://content.dcf.ks.gov/ees/keesm/implement_memo/11-1-11%20implementation%20memo.pdf).

240. See *id.* at 5–6.

241. Moffitt et al., *supra* note 219, at 7.

242. *Id.* at 23–24. (In Moffitt’s table, only four states changed their policy to employ what this Article calls deprivative recognition. But since the publication of Moffitt’s study, Kansas has also changed its policy).



### 3. Traditional Deprivative Recognition as a Regulatory Mechanism

Is traditional deprivative recognition a necessary response to the changes in family structure and to the risk that people use their nonmarital status to gain financially, or is it an unfair mechanism that strips people of vital financial resources?

One sensible perspective is that the policy of deprivative recognition only unveils the real function of the family and it is therefore a justified policy. It is an appealing apparatus because it responds to the proliferation of nonmarital partners who enjoy more benefits than their household justifies.<sup>243</sup> Such a mechanism allows the state to divert resources to families who truly need them, or who need them more. Amy Wax, for example, explains that the previous welfare policies, which allowed unmarried partners to benefit from their nonmarital status, were “viewed as unfair and corrosive of public morals.”<sup>244</sup> Policy that benefits nonmarital unions, moreover, encourages people not to get married—in order to get bigger grants—thus standing in contradiction to the welfare metastrategy of promoting marriage.<sup>245</sup> Others could consider deprivative recognition as a progressive course, as it departs from brightline rules of marriage versus nonmarriage and employs a functional test to uncover the relationship between the partners and their eligibility for the benefit, based on the purpose of the law.<sup>246</sup>

Looking more broadly at the context in which traditional deprivative recognition has been, and is, operating reveals why it is not normatively justified. I suggest that deprivative recognition is more than a functional test to examine the genuine structure of the family vis-à-vis the benefit at stake. Rather, deprivative recognition is a selective regulatory mechanism policing only behaviors that are deemed immoral. Further, deprivative recognition generally produces inequity because it most often results in economic maldistribution of resources between the partners and between the state and the partners. Finally,

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243. Analogously, when an alimony recipient does not get married only to avoid the termination of alimony, deprivative recognition is an effective remedy responding to the recipient's strategic behavior and reflects the real family unit.

244. Amy L. Wax, *Norm Change or Judicial Decree? The Courts, the Public, and Welfare Reform*, 32 HARV. J.L. & PUB. POL'Y 45, 52 (2009).

245. See, e.g., Brenda Cossman, *Contesting Conservatism, Family Feuds and the Privatization of Dependency*, 13 AM. U. J. GENDER SOC. POL'Y & L. 415, 460–81 (2005) (documenting how one of the main purposes of TANF has been to promote marriage and traditional family values and structure).

246. Cf. POLIKOFF, *supra* note 48, at 126 (“A legal system in a pluralistic society that values all families should meld as closely as possible the purposes of a law with the relationships that that law covers. Marriage is not the right dividing line.” (emphasis omitted)).

deprivative recognition may halt the creation of new kinships. I provide four grounds for the assertion that deprivative recognition is an unjust policy.

First, the state uses deprivative recognition in areas that traditionally have been deemed to have moral implications.<sup>247</sup> Deprivative recognition, at least as it currently operates, is restricted mainly to eliminating alimony and welfare and thus reflects the long-held tradition that “transfer payments to assist needy children and their caregivers are considered pathological (‘welfare as we know it’), while transfer payments for widowed and disabled persons stay respectable, a kind of insurance.”<sup>248</sup> Thus, benefits to widows and widowers are only terminated if they remarry, but not if they cohabit. Conversely, alimony termination “punishes women for engaging in activity deemed immoral by legislators.”<sup>249</sup> The moral nature of deprivative recognition can be best seen by the fact that some states—ironically, those that employ the harshest method of deprivative recognition—exclude same-sex couples from alimony termination.<sup>250</sup>

The selective nature of deprivative recognition is clearer when one realizes that it stands in contradiction to the trend toward privatization of support in family law. Brenda Cossman observes that in the United States there are three (sometimes conflicting) influential conservative values: fiscal conservatism, libertarianism, and social conservatism. Cossman demonstrates that in family law the tendency is generally to shift the cost of support from the state to the private sphere—to the partners (fiscal conservatism).<sup>251</sup> But “[t]he privatization of support obligations has occurred only to the extent that it can be made consistent with the social conservative vision of the family.”<sup>252</sup> The social conservative vision of family is one that favors marriage over other relationships.

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247. Another theory that could explain why the state terminates benefits that stem from non-recognition in selective cases is the greater political power possessed by the constituencies that enjoy the benefit. For example, it is probable that the law maintains cohabiting couples' survivor benefits while terminating or reducing their TANF because the elderly—beneficiaries of survivor's benefits—enjoy greater electoral power than poor women who receive TANF benefits. The two theories—that deprivative recognition is selective based on morality or based on political power—can coexist, because even if one accepts that the different treatment is related to political power, then the policy is still unjust (because the groups that can protect their interests through the political process are treated more favorably).

248. Bernstein, *supra* note 27, at 182.

249. Ullman, *supra* note 199, at 480; *see also* HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* 463 (1968) (discussing the termination or reduction of alimony due to cohabitation under the rubric of “misconduct” of the wife).

250. *See* Bornstein, *supra* note 195, at 1035–36.

251. Cossman, *supra* note 245, at 420–21.

252. *Id.* at 421.

Supporting this view of conflicting social and fiscal conservatism is the case of spousal-support termination.<sup>253</sup> By terminating alimony (without imposing any automatic obligations on the new partnerships), the state diminishes the scope of private responsibility and even takes a risk that the previous recipients of alimony will now rely on welfare.<sup>254</sup>

A second justification for the argument that deprivative recognition is a selective legal mechanism is that it stands in striking incongruity to the way states are reluctant to ascribe marriage-like rules when they are actively sought by one of the partners. The justifications that states proffer for not extending legal protections to unmarried couples contradict the justifications for employing deprivative recognition.

California, a state that exercises an aggressive deprivative recognition policy in cases of both alimony and welfare, is a paradigmatic example of contradictory policies. In the two doctrines, the presence of a man in a woman's apartment raises a rebuttable presumption about financial interdependency. Ironically, while presuming economic interdependency based merely on common residency, California denies the extension of such a presumption when an unmarried couple seeks benefits or protections (both for recognizing obligations between the partners and for affording the benefits that spouses enjoy with respect to third parties). For instance, unmarried cohabitants in California have no standing to sue for loss of consortium based on injury to or the death of their partner;<sup>255</sup> cannot claim a cause of action for negligent infliction of emotional distress based on witnessing injury to their partner;<sup>256</sup> cannot sue for the wrongful death of their partner;<sup>257</sup> and are not eligible to claim unemployment compensation benefits if they quit work to accompany their

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253. Deprivative recognition in the welfare area works somewhat similarly: Terminating welfare could ostensibly lead to the privatization of support (the man, not the state, will support the welfare recipient). But that is true only assuming that the result of the reduction or elimination of the grant will lead to that, rather than to the separation (or at least the noncohabitation) of the couple. The policy is more consistent with the social conservative view because the policy is "familializing and gendering." Fiscal conservatives are more focused on transforming the mother into a productive worker, and so could choose a different strategy. *See id.* at 480–81.

