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# **While They Waited: Pre – *Obergefell* Lives and the Law of Nonmarriage**

**Michael J. Higdon**

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## While They Waited: Pre-*Obergefell* Lives and the Law of Nonmarriage

Michael J. Higdon

**ABSTRACT.** In the wake of *Obergefell*, the United States now has a large class of married, same-sex couples whose relationships began at a time when marriage was unavailable to them. The law must therefore wrestle with the question whether any portion of a pre-*Obergefell* relationship should count toward the length of the ensuing marriage – an important question given the number of marital benefits tied directly to this calculation. As courts and legislators alike wrestle with this difficult question, they will need to examine how these couples ordered their relationships during a time when “nonmarriage” was the only option. This Essay argues that such an examination provides a unique opportunity for the law to not only move toward true marriage equality, but also reconsider its overall approach to nonmarriage in general. Specifically, this Essay identifies three lessons that can be gleaned from same-sex couples whose relationships spanned both sides of the marriage equality movement. It argues that each of these lessons can help us craft greater protections for nonmarital relationships.

### INTRODUCTION

To this day, couples who choose to cohabit without marrying do so at their legal peril.<sup>1</sup> For this reason, the law of cohabitation, and of nonmarriage more generally, has been subject to quite a bit of criticism.<sup>2</sup> This Essay revisits that criticism in light of the marriage equality movement, which of course scored a major victory in *Obergefell v. Hodges* almost five years ago.<sup>3</sup>

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1. Lynn D. Wardle, *Marriage and Domestic Violence in the United States: New Perspectives About Legal Strategies to Combat Domestic Violence*, 15 ST. THOMAS L. REV. 791, 802 (2003) (describing cohabitation without marriage as “the riskiest form of intimate living arrangement”).
  2. See *infra* Part II.
  3. 135 S. Ct. 2584 (2015).

Although *Obergefell* heralded the arrival of marriage equality, true equality would require that individuals like James Obergefell and Edith Windsor be permitted not only to receive marriage licenses, but also to count the years they spent in a marriage-like relationship as part of their marriage. After all, as Peter Nicolas has pointed out, “[a]lthough many legal consequences flow from the mere *fact* of being married or unmarried, . . . the absolute length of one’s marriage . . . also affect[s] a number of legal rights.”<sup>4</sup> For example, marriage length can determine whether a surviving spouse is entitled to social security benefits, whether a divorcing spouse can receive alimony and in what amount, and whether a particular piece of property was acquired during the marriage and, thus, is subject to division at divorce.<sup>5</sup>

In other words, *Obergefell* has spawned an interesting legal question: when confronted with a class of people who only recently acquired the right to legally marry the person of their choice, how does the law treat the marriage-like portions of their relationship that began during the pre-equality years? Of course, this is not the first time in American history when the law has had to confront such questions. Similar issues arose following passage of the Thirteenth Amendment<sup>6</sup> as well as the Court’s decision in *Loving v. Virginia*,<sup>7</sup> when former slaves and mixed-race couples, respectively, were finally permitted to legally wed in every state. Both of those instances, however, occurred during a time in which there was not yet a body of law devoted to nonmarital relationships. Thus, the plight of same-sex couples whose marriage-like relationships predated marriage equality provides the first real opportunity to analyze nonmarriage law’s efficacy both pre- and post-equality.

*Obergefell*’s promise of equality would seem to suggest we treat those years as part of the marriage, but the existing law of cohabitation would suggest we give them very little (if any) weight. When confronted with past situations involving opposite-sex couples, “the majority of courts appear[ed] to separate the nonmarital period from the marital period.”<sup>8</sup> But the same-sex couples who now find themselves in this position are different in one key respect—when their relationships began, nonmarriage was the only option. Thus, as the states struggle with how to properly characterize and treat these pre-equality years, the

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4. Peter Nicolas, *Backdating Marriage*, 105 CALIF. L. REV. 395, 397-98 (2017).

5. See *infra* notes 11-17 and accompanying text.

6. See *infra* notes 74-77 and accompanying text.

7. 388 U.S. 1 (1967). For a discussion of how states dealt with backdating marriages between mixed-race couples following *Loving*, see Nicolas, *supra* note 4, at 424-25.

8. Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1, 18 n.83 (2017); see also Allison Anna Tait, *Divorce Equality*, 90 WASH. L. REV. 1245, 1295 (2015) (“Because most legal rights and responsibilities in a romantic relationship begin at the moment of marriage, courts often do not assess premarital moments of commitment and partnership.”).

resulting questions are quite instructive for the law of nonmarital relationships. Indeed, much of the criticism that has been levied at the law of nonmarriage takes on a new dimension when considered against this unique backdrop. This Essay explores that criticism using a post-*Obergefell* lens.

This Essay does not, however, address when and how same-sex marriages after *Obergefell* should be backdated to include earlier nonmarital periods.<sup>9</sup>

Instead, this Essay accepts as fact that courts are beginning to understand that *Obergefell* created a need for some form of backdating to help remedy the vestiges of marriage inequality. As courts attempt to implement standards for backdating, they will have to look at the ways in which same-sex couples ordered their relationships while waiting for marriage equality. This Essay brings together the literatures on backdating and nonmarriage, and in doing so highlights an important concern: as courts study pre-*Obergefell* relationships, they should see how inapposite the current law of nonmarriage is to the reality of nonmarital relationships. By underscoring existing arguments while giving rise to new criticisms, the pre-*Obergefell* lives of same-sex couples could benefit future nonmarital partners in their quest for greater legal protections.

