The Norms for Cooperative Agreements

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ABSTRACT: In her important article, Toward a Private Law of Intimates' Obligations, *Emily Stolzenberg argues that our legal system's failure to respond adequately to claims made by nonmarital cohabitants is not a local or idiosyncratic mistake, but reflects an important, broader defect in our private law. The larger concern to which Stolzenberg draws attention is private law's failure to respond correctly or adequately to the significant category of interactions among "intimates"—understood as the transactions and interactions among cooperative parties in situations where parties act in ways neither wholly selfish nor entirely altruistic. The present Response discusses some difficulties in potential reforms, based on the fact that both the norms and expectations for cooperative behavior vary considerably across communities (and from one interacting pair to another), and because the norms by which we want parties to interact when a relationship is going well may not be the norms we want to apply (or the parties would want applied) when the relationship is over.*

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INTRODUCTION

In *Toward a Private Law of Intimates' Obligations*,[1] Emily Stolzenberg argues that our legal system's failure to respond adequately to claims made by nonmarital cohabitants is not a local or idiosyncratic mistake, but reflects an important, broader defect in our private law. The larger concern to which

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1. *See generally* Emily Stolzenberg, *Toward a Private Law of Intimates' Obligations*, 111 IOWA L. REV. 2055 (2026) (arguing that private law systemically overlooks claims made by nonmarital cohabitants).

Stolzenberg draws attention is private law's failure to respond correctly or adequately to the significant category of interactions among "intimates"—understood as the transactions and interactions among cooperative parties in situations where parties act in ways neither wholly selfish nor entirely altruistic.[2] Stolzenberg writes: "[N]ot enough law has been developed or adapted to govern the complex and complexly motivated interactions of other intimates, including unmarried partners."[3] This category includes not only nonmarital cohabitants but also "family members, friends, close associates, and parties in relations of trust" (though not married couples, for whom there are already established standards and practices).[4] Stolzenberg's theme is that "[p]rivate law has . . . approached intimates' property disputes mainly through the lens of promoting private ordering, but this orientation has been insufficiently attentive to [the collective's] interests in close relationships."[5]

In what follows, Part I offers an overview of Stolzenberg's argument, and Part II raises some questions about her prescriptions for reform, before concluding. Basically, I agree with Stolzenberg's thoroughly argued position that our courts and our private law have not served nonmarital cohabitants and other intimates well. As Stolzenberg points out, the applicable rules are often bad, and even when they come close to being adequate, courts seem biased against worthy plaintiffs in applying the rules.[6] The hesitations and doubts of the present Response are more about the next steps, arguing that the way forward is even more complicated than Stolzenberg's work seems to assume.

I. STOLZENBERG'S ARGUMENT

The starting point for Stolzenberg's critique is one that has received significant attention in recent years: How should the legal system in general and courts in particular respond to claims by long-term nonmarital cohabitants?[7] As Stolzenberg points out, the responses of the states have varied significantly, but generally have been inadequate everywhere.

In 1976, the California case *Marvin v. Marvin*[8] held that the existence of a long-term nonmarital cohabitation relationship was no reason to refuse

2. The article speaks of "the wide gap between self-interested, discrete bargained-for exchanges and selfless giving, the range of complex and complexly motivated interactions that I call cooperation." Stolzenberg, *supra* note 1, at 2083.

3. *Id.* at 2061.

4. *Id.* at 2093.

5. *Id.* at 2104.

6. *See id.* at 2071–86.

7. For extant view on how the courts should respond to claims by long-term nonmarital cohabitants, see Ira Mark Ellman, *"Contract Thinking" Was* Marvin*'s Fatal Flaw*, 76 NOTRE DAME L. REV. 1365, 1369 (2001); Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 884–94 (2005); June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 55–56 (2016); Courtney G. Joslin, *Nonmarriage: The Double Bind*, 90 GEO. WASH. L. REV. 571, 572–74 (2022).