254. Indeed, according to the Uniform Premarital Agreement Act, a court would not enforce—or would only partially enforce—a waiver of alimony in a prenuptial agreement if it would result in the recipient's eligibility for public assistance. A similar provision that prohibits the termination of alimony in such case—or court decisions that deny termination of alimony because the recipient would be eligible for public assistance—do not exist, as far as I know.

255. *Elden v. Sheldon*, 758 P.2d 582, 588–90 (Cal. 1988).

256. *Id.* at 588.

257. *Garcia v. Douglas Aircraft Co.*, 184 Cal. Rptr. 390, 393 (Ct. App. 1982).

partner (but would be eligible if they were married).<sup>258</sup> While cohabitants can sue each other to enforce expressed or implied agreements for alimony or property distribution, the cohabitation does not shift the burden of proof to the cohabitant who denies the obligations, and the contract must be provable in any case; in other words, here, a presumption of economic interdependence does not exist.<sup>259</sup>

Courts often rationalize their decision not to extend rights to unmarried couples by reference to evidentiary problems.<sup>260</sup> Accordingly, when the state does not presume an economic duty between unmarried partners in terms of benefits and mutual obligations, it is responding to evidentiary and bureaucratic problems in recognizing these couples. Indeed, exploring and proving the economic and emotional nature of such partners involves some difficulties.<sup>261</sup> Moreover, courts are allowed to use presumptions in different way when it concerns different issues. But this problem has not stopped the state from raising a presumption of economic interdependency when it seeks to eliminate benefits. Common residency is sufficient to raise such presumption for the purpose of ending or reducing social welfare and alimony. Thus, there should be no difference in presuming economic interdependency for the purposes of wrongful death, employment compensation, and alimony upon separation.<sup>262</sup> Presumptions reduce litigation costs for the parties and further judicial economy.<sup>263</sup> Therefore, I do not argue that courts cannot raise presumption of independency in case of terminating a benefit from unmarried partners,

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258. *Norman v. Unemployment Ins. Appeals Bd.*, 663 P.2d 904 (Cal. 1983).

259. *See Marvin v. Marvin*, 557 P.2d 106, 121–22 (Cal. 1976); *Schafer v. Superior Court*, 225 Cal. Rptr. 513, 517 (Ct. App. 1986) (ruling that the *Marvin* remedy is based on contract law).

260. *See, e.g., Norman*, 663 P.2d at 910 (“Recognizing and favoring those with established marital and familial ties not only furthers the state’s interest in promoting such relationships but assures a more readily verifiable method of proof.”).

261. *See, e.g., Garrison*, *supra* note 41, at 311 (“Marital intent is subjective; when not publicly expressed, it is extraordinarily hard to prove.”).

262. In this regard, one could argue that the state can justify recognizing a couple for one purpose and not for a different purpose. Accordingly, it is well established that different administrative agencies can examine different factors in different cases. For example, the state’s concerns in granting tax benefits are different from those it has regarding wrongful-death standing. But the state cannot raise a presumption based on the same fact (cohabitation) and then deny the presumption in another, similar case. In the same way that issue preclusion “prevents the relitigation of an ‘issue’ decided in an earlier proceeding based on a different cause of action,” the state cannot argue that the same factor immediately presumes economic interdependency—or even immediately terminates alimony—but selectively contradicts it right afterward. Antonio Gidi, *Issue Preclusion Effect of Class Certification Orders*, 63 HASTINGS L.J. 1023, 1026 (2012); *see also* Fara Agrusa, *Court of Appeals Applies the Doctrine of Collateral Estoppel to an Administrative Determination*, 63 ST. JOHN’S L. REV. 154 (1988) (discussing issue preclusion by administrative agencies).

263. Antonio E. Bernardo et al., *A Theory of Legal Presumptions*, 16 J.L. ECON. & ORG. 1 (2000).

while refusing to raise such presumption when unmarried partners seek benefits. What I argue is that the different treatment is illuminating why the evidential inquiry that accompanies request for recognition for benefits by unmarried couples cannot be justified alone as a reason to reject their requests. Moreover, deprivative recognition involves termination or withholding of benefit that either court (in divorce proceedings) or the state (in welfare) has already granted to the party. Termination of this benefit, thus, requires more caution than a decision to grant it.

The state can also rely on marriage promotion grounds to justify treating recognition for the purpose of eliminating benefits differently from the way it treats recognition for the purpose of granting benefits. Surely, employing deprivative recognition, while not recognizing unmarried couples in claims for recognition that will benefit the partners, is congruent with marriage promotion policy.<sup>264</sup> By denying such recognition, a state incentivizes couples to get married: If a couple wants to enjoy a panoply of rights, the price is marriage. And if a couple enjoys benefits from nonrecognition, eliminating those benefits likewise encourages people to get married.

But even if the two policies are reconcilable, this does not make them legitimate. Deprivative recognition does not promote marriage—marriage too will result in the elimination of the benefit (for example, the income of the spouse will be calculated for welfare purposes; alimony will be terminated). Thus, it is doubtful that deprivative recognition encourages marriage, rather than only preventing cohabitation in certain populations. And forcing people to marry when they are not ready or do not want to do so is not a tenable policy.<sup>265</sup> If the purpose of the policy is to cause people not to cohabit (in order to avoid benefit termination) then it is also questionable whether it is a wise policy. Because most marriages today are preceded by cohabitation, and because having another supporting person at home could be (but is not always) financially and emotionally advantageous, it may be in the state's interest to let these

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264. For the purpose of this article, I assume that marriage promotion is a permissible and even desirable state action. See generally Kaaryn Gustafson, *Breaking Vows: Marriage Promotion, the New Patriarchy, and the Retreat from Egalitarianism*, 5 STAN. J. C.R. & C.L. 269, 286–90, 301–08 (2009) (discussing the purposes of marriage promotion programs and criticizing the premise that marriage is the best status for families, arguing that marriage promotion policies both capture and further an anti-egalitarian sentiment, but do not implicate protected privacy interests).

265. Cf. Garrison, *supra* note 41, at 304 (“[M]arriage can be harmful as well as helpful . . . and some obvious marriage promotion strategies—for example, marriage incentives that produce more ‘shotgun’ marriages—could easily increase the number of weak marriages and thus work more harm than good.”).

partners stay together. Finally, it is doubtful that a policy is valid whose purpose is to discourage partners to cohabit for moral reasons alone.

