Compulsory Conjugality

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EREZ ALONI

What happens when the state changes the default rules that govern financial obligations between unmarried partners from opt in to opt out? Most states have an opt-in rule: unmarried partners do not take on financial obligations of one another unless they agree to do so with a contract. Nevertheless, advocates argue that an opt-out system puts the burden in the right place: unmarried couples who want to avoid default obligations should bear the burden of making contracts. A scholarly debate over the opt-in/opt-out model has raged for twenty years, but the issue is now coming to a head. Yet no research, until now, examines the actual impact of opt-out rules on affected couples.

This Article offers a new analysis based on an original qualitative study with interviews of thirty unmarried couples in an opt-out jurisdiction. The study reveals that most cohabiting couples do not know that the law considers them spouses. For those who know, either they do not realize that they can opt out, or they face difficulties trying to do so. Moreover, if couples do not opt out, the terms of the default contract the state imposes are not particularly popular—only about half of interviewees would have chosen these terms if they had thought to bargain. Further complicating things, the research shows that sometimes the opt-out law has an expressive effect: it communicates values of conjugality and commitment. Using this data, and relying on contractual theories, this Article contends that the opt-out scheme is choice-decreasing because it makes defaults highly sticky. Yet, contrary to the traditionalist view, an opt-out approach does not undermine the institution of marriage. Instead, this approach aligns with the neoliberal ambition to shift dependency-related responsibilities from the state to the family. Finally, this Article proposes that for opt-out regimes to avoid mimicking the problems of opt-in schemes, defaults must be better known to couples, be better tailored to diverse populations of unmarried couples, and adopt accessible methods of opting out.
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INTRODUCTION

The skyrocketing number of people who live in nonmarital relationships in the United States presents daunting, yet vital, regulatory challenges. Noting “the record number of unmarried cohabitants in the United States . . . and the need for greater clarity and predictability in the law governing cohabitants’ economic rights,” the Uniform Law Commission recently appointed a Drafting Committee on Economic Rights of Unmarried Couples to create a model law.1 Scholarship on the topic, which has grown in recent years, is greatly divided about what legal resolution is optimal but in agreement it poses one of the most challenging contemporary regulatory questions.2


One approach that looms large in discussions as a potential reform is adopting an “opt-out” scheme. Under such a regime, the state treats unmarried couples that meet certain criteria, upon breakup, as owing the same obligations to one another as married couples unless they deliberately contract out of those obligations. A version of an opt-out scheme already operates in Washington and Nevada, and the American Law Institute (ALI) endorsed it in 2002. If adopted in more jurisdictions, an opt-out scheme could affect millions of unmarried couples who will face the burden of opting out if they do not want to assume marital obligations (if they even know about the law and understand it is possible to opt out). Notwithstanding the consequences of such a regime, scholarship examining the real-life operation of an opt-out scheme and its effects is barely existent. This Article presents the first research that uses an empirical qualitative method—specifically, interviews with unmarried couples who live in an opt-out jurisdiction—combined with theoretical analysis to inquire into how an opt-out regime affects cohabiting couples’ lives.

The stakes are high, and the regulatory terrain is complex. Without appropriate legal recognition, partners at the end of non-formalized relationships have found themselves without rights against the other regarding property or spousal support, even when they are functionally similar to couples protected by matrimonial property legislation. Conversely, when recognition is overinclusive—that is, when the state casts

the nonmarital family is the most important challenge facing family law today, . . . . Yet existing literature does not adequately address this phenomenon.”.

1 An opt-out approach, sometimes referred to as a “de-facto marriage” or “status-based” approach, is specifically mentioned in the foundational documents of the Drafting Committee on Economic Rights of Unmarried Couples as one of the primary existing approaches that the Committee will consider. See UNIF. L. COMM’N, supra note 1, at 4. See infra Section I.A for arguments in favor of and against an opt-out approach; see also Kaiponanea T. Matsumura, Consent to Intimate Regulation, 96 N.C. L. REV. 1013, 1042 (2018) (“[T]he status approach has found favor with influential legal scholars.”).

2 PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 4.09–4.10, 5.04, 6.04–6.06 (AM. L. INST. 2002) [hereafter ALI PRINCIPLES]. For discussion about the states that have adopted a version of an opt-out regime, see Albertina Antognini, The Law of Nonmarriage, 58 B.C. L. REV. 1, 16–18 (2017) (“A limited number of states—two—apply the rules regulating property distribution at divorce to the end of a nonmarital relationship. They are Nevada and Washington, and both apply the rules ‘by analogy’ only.”) (internal citation omitted).

3 William Eskridge noted the need to produce empirical data before an evaluation of the desirability of an opt-out approach. See William N. Eskridge Jr., Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules, 100 GEO. L.J. 1881, 1985 (2012) (“In my view, cohabitation regimes ought not mimic marriage, contrary to the ALI’s Principles and the views of many scholars. . . . Because these ideas have not been subject to empirical testing, they ought to remain preliminary . . . .”).

4 See, e.g., Kaiponanea T. Matsumura, Choosing Marriage, 50 U.C. DAVIS L. REV. 1999, 2038–39 (2017) (“[D]efining choice narrowly poses the risk that partners will be able to avoid obligations to each other or improperly enrich themselves at the state’s expense.”). Albertina Antognini, Against Nonmarital Exceptionalism, 51 U.C. DAVIS L. REV. 1891, 1894 n.7 (2018). See also infra Section I.A (discussing the multiple interests in regulation of informal relationships).
its net too widely—it can frustrate couples’ expectations and preferences. Further, crafting a customized regulation is a challenging task because informal cohabitation is a heterogeneous practice—meaning that couples refrain from marrying for different reasons and adopt various commitment levels—thus, a one-size-fits-all strategy is likely to fit some while being detrimental to others.

Due to these complications, and despite an urgent need to adjust legislation, most jurisdictions in the United States have declined to adopt reforms and still rely on a contractual opt-in approach that has proven itself inadequate in protecting unmarried partners. Conversely, in recent years, some jurisdictions worldwide (notably Australia and some Canadian provinces) have moved from the traditional opt-in approach to an opt-out regime. In an opt-out system, couples are married by default. This approach’s presumed advantages are that it promotes certainty about what the law is, minimizes litigation, and values functions over formalities. Further, this scheme supposedly protects the economically vulnerable party—typically the partner who performs a large share of unpaid carework. Scholarship in the United States and elsewhere has long debated the wisdom of an opt-out approach. In a nutshell, the traditionalist response contends that equating unmarried relationships to marriage would lead to a decline in marriages and confusion about what each legal institution entails. Conversely, the functional approach supports an opt-out scheme, deeming it consistent with the law’s objectives of protecting couples’

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7 See, e.g., Erez Aloni, Deprivative Recognition, 61 UCLA L. REV. 1276, 1305 (2014) (noting the critique against an opt-out regime “for being too inclusive because it may impose marital obligations on people who may be uninterested in taking on such obligations.”).
8 See, e.g., June Carbone & Naomi Cahn, Nonmarriage, 76 MD. L. REV. 55, 58–59 (2016) (concluding that decisions about how to structure the law governing nonmarital relationships should be taken seriously and should consider the “full continuum of nonmarital relationships”); Wendy D. Manning & Pamela J. Smock, Measuring and Modeling Cohabitation: New Perspectives from Qualitative Data, 67 J. MARRIAGE & FAM. 989, 995 (2005) (finding that 53% of survey “respondents did not describe the process of cohabitation as a deliberate decision.”).
9 See, e.g., Courtney G. Joslin, Autonomy in the Family, 66 UCLA L. REV. 912, 926 (2019) (“Marvin removed the barrier that prevented nonmarital cohabitants from asserting claims that other nonspouses could assert. But . . . the default rule that applies to nonmarital partners is one of no sharing.”); infra Section I.B (discussing the drawbacks of an opt-in approach).
11 See generally id. at 50–56 (discussing the shifting marital trends in the United States and the need for reform should those trends persist); infra Section I.A.
12 See, e.g., Elizabeth S. Scott & Robert E. Scott, From Contract to Status: Collaboration and the Evolution of Novel Family Relationships, 115 COLUM. L. REV. 293, 295 (2015) (“Many contemporary scholars and policy advocates challenge the privileged status of marriage, arguing that the state should recognize and support other family relationships.”).
dependency and contribution to the relationship. Further, it recognizes relationships based on family members’ roles, rather than on formalities like marriage or contract. This Article intervenes in this debate by providing the first empirical findings on the effects that an opt-out regime has on informal relationships. In 2013, following the promulgation of the Family Law Act (“FLA”), the province of British Columbia (“BC”) in Canada became one of the only jurisdictions globally to adopt an opt-out approach. Five years after the FLA’s enactment, I used couples’ experience in BC as a real-world laboratory to evaluate the effectiveness, shortcomings, and strengths of an opt-out approach, as well as the ways unmarried couples navigate this regime. To this end, I interviewed thirty couples (urban, middle-class individuals aged 21–48) who moved in together after the law was already in effect. I examined couples’ knowledge and understanding of laws concerning their mutual obligations and how such laws influenced their decisions about moving in together and negotiating mutual obligations. I also asked about the kinds of obstacles couples face when they wish to opt out, why they remain unmarried, how they divide housework labor, how they construe their household finances, their plans for the future, and more. I used their responses to analyze whether the law fulfills its objectives and whether it is a majoritarian default, as well as to assess the expressive function of the law—meaning, the law’s interplay between reflecting couples’ norms of commitment and mutual support and sending a statement about the importance of such norms.

Overall, the research raises significant doubt about whether an opt-out approach—as construed in BC and by analogy elsewhere—is the panacea for the regulatory conundrum of nonmarriage. The interviews revealed that couples barely know or understand the law, experience difficulties in opting out, and exhibit cognitive biases and overoptimism in discussing financial obligations. These barriers to opting out suggest an opt-out approach, in effect, creates mandatory-like rules. In contractual terminology, the defaults are “super-sticky.” The upshot is that the “choice” to opt out from the

14 See, e.g., Nancy D. Polikoff, Beyond (Straight and Gay) Marriage: Valuing All Families Under the Law 5 (2008) (Proposing a functional approach, according to which there would be no bright-line rule for the division of benefits and protections by the state. Instead, the law’s protection of the familial unit would be distributed by the purpose of the law at stake and the function the family members fulfill).

15 Family Law Act, S.B.C. 2011, c 25 (Can.).

16 See infra Part II for discussion of methodology.

17 My conclusion is not exclusive to BC’s scheme, as the barriers I found are ubiquitous in all common-law systems that rely on contractual principles to establish and ascertain legal obligations among unmarried partners. See infra Section III.B.

18 See infra Section III.A (describing and analyzing the responses of participants in the study).

19 See Omri Ben-Shahar & John A. E. Pottow, On the Stickiness of Default Rules, 33 Fla. St. U. L. Rev. 651, 651 (2006) (explaining that “[i]n settings where these [transaction] costs are high, parties might find themselves ‘stuck’ in a default, unable to reach the outcome that they prefer.”); see also infra
default becomes all but illusory. The system’s reliance on contractual instruments means that most couples subscribe to (or find themselves abiding by) the default rules in lieu of an affirmative undertaking or, in some cases, even without tacit consent.

Despite this, an argument can be made that the default rules are still justified if they are majoritarian (representing what the majority of couples would have bargained for had they foreseen the need). Surprisingly, for this research sample, the defaults of equal division of property and obligations for spousal support mimic the expectations and practices of approximately half of the interviewees. In particular, the defaults do not reflect the lives of interviewees not yet ready to commit to the relationship or those with lower incomes than most others in the sample.

Making things more complicated is the observation that the law, when it is known to the couples, also promotes conjugality (marriage-like behavior) by communicating a norm of commitment and mutual responsibility between the partners. It is thus difficult to distinguish couples’ attitudes toward the default rules and the way they structure the economics of their household from the way the law shapes their expectations in the first place. The interviews reveal how the law’s expressive aspect helps some partners to justify and, sometimes, defend their legal entitlement to the same protections that spouses receive.

Taken all together—barriers to opting out, non-majoritarian, and the law’s effect on the couples’ expectations—an opt-out approach has the potential to make conjugality virtually compulsory. In operation, it does not advance the functional recognition of interdependency. Rather, it makes most couples de facto married, creating a status that risks dishonoring their preferences or actual behaviors. Furthermore, while an opt-out regime might help the partner with the primary caregiving responsibilities (most often, women), it can be detrimental to women with low income and wealth who might abstain from marriage purposely to avoid a partner’s debt.

The interviews also alleviate traditionalism’s concern that an opt-out regime will undermine marriage. Approximately half of the participants

Section III.B (analyzing the ascriptive features of default rules).

20 See, e.g., Ian Ayres & Robert Gertner, Majoritarian vs. Minoritarian Defaults, 51 STAN. L. REV. 1591, 1592–93 (1999) (positing that majoritarian default rules are designed to reflect the presumed choice of the majority of relevant bargainers).

21 This is a smaller majoritarian default than I expected, especially considering that couples in early adulthood are in the prime period for accumulating assets and creating strong emotional ties with their partners; further, sociological studies contend that cohabitants and married couples often share similar characteristics in terms of their financial behavior and expectations. See infra Section III.C.1 (discussing sociological data about cohabiting couples’ attitudes toward the law and their patterns of economic interdependency).

22 See infra Section III.D.

23 See infra Section IV.A, pp. 47–49 (analyzing how an opt-out approach has the potential to support and to harm the primary caregiver in the household).

24 See infra Section IV.B.
still wanted to get married at a later point, although the law already recognizes them as spouses. Others, who do not want to get married, expressed reasons that are external to the law. Hence, an opt-out regime does not undermine marriage. Moreover, an opt-out approach actually advances neoliberal values that some conservatives emphasize. The scheme significantly increases the number of couples subject to the same obligations as married couples and, hence, intensifies the private support obligations. Doing so further privatizes dependency and support, thus obviating the state’s collective responsibility regarding such vulnerability and shifting responsibility onto private individuals.

This research should be of interest to scholars and lawmakers in the United States and globally. The Hague Conference on Private International Law has recently placed “cohabitation outside marriage” as one of its primary current legislative topics. BC is an excellent terrain to examine the operation of an opt-out approach. Indeed, the Canadian model served as a primary inspiration to the ALI Principles and the scholarship supporting it.

This Article proceeds as follows: Part I discusses the demographic changes in relationship patterns in the United States and across various nations and the challenges they pose for regulation. It describes the major debates concerning opt-in and opt-out mechanisms. Part II details the study’s objectives and the methodology used, and it canvasses some of the study’s limitations. Part III analyzes the responses of interviewees. It uses contractual, economic, and sociological theories to understand how couples operate in this system. Part IV then develops a critique of both functional and traditionalist approaches to the opt-out regime. The Conclusion offers some initial proposals about a system that might overcome the problems in an opt-out regime or make opt-out regimes less ascriptive.

I. THE CHALLENGES AND THE DIFFERENT APPROACHES

Before explaining the methods and analyzing the results, it is imperative to understand the regulatory regime governing the obligations of unmarried couples and the dilemmas it poses. Section A provides data about the

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25 See infra Sections IV.B, IV.C.
26 See infra Section IV.C (describing the ways in which an opt-out regime promotes privatization of dependency).
demographic changes in family structure that make the legal regulation of partners in informal relationships a pressing matter. It also analyzes the challenges to regulation. Section B discusses the strengths and shortcomings of the opt-in and opt-out approaches. It further elucidates what is unknown about an opt-out model’s operation and the importance of continued study.

A. Regulating is Hard to Do

Addressing unmarried couples’ legal needs has been a critical and charged issue in family law over the past forty years. Since the 1980s, in many industrial nations, the number of people living in nonmarital unions has grown steeply and consistently. In the United States, approximately nine million couples live in informal conjugal relationships, almost a 30% increase from 2007. In Canada, over 3.7 million individuals live in nonmarital relationships. In 2016, over 20% of all couples lived in informal cohabitation—more than three times the proportion in 1981. In the United Kingdom, 3.2 million couples live in nonmarital unions, making cohabitation the country’s fastest-growing family type. The decline of marriage rates also translates into a reduction in the number of married parents. In the United States, 25% of parents who reside with children are unmarried. In 2011, in Canada, 45% of women in unmarried relationships had at least one child at home.

This demographic change in the number of unmarried couples who cohabit raises formidable regulatory dilemmas. In many countries—although to differing degrees—the legal recognition of marriage and of

30 See Bowman, supra note 28, at 97–99 (reporting the increase of cohabitants from the 1960s to 2000s in the United States); Waggoner, supra note 10, at 51–55 (noting the decline in marriage rates and increase in cohabitations in the United States).
31 See, e.g., Matsumura, supra note 3, at 1016 (“Unmarried cohabitants—over 18 million of them—now make up 7.1% of the adult population.”); Renee Stepler, Number of U.S. Adults Cohabiting with a Partner Continues to Rise, Especially Among Those 50 and Older, PEW R SCH. CTR. (Apr. 6, 2017), http://www.pewresearch.org/fact-tank/2017/04/06/number-of-u-s-adults-cohabiting-with-a-partner-continues-to-rise-especially-among-those-50-and-older/ (“Since 2007, the number of cohabiting adults ages 50 and older grew by 75%.”).
marriage-like relationships has profound legal effects. In the United States, more than in other countries, the federal and state governments distribute numerous benefits via marriage. Marital status establishes default and mandatory obligations between the partners themselves and sets of entitlements and rights between the spouses and third parties, particularly the state. Though few default rules are mandatory, states establish default obligations on the partners vis-à-vis one another, both during and, primarily, at the end of relationships (e.g., financial support during relationships, equal division of property upon breakup, elective share in inheritance).