This Essay proceeds in two parts. Part I explores how state courts have counted the pre-*Obergefell* years that same-sex couples spent in marriage-like relationships. Part II then considers how recognizing these same-sex “marriages” can better inform the law of nonmarriage.

## I. WHEN NONMARRIAGE IS THE ONLY OPTION

The year 2015 marked a major milestone in the gay rights movement in the United States. Gays and lesbians nationwide finally earned the right to marry the person of their choice. Not since the late nineteenth century, when former slaves were finally permitted to legally wed,<sup>10</sup> would Americans witness so large a group simultaneously achieving the right to marry. For same-sex couples

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9. It is, after all, quite difficult—as the scholars who have studied these issues can no doubt attest—to ask courts to look back in time to ascertain the precise point at which two parties seemingly agreed that their relationship was the functional equivalent of a marriage. It is a challenge to reconstruct time periods so long after the fact, which may be compounded in cases where divorcing spouses see things quite differently. How is a court to decide between those competing arguments? And what objective relationship markers offer some degree of certainty about the spouses’ past intentions? (Is it the day they started dating? Cohabiting? Registered as domestic partners?) Without a marriage license, it is potentially impossible to determine when two people had a meeting of the minds regarding marriage—especially if these events occurred when marriage was not even a possibility. See e.g., Nicolas, *supra* note 4; Tait, *supra* note 8, at 1308; Lee-ford Tritt, *Moving Forward by Looking Back: The Retroactive Application of Obergefell*, 2016 WIS. L. REV. 873, 898 (2016).

10. See *infra* notes 74-77 and accompanying text.

opting to exercise this new right and convert their marriage-like relationships into formal marriages, a difficult question arose: should the law count those initial marriage-like years toward the length of their legal marriage?

To ignore those years would mean that “many same-sex relationships appear artificially short in endurance when measured solely by reference to the couple’s civil marriage date.”<sup>11</sup> More importantly, a number of legal consequences flow from the length of marriage, thus exposing these couples to certain detriments should the full term of the relationship not be counted. At the federal level, Social Security,<sup>12</sup> pension,<sup>13</sup> and immigration benefits<sup>14</sup> are but three examples of benefits that arise only if a couple is married for a certain amount of time.<sup>15</sup> State law likewise conditions a number of protections on the length of the marriage, including the availability and amount of alimony in a divorce.<sup>16</sup> Other marriage protections only apply if the couple was married at the time of a certain event, such as property acquisition.<sup>17</sup>

Consider a same-sex couple who, prohibited from marrying, lived in a marriage-like relationship from 1990 to 2015. On the heels of *Obergefell*, the couple married in 2015, but divorced in 2018. In most states, the law would only treat the property acquired between 2015 and 2018 as marital property subject to division, even if the couple could show that their relationship was equivalent to a longer marriage. One could of course make the same argument about an opposite-sex couple who enjoyed a long cohabitation period prior to marriage, but the opposite-sex couple at least had the option of marriage, while the same-sex couple was forced to wait for a change in the law.

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11. Nicolas, *supra* note 4, at 397.

12. See, e.g., 42 U.S.C. § 416(c)(1)(E) (2018) (defining “widow” as a “surviving wife [who] was married to [the deceased] for a period not less than nine months immediately prior to the day on which [the deceased] died”).

13. See 5 U.S.C. § 8341(a)(1)(A) (2018) (requiring a marriage of at least nine months).

14. See, e.g., 8 U.S.C. § 1154(g) (2018) (“[A] petition may not be approved to grant an alien immediate relative status or preference status by reason of a marriage . . . until the alien has resided outside the United States for a 2-year period beginning after the date of the marriage.”).

15. See Nicolas, *supra* note 4, at 397 (cataloguing others).

16. Katharine K. Baker, *Homogenous Rules for Heterogeneous Families: The Standardization of Family Law When There Is No Standard Family*, 2012 U. ILL. L. REV. 319, 359 (“What is emerging as salient in the places implementing alimony guidelines are two variables, length of marriage and earning differential.”).

17. Susan N. Gary, *Marital Partnership Theory and the Elective Share: Federal Estate Tax Law Provides a Solution*, 49 U. MIAMI L. REV. 567, 573 (1995) (“A majority of states limit the property subject to division to marital property.”); see also Nicolas, *supra* note 4, at 398 (providing other examples of where “the length of a couple’s marriage relative to some other legally salient event determines whether they will be able to exercise a given right”).