To clarify, I do not argue that a state has to provide the same protections and benefits to married and unmarried partners.<sup>266</sup> But withholding benefits from unrecognized partners and at the same time denying them protections that stem from the very same relationships is tantamount to penalizing these partners based on a particular moral viewpoint.<sup>267</sup> The consequence of recognizing cohabiting couples in order to eliminate benefits and simultaneously not recognizing them commonly (preventing access to other benefits) is not simply that they are not provided an advantage, but it is much more burdensome in that these couples are penalized for not being married.<sup>268</sup> Further, such a policy is most harmful to partnerships in which there are power differences between the partners, particularly if the wealthier party does not want to make a financial commitment. In such cases, terminating the benefit but not obligating the refusing party to take financial responsibility does not promote marriage—it promotes economic injustice.

The third justification for the proposal that deprivative recognition produces inequity is that it can lead to economic maldistribution. By calculating the income of both partners together in order to terminate a benefit, the state assumes—without reason—that the couple is economically interdependent, although cohabitation does not warrant any duties of support between the couples.<sup>269</sup> Indeed, “the mere fact of living together provides little evidence of

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266. See REGAN, *supra* note 119, at 127 (justifying distinctions in treatments of unmarried couples for the purpose of the state’s and third parties’ benefits, based on a marriage promotion justification).

267. Cf. Garrison, *supra* note 41, at 296 (“Because cohabitation typically does not produce the same income-pooling benefits as marriage, a policy based on the assumption of income-pooling by cohabitants is counterfactual and might produce serious inequity . . .”).

268. In addition, a marriage promotion policy can encourage marriage in society in some ways, like providing couples with counseling, but such an invasion into people’s autonomy in choosing relationships exceeds the legitimate authority of the state to promote marriage. See Gustafson, *supra* note 264, at 303 (“State Healthy Marriage programs may encourage, or even require, welfare recipients to attend pro-marriage counseling but do not require them to marry. Some of the initiatives provide welfare recipients who marry more money than they currently receive, but do not propose giving unmarried recipients any less than they currently receive.”).

269. There are various studies, with somewhat different results, about the percentage of couples who share their incomes. There are also variations in the patterns of pooling income between subgroups of cohabitants. See BOWMAN, *supra* note 59, at 138–41. To generalize, about 50 percent of cohabitants do pool their incomes to some extent. See *id.* These numbers are limited to cohabitating opposite-sex couples. They do not say anything about nonintimate partners who share households, not to mention partners who do not live together.

what their relationship means.”<sup>270</sup> Thus, the result of deprivative recognition could be stripping people of an important financial resource without providing a new one and without considering whether there has been an economic change in their situation.

Fourth, deprivative recognition is an undesirable policy because it constructs a palpable barrier to the creation of new kinships and relationships. That is, partners must consider carefully before they move in together because the financial consequences—or, at least, the invasive inquiry that will most likely occur—will be harmful. Moreover, this hurdle to the creation of new living arrangements targets precisely the groups that need less-traditional living arrangements for support. Those who live with relatives, friends, and caregivers in the same apartment are overwhelmingly the elderly, the disabled, and people from low-income populations.<sup>271</sup> It is true that deprivative recognition generally exempts nonintimate partnerships. But deprivative recognition policies impose a bureaucracy to investigate the nature of the relationships, which is already a burden (one reason is because it could require people to define their relationships when they are not ready to do so). In the welfare context, for example, having an unrelated adult in one’s apartment almost immediately invites questions from social workers and could easily deter people from living together.<sup>272</sup>

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270. Garrison, *supra* note 41, at 312.

271. See, e.g., Jong Won Min, *Cultural Competency: A Key to Effective Future Social Work With Racially and Ethnically Diverse Elders*, 86 FAM. SOC’Y 347, 351 (2005) (describing how family and support networks are especially important to elderly people of color).

272. We can infer deprivative recognition’s harm to the creation of new supportive networks from the following story. Tadeusz M. Sypek and Maria S. Sypek had a separation agreement that included a cohabitation-termination provision: “Support payments shall terminate upon the Wife’s remarriage or if the Wife takes up residency with another man to whom she is not married.” In this case the parties themselves—rather than the state—contracted about this term. But the way that the provision was enforced was the same as with the statutory cohabitation-termination rule. Thus, in this case, the husband sued the wife to terminate alimony payments after the ex-wife moved into the apartment of a ninety-seven year old blind person who “cannot ambulate without a walker, and . . . has a pacemaker, a hearing aid, a truss for his rupture, and a leg brace.” The ex-wife’s job was as his housekeeper and caregiver. The ex-husband claimed that the separation agreement said that termination of alimony would take place upon her residing with another man, regardless of the type of relationship. The court, quite angry about the injustice and absurdity of the claim, rejected the husband’s suit and obliged him to pay attorney’s fees. But this case shows the harm to the creation of networks of support: When someone needs to fear a termination of alimony when moving for work, this is a real hurdle to the development of new living arrangements. This is of course an extreme case and one that was initiated from an act of private ordering, but there is no reason to believe that cohabitation-termination rules would not function the same way. See *Sypek v. Sypek*, 497 N.Y.S.2d 850, 851–53 (Sup. Ct. 1986).

## B. Unintended Deprivative Recognition

Unintended deprivative recognition is another subcategory of purely ascriptive recognition. Currently, the only case—that I know of—that falls under this category is the new financial aid rule. While the results of unintended deprivative recognition are similar to those of traditional deprivative recognition (that is, the partners are deprived of a vital benefit that stems from their relationships, while being denied other benefits that stem from recognition), here the state actually has some interest in the cultural recognition of the relationships.

The new rule for calculating federal financial aid eligibility for dependent students with unmarried cohabiting parents is different from traditional deprivative recognition and may be the harbinger of a new type of deprivative recognition—one that does not stem from animus against less traditional families.<sup>273</sup> It is unique for a few reasons. First, unlike the previously discussed examples of deprivative recognition, the financial aid rule is imposed by the federal government (as opposed to the states). Second, it responded to a demand for cultural recognition of a historically marginalized group. Third, the rule could be justified, as argued by Nancy Polikoff, as applying to parents rather than to partners—a progressive policy that shifts the focus from marital status to children's needs.<sup>274</sup> Accordingly, the parents should share the burden of raising the children (after they reach college age), and their marital status has nothing to do with the amount of financial aid that their children receive.

Despite good intentions behind the rule and the progressive justification for it, the new federal financial aid rule also leads to deprivation, because under the current American legal system, parenthood and coupling are not entirely separate. Significant financial benefits accrue to married parents that are unavailable to unmarried parents merely because of their marital status. The deprivative nature of

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273. It is possible to categorize the financial aid rule differently: decoupling parentage from adult relationships (recognizing parenthood without ascribing partnership rights on the parents). Under this category, parents are recognized solely for their duties as parents, but if they are partners their relationships go unrecognized. The question of recognizing parenthood without recognizing partnership is complex, and exceeds the scope of this paper. For the purpose of this paper and for the category of unintended deprivative recognition, suffice it to say that, as recognized by several courts during the litigation of same-sex marriage, segregating parenthood from partnership is not easy; and when the partnership is unrecognized, this has direct financial consequences on the parents. See, e.g., *Perry v. Schwarzenegger*, 704 F.Supp.2d 921, 973 (2011).