8. Marvin v. Marvin, 557 P.2d 106, 110 (Cal. 1976).

enforcement of the parties' express or implied agreements or to deny equitable remedies that would otherwise apply. Most states have followed *Marvin* in its general holding.[9] However, a small number of states rejected *Marvin*'s path, arguing that recognizing claims between cohabitants would undermine the state interest in encouraging marriage—and that any change in the law to recognize such claims should come from the legislature.[10] On the other hand, even among the states that accepted *Marvin*, many imposed additional requirements on cohabitant agreements, including that they needed to be express (no enforcement of implied agreements) and that they needed to be in writing.[11] Additionally, as Stolzenberg documents, even when claims are heard, courts often deny any recovery based on a seemingly narrow reading of the law and the facts.[12]

A small number of jurisdictions have additionally created a status (or presumptive status) for long-term nonmarital cohabitants, where the couple have rights to equitable property division upon the end of the relationship.[13] For example, Washington state recognizes the status of "committed intimate relationship,"[14] and Alaska courts will divide equitably the property acquired during a nonmarital cohabitation if, but only if, the cohabitants have made clear an intention to share in this way.[15] It is important to note that such status claims do not include anything comparable to the right to seek alimony (spousal support) that married partners have on the dissolution of marriage.

One can thus see the current legal landscape for nonmarital cohabitants along a spectrum, from no legal protection to protection under some set of private law claims (express contract, implied contract or equitable claims) to protection under a state status. There are, however, objections to both types of protection. The standard objection to status remedies is that they are insufficiently protective of the parties' autonomy.[16] The standard objection to private law remedies is that they are insufficiently protective of vulnerable parties—parties who might be left impoverished by the end of a long-term

9. *See* Stolzenberg, *supra* note 1, at 2073, n.90.

10. *See, e.g.*, Hewitt v. Hewitt, 394 N.E.2d 1204, 1211 (Ill. 1979). *Hewitt*'s basic holding was reaffirmed in *Blumenthal v. Brewer*. Blumenthal v. Brewer, 69 N.E.3d 834, 860 (Ill. 2016).

11. *See, e.g.*, N.J. REV. STAT. § 25:1–5 (2025) (cohabitant agreements need to be in writing); *see also* MINN. STAT. § 513.075 (2025) (cohabitant agreements are enforceable only if written and signed by parties).

12. Stolzenberg, *supra* note 1, at 2071–92.

13. *See, e.g.*, Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1, 16–18 (2017) (discussing the status rights in Nevada and Washington).

14. *See, e.g.*, Connell v. Francisco, 898 P.2d 831, 837 (Wash. 1995) (holding that property acquired during a long-term cohabitation must be equitably divided by the courts).

15. *See generally* Tomal v. Anderson, 426 P.3d 915 (Alaska 2018) (applying the standard to a situation where the partners continued to cohabit after their romantic relationship had ended). In Colorado, nonmarried cohabitants can "opt in" to rights and duties, through a "designated beneficiary agreement," through which the parties can agree to confer particular rights and protections (from a statutory list) to one another. COLO. REV. STAT. §§ 15-22-104–12 (2024).

16. *See, e.g.*, Garrison, *supra* note 7, at 818 (describing status approaches as "conscriptive").

cohabitation, some of whom may have been led by their partners to believe that they would be taken care of.[17] Stolzenberg's Article ultimately prescribes a direction that takes elements from both approaches: "[U]nmarried partners' intentions to take on specifically defined obligations toward one another should be relevant if expressed, but not always dispositive of how a relationship's joint surplus should be distributed."[18]

As Stolzenberg properly points out, even courts that purport to be willing to enforce the agreements of cohabitants often fail to do so in practice.[19] In the reported cases, sometimes the courts conclude that the agreements lacked consideration, or that the benefits provided by one partner to the other were intended as gifts rather than as part of exchanges. In other instances, the courts just seem reluctant to find a contract under facts which would clearly justify enforcement if the context were different (not between intimates).[20] Stolzenberg comments that "in their eagerness to respect individual prerogative, these jurisdictions 'depart[] from mainstream contract doctrine, which takes a more permissive view of contract enforcement.'"[21]

Other commentators find these outcomes to be an expression of gender stereotyping or hostility towards nonmarital cohabitation.[22] While Stolzenberg does not disagree, she argues that the outcomes also display a broader problem: Private law does not fully understand or properly respond to interactions of intimates—not only nonmarital cohabitants, but also close friends and family members.[23]

Stolzenberg's basic argument is that our legal system—prominently, our private law combined with our family law—can respond to individuals acting in a fully self-interested way (in their commercial interactions) and to individuals acting in a fully altruistic way (in their marital and parental capacities), but not the many forms of intimate interactions in which our motivations fall in-between those two extremes. In this claim, Stolzenberg is largely correct. The problem comes in what should follow from this diagnosis of the problem.