Similarly, legal recognition is relevant for various state-sanctioned purposes such as tax benefits and penalties, health benefits, immigration privileges, preferential treatment of pension plans, and the power to make healthcare decisions when the partner is incapacitated. The large number of legal effects attendant to marriage (or marriage-like relationships) is not entirely surprising. A primary purpose of state recognition of intimate partnerships is the ability to rely on “an off-the-rack rule to structure certain relations between members of the couple and third parties.” Put differently, one of the main modern functions of the legal recognition of relationships is to provide a simple way to designate an intimate partner for various legal purposes that arise as a result of mutual commitment and interdependence, without the need to execute contracts, wills, powers of attorney, or other forms of affirmative selection.


See, e.g., Melissa Murray, *Black Marriage, White People, Red Herrings*, 111 MICH. L. REV. 977, 996–97 (2013) (“In the United States, less marriage equals greater familial instability because marriage is the social safety net—or at the very least, the means by which we patch what is left of the disintegrating social safety net.”).


See, e.g., Emens, *supra* note 39, at 258 (listing the “benefits and burdens” that state and federal laws bestow upon married couples); Halley, *supra* note 39, at 49–50 (listing the legal attributes of marriage); Modernization of Benefits and Obligations Act, S.C. 2000, c 12 (Can.) (extending benefits and obligations of spouses to all couples who cohabit for at least one year).


See Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 618 (2013) (“Thus, when the state does not rely solely on contracts but offers an opt-in scheme as well, the government is not intruding into people’s lives but, instead, giving people a better means of regulating the legal implications of their relationships.”).
Because of the many attributes connected to marriage, when informal relationships are unrecognized, some couples are likely to suffer harms, both financial and dignitary. Without legal recognition, nonmarried partners at the end of their relationships have found themselves deprived of property rights (even when the parties’ joint effort helped accumulate wealth), without spousal support, or both. As Clare Huntington explains, “courts treat unmarried cohabitants as separate economic units, with claims for spousal support possible but rarely granted and property typically retained by whoever paid for it.” Lack of legal recognition also means denying a host of benefits and rights the state and other third parties distribute through marriage or other recognized relationships (such as civil unions, where they exist). The harm is also dignitary, as nonrecognition may stigmatize unmarried couples—casting their relationships as “inferior” to formally recognized ones. Although it is clear that some relationships flourish outside the auspices of the law, the mere denial of legal recognition might send a message that unmarried partnerships are “less” than other types of relationships.

44 When looking at the economic and cultural harms of nonrecognition, I build on Nancy Fraser’s well-known work that conceptualizes both elements as “folk paradigms of justice.” NANCY FRASER & AXEL HONNETh, REDISTRIBUTION OR RECOGNITION? A POLITICAL-PHILOSOPHICAL EXCHANGE 11 (Joel Golb, James Ingram, & Christiane Wilke trans., 2003) (emphasis omitted); see also Aloni, supra note 7, at 1300–02 (describing the harm of nonrecognition as “economic injustice and dignitary-cultural harm”).

45 See Aloni, supra note 43, at 589–90 (noting instances when nonmarried partners purchase property together, but upon death or separation, only one of them retains property rights); Winifred Holland, Intimate Relationships in the New Millennium: The Assimilation of Marriage and Cohabitation?, 17 CAN. J. FAM. L. 114, 127–28 (2000) (observing that historically, cohabitants in Canada were “excluded from the rights and obligations which attached automatically to marriage”); BOWMAN, supra note 28, at 38–52 (explaining the inadequacy of equitable and contractual remedies).

46 Huntington, supra note 2 at 178.

47 See L. COMM’N OF CAN., supra note 39, at 120–21 (noting legal consequences stemming from the lack of legal recognition); POLIKOFF, supra note 14, at 123–35 (observing that same-sex couples that are not recognized as married are excluded from legal benefits).

48 The stigma of being unmarried has declined significantly over the years. In 2012, a national survey in the United States found that 55% of participants stated that getting married is not an important experience to become an adult, while only 12% stated that getting married is “extremely important.” JONATHAN VESPA, U.S. CENSUS BUREAU, THE CHANGING ECONOMICS AND DEMOGRAPHICS OF YOUNG ADULTHOOD: 1975–2016, 4 (Apr. 2017), https://www.census.gov/content/dam/Census/library/publications/2017/demo/p20-579.pdf.

49 For discussions of the complexities of legally recognizing friendships, see Katherine M. Franke, Longing for Loving, 76 FORDHAM L. REV. 2685, 2703 (2008) (“[T]he rules, the norms, and the social field of friendship are developed beyond the scope and even interest of law.”); ETHAN J. LEIB, FRIEND V. FRIEND: THE TRANSFORMATION OF FRIENDSHIP—AND WHAT THE LAW HAS TO DO WITH IT 2 (2011) (suggesting some regulation of friendships would be beneficial but acknowledging that most people think “that friendship is a special part of our private spheres that the public sphere of the law can’t touch”). Laura Rosenbury argues that nonrecognition of nonconjugal relationships—in particular, friendships—adversely affects women by preserving the traditional division of carework. Laura A. Rosenbury, Friends With Benefits?, 106 MICH. L. REV. 189, 191 (2007).
At the same time, in a world in which informal relationships are facilely recognized as legally equivalent to marriage, individuals are likely, as well, to suffer injuries regarding their finances and their dignity and autonomy. A partner who might want to protect herself from an untrusted companion or the responsibility for her partner’s debt, or a couple who departs from conventional marital sharing norms, might find themselves married against their will. Legal recognition can also be financially detrimental: when the state ascribes marital status to unmarried couples to calculate eligibility for state-sponsored financial support, this might result in disqualification for welfare benefits, loans, subsidized housing, Medicaid, etc. Further, prescribing marital obligations between couples serves as a mechanism to shift the responsibility of supporting individuals in times of economic hardship from the state onto needy couples. Overinclusiveness in recognition, then, raises a set of challenges too.

Legal nonrecognition versus broad ascribed recognition—the two binaries of the regulatory conundrum—exemplifies a tension between over- and under-inclusive policies. A policy that triggers state recognition too effortlessly risks misclassification and thus being over-inclusive. Such policy is likely to assign marital status arbitrarily and imprecisely, casting a wide net that captures individuals who purposely aimed to avoid recognition and relationships that do not fit the economic and emotional interdependence patterns that the state aims to capture in matrimonial legislation. Conversely, an underinclusive approach—one that rules out too many relationships as undeserving of state recognition—is likely to exclude relationships that merit the state’s protection.

Making the regulatory terrain even more challenging is the lack of

50 Cf. Carbone & Cahn, supra note 8, at 108–09 (“Today, however, nonmarriage has emerged as a choice; one that exists for couples who want to create their own relationships on their own terms.”).
52 See Aloni, Deprivative Recognition, supra note 7, at 1320–22 (“[L]iving with an unrelated adult may change eligibility for welfare because in-kind assistance is calculated in determining eligibility.”); Lois Harder, The State and the Friendships of the Nation: The Case of Nonconjugal Relationships in the United States and Canada, 34 SIGNS 633, 649 (2009) (noting that the “Canadian welfare state” recognizes common-law relationships as marriage); Robert Leckey & Yann Favier, Cohabitation’s Boundaries and the Confines of Tradition, 25 SOC. & LEGAL STUD. 525, 533 (2016) (observing the relationship between welfare benefits and the private law of family).
54 See generally Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 HARV. L. REV. 1685, 1689–90 (1976) (“A] general rule will be more over- and underinclusive than a particular rule.”).
formalities, which renders the task of determining couples’ intentions “unpredictable and haphazard.” For one, most unmarried couples do not follow formalities, such as executing contracts. Although married couples comply with legal formalities in the solemnization process, when it comes to other formalities, such as contracts, married couples are also notoriously bad in entering into ante- or postnuptial contracts. In the absence of formalities, discerning the couples’ intentions becomes a daunting challenge to administrators and courts. Further, even relying on formalities alone cannot serve as a satisfying mechanism, for the presence of formalities might indicate the couple’s intention at one point in time—and such intention could later change. Formalities might also indicate an intention that is different from what couples actually performed or wished. Finally, in some circumstances, overriding the couples’ undertaking (even if expressed in formal documents) is justified either because of the process by which the parties executed their instruments (e.g., duress or nondisclosure) or because the undertaking will lead, or has led, to unconscionable results. Hence, even in the presence of formalities, there is no guarantee that authorized institutions will enforce the couple’s private agreement.

B. Two Imperfect Approaches

In some countries (the United States and England are the paradigm cases), laws pertaining to unmarried cohabiting couples have frozen; these laws struggle to keep pace with the countries’ demographic changes and regulatory predicaments. In other places, primarily through legislative

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55 Robert Leckey, Judging in Marriage’s Shadow, 26 FEMINIST LEGAL STUD. 25, 30 (2018).
56 See Ira Mark Ellman, “Contract Thinking” Was Marvin’s Fatal Flaw, 76 NOTRE DAME L. REV. 1365, 1367–70 (2001) (“[D]ecades of urging by contract enthusiasts have led few couples (married or unmarried) to make express contracts at all, much less comprehensive contracts intended to capture what their relationship is all about.”); Erez Aloni, The Puzzle of Family Law Pluralism, 39 HARV. J.L. & GENDER 317, 355 (2016) (“[U]nmarried partners often do not think in contractual terms and do not have sufficient understanding of the rules surrounding legal obligations between unmarried partners.”).
57 In any event, as Matsumura explains, even a marriage license does not end the recognition problem, in terms of ascertaining partners’ intentions and interdependency, because getting married might be too easy and does not reflect deeper obligations that some states require vis-à-vis public benefits and privileges. Matsumura, supra note 6, at 2013–15.
58 See id. at 2012–13 (discussing the benefits of relying on formalities and the difficulties associated with ascertaining intentions in informal relationships).
59 See id. at 2045 (discussing the possible changing views of spouses on their relationships).
60 See id. at 2048–50 (discussing cases in which formalities do not reflect a partner’s subjective intentions to accept financial obligations toward the other).
61 See Aloni, supra note 56, at 348 (discussing procedural and substantive doctrines that enable courts to set aside familial contracts).
62 See, e.g., Huntington, supra note 2, at 239 (“By continuing to apply a system of law that is designed for marital families, the state is undermining the shaky bonds in nonmarital families . . . .”).

In 2007, the Law Commission for England and Wales issued a report about cohabitation, stating that current law “ignores cohabitants altogether” and “is complex, uncertain, expensive to rely on and, as it was not designed for family circumstances, often gives rise to outcomes that are unjust.” L. COMM’N
reform processes, related laws have been amended to respond to societies’ changing demographics and the inequities that needed addressing. However, common law jurisdictions have adopted regulatory regimes that have raised scholarly, policy, and political debates concerning their effectiveness and fairness. In what follows, I categorize various regulatory schemes from various nations into two general approaches: the traditional opt-in approach and the opt-out approach.

The opt-in approach is based on contract principles or related equitable remedies such as unjust enrichment and constructive trust. In the United States, most states use contractual principles in adjudicating claims between unmarried couples, although they have some material differences in application. In 1976, the Supreme Court of California decided in *Marvin v. Marvin*, which at the time was revolutionary, that contracts touching on financial obligations between unmarried intimate partners do not categorically violate public policy and are therefore potentially enforceable. Following *Marvin*, all states but four have permitted couples to enter into cohabitation contracts that entail agreement about financial obligations upon future breakup, and some states have used principles of equitable doctrines to compensate couples for their contribution to the partnership, at the end of their relationships. The variations between the states’ rules of enforcement are material. For instance, some states, either by legislation or court decisions, require that cohabitation contracts be subject

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63 See, e.g., Bowman, supra note 28, at 173–220 (discussing and analyzing the regulatory models in England, Canada, Australia, the Netherlands, France, and Sweden).

64 See id. at 47–52 (discussing rights of unmarried partners based on contract principles); Aloni, supra note 43, at 58–89 (discussing the same); Robert Leckey, *Cohabitants, Choice, and the Public Interest*, in PHILosophical Foundations of Children’s and Family Law 115, 116–17 (Elizabeth Brake & Lucinda Ferguson eds., 2018) (discussing how common law doctrines in England and Canada are used to protect unmarried couples); Antognini supra note 6, at 1921–24 (discussing contractual and equitable approaches in the United States).

65 Antognini, supra note 6, at 1912 (“Jurisdictions address the end of a nonmarital relationship through one of three general doctrinal approaches.”).


67 Antognini, supra note 4, at 52 (reporting that the “states that do not recognize rights between unmarried couples are Louisiana, Mississippi, Georgia, and Illinois”).
to the terms of the statute of frauds. Still others—for example, New York—enforce only express agreements.

In Canada, the provinces of Ontario, New Brunswick, and Newfoundland and Labrador follow opt-in contractual principles (including quasi-contracts) when it comes to the property rights of partners vis-à-vis each other. In the jurisdictions that have adopted an opt-in contractual approach for rights between couples, living together does not raise a presumption of equal distribution of properties upon breakup. Unless the couple has executed a contract or can show that a single partner contributed to the property’s appreciation or purchase, making it unfair for the other partner to retain the gain, the couple is not entitled to an equal division of property upon breakdown of the relationship. However, in various contexts, the Canadian federal government defines unmarried couples as “common law partner[s]” after one year of living in “conjugal relationships.” Thus, some federal rights and obligations (tax, etc.) are ascriptive. They require partners to opt-in, such as by checking the “married” or “living common law” boxes on tax returns. Here, the filer does not choose; if their relationships fall under the definition of “common law,” they must indicate it. In this sense, the designation is ascriptive and not based on partners’ choice.

The shortcomings of an opt-in approach are well documented and I will not repeat them here in detail. One of the major weaknesses of such a system, as Albertina Antognini recently concluded in an analysis of U.S. cases, is that it favors partners who contribute financially to the purchase of property over “a relationship where the individuals follow a breadwinner-

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68 See, e.g., MINN. STAT. §§ 513.075–076 (1980) (explaining that a cohabitation agreement is enforceable only if “the contract is written and signed by the parties”); Posik v. Layton, 695 So. 2d 759, 762 (Fla. Dist. Ct. App. 1997) (noting that cohabitation contracts in Florida must be in writing); Kohler v. Flynn, 493 N.W.2d 647, 649 (N.D. 1992) (explaining that “[i]f live-in companions intend to share property, they should express that intention in writing.”). In 2015, New Jersey passed an amendment to its statute of frauds requiring that cohabitation contracts be in writing and that both parties have independent legal advice prior to execution. N.J. STAT. ANN. §§ 25:1-5 (West, Westlaw through L.2020, c. 60).

69 See, e.g., Morone v. Morone, 413 N.E.2d 1154, 1157 (N.Y. 1980) (holding that cohabitation agreements are enforceable only with an “explicit and structured understanding of an express contract”).

70 JULIEN D. PAYNE & MARYLIN A. PAYNE, CANADIAN FAMILY LAW 50 (7th ed. 2017); Sanders, supra note 29, at 632.


74 See, e.g., id. (discussing the difficulties in enforcing legal obligations in informal relationships).
homemaker model.” The opt-in approach also increases uncertainty because the law is so unsettled and, for that reason, is likely to result in the economically weaker partner’s not pursuing claims. For good reasons (not seeking legal recourse) because in most states, claims based on implied contacts in this arena are rarely successful. As Cynthia Bowman points out, it is probable that “cohabitants are only slightly more likely to obtain ‘palimony’ in California than in New York if the claim rests upon an implied contract, and at least the courts in New York are more candid about disallowing such claims.” Describing the Canadian context in Ontario, one author notes that unjust enrichment claims are unpredictable and create a sense of uncertainty in the law. In such a legal regime, lawyers are likely to disfavor representation based on a contingency fee since chances of success are difficult to assess or are generally slim. Responding to the limitation of relying on couples to execute contracts, the Law Commission of Canada stated that a contract “is a tool beyond the reach of many people. Leaving the parties to design their own contractual or private law arrangements imposes too high a burden on people who do not have time, energy or the requisite knowledge to do so.” Finally, courts are notorious for their limited ability to discern partners’ intentions regarding property division—a process that involves invasion into partners’ intimate life and risks invoking the judge’s bias.

In opt-out regimes, the state applies the same financial obligations that married couples owe to unmarried couples, upon the request of at least one of the partners, if the nature of the couple’s relationship mimics, to some degree, that of married couples, regardless of the missing formalities. The system aims to increase certainty and predictability about unmarried couples’ legal situation while embracing a functional approach. Australia’s doctrine of “de facto relationship” and Israel’s doctrine of “reputed spouse” are examples of such an approach. Canadian provinces with this system are British Columbia, Alberta, Manitoba, and Saskatchewan.