274. Nancy Polikoff, *Financial Aid Changes for Children of Same-Sex (and Other Unmarried) Couples*, BEYOND (STRAIGHT AND GAY) MARRIAGE (Apr. 30, 2013, 11:15 AM) <http://beyondstraightandgaymarriage.blogspot.com/2013/04/financial-aid-changes-for-children-of.html>.



unintended deprivative recognition stems from its asymmetrical nature: It recognizes the partners only for purposes of withholding a benefit, and bestows some cultural recognition on some parents who were disregarded by the law previously. But the recognition still results in financial determinant to the parents.

### C. The Regulatory Effect of Deprivative Recognition

Analyzing deprivative recognition uncovers another layer of existing regulation that affects the lives of those in unrecognized relationships. While some scholars, such as Lieb<sup>275</sup> and Rosenbury,<sup>276</sup> astutely acknowledge that some regulations already direct and influence the lives of the unrecognized, this Article exposes a layer of regulations that thus far has not been explored. Regulation of nonmarital unions is more complex than generally assumed and sends a complicated (but well-understood) message: Deprivative recognition signals that some people should get married—otherwise, they will be penalized (by withholding some support but not adding new sources of support). Alternatively, partners who need support (from the state or from their ex) should not live together. At the same time—despite the fact that no state mandates obligations of support between unmarried partners—by withdrawing other sources of support from the new partner, this regulation both assumes and communicates that unmarried intimate partners are expected to support each other financially. By focusing on alimony—an order that is provided primarily to women—deprivative recognition also sustains traditional gender roles, assuming that men do and should support women. Nonintimate partners, conversely, are exempt from such requirements, thus reinforcing the idea that nonintimate unions are still inferior to others and cannot serve as primary relationships. In such ways, deprivative regulation polices people's interpersonal behaviors.

The influence of deprivative recognition and its prevalence could increase the more that the number of nonmarital unions grows. Further, it is unclear whether nonintimate relationships will remain immune from deprivative recognition. Recall that the most progressive alimony law (Massachusetts') has already moved—at least theoretically—toward interdependency, rather

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275. LEIB, *supra* note 157, at 78–79 (arguing that the law is already present in the life of friends and providing examples from criminal and corporate law in which friendship is given special consideration).

276. Rosenbury, *supra* note 122, at 202–07 (contending that, by ignoring friendship, the law regulates people's preferences in terms of organizing their relationships around marital relationships while devaluing others).

than sexual activity, as the main factor determining recognition of partnerships that warrant termination of alimony. And, concerning the legal recognition of nonintimate partners, if such partners were to enjoy similar benefits as other partners, what reason is there to distinguish them from intimate partners—including for the purpose of imposing duties?

Indeed, recognizing friends exemplifies one of the tensions that exist between the aspiration of recognizing the plurality of relationships and the adverse effect that such recognition can have. Taking a simple approach for the moment, the state is faced with two options—both result in undesirable consequences. One, the state could simply ignore friendship, as it currently does. But as has been argued in Part II, complete nonrecognition of friendship relationships results in both cultural and economic harm. Further, if a couple of friends create a relationship that is financially and emotionally interdependent, why should it have a different consequence on the receipt of alimony or welfare benefits than intimate relationships have? Alternatively, the state can legally recognize relationships between friends who live together for a certain time for purposes of rights, protections, and duties. Such legal recognition, however, can result in cultural misrecognition because not all friendships are the same, and many do not create economic interdependency. Such recognition can also result in economic injustice if the friends are not economically interdependent.

Recognition of nonmarital unions thus raises the question whether it is possible to legally recognize more types of relationships without causing financial detriment and cultural harm; and if the answer is yes, then the question becomes, how can this be done? Assuming, for the moment, that the state has an interest in legally recognizing partners in nonmarital unions (for duties and for protections), such recognition has to follow some sort of ascription. But ascription, as we have already seen, raises questions of economic injustice and cultural recognition. Put differently, is there a way to settle the tension between cultural recognition (recognizing more types of relationships) and distributive justice in the law governing unmarried partnerships?

The tension between cultural recognition and distributive justice is not unique to family law. It is an inherent tension that stands at the center of the debate in other scholarly disciplines. Understanding this tension helps one to better understand both the tensions between proposals for more recognition of relationships and the possible resultant financial detriment, and the way to resolve this tension. The next Part returns to the scholarship discussed in Part II and examines how to integrate the double-edged sword of recognition into proposals for legal change.

#### IV. RECOGNITION AND REDISTRIBUTION IN FAMILY LAW

The previous Part has shown how ascription can lead to economic injustice. Responding to this finding, in this Part, I take one step back from deprivative recognition to examine more broadly the connection between cultural recognition and economic redistribution in the law of unmarried partners. My goal is to offer a theoretical tool that will settle the tensions between cultural recognition and economic justice in family law. In other words, I investigate how family law can fulfill its dual fundamental goals—redistributive justice and cultural recognition of relationships—such that neither goal negates the other.

To accomplish this, I look at the question from a theoretical angle. I first examine what cultural recognition means as a philosophical and political value. I identify the rise of cultural-dignitary recognition with the appearance of multiculturalism and briefly present the main and most recent theories of recognition. I then introduce Nancy Fraser's critique of recognition as an inadequate social justice claim that does not meet the demands of distributive justice and her alternate analytical perspective of recognition and redistribution. Using Fraser's work as a point of departure, I turn back to the law of unmarried partners. Extrapolating on Fraser's work, in Part IV.B, I explore how Fraser's dual paradigm should guide family law in the search for policy that accommodates the needs of nonmarital partners.

##### A. Recognition Versus Redistribution

Cultural recognition, as a social justice claim, has gained prominence in social movements and politics since the 1960s.<sup>277</sup> Such claims have been typical and central to struggles over sexual, gender, and racial equality.<sup>278</sup> The debate over what exactly "recognition" means is the subject of much discussion.<sup>279</sup> For the purposes of this Article, it is sufficient to note that the struggle for recognition is characterized by a political group that demands cultural ac-

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277. See Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 25, 37–38 (Amy Gutmann ed., 1994); SIMON THOMPSON, *THE POLITICAL THEORY OF RECOGNITION: A CRITICAL INTRODUCTION* 2 (2006) (suggesting that recognition as a political claim emerged from the collapse of democratic consensus during the late 1960s and was replaced by political movements that embraced multicultural notions).

