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# Consent to Intimate Regulation

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## CONSENT TO INTIMATE REGULATION\*

KAIPONANEA T. MATSUMURA\*\*

*Approximately fifteen percent of the adult population in the United States—more than 35 million people—are in informal intimate relationships. In contrast to the highly regulated marital relationship, unmarried partners largely evade laws that turn on relationship status. This invisibility has benefits and costs: partners can walk away from the relationship without burdensome judicial involvement, but they also miss out on laws that create joint property ownership or provide survivor benefits upon death. Most courts and scholars agree that the law should extend some rights and obligations to people in nonmarital relationships, but they have struggled to solve the puzzle of when and to whom the rights and obligations should flow. The existing implied contract and implied status approaches have not been wholly unsuccessful at providing rights to nonmarital partners, but they work infrequently and incoherently. That is because they have either dismissed consent or have misinterpreted it, favoring nonviable rationales such as dependency creation or similarity to marriage.*

*This Article seeks to reclaim consent as the basis to regulate informal intimate relationships. As a conclusion about the nexus between will, conduct, and consequence, consent is an analytic tool well suited to interrogating when intimate relationships should trigger legal consequences. This Article proposes two doctrinal improvements to establish whether nonmarital partners*

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*have consented to regulation. First, it outlines an objective approach to determine whether parties' conduct justifies the imposition of relevant legal obligations. Second, it argues that the inquiry should often focus on discrete commitments—whether property sharing, ongoing financial support, or companionship—rather than all of the bundled rights and obligations of marriage. Nonmarital partners may often consent to some, but not all, of these obligations. This improved consent framework suggests reforms to existing doctrines and also grounds functional approaches that respond to nonmarital partners' needs and lived experiences.*

INTRODUCTION .....	1014
I. NONMARITAL RELATIONSHIPS AND LEGAL REGULATION.....	1025
A. <i>Understanding Nonmarital Relationships</i> .....	1025
1. Subjective Views.....	1026
2. Objective Realities .....	1029
3. Demographic Variations .....	1037
B. <i>Regulatory Attempts</i> .....	1039
II. WHY CONSENT? .....	1046
A. <i>Choice and Authorization</i> .....	1046
B. <i>Addressing Consent Skepticism</i> .....	1051
III. CONSENT TO INTIMATE REGULATION .....	1058
A. <i>Determining the Act of Consent</i> .....	1058
B. <i>Determining the Scope of Obligation</i> .....	1064
IV. APPLYING THE CONSENT FRAMEWORK.....	1071
A. <i>Reforming Current Approaches</i> .....	1072
B. <i>Recognizing Rights and Obligations from the State</i> .....	1075
CONCLUSION .....	1082

#### INTRODUCTION

Consider when, if ever, the following relationships should trigger legal obligations, either between the partners themselves, or between the partners and the state:

*Anna and Ben:* Anna and Ben move into a rented apartment after they graduate from college. They dated during their senior year and are known to be a couple. They split the rent and expenses, like groceries, but they maintain separate bank accounts. They separately purchase big-ticket items, like furniture and electronics, but try to even out the expenses. After a few years, Anna decides to go to law

school. Although she takes out student loans in her name, Ben covers her share of the rent. They never explicitly exchange promises, but Anna subjectively believes that she will do the same if she is ever able to help Ben. After law school, Anna makes a much higher salary, but Ben has been doing quite well at work himself. Both make over \$100,000, and they file income taxes as singles, thereby paying several thousand dollars less than they would if married. By now, Anna and Ben have lived together for nearly a decade.

*Camille and David:* Camille and David start dating on-and-off in high school. Camille gets a job at a big-box retail store and, after two years, becomes a manager. Camille eventually becomes pregnant with David's child, even though he is seeing several different women at the time. Camille is excited to be pregnant; she wants someone to take care of. After he hears the news, David decides to move in with Camille to help raise the child and to provide a more traditional family environment. Camille continues to pay the rent on her one-bedroom apartment. Her salary, while consistent, is only enough to cover the living expenses from month to month. David helps out when he can but does not have a steady job. He likes to purchase gifts for the child, like toys or a new pair of shoes, but doesn't contribute much to the child's daily expenses. Camille doesn't mind having David around, and she loves him, but she knows that he has cheated on her in the past, and she is also wary of his ability to hold down a job.

*Eunice and Fanny:* Eunice and Fanny met when Fanny moved into the same retirement community a few years ago. Eunice was recently widowed. She has two adult children who live out of state. She owns her house, which she purchased with proceeds from the sale of her marital residence. She has several hundred thousand dollars in assets. Fanny also has two adult children. She divorced her husband about a decade ago. She also owns her house and has several hundred thousand dollars in savings. Eunice and Fanny began spending time together because they had so much in common. Eventually, they realized that they were sexually, as well as emotionally, attracted to each other. They spend several nights a week together, alternating between their houses. They also spend virtually every day together, watching television, going for walks, or taking vacations. They consider this relationship to be the most intimate they have experienced, but they do not want to marry because of concerns about the impact of marriage on their Social Security benefits and on their estates.

\* \* \*

These examples illustrate a growing social trend. Despite its continuing centrality to the legal regulation of the family, marriage has nearly lost its position as the predominant family form in the United States. In 1967, 70.3% of the adult population lived in married households.<sup>1</sup> Fifty years later, that share has dropped to 51.5%.<sup>2</sup> One in five adults over the age of twenty-five, 42 million of them, have never married, and one in four adults currently aged twenty-five to thirty-four may never do so.<sup>3</sup> Unmarried cohabitants—over 18 million of them—now make up 7.1% of the adult population.<sup>4</sup> An even greater share of the adult population report's being in committed intimate relationships while living in separate residences, giving rise to the label “Living Apart Together” (“LATs”).<sup>5</sup>

The law currently has little to say about these tens of millions of nonmarital relationships. All three of the relationships just described might dissolve without ever attracting the state's attention. This brings some benefits: Anna qualifies for federal loans for which she might have been ineligible if Ben's income was factored in,<sup>6</sup> and they both save several thousand dollars a year in income tax payments.<sup>7</sup> Camille avoids liability for David's financial obligations. Additionally, David's income will not factor into her eligibility for federal benefits

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1. See Table AD-3: *Living Arrangements of Adults 18 and Over, 1967 to Present*, U.S. CENSUS BUREAU (Nov. 2017), <https://www.census.gov/data/tables/time-series/demo/families/adults.html> [<https://perma.cc/Y6BN-QV2A>] (follow “Table AD-3. Living Arrangements of Adults 18 and Over, 1967 to Present” hyperlink). Other options besides living with a spouse include living alone, living with one's parents, living with an intimate partner, living with other relatives, or living with nonrelatives (i.e., roommates). See *id.*

2. See *id.*

3. WENDY WANG & KIM PARKER, PEW RESEARCH CTR., RECORD SHARE OF AMERICANS HAVE NEVER MARRIED 4, 12 (2014), [http://assets.pewresearch.org/wp-content/uploads/sites/3/2014/09/2014-09-24\\_Never-Married-Americans.pdf](http://assets.pewresearch.org/wp-content/uploads/sites/3/2014/09/2014-09-24_Never-Married-Americans.pdf) [<https://perma.cc/2G5H-CL87>].

4. See U.S. CENSUS BUREAU, *supra* note 1.

5. See Steven K. Berenson, *Should Cohabitation Matter in Family Law?*, 13 J. L. & FAM. STUD. 289, 310–11 (2011); see also Jacquelyn J. Benson & Marilyn Coleman, *Older Adults Developing a Preference for Living Apart Together*, 78 J. MARRIAGE & FAM. 797, 797 (2016).

6. See Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1276, 1294–96 (2014); see also *Basic Eligibility Criteria*, FED. STUDENT AID, <https://studentaid.ed.gov/sa/eligibility/basic-criteria> [<https://perma.cc/38LS-V43W>] (noting that “financial need” is a general eligibility requirement for federal student aid).

7. See Anthony C. Infanti, *Decentralizing Family: An Inclusive Proposal for Individual Tax Filing in the United States*, 2010 UTAH L. REV. 605, 616–17 (explaining that couples who earn similar or equal incomes experience little to no benefit from filing joint taxes).

like the Earned Income Tax Credit.<sup>8</sup> Eunice avoids losing Social Security widow benefits,<sup>9</sup> and she and Fanny both avoid having to redo their estate plans to make sure that their property passes to their children. And they all avoid the potential expense of a judicially supervised divorce. But the couples also miss out on valuable rights currently given to married couples, including rights as against the state, third parties, and the spouses themselves. In all three situations, the less-well-off partner would struggle to establish his or her entitlement to shared property or support. If Ben is killed in an accident, Anna cannot sue for wrongful death and will not inherit Ben's estate without a will. David likely cannot get health insurance from Camille's employer. And Eunice or Fanny may be denied visitation or medical decision-making authority if one of them ends up hospitalized. Moreover, to the extent that the state would like to use intimate relationships as a regulatory tool—to enforce morality, privatize dependency, and administer laws, among other objectives<sup>10</sup>—the lack of regulation amounts to a missed opportunity.

Most states offer pathways for nonmarital couples to formalize their relationships. A handful of states and municipalities have created statuses like civil unions and domestic partnerships that provide a defined set of legal rights and obligations for couples who formally register.<sup>11</sup> Additionally, in the forty years following the Supreme Court of California's pathbreaking *Marvin v. Marvin*<sup>12</sup> decision, nearly all states allow nonmarital partners to enter binding agreements regarding their respective property rights.<sup>13</sup> The use of

8. See, e.g., *Do I Qualify for EITC?*, IRS, <https://www.irs.gov/credits-deductions/individuals/earned-income-tax-credit/do-i-qualify-for-earned-income-tax-credit-eitc> [<https://perma.cc/7NQR-ZFM9>].

9. See Michael J. Brien, Stacy Dickert-Conlin & David A. Weaver, *Widows Waiting to Wed? (Re)Marriage and Economic Incentives in Social Security Widow Benefits 2* (Soc. Sec. Admin. Office of Research, Evaluation, & Statistics, Paper No. 89, 2001), <https://www.ssa.gov/policy/docs/workingpapers/wp89.html> [<https://perma.cc/C98C-77QA>].

10. See, e.g., Kaiponanea T. Matsumura, *Choosing Marriage*, 50 U.C. DAVIS. L. REV. 1999, 2035–41 (2017).

11. See, e.g., John G. Culhane, *After Marriage Equality, What's Next for Relationship Recognition?*, 60 S.D. L. REV. 375, 382–85 (2015) (describing statuses, like Colorado designated beneficiaries and Hawaii reciprocal beneficiaries, that can extend to two adults who may be in a presumptively non-sexual relationship, like a parent and child); Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87, 114–54 (2014) (describing the historical adoption of municipal and statewide domestic partner registries in California).

12. 557 P.2d 106 (Cal. 1976).

13. See CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 47–48 (2010) (noting that all but three states recognize some form of agreements between cohabitants).

formalities, like registering for a formal status or executing a written agreement, identifies the partners' preferences and minimizes the risk of erroneous determinations. Partners seeking to enter a domestic partnership in California, for example, must fill out, sign, notarize, and file a Declaration of Domestic Partnership, in which they declare that they meet statutory-eligibility requirements.<sup>14</sup> A written agreement memorializes the parties' intentions and is often accompanied by procedural safeguards,<sup>15</sup> such as reliance on legal counsel. Formalities provide evidence of the partners' intentions, caution them against inconsiderate action, and focus their attention on the conduct likely to affect their legal rights.<sup>16</sup>

The problem is that most nonmarital partners do not engage these formalities. Couples wishing to formalize their relationships marry; they rarely elect to enter a formal nonmarital status. For instance, during the first three months that civil unions were available in Illinois, only 87 of 1,470 couples entering civil unions in Cook County were marriage-eligible.<sup>17</sup> In 2015, after same-sex marriage became legal in Hawaii, only 23 couples entered civil unions compared to the 22,820 who married.<sup>18</sup> Since Colorado created a designated beneficiary status in 2009 allowing two unmarried people to agree to provide one another with legal rights, benefits, and protections, only 672 couples in three populous counties registered as designated beneficiaries in comparison to the approximately 131,100 who married.<sup>19</sup> Written agreements between nonmarital partners also appear to be rare.<sup>20</sup>

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14. See CAL. FAM. CODE § 297 (West, Westlaw through Ch. 10 of 2018 Reg. Sess. laws); CAL. SEC'Y OF STATE, DOMESTIC PARTNERS REGISTRY FORMS & FEES, DECLARATION OF DOMESTIC PARTNERSHIP 1, <http://dp.cdn.sos.ca.gov/forms/sf-dp1.pdf> [<https://perma.cc/3V7E-U8SF>] (setting forth eligibility requirements for domestic partnership).

15. See Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 800 (1941) (noting that written agreements serve an evidentiary and cautionary function).

16. See *id.* at 800–03 (describing evidentiary, cautionary, and channeling functions performed by formalities and explaining how they interrelate). As many scholars have observed, formalities do not eliminate the risk of error, see, e.g., Jessica A. Clarke, *Identity and Form*, 103 CALIF. L. REV. 747, 807–28 (2015) (discussing a formal identity model and highlighting the inherent problems when the law depends on formalities); Matsumura, *supra* note 10, at 2048–49, but they reduce the risk considerably.

17. See COOK COUNTY CLERK DAVID ORR, OPPOSITE-SEX CIVIL UNIONS: MOTIVES FOR NOT MARRYING 1, <https://www.cookcountyclerk.com/sites/default/files/pdfs/Opposite%20Sex%20Civil%20Union%20Report%20Final%202012.19.11.pdf> [<https://perma.cc/NB5H-WFDT>].

18. *Preliminary 2015 Vital Statistics*, ST. HAW., DEP'T HEALTH, <http://health.hawaii.gov/vitalstatistics/preliminary-2015/> [<https://perma.cc/Y8G4-RNDT>].

19. Based on searches of the online public records systems of Colorado's largest counties. Denver County issued only 465 Designated Beneficiary Agreements from 2009

Most nonmarital relationships develop organically with questions about legal ramifications arising *after* the partners have intertwined their lives in various respects. Without formalities, the regulatory challenges are daunting. Imperfectly calibrated entrance requirements to relationship-based statuses will sweep too broadly, dragging in people who had no intention of assuming legal obligations, or too narrowly, thereby excluding people who stood to benefit from those protections. Any serious effort to recognize nonmarital relationships must therefore answer when, short of formal registration, a relationship will trigger various legal rights and obligations.<sup>21</sup>

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to 2017, compared to 47,799 marriage licenses during the same period. *Denver Clerk and Recorder Online Services*, OFFICE OF THE CLERK & RECORDER, <https://countyfusion3.kofiletech.us/countyweb/disclaimer.jsp>. El Paso County issued only 62 Designated Beneficiary Agreements from 2009 to 2017, compared to 49,296 marriage and civil union licenses. *Marriage/Civil Union Records Search*, CLERK & RECORDER, <http://recordingsearch.car.elpasoco.com/rsui/MarriageRecords/Search.aspx>. Jefferson County issued 145 Designated Beneficiary Agreements from 2009 to 2017, compared to 34,082 marriage licenses. *Clerk and Recorder Web Access*, JEFFERSON CTY., COLO., <https://landrecords.co.jefferson.co.us/Marriage/SearchEntry.aspx>. Aggregation of the numbers performed by author using online search databases for Denver County, Jefferson County, and El Paso County.