For instance, according to Section 3(1)(b) of BC’s FLA, a person is a “spouse”—for purposes of the division of property and spousal support—if they have “lived with another person in a marriage-like relationship” and “ha[ve] done so for a continuous period of at least 2 years” or “ha[ve] a child

75 Antognini, supra note 4, at 31.
76 BOWMAN, supra note 28, at 51.
77 L. COMM’N OF CAN., supra note 39, at 115.
78 Id.
79 BOWMAN, supra note 28, at 57; Scott, supra note 72, at 256–57.
80 BOWMAN, supra note 28, at 186–200 (discussing Canada and Australia); Talia Einhorn, Same-Sex Family Unions in Israeli Law, 4 Utrecht L. Rev. 222, 225 (2008).
It is a mixed directive composed of a firm rule (“at least two years”) and a standard (“in a marriage-like relationship”). Couples can opt out of these obligations by executing a contract that deviates from these default rules, namely, the rules of division of family assets and order to pay spousal support.

The assumed benefit of this opt-out method is that couples do not need, on a case-by-case basis, to prove the nature of their relationships to incur mutual obligations. Advocates contend that this approach promotes certainty about what the law is, thereby minimizing litigation. Supporters also depict opt-out systems as particularly supportive of women because they protect women’s contribution to the growth of marital assets. This is because in an opt-in system, caregivers would have no rights to an equitable distribution of property acquired during the relationship at the relationship’s end. In theory, the scheme protects the economically vulnerable party (disproportionately female) by operating as a penalty default: a default that shifts the burden to convey information about intentions on the party who does not want an equal division of the assets. By imposing automatic obligations on couples two years after they begin living together in a marriage-like relationships, as the BC law does, lawmakers placed the burden of revealing their true intention (vis-à-vis obligations) on the economically stronger party, who has the incentive to opt out. The interest in an opt-out approach reaches beyond Canada and has been the subject of fierce debate for many years. For instance, in 2002, the American Law Institute’s recommendations for family-law reform included adopting an opt-out approach under which couples who cohabit for three years (fewer if they have a child) would be presumed “domestic partners,” thus ascribing the same obligations as married couples have. Similarly, in her influential book Unmarried Couples, Law, and Public Policy, Cynthia

82 Family Law Act, S.B.C. 2011, c 25, § 3(1)(b) (Can.).
86 Cf., Natasha Bakht, A v B and Attorney General of Quebec (Eric v Lola)—The Implications for Cohabitating Couples Outside Quebec, 28 CAN. J. FAM. L. 261, 272 (2014) (stating that an opt-out system “is beneficial because it automatically protects those most vulnerable who would not have the resources or knowledge to opt out, while still permitting those who wish to be independent as to property to retain individual autonomy”).
87 See Heather Conway & Philip Girard, “No Place like Home”: The Search for a Legal Framework for Cohabitants and the Family Home in Canada and Britain, 30 QUEEN’S L.J. 715, 769–70 (2005) (discussing legal reform in dealing with cohabitation in Canada and Britain); Matsumura, supra note 6, at 2065–66 (discussing some of the debates in the United States about an opt-out approach); Scott & Scott, supra note 12, at 343 n.189, 359 (noting that the ALI Principles “have gained little traction” and that “American states have not adopted either the Principles or the domestic-partnership status”).
88 ALI PRINCIPLES, supra note 4, at ch. 1.
Bowman proposed that couples who live together for three years or have a child should be considered spouses for all legal purposes. Both the Institute’s and Bowman’s proposals encountered significant opposition. The traditionalist response contends that such laws would lead to a decline in marriages and confusion as to what each institution entails. Critical scholars assert that ascribing obligations to couples against their will “extends the shadow of marriage,” resulting in fewer variations and diversity of relationship structures that differ from marriage. Janet Halley calls the opt-out system “passive Marvin,” warning “that passive Marvin virtually annexes the law of marriage.”

As the opt-out approach is new, there is relatively little knowledge of how it operates in practice. Robert Leckey’s caselaw analysis of post-reform cases in BC and Saskatchewan found courts “breathing life into … the ‘marriage-like relationship’” standard while invoking their own biases and normative judgments about what counts as “marriage-like.” It seems the reform has not fully realized its goal of maximum predictability, with Leckey concluding that “[d]isputes over the ‘spousal’ nature of a cohabitation and that nature’s duration make it harder for cohabitants to claim a share of family property than for married spouses.” He further finds 12% of pre-reform cases in BC and Saskatchewan included disputes about the nature of the parties’ relationship, a proportion that grew to 30% post-reform. Overall, however, other than this shift, “there was no radical change in the population of litigants” pre- and post-reform, and “[t]here is little change regarding the sexes of the parties, their ages, their economic activities . . . the presence of children, and the average and median durations of their unions.” The comparison also suggests that post-reform courts awarded larger amounts, although post-reform data are derived from only

89 Bowman, supra note 28, at 223–38.
91 Franke, supra note 49, at 2697 (“The intended effect of the ALI Principles is to enlarge marriage law’s shadow.”).
92 Halley, supra note 37, at 20, 22.
93 Leckey, supra note 55, at 34–35.
95 Leckey, supra note 81, at 139.
96 Id.
nineteen cases, potentially reflecting an incomplete picture. 97 Considering Leckey’s analysis, it is reasonable to conclude that the opt-out approach adopted in BC and Saskatchewan has failed to achieve its goal of increased certainty to the maximum extent (and thus did not minimize litigation) because parties, more aggressively than before the reform, dispute that they live in a “marriage-like” relationship. 98

In conclusion, as nonmarriage is on the rise in countries worldwide, it serves as a fertile ground for regulatory dilemmas and disagreements. The opt-in and opt-out systems each include some benefits and carry some significant drawbacks. In particular, they both try to balance the predictability and protection of economically vulnerable parties on the one hand and autonomy and diversity (of relationships) on the other. The opt-out approach is harder to evaluate given its newness and the relative lack of research. The next Part describes the methodology I used to test the effects of an opt-out regime.

II. METHODS

Except for Leckey’s scholarship on the opt-out regimes in BC and Saskatchewan, there is no literature exploring the repercussions that such a scheme has on the legal system and the affected couples. Moreover, Leckey’s work, as valuable as it is, tells us only about the way couples in an opt-out system fared in court. We do not know how many couples did not reach court in the first place because they predicted that their relationships would or would not be considered “marriage-like,” or because they had other misconceptions about the law. Put simply, caselaw analysis provides only partial data about how the reform influenced the behaviors of couples before relationship breakdowns. It also does not account for whether couples’ behavior changed because of the law, in terms of choosing whether to move in together or whether to execute an agreement.

This study seeks to learn about the effect an opt-out scheme has on couples outside the court. To use the words of Susan Silbey, “To know what law does and how it works, we needed to know how ‘we the people’ might be contributing to the law’s systemic effects, as well as to its ineffectiveness.” 99

Accordingly, my goal is to learn how couples in informal relationships operate within an opt-out regime, particularly, how couples navigate the terrain of relationship recognition, even if they are unaware of the law or do not seek recourse from legal institutions. Fundamentally, the impact of a law concerning couples’ legal recognition begins long before parties plan to split

97 Id. at 138.
98 Id. at 139 (“[L]aw reform appears to have increased disputes about the duration of the union or the duration of cohabitation that could be qualified as ‘marriage-like’ or ‘as spouses.’”).
up. Couples might decide one of the following: to postpone moving in together to avoid or delay the law’s application; to execute a contract that deviates from the default rules; to informally create obligations different from those reflected by the default rules; or not to use the legal apparatus at all upon separation. Couples might initially be ignorant of the law but later use it as a bargaining tool when contemplating separation. Conversely, they may assume that the law reflects the desirable or common norm, and they should comply. Again, borrowing Silbey’s words, my interest extends beyond an exploration of the law’s effectiveness, more broadly, to the “law’s effects.”

From the perspective of legal realism, law is more than what the lawmaker legislates and the judge adjudicates. Relying on the work of Karl Llewellyn, and applying it in the context of relationship recognition, Janet Halley maintains that legal realism views laws as operated and practiced by all those who use them. The group of users includes “everyone who alters his or her conduct or even his or her ideas to reflect predictions about how legally authorized agents will behave.” Under this understanding, the law is broader than the black-letter law: the law is its effects. And the effects of the law of adult relationships kick in long before a couple contemplates divorce or separation. Building on Lewis Kornhauser and Robert Mnookin’s ever-important work, Halley points out that intimate partners bargain “in the shadow of the law,” not only in divorce settlement. Rather, the shadow of the default rules “permeates marriage and may even be important in conditioning [couples’] interactions on their first date.” This assumption—that the law of adult relationships can metaphorically throw its shadow on relationships long before the breakup—motivates this study and is also tested by this study.

Using BC as a real-world laboratory, the study’s primary objective is to produce and report qualitative data about couples’ experiences of—and attitudes toward—the current opt-out system. Through semi-structured interviews with thirty couples who live in non-formalized relationships, I try to get a better sense of the drawbacks and advantages of such a system and how it has affected the couples’ behaviors (if at all).

My research assistant and I have conducted interviews with twenty-seven different-sex and three same-sex couples. The participants’ ages

100 Id. at 328.
101 Halley, supra note 37, at 47–48 (relying on Llewellyn’s work in K. N. Llewellyn, Behind the Law of Divorce: I, 32 COLUM. L. REV. 1281 (1932)).
102 Id. at 48 (emphasis omitted).
104 Id. at 49.
105 For the purpose of this Article, I did not separate the same- and different-sex couples because I do not think that the experience of same-sex couples regarding knowing and understanding the law is markedly different. Although there is a possibility that same-sex couples would be more egalitarian in dividing property or would have greater familiarity with legal instruments like contracts, because of the years without the possibility of marriage, the interviews suggested that they were not different from the
ranged from twenty-one to forty-eight. Only four couples had a partner older than forty, and in only one relationship were both partners older than forty. Overall, most of the sample is composed of partners between the ages of twenty-seven and thirty-five. Appendix A provides information about each interviewee’s age, ethnicity (self-described), religion, and occupation.\footnote{See infra Appendix A for the sociodemographic of the interviewees.}

Seven couples had children, four of them from previous relationships and three shared; some children lived in the household most of the time and some with their custodial parent.

Criteria for inclusion in the study were couples who had lived two to five years together in unmarried relationships. This was an important factor: as these couples had moved in together when the FLA was already in force, I was able to examine whether that law had any effect on their cohabitation decisions. Interviews with couples residing in Vancouver were conducted face-to-face at a time and location suggested by participants. Most frequently, the interview was held at a coffee shop and occasionally in people’s homes. Twelve interviews were held on Skype—with couples living in other parts of BC (e.g., Whistler, Kamloops, Victoria).

Recruitment efforts changed over time. Initially, I used my own social media accounts (I excluded first-circle relationships to interviewers) as well as UBC’s and Allard School of Law’s accounts. I also placed ads in cafés around Vancouver and in a community center. Later, I used Facebook ads to reach out to larger populations, including people unconnected with my circles. I compensated participants by giving each couple a $60 Amazon gift card—an amount approved by UBC’s Behavioural Research Ethics Board.

Though the sample is diverse in several ways, most respondents were highly educated, middle-income young professionals between the ages of twenty-seven and thirty-five. All individuals except four have at least a bachelor’s degree or are in the process of obtaining one. Participants mostly fit into what are traditionally considered middle-class occupations, according to social-class classification schemes.\footnote{See Robert Erikson & John H. Goldthorpe, The Constant Flux: A Study of Class Mobility in Industrial Societies 38–46 (1992) (providing a class schema).} Further, with one exception, all are nonreligious individuals. In sum, the sample is likely to reflect common experiences among young, middle-class, highly educated, and secular couples, a population that has, or is presumed to have, an interest in property division and other financial obligations between partners. Early adulthood is the ideal age for this study, as this population often represents individuals who are in the primary years of building a career, accumulating assets, and creating significant interdependency.\footnote{See Sharon Sessler & Amanda Jayne Miller, Cohabitation Nation: Gender, Class, and the Remaking of Relationships 14 (2017) (justifying their decision to interview couples between others. In any event, my results would have remained the same if the sample included only the twenty-seven different-sex couples.}
will have relationship patterns of a joint venture, compared with older couples who might be living on their retirement savings and be in their second or third major relationship. Additionally, as I explain in Section III.A, this population—of all populations—has the strongest reason to know about the rules concerning obligations between partners.\textsuperscript{109}

By the same token, the sample has some limitations: it primarily contains well-educated individuals, in their midlife years, with a secular orientation. I did not interview any elderly couples, recent immigrants from Asia, or other racialized individuals, to name just a few of the relevant groups left out. I fully acknowledge that these groups might (or even likely) have different narratives and legal needs.\textsuperscript{110} In a future project, I aim to focus on these populations. As well, the sampling of same-sex couples is too small to draw any conclusions about differences between those couples and their different-sex counterparts.\textsuperscript{111} Finally, I have only a small sample of couples who raise children together. I believe that this is a strength of this research. For one, the presumption of equal sharing and requirement of support is more justifiable when one of the partners has made career sacrifices to raise children. In other words, such a situation presents the least controversial argument in favor of an opt-out regime.\textsuperscript{112} Indeed, most opt-out regimes

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\textsuperscript{109} See infra Section III.A (discussing the particular reasons the interviewees had an incentive to know the default rules).
\textsuperscript{110} The mentioned groups have or might have a particular interest in regulating adult relationships. Elderly couples constitute one of the largest groups of cohabitants in the United States. BOWMAN, supra note 28, at 118–20. They have a lot to lose from an automatic presumption of marriage; for example, loss of social benefits or alimony or disputes with children (their own or their partner’s) about inheritance. Aloni, supra note 43, at 582–83. Recent immigrants from Asia comprise a big group of Canadian residents that warrant scholarly attention. According to the 2016 census, over one-fifth of Canada’s population is foreign-born: the majority (61.8\%) of newcomers to Canada from 2011 to 2016 were born in Asia. STAT. CAN., IMMIGRATION AND ETHNOCULTURAL DIVERSITY: KEY RESULTS FROM THE 2016 CENSUS (Oct. 25, 2017), https://www150.statcan.gc.ca/n1/daily-quotidien/171025/dq171025b-eng.htm [hereinafter STATISTICS CANADA: IMMIGRATION]. The 2006 Canadian census found that living arrangements vary by ethnocultural group. Anne Milan, Leslie-Anne Keown & Covadonga Robles Utquiu, Families, Living Arrangements, and Unpaid Work, in WOMEN IN CANADA: A GENDER-BASED STATISTICAL REPORT 18 (2011), https://www150.statcan.gc.ca/n1/pub/89-503-x/2010001/article/11546-eng.htm. In the United States, immigrant groups have also struggled to cope with the law of unmarried couples; they came with their own understandings of what constitutes a marriage or a union—a situation leading to confusion and injustice. BOWMAN, supra note 28, at 114–16.
\textsuperscript{112} See, e.g., Ayelet Blecher-Prigat, The Costs of Raising Children: Toward a Theory of Financial Obligations Between Co-Parents, 13 THEORETICAL INQUIRIES L. 179, 190 (2012) (arguing that “the
create a special rule for people who raise children together (i.e., waive the requirement of living together two years before the presumption arises). Second, the number of adults who live without children in the United States and Canada is growing exponentially, and it is interesting to learn how norms of sharing operate in such a situation. Nevertheless, the opt-out regimes are not limited to couples who have children, but they apply to childless couples regardless.

Vancouver—along with the other locations—is ideal for such a study because it is one of the most expensive real-property markets in North America. It is reasonable to assume that couples with even a small interest in real property will be motivated to respond to laws concerning division of properties. Vancouver is also an immigrant city, with a little over 40% of its population composed of newcomers. As the interviews confirm, coupleship recognition is linked to immigration processes.

The BC experience can provide a valuable lesson to the United States. In terms of recognizing spouses and unmarried couples, Canadian and American family law systems share similar principles. Scholarly and public debates about the recognition of informal relationships raise the same concerns and assumptions. They both have a mix of federal and provincial or state law. Further, there is no reason to believe couples’ experiences in BC would differ from those in the United States. While there are pertinent obligations created between adults by virtue of their joint parenthood should not be limited to the activity of parenting, but rather extend to financial obligations that they owe one another.


115 STATISTICS CANADA: IMMIGRATION, supra note 110.

116 Much of the law concerning informal relationships relies on contractual principles, such as requirements of formalities, implied contracts, and principles of unjust enrichment. The United States and Canadian systems, with the exceptions of Louisiana and Quebec, share the common-law principles pertaining to contracts between intimate partners.


118 There are significant differences in Canada and the United States about the types of benefits attached to marriage, such as health insurance and taxation. In Canada, fewer attributes are connected to marriage. There are also differences when it comes to the level of religiosity of the populations. However, regarding legal obligations between the partners upon breakup, the differences are minor. It is still the case, as I detailed before, that in Canada (like in the United States), the creation of obligations between partners depends on the recognition of their relationships as marital or marital-like.