278. See FRASER & HONNETH, *supra* note 33, at 1; Taylor, *supra* note 277, at 36–37.

279. See, e.g., Paddy McQueen, *Social and Political Recognition*, INTERNET ENCYCLOPEDIA PHIL., [http://www.iep.utm.edu/recog\\_sp](http://www.iep.utm.edu/recog_sp) (last updated Apr. 8, 2011).

knowledge for some feature it possesses, a collective identity.<sup>280</sup> That is, the demand for equality is not conditioned on assimilation to the norms of the dominant majority.<sup>281</sup>

The origin of recognition as a normative philosophical backbone is old, reaching back to Hegel's well-known dialectic on the master-slave and the notion of "the struggle for recognition."<sup>282</sup> Responsible for its resurgence to the academic front in the late twentieth century are primarily the theoreticians Charles Taylor and Axel Honneth. In a nutshell, Taylor asserts that recognition "is a vital human need" because people's identities are shaped, formed, and determined by the way other people recognize them.<sup>283</sup> Because recognition is such a necessity, misrecognition "can inflict a grievous wound, saddling its victims with a crippling self-hatred."<sup>284</sup> This respect for identity should be applied to the public sphere as well. Taylor also differentiates between politics of equal recognition and politics of differences. The former is founded on formal equality and universalism: All subjects are treated similarly. The latter accommodates peoples' and groups' uniqueness and differences while not forcing assimilation to the dominant culture. A politics of cultural recognition supports the politics of differences. Similarly, Honneth conceptualizes all social and political conflicts as expressions of the struggle for recognition.<sup>285</sup>

The intervention of the American critical theorist Nancy Fraser is in pointing out the inadequacy of recognition as a sole normative claim. Her central argument is that the rise of the politics of recognition has eclipsed the

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280. See THOMPSON, *supra* note 277, at 3.

281. See FRASER & HONNETH, *supra* note 33, at 7.

282. See generally G. W. F. HEGEL, PHENOMENOLOGY OF SPIRIT 230–70 (A.V. Miller trans., 1977). In this subchapter, Hegel tells the story of two consciousnesses that try to achieve independence in the world. But one consciousness understands that it cannot reach approval and independence without the recognition of the other consciousness. The problem is that the existence of the other consciousness, which also looks for independence, threatens the independence of the first consciousness and it starts "a life-and-death struggle." In the struggle, the two self-consciousnesses confront one another. The struggle ends in the creation of an asymmetrical relationship between a master—who won because he was ready to sacrifice his life—and a slave—who was ready to give up in order not to lose his life. Ostensibly, the master becomes superior but he does not enjoy the recognition he receives from the slave, who is his inferior. The slave, on the other hand, succeeds in developing a better sense of self-consciousness and creates a world through his work. This change gradually leads them to reconceptualize their relationship in a way that each recognizes the other. See *id.*

283. Taylor, *supra* note 277, at 25–26 (describing "identity" as "a person's understanding of who they are, of their fundamental defining characteristics as a human being.").

284. *Id.* at 26.

285. AXEL HONNETH, THE STRUGGLE FOR RECOGNITION: THE GRAMMAR OF SOCIAL CONFLICTS 137–40 (1995).

previously dominant politics of redistribution: a social struggle that was focused on injustices that stem from socioeconomics and whose remedy was the fair distribution of resources.<sup>286</sup> Currently, the widely acknowledged injustice is misrecognition and, in accordance, the remedy has become recognition—a development that has risked neglecting the struggle for distributive justice. She also contends that social justice endeavors are presented as focusing on pursuing either recognition or redistribution—as offering distinct and opposite views on social justice.<sup>287</sup> On the surface, according to Fraser, recognition and redistribution are incommensurable because they treat group differences in a contradictory fashion. Redistribution is founded on locating classes as a result of an unjust political economy and seeking to abolish group differences. Conversely, cultural recognition struggles can either advocate for the celebration of differences or for the deconstruction of differences.<sup>288</sup> When recognition strives to celebrate differences and redistribution aims to abolish differences, there are tensions between the proposed remedies. But, according to Fraser, the contradictory nature of these claims is a “false antithesis.”<sup>289</sup>

In fact, recognition and redistribution, as “folk paradigms of justice,” are not mutually exclusive alternatives.<sup>290</sup> Fraser contends that “[v]irtually all real-world axes of subordination can be treated as two-dimensional,” meaning that they all “implicate both maldistribution and misrecognition.”<sup>291</sup> For example, gender can be interpreted as a classlike differentiation because it structures the division between paid productive labor and unpaid domestic work. The remedy in accordance is redistributive redress: the abolition of gender as a class. At the same time, “gender appears as a status differentiation, rooted in the status order of society.”<sup>292</sup> This status subordination—expressed by sexual harassment, domestic violence, unequal representation, and more—is a result of devaluing femininity and is a part of the harm of cultural misrecognition.

While these two harms—cultural and economic—can intersect, they are not byproducts of the other; rather, each has some independence. Addressing only one of them will not solve the problem.<sup>293</sup> But the two remedies are not

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286. See Fraser, *supra* note 32, at 68, 70–74 (1995) (“[G]roup identity supplants class interest as the chief medium of political mobilization.”).

287. FRASER & HONNETH, *supra* note 33, at 12–15.

288. *Id.* at 15.

289. *Id.* at 16.

290. See *id.* at 11.

291. *Id.* at 25.

292. Nancy Fraser, *Feminist Politics in the Age of Recognition: A Two-Dimensional Approach to Gender Justice*, 1 *STUD. SOC. JUST.* 23, 26 (2007).

293. See *id.*

easily pursued simultaneously. Abolishing economic injustice means abolishing the gendered division of labor. If one views gender merely as a redistributive problem, then the remedy is abolition of gender as class.<sup>294</sup> The remedy for cultural injustice is recognition—overcoming sexism and misogyny by revaluing the status and practices of women. The problem with these two remedies is that they could run counter to each other: Redistribution seeks to abolish gender differences while recognition seeks to elevate these differences.<sup>295</sup>

In order for the dual claims to coincide, Fraser suggests adopting transformative remedies rather than affirmative remedies.<sup>296</sup> Affirmative strategies are “remedies aimed at correcting inequitable outcomes of social arrangements without disturbing the underlying framework that generates them.”<sup>297</sup> Transformative remedies “mean remedies aimed at correcting inequitable outcomes precisely by restructuring the underlying generative framework.”<sup>298</sup> For example, consider the politics of identity as applied to gay rights, a strategy that aims to present homosexuality as an essentialist identity in order to end discriminatory policies (affirmative remedy), rather than confronting and deconstructing the societal distinction of gay versus nongay (transformative remedy).<sup>299</sup> In the distributional aspect, examples of an affirmative remedy include the welfare state: programs that help to recover maldistribution but do not change the underlying structural problems that cause economic injustice.<sup>300</sup> Transformative strategies in distributive justice are those that reduce social inequality without creating stigmatized groups of recipients.<sup>301</sup> Fraser contends that the combination of transformative recognition with transformative redistribution results in the most plausible plan because it is the only combination that would not end in perpetuating one or the other injustice.

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294. See Fraser, *supra* note 32, at 76.