Currently, treating the pre-marriage relationship as nothing more than cohabitation would place a profound disability on such couples. After all, the law currently offers, at most, only constrained protections for nonmarital relationships.<sup>18</sup> Specifically, state law protections for cohabitants typically require the parties to have entered into an agreement regarding their respective rights.<sup>19</sup> A handful of states simply refuse to enforce cohabitation agreements.<sup>20</sup> Even then, states will often condition recovery on how closely the nonmarital relationship resembles a traditional marriage. Accordingly, for the same-sex couples whose relationships began prior to marriage equality, something more is required if the law is to honor *Obergefell*'s promise of ensuring them "the rights, benefits, and responsibilities" of marriage.<sup>21</sup>

Just two years later, the Court clarified in *Pavan v. Smith* that *Obergefell* "held the relevant state laws unconstitutional to the extent they treated same-sex couples differently from opposite-sex couples."<sup>22</sup> Thus, *Pavan* stands for the proposition that, under *Obergefell*, states must do more than just permit same-sex couples to wed. But, in their attempts to provide true marriage equality, how are states to treat the pre-equality years when same-sex couples had no option but to form nonmarital relationships? A brief survey of the law reveals that, thus far, the results are mixed.

On the more positive end, consider the case of Debra Parks, who ended a forty-year relationship with her partner in 2017.<sup>23</sup> During this time, the two had bought a house and "other property together, had joint bank accounts, used each

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18. See, e.g., Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1402-03 (2001) (describing the law of cohabitation as "not particularly generous" given that "[o]nly a small percentage of cohabitants will have even a possibility of legal recovery when their relationships end.").
  19. William A. Reppy, Jr., *Choice of Law Problems Arising When Unmarried Cohabitants Change Domicile*, 55 SMU L. REV. 273, 273-74 (2002) ("[O]nly a handful of American jurisdictions takes the position that the cohabitants, having made no contract, share a legal status . . . creating property rights and obligations of the cohabitants."). While some states permit implied agreements, others require that they be express, sometimes in writing. *Id.* at 274. The two states that ignore the contract approach and instead look at the nature of the couple's relationship are Nevada and Washington. See Gregg Strauss, *Why the State Cannot "Abolish Marriage": A Partial Defense of Legal Marriage*, 90 IND. L.J. 1261, 1280 (2015) ("Washington, and perhaps Nevada, have developed an alternative status-based regime for cohabiting couples.").
  20. Emily J. Stolzenberg, *The New Family Freedom*, 59 B.C. L. REV. 1983, 2020 (2018) ("Georgia, Illinois, and Louisiana seem to go further, rejecting any claim arising from a cohabitant relationship.").
  21. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015).
  22. 137 S. Ct. 2075, 2078 (2017).
  23. See Andrew Dys, *Same-Sex Legal Groundbreaker: Judge Says Rock Hill Couple Married in S.C. for Decades*, HERALD (Rock Hill) (March 19, 2017), <https://www.heraldonline.com/news/local/article139540723.html> [<https://perma.cc/439J-W9UN>].



other on tax documents, and lived together until 2016.”<sup>24</sup> The couple resided in South Carolina, which did not permit same-sex marriage until 2014 but does recognize common-law marriage.<sup>25</sup> When Parks sued to have her relationship declared a common-law marriage, the judge agreed. In essence, the court ruled that not only had the two entered into a common-law marriage, but that it had begun in 1987 when Parks divorced her husband.<sup>26</sup> Other states have similarly used common-law marriage when dealing with individuals whose same-sex partners died before they were able to legally wed.<sup>27</sup>

In states that do not permit common-law marriage, some courts have attempted to offer similar benefits by backdating the marriage to an earlier date when the couple was incapable of legally marrying. Importantly, however, these courts have only done so when the parties can prove that, but for the legal prohibition against same-sex marriage, they likely would have wed. For instance, an Oregon court applied the marital presumption to an unmarried same-sex couple, holding that the mother’s lesbian partner was the child’s legal parent.<sup>28</sup> The court did so by noting that same-sex and opposite-sex couples were not similarly situated—one group could marry, while the other could not.<sup>29</sup> Thus, for purposes of applying the marital presumption, the court held that “the salient question is whether the same-sex partners *would have* chosen to marry before the child’s birth had they been permitted to.”<sup>30</sup> On that basis, the court reversed the lower court’s grant of summary judgment, ruling that there was a genuine issue of material fact as to whether the parties would have wed.<sup>31</sup>

At least one court, however, has refused to extend that benefit to same-sex couples when they failed to promptly wed after gaining that right, essentially

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24. *Id.*

25. *Id.*

26. *Id.*

27. See Nicolas, *supra* note 4, at 416-18 (discussing cases).

28. *In re Madrone*, 350 P.3d 495 (Or. Ct. App. 2015). Under the marital presumption, courts presume that when a married woman gives birth, the child’s father is her husband. See Michael J. Higdon, *Constitutional Parenthood*, 103 IOWA L. REV. 1483, 1493 (2018). Today, the presumption frequently comes into play when a married woman gives birth using artificial insemination. See, e.g., Browne Lewis, *Two Fathers, One Dad: Allocating the Paternal Obligations Between the Men Involved in the Artificial Insemination Process*, 13 LEWIS & CLARK L. REV. 949, 970 (2009) (“[A]rtificial insemination is treated as just another way for a woman to get pregnant . . . [Under the marital presumption], her husband is presumed to be the father of the child.”).

29. *In re Madrone*, 350 P.3d at 503.

30. *Id.* at 501 (“Given that same-sex couples were until recently prohibited from choosing to be married, the test for whether a same-sex couple is similarly situated to the married opposite-sex couple . . . cannot be whether the same-sex couple chose to be married or not.”).