II. SOME QUESTIONS RAISED BY STOLZENBERG'S PRESCRIPTIONS

I want to consider two lines of questions—not objections, precisely, but questions for further and ongoing consideration. The first line of questions concerns the narrower topic of nonmarital cohabitants and the second the complications that can arise in reforming the private law.

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17. *See, e.g.*, Ellman, *supra* note 7, at 1367 (arguing for an updated status approach).

18. Stolzenberg, *supra* note 1, at 2096.

19. *See, e.g.*, Stolzenberg, *supra* note 1, at 2095–96 and accompanying text.

20. *Id.* at 2092–96.

21. *Id.* at 2090 (alteration in original) (quoting Kaiponanea T. Matsumura, *Consent to Intimate Regulation*, 96 N.C. L. REV. 1013, 1020–21 (2018)).

22. Stolzenberg, *supra* note 1, at 2071–81.

23. *Id.* at 2076–81.

Regarding nonmarital cohabitants, Stolzenberg notes[24] but does not focus upon the fact that nonmarital cohabitants can have very different expectations and values—expectations varying both within couples and across couples. As June Carbone and I have noted—summarizing the work of a number of scholars—the expectations of nonmarital cohabitants differ both relative to married couples and among themselves, the latter especially along the lines of economic class.[25] Nonmarital cohabitants have varying expectations regarding sharing during the relationship and afterwards, and, if they are raising children together, they have different ideas about decision-making during the relationship and who controls parenting time after the relationship is over. Additionally, Katherine Franke has documented how long-term same-sex couples often have quite different expectations and values than their opposite-sex counterparts.[26] Franke argues that the differences are wide-ranging, regarding everything from sexual fidelity during the relationship to financial support afterwards.[27]

Stolzenberg declares that "[d]eveloping a law of intimate obligations will require decision-makers to articulate and to apply more publicly inflected judgments about how intimate relationships should proceed."[28] While this is likely correct, it only points to the difficulties and controversies ahead. If romantic and transacting partners of different backgrounds—as divided by combinations of religion, class, race, sexual orientation, ethnic heritage, and age—have widely diverging understandings of appropriate behavior, how are the courts supposed to choose the right values to reinforce, and, indeed, is this a choice best left to the courts as contrasted with legislative bodies or administrative agencies? At a time when many are losing trust in both our court system and our legislators, one can see the attraction of trying to leave matters to private ordering by the parties.

So, if we are counseling courts, legislatures, and administrative agencies regarding which presumptions and default rules, and which equitable standards and non-waivable rights, to impose on cohabitants (and other "cooperative" interactions), whose standards, values, and expectations should be used? This is a real, rather than a rhetorical, question. The point of this Response is not to deny that we need to improve the private law to deal with cooperative parties, but that the path forward may require a lot of work and many hard choices.

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24. *Id.* at 2094, 2095 n. 219.

25. *See* June Carbone & Brian H. Bix, *Family Law Agreement and the New Gender Bargains*, 39 J. AM. ACAD. MATRIM. LAWS. 399, 402–03 (2026) *see also* Erez Aloni, *Marital Rules for Unmarried Couples: Feminist Objections to a Feminist Proposal*, 39 INT'L J. L. POL'Y & FAM. 19–20 (2025) (arguing against "uniform defaults," in favor of "refinements" that take into account the different circumstances of different couples).

26. *See generally* KATHERINE FRANKE, WEDLOCKED: THE PERILS OF MARRIAGE EQUALITY (2015) (noting that long-term same-sex couples frequently hold different expectations and values from their opposite-sex counterparts).

27. *See id.* at 152–53, 215–17.

28. Stolzenberg, *supra* note 1, at 2106.

Stolzenberg is quite clear that her work is meant to be only the first step.[29] She reports that there is much more work still to be done in developing private law rules to use with nonmarital cohabitants and other interactions that do not fit into the extreme models of entirely self-serving and entirely selfless parties. And she does suggest some possible responses.[30] This is not the occasion to consider all of her suggestions and proposals in detail, but I do want to offer a few, hopefully relevant, observations.