295. Fraser provides similar accounts of contradictory remedies in the sexual and racial arenas. See *id.*

296. *Id.* at 89–91.

297. *Id.* at 82.

298. *Id.*

299. Identity politics is the use and emphasis of a group’s unique character in order to achieve political goals. It promotes an essentialist view of the group. There is ample critique on the use of identity politics, most recently in the gay rights movement. The main critique is that such politics can perpetuate a monolithic or inflexible view of the group. See, e.g., Richard T. Ford, *Beyond “Difference”: A Reluctant Critique of Legal Identity Politics*, in *LEFT LEGALISM/LEFT CRITIQUE* 38, 55 (Wendy Brown & Janet Halley eds., 2002).

300. Fraser, *supra* note 32, at 84.

301. *Id.* at 85 (“Transformative remedies typically combine universalist social-welfare programmes, steeply progressive taxation, macro-economic policies aimed at creating full employment, a large non-market public sector, significant public and/or collective ownership, and democratic decision-making about basic socioeconomic priorities.”).

Tensions similar to those identified by Fraser exist in the law of unmarried partners. Below, I explain this dilemma in more detail—by applying it to specific proposals and theories—and suggest how to resolve it.

## **B. Beyond Recognition**

Scholarly proposals aimed at repairing the legal situation of unmarried partners face a similar set of tensions as those analyzed by Fraser: recognition of people in nonregistered unions requires ascription; ascription often leads to contradiction between cultural recognition and economic justice. Multiple scholarly proposals exemplify this tension; the purpose of this Subpart is first to deconstruct these disagreements. Section II.A showed how some family law scholarship identifies the combination of economic and cultural injustices as the harm of marriage exceptionalism. But Parts II and III also raise questions about the ability of major proposals in family law to encompass both perspectives without reducing one to the other. One central problem with these proposals is that, recognition remedies are decoupled from redistribution remedies, and eventually eclipse the latter. This Part examines these tensions in a theoretical and systematic fashion. At the same time, it helps to reconcile the squabble, suggesting a way to rethink regulation in the field in a way that economic justice and cultural justice are compatible.

### **1. Deconstructing Proposals for Recognition**

The following table catalogues major proposals according to their suggested remedies, allowing us to elucidate the tensions between them and the tensions in policies concerning unmarried partners in general. Ultimately, it also shows which proposals will result in maldistribution or misrecognition, and which will cross this hurdle and achieve both.

TABLE 1.

	Affirmative	Transformative
Redistribution <sup>302</sup>	Ascribing obligations between partners regardless of their clear consent; could result in misrecognition (and maldistribution for those who benefit from nonrecognition) (ALI, Bowman)	Duties and rights are distributed based on family function; supports care-work and vertical relationships rather than horizontal relationships and marriage (Polikoff, Fineman)
Recognition	Recognition of nonmarital unions; cultural respect toward marginalized relationships; supports relationship differentiation (Leib, Lifshitz)	Recognition based on the value of the relationships rather than status; reconstructions of relationships; blurs relationship differences (Rosenbury, Franke)

In the first cell, where redistribution and affirmation intersect, we find the proposals whose remedies aim primarily to solve economic maldistribution. These proposals suggest status-based legal recognition of marriage—like unions to prevent unfair economic distribution. They are less concerned about cultural misrecognition.<sup>303</sup> The redistributive nature of these proposals—versus their secondary treatment of dignitary recognition—becomes clearer because such remedies can result in misrecognition if they assign recognition status to people who are not interested in it. The proposals also risk blurring group differentiations since most cohabitants are treated the same. At the same time, the proposals aim to apply only to intimate partners, thus still maintaining cultural misrecognition of nonintimate partnerships. In addition, despite their redistributive intention, the proposals can result in economic detriment for those who enjoy financial gain from nonrecognition. Both proposals are affirmative because they suggest only an ad hoc solution

302. “Redistribution” here is broadly defined and includes wealth transfers between the partners and division of resources by the state.

303. Unjustified economic loss can also be a dignitary loss; and the economic loss stems from the devaluation of nonmarital unions. But the response and the problem are mainly about unfair financial loss to nonmarital relationships and the devaluation of domestic work. Bowman, *supra* note 59, at 9 (providing examples of typical harm that is incurred by unmarried cohabitants, all of them related to financial loss).



rather than targeting the source of the problem: the focus on status rather than on the function of the family.

In the second cell, where redistribution and transformation intersect, is the project of “valuing all families,” as described by Polikoff.<sup>304</sup> This is not a clear-cut categorization for this work, because Polikoff cares deeply about the cultural and symbolic harm that stems from marriage exceptionalism and suggests a few remedies to fix it.<sup>305</sup> But looking at her model overall and its principles clarifies that her remedies are mainly distributive in nature, in the sense that they tend to focus on ways in which resources are allocated (and stem from her respect for care-work and human need) rather than on the cultural value that is attached to specific types of families.<sup>306</sup> In fact, Polikoff’s proposal tends to blur group differentiation in that it moves away from status (such as marriage and registration) as the prerequisite for fair assistance and protection.<sup>307</sup> Likewise, Fineman suggests distributive transformative reform. Rather than subsidizing and supporting adult relationships, the state needs to distribute resources to support “derivative dependents”—those who provide support to those who cannot care for themselves—rather than supporting adult relationships.<sup>308</sup> Her theory thus is transformative because it shifts the view from adult relationships to support of care and radically transforms the conditions that merit allocation of resources. Both proposals emphasize vertical relationships and *de facto* give more force to care-work—and thus tend to disfavor recognition of types of adult relationships that are not based predominantly on care-work.

In the third cell, where recognition and affirmation intersect, are proposals that support cultural recognition of more types of relationships, and ask to distinguish these groups from others. Those who promote such recognition, on the one hand, would encourage the law to bestow greater protections on nonmarital partners. On the other hand, they insist on distinguishing between types of nonmarital unions by ascribing different sets of rules to each group. In other words, affirmative recognition advocates more group differentiation.

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304. POLIKOFF, *supra* note 48, at 123–45.

305. For example, Polikoff suggests that marriage as a legal institution will be changed to “civil partnership,” because “[m]arriage’ has a long history of exclusion.” *Id.* at 132.

306. For instance, the “three key principles for valuing all families”—“place the needs of children,” “support the needs of children,” and “recognize adult interdependency”—are all concerned about distribution of resources, either between the state and the caregivers or between the adults. *Id.* at 137–43.

307. Further, as indicated by Rosenbury, Polikoff’s proposal privileges dependent care and interdependence “by implying that domestic caregiving should be the essential element of the states’ definitions of family.” Rosenbury, *supra* note 122, at 200.