20. I am unaware of a systematic study of the prevalence of written agreements between nonmarital partners. Anecdotally, legal disputes reported in case law rarely, if ever, involve the validity of such agreements. *See generally* Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1 (2017) (describing the relevant case law).

21. Several scholars have proposed models for regulating intimate relationships that touch on this question, at least in passing. These proposals have (1) focused on the conscription of couples in marriage-like relationships, *see generally*, BOWMAN, *supra* note 13 (imposing marital property obligations on long-term cohabitants); 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, 235–36 (2016) (proposing to treat long-term cohabitants as married for all purposes); *see also* William A. Reppy, Jr., *Property and Support Rights of Unmarried Cohabitants: A Proposal for Creating a New Legal Status*, 44 LA. L. REV. 1677, 1716–18 (1984) (suggesting that legislation recognizing a new status for cohabitants could clarify their rights and obligations); (2) advocated for the expansion of status-alternatives to marriage, *see* Culhane, *supra* note 11, at 376 (examining “the establishment and subsequent flowering of several new forms of legally recognized relationships”); (3) argued for the expansion of rights to people outside the traditional sexual dyad, *see generally* NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2008) (proposing to offer legal benefits to relationships that perform the functions those benefits seek to reward); Laura A. Rosenbury, *Friends with Benefits?*, 106 MICH. L. REV. 189 (2007) (exploring how family law could recognize and protect purely platonic relationships); (4) considered rules that would strengthen contractual rights, *see generally* Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573 (2013) (proposing “registered contractual relationships” as a legal-status alternative to marriage in which couples sign a contract defining their rights and obligations to each other); Kaiponanea T. Matsumura, *Public Policing of Intimate Agreements*, 25 YALE J. L. & FEMINISM 159 (2013) (criticizing courts’ use of the public policy doctrine to avoid enforcement of intimate agreements); *see*



There is a developing consensus that the law should recognize informal relationships, at least for some purposes. Jurisdictions have taken two approaches. First is an implied contract approach—many of the states that follow *Marvin* allow partners to attempt to establish the existence of unwritten agreements, although these attempts are often “uncertain and costly.”<sup>22</sup> Second is an informal status approach—a small number of courts have recognized that certain relationships will give rise to enforceable duties based on the nature of the relationship rather than the exchange of express or implied promises.<sup>23</sup> This is also the approach advocated in the American Law Institute’s Principles of the Law of Family Dissolution (“ALI Principles”), under which the sharing of a common residence for a predetermined period of time would give rise to a presumption that the couple are domestic partners.<sup>24</sup>

The existing approaches rarely produce satisfactory outcomes. Courts seldom recognize implied contracts because they hold litigants to stringent standards, expecting either that every contingency be expressly bargained for or that the parties have made “marriage-like commitments.”<sup>25</sup> In doing so, the implied contract approach departs

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also June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 108–10, 112 (2016) (asserting that the law “should respect independent actors who manage their own relationship terms”); or (5) advocated more generally for the recognition of a space outside of marriage, see, e.g., Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425, 481–87 (2017) (outlining a constitutional right to nonmarriage); Melissa Murray, *Accommodating Nonmarriage*, 88 S. CAL. L. REV. 661, 664–66 (2015) (calling for greater accommodation of nonmarital relationships as a meaningful alternative to marriage).

22. See Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 255–56.

23. See *infra* notes 156–58 and accompanying text.

24. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03 (AM. LAW INST. 2002).

25. Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 885 (2005) [hereinafter, Garrison, *Is Consent Necessary?*]; see also Milton C. Regan, Jr., *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 NOTRE DAME L. REV. 1435, 1447 (2001) (“[I]n order to bring a claim successfully, a partner must establish that the cohabitation was the substantive equivalent of marriage.”); Scott, *supra* note 22, at 258 (emphasizing the importance of facts indicating the relationship is “marriage-like”). Some states, like New York, flat-out refuse to enforce implied agreements, see, e.g., *Morone v. Morone*, 413 N.E.2d 1154, 1158 (N.Y. 1980) (“[W]e decline to recognize an action based upon an implied contract for personal services between unmarried persons living together.”); see also Scott, *supra* note 22, at 256 n.99 (citing *Morone* and other cases from different states that reject enforcement of implied agreements), while others just make such agreements difficult to prove, see Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309, 317 (2008) (noting that California appellate decisions

from mainstream contract doctrine, which takes a more permissive view of contract enforcement.<sup>26</sup>

Informal status approaches like the ALI Principles assign rights based on the relationship's conformity to an amalgam of social, cultural, or legal standards that approximate marriage.<sup>27</sup> This approach struggles to draw lines between those relationships that deserve regulation and those that do not. As the opening hypotheticals illustrate, nonmarital relationships are diverse. Within these relationships, partners may experience subjective feelings like attraction, love, and commitment, and they may engage in objective acts like caregiving, division of domestic labor, pooling of funds, and sexual intercourse. But the relationships need not involve all these things; neither, for that matter, does marriage, making the task of comparing the relationships particularly daunting.

By drawing comparisons to marriage, both approaches tend to enshrine a traditional, middle-class ideal of intimate relationships typified by the breadwinner/homemaker model, ignoring changing norms as well as class and cultural differences.<sup>28</sup> Moreover, both approaches only recognize *inter se* rights—obligations running between the partners. They leave off the table whether and how the law should recognize rights against the state or third parties, like standing to sue for wrongful death or favorable tax treatment.<sup>29</sup>

These shortcomings stem in large part from misunderstandings or mistrust of consent. Consent is not a totemic concept that one must either accept or reject wholesale, but rather a conclusion about the nexus between subjective will, conduct, and consequence.<sup>30</sup> Consent is also context-dependent. The imposition of general legal obligations on the citizenry requires a different type of consent, if any, than sexual contact or the performance of a medical procedure by a

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demonstrate “that the *Marvin* requirements have been strictly construed and that an award is by no means easy to obtain”).

26. See Thomas W. Joo, *The Discourse of “Contract” and the Law of Marriage*, in 24 RESEARCH IN LAW & ECONOMICS: A JOURNAL OF POLICY 161, 162 (Dana L. Gold ed., 2009) (“Both supporters and opponents of a ‘contractual’ approach to marriage law tend to use ‘contract’ to signify a market-libertarian normative view about the role of bargaining rather than to refer to the actual, more complex nature of contract law.”).

27. See *infra* text accompanying notes 165–67.

28. See *infra* notes 172–75 and accompanying text.

29. See Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1126 (1981).

30. See Tom L. Beauchamp, *Autonomy and Consent*, in THE ETHICS OF CONSENT 55, 57 (Frank Miller & Alan Wertheimer eds., 2010) (defining consent as “both a *decision in favor* of a proposed course of action and an *authorization*”—“a permission-giving act”).

physician.<sup>31</sup> Consent's role in the regulation of intimate relationships has received minimal attention.<sup>32</sup> The requirement of consent has been parroted or brushed aside but not interrogated.

In this Article, I explore, and ultimately defend, the role of consent in regulating informal relationships. I propose two methodological refinements for analyzing whether partners have consented to legal regulation based on their informal relationships. The first focuses on how to determine whether a party's conduct justifies the state's exercise of authority. The second focuses on how to define the object of consent.

To answer the first question—when a person's conduct justifies legal regulation—I draw lessons from the analysis of consent in contract doctrine. Courts and scholars have long struggled to reconcile the doctrinal ideal of consent<sup>33</sup>—“the master concept that defines the law of contracts in the United States”<sup>34</sup>—with the reality that parties will not contemplate or agree to all of the terms in their agreement<sup>35</sup> and will inevitably be governed by background rules that they did not elect.<sup>36</sup> The enforcement of every contract raises the question whether it is just, based on the commitments a party willed, to hold that party to commitments she did not expressly intend to make. Courts have developed doctrines to ensure that the agreements

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31. See *infra* Section II.A.

32. The related concepts of autonomy and choice have received significant attention. For example, hundreds of articles have been written about the extent to which the Fourteenth Amendment guarantees the right of autonomous choice in the family realm to marry a same-sex spouse, to create or terminate a parent-child relationship, or to create other types of family relationships. Consent, on the other hand, is rarely discussed. Even articles that explicitly reference consent in their titles, see generally, Garrison, *Is Consent Necessary?*, *supra* note 25, do not spend much time defining the concept and tend to fall back on the concept of autonomy.

33. See Peter Linzer, *Uncontracts: Context, Contorts and the Relational Approach*, 1988 N.Y.U. ANN. SURV. AM. L. 139, 141–42 (describing consent as a central pillar of neoclassical contract theory that “is increasingly being seen as only one of a number of factors affecting contract-like liability”).

34. Peter H. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899, 900 (1994).

35. See Randy E. Barnett, *Consenting to Form Contracts*, 71 FORDHAM L. REV. 627, 628 (2002); Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 MICH. L. REV. 489, 489–90 (1989) (describing background rules over which people do not typically bargain).

36. See Jean Braucher, *Contract Versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697, 730 (1990); Craswell, *supra* note 35, at 490; Juliet P. Kostritsky, *Taxonomy for Justifying Legal Intervention in an Imperfect World: What to Do When Parties Have Not Achieved Bargains or Have Drafted Incomplete Contracts*, 2004 WIS. L. REV. 323, 335–36.

reflect the parties' broader goals<sup>37</sup>: they ensure a minimum level of mental competence and voluntariness to protect the parties' will but then look to objective acts to establish assent to the key aspects of the transaction. Without certainty as to the central terms of the transaction, the law will not intervene. But once those key terms are sufficiently certain, the law will supply a range of background rules and missing terms even if the parties did not will or contemplate those terms.<sup>38</sup> These rules enable courts to operationalize gradations of consent.<sup>39</sup>

This textured approach to the concept of justification is the first step. The second is the identification of the relevant legal obligation. To answer the question "consent to what?", we must disaggregate the legal obligations associated with marriage. Rarely will an informal relationship justify the imposition of all of marriage's rights and obligations.<sup>40</sup> To reflect the characteristics of varied relationships, packages of rights must be tailored according to the different functions the relationships serve for the partners and the state. Couples who provide each other with emotional support or request leave from employers to take care of each other but keep their finances separate, for example, might consent to provide caregiving<sup>41</sup>

37. The requirement of definiteness, for example, relieves parties of liability when they have not agreed to key terms. See Omri Ben-Shahar, *Contracts Without Consent: Exploring a New Basis for Contractual Liability*, 152 U. PA. L. REV. 1829, 1830 (2004) ("[A] communication is an offer—such that it can be accepted unilaterally—only if it is definite."). The rule against enforcing agreements to agree is a variation on this requirement. *Id.* at 1829–30 (explaining that no liability arises between the parties while the agreement is being negotiated). One area in which these rules have arguably failed to protect parties is in dealing with contracts of adhesion. See Margaret Jane Radin, *The Deformation of Contract in the Information Society*, 37 OXFORD J. LEGAL STUD. 505, 517–23 (2017) (discussing multiple approaches developed by courts to interpret "boilerplate" contracts of adhesion); Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms*, 103 CORNELL L. REV. 117, 127, 132 (2017).

38. See, e.g., Craswell, *supra* note 35, at 503–05 (noting that parties cannot possibly contemplate all of the rules governing their relationship, like rules governing "excuses, remedies, and other details of the promisor's obligation," and must therefore rely on background rules provided by the legal system).

39. See Ben-Shahar, *supra* note 37, at 1831 (suggesting that consent can be conceptualized as a consensus between parties that grows as negotiations continue). To be clear, although many of these doctrines are well settled, the role of consent in contract law writ large is not. See *infra* Section III.A.

40. See *infra* Section I.A.2 (discussing the ways in which cohabitation is similar and dissimilar to marriage).

41. Spousal-support obligations are reflected and encouraged in statutes like the Family and Medical Leave Act, 29 U.S.C. § 2601 (2016) (entitling employees to take reasonable leave to help care for a newborn or adopted child and to care for a child or spouse who has a serious health condition), and its state counterparts, as well as in common law doctrines that impose upon spouses a duty of support, see, e.g., *Borelli v.*

or to make end-of-life decisions, but not to divide property equally when the relationship comes to an end. Disaggregation calls attention to the things that matter—the functions themselves—rather than the relational proxy of marriage.

Thinking of regulation within this framework of consent provides immediate and long-term payoffs. It suggests concrete reforms to the implied contract doctrine: courts looking for implied agreements too often analyze the parties' conduct in the shadow of marriage and must instead consider whether the conduct justifies discrete obligations. It also suggests that informal status approaches should not analogize to marriage and impose rights and obligations in an all-or-nothing fashion. These approaches would be more effective if they focused on disaggregated commitments revolving around core functions like property sharing, childrearing, or emotional support.

Looking toward the future, consent provides a heretofore missing foundation for proposals to regulate intimate relationships based on the functions they perform. Scholars calling for a functional approach—that like relationships should be treated alike—have struggled to explain when regulation should begin.<sup>42</sup> Assuming the state wants to provide legal protections or impose responsibilities on those in informal relationships,<sup>43</sup> it must decide when to do so without

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Brusseu, 16 Cal. Rptr. 2d 16, 18–20 (Cal. Ct. App. 1993) (citing numerous California cases that impose a duty of spousal support).

42. See, e.g., BOWMAN, *supra* note 13, at 224 (“After they have been living together for two years or have a child, a cohabiting couple should be treated by the law as though they were married.”); Blumberg, *supra* note 29, at 1143, 1148, 1156, 1159 (relying on cohabitation for different lengths of time depending on the government benefit); Waggoner, *supra* note 21, at 239–40 (treating a couple as married if they share a common household and are in a committed relationship). Nancy Polikoff has proposed entry requirements so capacious that they would almost certainly be rejected. See POLIKOFF, *supra* note 21, at 195. For example, she argues that “all those dependent in whole or part upon the deceased” should be able to sue for wrongful death. *Id.*

43. The purpose of this Article is to engage the courts and scholars that have attempted to recognize informal nonmarital relationships through contract or status approaches and to demonstrate why those approaches have gone astray. The analysis sheds light on the ways in which nonmarried partners live and how legal regulation could impact them. It therefore informs—but admittedly does not answer—the ultimate question whether the state should regulate people in informal relationships. The stakes of that question are high, as Professor Harry Krause presciently observed at the turn of the millennium:

Socio-philosophers might ask themselves whether giving legal status to cohabitants is “progressive”—as the mostly liberal advocates insist it is—or whether it is in reality “reactionary”—as conservatives would generally deny? Instead of accepting and adapting to “modern lifestyles,” does the legalized cohabitation movement discourage out-of-wedlock cohabitation by making “free love” unfree?

the benefit of formal registration. Neglecting consent, proponents of functional approaches have struggled to answer this question. Approaching regulation through the lens of consent would encourage courts and legislators to articulate the relationship between the parties' conduct and the imposition of legal obligations. Moreover, the narrower scope of obligation would result in a reduced cost of adjudicatory error. The eventual accretion of legal and social norms based on the salient characteristics of lived relationships could also aid both nonmarital partners and the state in making sense of informal relationships.<sup>44</sup> Although the articulation of a functional regulatory system is beyond the scope of this Article, reckoning with consent is a necessary first step toward a more responsive, functional family law.

