Restating the Law of Nonmarital Contracts

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Date : April 27, 2021

Albertina Antognini, *Nonmarital Contracts*, 73 **Stan. L. Rev.** 67 (2021).

Millions of Americans are in cohabiting relationships marked by varying degrees of intimacy and dependency. Although at least some of these relationships are functionally similar to marriage, the law has had a limited role in regulating them. Nonmarital partners are ineligible for benefits like family leave, Social Security, favorable tax treatment, and more. Moreover, marital property rules do not apply to them, meaning that economically vulnerable partners may find themselves with nothing at the relationship's end. In most states, one legal tool available to nonmarital partners is contract. Since the California Supreme Court's *Marvin v. Marvin* decision over forty years ago, the vast majority of jurisdictions have allowed partners in intimate relationships to enter into contracts governing property, as long as sex is not consideration for the contract. The problem, most scholars observe, is that the vast majority of couples either do not bother to make agreements in the first place or do not express them in the form of a concrete exchange. Taking courts at their word, scholars assume that courts will enforce nonmarital contracts when they find them.

Albertina Antognini's latest article, *Nonmarital Contracts*, disrupts this account. Through a painstakingly detailed examination of the entire universe of cases involving express contracts between nonmarital partners, Antognini shows that courts very rarely enforce agreements between opposite-sex partners exchanging domestic labor for money or other property, the very type of exchange that *Marvin* theoretically greenlighted. Thus, contract fails to make much of an impact, but for a different reason than is commonly assumed: the very courts that proclaim a right to contract in theory decline to enforce them in reality.

Antognini's analysis is based on a universe of approximately 120 reported cases that involve claims between nonmarital partners based on an express contract, culled from an initial sample of thousands of false positives.[1] The relatively small number of cases allows Antognini to engage every single one without cherry-picking. And indeed, they cannot all be harmonized, a fact that ultimately contributes to a richer set of insights.

Antognini identifies two notable fault lines in this body of cases. First, courts are much more likely to enforce claims between opposite-sex partners predicated on the exchange of property; claims based on domestic services are rarely enforced. Second, contract claims between same-sex couples, many of which involve domestic services, fare quite well in comparison to contract claims between opposite-sex couples.

Courts provide various reasons not to enforce contracts involving domestic services. Some courts struggle to disentangle domestic services from the sexual nature of the relationship, treating the services as an extension of the sex that is also taking place. Some courts presume that the party performing the domestic services offered them out of love and affection, or simply performed them as part of the give-and-take of the relationship, rendering them gratuitous. Other courts find promises to support or take care of the partner providing the domestic services too vague to be enforced.

Not all claims fare so poorly, however. These same concerns—of intertwined sexual services,

gratuitousness, or vagueness—are not present when the one partner brings a claim based on tangible property like earnings, shared expenses, or rent. Antognini shows that when partners attempt to recover their share of money spent maintaining the household, or for financial contributions to property that the partners shared during the course of the relationship, courts have easily set aside the sexual nature of their relationships.

Courts have also been much more willing to enforce contracts involving domestic services between same-sex couples. A common assumption in that context is that the parties turned to contract because of their inability to marry, and thus their intentions should be honored (which leads one to wonder whether future claims brought by same-sex partners who could have married will face greater resistance).[2]

This descriptive work suggests that many scholars have been too quick to take the courts at their word, and perhaps too sanguine about the availability of contract law as a tool to define the legal parameters of nonmarital relationships. Yes, contract law allows partners to exchange property for property, but it renders much of the work that goes on in a relationship—work traditionally performed by women—market-inalienable. From this state of affairs, Antognini draws several compelling insights. She sees in the devaluation of domestic work a preservation of coverture in contract. Within marriage, contract doctrine prevents wives from entering into agreements regarding domestic services, effectively ensuring that any labor they perform within the home will be for the benefit of others. (Pp. 93-94.) But contract doctrine, as reflected in the decisions involving nonmarital partners, extends these effects to people outside of marriage, further articulating the divide between the market and the family. As Antognini puts it, “status is still driving these decisions—in that courts are making judgments about the nature of intimate relationships based on the content supplied by marriage—and limiting contract accordingly.” (Pp. 142-43.) Indeed, based on Antognini’s comprehensive description of the case law, it is hard to unsee the role that marriage plays in determining the types of contract terms that courts will enforce.[3]

Antognini argues that the status quo is unacceptable because, “in addition to being confused and contradictory, . . . courts are concealing judgments about relationships behind the guise of contract.” (P. 145.) Thus, she pushes courts and scholars to choose between two options for reform: stating clearly that contract is not available for domestic services or ensuring that parties are actually able to contract for home labor. The first option has the benefit of clarity and would allow partners to arrange their legal relations based on the law as it actually operates. However, it would perpetuate “the inequities imposed on the homemaker and the devaluation imposed on homemaking.” (P. 147.) Enabling partners to contract for household work, in contrast, would provide a mechanism to value such work, bridging the spheres of the home and the market.

It’s difficult to imagine a world in which domestic labor has some sort of compensable value, which probably goes a long way to explaining the judicial decisions that Antognini critiques. Spouses do not typically provide an accounting of the different tasks they perform, and courts are not accustomed to assigning market rates to those tasks, nor answering questions like why childcare might be worth a certain amount to an average-earning spouse but much more to a high-earning spouse. And as Antognini points out, it is difficult to imagine a contract law that does not interpret the parties’ commitments through the lens of what courts deem to be objectively reasonable, a lens that will be skewed by the judiciary’s own assumptions about the value and content of marriage. Even for open-minded judges, the pull of marriage will be hard to escape. Left to their own devices, partners themselves structure their relationships unimaginatively. That most partners in the cases at bar simply try to recreate marital-like arrangements (unenforceable) or engage in specific transactions related to joint financial contributions (enforceable) seems to follow predictably from a lack of other options. This suggests, as Antognini herself admits, that merely enforcing more contracts between nonmarital

partners will not necessarily result in widespread change.

One article cannot possibly address all of the implications that follow from the realization that the law of nonmarital contracts is not what courts have said it is. In *Nonmarital Contracts*, Antognini provides plenty of food for thought, raising tantalizing questions that beg answers. Scholars of nonmarriage will surely be contending with the issues Antognini has raised for quite some time.

1. Antognini excludes claims based on implied contracts, which one assumes would be treated with even more skepticism by the courts, as well as cases arising after the death of one of the partners.
2. All of the cases except one were decided before same-sex marriage was legal within the relevant jurisdiction, and in that exceptional case, the relevant conduct occurred before legalization. *See* Appendices B.1-4.
3. That same-sex couples were clearly not "marriage material" before the legalization of same-sex marriage saved their contracts from the same fate as opposite-sex couples' agreements. Yet marriage was still shaping contract—by allowing those agreements to be enforced—in its absence.

Cite as: Kaiponanea Matsumura, *Restating the Law of Nonmarital Contracts*, JOTWELL (April 27, 2021) (reviewing Albertina Antognini, *Nonmarital Contracts*, 73 **Stan. L. Rev.** 67 (2021)), https://family.jotwell.com/restating-the-law-of-nonmarital-contracts/.