31. *Id.* at 503.

punishing them for not being married. In *Ferry v. De Longhi America, Inc.*, a case arising out of California, Patrick Ferry and Randy Sapp started living together in 1985.<sup>32</sup> In 1993, they “were married in a religious ceremony performed by a religious leader pursuant to the principles of [their] beliefs.”<sup>33</sup> The two men would live together until December 2013, when Sapp tragically died as a result of a heater that allegedly malfunctioned.<sup>34</sup> When Ferry brought a wrongful death action, the manufacturer moved to dismiss on the basis that Ferry was not Sapp’s legal spouse and, thus, lacked standing.<sup>35</sup> The court agreed, noting that because same-sex marriage became legal in California in June 2013, the two men could have legally wed prior to Sapp’s death if they had so intended.<sup>36</sup> In essence, the two men had lived as a married couple for over thirty years but were punished for not obtaining a marriage license in the six months between finally gaining the right to do so and Sapp’s death.

Finally, some states have passed legislation on the subject. Just like the court decisions, however, not all legislation on this topic is fully inclusive of the pre-equality years. Specifically, as Nicolas has found, seven states that permitted same-sex couples to enter into domestic partnerships or civil unions pre-*Obergefell* have since “created a seamless mechanism for converting civil unions or domestic partnerships to marriages.”<sup>37</sup> Of those, seven have legislated that the marriage began on the date the relationship was converted to a formal marriage. The remainder set the date as the one on which the couple entered into the domestic partnership or civil union.<sup>38</sup> Although the latter approach allows the same-sex couple to count more of their relationship toward the subsequent marriage, it still only counts those portions that came after the couple entered into the domestic partnership or civil union—formal relationship options that may not have been available earlier in the couple’s relationship.

Given how little time has elapsed since *Obergefell*, and the complexities inherent in the question of when and how to backdate marriage,<sup>39</sup> it is unclear how states will ultimately strike the balance between true marriage equality and the

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32. 276 F. Supp. 3d 940, 943 (N.D. Cal. 2017). The relationship actually started the previous year. *Id.* at 942-43.

33. *Id.* at 943. According to Ferry, “[h]ad it been possible to do so, they would have obtained a marriage license.” *Id.* (internal quotes omitted).

34. *Id.*

35. *Id.* at 944-45.

36. *Id.* at 949-50. Per the court, “the act of obtaining a marriage license is an administrative burden that all couples must bear if they wish to avail themselves of the legal rights and privileges of a formal marriage.” *Id.* at 952.

37. Nicolas, *supra* note 4, at 405.

38. *Id.* at 405-06 (discussing the various legislative approaches).

39. See *supra* note 9 and accompanying text.

law's reluctance to protect nonmarital relationships. Nonetheless, as discussed below, simply recognizing the existence of this need vis-à-vis the same-sex relationships that predated *Obergefell* provides critical commentary on the current state of nonmarriage law in the United States. Specifically, those relationships provide an illuminating example of not only the impediments that keep couples from legally marrying, but also the degree to which domestic relationships have evolved since the law of nonmarriage was first developed.

## II. HOW MARRIAGE EQUALITY INFORMS THE DEBATE OVER NONMARRIAGE

This Part explores how “marriages” that effectively began before couples had the ability to legally wed help illuminate the limitations of nonmarriage law as it exists today. With nonmarriage being the only option for same-sex couples, we have a vast sample size of individuals who conducted their relationships in a nonmarital form. By studying those pre-equality relationships, there is much the law can learn about nonmarriage, both as a social phenomenon and as a legal construct. This Part focuses on three discrete lessons the law can take from such a study: (A) the role choice plays in a couple's decision not to marry; (B) the degree to which the law of cohabitation relies on traditional marriage as a benchmark for determining which nonmarital relationships merit protection; and (C) the way in which the law has used nonmarriage as a basis for withholding benefits and punishing those who do not conform to societal expectations.

### A. Choice

One of the more compelling characteristics shared by same-sex couples who, pre-*Obergefell*, lived in a marriage-like state is the fact that nonmarriage was their only option. Although their lack of choice stemmed from discriminatory marriage laws, the reality is that many couples, regardless of whether they are same- or opposite-sex, likewise “opt” out of marriage as a result of other circumstances

beyond their control.<sup>40</sup> In fact, many cohabitating couples do eventually wed.<sup>41</sup> That has not stopped courts, however, from treating couples' decisions to cohabit as though they represent a conscious choice to never marry—one for which they must forever bear the consequences.

Consider, for instance, a 1994 Mississippi case in which Elvis Davis, a woman who spent thirteen years cohabitating with the father of her child, brought a claim arguing that she was entitled to an equitable distribution of the couple's property.<sup>42</sup> The two held themselves out as husband and wife, and Elvis had worked in her partner's businesses and also as a homemaker for him and their daughter.<sup>43</sup> During the course of their relationship, her partner's net worth had grown from \$850,000 to over \$7 million.<sup>44</sup> Nonetheless, the court refused her claim. In doing so, the court made much of the fact that, at some unspecified point in the relationship, Elvis declined a marriage proposal.<sup>45</sup> Thus, the court seemingly gave no consideration to any other event in the evolution of the couple's thirteen-year relationship other than that one point in time when Elvis expressed a desire not to marry.