### I. NONMARITAL RELATIONSHIPS AND LEGAL REGULATION

This Part provides a descriptive account of nonmarital relationships. It considers both the subjective attitudes of people in nonmarital relationships and the way they structure their relationships. It then uses this descriptive account to contextualize the existing efforts to regulate informal relationships and to explain why those efforts have struggled.

#### A. *Understanding Nonmarital Relationships*

Tens of millions of adults in the United States have nonmarital partners.<sup>45</sup> Their relationships vary in myriad ways, including attitudes

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At worst, does it resurrect the time-honored legal institution of “concubinage,” conferring on the “concubine” a legal status somewhere below that of a spouse?

Harry D. Krause, *Marriage for the New Millennium: Heterosexual, Same Sex—Or Not at All?*, 34 FAM. L.Q. 271, 297–98 (2000).

44. For a discussion of norm deficits, see Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COLUM. L. REV. 293, 360–62 (2015); Chiung-Ya Tang, Melissa Curran & Analisa Arroyo, *Cohabitators' Reasons for Living Together, Satisfaction with Sacrifices, and Relationship Quality*, 50 MARRIAGE & FAM. REV. 598, 600 (2014).

45. For the purposes of this descriptive analysis, I use the term “partner” to refer broadly to people in nonmarital relationships. This term encompasses people who live together in intimate relationships and people in intimate relationships who live in separate households. However, much of the available data comes from the U.S. Census Bureau, in particular, the Current Population Survey, which focuses on people who self-identify as sharing a residence with a nonmarital partner, and the National Survey of Family Growth, which asks about cohabitation. See U.S. CENSUS BUREAU, *supra* note 1; NAT'L CTR. FOR HEALTH STATISTICS, NATIONAL SURVEY FOR FAMILY GROWTH 6, [https://www.cdc.gov/nchs/data/nsfg/nsfg\\_2013-15\\_malea\\_crq.pdf](https://www.cdc.gov/nchs/data/nsfg/nsfg_2013-15_malea_crq.pdf) [<http://perma.cc/87K6-LP2K>]. When referring to these studies, I use the terms “cohabitation” and “cohabitants.” Although consent could theoretically ground the regulation of relationships involving people who intertwine their

toward cohabitation and marriage—for example, whether they view the relationship as permanent or temporary, exclusive or nonexclusive, a stepping stone to marriage or not—and the structure of the relationships—for example, whether they are raising children, whether they have been previously married or have children from previous marriages, whether one or both partners are in the workforce, the extent to which they have commingled their property or finances, and whether they have sexual relations. This Section reveals the tenuous relationship between subjective views and objective conduct.

### 1. Subjective Views

Nonmarital partners hold differing views about the significance of their relationships. Social science research has focused on three dimensions—permanency, intimacy, and commitment—when assessing the strength of nonmarital relationships.

*Permanency.* One important point of difference is whether partners see cohabitation as being permanent or temporary. Partners make predictions about whether their relationships will likely endure.<sup>46</sup> These feelings may be reflected in their confidence about whether they will eventually marry<sup>47</sup> or their ambivalence about wanting a future with their current partner.<sup>48</sup>

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lives in various ways but whose relationships are not defined by physical intimacy, like siblings, those relationships have not been studied in the same way and are therefore omitted from this descriptive account.

46. See Michael Pollard & Kathleen Mullan Harris, *Cohabitation and Marriage Intensity: Consolidation, Intimacy, and Commitment*, 17 tbl.1, 18 tbl.2 (RAND Labor & Population, Working Paper No. WR-1001, 2013), [https://www.rand.org/content/dam/rand/pubs/working\\_papers/WR1000/WR1001/RAND\\_WR1001.pdf](https://www.rand.org/content/dam/rand/pubs/working_papers/WR1000/WR1001/RAND_WR1001.pdf) [<https://perma.cc/24HE-BGLU>] (comparing the average permanency of three different types of relationships—(1) couples who cohabit, (2) married couples who cohabitated prior to marriage, and (3) married couples who did not cohabit before marriage).

47. PEW RESEARCH CTR., *THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES* 78 (2010), <http://assets.pewresearch.org/wp-content/uploads/sites/3/2010/11/pew-social-trends-2010-families.pdf> [<https://perma.cc/84DJ-NEVR>] (“As for the marital intentions of people who currently are cohabitating, 69% say they expect they will someday marry that person, 25% say they don’t expect to and 6% don’t know or would not answer.”). A 2013 National Center for Health Statistics study reported that 40% of first cohabitation transitioned to marriage within three years, 32% remained in a cohabiting relationship at the three-year mark, and 27% had dissolved. Casey E. Copen, Kimberly Daniels & William D. Mosher, *First Premarital Cohabitation in the United States: 2006-2010 National Survey of Family Growth*, NAT’L HEALTH STAT. REP. (Centers for Disease Control and Prevention, Washington, D.C.) Apr. 2013 at 1.

48. Scott M. Stanley, Sarah W. Whitton & Howard J. Markman, *Maybe I Do: Interpersonal Commitment and Premarital or Nonmarital Cohabitation*, 25 J. FAM. ISSUES 496, 512 (2004).

*Intimacy.* Intimacy refers to levels of “reported closeness, love, and satisfaction.”<sup>49</sup> Studies of intimacy ask respondents to rate the “closeness” of their relationship or ask how much the respondents love their partner.<sup>50</sup> They also analyze the partners’ motives for being with each other. For example, one intimacy study assessed whether the couples chose to live together for reasons related to spending more time together, reasons related to convenience, or reasons related to testing the relationship.<sup>51</sup> In another study, respondents were asked to consider whether their family now is closer, less close, or the same level of closeness as their families were when they were growing up.<sup>52</sup>

Perhaps unsurprisingly, recent studies have found that the motives for cohabiting can affect commitment and relationship quality. People who cohabit to spend time together also reveal higher levels of commitment and relationship satisfaction, and lower reported levels of ambivalence and conflict.<sup>53</sup>

*Commitment.* Commitment is an amorphous concept that straddles the line between permanency and intimacy. It can measure the extent to which people perceive the relationship to be enduring,<sup>54</sup> as well as levels of emotional attachment to one’s partner.<sup>55</sup> Commitment may stem from a desire to be in the relationship and to maintain it in the future, what theorists call “dedication,” or from forces that make it difficult to leave the relationship regardless of one’s desires, such as structural or financial investments or social pressures, what theorists call “constraints.”<sup>56</sup> Although not all constraints are subjectively perceived as constraining, financial and

49. Pollard & Harris, *supra* note 46, at 13.

50. *Id.* at 17–18, tbls.1–2 (Panel B). For a comparison of intimacy indicators between cohabitating respondents and married respondents, see *id.* at 17 tbl.1, 18 tbl.2 (illustrating that the rates for cohabitation are slightly lower than the rates for marriages of the same length).

51. Galena K. Rhoades, Scott M. Stanley & Howard J. Markman, *Couples’ Reasons for Cohabitation: Associations with Individual Well-Being and Relationship Quality*, 30 J. FAM. ISSUES 233, 246–47, 251 (2009).

52. PEW RESEARCH CTR., *supra* note 47, at 49.

53. See Tang et al., *supra* note 44, at 615.

54. See, e.g., Pollard & Harris, *supra* note 46, at 17 tbl.1, 18 tbl.2 (grouping partners’ perceptions about the permanency of the relationship under the “commitment” category).

55. See Stanley et al., *supra* note 48, at 503–04 (calculating interpersonal commitment from four subscales related to emotional attachment, including the degree to which a person considered the relationship to be the most important thing in his life).

56. Galena K. Rhoades, Scott M. Stanley & Howard J. Markman, *A Longitudinal Investigation of Commitment Dynamics in Cohabiting Relationships*, 33 J. FAM. ISSUES 369, 371 (2012).



structural investments, such as splitting the rent, are not highly correlated with dedication.<sup>57</sup>

Commitment theorists have observed that individuals in close relationships move “from acting based on self-interest to acting based on preferences for joint outcomes.”<sup>58</sup> This transformation involves the development of “we-ness,” where “one’s partner’s satisfactions and dissatisfactions become more and more identified with one’s own.”<sup>59</sup> The level of dedication affects the extent to which one partner will place the interests of the other partner or the relationship over his or her immediate self-interests, and the way the partner will perceive the sacrifice as satisfying or harmful.<sup>60</sup> Scientists have identified different measures of dedication, including the importance of the relationship relative to anything else in life; whether the respondent would want to be with his partner in a few years; whether the respondent thought of his partner in terms of “us” and “we” rather than “me” and “her”; and whether he wanted the relationship to stay strong regardless of “rough times.”<sup>61</sup>

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As I will demonstrate in Section I.B, existing regulatory approaches to informal relationships value these subjective views. They assume that legal intervention is unnecessary when the partners are just trying out their relationship but seek to reward dedication and other indicators of permanency, intimacy, and commitment. That the law should reward these subjective views begs the question of how to identify when one or both partners hold them.

57. *Id.*; see also *id.* at 375–76 (reporting that dedication scores and a checklist of twenty-five external factors revealing constraint were “not significantly correlated”); *id.* at 384 (noting that constraints made it harder to break up regardless of the intrinsic desire to be together). This finding suggests that behavior often taken as a signal of subjective dedication may not always indicate a person’s subjective feelings about the relationship.

58. Scott M. Stanley, Galena K. Rhoades & Sarah W. Whitton, *Commitment: Functions, Formation, and the Securing of Romantic Attachment*, 2 J. FAM. THEORY & REV. 243, 244 (2010).

59. *Id.* (quoting George Levinger, *A Social Exchange View on the Dissolution of Pair Relationships*, in SOCIAL EXCHANGE IN DEVELOPING RELATIONSHIPS 175 (Robert L. Burgess & Ted L. Huston eds., 1979)).

60. *Id.* at 246.

61. Stanley et al., *supra* note 48, at 503. Participants were asked to rate their agreement with the four dedication measures on a scale of one to five with one indicating strong disagreement, three indicating neutrality, and five indicating strong agreement. *Id.* at 503. The mean aggregated score for cohabitants was 15.74, suggesting an average response of nearly four (“agree”). *Id.* at 506. The mean aggregated score for married couples was 18.09. *Id.*

## 2. Objective Realities

The law has treated objective acts as proxies for the partners' subjective views. This Section identifies those proxies and challenges the link between them and the views they supposedly represent.

*Financial interdependence.* Courts and scholars have treated the pooling of finances as an important factor determining the duties couples owe each other upon dissolution of their relationships.<sup>62</sup> Commingling property can provide insights into the ways in which the partners may have viewed their relationship.<sup>63</sup> Pooling of finances, in the form of joint accounts or shared property ownership, may suggest a willingness to pursue collective interests instead of individual ones, which could indicate the subjective belief that the relationship is permanent or a greater commitment to a future together.<sup>64</sup> It may also indicate greater confidence in the quality or stability of the relationship.<sup>65</sup>

Social scientists have found that approximately half of cohabiting couples keep their finances separate. One study found that 45.7% of cohabiting couples maintain separate finances.<sup>66</sup> That study is consistent with another study that concluded that 52% of cohabitants shared income in a common pot.<sup>67</sup> Although cohabitants who maintain joint accounts may enjoy higher relationship quality than

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62. See, e.g., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03(7)(b)–(c) (AM. LAW INST. 2002) (identifying “[t]he extent to which the parties intermingled their finances” and “[t]he extent to which their relationship fostered the parties’ economic interdependence” as factors revealing a shared life); Carbone & Cahn, *supra* note 21, at 61–69 (citing various cases in which the courts examined the degree to which cohabitants commingled their funds).

63. I use conditional language here because commingling property does not necessarily suggest commitment or intimacy. A couple may pool resources due to the scarcity or expense of housing or other practical considerations. See Fiona Rose-Greenland & Pamela J. Smock, *Living Together Unmarried: What Do We Know About Cohabiting Families?*, in HANDBOOK OF MARRIAGE AND THE FAMILY 255, 264 (Gary W. Peterson & Kevin R. Bush eds., 2013) (noting an interview study conducted in New York which concluded that a majority of respondents cohabited due to finances, convenience, or changes in their housing situation instead of a desire to try out marriage). And partners who keep their finances separate might nonetheless consider themselves deeply committed.

64. See Fenaba R. Addo & Sharon Sassler, *Financial Arrangements and Relationship Quality in Low-Income Couples*, 59 FAM. REL. 408, 410–11 (2010).

65. *Id.* at 411, 417 (suggesting this hypothesis but only finding support for it among women but not men).

66. Kristen R. Heimdal & Sharon K. Houseknecht, *Cohabiting and Married Couples’ Income Organization: Approaches in Sweden and the United States*, 65 J. MARRIAGE & FAM. 525, 533 (2003).

67. Catherine Kenny, *Cohabiting Couple, Filing Jointly? Resource Pooling and U.S. Poverty Policies*, 53 FAM. REL. 237, 243 (2004).

those who do not,<sup>68</sup> pooling does not always reflect “we-ness.” When couples pool money, the ways in which they contribute can vary. A couple may regard household money as “nebulous and not formally monitored or accountable” or may think of contributions as separate, either as “‘equal contributions’ or going ‘half and half.’”<sup>69</sup> The former system has been called “joint pooling” and indicates that the couple operates as a single economic unit; the latter is called “partial pooling” and is based on the idea that the partners operate autonomously.<sup>70</sup> Cohabitants are more likely than married couples to fall within the latter system and to view pooled funds as “separate, individual, calculable, and directly accountable.”<sup>71</sup> When higher earning partners subsidize the lower earner, both partners understand the practice as a form of generosity and a departure from the ideal of an equal contribution model.<sup>72</sup>

*Economic dependency.* Relatedly, scholars have focused on the ways in which the couple’s labor-market participation contributes to dependency. Although in a majority of marriages, both spouses participate in the labor force, the male-breadwinner-female-homemaker model and the economic dependency that it creates has not entirely disappeared. One justification for the creation of *inter se* obligations between nonmarital partners has been to remediate this dependency.<sup>73</sup> Scholars have speculated about the extent to which cohabitation may be a more gender-egalitarian institution than marriage, especially regarding partners’ labor participation and dependency, or whether it follows the patterns of marriage.<sup>74</sup>

Data from the U.S. Census Bureau indicate that out of 8,075,000 unmarried opposite-sex couples in 2016, 5,331,000, or 66%, were both in the labor force.<sup>75</sup> In almost 19% of couples, only the male partner

68. See Addo & Sassler, *supra* note 64, at 419 (“Couples practicing independent money management report lower levels of relationship satisfaction.”).

69. Carolyn Vogler, *Cohabiting Couples: Rethinking Money in the Household at the Beginning of the Twenty First Century*, 53 SOC. REV. 1, 18 (2005).

70. Carolyn Vogler, Michaela Brockmann & Richard D. Wiggins, *Managing Money in New Heterosexual Forms of Intimate Relationships*, 37 J. SOCIO-ECON. 552, 565 (2008).

71. Vogler, *supra* note 69, at 18.

72. See *id.*

73. See, e.g., Garrison, *Is Consent Necessary?*, *supra* note 25, at 828–29 (discussing dependency-creation rationale in the context of marital obligations).

74. See generally Vogler, *supra* note 69 (examining how couples organize finances to assess the different ways in which cohabitation can remediate and simultaneously reproduce traditional gender inequalities).