308. FINEMAN, *supra* note 165, at 161–65.

For example, while Leib's remedies are somewhat distributive in their nature (recognizing friendships for specific financial purposes, holding fiduciary duties),<sup>309</sup> he does not want friends to be treated similarly to intimate partners.<sup>310</sup> Thus, for instance, he does not support the creation of a registry for friendships. He wants the law to recognize the cultural value of friendships, but only as far as they remain a distinct group from other types of relationships. Leib's proposal is affirmative in its nature. While he acknowledges the structural problems associated with marriage exceptionalism, his remedy is limited to providing some rights and protections to friends because ending the overall problems of relationship regulation is unrealistic.<sup>311</sup> Likewise, Lifshitz advances the "case against equalizing the mutual obligations of cohabitants and married partners."<sup>312</sup> Under his proposal, cohabitants would be divided into a few types, who would be treated differently. His cultural recognition ratifies strict differentiation between types of relationships and is restricted to intimate partnerships.<sup>313</sup>

In the fourth cell, where recognition and transformation intersect, are the projects that extend value into more types of relationships while deconstructing hierarchies of relationships. Rosenbury's claim is mainly critical of the symbolic harm that stems from misrecognition of friendships and the way that the legal division between intimate and nonintimate relationships perpetuates gender inequality.<sup>314</sup> Unlike Leib, who is occupied with affirmative recognition, Rosenbury's main enterprise lies in deconstructing the privileges attached to in-home (domestic) relationships.<sup>315</sup> In a similar fashion, Franke

309. Eric Posner, who reviews Leib's book, also concludes that "[i]t quickly becomes clear that when Leib says friendship should be subject to 'regulation,' he does not mean anything as radical as that term conjures up." Eric A. Posner, *Huck and Jim and Law*, NEW REPUBLIC (Feb. 21, 2011), <http://www.newrepublic.com/book/review/friend-transformation-ethan-leib> (reviewing ETHAN J. LEIB, *FRIEND V. FRIEND: THE TRANSFORMATION OF FRIENDSHIP—AND WHAT THE LAW HAS TO DO WITH IT* (2011)).

310. Cf. LEIB, *supra* note 157, at 82–83.

311. *Id.* at 72–73.

312. Lifshitz, *supra* note 16, at 1569.

313. See *Id.* at 1586 ("Yet, even those who believe that, in certain instances, cohabitation relationships reflect such implied or relational contracts cannot ignore the fact that, in other cases, refraining from marriage indeed reflects a conscious rejection of marriage and its legal consequences or that, in yet other cases, cohabitation serves as a kind of trial period prior to marriage.").

314. Rosenbury, *supra* note 122, at 191 ("This Article illustrates how family law's failure to recognize friendship impedes existing attempts to achieve gender equality through the elimination of state-supported gender role expectations.").

315. As stated before, Rosenbury's practical proposal is purposefully general (a guideline). In some interpretations, her remedy is considered affirmative recognition. Her normative commitment, however, is clearly transformative. *Id.* at 226 ("Although potentially useful as an interim strategy, changing the legal content of either family or friendship will likely not do enough to alter the incentives that push women to prioritize domestic relationships over

critiques arguments in favor of recognizing friendships as status, because such a stand “indulges the misplaced view that, if something important is at stake, law should regulate it.”<sup>316</sup> At the same time, she encourages the creation of more thoughtful menus of options that would recognize different types of relationships.<sup>317</sup>

Classifying these proposals exposes the problem that is inherent in ascription of status upon unregistered parents: when trying to solve one of the axes of the harm (either cultural harm or economic injustice) the proposals inflict the other injustice on the partners. This classification thus illustrates the tension between cultural recognition and distributive justice in the law of unmarried partners. But Fraser’s framework not only exposes the weaknesses of the proposals but also helps in formulating theoretical tools for how to recognize the plurality of relationship types while avoiding financial injustice.

## 2. Reconstructing the Differences

In order to find the way to achieve the goals of cultural and distributive justice for nonmarital partners, we need to see which combination of recognition and distribution would reduce the problems of nonrecognition and maldistribution. From Fraser we know already that transformative remedies can work together—but we need to see how to apply it in family law.

One grouping that does not work together is affirmative redistribution (Bowman, ALI) with transformative recognition (Rosenbury, Franke). The project of assigning status and “expanding the shadow of marriage” is at odds with the project of deconstructing marriage and the hierarchy of sexual and nonsexual relationships.<sup>318</sup> Acknowledging the variety and complexity of relationships as proffered by transformative recognition is antithetical to protecting only marital-like relationships, as advanced by affirmative redistribution.

Another pair that is at odds is affirmative redistribution (Bowman, ALI) with affirmative recognition (Leib, Lifshitz). Affirmative redistribution remedies aim to reduce differences between some types of relationships (married and

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other relationships. Instead, such approaches risk reinforcing the line between friends and family, thereby strengthening the existing hierarchies of care instead of challenging them. In order to alleviate these risks, family law scholars must move beyond the construction of the family in order to examine the construction of family law as a whole.”).

316. Franke, *supra* note 123, at 2703.

317. Katherine Franke, *Civil Unions in Hawaii and Illinois: How'd They Get it Right?*, HUFFINGTON POST (Feb. 23, 2011), [http://www.huffingtonpost.com/katherine-franke/civil-unions-in-hawaii-an\\_b\\_827132.html](http://www.huffingtonpost.com/katherine-franke/civil-unions-in-hawaii-an_b_827132.html).

318. See Franke, *supra* note 123, at 2697 (“The intended effect of the ALI Principles is to enlarge marriage law’s shadow.”).

cohabitants) by creating statuses that bring more people under the scope of the law and treat them similarly to married couples. Affirmative recognition, on the other hand, fosters further group differentiation. Affirmative recognition and affirmative redistribution are counteractive because affirmative redistribution provokes misrecognition of differences between relationship types, while affirmative recognition asks to formalize the differences in types of relationships.

A more plausible combination is affirmative redistribution (Bowman, ALI) with transformative redistribution (Polikoff, Fineman). Indeed, in her book, Polikoff endorses the ALI recommendations.<sup>319</sup> But these two remedies can be at odds, too. This is because affirmative redistribution is primarily about finding a way to create a better division of resources, but is limited to marriage-like relationships in which the couples share the same residence. Conversely, transformative redistribution is dedicated to changing the deep structure of the economics of relationships and to transforming the distribution of resources from status-based to need-based. That is, transformative redistribution aspires to move away from marital rules toward a vindication of caregiving and dependent caregiving, regardless of the status of the family.

Transformative redistribution (Polikoff, Fineman) paired with transformative recognition (Rosenbury, Franke) is the combination that can most readily address both economic maldistribution and cultural recognition of diverse types of relationships without increasing disparity in those areas. Transformative redistribution would verify that rights and privileges from the state, and obligations between partners, are being distributed based on interdependency and the function of the family, rather than on status of the family. Transformative recognition would balance the focus on care-work, vulnerability, and interdependency (factors advanced by transformative redistribution as worthy of protection) with recognition of multiple and diverse relationships, including those that do not provide care in the traditional sense. That means that transformative recognition would promote cultural recognition of more relationships (such as relationships that are not based on domestic care), which would halt the development and entrenchment of “hierarchy of care.”<sup>320</sup>

The combination of both remedies can ensure—against the backdrop of more legal recognition—that there is recognition of nonrecognition. In other words, both approaches could protect the interest of those partners who do not wish to be legally recognized by the state. Protecting couples from

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319. POLIKOFF, *supra* note 48, at 177–79.