When it comes to the same-sex couples whose relationships began pre-*Obergefell*, however, courts cannot rely on conscious choice when deciding what level of protection to afford the couple's premarital relationship. Indeed, for those couples, there was no choice whatsoever when it came to marriage versus

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40. See Wendy D. Manning & Pamela J. Smock, *Measuring and Modeling Cohabitation: New Perspectives from Qualitative Data*, 67 J. MARRIAGE & FAM. 989, 995 (2005) (presenting data that “call into question the assumption often made in research of a conscious decision-making process leading to cohabitation”). According to Kaiponanea Matsumura, “[m]ost nonmarital relationships develop organically with questions about legal ramifications arising *after* the partners have intertwined their lives in various respects.” Kaiponanea T. Matsumura, *Consent to Intimate Regulation*, 96 N.C. L. REV. 1013, 1019 (2018). Or, stated differently: “Most cohabitation evolves from a drift into sleeping more and more frequently together and a gradual accumulation of possessions at one residence . . . [T]here is only a mutual, often unspoken, recognition of the desire to be together, with little attention given to planning for the relationship.” Eleanor D. Macklin, *Nonmarital Heterosexual Cohabitation*, MARRIAGE & FAM. REV., Mar.-Apr. 1978, at 6; see also Kathryn S. Vaughn, Comment, *The Recent Changes to the Texas Informal Marriage Statute: Limitation or Abolition of Common-Law Marriage?*, 28 HOUS. L. REV. 1131, 1153 (1991) (“Because so many couples ‘drift’ into cohabitation arrangements, there is not always an agreement to be husband and wife even though the couples live in all respects like a married couple.”).
41. See Estin, *supra* note 18, at 1384 (“Sixty percent of opposite-sex cohabitants in the United States go on to marry each other, and this often happens quickly.”).
42. *Davis v. Davis*, 643 So. 2d 931 (Miss. 1994).
43. *Id.* at 932-33.
44. *Id.*
45. *Id.* at 936 (“When opportunity knocks, one must answer its call. Elvis Davis failed to do so and thus her claim is all for naught.”).

nonmarriage. To couples whose relationships began more than twenty years ago, the thought of marriage versus nonmarriage may never have occurred. Marriage equality was a topic that only seriously emerged in the mid-1990s,<sup>46</sup> and the first state to legalize same-sex marriage did not do so until 2003.<sup>47</sup> Thus, the same-sex couples who lived in premarital, pre-*Obergefell* cohabitation disrupt the idea that nonmarriage is something people elect. For that reason, courts must look beyond choice and instead take into account that, in some instances, cohabitation serves as either a temporary status on the path to marriage or simply a status that unfolded organically.<sup>48</sup> Regardless, it should not be viewed as a complete rejection of marriage.

It could very well be that marriage simply did not make economic sense for a cohabiting couple. After all, economic hardship is one of the qualities shared by those most likely to cohabit.<sup>49</sup> “As compared with their married counterparts, unmarried parents are younger, lower income, less educated, disproportionately nonwhite, and more likely to have children from multiple partners.”<sup>50</sup> Given that cohabitation is more prevalent among marginalized groups, courts and legislatures should be more cautious when it comes to dismissing these relationships as the product of a bad decision. For people within these particular social groups, perhaps the decision not to wed was, like the same-sex couples who pre-dated *Obergefell*, due to circumstances beyond their control.<sup>51</sup>

Such a realization could propel states to focus on the real question that arises in the context of nonmarriage: regardless of why the parties came to be in this

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46. Margaret H. Lemos & Ernest A. Young, *State Public-Law Litigation in an Age of Polarization*, 97 TEX. L. REV. 43, 62 (2018) (noting that “the same-sex marriage issue became salient in the mid-1990s”).

47. See *Goodridge v. Dept. of Pub. Health*, 798 N.E.2d 941 (Mass. 2003). As one commentator has written: “I went to the Netherlands in 1998, just after marriage had become equal there. And it was an amazing feeling . . . because I had never imagined that possibility.” Laura J. Kendall, *Dancing with My Grandma: Talking with Robyn Ochs About Complex Identities and Simple Messages in the Marriage Equality Movement*, in BISEXUALITY AND SAME-SEX MARRIAGE 181, 199 (M. Paz Galupo ed., 2008).

48. Further, to the extent the decision to now wed does involve choice, it would be a mistake to assume that both parties have equal say given that “[t]he decision to marry . . . rests on which individual has the most bargaining power.” Antognini, *supra* note 8, at 57.

49. Lawrence W. Waggoner, *Marriage Is on the Decline and Cohabitation Is on the Rise: At What Point, If Ever, Should Unmarried Partners Acquire Marital Rights?*, 50 FAM. L.Q. 215, 230 (2016) (finding that many cohabitating couples exist “at or below the poverty level”).

50. Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 186-87 (2015) (citations omitted); see also Matsumura, *supra* note 40, at 1038 (“[L]ess wealthy and less educated adults are more likely to be in comparatively unstable relationships.”).