75. See *America’s Families and Living Arrangements: 2016*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/2016/demo/families/cps-2016.html> [http://perma.cc/J5HV-893A] (last modified Apr. 6, 2017) (follow “Table UC1. Opposite Sex Unmarried Couples By Labor Force Status Of Both Partners: 2016” hyperlink).

was in the labor force; in 7% of couples, only the female partner was in the labor force.<sup>76</sup> This compares to the 51% of married couple family groups with both spouses in the labor force, 22% in which only the husband was in the labor force, and the almost 8% in which only the wife was in the labor force.<sup>77</sup> These figures indicate higher levels of joint participation in the labor force by cohabiting couples, although the differences could be explained in part by the significantly higher percentage of married couples with neither spouse in the labor force.<sup>78</sup> In terms of gender, husbands are more likely than men in cohabiting relationships to be the sole worker, although the difference is not particularly stark.

*Raising children.* Although a robust body of scholarship addresses questions about the rights and duties running between nonmarital partners and their children,<sup>79</sup> less attention has been paid to how the presence of a child changes the horizontal relationship between adult partners. As of 2015, of the 8.4 million opposite-sex cohabiting households, approximately 3.3 million, or just under forty percent, have a child under the age of eighteen.<sup>80</sup> Roughly half of the children in cohabiting households are the biological children of the couple as opposed to only one of the partners.<sup>81</sup>

The presence of children may lead to behaviors associated with commitment, although that commitment may take the form of dedication or constraint.<sup>82</sup> A caregiver may be less likely to make

76. *See id.*

77. *See America's Families and Living Arrangements: 2016*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/2016/demo/families/cps-2016.html> [http://perma.cc/J5HV-893A] (last modified Apr. 6, 2017) (follow “Table FG2 Married Couple Family Groups, By Family Income, and Labor Force Status of Both Spouses: 2016” hyperlink).

78. The data are not broken down by age, but the higher percentages of married couples out of the workforce likely reflect higher percentages of retired couples.

79. *See generally* CLARE HUNTINGTON, *FAILURE TO FLOURISH: HOW LAW UNDERMINES FAMILY RELATIONSHIPS* (2014) (discussing the ways in which the law influences families, including through regulation, indirect regulation, and social norms); Carbone & Cahn, *supra* note 21 (discussing the financial and custodial obligations underlying the legal treatment of nonmarriage); Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 173 (2015) (proposing greater legal rights and responsibilities for unmarried coparents).

80. Heidi Glenn, *No, You're Not in a Common Law Marriage After 7 Years Together*, NAT'L PUB. RADIO (Sept. 4, 2016, 8:12 AM), <http://www.npr.org/2016/09/04/487825901/no-you-re-not-in-a-common-law-marriage-after-7-years-of-dating> [http://perma.cc/A9TC-K98H (dark archive)] (summarizing U.S. Census Bureau statistics).

81. *See* Rose-Greenland & Smock, *supra* note 63, at 262.

82. *See* Rhoades et al., *supra* note 56, at 371 (“Dedication and constraint commitment are sometimes associated, as one may choose to become more constrained because he or she feels dedicated and behaviors undertaken because of dedication may lead to increased constraints in the future.”).

decisions in his or her own interests, for example, by forgoing better professional opportunities.<sup>83</sup> Scholars have noted that where one party disproportionately provides the caregiving, the caregiver experiences market penalties in the form of lost wages and lower retirement benefits while the non-caregiver earns higher wages than they otherwise would.<sup>84</sup> The data suggest that couples with children are more likely to have a partner withdraw from the labor force: 69.6% of partners without children are both in the labor force, in comparison to 60% of partners with children.<sup>85</sup> A higher percentage of men in cohabiting relationships with children will be in the labor force relative to those without children: 88.6% to 82.6%.<sup>86</sup> In contrast, a lower percentage of women in cohabiting relationships with children will be in the labor force when compared to women without children: 67.6% to 76.8%.<sup>87</sup> Moreover, women with children are less likely to earn high salaries than women without, and somewhat less likely to out-earn their male partners.<sup>88</sup>

Partners with children are also somewhat more likely to contribute to a shared household, which, as discussed above, can indicate greater commitment.<sup>89</sup> A U.K. study of the way cohabiting couples allocate money concluded that “cohabiting parents were very similar to married respondents . . . in being most likely to use [a] system in which households operated more or less as single economic units, . . . whereas respondents in childless cohabiting unions stood

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83. See Cynthia Lee Starnes, *Lovers, Parents, and Partners: Disentangling Spousal and Co-Parenting Commitments*, 54 ARIZ. L. REV. 197, 203 (2012) (noting the “common case” where the “mother earns much less than the father, primarily because her role as primary family caregiver compromised her investment in the workplace” and proposing greater post-dissolution financial support of a coparent based on a shared-parenting commitment).

84. See Merle H. Weiner, *Caregiver Payments and the Obligation to Give Care or Share*, 59 VILL. L. REV. 135, 149–50 (2014).

85. *America’s Families and Living Arrangements: 2016*, U.S. CENSUS BUREAU, <https://www.census.gov/data/tables/2016/demo/families/cps-2016.html> [<http://perma.cc/J5HV-893A>] (follow “Table UC3. Opposite Sex Unmarried Couples by Presence of Biological Children under 18, and Age, Earnings, Education, and Race and Hispanic Origin of Both Partners: 2016” hyperlink).

86. *Id.*

87. *Id.*

88. *See id.* For example, only 42,000 women with children earn over \$100,000, in comparison to 173,000 women without children. *See id.* Twenty-three percent of women with children out-earn their male partners, as compared to 27.7% of women without children. *See id.*

89. *See, e.g.,* Vogler, *supra* note 69, at 17 (“Whereas single couples who have a biological child together appear to handle money in broadly similar ways to married parents nubile and post-marital couples appear to handle money rather differently from married couples.” (citation omitted)).

out as being far more likely to keep money partly or completely separate.”<sup>90</sup> The study found, for instance, that 52% of cohabiting parents operated a “joint pooling” system, in which couples pool all their money, usually in a joint bank account, and each takes money as needed, in comparison to 59% of married parents and 39% of cohabitants without children.<sup>91</sup> Only 34% of cohabiting parents used an individualized financial system, in which partners keep much of their finances separate, in comparison to the 61% of cohabitants without children.<sup>92</sup>

Cutting in the other direction, “shotgun cohabitations,” cohabitations beginning *after* conception but before childbirth,<sup>93</sup> are on the rise. A recent study found that 18.1% of women who were unmarried and non-cohabiting at conception were cohabiting at birth, as compared to the 5.3% who married.<sup>94</sup> The imminent arrival of a child encourages hastily arranged unions, which in turn “may be poorly-matched, of low quality, and at greatest risk of dissolution,”<sup>95</sup> and seem more likely to match the description of “convenience reasons” for cohabiting that lead to lower levels of commitment and intimacy.<sup>96</sup> Sociologists Kathryn Edin and Maria Kefalas have shown that women whose partners move in because of the birth of a child often do not marry because they do not want to link their financial fates to those of their partners, or because they do not trust that their partner will be fully committed to the relationship.<sup>97</sup>

*Previous relationships.* Another feature of most cohabiting relationships is that at least one partner has previously been married.<sup>98</sup> This may affect attitudes about commitment or the permanency of their relationship and may also affect other structural considerations. For example, cohabitation can be grounds for termination of support obligations, which can affect the way partners

90. Vogler et al., *supra* note 70, at 567 tbl.11.

91. *See id.* at 565, 567 tbl.11.

92. *See id.* at 565–66, 567 tbl.11 (categorizing the partial pooling and independent management systems as individualized systems).

93. Daniel T. Lichter, Sharon Sassler & Richard N. Turner, *Cohabitation, Post-Conception Unions, and the Rise in Nonmarital Fertility*, 47 SOC. SCI. RES. 134, 135 (2014); *see also* Heather Rackin & Christina M. Gibson-Davis, *The Role of Pre- and Postconception Relationships for First-Time Parents*, 74 J. MARRIAGE & FAM. 526, 527 (2012).

94. Lichter et al., *supra* note 93, at 140 tbl.3.

95. *Id.* at 136 (citation omitted).

96. *See* Rhoades et al., *supra* note 56, at 240 tbl.1.

97. KATHRYN EDIN & MARIA KEFALAS, PROMISES I CAN KEEP: WHY POOR WOMEN PUT MOTHERHOOD BEFORE MARRIAGE 111–14 (2005).

98. BOWMAN, *supra* note 13, at 117.

structure their living arrangements, engage in intimacy, and pool their resources.<sup>99</sup> The presence of children from previous relationships, whether marital or nonmarital, may impact a partner's willingness to tie his or her financial well-being to someone with preexisting support obligations. Children may also provide an incentive to draw clear lines between partners' separate property to pass it on to their respective children.<sup>100</sup> These considerations are especially likely to arise for older cohabitants. Ninety percent of adults over the age of fifty-one who cohabit—a little over one million individuals—were previously married.<sup>101</sup> Retirees and surviving spouses must also navigate concerns about the effect of subsequent relationships on pensions and other financial matters.<sup>102</sup>

*Cohabitation.* The vast majority of studies discussed in this Section assume the importance of living together under the same roof. This assumption is reflected in the law. Policy proposals targeting nonmarital relationships, like the ALI Principles, tend to focus on people who are cohabiting.<sup>103</sup>

Yet the focus on co-residential couples ignores LATs—“a monogamous intimate partnership between unmarried individuals who live in separate homes but identify themselves as a committed couple.”<sup>104</sup> Recent studies indicate that between six to twelve percent of adults in the U.S. are in LAT relationships,<sup>105</sup> potentially greater than the percentage who report cohabiting.<sup>106</sup> The research also

99. See Aloni, *supra* note 6, at 1315–20 (examining the cohabitation-termination doctrine); Antognini, *supra* note 20, at 21–30 (discussing how courts define and assess the nonmarital relationship when terminating domestic support payments).

100. See, e.g., Benson & Coleman, *supra* note 5, at 798, 803.

101. See Rose-Greenland & Smock, *supra* note 63, at 262.

102. See *id.*

103. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03(1) (AM. LAW INST. 2002); see also § 6.03(1) cmt. c (calling the sharing of a primary residence a “threshold requirement”).

104. Benson & Coleman, *supra* note 5, at 797; see also Susan Frelich Appleton, *Leaving Home? Domicile, Family, and Gender*, 47 U.C. DAVIS L. REV. 1453, 1491 (2014) (defining LATs and noting that LATs would be classified as “single” under conventional studies).

105. See Cynthia Grant Bowman, *How Should the Law Treat Couples Who Live Apart Together?*, 29 CHILD & FAM. L.Q. (Cornell Law Sch., Research Paper No. 17-43) (forthcoming) (manuscript at 16), [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3048340](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3048340) [<https://perma.cc/HS6T-9RW6>] (reporting 9% of respondents in a national survey and 12% of respondents in a New York survey (percentages rounded to the next highest or lowest whole number)); Charles Q. Strohm et al., “*Living Apart Together Relationships in the United States*,” 21 DEMOGRAPHIC RES. 177, 190 (2009) (reporting figures of 7% of women and 6% of men in the United States that are in a LAT relationship).

106. See Berenson, *supra* note 5, at 311 (citing Strohm et al., *supra* note 105, at 190).

reveals a preference among some older adults for the LAT model. As noted above, older adults are more likely to be previously partnered, which can affect the way they structure their relationships.

Research on LATs indicates that people who do not live under the same roof can enjoy high levels of commitment and emotional support.<sup>107</sup> Within this category, there is variation: one qualitative study from the U.K. observed that despite high reported levels of overall commitment, LATs could be divided into four categories: those who lived apart (1) because of preference about living alone; (2) based on constraints or circumstances; (3) because it was too early in the relationship to live together; and (4) based on a desire for less commitment.<sup>108</sup> Unsurprisingly, individuals in the first two categories reported the highest levels of commitment, reporting joint decision making and the sharing of confidences, hobbies, interests, and expenses.<sup>109</sup> Studies of older LATs indicate that they desire intimacy, including physical and emotional support, without the legal obligation to provide financial support or caregiving.<sup>110</sup> Many reported the avoidance of structural commitments as a benefit of the arrangement: they could “maintain or establish autonomy via the continuance of roles[,] . . . traditions/rituals[,] . . . and hobbies that predated the LAT relationship.”<sup>111</sup> But respondents indicated that they felt fully committed on an emotional level, although their feelings of commitment did not translate to beliefs about the permanence of their relationships.<sup>112</sup>

The existence of LATs confirms that living under the same roof is yet another proxy for subjective attributes. Conversely, people may cohabit without feelings of permanency, intimacy, or commitment.

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107. *See id.* (reviewing studies); *see also* Bowman, *supra* note 105, at 28 (reporting that a plurality of LATs would turn to their partner first—as compared to friends or family members—if emotionally upset).

108. Julia Carter et al., *Sex, Love and Security: Accounts of Distance and Commitment in Living Apart Together Relationships*, 50 *SOC.* 576, 584 (2015); *see also* Bowman, *supra* note 105, at 25 tbl.10, 26 fig.1 (surveying reasons for living apart and identifying responses across a similar spectrum).

109. *See* Carter et al., *supra* note 108, at 584–87.

110. *See* Benson & Coleman, *supra* note 5, at 802–03. The findings of the Benson and Coleman experiment reflect findings of studies conducted in other industrialized nations. *See id.* at 798 (collecting studies).

111. *Id.* at 802.

112. *See id.* at 808.



Cohabiting relationships fizzle out, with intimacy ending while the parties still live together.<sup>113</sup>

*Sex and exclusivity.* Sex is another important proxy for subjective attitudes. Sexual activity is central to the law's recognition of intimate adult relationships.<sup>114</sup> It is often a touchstone for whether the law will recognize a nonmarital relationship, either for awarding rights<sup>115</sup> or terminating them.<sup>116</sup> Commitment scholars have associated sexual exclusivity with relationship commitment and intimacy.<sup>117</sup> Exclusivity can signal "greater motivation for, and investment in, pleasing the partner in a variety of ways, including sexually."<sup>118</sup> Scholars interpret its absence as an indication of lack of commitment.<sup>119</sup> Sexual activity is treated as a marker of a healthy relationship and is often included in measures of relationship quality. The assumption appears to be that sex accompanies love and closeness.

Studies generally reveal that married and cohabiting couples report having sex equally frequently and with similar levels of sexual satisfaction.<sup>120</sup> Although married individuals engage in extramarital sex,<sup>121</sup> studies indicate that people in nonmarital relationships are less likely than people in marriages to be sexually exclusive.<sup>122</sup>

It is worth noting that while sex and exclusivity may indicate intimacy and commitment, they also occur within relationships that

113. See, e.g., *Fleming v. Spencer*, 110 Wash. App. 1017, 2002 WL 171249, at \*1–2 (Wash. App. Feb. 4, 2002) (unpublished) (involving a couple who ended physical intimacy two years before the parties ceased cohabiting).

114. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* 145–50 (1995).

115. See, e.g., *Fleming*, 2002 WL 171249, at \*2–5 (finding that a meretricious relationship ended when a couple ceased to be intimate even though they continued to live together for several more years); PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03(7)(h) (AM. LAW INST. 2002) (making the existence of "physical intimacy" relevant to whether partners "share a life together").