Most importantly, the reality is that in the United States, as in Canada, there is a growing societal need to craft family law that responds to the situation at hand. The number of divorces, nonmarital unions, and children born to unmarried parents necessitates a response from the courts and, eventually, the political system. While some in the United States attach greater importance to marriage than Canadians do, the values and attitudes in the United States concerning family life are changing rapidly, making the
differences concerning the importance of marriage between populations in both countries, there are no germane differences in the way that couples discuss (or do not discuss) obligations, the problems with entering into contracts among intimate couples, the rationales in protecting the investment of the primary care provider in the relationships, the societal expectations about norms of sharing the assets of the relationships, and the misconceptions that couples have about the law.119 There are also no applicable differences in the values and considerations that underpin the law in this area.120

I and my research assistant, Adam Yang Vanzala, a sociology PhD candidate, conducted the interviews. I contemplated whether to interview the partners in each couple together or separately (but simultaneously), noting that Sharon Sassler and Amanda Miller recently chose to interview partners separately to “assess partner similarities and differences in responses.”121 While separately interviewing partners provides more candid answers and exposes conflicting narratives, I nevertheless chose to interview partners together, as I was particularly interested in identifying points of agreement and contention between them. Observing the partners’ reactions to each other’s statements on recognition added a clarifying dimension to the interviews. Though each individual may have tailored their responses to please their partner or to mitigate any potentially uncomfortable moments, some topics evoked a considerable amount of disagreement as well as resonance. Therefore, interviewing partners together allowed us to identify clear points of agreement and even contention between them. When answering the questions, I noticed individuals relied on their partner for recall and frequently corrected each other when something one partner mentioned did not correspond to the other’s account. Separate interviews might not reflect how things happen in their everyday lives, something only naturalistic observation could answer, but it provides a better snapshot of people’s relationship dynamics. Using this methodology also allowed us to combine the interdisciplinary skills of legal and sociological training.

The interview consisted of a semi-structured, open-ended format. Interviews were recorded, transcribed, and initially analyzed using an open-coding strategy to identify emerging themes. I started the interview with experience in Canada highly relevant.

119 For discussion on U.S. couples’ knowledge about their legal obligations, see Ira Mark Ellman & Sanford L. Braver, Should Marriage Matter?, in MARRIAGE AT THE CROSROADS 170, 171–72 (Marsha Garrison & Elizabeth S. Scott eds., 2012) (describing U.K. and U.S. studies about couples’ understanding of the law and concluding that legal misconceptions are prevalent and that couples do not focus on legal aspects of their relationships).

120 Indeed, as the ALI Principles state, some U.S. jurisdictions already follow the BC model: “Although not always articulated in this way, several American jurisdictions follow a status approach similar to that adopted in this section, as do several Canadian provinces . . . .” ALI PRINCIPLES, supra note 4, at § 6.03.

121 SASSLER & MILLER, supra note 108, at 199.
questions concerning the pre-cohabitation period, the reasons the couple moved in together, the timing of moving in together, and the transition period from dating to cohabiting. Without asking directly at this point, I used this early questioning to gauge whether the law played any role in their decision to move in together or not to do so. I then asked a set of questions regarding the division of housework labor, followed by queries about sharing financial expenses and about other economic aspects of their relationships (e.g., “How are housing costs divided between the two of you? How much has living together improved the economic well-being of each one of you?”).

Next, I asked couples about their plans for the future: what are their long-term plans; whether they want to have children; and whether they intend to stay in the same place in the near future. I did this to learn a bit more about the level of commitment the couple has. I then asked about the legal obligations between the partners: whether they have made any formal or informal agreement about the division of property or support; whether they know the law; what they think the law says; and whether the law reflects their understanding of their relationships. I further asked whether they knew about the law when they moved in together and if they think their relationship meets the definition of “marriage-like.” In the final stage, before collecting demographic data, I tried to get further information about the relationship’s nature and particularly about each couple’s decision not to get married. Overall, I gathered a considerable data pool that increases knowledge about many aspects of cohabiting couples. Some of the results—those about unmarried couples in an opt-out regime—are discussed in the following Part.

III. ASCRIPTION TROUBLE

This Part discusses the major findings of the qualitative study and draws on them to analyze the effects of the opt-out model. Section A describes the engagement of the couples with the law. Section B uses the interviewees’ experiences to assess the level of ascription. Section C examines the degree to which couples’ behaviors and expectations conform with the equal-sharing presumption that defaults supply. Section D enquires into the constitutive impact that the law has on couples who live under this regime.

A. The Choice of Defaults

Couples in my sample had an abysmal understanding of the law, a hard time comprehending the law if they tried, difficulties discussing their obligations with one another, and challenges in executing contracts. This Section reports what I learned from the interviews regarding these aspects.
1. Knowing and Understanding the Law

To better understand whether couples can opt out from default regimes, we need to know whether they are aware of the automatic obligations that their relationships raise.

The study finds that couples’ degree of familiarity with and understanding of the law is tenuous. A third of the couples (ten out of thirty) were completely ignorant about the law’s existence or knew so little as can be characterized as nonexistent. When asked if they knew anything about the law concerning their obligations, they responded that they knew nothing. Over time, I found out that many couples who initially said that they knew nothing actually knew more than they realized, so I always followed up with probing questions (such as, “Do you know whether you have any financial obligations vis-à-vis one another upon breakup?”) to examine real levels of knowledge. This third expressed ignorance about the laws governing their mutual obligations even after I probed.

In only seven out of the thirty couples, both partners had a good understanding of the law; in two other couples, only one partner had a good understanding. By “good understanding,” I mean an awareness that the couple was recognized as spouses automatically, without taking any affirmative steps. The rest of the couples—thirteen out of thirty—had different degrees of understanding of the law but fell into one or more common mistakes, which I discuss below.

One such mistake was not realizing they could opt out of the law’s application regarding their mutual financial obligations. Namely, in five couples, at least one partner (and typically both) thought that the two years was a mandatory regime, without a way out. Eve122 (twenty-nine), who knew the law rather well, answered, “I did not know you could opt out of it, I kind of thought it was a—it automatically happened, regardless.” Jessica (thirty-three) mentioned that she “wasn’t aware you could opt out or go to a notary or whatever and have something formalized there, so effectively a prenup.”

The opposite misunderstanding, however, was much more common: approximately a quarter of the interviewees mistakenly expressed the idea that they needed to “apply” in order to be considered “spouses” or “common law” partners (in other words, they believed they were living under an opt-in regime).123 Danny (twenty-five), an urban-gardener with a master’s degree in public policy, had a typical response: “I have a vague

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122 Eve is not her real name; all interviewees’ names used herein are aliases.
123 Couples are right that triggering the law’s application requires one of the partners to claim property rights or support from the other partner or to apply to court. Yet, at least for some federal purposes, these couples ought to choose the designation of “living common law” if they live in conjugal relationships. See, e.g., Old Age Security Act, RSC 1985, c-9, S 2 (Can.) (“common-law partner, in relation to an individual, means a person who is cohabiting with the individual in a conjugal relationship . . . .”). Further, theoretically, the entitlement to an equal share in a partner’s property is created without any affirmative step, even if the partners do not seek to exercise their right.
understanding of common law [relationships] in general and applying for that, which we haven’t done.”

Couples with some understanding of the law, or knowledge about its existence, typically heard about it from friends and sometimes from family or just had a general idea about it. Jenny’s response is typical: “I have a general idea, I don’t know where I learned this, but like I have a general sense that unmarried couples have virtually the same rights as married couples. That’s just what I’ve been told or what I’ve heard on the street . . . .”

Even couples with a solid legal understanding fell into the other common mistake I observed: they confused how long it takes to be considered “common-law partners” for federal purposes (after living in a “conjugal relationship” for one year) with how long it takes to be considered “spouses” for provincial purposes (after two years, in BC). 124 Eight couples in the interviews mixed up the federal and the provincial time requirements. As one partner with a basic understanding of the law stated, “It’s kind of confusing, too, because there are some things that say you’re common law after one year and then there’s some things that say you’re common law after two years, so I’m not really sure how that’s decided.” While the problem of different timelines at the federal and provincial levels is unique to Canada, there is a good chance that similar confusions will occur in the United States. 125

If you think that being confused about the timing is not a big deal, consider the following story. Tim and Tommy, a same-sex couple, moved from Scotland to BC in 2017. Tim, a native English speaker with a PhD in chemistry, was a permanent resident of Canada and, on that basis, aimed to sponsor Tommy. The problem was that when Tim first entered Canada, he checked the box for “single,” despite having lived together with Tommy for thirteen months (and hence already considered in a conjugal relationship for one year). He did this because they thought their relationship was only federally recognized after two years. “We thought it took two years cause when you Google it, it says British Columbia common law, two years, so we thought there was a special situation for this province only—that overruled the federal one which said one year only.” The situation was, then, that Tim was “accidentally lying” (his words), because he was confused between the two different time-dependent definitions. After consulting a lawyer, and paying much for such guidance, Tommy had to apply for permanent residency on humanitarian and compassionate grounds, only because of, as Tim says, “an honest mistake cause, basically, you ticked the wrong box”—

124 Margrit Eichler, Common-Law Unions in Canada, CAN. ENCYCLOPEDIA (Sept. 21, 2016), https://www.thecanadianencyclopedia.ca/en/article/common-law-unions-in-canada#. See also Family Law Act, S.B.C. 2011, c 25 § 3(1)(b)(i) (Can.) (defining a “spouse” as a person who “has lived with another person in a marriage-like relationship, and has done so for a continuous period of at least 2 years”). 125 In the United States, marital status matters at the federal and state level and each can define eligible marriages differently. For why and how the federal government shapes family law, see Courtney G. Joslin, Federalism and Family Status, 90 IND. L.J. 787, 788 (2015).
even though, when one looks up the definition online, “it literally says two years.” The consequences of this mistake are devastating: processing such an application can take up to twenty-nine months. Tim and Tommy applied a year ago; during this time, Tommy has not been allowed to work or leave the country, so Tim serves as the sole provider.

When BC promulgated the reform, legislators noted, “During the consultation period, feedback indicated that many unmarried couples now are under the mistaken belief that, after two years, they are treated the same as married couples and are entitled to division of property if they separate. This misunderstanding causes significant disadvantage.” The findings call into question the data that the BC lawmakers relied on when deliberating about adopting an opt-out approach. It is hard to believe that before the BC law was passed couples thought they were deemed married after two years of cohabitation—given that, even now, when it is the law, they have little idea that they are considered spouses. Another rationale for the reform was harmonization: making the law simpler by using the same period as various other acts. As this study evidenced, this objective has not been achieved, as the most important distinction—the one between the federal and the provincial laws—is often confused.

Understanding the law is difficult even for those who try hard to do so. Two partners, Romeo (twenty-one) and Juliet (twenty-one), are students at UBC in highly competitive programs; they are native English speakers who come across as highly articulate. When they were close to reaching their two-year threshold, they tried to comprehend the law by researching both BC and federal websites. Despite being sophisticated readers and researchers, they were unable to grasp the relevant laws fully. As Romeo described, “I remember that I had a bit of trouble figuring out whether common law was federal or provincial law.” Further, he “also had trouble figuring out whether it was something that you could decide or declare or apply for versus whether it was forced upon you.” Both of them reported frustration at being unable to decipher these legal regimes, despite the noteworthy effort.

Similarly, Ryan (thirty-five), whose job as a union negotiator often includes engaging with legal materials, and Jessica (thirty-three), an occupational therapist, described their frustration and confusion in trying to understand the law:

Jessica: I remember doing some research about when, what is the timeline for when you’re considered common law because I have heard different things from different friends where


\[127\] Id.
some people said six months . . . and then other stuff was two years, and it was just really unclear if there was a time limit kind of thing. . . . And I wanted to get an idea of what sort of rights and obligations that did provide. [I] work in healthcare, I’m quite concerned with healthcare matters, and I wanted to know . . . if I’m someone’s common-law partner am I their next of kin as a spouse would be, can I make healthcare decisions for them . . . ? And I did a lot of Googling at the time and I never really felt confident in the information that I was able to get; it was just very unclear at that time . . . .

**Ryan:** And I would say something very similar, which is that I had trouble figuring out what was sort of covered by provincial law and what might be federal.

Many couples had good reasons to know the law (regarding their mutual obligations), discuss the law, and reach some shared understanding of their mutual obligations. The couples’ responses often revealed that they had intended to keep some properties out of their partner’s reach. One-third of the couples had what I characterize as a “strong interest” in clarifying their legal position (since they own realty together) or in excluding property from the shared pool. Further, a few couples had title to the property under only one of the partners’ names (e.g., one partner did not have a permanent residency when they purchased or was not qualified to take a mortgage). In addition to co-owning property, one couple had a business for which one serves as the de facto CEO and the other as the service provider. Further, a few interviewees had a strong interest and stated intention not to share the liability of their partner’s debt.

Another third of the couples I interviewed had what I characterize as a “moderate interest” in clarifying their legal obligations, as they owned significant assets from before the relationships. While property bought before a relationship is separate under BC law (i.e., is excluded from family property and is not part of the distribution pool), transmutations of property occurred in many of these couples’ dealings—and tracing the origins of contributions is complex.129 For instance, one partner moved into the apartment that her partner owned; recently, they sold it and purchased a new property together. Another partner sold shares she owned and bought property while together with a partner (appreciation on such property is considered marital property130). Additionally, while the assets purchased before the relationships are excluded, their appreciation is part of the divisible family property, and some partners might want to avoid this. Many interviewees were ignorant about this point. Others contributed to their

129 Id. at § 85(1)(g) (tracing of excluded property).
130 Id. at § 84(1)(a), 84(2)(g).
retirement savings while together (which makes such savings part of the family property\(^\text{131}\)), co-owned a car, or both. All these people had good reasons to sort out their obligations in advance. In any event, due to the vagueness, ambiguities, and uncertainties of the law of property division and of spousal support, it is wise for those with property to formalize their legal obligations.\(^\text{132}\)

2. **Cognitive Bias and Overoptimism**

Notwithstanding these incentives to put their legal rights and responsibilities in order, couples have given this little thought or have had very unclear understandings about how or why it is relevant to them. Daniella (thirty-six), a sophisticated, business-oriented person, acknowledged that she and her partner’s properties are “a giant mess. If we ever get separated it will be a big battle.” Yet, Yossi, her forty-year-old partner, stated that he “didn’t really think about [their obligations].”

Most couples did not discuss obligations directly, due to a combination of trust, naïveté, and dislike of what they felt was mixing the personal with business. Despite having a business together and being experienced with buying and selling properties, Daniella and Yossi felt mingling love with domestic agreements does not make sense. Yossi explained that signing a contract is “like business, bring[ing] a business into a relationship.” Danielle mentioned that her mother asked her whether she would sign a contract, as she “was coming into the relationship with a lot more assets than [Yossi].” Yet, she “figured, even though [Yossi] had a lot more debt and was not making money yet, [he] had potential, so [it’s] not [like he was] going to try to steal money from me.” Another female interviewee stated: “I guess we just haven’t really thought a lot about, you know, something as trivial as breaking up or like one of us dying, for example.”

Erin (twenty-eight) is a lawyer who owns the apartment she lives in with her partner, Williams (twenty-eight), an elementary school teacher. Their informal agreement is that Williams is not entitled to any share of the property, including its appreciation. When they moved in together, Erin drafted a contract but eventually put it aside. When I asked her why she did this, she replied:

**Erin:** I don’t know, I just figured that he’s a really reasonable person, and you know.

**Williams:** I believe in good karma.

**Erin:** I mean, I just don’t think that he’d go after me.

\(^{131}\) *Id.* at § 84(2)(e).

\(^{132}\) See Jeffrey Behrendt, *The Only Cohabitation Agreement Guide You’ll Ever Need: A Canadian Lawyer Explains All* (2016) (noting that there are several good reasons to enter into a cohabitation agreement, among them, “the rules for property division for unmarried couples are very vague . . . .”).
Williams: If things went, went bad, that would just be a terrible thing to do.

Earlier studies have found that married couples are too optimistic or too trusting to discuss financial topics that touch on possible breakup and to negotiate them effectively or are embarrassed to raise such issues with their partners. The interviews track similar patterns within cohabiting couples. Tim, for example, expressed, “We don’t foresee ourselves having any issues about breaking up or anything like that cause we’re too strong communication-wise, and we anticipate arguments before we even have them, we’re really academic in that, so . . . .” Yet, Tim, like other interviewees, is at greater risk of separation than married couples, as evident by the high separation rates among unmarried couples versus married. Indeed, one study found that even in Quebec, the province with the highest cohabitation rate and the strongest acceptance of cohabitation as a marriage alternative, informal cohabitations remain more unstable than marriages.

In addition, married partners can afford some degree of optimism because they assume that the law duly protects them in case of divorce. But it is evident that at least half of the couples I interviewed did not assume the protection of the law in case of a breakup—so they do not have similar grounds to feel that the law adequately protects them.