51. See Ira Mark Ellman, *Marital Roles and Declining Marriage Rates*, 41 FAM. L.Q. 455, 485 (2007) (“The unmarried have not selected their situation, they have settled for it.”).

form of relationship, how should the law treat them when the relationship ends? As Albertini Antognini has explained, the real focus should be on “whether a nonmarital *separation* should be treated like a *divorce* . . . the most direct comparison accessible to courts.”<sup>52</sup> Perhaps recognizing the existence of same-sex couples who had no choice in the matter will help courts begin to focus on answering this more fundamental question. Doing so will help couples in non-marriage relationships across the board, whether their decision to cohabit was made for them by the law, outside circumstances, or was their conscious choice.

### B. Traditional Marriage as a Benchmark

Even when states do provide some remedies for cohabitating couples, those protections are often premised on outdated, stereotypical notions of what marriage should look like. Same-sex relationships that predated marriage equality, however, force courts to confront just how inappropriate that benchmark is when adjudicating claims by cohabitants. In essence, courts must instead ask a new question: For couples who never thought marriage would be an option for them, how did they structure their relationships? It is an important question given that a consistent criticism of the law of nonmarriage has been courts’ practice of conditioning recovery and benefits on how closely the relationship looks like marriage.<sup>53</sup> Under this judicial approach, the only people who are protected are those whose relationships conform “to an amalgam of social, cultural, or legal standards that approximate marriage.”<sup>54</sup> The problem with this limited protection is its assumption that the degree to which a nonmarital relationship deserves legal protection is tied to how closely it approximates a stereotypical marriage.

Many have criticized *Obergefell* for “reify[ing] marriage as a key element in the social front of family, further marginalizing nonmarital families.”<sup>55</sup> Others have gone so far as to characterize the majority opinion as “a love letter to

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52. See Antognini, *supra* note 8, at 56.

53. Although the typical approach is to deny cohabitants recovery if the relationship is not sufficiently marriage-like, there are some instances where courts have denied recovery if the relationship looks *too much* like marriage. *Id.* at 10-58. Antognini provides an in-depth examination of these cases, contrasting “[t]he cases that require the nonmarital relationship to be marriage-like in distributing property or awarding alimony” with those where “if the relationship looks anything like marriage, . . . courts prevent the plaintiff from recovering.” *Id.* at 59.

54. Matsumura, *supra* note 40, at 1021.

55. Clare Huntington, *Obergefell’s Conservatism: Reifying Familial Fronts*, 84 *FORDHAM L. REV.* 23, 23 (2015).

marriage,”<sup>56</sup> frequently quoting Justice Kennedy’s statement that “[n]o union is more profound than marriage, for it embodies the highest ideals of love, fidelity, devotion, sacrifice, and family.”<sup>57</sup> Thus, as one article states, “[i]n the process of explaining how vital marriage is to individuals and society, *Obergefell* repeatedly shames those who do not marry.”<sup>58</sup>

One of the more interesting aspects of *Obergefell*, however, is the way in which the opinion arrives at the conclusion that same-sex marriage falls within the fundamental right to marry. Specifically, the Court did so by identifying four essential “principles and traditions” related to marriage that justify its classification as a fundamental right—principles and traditions that, according to the Court, apply equally to same-sex couples<sup>59</sup>: 1) “the right to personal choice regarding marriage is inherent in the concept of individual autonomy;”<sup>60</sup> 2) marriage “supports a two-person union unlike any other in its importance to the committed individuals;”<sup>61</sup> 3) marriage “safeguards children and families and thus draws meaning from related rights of childrearing, procreation, and education;”<sup>62</sup> and 4) “marriage is a keystone of our social order . . . , without which there would be neither civilization nor progress.”<sup>63</sup>

By breaking marriage down into these four “essential attributes,” while seemingly excluding more stereotypical assumptions of marriage, such as gender roles,<sup>64</sup> the question arises as to whether *Obergefell* might nonetheless offer some hope for those in nonmarital relationships. After all, if marriage continues to serve as the benchmark for whether cohabitants are entitled to legal protections, *Obergefell* could lead to a refinement of that comparison—one that ultimately benefits cohabitants and individuals in other nonmarital relationships. Courtney

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56. Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1212 (2016).

57. 135 S. Ct. 2584, 2608 (2015).

58. Leonore Carpenter & David S. Cohen, *A Union Unlike Any Other: Obergefell and the Doctrine of Marital Superiority*, 104 GEO. L.J. ONLINE 124, 126 (2015); see also Gregg Strauss, *What’s Wrong with Obergefell*, 40 CARDOZO L. REV. 631, 631 (2018) (“*Obergefell*’s glorification of marriage is wrong, not because it was harmful or hurtful, but because its rhetoric denies the equal dignity of citizens in nonmarital families.”).

59. *Obergefell v. Hodges*, 135 S. Ct. at 2589.

60. *Id.*

61. *Id.*

62. *Id.* at 2590 (citing *Pierce v. Soc’y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

63. *Id.* (quoting *Maynard v. Hill*, 125 U.S. 190, 211 (1888)).

64. See Cary Franklin, *Biological Warfare: Constitutional Conflict over “Inherent Differences” Between the Sexes*, 2017 SUP. CT. REV. 169, 187–88 (2017) (“The Court observed in *Obergefell* that much of what had once seemed ‘natural’ about marriage was subsequently revealed to reflect stereotyped conceptions of men’s and women’s roles.”).