116. See Antognini, *supra* note 20, at 24–25 (noting the importance of sex to the determination of whether to terminate alimony).

117. Carter et al., *supra* note 108, at 578.

118. Stanley et al., *supra* note 48, at 513.

119. See Heather D. Hill, *Steppin' Out: Infidelity and Sexual Jealousy Among Unmarried Parents*, in UNMARRIED COUPLES WITH CHILDREN 104, 108 (Paula England & Kathryn Edin eds., 2007).

120. See Stanley et al., *supra* note 48, at 506 tbl.1 (showing spouses averaging 4.41 on a Likert-type scale for sexual satisfaction in comparison to 4.13 for cohabitations); *id.* at 507 ("For analysis of sexual frequency, there was no significant effect for relationship status.").

121. See Adaora A. Adimora, Victor J. Schoenbach & Irene A. Doherty, *Concurrent Sexual Partnerships Among Men in the United States*, 97 AM. J. PUB. HEALTH 2230, 2230 (2007) (finding that more than one in ten men is involved in concurrent relationships).

122. *Id.* at 2336; see also Garrison, *Is Consent Necessary?*, *supra* note 25, at 841 n.100 (collecting sources).

neither the partners nor outside observers would characterize as serious. Moreover, many of the other structural attributes of nonmarital relationships do not depend on sex: people can still pool income and property, make professional sacrifices, and name each other as beneficiaries of life insurance policies without having a sexual relationship. Most subjective attitudes, like commitment, permanency, and emotional closeness likewise can arise in non-sexual relationships.<sup>123</sup>

\* \* \*

The structural attributes discussed in this Section illustrate why social scientists have characterized nonmarital relationships as essentially heterogeneous<sup>124</sup> and lacking in institutional norms.<sup>125</sup> About half of cohabiting partners pool their finances while half do not. Most pursue opportunities in the labor market, but some live in single-earner households. Many have been in previous relationships, but those that have may be old or young and may have dependent children, adult children, or no children. The category of cohabitation itself is over- and under-inclusive, leaving out people whose relationships bear many other hallmarks of closeness because they do not live under the same roof while including relationships that no longer perform many of the desired functions. Additionally, these objective indicia do not always correspond to the subjective views they are supposed to represent. The pooling of income, for example, may not reflect commitment when the partners mentally segregate their contributions. Partners who choose not to live together may still have strong feelings of intimacy or commitment.

### 3. Demographic Variations

The variations just discussed cut across demographic groups. However, they tend to coalesce in distinct patterns around class and

123. See, e.g., Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809, 850–54 (2010) (noting the potential benefits of separating sex from intimacy); cf. Elizabeth F. Emens, *Compulsory Sexuality*, 66 STAN. L. REV. 303, 350–53 (2014) (looking at and critiquing laws—like marriage’s consummation requirement—that require sex).

124. See, e.g., Rose-Greenland & Smock, *supra* note 63, at 256 (“Along with the increased focus on diversity in cohabitators has come recognition that there is diversity in forms of cohabitation, or the cohabiting family itself.” (citations omitted)).

125. See, e.g., Margaret F. Brinig & Steven L. Nock, *Marry Me, Bill: Should Cohabitation Be the (Legal) Default Option?*, 64 LA. L. REV. 403, 407–08 (2004).

race.<sup>126</sup> Wealthier, better educated adults tend to marry each other and have children within the marriage.<sup>127</sup> Studies have found that higher male earnings have a positive effect on marriage, the transition between cohabitation and marriage, and childbirth within marriage.<sup>128</sup> Higher education levels for women also have a positive effect on marriage rates.<sup>129</sup>

In contrast, less wealthy and less educated adults are more likely to be in comparatively unstable relationships. One study found that “[i]n 2010, 58 percent of first births to women with either a high school degree or some college were out of wedlock, while for those with a college degree, the comparable statistic was only 12 percent.”<sup>130</sup> The relationships of unmarried parents are much less likely to survive. Data from The Fragile Families and Child Wellbeing Study<sup>131</sup> demonstrate that by the time their children were five years old, only one-third of unmarried couples were still together, in comparison to eighty percent of their married counterparts.<sup>132</sup> Moreover, a significant percentage of these parents go on to have children with different men and women, resulting in what sociologists call “multiparent fertility.”<sup>133</sup>

Sociologists like Kathryn Edin and Maria Kefalas have shown that people in unstable relationships do not reject marriage. Rather, they idealize marriage as something they want to do when they are ready—something they want to do right.<sup>134</sup> Edin and Kefalas point out that given the prevalence of problems such as “domestic abuse, chronic infidelity, alcoholism or drug addiction, repeated

126. See EDIN & KEFALAS, *supra* note 97, at 1–26; ISABEL V. SAWHILL, *GENERATION UNBOUND: DRIFTING INTO SEX AND PARENTHOOD WITHOUT MARRIAGE* 65–70 (2014) (examining the impacts of social class on decisions regarding marriage and childbearing).

127. See RALPH RICHARD BANKS, *IS MARRIAGE FOR WHITE PEOPLE? HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE* 27 (2011); SAWHILL, *supra* note 126, at 79.

128. See Marcia Carlson, Sara McLanahan & Paula England, *Union Formation in Fragile Families*, 41 *DEMOGRAPHY* 237, 239 (2004) (summarizing studies).

129. See *id.* at 250, 255 (summarizing findings from the Fragile Families study data).

130. See SAWHILL, *supra* note 126, at 70.

131. For information about this longitudinal study of “nearly 5,000 children born in large U.S. cities between 1998 and 2000,” see *About the Fragile Families and Child Wellbeing Study*, THE FRAGILE FAMILIES & CHILD WELLBEING STUDY, <https://fragilefamilies.princeton.edu/about> [<https://perma.cc/TLP3-3HFV>].

132. SAWHILL, *supra* note 126, at 70–71.

133. See *id.*

134. EDIN & KEFALAS, *supra* note 97, at 106–09; see also BANKS, *supra* note 127, at 25–26.

incarceration, or a living made from crime” in the low-income population, their reluctance to marry “might be quite reasonable.”<sup>135</sup>

African Americans have felt the marriage decline particularly acutely. Black women are half as likely to marry as white women, and black spouses are nearly twice as likely as white spouses to divorce.<sup>136</sup> These differences cannot be explained by class alone, as disparities persist even into the middle and upper-middle classes.<sup>137</sup> Ralph Richard Banks identifies a complicated alchemy of factors that have contributed to the decline of marriage among the black middle class, including a shortage of eligible men,<sup>138</sup> a refusal on the part of women to “settle” for lower earning men,<sup>139</sup> and the complicated dynamics of interracial relationships.<sup>140</sup>

Whatever the causes, these findings identify a further challenge for regulatory policy: the potential for disparate impacts across class and race. As marriage stratifies, rules targeting informal relationships are increasingly likely to impact people with lower education and less wealth, or who come from certain racial groups. Put another way, rules designed to enforce joint financial obligations or to redistribute property between higher- and lower-income individuals<sup>141</sup> fit less comfortably in a world where the wealthy and well educated are likely to marry each other and in which nonmarital couples may have few assets and more liabilities.<sup>142</sup>

### B. Regulatory Attempts

The great variation in relationships described in this Part makes it difficult to identify when legal rights and obligations should begin. Attempts to regulate nonmarital relationships must explain whether the partners’ subjective views are ever relevant to the imposition of obligations, and, if so, which ones. Regardless of the law’s position about subjective views, it must also identify the objective conduct that

135. EDIN & KEFALAS, *supra* note 97, at 216, 217.

136. BANKS, *supra* note 127, at 7–8.

137. *See id.* at 9.

138. *See id.* at 29–48.

139. *See id.* at 83–102.

140. *See id. passim.*

141. *See, e.g.,* Marvin v. Marvin, 557 P.2d 106, 122–23 (Cal. 1976) (en banc) (recognizing express and implied agreements between cohabitants, in this case a homemaker and a movie star).

142. *See* SAWHILL, *supra* note 126, at 75–76 (noting that, in the past, “doctors married nurses and CEOs married their secretaries, and even when a highly educated man married a highly educated woman, the woman was unlikely to work,” although that is no longer the case).

will trigger legal obligations. Existing approaches fail these daunting challenges.

As discussed above, one approach involves the recognition of contractual or equitable rights between unmarried cohabitants. This approach is commonly associated with *Marvin v. Marvin*,<sup>143</sup> a landmark decision by the Supreme Court of California. The *Marvin* court discarded public policy objections to the creation of enforceable obligations between cohabitants and held that agreements not resting on “meretricious consideration” could be enforced.<sup>144</sup> In the forty years following the *Marvin* decision, nearly all states began to accept some form of contracting between cohabitants.<sup>145</sup>

If the challenge is to identify when individual preferences should give rise to enforceable obligations, a contract approach would seem ideal.<sup>146</sup> But courts have struggled to implement the approach for several reasons. First, as critics of *Marvin* have pointed out, “[p]eople don’t generally make formal contracts about either the conduct of their relationship or the consequences that ought to flow in the event they end it.”<sup>147</sup> They might be uninterested in arms-length bargaining or incapable of achieving that self-interested distance.<sup>148</sup>

Second, courts have struggled to identify a workable standard for ascertaining the parties’ subjective preferences and determining when those preferences should justify legal obligations. Where the parties have failed to enter an express agreement, courts must infer terms from the parties’ conduct, which is largely an indeterminate inquiry and gives courts license to impose their own ideas about fairness, threatening the legitimacy of the process and dishonoring the preferences of the parties.<sup>149</sup> Agreements between cohabitants frequently claim broad obligations based on the relationship as a

143. *Marvin*, 557 P.2d at 106.

144. *Id.* at 109–10.

145. See BOWMAN, *supra* note 13, at 47–48 (noting that all but three states recognize some form of agreements between cohabitants). A notable exception is Illinois: within the last year, the Illinois Supreme Court reaffirmed the rule, articulated in *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979), that “disfavor[s] private contractual alternatives to marriage or the grant of property rights to unmarried cohabitants.” *Blumenthal v. Brewer*, 69 N.E.3d 834, 852 (Ill. 2016) (citations omitted).

146. See Ira Mark Ellman, *The Theory of Alimony*, 77 CALIF. L. REV. 1, 13–14 (1989).

147. See, e.g., Ira Mark Ellman, *Inventing Family Law*, 32 U.C. DAVIS L. REV. 855, 874 (1999).

148. See Ira Mark Ellman, “Contract Thinking” Was Marvin’s Fatal Flaw, 76 NOTRE DAME L. REV. 1365, 1373 (2001); Carl E. Schneider, *Moral Discourse and the Transformation of American Family Law*, 83 MICH. L. REV. 1803, 1832 (1985).

149. See Ellman, *supra* note 147, at 874–75; Ellman, *supra* note 146, at 20–23.

whole.<sup>150</sup> *Marvin* itself involved sweeping allegations—that the parties would pool their earnings, share equally in all property acquired, and provide support—based on the way the parties had lived their lives for seven years.<sup>151</sup> Indeed, without proof of discrete commitments, courts have looked to conduct suggesting the broad commitment to live like a married couple.<sup>152</sup> Courts in states recognizing implied agreements have generally been hostile to these claims.<sup>153</sup> When assessing the conduct giving rise to a party's claims, courts will often draw comparisons to an idealized view of marriage and find those relationships wanting.<sup>154</sup> In short, when contracts enter the intimate realm, contract doctrine developed in other areas no longer seems to apply.

An alternative approach is to regulate partners who stand in a status relationship to each other. This approach focuses on the nature of a cohabiting relationship rather than the parties' commitments when parceling out marriage-like rights.<sup>155</sup>

Thus far, a few courts have endorsed a status-based approach to nonmarital regulation.<sup>156</sup> Most famously, the State of Washington grants legal rights to partners in committed intimate relationships, formerly called “meretricious relationships,”<sup>157</sup> when the parties cohabit in a “stable, marital-like relationship . . . with knowledge that

150. See, e.g., Ellman, *supra* note 147, at 874–75 (describing the problem as ascertaining broad commitments “about the consequences of dissolution” from “conduct during a relationship”).

151. See *Marvin v. Marvin*, 557 P.2d 106, 116 (Cal. 1976) (en banc). In *Marvin*, the plaintiff pleaded the existence of an express agreement, but the court allowed her to amend her complaint to add theories of implied contract or equitable relief based on the same conduct. See *id.*

152. See Antognini, *supra* note 20, at 10–11.

153. See *BOWMAN*, *supra* note 13, at 50–53. Even Michelle Marvin, on remand, failed to establish the existence of an agreement, express or implied, and ended up with nothing. *Marvin v. Marvin*, 176 Cal. Rptr. 555, 558–59 (Cal. Ct. App. 1981); see Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1382 (2001) (detailing what occurred after the remand).

154. See, e.g., *Taylor v. Fields*, 224 Cal. Rptr. 186, 192 (Cal. Ct. App. 1986) (rejecting the existence of a valid agreement between a decedent and his sexual partner of forty-two years because they never lived together); see also Antognini, *supra* note 20, at 8–9; Estin, *supra* note 153, at 1402–03 (noting that “[o]nly a small percentage of cohabitants will have even a possibility of legal recovery when their relationships end”).

155. See, e.g., Blumberg, *supra* note 29, at 1163–70.

156. Those two states are Alaska and Washington. See *Boulds v. Nielsen*, 323 P.3d 58, 62–63 (Alaska 2014); *Connell v. Francisco*, 898 P.2d 831, 836 (Wash. 1995) (en banc). Several Oregon intermediate appellate decisions also take a status approach. See, e.g., *Shuraleff v. Donnelly*, 817 P.2d 764, 768 (Or. Ct. App. 1991).

157. See *Olver v. Fowler*, 168 P.3d 348, 350 n.1 (Wash. 2007) (en banc).

a lawful marriage between them does not exist.”<sup>158</sup> Courts examine factors including “continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects, and the intent of the parties” to determine the relationship’s existence.<sup>159</sup> If found to exist, courts will make a “just and equitable distribution of the property” that would have been community property if the couple married.<sup>160</sup> It is unclear how frequently committed-intimate-relationship claims arise, but the low number of published appellate decisions suggests that actions are correspondingly rare.

That said, the status approach has found favor with influential legal scholars. For example, the ALI Principles propose that a couple sharing a primary residence for a continuous period of time will be presumptively entitled to the division of property acquired during the course of the cohabiting relationship and, if applicable, compensatory payments after the relationship comes to an end.<sup>161</sup> One can rebut the presumption by demonstrating that the parties did not share a life together based on the consideration of various factors, including (1) statements regarding their relationship, (2) the extent to which they intermingled their finances, (3) the extent to which their relationship fostered economic dependency, (4) whether they assumed specialized or collaborative roles in furtherance of their life together, (5) their emotional or physical intimacy, and (6) their reputation in the community.<sup>162</sup> However, a significant number of lengthy cohabitations would result in property and support obligations running between the partners.

The status approach discounts the subjective preferences of the parties. Proponents, like Cynthia Bowman, have characterized these proposals as imposing obligations on couples “without their

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158. *Connell*, 898 P.2d at 834.