Couples not only underestimated their likelihood of breakup, but they were also highly optimistic about having an easy, clean separation. Despite experiencing complex divorces for both partners’ parents, Antonio (thirty) thought it would be different for them: “Now for me, it’s just easy, you know 50/50, boom, if that had to happen.” Another couple, both engineers in their early thirties, shared a similar belief, as the male partner articulated: “We both have some respect, and trust each other, and . . . if we separated, it would be on . . . good terms, and we wouldn’t fight each other over things like a vehicle.” Likewise, Molly (thirty-three) expressed a similar sentiment when stating, “I have a very hard time picturing a situation that would get, like, super acrimonious . . . obviously that happens all the time, but I think


134 According to the 2011 General Social Survey on Families, out of five million individuals who ended relationships between 1990 and 2010, 49% dissolved a common-law relationship, and 44% dissolved a marriage. Maire Sinha, *Parenting and Child Support After Separation or Divorce, in Spotlight on Canadians: Results from the General Social Survey 1, 5* (2014).

we’re different.” Couples who reflect on their trust and naiveté often manifested some kind of ambivalence; after sharing a sentiment of trust, they proceeded with a statement of justification or self-doubt. “I don’t care what the law says. And maybe that’s ignorant and naïve,” stated Kelley. Then she acknowledged, “But again, we’re in a good place, right, so that is why the law is here.”

Only a small fraction of the couples had discussed the division of property in case of a breakup. One partner, twenty-nine years old from Victoria, described the motivation to discuss things as follows: “We’ve had conversations before because we’re not married, so it’s not like we have a formal arrangement of our finances. If something were to happen and we separated, it’s, well, what are we going to do? So ‘C’ and I have talked about it.”

Ryan and Jessica (the union negotiator and occupational therapist) were engaged in a long process of clarifying their mutual obligations. One main motivation for this is that Jessica is divorced and wanted to ensure her independence. They have exchanged emails about the possible legal arrangement they would like to see, taking a very realistic approach. And although Jessica recounted the process as involving a “somewhat strange conversation about hypothetical reasons [to break up],” both partners eventually described the results as satisfying. Ryan explained the rationale for the agreement as follows:

I felt good about it for the idea that we, presumably if we broke up, we might not like each other in that moment, we like each other now, we could have sort of respectful conversation now about what we wanted, and that might be easier to do now than it would be later.

Jessica shared a similar sentiment:

I felt really good, . . . I remember joking about this afterwards that even though we spent like half that day talking about what if we broke up, the idea that we could have that conversation just made me feel like more secure and, and confident in the relationship . . . .

Although their experience was the exception, a few other couples had frank discussions about the legal arrangement. The next Section describes their attitudes toward a formal contract.

3. The Problems with Executing a Contract

Overall, only seven couples contemplated a contract. Merely two

\textsuperscript{136} Separation from \textit{cohabiting} relationships is likely to be at least as acrimonious as separation from divorce. One Australian study found that separated cohabiting parents reported more conflict than divorced parents and that ending cohabiting relationships “clearly does not prevent severe separation adjustment problems.” W. Kim Halford & Susie Sweeper, \textit{Trajectories of Adjustment to Couple Relationship Separation}, 52 \textit{FAM. PROCESS} 228, 240 (2013).
executed a formal one, and two others wrote an informal one. The couples’ diverse experiences exemplify the barriers that couples who overcome the cognitive bias face when wishing to opt out.

When I asked Ryan and Jessica why they did not consult a lawyer and formalize their contract, they answered that “cost was a big part of it.” Kelley (forty-three) and Megan (forty-eight) are another couple that took steps toward writing a contract but did not formalize it. The problem is that a court might not enforce the contract because it did not comply with the formalities that guarantee the strongest protection from court intervention in setting aside the contract. The couple worked on a draft contract that arranged their relative ownership in their shared home (the title is only in Megan’s name). At the time of the interview, this draft remained on their computer, unsigned.

BC law requires a cohabitation agreement regarding the division of property and debt be signed by both partners and witnessed by another person. Because their agreement does not follow the required formalities, a court might or might not adhere to it—the law gives courts maximum discretion in such cases. When asked why they did not sign the agreement, they responded that they “were out of money for legal advice.” This is a telling response, as the law in BC does not require independent legal advice as a condition for enforceability. The response sheds light on the difficulty in entering into a contract without guidance.

Other couples did not even consider writing an informal document because one of the partners resisted. Bertha (thirty) reported that they had “not sat down and talked to anyone or written anything out or signed any documents” and that she “wish[ed] we did, personally.” According to Bertha, her partner Wakeford (forty-two) had “pushed back” against her idea to hire a lawyer because he thought “they’re overpriced and that we are smart people.” On his side, Wakeford explained that he is the economically vulnerable party, and an agreement would be on his behalf. Thus, he claimed:

When it’s my assets on the line, then I’m less inclined to say we need a formal contract. For instance, like buying a vehicle together—it’s registered and titled to her, so I’m the only one vulnerable, but I feel like if that was reversed, I definitely would not begrudge a more formal contract because she requires it. I would be completely open to that.

Two couples shared a mutual intention to enter into a contract and did not execute one, at least not a binding one. One of those couples—the engineers—had attorney friends who advised them to enter into a contract and instructed them how. And while both partners “understood that it would

138 Id. at § 93(6).
be good to have something on paper . . . we just didn’t have time for it.” Kemala (thirty) and Ethan (thirty-one) also wanted to enter into an agreement, but a few things stood in their way. Most importantly, they realized that there is not much to contract around because they do not own any property. Thus, Ethan explained, it became “low priority, we haven’t really put anything into place, we haven’t contacted a lawyer. I don’t even know what we would put in it.” Ethan then clarified that the reason he did not push to execute an agreement is that, because his main asset is under sole proprietorship, Kemala “can’t really claim half of that, it’s just me, or maybe I don’t know.” His last assertion is correct: he does not know—there is no reason to treat sole proprietorship as an excluded property.

Surprisingly or not (because it goes against the stereotype), the two couples who executed a contract did it to protect the female partner’s property. Nivaan (twenty-six), a commercial banker, and her partner, Diter (twenty-nine), working for a software company, executed a contract that guarantees that Nivaan is the sole owner of the property they live in. Nivaan is an only child, and her parents paid for the down-payment on the apartment. Diter is not entitled to share from the appreciation of the property. Their contract, then, deviates from the default rules of property division. They have both had independent legal advice. Olivia (twenty-eight) and Logan (twenty-five) are another couple who entered into a formalized agreement. Olivia inherited a sum of money, which she used to buy the apartment they live in. Their contract replicates the default rules. The purpose of the contract was to clarify her ownership—including her sole ownership in a trust account—and to guarantee, in the words of Logan, “a fair and clean split.”

Most couples who contemplated an agreement, then, did not form a binding agreement. The two who executed a contract did this to secure the property owner’s rights in the living space they were sharing. Both couples relied on legal advice.

In conclusion, we have so far observed, on one end of the spectrum, couples who know a nominal amount about the law and hold inaccurate perceptions about their legal position; most commonly, they think they need to apply for recognition as spouses, or they are confused about the time at which obligations automatically attach to their relationships. On the other end of the spectrum, we find couples who believe that they cannot opt out or who find the process of contracting too onerous. In addition, we witnessed cognitive biases that inhere in such relationships: partners’ overestimation of their chances of staying together, expectations of a clean breakup, combined with couples’ limited ability to engage with each other on these topics.

B. The Defaults of Choice

Based on the findings so far, I suggest that BC’s opt-out regime, as it currently operates, is highly ascriptive in its nature. For those who are
unaware of the law altogether, or who think they must take active steps to enjoy its protection, the law imposes obligations “by surprise.” As one interviewee observed, some people “kind of get trapped into that law without really knowing the details.” Danny articulated a similar attitude: “I don’t have an issue with this law as I understand it now, but I have an issue with not knowing about it, having lived in BC for years.”

I do not claim that the law imposes obligations that all couples would find unreasonable or that are different from what they would have expected anyway. Rather, scholars who support an opt-out approach often respond to critiques about the harm to the autonomy of unmarried couples by stating, “[a]s with marriages, if the parties do not like the norm, they may contract around it.”\textsuperscript{139} But the assertion that couples can easily exercise choice by opting out, that this law minimally affects them, is mistaken. Further, the assumption that not contracting out indicates implicit agreement to a sharing regime is just as wrong as the argument that couples indicate their consent to the default rules by not opting in.

In cases where residents do not know the law, BC’s degree of ascription serves as an offense to autonomy and to the law’s legitimacy. Some scholars react to this appraisal of autonomy violation by arguing that “[t]he flaw is the premise that those who marry or do not marry accurately understand the legally enforceable economic obligations that each will have towards the other. In [the United States] federal system, it is not possible for this proposition to be true.”\textsuperscript{140} Married couples, as well, the argument goes, have not consented to the default rules of financial obligations upon divorce because they cannot possibly know them. Accordingly, inscription (on unmarried couples) is based on a notion of consent similar to that which the law assumes regarding support obligations for married couples.

What such a critique misses are the functions that formalities (such as marriage) serve. While it is true that married couples often also do not know the nitpicky rules of division of property and spousal support, the process itself of getting married serves the cautionary aspect of formalities, which does not exist in an opt-out model. Famously, Lon Fuller elucidated that one role of formalities is to caution parties before entering into a commitment.\textsuperscript{141} Accordingly, the ritual of formalities—for example, signature or exchange of consideration—ensures that the parties deliberate before entering into a binding agreement. As Matsumura recently explained, “[c]hoice, especially formal choice, can highlight the seriousness of the decision to become married. The basic requirements of formal marriage in most states—obtaining and recording a marriage license, often satisfying a waiting period, and participating in an official ceremony—all serve this cautionary function.”\textsuperscript{142}

\textsuperscript{139} Polikoff, \textit{supra} note 28, at 372.
\textsuperscript{140} Id. at 370.
\textsuperscript{141} Lon L. Fuller, \textit{Consideration and Form}, 41 \textit{COLUM. L. REV.} 799, 800 (1941).
\textsuperscript{142} Matsumura, \textit{supra} note 6, at 2030.
Formalities also serve to make the undertaking legitimate in the eyes of the parties. Deliberation has a behavioral aspect. Parties are more willing to commit to the undertaking and take it more seriously if they contemplate the act. Formalities, according to David Hoffman and Zev Eigen, “are supposed to signal to individuals that a privately made instrument of law (a contract) bears the seal of the law’s formal approval, and hence the authority of legitimate law stands behind it.”\(^{143}\) They suggest that the more a promisor feels that the deal is legitimate, the more likely the chance that she will respect her undertaking.\(^{144}\) Given the lack of formalities, couples may perceive an opt-out system as illegitimate should they find themselves in a contract for equal division of property and spousal support, particularly if they wished to avoid that very situation or, as in the case of some interviewees, are unaware that the law even exists. The feeling of illegitimacy can evoke resistance. In family law cases, feelings of resistance may increase acrimony among partners at separation, making the process of division more antagonistic and affecting partners’ future interactions.\(^{145}\) Because some ex-partners continue to co-parent together or have other reasons to remain cooperative, this sense of illegitimacy concerning the law runs contrary to one of the basic principles of contemporary family law.\(^{146}\)

Simultaneously, when couples do not know that they can opt out from the default rules, or when opting out is too arduous, family law does not serve its facilitative function. For Fuller, formalities play a facilitative role, as they help channel parties to the form they must follow to create legally binding obligations.\(^{147}\) For example, the writing requirement guides the prospective promisor about the right way to enter into an agreement. Family law scholarship has long emphasized facilitation as a primary function of domestic relations law. Facilitation should “help people organize their lives and affairs in the ways they prefer. Family law performs this ‘facilitative’ function by offering people the law’s services in entering and enforcing contracts, by giving legal effect to their private arrangements.”\(^{148}\) Indeed, an opt-out regime purports to serve this role, by posing clear requirements that should guide couples about how to tailor their own arrangements and point them to the specific form of opting out: a written, signed contract witnessed by one person. In practice, however, the BC opt-out scheme fails to enable


\(^{144}\) Id.

\(^{145}\) See, e.g., CLARE HUNTINGTON, FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS 91, 126 (2014) (discussing the negative effects of the adversarial system on any human instinct for reconciliation and compromise).

\(^{146}\) See id. at xii (“This approach to family disputes ignores the reality that even as legal relationships change—from spouse to former spouse . . . —familial connections typically endure. Divorced spouses continue to co-parent . . . ”).

\(^{147}\) Fuller, supra note 141, at 801–02.

feasible facilitation. Placing the burden to opt out on the couples, without assistance and guidance about how to do it, and imposing formal requirements for opting out that are rather stringent, facilitation functions mainly for wealthy, sophisticated partners who can have an attorney’s assistance. Setting a process of opting out that is quite laborious raises the question of whether the law’s interest is in enabling facilitation or in making alteration of the default grueling. 149

The fact that most interviewees did not opt out is hardly surprising, as the default rules in family law often serve as a de facto mandatory rule, or, at least, a “super-sticky” default rule. Scholarship on contract theory has documented the “stickiness” of default terms—or how parties to a contract might not alter an undesirable default rule. 150 A primary obstacle to displacing a default term governing financial obligations is the partners’ cognitive bias and overoptimism. We have seen that even a trained lawyer with a strong interest in entering an agreement with her partner backed up eventually, so the hurdles to execute a contract are significant.

High transaction costs are another obvious explanation for the default’s stickiness in the study’s case, for the process of executing a contract is onerous. It is true that parties can, with little effort, download a boilerplate contract. But, considering the complexity of asset division laws and spousal support, they would be justified in consulting a lawyer. Further, the rituals—the signature and witness requirements—serve as deterrents to a “do-it-yourself” type of contract, like the one that Kelley and Megan did.

Other than the cost, the party who suggests altering the defaults might be concerned about their partner’s response, and for good reason. As Omri Ben-Shahar and John Pottow argue regarding a commercial contractual scenario, “[N]o matter what the default practice is, a proposal to opt out of it can raise a host of suspicions.” 151 This is surely the case in a suggestion to contract around defaults in the context of financial obligations between intimate partners. If defaults are sticky for sophisticated commercial parties or those with a less intimate connection, the defaults governing relationship dissolution are practically adhesive. As such, the default is not a mere “nudge”—a mechanism that steers couples toward a particular choice rather than choosing for them. 152 In reality, the default’s function is more akin to mandatory rules than gentle guidance in one direction.

In conclusion, as it operates in the lives of unmarried couples, BC’s opt-
out scheme leaves the choice to contract around the default rules quite illusionary. Unless the couples are wealthy enough to afford a lawyer or are highly entrepreneurial, we can assume that most of them will remain married by default, with little opportunity to design a different regime. One of the fundamental problems that the law tried to address is that unmarried couples did not contract about their obligations and thus found themselves without protections at the end of their relationships. The opt-out regime did not solve this matter but essentially placed the burden on those who wanted to avoid the obligations.  

The same difficulties that existed with the previous system still exist, although now they fall on those who might wish to deviate from the default. To clarify, I do not argue that opt-out systems are inherently ascriptive and autonomy-violating. Rather, in Parts IV and Conclusion, I suggest some ways to reduce the level of ascription or at least the adverse effects of ascription. However, the way that the BC system is structured, which resembles similar suggested models in the United States, makes active choosing fairly unlikely.

C. Majoritarian or Minoritarian Defaults

This Section inquires into whether, and to what extent, the default rules mirror what most couples would have bargained had they been informed of the rules. Put differently, I aim to understand better whether the law echoes the common expectations of couples who live in unmarried relationships about the nature of their commitments, and whether the law was too autonomous in that regard and “march[ed] to its own drummer.”

Law, it is axiomatic, derives its legitimacy from mirroring the cultural dynamics and traditions of the time. Positive law often reflects a construct of custom and practice, on the one hand, and morality, on the other. Most positive laws are consistent with both: laws replicate society’s prevalent attitudes and stem from reason and morality. Sometimes, however, “[l]aw has . . . taken the lead in opposing or reforming prevailing customs or moral norms.” From the premise that law “often reproduces norms, activities, and relationships that exist independent of law,” I ask whether an opt-out approach serves as a majoritarian default.

To learn about the couples’ attitudes toward the equal division of property and spousal support, I investigated how they manage their current finances and their opinions of the law that equalizes their duties to those of married couples. In the first set of questions I asked how they divided their housing costs (rent, mortgage, utilities). Living in an arrangement in which

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153 See Ben-Shahar & Pottow, supra note 19, at 653 (discussing the “stickiness” of out-opt regimes).  
156 Id. at 7.  
couples contribute to the household finances based on their relative income (pro rata) or income pooling was a strong indication of a sharing regime and interdependence. Conversely, choosing to calculate an exact amount that each partner contributes and reimburse the other regularly was indicative of a separate financial regime. Separate versus shared bank accounts was another indication of the level of a couple’s economic independence and interdependence, respectively. I also interpreted partners’ intentions to be responsible to each other by their direct responses about whether they thought the properties they accumulated while together should be divided equally in the event of separation and whether they reached any formal or informal agreement about financial obligations in case of a breakup. Other indications of an equal-sharing regime include the creation of emotional interconnection and long-term commitment.

1. *The Sharers*

Surprisingly, the defaults reflect the behavior and presumed or explicit wishes of only about half of the interviewees. Namely, approximately half of interviewees live together with some form of financial sharing and economic interdependence. For this group, the defaults mimic what they would have chosen if they were informed about the law and bargained about their obligations. The law, then, is barely majoritarian. Only half of the couples I interviewed believe that, upon dissolution, the partners should equally divide the assets that the household added while the relationship was still intact and should be obligated to pay spousal support.