Joslin makes the case that “[t]hese principles must be applied equally to non-marriage.”<sup>65</sup>

The same-sex couples who were forced to wait for the right to marry lend some support to Joslin’s argument. As an initial matter, the nature of Obergefell’s long-term, *nonmarital* relationship with his partner, upon which the Court relied when pointing out the core similarities between same- and opposite-sex marriages, was unlikely to have changed in any qualitative way as a result of receiving a marriage license. Thus, it is difficult to justify holding those pre-equality years against them when deciding marital benefits. The question then becomes whether the law should ever automatically give marriage a virtual monopoly on the legal protections afforded individuals in domestic relationships. In fact, as Matsumura has detailed, the law has already carved out areas in which “acts distinct from formal requirements can sometimes move people from the legal category of unmarried to married.”<sup>66</sup> Is it really justified in refusing to do so when that refusal punishes those in an economically vulnerable position for being in a relationship that, per the Supreme Court, already shares the essential attributes of the one relationship status that is protected?

There is one other question, however, that arises in this context when looking at the pre-equality relationships of same-sex couples. Given that many of the individuals in same-sex relationships grew up in a world where marriage was not possible and their relationships were marginalized (if not demonized), would it not be reasonable to assume that those relationships would look somewhat different from traditional marriages? If so, should the law accept those differences or simply ignore them?<sup>67</sup> This concern harkens back to one raised by Paula Ettelbrick in 1989, when the same-sex marriage movement was in its embryonic stages: “The moment we argue . . . that we should be treated as equals because we are really just like married couples and hold the same values to be true, we undermine the very purpose of our movement and begin the dangerous process of silencing our different voices.”<sup>68</sup> Perhaps the courts’ recognition of the

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65. Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425, 476 (2017).

66. Kaiponanea T. Matsumura, *Choosing Marriage*, 50 U.C. DAVIS L. REV. 1999, 2006 (2017).

67. For a fascinating case in which a court in the 1980s applied a more essentialist view of “family” to determine that a surviving member of a same-sex couple could qualify as a “family member” for purposes of a rent-control statute, see *Braschi v. Stahl Associates Co.*, 543 N.E.2d 49, 53-54 (1989) (“[A] more realistic, and certainly equally valid, view of a family includes two adult lifetime partners whose relationship is long term and characterized by an emotional and financial commitment and interdependence.”).

68. Paula L. Ettelbrick, *Since When is Marriage a Path to Liberation?*, in *WE ARE EVERYWHERE: A HISTORICAL SOURCEBOOK IN GAY AND LESBIAN POLITICS* 757, 758 (Mark Blasius & Shane Phelan eds., 1997).



ways in which same-sex couples structured their lives prior to *Obergefell* could be instructive in broadening the law's conceptions of modern relationships.

One of the differences that bears mentioning is, of course, gender. With same-sex marriage, courts can no longer rely on the stereotype of the working husband and homemaker wife. This could be beneficial to the law of nonmarriage, which is not immune to such stereotypes. As Antognini points out, to the degree that the law of nonmarriage has typically employed marriage as a barometer for what a relationship should look like, "[t]he overarching definition of marriage that these decisions impose is one steeped in archetypal gender relations."<sup>69</sup> With the legalization of same-sex marriage, however, the law must "confront[] the sleeping dog, by challenging the rigidity of gender role and identity that conspires with political will to deny the creative possibility and richness in *all* lives of committed intimate relation."<sup>70</sup> Thus, gender is a prime example of how looking at same-sex couples whose relationships predate *Obergefell* can provide a richer understanding of nonmarital relationships, enabling the states to offer more meaningful protections without relying solely on traditional marriage.<sup>71</sup>

### C. Social Conformity

Finally, as courts attempt to ascertain how to treat the nonmarital portions of same-sex relationships that began pre-*Obergefell*, they must be mindful of the ways in which the law of nonmarriage has historically been used to punish social deviance. After all, within this area of the law, courts have been known to apply different standards in different contexts to effectively punish someone who failed to conform to societal expectations of domestic relations.<sup>72</sup> For same-sex couples whose relationships began pre-*Obergefell*, there is the very real danger that states that dislike marriage equality could hold any post-*Obergefell* period of cohabitation against them, effectively punishing them for their failure to conform to

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69. Antognini, *supra* note 8, at 60.

70. John G. Cullhane, *Uprooting the Arguments Against Same-Sex Marriage*, 20 CARDOZO L. REV. 1119, 1149 (1999).

71. This is not to suggest, of course, that all nonmarital relationships should be afforded rights equal to marriage. Indeed, as June Carbone and Naomi Cahn have pointed out, "[n]onmarriage is not one single institution, but instead is a continuum of relationships." June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 94 (2016). The point here is merely that in attempting to determine which nonmarital relationships are entitled to economic protection, standards that are broader than "marriage-like" should be employed.