320. ROSENBERY, *supra* note 122, at 228.

deprivative recognition is consistent with both camps because transformative redistribution is (presumably) committed to imposing duties based on function, rather than based on status.<sup>321</sup> Transformative recognition, on its side, will insist on creating safe libertarian-like space in which people's relationships can still develop and be undefined (that is, the state would not ascribe), as part of recognition.<sup>322</sup>

Finally, it is possible that there will be some tension between the two approaches around the existence of registration schemes and their role in family law (for example, what are the consequences of being registered or not). This is because transformative redistribution distances itself from status and registration; but it appears that transformative recognition, in its quest for recognition of diverse relationships, would support the creation of multiple registrations that will assist people to organize their lives. It seems that both camps could agree on the existence of a registry if the following conditions are satisfied: First, there is a variety of state institutions that culturally recognize the differences between relationships but do not perpetuate the hierarchy between the relationships.<sup>323</sup> Second, registration is not the only way to gain the full scope of protection by the state, but, rather, the function of the family is considered as well. In other words, registration scheme is consistent with economic redistribution because registration provides a useful and accessible mean for couples to organize the legal consequences that stem from their relationship. Registration saves the need for lawyers, multiple documents, and engaging with bureaucracies.<sup>324</sup>

This Article does not propose a unified, detailed plan for transformative recognition and redistribution. Its aim is only to point out that addressing

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321. While the Article does not aim to provide a policy for treating unmarried partners, these theoretical tools are helpful in crafting policy regarding unmarried partners. For instance, redistribution and recognition can provide a framework for solving the issues that arise when nonregistered partners enjoy financial benefits due to their status. Accordingly, purely ascriptive recognition might be a suitable policy in these instances, and might not. It could be a suitable policy in a world where benefits, rights, and protections are allocated by functional tests. In such a scenario, purely ascriptive recognition could bring about the cultural recognition of all relationships without perpetuating the notion of fixed, idealized relationships, and would respond to the financial reality between partners. Purely ascriptive recognition would not be suitable, as it is unsuitable (and, indeed, deprivative) now, in a world where it creates both dignitary harm (generating stigma) and economic maldistribution.

322. Cf. Franke, *supra* note 123, at 2697 ("marriage as currently defined and governed by law . . . also seeks to govern—and indeed does govern—the lives of those who lie outside the pickets of marriage itself."); Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809, 863 (2010).

323. See Aloni, *supra* note 111, at 578 (suggesting a registration scheme open to a variety of nonmarital unions could be different than marriage, rather than inferior to it).

324. *Id.* at 618.

only distributive injustice or only cultural harm will always yield inequitable results.

The proposals advocated by the transformative plans are not without problems. Transformative remedies are harder to pursue than affirmative remedies because, by their nature, the former are more revolutionary. And there is always the valid question of what to do until transformative change arrives; some rightly argue that perhaps it is better to seek incremental (affirmative) change that protects some people than to work for structural change that may never come. These well-known and valid questions are at the center of the debate regarding social and legal change, and there are many approaches to the dilemma.<sup>325</sup> This Article does not offer an answer to this dilemma. Rather, the Article crafts a general vision that could be useful even in considering small changes in the law; that is, revisions to specific laws—not only big revolutions—should follow the offered paradigm.<sup>326</sup>

### CONCLUSION

Over the past two decades, while the marriage equality movement has gained significant traction, scholars criticized the movement for its over-focus on marriage. One of the concerns that were voiced was that extending marriage's symbolism increases marriage's shadow into all other relationships (that is, nonmarital unions are being evaluated and treated comparably to marriage).<sup>327</sup> By that, the marriage equality movement entrenches the symbolic power of marriage and the decreasing choices of marriage alternatives. This critique has often been dismissed as too vague and unrealistic.<sup>328</sup> The harm that was proffered by marriage critics seemed too far in the future, too academic. But the harm is present and clear. Not only do we know already that in many places, as soon as same-sex marriage was legalized, civil unions were abolished. But as this Article tells, the choice to live in nonmarital, undefined unions, is also diminishing. The harm that can be caused by over-recognition is already tangible.

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325. See, e.g., MICHAEL T. HAYNES, *THE LIMITS OF POLICY CHANGE: INCREMENTALISM, WORLDVIEW, AND THE RULE OF LAW* 3–5 (2001) (arguing that incrementalism is the most realistic and preferred plan for legal and social change).

326. For instance, to implement transformative policies, not only full reorganization of the whole system would work. Rather, specific laws that rely on the function of the family for specific purposes—constitute important steps.

327. See, e.g., Katherine M. Franke, *The Politics of Same-Sex Marriage Politics*, 15 COLUM. J. GENDER & L. 236, 246–47 (2006).

328. See, e.g., Evan Wolfson, *Crossing the Threshold: Equal Marriage Rights for Lesbians and Gay Men and the Intra-Community Critique*, 21 N.Y.U. REV. L. & SOC. CHANGE 567, 604–08 (1995).

LGBT organizations that applaud the financial aid rule somewhat blindly pursued their aims of cultural recognition without considering the economic distributional effects of their lobbying—especially the effect it has on other unmarried partners. But it is not only unmarried opposite-sex couples who will be harmed by this new rule: In the same week this new policy unfolded concerning student financial aid, a study found that the overall poverty rate has increased within the LGBT community and that same-sex couples are more likely to be poor than opposite-sex couples.<sup>329</sup>

The lesson from the financial aid saga should be learned by legal scholars who, with good intentions, seek more recognition of unmarried partners. Lawmakers, advocates, and scholars should consider the bottom line at the same time that they consider issues of recognition; they should choose their battles carefully and in a way that helps to mitigate rather than exacerbate systemic problems. Cultural and legal recognition are important, of course, but family law must ensure that the pursuit of these goals does not create or support policies that discriminate against unmarried partners.

Similarly, functional family law is a good and important cause. But ascription is a double edged-sword; purely ascriptive recognition may be seen as a progressive policy that addresses the partners' function as a family rather than their documented status; and that may be an accurate description. But ascription can also become deprivative. Progressive individuals should also be careful not to mistake the agenda of valuing all families with that of over regulation of relationships.

Thus, everyone's goal should be equitable distribution of resources and benefits for all families, regardless of their status. Promoting this platform is the best means of winning true, deeply rooted equality for unmarried partners.

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329. See M.V. LEE BADGETT, LAURA E. DURSO & ALYSSA SCHNEEBAUM, NEW PATTERNS OF POVERTY IN THE LESBIAN, GAY, AND BISEXUAL COMMUNITY (2013), *available at* <http://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Poverty-Update-Jun-2013.pdf>.