159. *Id.*

160. *Id.* at 835. “Alaska, like Washington, provides for marital-like property distribution following a cohabitative relationship.” *Boulds*, 323 P.3d at 62–63. Alaska courts use similar factors to the Washington courts to determine whether the parties intended to create a partnership. *See id.* at 63. However, that determination does not automatically result in marital property-like rights. *See id.* at 64. Rather, the courts will examine whether the parties intended to share all property or just some subset. *Id.* This semi-contractual, semi-status approach has produced status-like outcomes. *See, e.g., id.* at 64–65 (treating the relationship as marriage-like and dividing a pension); *Longway-Marotta v. Nelson*, No. S-16367, 2017 WL 5505390, at \*2–3 (Alaska Nov. 15, 2017).

161. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 6.03–.06 (AM. LAW INST. 2002).

162. § 6.03(7) (listing factors).

consent.”<sup>163</sup> Critics have likewise charged that status approaches give too little weight to individual autonomy.<sup>164</sup>

Because proponents of status approaches understand those approaches to be based on something other than consent, they have looked to alternative justificatory rationales that do not depend on the preferences of the parties. Alternatives include the creation of dependency, as when one’s conduct results in the birth of a vulnerable child<sup>165</sup>; the degree of subjective “closeness,” as implied by the ALI’s consideration of “emotional intimacy” and “qualitative[] distinct[iveness] from previous relationships”<sup>166</sup>; the promotion of equality between partners, especially to compensate benefits conferred during the course of the relationship<sup>167</sup>; or simply the treatment of like relationships—marriage and “almost-marriage”—alike.

These rationales suffer from over- and under-inclusiveness. That is because cohabiting relationships are not the only adult relationships that create dependency or are characterized by emotional closeness or sacrifice. Parents and their children, or siblings, for example, may pool resources, develop patterns of dependency, and be as emotionally connected as intimate partners.<sup>168</sup>

The rationales are also unsatisfying. The dependency-creation rationale struggles to define dependency in absolute terms or to account for the agency of both partners. Imagine two associates at a major law firm earning approximately \$200,000, one of whom leaves to take a job as a court staff attorney with a \$100,000 salary because he wants to spend more time with his child and because he does not enjoy law firm life. Three years later, he and his partner break up.

163. BOWMAN, *supra* note 13, at 224 (noting that her proposal would impose obligations based on the length of the partners’ relationship “without their consent, similar to the proposal of the American Law Institute”).

164. See Garrison, *Is Consent Necessary?*, *supra* note 25, at 856; see also Shahar Lifshitz, *Married Against Their Will? Toward a Pluralist Regulation of Spousal Relationships*, 66 WASH. & LEE L. REV. 1565, 1587–88 (2009); David Westfall, *Forcing Incidents of Marriage on Unmarried Cohabitants: The American Law Institute’s Principles of Family Dissolution*, 76 NOTRE DAME L. REV. 1467, 1467 (2001) (discussing the ALI Principles’ treatment of relationships as a “mandate” for unmarried cohabitants).

165. See Garrison, *Is Consent Necessary?*, *supra* note 25, at 826–29.

166. See *id.* at 831–32; PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03(7).

167. See BOWMAN, *supra* note 13, at 227 (describing ways in which a cohabitant can benefit the other partner by “contribut[ing] to household expenses, devot[ing] labor to [the] partner’s business, or simply tak[ing] care of the house and children); Garrison, *Is Consent Necessary?*, *supra* note 25, at 873–74 (correcting power imbalances).

168. See, e.g., Culhane, *supra* note 11, at 386–87 (describing a interdependent relationship between sisters who lived together for seventy-six years).



Assume he has been out-earned by over \$400,000; has he been placed in a vulnerable or losing position owing to the relationship? On an absolute scale, \$100,000 in annual income is generous; and nothing about his education or background suggests that his choices were constrained.<sup>169</sup> Additionally, unlike the vertical relationship between parent and child, where the child has no meaningful choice in creating the vulnerable situation in which he finds himself, the horizontal relationship between adults must account for individual agency: the rationale does not explain the choices for which one's partner should bear responsibility.

The equalization rationale suffers from several deficiencies. Most importantly, it does not identify which relationships should be subject to redistribution but rather only what should happen when such relationships are already identified. Financial inequality alone does not create an obligation. For example, it does not explain why a wealthy roommate should not have to share his income with a less wealthy roommate, nor why a casual one-night stand with a wealthy person should not result in ongoing redistribution. Moreover, an insistence upon egalitarianism struggles to account for the myriad ways in which partners are differently situated—for example, in terms of their personal histories, values, and priorities—as well as the cumulative effects of their choices.<sup>170</sup> And many relationships will have more liabilities than assets, resulting in the redistribution of (potentially unforeseen) obligations rather than support.<sup>171</sup>

The functional rationale posits that relationships that are similar enough to marriages should be treated as marriages. The ALI Principles, for example, propose a set of rules presuming that adults without children who have cohabited for a sufficient length of time will be in relationships that “may be indistinguishable from marriage except for the legal formality of marriage.”<sup>172</sup> But it is not clear what the hallmarks of marriage are: many marriages do not bear all the

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169. As Marsha Garrison has argued, the partner might have *benefited* financially from the economies of scale and time created by sharing a residence. Garrison, *Is Consent Necessary?*, *supra* note 25, at 874–75.

170. See Schneider, *supra* note 148, at 1831.

171. See, e.g., DOUGLAS E. ABRAMS ET AL., CONTEMPORARY FAMILY LAW 573–74 (4th ed. 2015) (noting that most families facing divorce have a low net worth, and a significant portion have only liabilities).

172. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS ch. 1, Overview of Chapter 6 (AM. LAW INST. 2002) (footnote omitted).

hallmarks of marriage.<sup>173</sup> The skein of rights and obligations associated with marriage cluster around separate, sometimes incoherent objectives,<sup>174</sup> barely held together by marriage's relatively coherent social and legal meaning.<sup>175</sup> As a result, attempts to analogize “to marriage,” here and in the contract context, invite a comparison to an idealized, middle-class relationship.<sup>176</sup> The task of analogizing runs a significant risk of improper fit, especially given the idiosyncrasies of nonmarital relationships and the class- and race-based variations discussed in Section I.A. The consequences of this mismatch are the imposition of unwanted legal obligations or the denial of desired legal rights.

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Existing approaches may sometimes extend rights and obligations to people in nonmarital relationships but only haphazardly. The failure to enact more consistent, coherent regulation stems from the absence of a justificatory rationale that

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173. See Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1765 (2005); Regan, *supra* note 25, at 1448 (noting that spouses may not share a common residence, sleep in the same bed, maintain joint bank accounts, or maintain sexual exclusivity).

174. Some scholars have observed the extent to which the state has pinned questionably related rights and obligations on marriage and have called for disaggregation of these rights. See *infra* notes 279–306 and accompanying text.

175. See Matsumura, *supra* note 10, at 2048–49; Scott & Scott, *supra* note 44, at 306–13.

176. The Reporters of the ALI Principles noted that “[d]omestic partners fail to marry for diverse reasons,” including that “some ethnic and social groups have a substantially lower incidence of marriage and a substantially higher incidence of informal domestic relationships than do others.” PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.02 cmt. a. But their proposal does not take these differences into account. The choice of a one-size-fits-all solution disregards the reasons why people in certain demographic groups do not marry, see *supra* Section I.A.3. My suspicion is that the Reporters were more concerned about instances of “strong social or economic inequality between the partners, which allows the stronger partner to resist the weaker partner’s preference for marriage.” § 6.02 cmt. a. The roots of this concern can be found in Reporter Grace Ganz Blumberg’s important Article, *supra* note 29, in which Blumberg has focused on gender dynamics that disfavor women:

Self-interest would lead the man to give up as little as possible. The woman has scant leverage with which to persuade him otherwise. She lacks economic power. She needs a stable relationship more than he does: it is vital to the comfortable exercise of her reproductive potential, and it is a means of enhancing her wealth and standard of living. . . . Even a feminist must agree that there is ample economic and biological basis for Midge Decter’s assertion that “marriage is something asked by women and agreed to by men.”

*Id.* at 1163. The solution proposed by the ALI Principles to impose marriage-like *inter se* obligations makes more sense in light of these concerns. *Id.* at 1163.

appropriately balances concerns about individual will, conduct, and consequences. Consent supplies that rationale.

## II. WHY CONSENT?

Consent is a concept capable of multiple interpretations. This Part defines consent and defends its relevance in the context of intimate regulation.

### A. *Choice and Authorization*

Although they have not arrived at a consensus about an appropriate regulatory approach, courts, scholars, and policymakers generally agree that the law should recognize informal nonmarital relationships in some circumstances. Moreover, both the implied contract and implied status approaches agree that legal obligations can stem from conduct, rather than express commitments.<sup>177</sup> And despite statements to the contrary,<sup>178</sup> the status approach does not discount will entirely. In drafting the ALI Principles, for example, the Reporters gave significant weight to “what the parties themselves expected” and “emotional intimacy”<sup>179</sup>: subjective features. Status approaches also allow parties to contract *out* of the default status, preserving a space for the exercise of individual preferences.<sup>180</sup>

There are many challenges with designing a legal rule around a person’s subjective will, including that those views are difficult to prove and subject to change.<sup>181</sup> Nonetheless, it would be particularly inappropriate to discount the will of the parties in the context of choosing their relationships. The Supreme Court has recognized centrality of such exercises of will to one’s right of self-definition.<sup>182</sup> For example, the Court described the choice to marry as “inherent in the concept of individual autonomy[,]” and “among the most intimate that an individual can make.”<sup>183</sup> So too, I have argued, is the decision

177. See *supra* Section I.B.

178. See *supra* text accompanying note 163.

179. Ellman, *supra* note 147, at 873, 883 (explaining the rationales underlying the regulation of long-term intimate relationships).

180. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.01(2). Although Professor Bowman’s proposal would apply an irrebuttable presumption after two years of cohabitation, she too would allow parties to contract out of this status, indicating her sympathy to the importance of will/autonomy. BOWMAN, *supra* note 13, at 228.

181. See Matsumura, *supra* note 10, at 2052–53.

182. See Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 FORDHAM L. REV. 1509, 1532–33 (2016) (discussing *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)).

183. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015).

not to marry.<sup>184</sup> The choice to engage in private, consensual intimate conduct, even outside of marriage, is also one with which the state cannot interfere.<sup>185</sup>

There is therefore broad agreement that will, conduct, and their relationship to consequences matter. A successful regulatory approach must balance those considerations.

Consent is a tool for mediating the relationship between individual action and the legitimate exercise of state authority. Although consent has long been the subject of philosophical exploration and uncertainty,<sup>186</sup> the law has consistently treated consent as a justification for the exercise of state power and as the basis for the creation or adjustment of legal relationships between individuals.<sup>187</sup>

184. See Matsumura, *supra* note 182, at 1541–42.

185. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

186. For centuries, political philosophers have struggled to identify the source of individual obligation to obey a jurisdiction's laws, and the extent to which it stems from consent, whether actual or hypothetical. See Richard Dagger & David Lefkowitz, *Political Obligation*, STAN. ENCYCLOPEDIA PHIL. (Aug. 7, 2014), <https://plato.stanford.edu/entries/political-obligation/> [<https://perma.cc/8B68-BXZK> (dark archive)] (“[T]he history of political thought is replete with attempts to provide a satisfactory account of political obligation, from the time of Socrates to the present. These attempts have become increasingly sophisticated in recent years, but they have brought us no closer to agreement.”); see also DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY* 1–4 (1989) (identifying questions raised by consent theory, including who needs to consent (and to what), how to consent, and when to consent). Social contractarians, including John Locke, have argued that individuals' duty to submit to the State's authority stems from individuals' authority to bind themselves, and the exercise of that normative power in creating the State. See Fred D'Agostino, Gerald Gaus & John Thrasher, *Contemporary Approaches to the Social Contract*, STAN. ENCYCLOPEDIA PHIL. (May 31, 2017), <https://plato.stanford.edu/entries/contractarianism-contemporary/> [<https://perma.cc/32MA-LVM7> (dark archive)]. Critics of the social contract theory have challenged the accuracy of asserting that anyone ever granted consent. John Rawls has argued that though people cannot consent in advance to participate in society in a “literal sense,” “[o]ur social situation is just if it is such that by [a] sequence of hypothetical agreements we would have contracted into the general system of rules which defines it.” JOHN RAWLS, *A THEORY OF JUSTICE* 13 (1971). Although this original position is purely hypothetical, it still reveals the principles, “moral or otherwise[.] . . . that we do in fact accept.” *Id.* at 21. In response, some have argued that hypothetical consent, what one might have agreed to if asked in advance, has no force as consent and depends instead upon the reasons why it might be fair or proper to enforce rules nonetheless, rendering consent superfluous. See Ronald Dworkin, *The Original Position*, in *READING RAWLS* 16, 18 (Norman Daniels ed., 1975).

187. See Schuck, *supra* note 34, at 901 (arguing that an “abiding, almost obsessive suspicion of state power” lives on in an “American political culture [that] still presumes that the most legitimate ground for binding individuals is their consent to the transaction”); cf. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (proclaiming that governments “deriv[e] their just powers from the consent of the governed”).

Consent is both “a *decision in favor* of a proposed course of action” and “a permission-giving act.”<sup>188</sup> Consent therefore stems from individual will: the “ability to select a course of action as a means of fulfilling some desire.”<sup>189</sup> But that decision itself raises complicated questions. For instance, the exercise of will is inevitably constrained by one’s circumstances. This raises the question whether consent requires unfettered choice or can exist when a person has a more limited range of options. Moreover, standards for identifying or proving the exercise of will can affect the extent to which the law protects it. For example, imagine a person who participates in a wedding ceremony and publicly says “I do,” yet harbors internal reservations about the decision to marry.<sup>190</sup> The adoption of an objective standard of proof could hold her responsible for her public statements notwithstanding her hidden preferences to the contrary. The adoption of a subjective approach, in contrast, would credit her internal desires, although proving those desires would be complicated. The decisional component of consent therefore involves a conclusion about the nexus between will and conduct.

The law may be satisfied by different manifestations of will depending on the circumstances.<sup>191</sup> For example, within the context of consent to sexual relations, Heidi Hurd has argued that consent should focus entirely on a person’s subjective will.<sup>192</sup> She argues that autonomy resides in the ability to will the alteration of moral rights and duties.<sup>193</sup> If consent is normatively significant because it constitutes an expression of autonomy, then it must depend on the person’s state of mind at the relevant time.<sup>194</sup> If the purpose of requiring the performance of a token act is merely to reflect the

188. Beauchamp, *supra* note 30, at 57.

189. Timothy O’Connor, *Free Will*, STAN. ENCYCLOPEDIA PHIL. (Oct. 29, 2010), <https://plato.stanford.edu/entries/freewill/> [<https://perma.cc/NCM9-9JT6> (dark archive)].

190. See *Jackson K. v. Parisa G.*, 37 N.Y.S.3d 207, 2016 WL 1689184, at \*9 (N.Y. Sup. Ct. Apr. 8, 2016) (unpublished table opinion).