I find this result surprising for two reasons. For one, another study—although using quantitative methods—found stronger support for equal division of property among unmarried cohabitants. In recently reported research conducted in Alberta surveying 118 individuals who live in common-law relationships, 76% of the respondents supported equalizing division-of-property rules that pertain to married couples to apply to unmarried couples, while 24% objected. Second, the participants in my study belong to the group most likely to adopt sharing norms, as they are at the prime age of planning to buy property and raise children. Indeed, the great majority of couples said that their long-term plan was to buy real property. Norms of sharing would likely be different if I had interviewed

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158 In two cases, I had trouble characterizing the couples’ approach. In one couple, the male interviewee avoided answering directly, suggesting he likely does not support equal sharing; and, regardless, the relationship showed some degree of financial separation and noncommitment. Another couple was very transparent but hesitated and had conflicting considerations.


elderly couples or couples with lower incomes and more couples with shared children in their household.\textsuperscript{161}

For some participants, it was easy to justify the equal division, as they based their relationships on joint venture principles: the law “make[s] sense because since we’ve been together, we’ve made money together, and all the money we’ve made on the real estate was together,” Daniella explained. Likewise, Richard (twenty-nine), Courtney’s partner (thirty), had reservations about spousal support. Still, he easily justified the norm of equal division and eventually even support obligations because “the argument that you spend so much of your time together and . . . living together, I think, supersedes a lot of the [arguments against equal division].” Bertha described a typical process in which a couple begins as two independent individuals, and gradually, finances become more intertwined. She reported that “our independent finances have been kind of just independently but . . . in the future . . . we think of our finances as merging, like when we consider buying or renting a future home, we consider buying it together . . .”

Predictably, the couples who raise children together full time were able to articulate their sharing presumption without effort or hesitation. As Emma (thirty-six) elucidated, “I feel like as soon as you have a child and you live together . . . yes, you’re married, like a child is probably the biggest commitment anybody would ever make.” Ethan and Kemala do not have children. But the option of having them one day helped them to make sense of the law. Ethan reasoned that “I get the logic behind it that, if someone took care of the kid when the other person worked, just because they didn’t pay the mortgage doesn’t mean they don’t have any right to the property.” At the same time, raising a child when only one of the partners is a legal parent can make the sharing presumption more doubtful. Wakeford, who is divorced, has joint custody, and lives with Bertha, acknowledged that equal sharing is more complicated because “we’ve always had some concession, because I have a child, that we don’t—well, so far, we don’t consider that 50/50.”

Some sharers expressed the idea that the law’s timeline (two years) kicks in too late.\textsuperscript{162} For them, the law mirrors their arrangement but might commence later than their needs arise. Two couples moved in together after long periods of dating (three years in one instance and six in the other) and bought property together right away. For a third couple, the female partner moved from England to live with her partner, and after a few months, they bought a home together. In all these cases, the two-year rule rendered the law underinclusive, as the couples adopted sharing regimes before two years of living together. Kelley and Megan, who dated for six years prior to

\textsuperscript{161} Elderly couples often do not get married because of pressure from their children to avoid comingling finances and thus endangering the children’s inheritance. There are other incentives to avoid sharing, such as possible loss of state benefits and spousal support. See Aloni, supra note 7, at 1329.

\textsuperscript{162} Family Law Act Questions and Answers, supra note 126, at 3 (“Couples who have lived together in a marriage-like relationship for two years are treated the same under the Family Law Act as married couples.”).
moving in together, said, “we would rather not have had to wait the two years” before the law considered them spouses. These partners were still able to claim equal division based on unjust enrichment principles, but this is a more challenging legal claim than relying on the “marriage-like” relationship presumption that the law provides.163

2. The Non-sharers

Nevertheless, around half of the couples I interviewed expressed an attitude that I interpret as rejecting equal division of assets and support obligations upon separation. Interestingly, it was significantly easier to characterize couples as rejecting the defaults, as they often expressed an unequivocal attitude, and their behavior was strongly indicative of such an approach. A few couples have purposefully created a distinct financial separation: each partner had an independent bank account; they calculated exactly how much each person contributed to the household; and each partner generally had a sense that the other had their own separate financial obligations. As Robert (thirty-five) noted, “It was clear from both of us that we wanted to keep separate bank accounts and a lot of the finances separate. So, we built a system based on that.”

Notably, the practice of separate financial regimes often correlated with couples who expressed a sentiment that they are not confident in their relationship’s future and are not ready to get married. Robert stated,

For me, at least the initial part of the relationship of moving in, to keep separate accounts was more of a safeguard if things didn’t work out between us. I had lived with a previous partner, and obviously, things didn’t work out there . . . So . . . the thinking behind it was to kind of safeguard myself from the worst-case scenario.

Caroline, his partner, expressed a similar sentiment: “Seeing a lot of relationships, other peoples’ relationships breaking up and how difficult it can be to sort of untangle it financially and not wanting to go through that, that was probably the biggest reason, I guess.” When asked later why they do not get married, they both indicated that they are not ready for this commitment yet. Robert connected marriage with the separate financial regime:

I think that we’re probably not at the point in our lives where we would want to make that change at the moment. I would think that there would be a better time in the future for that . . . We’ve been living together for a bit but also looking at it we haven’t lived together for that long and, you can’t get divorced

163 See Leckey, supra note 94, at 72, 74 (explaining that in certain jurisdictions, “unjust enrichment offers former cohabitants their best recourse under the general private law,” and some jurisdictions have extended “the presumption of equal division of family property” to “those cohabitants qualifying as ‘spousal’ or ‘marriage-like’”).
if you don’t get married, so . . . if we were to break up, things would be probably a little less messy than if we had to formally file for divorce.

Similarly, Emily (twenty-nine) and Gareth (thirty), seasonal workers in Whistler’s buzzing leisure and tourism industry, practice a strict financial-separation regime and also linked their nonmarriage to nonsharing. According to Emily, being married would mean a stronger commitment, including financial commitment. In her words, if they were to get married, “I would tend more to make longer-term commitments . . . and more joint commitments, and I think we would pool our finances more.” But, meanwhile, as they are not there yet, the separate regime is beneficial to her because “it’s nice to have that autonomy” [to do whatever she wants with her money]. Matthew (thirty-three) mentioned to Jessica (twenty-eight) a few occasions in which he had paid more than she had on some household expenses, and stated, “For me, fair would mean you get what you brought, I get what I brought. And that’s not 50/50, so to break it down 50/50, I feel like that wouldn’t be fair.” And Jessica opined about equal sharing, “I think that if he paid for it, or even though I paid a little bit, but he paid more, I would think that he would take it ‘cause that was his, that’s your stuff.” This couple, as well, showed hesitation toward commitment and indicated that marriage would be the next level of commitment, but they were not ready to take this step yet.

Two couples with low incomes were explicit about their reasons for keeping money separate. In one case, the couple stayed unmarried purposely to avoid sharing the debt of the male partner. Linda (thirty-two) and Bob (thirty-six) have been best friends for years. When Linda bought a home (because rent was too expensive), she invited Bob to join her as a platonic roommate to help pay the mortgage. Later, their relationship started to change because Linda wanted to have sexual relations with Bob; eventually, they became a couple. Bob and Linda commingle their finances and share their lives quite extensively. However, Linda does not want to get married, mainly because she does not want to be responsible for Bob’s debt. Bob has an eight-year-old child who lives in a different jurisdiction and an unstable job. Linda stated that getting married will be “stressful” because Bob “has debt, and I will have to take responsibility for that, and I don’t want to. So, I will be resentful [of that if we get married].” When it comes to equal sharing of properties, Linda also objects. She agrees that Bob deserves some part of the appreciation of the property’s value, and she would not leave Bob “high and dry.” However, she does not think that Bob should be entitled to half of the property’s appreciation.

Although Molly and Lainey are not low-income, Lainey is also concerned about liability for Molly’s debt. Molly is about to return to school, and Lainey wants to avoid debt for her education expenses. She said they might need to execute an agreement because “I don’t have debt, and she
[Molly] does, and I guess that’s a risk for me.” Erin (the lawyer) expressed a similar sentiment, as she does not think it is fair to share the increase in property value and Williams’s student debt. Accordingly, she stated,

I was a little bit concerned because I find it a bit odd that obligation backdates from the date of cohabitation when you start, when you become common law, so basically, my place increased in value pretty significantly in 2016, 2017, 2018 . . . . And then he’s also got student debt, and so I don’t want to be on the hook for that.

The other couple with a low income, Nicole (thirty-two) and James (twenty-seven), have practical and ideological reasons to adopt a strict separation regime. In Nicole’s words: “[Our finances are] so very, very separate. He pays his own cell phone bill; I pay my own cell phone bill.” One major incentive for their separation is that James is a recipient of disability benefits as he is on the autism spectrum. Nicole commented,

The legal problem, I think once you start mixing that kind of stuff personally, I think it’s harder to prove things legally . . . it seems like a headache that I just don’t want to deal with so that’s why, one reason that . . . we just have separate financial situations, so it’s just not pertinent to mix, like he’s on disability and I work, so I keep my paychecks, he keeps his disability payments, and being in an abled/disabled relationship, that’s pretty firmly separate . . . .

Besides their issue with losing social assistance, their reason is also ideological. James defined himself as a “men’s rights activist,” and Nicole is a feminist.164 While their ideologies are potentially conflicting,165 they share the same conclusion when it comes to financial issues. James put forward that being a men’s rights activist “really is what it sounds like, like all I want is for both men and women to be equal under the law . . . .” Nicole elaborated on James’s position while explaining how it corresponds with her views:

[H]e’s concerned with men being saddled with things like alimony payments, he doesn’t think that it’s ethical that men tend to end up with those legally quite often because they are the higher earners, but, personally, I feel really similarly on the opposite end of the spectrum. I don’t think anybody should be

164 See Rachel M. Schmitz and Emily Kazyak, Masculinities in Cyberspace: An Analysis of Portrayals of Manhood in Men’s Rights Activist Websites, 5 SOC. SCI. 1, 1 (2016) (explaining that men’s rights activists “seek to establish resources for men to utilize in maintaining their elevated position in society in relation to women and other social minorities”).

165 See id. (detailing how men’s rights activism conflict with feminism, “men’s right activist groups focus increasingly on the toxic consequences of feminism on men’s lives, leading to a distinctive anti-feminist framework”).
paying to take care of me, either, if that makes sense.

Alexandra (thirty-six), about to graduate from her PhD program in science, is another individual who practices clear separation and adopts a language of self-reliance. She mentioned, “I say I’m independent and I can support myself right . . . . I wouldn’t expect because I have my job, I have my career, I can support myself, I don’t expect anyone else to support me.”

In conclusion, for approximately half of the couples I interviewed, the defaults of equal sharing reflect their presumed intention—at least, those they are ready to admit to when their partner is sitting next to them, when they are not in conflict, and when, for many of them, it is the first time they have learned about the law. Considering this is the age group most likely to create economic interdependencies, our findings call for more research into the law’s effects on cohabitant groups who are less likely to merge finances and become interdependent.

D. The Making of a Norm

I could have ended the analysis here and concluded that the law, at least as applicable to couples in my sample, is not strongly majoritarian. However, as these couples’ perceptions are hard to distinguish from the law’s effects, my analysis would be superficial and incomplete if I failed to consider how the law’s expressive and constitutive aspects shape couples’ expectations. Then, I explore the extent that the couples’ views about sharing, as expressed in the interviews, are also shaped by the norm that the defaults announce and whether the law also spreads a variation of traditional marital norms. It comes as no surprise that the “[l]aw deflects society; but society is reflected in the law.”

This study suggests that an opt-out approach sometimes infuses norms and sharpens legal entitlements and expectations.

One main obstacle I encountered in ascertaining the expressive effect is the large number of couples who are unaware of the law. There is an interplay between one’s awareness of the law and its expressive function. Unawareness of the law reduces its expressive operation.

Yet, when couples knew about the law—or some aspects of it—I found sufficient indications that the law served as more than the reflection of their perceived obligations; the law also conveyed norms. The interviews indicate that the law propagates the norm of equal sharing through a few mechanisms. To the extent they knew about the law, the participants absorbed the norms that the law implies. Couples might think that if the law adopts the norm that couples should share gains and losses after two years of cohabitation, then it mirrors a typical pattern that is fair. This is particularly true for couples who thought the regime was mandatory.

Interestingly, couples who thought there was no way to opt out typically had a strong understanding of the law (they knew of the two years and realized that it means an equal division of property and obligations to pay spousal support in case of breakup). For them, we can assume a strong effect of the law in communicating norms. Emma had a robust understanding of the law, although she did not know that opting out is an option. Originally from France, Nathan moved to Vancouver for work and met Emma; they now live in BC and have a child together. He learned about the law from Emma. For Nathan, coming from another country, the law at first sounded utterly foreign. He stated,

I had no clue, and I listen to what [Emma] said . . . and I said, okay, sure. I was also amazed about how you speed up in Canada when you’re common law . . . and I was amazed by that because [it is] very different from France’s system.

However, the law grew on him, and, especially after having a child, he learned to accept this norm. He described his ambivalence and process of coming to terms with the law as follows: “I was kind of worried at first, but . . . like being in a relationship, it’s a risk and I had to accept the rules, and that’s it.” Ethan, Kemala’s partner, also spoke of a process of resistance to acceptance. Initially, when he learned about the law in 2013, he recollected,

I was single; I was initially kind of horrified; I was, like, what the heck, what if two people don’t want to get married. I was in the mindset of, wow, that’s like a huge risk to move in with someone, so I was very initially against it. And then, yeah, it kind of became exactly like [Kemala] said, this actually works out, this is a big benefit as opposed to living in a country like [where Kemala is originally from] which, you might not even be able to sign a lease together.

Ethan’s tolerance for the law, it seems, developed due to his ability to sponsor Kemala as a permanent resident after merely one year of living together. Appreciating the recognition of their relationships by the federal government influenced how he felt about other laws that govern unmarried partners’ relationships.

Some couples also understand the two-year threshold as signifying that the level of commitment ought to evolve—a sort of deadline that signals the end of a deliberation period. After this, the couple’s inner status changes and becomes closer to a traditional marriage model. Diter put this directly: “I feel like it takes away a lot of the importance ‘cause you’re already forced to commit, especially when you sign an agreement like I did.” The reality for him is that the law “forced [him] to commit.” Similarly, for the engineers, who knew the law reasonably well, the law had a symbolic effect on their relationship. The male partner articulated that if the law labels them
“spouses,” then the meaning is that the couple should behave accordingly. He did not “expect anything to change when [they’re] actually married . . . [I]f you are married according to the law, that, to me is the commitment. So, I think what the two years—I knew of the two years coming up,” and they served as equivalent to being married.

Sometimes, the recognition of unmarried relationships channels marital-like behavior in more concrete and practical ways. In Antonio and Andrea’s case, to apply for permanent residency as a couple, they opened a joint bank account as a means “to prove that we’re a real relationship . . . it was a way also to show that, yes, we are together.” The act of opening a joint bank account accelerated the sharing regime that now regulates their relationship. This is also the case for Ethan and Kemala, who opened up a bank account (for which they had no use) to demonstrate the sincerity of their relationship to the immigration agency. Initially, only Ethan deposited money into it. Thus, he elaborated, “early last year we opened that and then we started using it, and I started putting money in there and just paying bills out of that account even though it was just my money.” This action opened the door to more financial sharing, so the bank gave Kemala “a debit card, and then I added her as an authorized user on my main credit card and we just, once a month we go over the budget, we put in all our expenses.” Later on, Kemala started to deposit her salary into this joint bank account.

The law’s constitutive aspect helps some partners justify, sometimes even to defend, their legal entitlement or their “bargaining endowment.” The law equips each partner with the language to articulate an entitlement to equal division or to justify and rationalize the law. Some interviews indicated couples (or individual partners) had internalized the norms of the law and are also familiar with the justifications for earlier legal protections of the primary-caregiver spouse in case of a breakup. Some use these concepts to defend this law. As Emma explained, “I personally think that is a good thing, I think that it benefits women in potentially a situation that has not benefitted women in the past, so I kind of like it.” For Emma, then, the opt-out reform is an evolution of previous laws that dealt with obligations between married couples; and her understanding of the law derives from preexisting versions of laws with similar functions.

Some couples, then, have adopted what Yvonne Zylan, a sociologist of law, calls “justificatory narratives”—articulating terms that describe, in legalese, social claims or entitlements, and justify state intervention based on a “legitimacy-conferring” framework that was proffered by previous claim-justifying discourses. These terms invite the law to intervene and

167 See Mark Galanter, Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law, 19 J. LEGAL PLURALISM 1, 7 (1981) (explaining that “[t]he bargaining endowment which courts bestow on the parties includes not only the substantive entitlements conferred by legal rules, but also rules that enable those entitlements to be vindicated”).
168 YVONNE ZYLAN, STATES OF PASSION: LAW, IDENTITY, AND THE SOCIAL CONSTRUCTION OF
make “common-law partner” a legal category deserving of the state’s use of ascription. In some of the partners’ minds, knowing about the law fortifies the idea that they are entitled to a remedy. One cohabitant explained how the law helps, or will help, in a case of a breakup, to assess their obligations: “[W]e’re aware of the Act, we’re aware of the law . . . [I]f we do end our relationship . . . we [will] rely on the Act to guide us.” One interviewee explained how knowing the law would have helped her to claim a benefit: “And also if that system reminded you that, at this point, you are now considered spouses, that would help people to realize that there are all these benefits that you can now start using because you are spouses.” The law, then, has a constitutive power in establishing expectations between partners as well as between partners and third parties.