Consider an analogous discussion in contract law regarding "relational contracts." A number of theorists—most prominently, Ian Macneil and Stewart Macaulay—had famously argued that contract theory and contract doctrine misunderstood, in a basic way, what was going on in many, perhaps most, contracts.[31] Rather than being the atomistic (one-shot) interactions of self-interested parties, the argument goes, contracts often involve an ongoing relationship, and the rules and principles of contract law should (and, to a limited extent, already did) work to reinforce those relationships.[32] However, other scholars argued that it would be a mistake to take the norms that were useful in maintaining the relationship when things were going well and impose them in "endgame" situations, after the relationship had broken down.[33] This is not the place to resolve the central questions raised by relational contract theory (a literature already over four decades old)[34], but it is a reminder that one should not too quickly extrapolate from the fact that parties are not (or should not be) selfish and atomistic to the conclusions about the optimal legal norms to apply to their disputes in court. And the norms that might otherwise be optimal once a dispute got to court may create suboptimal incentives for the parties during their relationship. Courts that refuse to grant contractual remedies to cohabitants argue that we have good reasons to encourage marriage, and that giving even a partial remedy to nonmarried cohabitants reduces the incentive to marry.[35] Like a large majority of courts and commentators, I reject the conclusion that this is sufficient reason not to enforce cohabitants' agreements. That is not because

29. *Id.* at 2087–93.

30. Stolzenberg, *supra* note 1, at 2093–2107.

31. *See, e.g.*, Ian R. Macneil, *Relational Contract Theory: Challenges and Queries*, 94 NW. U. L. REV. 877, 902–03 (2000); Stewart Macaulay, *Relational Contracts Floating on a Sea of Custom? Thoughts About the Ideas of Ian Macneil and Lisa Bernstein*, 94 NW. U. L. REV. 775, 778–79 (2000).

32. *See, e.g.*, Jay M. Feinman, *Relational Contract Theory in Context*, 94 NW. U. L. REV. 737, 740–43 (2000) (discussing relational contract theory).

33. *See generally* Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 U. PA. L. REV. 1765 (1996) (explaining why middlegame norms should not be applied in endgame situations); David Charny, *The New Formalism in Contract*, 66 U. CHI. L. REV. 842, 852–54 (1999).

34. *See generally* Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981) (demonstrating relational contract theory published over four decades ago); Tim Cummins & Sally Guyer, *Relational Contracting in Practice: A Route to Relational Economics?*, *in* THE RELATIONAL VIEW OF ECONOMICS 229–45 (Lucio Biggiero et al. eds., 2022).

35. *See* Hewitt v. Hewitt, 394 N.E.2d 1204, 1209 (Ill. 1979).

the argument for promoting marriage is without value, only that other considerations are collectively weightier. Some of the above sorts of considerations might be relevant to agreements between Stolzenberg's "cooperative" parties. It is not that there are no reasons to create a different set of norms for such transactions, but only that we may have reason to be cautious and worry about (among other things) problems in application and problems of suboptimal incentives.

With nonmarital cohabitants, the question is usually whether to enforce agreements that purport to give parties rights they would not otherwise have, such as a right to support or equitable division of property. In other family contexts, of course (as with premarital or marital agreements), the agreements purport to waive rights that parties would otherwise have, such as taking away a spouse's right to equitable division of property or support. Relevant to the second category of agreements, agreements that waive rights, Stolzenberg comments that "[g]iving judges authority to review and modify [intimates'] agreements for fairness offers some level of protection for the [parties'] potentially extensive cooperation, while simultaneously demonstrating the law's willingness to depart from the parties' bargains to vouchsafe society's interests in their relationships."[36] Stolzenberg's analysis seems to assume good (or good enough) judges will be able to come up with the right solutions; but even assuming very good judges (who are competent, wise, and have values of which we approve), there are still many hard questions to resolve. At a minimum, this issue touches a quite general question in family law: When should we be "privatizing" care for the needy, such that care is the responsibility of the partner or the ex-partner, rather than of society generally?[37]

Stolzenberg points us to analogies, suggesting how matters might be generalized. As already noted, Alaska courts respond to the end of long-term nonmarital cohabitation by asking the seemingly simple question of whether the parties intended to share property or not.[38] Stolzenberg emphasizes the way those courts focus on behavior, not just on express promises.[39] However, this raises its own set of problems, as indicated by the discussion above regarding relational contracts. One complication in resolving commercial disputes is that the standards the parties live by (and want to live by, and, in some sense, *should* live by) when things are going well may be different from

36. Stolzenberg, *supra* note 1, at 2096.

37. Consider a standard sort of hypothetical for thinking about spousal support. In the course of a short marriage, one of the spouses suffers an accident that leaves that spouse is great need. The accident is in no way the fault of the other spouse. If the marriage ends not long after the accident, should the ex-spouse be responsible for supporting the injured spouse indefinitely (even assuming that the potential obligor spouse could afford the payments)? For some recent reflections on privatizing care as a core problem of family law and family law reform, see Susan Frelich Appleton & Albertina Antognini, *Abolishing the Family*, 61 HARV. C.R.-C.L. L. REV.445, 453–57 (2026).