191. See Brian H. Bix, *Contracts*, in THE ETHICS OF CONSENT, *supra* note 30, at 251, 255 (“[I]t serves neither autonomy nor welfare to demand the fullest form of consent before we treat the relevant moral or legal threshold as being met.”); Alan Wertheimer, *Consent to Sexual Relations*, in THE ETHICS OF CONSENT, *supra* note 30, at 195, 196 (“The criteria for what constitutes [morally transformative] consent will always involve moral argument and empirical evidence that is sensitive to the reasons for adopting a more or less rigorous view of [morally transformative consent for the law].”); Beauchamp, *supra* note 30, at 58 (arguing that it could be “unreasonable to demand . . . [a]utonomy-protective standards [that are] excessively difficult or impossible to implement”).

192. Heidi Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121, 124–25 (1996).

193. *Id.* at 124.

194. *Id.*; see also Larry Alexander, *The Moral Magic of Consent (II)*, 2 LEGAL THEORY 165, 165 (1996).

mental state, then the act itself is morally irrelevant.<sup>195</sup> This proposed definition of consent emphasizes the importance of subjective will to the exclusion of objectively measurable authorization. Challenging this subjective approach, Alan Wertheimer has argued that if consent renders it permissible for A to do something to B, then B's mental state alone—unaccompanied by any outward manifestation—would be incapable of authorizing A to act.<sup>196</sup> He has therefore argued in favor of a “suitably qualified performative view” that “takes account of the background conditions within which [one] gives a token of consent.”<sup>197</sup> Within the context of contract law, an objective approach has come to dominate the doctrinal analysis of contractual assent. To privilege subjective intent over objectively manifested behavior would, at best, promote uncertainty as to the terms of the agreement, and, at worst, incentivize contracting parties to generate evidence of contradictory intentions with which to undermine the validity of unfavorable agreements.<sup>198</sup> Contract law has therefore largely treated the relevant acts of will as objective ones.<sup>199</sup>

Consent is also an *authorization*: it justifies the imposition of legal obligations.<sup>200</sup> Although discussions of consent tend to collapse the will and authorization inquiries, an expression—e.g., a statement of terms followed by “I agree”—or an act—e.g., accepting a shipment of goods—might prove one but not the other. For example, most of us regularly click through online form agreements, indicating that we

195. See Hurd, *supra* note 192, at 137.

196. See Alan Wertheimer, *What Is Consent? And Is It Important?*, 3 BUFF. CRIM. L. REV. 557, 568 (2000).

197. *Id.* at 571.

198. See Randy E. Barnett, *Contract Is Not Promise; Contract Is Consent*, 45 SUFFOLK U. L. REV. 647, 651 (2012); Barnett, *supra* note 35, at 635.

199. See, e.g., *Lucy v. Zehmer*, 84 S.E.2d 516, 521 (Va. 1954) (“In the field of contracts, as generally elsewhere, [w]e must look to the outward expression of a person as manifesting his intention rather than to his secret and unexpressed intention. The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts.” (quoting *First Nat'l Bank of Roanoke v. Roanoke Oil Co.*, 192 S.E. 764, 770 (Va. 1937))); Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 303 (1986) (arguing that “whether one has consented to a transfer of rights . . . generally depends not on one's subjective opinion about the meaning of one's freely chosen words or conduct, but on the ordinary meaning that is attached to them”); Wertheimer, *supra* note 196, at 567–68 (“As a general proposition, no one thinks that the consent that gives rise to a binding promise refers to anyone's mental state. To promise is to promise, not to have the intent or desire to promise.”).

200. The concept of consent also plays a role in determining the moral duties owed by private individuals—i.e., how we should treat one another. But my focus is on the role consent plays in the creation of a *legal* relationship—i.e., one that the state will enforce through its coercive power.

have read and agree to terms and conditions that we have not seen.<sup>201</sup> The act of checking boxes arguably offers express proof of authorization<sup>202</sup> but not necessarily of will.<sup>203</sup> Here, lack of knowledge of terms and conditions would prevent a decision in their favor. Similarly, physicians' common practice of obtaining informed consent—disclosing risks, proposing a course of action, and obtaining a signed consent form—provides evidence of something, although scholars are skeptical about whether patients can truly understand the consequences of the procedure they are authorizing.<sup>204</sup>

As an authorization, consent has been treated as critical to the creation of particularized legal duties running between contracting parties.<sup>205</sup> It builds, from the ground up, specific legal obligations that otherwise would not exist. Although tort operates in the opposite direction, imposing liability for “conduct the law treats as wrong,”<sup>206</sup> a tort plaintiff's consent to the defendant's conduct “marks a deficiency in [a] prima facie case at the most fundamental level: where the plaintiff consents, the defendant's act is simply not tortious.”<sup>207</sup> Admittedly, the law places limits on consent by balancing it with other values. In the tort context, for example, courts have limited defenses like assumption of the risk and product warnings and have imposed heightened informed consent requirements governing health-care-related injuries.<sup>208</sup> And in the contract realm, doctrines like substantive unconscionability<sup>209</sup> and public policy,<sup>210</sup> as well as the

201. See, e.g., Wilkinson-Ryan, *supra* note 37, at 126–28.

202. See Barnett, *supra* note 35, at 635 (analogizing clicking a box on an online click license agreement to agreeing to perform whatever a trusted friend specifies in a sealed letter, the contents of which are unknown).

203. See Wilkinson-Ryan, *supra* note 37, at 124–26 (noting that most consumers are not actually aware of terms, leading courts to ask whether the consumers had reasonable notice of the *existence* of the terms).

204. See, e.g., Beauchamp, *supra* note 30, at 58 (questioning patients' substantive understanding of the procedures to which they purportedly consent).

205. See Radin, *supra* note 37, at 508 (“A core contract, in the sense of traditional theories, (i) shifts particular entitlements between two private parties, in a context of exchange between them, where (ii) the parties to the exchange are human beings who possess free will or autonomy, . . . and where (iii) each party arrives at and commits to a particular specific exchange, a *consensus ad idem*, through exercise of the party's own free will or autonomy.” (footnote omitted)).

206. DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 12 (2d ed., West 2011 & Supp. 2017).

207. *Id.* § 105 (noting that “[t]he consent principle is general in its scope, firm in its acceptance, and central in its significance”); see also Schuck, *supra* note 34, at 902 (observing that consent by the victim relieves the injurer of the duty she owes and also makes her conduct non-faulty).

208. See Schuck, *supra* note 34, at 907–08.

209. See RESTATEMENT (SECOND) OF CONTRACTS § 208 (AM. LAW. INST. 1981).

expanded use of custom, trade usage, and changed circumstances, place limits on what parties can consent to and how strictly those terms are to be interpreted.<sup>211</sup> These rules effectively make it more difficult for individuals to authorize the wrongful conduct of another or to create enforceable duties. But they have not erased the fundamental importance of consent to the legal relations imposed upon private individuals.

These inquiries reveal that consent is not a rigid concept capable of universal application. Rather, it is a *conclusion* that a particular exercise of will justifies the imposition of legal consequences when balanced against other considerations. To say that consent is required is therefore to raise the question of the appropriateness of the state's exercise of authority under the circumstances.

*B. Addressing Consent Skepticism*

Thus far, I have argued that from a legal perspective, consent is a conclusion about the relationship between the individual and the state. Unless one takes the position that individual will imposes no limits on the exercise of state authority, consent is inescapable. However, many scholars have expressed skepticism that consent is relevant to the imposition of legal obligations on people in intimate relationships. Their arguments provide a useful tool to sharpen the concepts discussed in the previous Section.

First, critics of consent argue that because it is impossible for people to contemplate, much less will, all the ways the law will affect marriage or marriage-like relationships, consent is not worth pursuing as an explanatory rationale. This argument implicitly defines consent as synonymous with will and insists on a glove-like fit between will and particularized obligations: that people can only will that which they directly contemplate. Further, they contend that the definition of consent cannot allow a looser fit between will and obligation because such an expanded definition would render the concept of consent meaningless. Such a watered-down definition would require “little more than a willingness to be part of a society that recognizes obligations toward others.”<sup>212</sup> Second, the law has frequently imposed duties between adults and children over a party's (usually a man's) objections. For example, the law has forced statutory rape victims to pay child support for their biological children, imposed obligations on

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210. *See id.* § 178.

211. *See* Linzer, *supra* note 33, at 142.

212. *Id.*



fathers who were affirmatively deceived by their partners, and even imposed obligations on men whose sperm was misappropriated. If consent is irrelevant to the imposition of obligations in the vertical parent-child relationship, why should it be necessary in a horizontal relationship between adults? And third, critics of consent are suspicious of neoliberal commitments to existing property entitlements and argue that consent inherently preserves distributional inequalities. I address these arguments in turn.

The first argument evokes and then critiques a definition of consent that virtually equates consent with subjective will. Nancy Polikoff, for example, argues that consent rests on a “fatal flaw”: “the premise that those who marry or do not marry accurately understand the legally enforceable economic obligations that each will have towards the other.”<sup>213</sup> Relatedly, Ira Ellman has cautioned against “inferring understandings very freely from the parties’ conduct.”<sup>214</sup> These arguments insist that the parties manifest a subjective understanding about the specific legal consequences that would flow from their actions in order to consent to those consequences. Where the parties were not even aware of, much less willed, those consequences, consent has no explanatory role.<sup>215</sup>

Implicit in the strictness of this definition is skepticism about the consequences of stretching consent too far. The skeptics have a point. For example, within the political theory context, John Locke argued that “every man, that hath any possession, or enjoyment, of any part of the dominions of any government, doth thereby give his *tacit consent*, . . . whether this his possession be of land, . . . or whether it be barely travelling freely on the highway.”<sup>216</sup> The notion that by traveling on the highway one consents to obey this country’s system of laws may seem absurd because of the attenuated relationship between the act and the thing it is supposed to justify.<sup>217</sup> The challenge faced by Locke is the challenge faced by consent generally.

213. Nancy D. Polikoff, *Making Marriage Matter Less: The ALI Domestic Partner Principles Are One Step in the Right Direction*, 2004 U. CHI. LEGAL F. 353, 370.

214. Ellman, *supra* note 147, at 874; *see also id.* at 874–75 (“It is arguably likely that even couples with very clear understandings about their conduct during marriage never had any common *understanding about the consequences of dissolution.*” (emphasis added)).

215. Polikoff, *supra* note 213, at 372.

216. John Locke, *The Second Treatise of Government*, in TWO TREATISES OF GOVERNMENT 113, 176 (Mark Goldie ed., 1993) (1698) (emphasis added).

217. *See* HERZOG, *supra* note 186, at 184 (“If tacit consent reaches as far as the brute fact of residence, regardless of one’s alternatives, regardless of one’s reasons for remaining . . . it reaches too far.”).

Consent theorists . . . need a conception of consent that is descriptively plausible: they need to be able to point at citizens and show us their consent. But that conception also needs to be normatively robust: whatever counts as consent has to generate an obligation. These two requirements pull in different directions.<sup>218</sup>

The looser the fit between act and obligation, the less the act looks like consent.

That said, as I argued in the previous Section, there is no single definition of consent.<sup>219</sup> Rather, a definition should consider “what is fair and reasonable to require in circumstances of practice.”<sup>220</sup> One might not see consent as especially important in situations that are morally straightforward; for example, when imposing a generalized duty not to harm a passersby unnecessarily.<sup>221</sup> But in a morally complicated area like consent to sexual relations, the law might insist on a greater fit between the parties’ will and the permission-giving act.<sup>222</sup> The same distinction could be made between duties owed to all versus special duties owed to one, or a few: the law might reasonably require a tighter fit between will, act, and consequence in the latter context.

In few other contexts has the law required as strict a definition as the one consent critics advocate. As I will argue at length in the next Section, contract doctrine balances the parties’ preferences against the fact that it would be impossible to contemplate, much less memorialize, all of their views about the different legal and factual permutations within a single agreement.<sup>223</sup> At bottom, arguments about the definition of consent are not arguments against the *functions* that consent performs. I doubt that critics of consent would authorize the state to make a person responsible for an adult or child to whom the person has little apparent connection, like a stranger living on the other side of town.

218. *Id.* at 185.

219. *See supra* note 191.

220. Beauchamp, *supra* note 30, at 58.

221. *See* Cynthia A. Stark, *Hypothetical Consent and Justification*, 97 J. PHIL. 313, 318 (2000) (noting that critiques of hypothetical consent “are not concerned with the problem of the bindingness of moral rules generally, but rather with the bindingness of those principles to which one might think consent is especially relevant”).

222. The importance of these interests is why the topic of consent to sexual relations has remained controversial, as the recent college affirmative-consent policies attest. *See, e.g.*, Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 889 (2016).

223. *See infra* Section III.A.

The second argument is that the law imposes family obligations without consent all the time. If consent is not required to impose obligations in one type of family relationship (between parents and children), then it should not be required to impose obligations in another type of family relationship (between adults). Parental obligations have traditionally flowed from consanguinity or status.<sup>224</sup> These obligations have been imposed in cases where the facts suggest that men did not intend to have a child, but the law imposed fatherhood nonetheless, for example where a man's partner promised not to hold him responsible for the child<sup>225</sup>; misrepresented her fertility<sup>226</sup>; engaged in sex with a minor not capable of offering legal consent<sup>227</sup>; or appropriated his sperm and inseminated herself.<sup>228</sup>

Once one rejects the view that consent and will are synonymous, however, it is not clear that consent plays no role in the imposition of duties between parent and child. The unwanted fatherhood cases involve voluntary acts from which parenthood might predictably flow. In *State ex rel. Hermesmann v. Seyer*,<sup>229</sup> for example, a minor father who was only thirteen years old at the time of conception argued that he was not legally capable of consenting to sexual intercourse and therefore could not have consented to the birth of his child.<sup>230</sup> But when analyzing voluntariness, the court noted that “the sexual relationship . . . lasted over a period of several months. *At no time did Shane register any complaint to his parents about the sexual liaison.*”<sup>231</sup> The court later concluded that the infant, “the *only truly innocent party*, is entitled to support from both her parents regardless of their

224. See Garrison, *Is Consent Necessary?*, *supra* note 25, at 826; Michael J. Higdon, *Marginalized Fathers and Demonized Mothers: A Feminist Look at the Reproductive Freedom of Unmarried Men*, 66 ALA. L. REV. 507, 517 (2015); Emily J. Stolzenberg, *The New Family Freedom*, 59 B.C. L. REV. (forthcoming 2018) (manuscript at 22–23) (on file with the North Carolina Law Review).

225. See, e.g., *Kesler v. Weniger*, 744 A.2d 794, 795 (Pa. Super. Ct. 2000) (rejecting a man's contention that he only agreed to father a child because the child's mother promised that he would not be held responsible for the child's financial support).

226. See, e.g., *Dubay v. Wells*, 506 F.3d 422, 426 (6th Cir. 2007) (involving the imposition of child support upon a man who had sex with the child's mother after she assured him that she was both infertile and using birth control).

227. See, e.g., *State ex rel. Hermesmann v. Seyer*, 847 P.2d 1273, 1274 (Kan. 1993) (imposing child support obligations on a minor who was thirteen years old when he had sex and conceived a child with his babysitter who was seventeen years old at the time).

228. See, e.g., *Phillips v. Irons*, No. 1-03-2992, 2005 WL 4694579, at \*1–3 (Ill. Ct. App. Feb. 22, 2005) (involving a woman's unconsented use of sperm collected in a condom after oral sex in order to conceive).

229. 847 P.2d 1273 (Kan. 1993).

230. *Id.* at 1275.