Studies about the impact of default rules on the status quo provide another vehicle to understand the extent to which the law broadcasts norms of sharing and commitment. Studies on status quo bias abound. These sets of behavioral-economy experiments test the hypothesis that, all things being equal, people prefer to maintain their status quo rather than to modify their situation. Research finds ample evidence for the bias (in favor of status quo) and, in particular, regarding default rules. Russell Korobkin famously argues that “when lawmakers anoint a contract term the default, the substantive preferences of contracting parties shift—that term becomes more desirable, and other competing terms becoming less desirable.” For the few couples that knew about and understood the legal regime, the law seems to have this effect: if they get to talk about their commitments and obligations, the law serves as a legitimizing source, reflecting that their sharing regime is in line with the norm. Logan, who entered into a cohabitation agreement with Olivia, explained the legitimizing effect of the default rules: “there wasn’t anything in [the contract] that I was super against because of the fact that it follows the current Act pretty well, so . . . .” Here is an example, then, of how couples negotiate cohabitation agreements in the shadow of the law.

Overall, the default barely “reflects what most people would choose if they were adequately informed.” In any event, this rule is sometimes “too crude” in that it brings together heterogeneous groups of sharing and commitment practices. The law diffuses particular cultural understandings of obligations, which might be unexpected for people from non-Canadian

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169 See Ménard, supra note 135, at 62 (defining common-law partners as “partners who live together in a conjugal relationship”).


171 Id. at 611.

legal cultures, such as immigrants. And when known to the couples, the law plays a role in establishing and justifying legal entitlement for equal sharing and spousal support.

IV. FUNCTION, PRIVATIZATION, AND MENUS

Drawing on the analysis of the opt-out regime in Part III, this Part zooms out to examine what insights the couples’ experiences can provide regarding the scholarly and policy debate in the United States. As the following discussion suggests, both supporters and critics of the opt-out regime missed the mark on the consequences of the approach. Section A argues that functionalists fail to appreciate that the regime creates semi-statuses, with inadequate regard to the couple’s actual familial function. Section B contends that traditionalists dramatize an opt-out scheme’s effects on marriage and the family law system altogether. Finally, both sides underappreciate how the opt-out model promotes privatization of dependency.

A. A Menu of Marriages

Literature supporting an opt-out regime labels it as “functional”—meaning, a legal scheme that does not determine legal consequences of relationships based on formalities (such as a written agreement, registration, or marriage certificate) but rather on the family’s function. As Nancy Polikoff, in endorsing the ALI Principles, submits, an opt-out scheme advances “inclusion within the law of all relationships that achieve the law’s purpose.”

The main flaw in labeling an opt-out system as advancing functional qualities is that, in practice, the scheme establishes what scholars have traditionally referred to as “statuses.” Although the definition of “status” is complex and a subject of some disagreement, for the purpose of this Article it is sufficient to use its basic definitions to illustrate that an opt-out regime creates a legal situation akin to status. Black’s Law Dictionary has two definitions of status that are relevant here. One, “[a] person’s legal condition regarding personal rights but excluding proprietary relations”

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174 For a definition of functionalism, see Edward Stein, Looking Beyond Full Relationship Recognition for Couples Regardless of Sex: Abolition, Alternatives, and/or Functionalism, 28 L. & INQ. 345, 365 (2010) (“Under this approach, the characteristics of a relationship—rather than, or in addition to, its formal legal status—determine how a relationship should be treated under the law.”).

175 Polikoff, supra note 28, at 366.


177 As mentioned previously, supra note 37, I prefer to treat marriage as its effects. The discussion of “status” here is solely a response to the argument that an opt-out regime shifts the law from status to function.
status of a father> <the status of a wife>.

Two, “[a] person’s legal condition insofar as it is imposed by the law without the person’s consent, as opposed to a condition that the person has acquired by agreement <the status of a slave>.”

Under these two definitions, to a great extent, the opt-out regime in BC acts like it establishes a status rather than screening for function. Unless they contract out, most couples find themselves in a “legal condition regarding personal rights,” sometimes even “imposed by the law without the person’s consent.” As I argue in Section III.A.2., the contractual approach fails to provide an effective way to opt out. The system’s reliance on contractual instruments means that most couples subscribe to (or find themselves abiding by) the default rules, in lieu of an affirmative undertaking or, in some cases, even without tacit consent. In the absence of a more user-friendly mechanism to opt out, the notion that unmarried couples can choose not to live in an “ascrbed marriage” is a fiction. The opt-out approach, then, imposes a “status” on most individuals. Indeed, Grace Ganz Blumberg, one of the ALI Principles’ reporters, described its approach as “status-based.”

Theoretically, the opt-out model is functional because it applies only to couples who meet the criteria of living in “marriage-like” relationships. Thus, the argument goes, unmarried couples can avoid the ascription ex-ante by not living in marriage-like relationships and ex-post by proving that their relationships did not resemble marriage and they do not qualify as spouses. However, there are multiple problems in relying on the standard-made formulation of “marriage-like” to cultivate the scheme’s functionality and avoid misclassifications. First, “marriage-like” is a vague standard that leaves plenty of room for judicial discretion.

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178 Status, BLACK’S LAW DICTIONARY (11th ed. 2019).
179 Id.
180 Id.
182 See, e.g., Leckey, supra note 94, at 140–41 (explaining how individuals must show that they have “cohabited ‘as spouses’ or ‘in a marriage-like relationship’”).
183 See id. (explaining that the definition of spouse is “qualitative” and that individuals “must have cohabited . . . in a marriage-like relationship.”) Also explaining how there are “disputes regarding the nature and duration” of cohabitations and the “need to prove the nature and duration of the relationship complicates assumptions that reform will ease the evidentiary burden linked, pre-reform, with claims in unjust enrichment”).
Spousal relationships are many and varied. Individuals in spousal relationships, whether they are married or not, structure their relationships differently. . . . Because of the variety of relationships, no one factor can be determinative of the issue of whether a spousal relationship actually exists. All relevant factors must be weighed to reach such a determination . . . .

Due to the flexibility of the standard, few couples without written contract can predict that their relationships will not meet the test of “marriage-like.” Despite the critique that courts have considered primarily traditional relationships as married-like, courts have also been willing to consider as “marriage-like” relationships in which the couples kept a financial separation regime or do not live together any longer. While these outcomes, in my view, have been justified in the specific cases, they point to the indeterminacy of this regime, as well as to the reasonable chance that a couple will satisfy the standard of living in a marriage-like relationship. Second, in any event, in case of dispute, the burden of litigating is heavy and costly. A partner might prefer to reach a settlement rather than going to trial to prove their relationship was not “marriage-like.” Third, as I discussed previously, the law promotes the norms of conjugality by formalizing the notion that partners are entitled to an equal division of property and spousal support upon separation. Therefore, the chances of being in a non-marriage-like relationship are even smaller, as partners might absorb the law’s precept that equal division and spousal support obligations are the expected norm and find that they are entitled to such an arrangement. From the standpoint of Holmes’s bad man, we might even speculate that one partner could take advantage of the background rules that create an expectation of compensation.

In summation, the result of the regime’s contractualization, with the elusive definition of “marriage-like,” undermines the argument that an opt-out scheme classifies relationships based on their function. Effectively, an opt-out system brings in marriage through the back door, creating a world where most couples who live together for more than two years are considered spouses for property division and spousal support purposes.

Supporters of an opt-out regime also justify it as protective of women. As Bowman puts forward when advocating an opt-out approach in the United States, “[i]ndividuals in such [unmarried] families, especially women and children, are likely to be left in a vulnerable economic position if the

185 Weber v. Leclerc, 2015 BCCA 492, para. 21, 27 (holding that economic dependence or interdependence is only one factor in determining “marriage-like,” and relationships that are not economically dependent can be recognized as “marriage-like”).
186 Oliver Wendell Holmes, The Path of the Law, 10 HARV. L. REV. 457, 459.
187 See Janet Halley, Conclusion: Distribution and Decision: Assessing Governance Feminism, in GOVERNANCE FEMINISM: AN INTRODUCTION 253–54 (2018) (suggesting how to do “distributional analysis” and detailing how one element is “separating is from ought”) (citation omitted).
union is ended by separation or death.”

There is no question that because women typically contribute more unpaid labor to the household and are often the primary care providers for children, they are more likely to be harmed by a breakup. Without rules of equal division of property and spousal support obligations, the primary care provider might be left without properties that the family, as a joint venture, created and grew in value. There is no doubt that the opt-out approach assists some women, especially those in relationships with traditional gender roles, in receiving their fair share in the household family property.

Nonetheless, the question arises as to whether, and to what extent, an opt-out approach supports all women. This is because the risk of misclassification might be harmful to some women, particularly to women with low incomes and low wealth. In recent years, sociology and demography scholarship has documented that women in the United States do not get married because they are concerned that their male partners are financially unstable, and these women are not willing to assume responsibility for the debt (or future debt) of their partners. For instance, in a recent study of never-married individuals, 78% of female participants indicated that finding a partner with a steady job is very important to them.

Indeed, recall that it was the reason Linda (one of the interviewees) did not marry Bob. Unfortunately for Linda, the FLA equally divides debt incurred during relationships. While Bob had incurred some of his debt before his relationship with Linda, Bob incurred other debt while they were living together. Although Linda did not marry Bob precisely because she wished to avoid sharing his debt, they lived in a marriage-like relationship (per their statement in the interview and based on my analysis of their relationship, as described). For Linda and women with low income and low wealth, the opt-out system might be detrimental.

Simultaneously, the opt-out approach might be—or is even likely to

188 Cynthia Grant Bowman, Social Science and Legal Policy: The Case of Heterosexual Cohabitation, 9 J. L. & FAM. STUD. 1, 2 (2007).

189 Women still perform more housework and carework than their male counterparts. Despite major changes in women’s participation in the paid labor force, it is still the reality that, especially in households with children, specialization of carework is prevalent. According to the U.S. Bureau of Labor Statistics, in 2011, 64.2% of mothers with children under six years participated in the labor force, compared with 76.5% of mothers with children six to seventeen years of age. Twenty-seven percent of employed women usually worked part time, while only 11% of men did. See U.S. BUREAU OF LAB. STAT., WOMEN IN THE LABOR FORCE: A DATABOOK (2013) (providing statistics for women in the labor force); Cynthia Lee Starnes, Lovers, Parents, and Partners: Disentangling Spousal and Co-Parenting Commitments, 54 ARIZ. L. REV. 197, 207 (2012) (“The primary family responsibilities that lead married mothers to limit paid employment go far in explaining the motherhood penalty.”).

190 See e.g., Carbone & Cahn, supra note 8, at 100 (“Women see themselves as assuming primary responsibility for children, and if a man is not pulling his own weight in the relationship, he may detract from the woman’s ability to provide for herself and the children.”).


192 See supra Section III.C.
be—disadvantageous to women who execute an agreement concerning financial obligations. When BC promulgated the law, it also modified the rules concerning courts’ review of contracts. The FLA adopted a less interventionist approach than its predecessor, lessening the court’s authority to set aside domestic contracts.\(^{193}\) While before the reform, the court was able to set aside a contract upon finding unfairness, the new threshold for intervention is “significant unfairness.”\(^ {194}\) The result is that women who enter into an agreement that gives them only a few rights in the property will have slimmer chances of successfully challenging that agreement. The scheme thus strengthens predictability while diminishing judges’ discretion and making the excuse of obligation more difficult. Because those who execute contracts are likely those with significant properties, wealthy women will be worse off in this regime than before. This is especially true because parties bargain in the shadow of the default rules, so it is unlikely that they will get much more than the default rules grant them; put differently, those rules more or less set the framework for what each partner expects to get.\(^ {195}\)

Moreover, importantly, the default rules are not optimal for the economically weaker partner.\(^ {196}\) The strengthening of contract enforceability in an opt-out regime is not unique to BC. The basic principle of a regime that imposes default rules that establish obligations between the partners is to enable parties to opt out with a degree of certainty. We can reasonably predict that every state that adopts an opt-out regime will accompany it with rules that reduce courts’ authority to review contracts that met procedural requirements.\(^ {197}\)

Further, not only does the opt-out regime fail to promote functional family law or assist women of all economic classes, it also stands in contradiction to a well-developed menu of regulatory regimes for legal recognition of relationships.\(^ {198}\) The idea of such a menu means commitment to the “recognition of a variety of supportive family forms offering persons of all sexes and orientations the opportunity to structure

\(^{193}\) See, e.g., Asselin v. Roy, [2013] BCSC 1681, para. 124 (Can.) (“The tenor of the new Act appears to favour a less interventionist approach than its predecessor, the FRA.”).

\(^{194}\) Id. at para. 128 (“Under the previous legislation, a finding of unfairness based on one of enumerated factors in s. 65(1) was sufficient to allow the court to, in effect, rewrite the parties’ Agreement to achieve the fairness found lacking in the original version.”).

\(^{195}\) See Galanter, supra note 167, at 27–28 (discussing the presence of customary laws, lurking in the “shadows,” throughout history). Of course, the bargaining endowments do not exclude the option that the prenuptial agreement will grant more than the default. Still, at least the default rules stand as a general guideline for what the parties can reasonably expect.

\(^{196}\) See Aloni, supra note 56, at 353–54 (providing an example of how default rules disadvantage the economically weaker partner).

\(^{197}\) Cf. id. at 349–53 (discussing the connection between procedural and substantive requirements in domestic agreements).

\(^{198}\) See Stein, supra note 174, at 360 (defining such a menu as “the development of a plurality of relationship-recognition alternatives that includes, but is not limited to, marriage”).
their families and live their lives as best suits them.” This menu of regulatory options refers to establishing various legal mechanisms, beyond marriage, to enable couples to organize the consequences of their mutual lives. For example, a menu can include an additional registration scheme (like a civil union or domestic partnership) that helps couples who do not wish to get married to organize their mutual obligations. Such a system responds to the needs of diverse types of families, composed of different commitment levels and varied legal needs.

The menu of options in BC does not come close to this description. The system nudges couples into one of three options: be single, live in a non-solemnized marriage, or live in a solemnized marriage. A fourth option—shaping one’s unique preferences—is dependent on contracts and thus becomes costly and difficult to accomplish. The result is a menu composed of marriage in different forms, and only a little more flexibility for individuals and couples who can use contracts to achieve it.

This limited menu is not an issue that is unique to BC; rather, every opt-out model that is so ascriptive will adversely affect the other institutions on the menu and will de facto prevent a meaningful menu from developing. This is because one of the basic principles of a well-functioning menu is that it should not offer options that neutralize other options in a way that, de facto, decreases choice. In other words, for a menu of options to be successful, the options should correlate with each other. The options need to be tangential: they can touch the boundaries of each other but not take over one another. In a system with an opt-out option, because all rights and benefits are already granted to unmarried couples, they have little reason to enter into a different legal institution or to negotiate the legal effects of their relationships. This makes the addition of any potential registration scheme useless. If couples have no motivation to register, any other institution on the menu will be unserviceable (couples will not use it because it does not offer an extra value).

BC’s menu of options—if we can even use this term in the case of BC—is better called a “menu of marriages.” The words of Halley, describing the considerably less ascriptive system in the United States, fit well here: this system is “less emphatic about choice, more regulatory, more governmental in the Foucaultian sense than a real menu of options.”

199 Case, supra note 42, at 1772.
200 For more on the “menu of options” for legal recognition of relationships, see Aloni, supra note 43, at 599.
201 The worldwide experience with civil unions and domestic partnerships teaches that when the institutions on the menu do not offer an extra value mimic other institutions, couples are unlikely to select them. That experience clearly demonstrates that civil unions are only a burden on family law, and couples rarely choose them as an alternative to other forms of regulatory choices. “With the exception of France and Belgium . . . registered partnerships generally are not a popular option among opposite-sex couples. Nor are they very popular among same-sex couples.” Id. at 600.
202 Halley, supra note 37, at 32 (emphasis in original).
B. The End or the Revival of Marriage

For precisely these reasons, traditionalist scholarship’s strong resistance to an opt-out model is puzzling. Critics of the ALI Principles argue that an opt-out regime will undermine marriage. Lynn Wardle’s critique is typical; accordingly, the ALI Principles “significantly weaken the institution of marriage.”\(^{203}\) Wardle states that having marriage alternatives will encourage individuals to choose “the dangerous alternative of nonmarital domestic partnership if it is legalized.”\(^{204}\) Other appraisals add that preferring marriage to institutionalized cohabitation is imperative because “evidence strongly suggests that the marital advantage is real and that it persists across national, cultural, and socioeconomic boundaries.”\(^{205}\) Traditionalist scholarship further contends that “conscriptive schemes conflict with social policies favoring formal marriage and marital childbearing by suggesting that public support for marriage is declining.”\(^{206}\)

But an opt-out regime, to the extent that couples actually know about it (which is doubtful), can send an even stronger message of support for marriage and the norms attendant to the institution. In view of that, it does not matter whether one formally marries or not; after two years, couples should adopt marital norms. In practice, the opt-out approach does not undermine marriage; it endorses marital commitment to its largest extent. The opt-out regime, which deems most people as married regardless of whether they are registered or not, brings marriage through the back door, contributing to the rearticulation of the traditional family as the site of caregiving and support. Indeed, it brings marriage back to its glory days, in which most people were married. In an opt-out regime, marriage is so important that it serves as the default framework for most intimate relationships.

