A Status Breakdown

Author : Brian Bix

Date : November 3, 2020

Kaiponanea T. Matsumura, *Breaking Down Status*, __ **Wash. U. L.R.** __ (forthcoming 2021), available at SSRN.

One of the hottest topics in family scholarship today is the proper legal treatment of unmarried cohabiting couples. Of course, it is hardly a new topic: it has been a center of controversy at least since the Marvin v. Marvin decision almost 45 years ago. On one side, it has been argued that giving unmarried couples marriage-like rights (equitable division of property at the end of the relationship or a claim for something like alimony) would undermine the public policy favoring marriage, while also not respecting the autonomy of those who declined to marry precisely to avoid such obligations. On the other side, refusing any marriage-like rights to long-term unmarried cohabitants would arguably fail to protect vulnerable parties (in particular, those partners, usually women, who have given up careers) and create an unjust result between the parties (where often one party leaves a long-term cohabitation with much more property than the other, often after having promised that household earnings would be shared).

During the decades since *Marvin v. Marvin*, the number of couples cohabiting outside of marriage has increased significantly; the Census in 2018 reported that more people in the 18-24 year group were living with a partner than were living with a spouse. However, outside a handful of states (*e.g.*, Washington State, with its status of "Committed Intimate Relationship"), and excluding the small number of couples who enter detailed written agreements, unmarried cohabitants are still treated as legal strangers. Indeed, as Kaiponanea Matsumura points out in "Breaking Down Status" – and others have pointed out as well[1] – cohabitants are treated by the law *worse* than legal strangers, as courts will regularly refuse enforcement of informal agreements between cohabitants (exchanges are presumed to be made altruistically) that would be more likely to be enforced between strangers. (P. 58.)

In "Breaking Down Status," Matsumura approaches the problem of how to treat long-term unmarried cohabitants indirectly, by offering an intriguing and detailed comparison between domestic relations status (married or unmarried cohabitants) and worker status (full-time employee or independent contractor). For both employment and intimate relationships, the author shows how the legal status options developed long ago, in a far different time, have come to fit current practices and expectations poorly. On the employment side, the proper characterization of gig workers (*e.g.*, Uber and Lyft drivers) has made salient how the options of "employee" and "independent contractor" both seem problematic. Each status comes with its own bundle of benefits and disadvantages, and each falls short of the experiences or needs of most gig workers. For example, gig workers do not seem to be independent contractors in the core sense of that label, in that they often work for only one company, and their terms of employment are generally set by that company. On the other hand, gig workers often have a flexibility regarding the number of hours worked that traditional employees do not have.

In the area of domestic relations, there are many unmarried couples who hold themselves out as married, and generally follow the norms and expectations of married couples in their community. However, there are also many unmarried cohabitants whose behavior and self-perception fill the whole spectrum from "basically married" to mere "friends with benefits." And while one might picture a partner refusing to marry as some rich man who selfishly wants to keep all the property to himself, there is also, as a number of observers have reported, the reality of single, working class mothers "reluctant to commit to a marriage-like relationship because of concerns about a partner's income stability, expenses, and debts."[2]

As Matsumura points out, status relationships tend to encapsulate a complex of autonomy, dependency, vulnerability, and oppression. An obvious reformist reaction is to argue that each situation should be judged individually, taking into

account all the circumstances. This is the impulse that creates equitable exceptions to legal rules, and one also finds it in Family Law, in doctrines like equitable (de facto) parental status and equitable adoption. However, as is well known, what is gained by individual consideration comes with costs – uncertainty, unpredictability, and too much discretion to judges (keeping in mind that many judges do not share "our values" – regardless of how one fills out the content of "our values"). It is not surprising that these equitable doctrines tend to become ever more rule-like over time: to create more predictable outcomes regarding when (*e.g.*) equitable parental status will be granted and when it will be refused. And, as Matsumura argues, the intermediate solution of having a large variety of statuses also has difficulties: like the "numerus clausus" idea in property law (not having too many categories of property),[3] having too many family categories, or allowing parties to create an infinite number of new status structures through private agreement, which can quickly lead to confusion and inefficiency.

The article draws broad lessons: that in the government's treatment of its citizens, it is inevitable that people be divided into categories, and it is convenient if those categories – "status" categories – often contain bundles of rights and obligations. Matsumura's take-away is clear: "Status is inevitable." (P. 55.)

However, the article does not prescribe resigned acceptance of misfit statuses. Matsumura believes that statuses can be reformed, though he warns that the process is rarely straightforward. What solves one problem may create another; it is hard to serve well autonomy, efficiency, and dependency (or even any one of them alone – e.g., responding to vulnerability can also have the unintended effect of encouraging vulnerability). Finding the right legal response to unmarried cohabitation (and gig employees) will require creativity and hard work.

Editor's Notes: For another review of this article, also published today, see Aníbal Rosario-Lebrón, Rounding the Square Peg: Matsumura's Redefining of Status Regulatory Schemes, JOTWELL (November 3, 2020).

Also, please note that Jotwell's Contributing Editors make their own selections as to what to review; review topics are not assigned by the Section Editors.

1. E.g., Courtney G. Joslin, *Autonomy in the Family*, 66 **UCLA L. Rev.** 912 (2019).
2. Naomi Cahn & June Carbone, *Blackstonian Marriage, Gender, and Cohabitation*, 51 **Ariz. St. L.J.** 1247, 1273 (2019).
3. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 **YALE L.J.** 1 (2000).

Cite as: Brian Bix, *A Status Breakdown*, JOTWELL (November 3, 2020) (reviewing Kaiponanea T. Matsumura, *Breaking Down Status*, __ **Wash. U. L.R.** __ (forthcoming 2021), available at SSRN), https://family.jotwell.com/a-status-breakdown/.