38. Stolzenberg, *supra* note 1, at 2098–99.

39. *Id.*

the standards the parties want to apply to disputes after things have broken down.[40] Gregg Strauss has pointed out that a similar dynamic occurs in family law, in particular with questions of parental rights. A legal parent may invite, or at least allow, a cohabitant to play a role in taking care of a child (indeed, it may be both difficult and unwise to refuse the cohabitant such a role), but, Strauss argues, courts and commentators err when they read such cooperation as an agreement granting the cohabitant parental rights, and in seeing any such grant as extending beyond the period of the cohabitation.[41]

The point one can derive from Strauss (and Franke) is that the norms of the parties, or the community, that would apply during the relationship do not—either as a descriptive matter or as a normative matter—necessarily apply after the relationship has ended. That a commercial or intimate connection is "cooperative" still leaves open significant questions about whether property acquired during the relationship should be evenly or equitably divided afterwards, and whether, when, and to what extent there should be any right to benefits or duty to support after the relationship ends. Stolzenberg writes: "Whatever doctrinal frameworks are proposed to structure intimates' obligations, they should incorporate both the empirical assumption that at least some intimates cooperate and the normative judgment that such cooperation should be protected."[42] This, of course, reminds us of the difficult and intertwined normative questions here about expectations. If the rules are clear that a certain type of interaction entails no entitlement to equitable division or post-relationship support, and someone becomes dependent or relatively impoverished after such a relationship, what should the state do? Again, this is not a rhetorical question. I think it is a genuinely difficult question, more difficult than it seems to be regarded by many scholars on both sides of the issue—both those who would impose obligations as a matter of course and those who would only impose obligations in response to express agreements of the parties.

Stolzenberg's reference to the laws surrounding partnership and joint venture is informative.[43] Parties entering a commercial partnership—or joint venture or corporate form—are taking up a structure whose rules, covering both during and after the relationship, are relatively well established and stable. The parties may or may not be well-informed about those rules, but we consider it reasonable that those rules apply to them, not least because the parties in some sense *should have known* the relevant legal standards. At the moment, the established norms for what Stolzenberg calls "cooperative" interactions are mostly ones of no or few post-relationship rights. And there are thus significant, but not necessarily conclusive, arguments for not

40. *See* Bernstein, *supra* note 33, at 1796.

41. *See* Gregg Strauss, *Parentage Agreements Are Not Contracts*, 90 FORDHAM L. REV. 2645, 2662–67 (2022).

42. Stolzenberg, *supra* note 1, at 2095–96.

43. *See* Stolzenberg, *supra* note 1, at 2094–97.

recognizing post-relationship claims. Of course, we can change the rules, and then the expectations would be different.

Stolzenberg's basic prescription is that we (through the courts, legislatures, or some other process) need to develop new private law rules for such cooperative ventures. My response is that we cannot assume any obvious answers to what those norms should be, and that whatever norms are chosen are likely to differ from the current expectations of many. Still, having such rules in detail and widely promulgated will, whatever their other merits, at least allow parties to know in advance what to expect.

CONCLUSION

In the vast majority of American states, long-term nonmarital cohabitants have no property or support rights against one another, and courts are, in practice, highly reluctant to recognize normal private law claims (whether express agreement, implied agreement, unjust enrichment or other equitable claims).[44] As Emily Stolzenberg has shown, this may be best seen as an example of a more general failing: Our legal system does not respond adequately to (unmarried) parties in a cooperative relationship.

Stolzenberg has properly prescribed that rules for such situations need to be developed. More specifically, legal standards are needed that are in part responsive to the intentions of the parties, but also work to enforce general norms about best behavior and protect the most vulnerable. This is all eminently reasonable, though part of the present Response has been a reminder that the project may be even more complicated than it seems when stated in the above abstract terms. This is because both the norms and expectations for cooperative behavior have been shown to vary considerably across communities (and from one interacting pair to another), and because the norms by which we want parties to interact when a relationship is going well may not be the norms we want to apply (or the parties would want applied) when the relationship is over.

44. Stolzenberg, *supra* note 1, at 2071–92.