The interviews confirm that BC’s opt-out approach did not undermine marriage in the sense of traditionalists’ concern. Generally speaking, at least half of the interviewees mentioned that they plan on getting married at some future point. For some, although they were legally recognized as spouses, marriage still serves as an additional step in signaling commitment. Courtney and Richard are an excellent example. Both identify as polyamorous, Courtney is once divorced, and Richard has a child from a previous partner. Richard is an ideological cohabitant who does not believe in marriage. Yet, Courtney explains that marriage is still important to her for practical and symbolic matters. Practically, she said:

\(^{203}\) Wardle, supra note 90, at 1226–27.

\(^{204}\) Id.

\(^{205}\) Marsha Garrison, Nonmarital Cohabitation: Social Revolution and Legal Regulation, 42 FAM. L.Q. 309, 328 (2008). For a similar argument, see, for example, Margaret F. Brinig, Domestic Partnership: Missing the Target?, 4 J.L. & FAM. STUD. 19, 23–24 (2002) (arguing that “cohabitation does not promote ‘economic efficiency’ in the same way marriage does”).

\(^{206}\) Garrison, supra note 205, at 330.
Marriage is a really easy way to make sure all of your bases are covered in like the event of an emergency. . . . You don’t need a piece of paper that says that you love each other, you need the piece of paper that says automatically without filing 30 different other pieces of paper that really you’re never going to get around to filing that makes sure that that person has the rights that they need in an emergency.

On the symbolic level, marriage still holds a particular significance in society. Thus, common-law status, according to Courtney, doesn’t have the more automatic sort of respect. One of [Richard’s] family members had a Christmas dinner, and boyfriends and girlfriends weren’t invited. Had we been actually married, there’s no way in hell they would have not invited me. But because we’re not actually married in their eyes, I’m just his girlfriend.

Couples in which both partners did not wish to get married had various reasons, all in line with the general reasons that people cohabit. Some were waiting for more financial stability before they take this step. For others, marriage meant a ceremony that is costly (although they can register with the province with minimal cost) and thus unnecessary. Others opposed marriage from an ideological standpoint. Yet, these couples who expressed no desire to get married for the reasons I listed typically manifested commitment levels no different from those who wished to get married. Overall, the law did not have the effect of steering these couples away from marriage. Those who do not wish to get married, although living in committed long-term relationships, were not motivated by the law not to do so, at least not consciously.

Traditionalists are further apprehensive that marriage alternatives create confusion that further undermines marriage. The interviews show that this critique is justified: couples have a hard time learning about the rules that govern their relationships. However, many studies have shown that couples are confused even in the absence of an opt-out regime. In the end, the complexities of family composition will require the move to a more complex family law. There are ways to ameliorate the harms of confusions—and I suggest some of them in the Conclusion. But confusion cannot serve as a justification that outweighs all other considerations.

C. Cohabitation as Privatization

In recent years, privatization of dependency emerged as a major critique

\[ \text{Wax, supra note 90, at 1012 (“The alternatives to marriage create a plethora of choices and uncertainties. The understandings, roles, and duties that attend the myriad liaisons short of marriage are murky, confused, conflicting, and poorly defined.”).} \]
of the role of marriage and of family law institutions more generally. Scholars have pointed out that privatization of support is one of the keystones of family law in the United States. A primary function of family law is to free the state from the burden of supporting dependent members of society. The state “recognizes and bestows benefits on families so that they will serve a private welfare function, minimizing reliance on state and federal coffers.” Although the private welfare function is rarely discussed as an impetus for an opt-out regime, this objective is discernable in adopting such a regime.

Family law history in the United States is filled with steady sequences that enforce and expand private support obligations among intimate partners. For example, in the nineteenth century, common-law marriage served as a doctrine that “provided judges with a way to privatize the financial dependency of economically unstable women plaintiffs.” Fast forward to the twenty-first century, courts justifying the legalization of same-sex marriage in the United States also recognized the role of privatization as a function of marriage. As one New Jersey judge put it, “[m]arriage’s vital purpose is not to mandate procreation but to control or ameliorate its consequences—the so-called ‘private welfare’ purpose.”

From this perspective, just as in the United States, where the common-law marriage doctrine has served to deepen the privatization of dependency, the Canadian context teaches the same. A famous Canadian Supreme Court case challenged the exclusion of unmarried couples from matrimonial protections as unconstitutional. Supreme Court Justice L’Heureux-Dubé dissented, contending that treating unmarried couples differently than married couples, in this case, is discriminatory. In her fierce dissent, she acknowledged that rules of equal division serve a “desire to avoid diverting funds from the public purse in order to support separated individuals.”

Proponents of an opt-out regime should be careful with what they wish for. There is no question that the opt-out mechanism advances the

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208 See Margaret Ryznar, The Odd Couple: The Estate Tax and Family Law, 76 L.A. L. REV. 523, 540 (2015) (“The traditional view of families is as economic support for its members. In fact, society depends on the family as a private safety net, and family law is a leading example of this societal dependency.”).
211 Rosenbury, supra note 209, at 1868 (“In Windsor, the Court also acknowledged the role of family members in providing support to one another, thereby privatizing dependency.”); Douglas NeJaime, Windsor’s Right to Marry, 123 YALE L.J. ONLINE 219, 230 (2013).
214 Id.
215 Id. at para. 116.
privatization of dependency, which is a prime goal of fiscal conservatives.216 The opt-out regime might just be another step in a system that already relies on the families to fill in the role that the government should be taking. Privatizing support is part of a larger neoliberal approach that seeks to transfer economic risks from the collective to families themselves.217 In neoliberal thought, marriage serves to “impose discipline and privatize dependency among the poor.”218 Marriage “is a gendered institution for privatizing social costs—women, dependent on husbands or the low-wage job market, must bear responsibility for child care costs.”219 The ideology that the married family is at the center of society, and is the primary unit for support in time of economic crises, sends a signal that it is the spouses’ role to take care of one another.

The implications of an opt-out regime—besides the obvious care for the economically vulnerable partner—is the continuance of an ideology that relies on individuals to care for basic needs. Privatization results in increased inequality in life chances between those who can afford to raise a family and those who cannot.220 Further, in the United States, where a large percentage of cohabiting couples have low income and wealth, the privatization aspect is even more noticeable and impactful. The state has long tried to deal with poverty by increasing marriage rates.221 Moving to increase marriage rates via recognition of marriage-like relationships might just be another incarnation of marriage promotion policy. Moreover, low-income couples who rely on state-welfare support would lose some income-based subsidies because of such recognition.

In summary, in the absence of measures to assist couples in making an active choice and considering the stickiness of default rules and of couples’ cognitive biases against arranging their obligations, the channeling function of the rule-based approach promotes privatization and commitment. The law assumes couples are altruistic: they share everything.222 Contracting out of

216 Brenda Cossman observes that in the U.S., there are three (sometimes conflicting) influential conservative values: fiscal conservatism, libertarianism, and social conservatism. In general, Cossman demonstrates that in family law, the tendency is to shift the state’s cost of support to the private sphere—to the partners (fiscal conservatism). Brenda Cossman, Contesting Conservatisms, Family Feuds and the Privatization of Dependency, 13 AM. U. J. GENDER, SOC. POL’Y & L. 415, 461–65 (2005).

217 Angela P. Harris, From Stonewall to the Suburbs?: Toward a Political Economy of Sexuality, 14 WM. & MARY BILL RTS. J. 1539, 1558 (2006).


219 Id.


221 See Isabel V. Sawhill & Ron Haskins, Work and Marriage: The Way to End Poverty and Welfare, BROOKINGS (Sept. 1, 2003), https://www.brookings.edu/research/work-and-marriage-the-way-to-end-poverty-and-welfare/ (noting that certain laws, for example, the welfare law of 1996, encouraged marriage with the goal of lowering the poverty rate).

222 On the role of mandatory altruism in family law and between spouses, see generally, Janet
altruism is difficult. Additionally, the law’s choices are quite limited. The law nudges couples into one of four options: be single, be married by default, or be married with formalities. The fourth option—shaping one’s unique preferences—becomes costly and difficult to accomplish.

CONCLUSION

It has become a cliché to state that family structure has changed, and the law has not kept pace. But it is clear that, with the rise in the number of informal relationships, the status quo cannot remain for long. When choosing how to address the regulatory design, opt-out regimes can and should remain on the table as one strategy. Nonetheless, BC teaches a critical lesson about the common complications that are involved in implementing such a regime. Below, I offer what potential pitfalls to avoid and some strategies on how to do so. I do not aim to present an exhaustive list and analysis, simply to point to main topics, with some initial thoughts on refraining from repeating BC’s mistakes.

A primary problem with an opt-out regime is that people do not know about the law. This is not a drawback unique to this area: transparency and publicity of default legal regimes can make the difference between enabling choice and mandating one.223 A few simple steps can make the law more transparent and known, and thus more effective and just. For instance, one interviewee suggested that lease agreements (the templates themselves) should contain some disclosure about the law. It makes sense because, while some partners move into the other partner’s or partners’ home, a substantial percentage of couples move together into a new apartment. This is a worthwhile way, with minimal regulatory costs, to make couples aware of the defaults that are likely to govern their relationship. Notifying a couple when they have reached their two-year mark, to the extent the government knows about it (for example, because the couple file taxes together), would likewise not require too great an administrative burden.

Of course, the more the default law is known, the stronger its constitutive effect will be. Thus, couples’ knowledge alone would be an advance, but their knowledge alone is insufficient. Hence, considering the impact that the law governing informal relationships has, a less ascriptive mechanism might include (at least) an easier way to opt out. I can imagine various ways to channel couples to deliberate and make an informed choice about their mutual financial obligations. As one example, individuals in BC who want to notify the relevant parties where their latest will is simply fill in an online form and pay $17 to register their will.224 An equivalent


223 Cf. Sunstein, supra note 172, at 86 (arguing that default rules should be transparent to gain legitimacy).

mechanism that enables couples to alter the defaults that govern their relationships does not exist.

The heterogeneity of experiences the couples in this study exhibited, along with other studies confirming cohabitation as a diverse practice, lead to the understanding that one-size-fits-all is not going to work in this area. Hence, one option is to formulate customized default rules that function differently according to typical common grounds among types of partnerships. Just as default rules for investing retirement funds change according to age (younger age: riskier track; older: more solid), the law can tailor defaults based on the partnership type. As an example: for the elderly, no automatic equal division, and just the opposite for people in long-term first relationships. Such a regime can make the law more complicated; however, relationships are complex, and one default will rarely fit all. Another possibility, as I suggest elsewhere, is creating a registration scheme that is functional enough to accommodate the needs of various types of relationships (not merely marriage-by-a-different-name). A registration scheme would be flexible and would also enable conjugal and nonconjugal partners to designate their partner as a beneficiary for various circumstances. Yet, under BC’s opt-out model, where marital benefits and duties are automatically assigned, few couples would have an incentive to use such registration.

The bottom line is that more innovative and systematic thinking is required. An effective plan cannot isolate one part of the menu of options but will look at the entire system together. Reform must envision a comprehensive plan and policy recommendations for a set of legal institutions—a menu of options for legal recognition of relationships—that work in harmony, increase choice, and reflect the reality of family life in the twenty-first century. Fragmentation, such as focusing only on the rules of contracts between unmarried couples, without thinking about the default rules of division of properties and support, is doomed to fail. This is because the other institutions of family law also affect the lives of unmarried couples. Thus, construing rules of recognition without contemplating which rules of division should apply, or what rules for contract formation and opting out are enforceable, will soon face problems.

While it is not what the law’s promoters had hoped for, the good news is that the outcomes have been, for the most part, less dramatic than both sides of the debate imagined. Of course, since this study was limited to young adults, mainly educated and often childless, to better assess the regime, we ought to learn the effects the law has on other groups of cohabitants. Both supporters and critics should contend with how the law

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225 See Aloni, supra note 43, at 607–31 (proposing a “registered contractual relationships” scheme founded on contracts and providing for maximum flexibility).

226 See generally Eskridge Jr., supra note 5, at 1965 (discussing the possible configuration of menus and their utility for nonconjugal partners).
has spread conjugality, bringing in traditionalism through the back door. Indeed, on the whole, it is a regime of compulsory conjugality—as most partners will find themselves married by default. For some, that will be good news; for others, proof of the extent to which marriage is the core institution in whose likeness other institutions are created. The opt-out regime also promotes privatization of dependency, an already well-entrenched function of family law and policy. Some might find this positive, but progressives who support an opt-out regime must engage with the fact that it is a major impetus and a significant result of the scheme.

In any event, BC’s experiment with an opt-out regime, even if not the success that many wished, helps scholars and policymakers to better understand how to shape a law responsive to the reality of diverse family structures. It will assist in crafting the next type of regulatory regime. It is better than stagnation. Now it is the job of family law commentators, policymakers, and legislators to take this to the next stage.
### Appendix A: Sociodemographic Characteristics of Interviewees

<table>
<thead>
<tr>
<th>#</th>
<th>Ages</th>
<th>Occupations</th>
<th>Ethnicity (self-described)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>21 and 21</td>
<td>Works at a non-profit/Software</td>
<td>Canadian/White</td>
</tr>
<tr>
<td>2</td>
<td>27 and 26</td>
<td>Bike workshop coordinator/Carpenter</td>
<td>Jewish/Not stated</td>
</tr>
<tr>
<td>3</td>
<td>32 and 31</td>
<td>Chemistry instructor/Unemployed</td>
<td>Scottish/White Italian</td>
</tr>
<tr>
<td>4</td>
<td>28 and 29</td>
<td>Graduate student/Hotel manager</td>
<td>Brazilian/Not stated</td>
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<tr>
<td>5</td>
<td>43 and 48</td>
<td>Midwife/Accountant</td>
<td>White/White</td>
</tr>
<tr>
<td>6</td>
<td>36 and 35</td>
<td>Legal assistant/Software engineer</td>
<td>Canadian/White Western</td>
</tr>
<tr>
<td>7</td>
<td>27 and 29</td>
<td>Dietician/Computer engineer</td>
<td>Indian Fijian/Indian Fijian</td>
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<tr>
<td>8</td>
<td>37 and 40</td>
<td>Software sales rep/Chiropractor</td>
<td>French Canadian/Canadian</td>
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<tr>
<td>9</td>
<td>30 and 42</td>
<td>Unemployed/Entrepreneur</td>
<td>White/White</td>
</tr>
<tr>
<td>10</td>
<td>29 and 30</td>
<td>Small-business owners (both)</td>
<td>English Canadian/Caucasian</td>
</tr>
<tr>
<td>11</td>
<td>23 and 25</td>
<td>Urban farmer/Recent graduate</td>
<td>Caucasian/Caucasian</td>
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<tr>
<td>12</td>
<td>29 and 33</td>
<td>Engineer/Engineer</td>
<td>White/Canadian</td>
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<tr>
<td>13</td>
<td>31 and 31</td>
<td>Mortgage broker/General manager</td>
<td>White/White</td>
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<td>28 and 33</td>
<td>Marketing/Technician</td>
<td>Canadian/Caucasian</td>
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<td>32 and 35</td>
<td>Student/Service manager</td>
<td>Caucasian/White</td>
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<td>28 and 30</td>
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<td>Caucasian/Caucasian</td>
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<td>18</td>
<td>30 and 29</td>
<td>Events coordinator/e-Commerce</td>
<td>White/Caucasian</td>
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<td>19</td>
<td>30 and 31</td>
<td>Counsellor/Medical writer</td>
<td>Javanese Muslim/Jewish</td>
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<td>32 and 38</td>
<td>Electrician/Sprinkler fitter</td>
<td>White/White</td>
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<tr>
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<td>32 and 27</td>
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<td>White Canadian/White</td>
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<td>36 and 43</td>
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<td>White/Serbian</td>
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<td>27 and 28</td>
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<td>White/White</td>
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<td>Property manager/Project coordinator</td>
<td>White/Métis</td>
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<td>Jewish/Jewish</td>
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<td>33 and 35</td>
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<td>White/White</td>
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<td>Chinese/German</td>
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<td>30 and 31</td>
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<td>Canadian/Caucasian</td>
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<td>29</td>
<td>30 and 29</td>
<td>Actor/Writer</td>
<td>White/White</td>
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<tr>
<td>30</td>
<td>33 and 44</td>
<td>Social Worker/Data manager</td>
<td>White Australian/White</td>
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