72. *See id.* at 60 ("Marriage law has long served to institutionalize expectations about appropriate conduct by reinforcing broadly shared community norms and 'channeling' intimate relationships into marriage." (citations omitted)).

societal expectations. One example already exists. In *Ferry*, the court refused to treat a same-sex couple's pre-equality years as a marriage, given that they theoretically had six months to marry before one of the partners died.<sup>73</sup> The hypocrisy in such an approach is alarming. Same-sex couples were punished during the pre-*Obergefell* years because their relationships, which failed to conform to the traditional model of "one man and one woman," were deemed unworthy of being treated as a legal marriage. Once marriage equality did become an option, same-sex couples were then punished for not, in short order, conforming to the legal and societal expectation that couples must wed to protect themselves from economic harm.

Cases like *Ferry* are troubling in that they harken back to the period after the passage of the Thirteenth Amendment when former slaves gained the right to marry. As historian Tera W. Hunter discusses in her latest book, *Bound in Wedlock*, prior to emancipation, slaves were permitted to "marry," but such unions had absolutely no legal effect.<sup>74</sup> With the passage of the Thirteenth Amendment, however, former slaves could enter into legal marriages. Yet for those who failed to promptly legalize their pre-emancipation unions, states now had another way to subjugate them. Specifically, "[t]hose who were already in cohabitating relationships were told to immediately legalize their unions and legitimize their children and grandchildren."<sup>75</sup> At least one southern state gave the former slaves just six months to wed or be subject "to criminal prosecution for adultery and fornication."<sup>76</sup> As Katherine Franke has discussed, this "served to domesticate African American people who were either unaware of, or ignored, the formal requirements of marital formation and dissolution, or who chose to conduct their intimate sexual relationships in ways that fell outside the matrimonial norms of Victorian society."<sup>77</sup>

Of course, there are many differences between marriages involving former slaves and same-sex couples – not the least of which is the fact that LGBT people were already viewed as persons under the Constitution when *Obergefell* was

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73. See *supra* notes 32-36 and accompanying text.

74. TERA W. HUNTER, *BOUND IN WEDLOCK: SLAVE AND FREE BLACK MARRIAGE IN THE NINETEENTH CENTURY* 6 (2017) ("As chattel, slaves were objects, not subjects. Marriage for them was not an inviolable union between two people, but an institution defined and controlled by the superior relationship of master to slave."). Indeed, in the context of a slave wedding, the typically "till death do you part" vow was changed to "until death or distance do you part," recognizing the right of the slave owner to unilaterally separate the couple at any point. *Id.*

75. *Id.* at 236.

76. Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1421 (2004) (noting postbellum marriage law in Florida).

77. Katherine M. Franke, *Becoming A Citizen: Reconstruction Era Regulation of African American Marriages*, 11 YALE J.L. & HUMAN. 251, 257 (1999).

issued. But as *Ferry* indicates, some similarities exist in the way marriage equality could go from being a benefit to a detriment if it is employed a means for the majority to impose social conformity on the minority.<sup>78</sup> After all, both examples involve groups of people who had spent years ordering their lives around the fact that marriage was not an option. As a result, some of the same-sex couples whose relationships began pre-*Obergefell* may not immediately, or ever, exercise their right to marry. Thus, like former slaves who were punished for not immediately conforming their relationships to a legal institution to which they had only just been given access, the law must be mindful of similar expectations being imposed on same-sex couples. It is true that *Ferry* represents a single instance in which a court has punished a same-sex couple for a delay in formalizing a relationship that had already existed for some time, but other courts could follow suit if they are not mindful of the history behind the law of nonmarriage—a history that illuminates the ways in which the law has used nonmarital relationships as a tool to punish those who do not conform. Hopefully, greater awareness of this propensity will discourage states from following a similar path with not only same-sex couples whose relationships predated *Obergefell*, but any couple whose relationship is at odds with societal norms.

## CONCLUSION

Since *Obergefell*, many same-sex couples have solemnized relationships that endured the time during which marriage was not an option. But true equality demands that at least some of those nonmarital years be counted alongside the marital years in determining the length of these “new” marriages. As courts wrestle with how best to do so, there is much the law can learn about the reality of nonmarriage in the United States. Specifically, the same-sex couples who were forced to bide their time in marriage-like relationships created unions that further illustrate both the nature and the legal struggle of nonmarital relationships. States and courts would do well to pay close attention, given that these relationships could greatly inform the law of nonmarriage going forward. Thus, *Obergefell* may ultimately hold a positive impact not only for same-sex marriage, but for other forms of domestic relationships that exist on the legal and societal periphery. Although not enough time has passed for the true impact of the *Obergefell* arguments to be determined, Nan Hunter’s words as to the opinion’s legacy are particularly salient in this context: “[n]ot only is it far too soon to know the

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78. See *supra* notes 32-36 and accompanying text.

WHILE THEY WAITED

answer, but in fact, the answer does not yet exist. It is up to us as citizens to create it.”<sup>79</sup>

*Professor of Law, University of Tennessee College of Law. My sincerest appreciation to all the participants at the Arizona State University Sandra Day O'Connor College of Law's Roundtable on Nonmarriage for their invaluable feedback.*

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79. Nan D. Hunter, *The Undetermined Legacy of 'Obergefell v. Hodges,'* NATION (June 29, 2015), <http://www.thenation.com/article/the-undetermined-legacy-of-obergefell-v-hodges> [<https://perma.cc/2EFJ-YGSN>].