231. *Id.* at 1277 (emphasis added).

ages.”<sup>232</sup> These statements indicate that the court viewed the imposition of parenthood as a reasonable consequence of the father’s voluntary actions.<sup>233</sup> Especially in light of the strong policies favoring the support of “innocent” children, one can interpret this result as adopting an objective approach *within* a consent framework.

Even if the imposition of vertical duties rejects consent, the departure is typically justified by dependency creation: the adults involved have caused the child’s dependency and therefore owe the child duties of support.<sup>234</sup> This rationale applies with much less force in the horizontal context. It is easier to argue that children have no role in the creation of dependency because they exercise no agency in their birth nor in the circumstances in which they find themselves. In contrast, even granting that adults operate within circumstances of constraint, it is difficult to argue that a competent adult had a comparably reduced level of agency in the nonmarital relationship.<sup>235</sup>

The third argument against consent is that it instantiates neoliberal assumptions about property relations that are antithetical to the family. Neoliberalism describes an ideology that promotes the expansion of market logic—specifically, an individualistic,

232. *Id.* at 1279 (emphasis added).

233. See Susan Frelich Appleton, *Reproduction and Regret*, 23 YALE J. L. & FEMINISM 255, 293–300 (2011). There are, admittedly, a few instances in which the law has imposed parental obligations on men who did not voluntarily participate in a child’s creation. See Stolzenberg, *supra* note 224, at 24–26 (collecting cases). In these situations, as well as those in which obligations are imposed over a person’s express *non*-consent, it is perhaps futile to justify the obligation on this basis. This Article focuses on the obligations between adults and the state, so the question whether the law should revisit vertical obligations is beyond the scope of this Article, although others have contested this issue.

234. Garrison, *Is Consent Necessary?*, *supra* note 25, at 828. Martha Fineman has argued that the inevitable dependency created by the mother-child relationship is so important that it should displace the marital relationship as the central family relationship recognized by the state. See FINEMAN, *supra* note 114, at 228. With the state playing a supportive, nurturing role, the focus would not be on consent, but rather on the caretaker/dependent relationship. See *id.* at 233–35. But she distinguishes purely adult relationships, in which “the interactions of female and male sexual affiliates would be governed by the same rules that regulate other interactions in our society—specifically those of contract and property.” *Id.* at 229.

235. When women were prevented from exercising full control over property and were discouraged from participating in the economic sphere, the comparison to children may have been more appropriate. See Garrison, *Is Consent Necessary?*, *supra* note 25, at 828–29 (explaining the burdens of coverture historically justified support obligations). Although women have not yet achieved economic equality, the analogy to children seems extreme when considering modern marital relationships. See *id.* at 874–77 (noting the absence of persuasive evidence that women are systematically exploited in cohabiting relationships); Carbone & Cahn, *supra* note 21, at 109 (explaining that the two traditional restrictions on women which resulted in dependency on men, including labor restrictions and lack of contraception, are no longer prevalent in society).

unencumbered, wealth-maximizing ethos—to all social and legal realms.<sup>236</sup> Anne Alstott has argued that “[i]n family law, three neoliberal ideals dominate both constitutional and subconstitutional law: negative liberty, market distribution, and the minimal state.”<sup>237</sup> Although consent typically has an unobjectionable moral valence—for instance, few argue that we should promote *nonconsensual* sexual relations—its legal significance is often associated with the concept of unfettered economic exchange.<sup>238</sup>

The association of consent and market logic has led to several distinct concerns. Scholars have argued that to the extent that the law equates autonomy with one’s choice of financial obligations, it reinforces the notion that people are individual economic units.<sup>239</sup> This individualistic approach is incompatible with the interdependency that develops within familial relationships and therefore fails to credit the joint contributions and the (sometimes contrary) expectations of both partners.<sup>240</sup> Approaching adult relationships through the lens of economic exchange may destabilize “intimate relationships’ cooperative, collaborative qualities.”<sup>241</sup> Moreover, requiring consent may hinder the necessary redistribution of resources or legitimize distributional inequalities. To the extent they fail to question the allocation of entitlements in the first instance, consent theory risks cementing them.<sup>242</sup> For example, before we determine whether an employer has bargained away with his employee the right to fire that employee at will, we have to determine whether he has that right in the first place; if he is motivated by race or sex, the law might deprive him of such a right.<sup>243</sup> In the domestic context, consent can obscure the fact that decisions are not always made on an even playing field. If one partner earns somewhat less

236. See Melissa Murray & Karen Tani, *Something Old, Something New: Reflections on the Sex Bureaucracy*, 7 CALIF. L. REV. ONLINE 122, 152–53 (2016).

237. Anne L. Alstott, *Neoliberalism in U.S. Family Law: Negative Liberty and Laissez-Faire Markets in the Minimal State*, 77 LAW & CONTEMP. PROBS. 25, 26–27 (2014).

238. See, e.g., Barnett, *supra* note 199, at 297 (describing contract law as the libertarian exchange of already vested entitlements).

239. Blumberg, *supra* note 29, at 1136–37; Stolzenberg, *supra* note 224, at 51.

240. Stolzenberg, *supra* note 224, at 52–56.

241. *Id.* at 57–58.

242. See Braucher, *supra* note 36, at 712–13 (“Interrelated elements of wealth, power, knowledge, and judgment of the parties constitute the conditions in which they make choices or undertake relationships. Choices, relationships, entitlements, and abilities cannot be separated.”); Lea Brilmayer, *Consent, Contract, and Territory*, 74 MINN. L. REV. 1, 21–22 (1989) (noting that “the prior assignment of rights and obligations” affects consent).

243. Peter Linzer, *Is Consent the Essence of Contract?—Replying to Four Critics*, 1988 N.Y.U. ANN. SURV. OF AM. L. 213, 220 n.11.

and provides more care of a dependent child, for example, seemingly equal contributions to household expenses will result in the higher earning partner having more income to keep for himself.<sup>244</sup>

These concerns rightfully arise the more the law favors a subjective definition of consent. If one's consent were only valid if one subjectively willed the precise obligation at hand, redistribution would be rare indeed. But that consent *can* accompany the perpetuation of a market ideology in the family realm does not suggest that it *must*. Consent is not inconsistent with the recognition of positive rights nor does it require a minimal state; it simply ensures, in light of the existing state of affairs, that the state justify its exercise of authority.<sup>245</sup> A definition of consent that insists upon a tight fit between subjective will and the objective conduct triggering legal obligations, coupled with heightened proof requirements and a rigid understanding of property concepts like title and vested rights, will produce neoliberal outcomes. But a different consent framework could produce different outcomes.

Finally, consent does not shield underlying entitlements from searching analysis. The law makes determinations about the alienability of objects and actions, thereby altering their status as property.<sup>246</sup> For example, some workers cannot sell more than forty hours of their labor per week without requiring a higher overtime wage. The law should calibrate these rules to respond to the sources of inequality rather than attempting piecemeal remediation on the backs of individuals who happen to be in intimate relationships. If gender disparities in salaries or educational opportunities place women in a disadvantageous position compared to their male partners, the law should address those inequalities directly rather than through the happenstance of the person with whom any given woman is cohabiting.<sup>247</sup>

The concerns I respond to in this Section sharpen several aspects of consent that are useful going forward. They reveal that consent is context-dependent and can vary in terms of the extent to which it emphasizes the importance of will and authorization. Consent does

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244. BOWMAN, *supra* note 13, at 170.

245. See Brilmayer, *supra* note 242, at 23 (arguing that “[c]onsent is a process value, not a justification of a particular state of affairs”).

246. See generally Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) (exploring the significance of market-inalienability and its justifications).

247. If gender-based earning disparities were to justify redistribution, they would have no effect in a relationship with a lower earning man or another woman. In those relationships, as in situations involving single women, the law would fail to address the problem of wage discrimination.

not justify existing entitlements but instead governs the way that the state alters them. Above all, consent highlights the relationship between individual freedom and state regulation.

### III. CONSENT TO INTIMATE REGULATION

This Part articulates two methodological refinements for determining whether parties have consented to the imposition of intimate obligations. The first focuses on identifying the act of consent. The second focuses on how to define the object of consent.

#### A. *Determining the Act of Consent*

I have shown that consent is an analytic framework that insists upon different relationships between will and authorization depending on the context. The challenge in any given context is to articulate a definition of consent that appropriately balances will, conduct, and the policy considerations that justify the exercise of state power. This is the very inquiry that has both evaded and confounded regulatory efforts to this point. As revealed in Section I.B., courts and scholars have battled about a caricature of consent without considering what consent to the imposition of legal obligations between partners and the state should actually look like.<sup>248</sup>

A key challenge to the imposition of obligations on people in nonmarital relationships is the diversity of relationship structures and the complicated relationship between those diverse forms and the partners' subjective views. As a law of voluntary obligations arising within idiosyncratic relationships, contract law has clear parallels to nonmarital relationships. Although I have previously argued for greater enforcement of contracts between nonmarital partners,<sup>249</sup> that is not my argument here. Rather, I contend here that when looking for principles that explain the relationship between will, conduct, and corresponding obligations, contract doctrine may be a useful guide.

The concept of consent is at the core of classical contract doctrine. Contract law creates a legal relationship between parties based on the terms to which they have assented: that legal relationship would not exist absent the parties' consent.<sup>250</sup>

248. See Joo, *supra* note 26, at 162 (noting that in the realm of intimate relationships, courts and scholars have imported a "market-libertarian normative view about the role of bargaining").

249. See Matsumura, *supra* note 21, at 215.

250. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 17 (AM. LAW INST. 1981) ("[T]he formation of a contract requires a bargain in which there is a manifestation of mutual assent."); Bix, *supra* note 191, at 251 (noting the common view that consent is "at

Assumptions about consent explain why most people would find it shocking if the act of walking down a street and glancing in a store window would create a legal obligation to purchase a product displayed there at the listed price. Depending on how one defines it, however, consent is missing in virtually all contracting situations.

Contracts are always incomplete, making it impossible to attribute all the legal consequences that may be imposed to the parties' will. In the first place, "[b]ecause parties cannot predict uncertain future events or states of the world, *ex ante*, they lack information needed for complete contracts . . . . Consequently, parties cannot realistically achieve complete contracts, and many contracts remain inefficiently incomplete."<sup>251</sup> For example, the inclusion of the term "US Fresh Frozen Chicken, Grade A . . . 2 ½–3 lbs" in a contract between a buyer and seller of poultry may seem sufficiently clear until a dispute arises as to whether the term "chicken" means only young birds or older "stewing chicken" meeting the size and quality requirements.<sup>252</sup> It is not always clear what meanings lie beneath the surface of even the simplest of terms; further specification (chickens of a certain breed or color) is always possible but would make agreements impossibly long and unwieldy.

Moreover, as Professor Richard Craswell has demonstrated, parties are bound by background rules—"those parts of contract law

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the essence of contract law"); Kostritsky, *supra* note 36, at 331 ("The justification for contract law rests on the assent of the parties."); Schuck, *supra* note 34, at 900 ("Consent is the master concept that defines the law of contracts in the United States."). This is not to say that consent is the sole justification for enforcing agreements. Numerous scholars have observed that the law will sometimes impose non-consensual obligations based on a party's conduct or social policy. *See, e.g.*, Braucher, *supra* note 36, at 701 (noting that legal decision-makers have the authority to assess the validity of consent, "mold obligations along socially desired lines," and "supply a great deal of the content of contractual obligation," undermining the position of consent as an individual-based obligation); Orit Gan, *The Many Faces of Contractual Consent*, 65 DRAKE L. REV. 615, 617 (2017) (arguing that the law should recognize "shades" of consent); Linzer, *supra* note 33, at 142 ("[C]onsent is far from indispensable today, and . . . is increasingly being seen as only one of a number of factors affecting contract-like liability."). Courts will also refuse to enforce agreements to which the parties consented based on their own "policy evaluation about the substance of the agreement." Joo, *supra* note 26, at 181; *see also* Nancy S. Kim, *Relative Consent and Contract Law*, 18 NEV. L.J. 165, 176–78 (2017) (arguing that consent may be withdrawn or "destroyed" under certain conditions). I neither advance nor defend the view that contract is solely based on consent. Rather, I argue that consent is typically viewed as a central guiding concept, an argument with which even those critical of consent seem to agree. *See* Linzer, *supra* note 33, at 142 ("This is not to say that consent is irrelevant.").

251. Kostritsky, *supra* note 36, at 335.

252. *Frigalim Importing Co. v. B.N.S. Int'l Sales Corp.*, 190 F. Supp. 116, 117 (S.D.N.Y. 1960).



that govern the proper remedies for breach, the conditions under which the promisor is excused from her duty to perform, or the additional obligations (such as implied warranties) imputed to the promisor as an implicit part of her promise”—that will impact the parties’ rights but over which they may have little control.<sup>253</sup> Parties may have no knowledge of these terms or may not have selected them if given the opportunity. These problems arise even in the context of arms-length negotiations between sophisticated parties represented by legal counsel. But there is a whole category of exchanges currently subsumed under the rubric of contract law that do not involve negotiations in the traditional sense. These transactions are governed by boilerplate terms—“composite rigid texts, most often consisting of fine print, delivered to consumers, employees, and many businesses in the position of consumers”<sup>254</sup>—that parties agree to by clicking “I accept” on a webpage or even by browsing a website.<sup>255</sup>

One response to the parties’ inability to will the entirety of their agreements is to reject the value of consent as an explanatory concept, as some family law scholars have done.<sup>256</sup> But among contract scholars, even skeptics of consent are not willing to go that far. For example, although Jean Braucher argues that consent overemphasizes contract’s private functions and does not credit the extent to which contract is regulatory, she only goes so far as to argue that “[c]onsent will not work as a rationale to enforce contracts without *also* bringing in social control of the parties’ affairs.”<sup>257</sup> Margaret Radin, one of the staunchest critics of form agreements, argues that those “agreements” should be removed from the rubric of contract and subjected to regulation under legal theories like tort law rather than arguing against the centrality of consent to contract.<sup>258</sup>

It would be an overstatement to suggest that the role of consent in contract is settled as a theoretical matter. But contract doctrine has developed useful tools to deal with the practical problem of incomplete agreements within diverse relationships. The first is that the law has defined the doctrine of mutual assent or *consensus ad idem* loosely: “both parties must understand and freely consent to one and the same exchange, without necessarily assuming that each party

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253. See Craswell, *supra* note 35, at 489–90; see also Bix, *supra* note 191, at 251; Braucher, *supra* note 36, at 730.

254. Radin, *supra* note 37, at 515–16.

255. See *id.* at 519–20.

256. See *supra* Section II.B.

257. Braucher, *supra* note 36, at 700 (emphasis added).

258. See Radin, *supra* note 37, at 531–33.

must explicitly consent to each and every clause.”<sup>259</sup> A key insight from contract law is that the parties’ relationship may be governed in part by terms that are the product of hypothetical bargains, terms to which they did not *in fact* agree,<sup>260</sup> but only if the parameters of the agreement are sufficiently certain.<sup>261</sup> Otherwise, a court would go too far in “imposing its own conception of what the parties should or might have undertaken, rather than confining itself to the implementation of a bargain to which [the parties] have mutually committed themselves.”<sup>262</sup> Under black letter law, terms are certain when “they provide a basis for determining the existence of a breach and for giving an appropriate remedy.”<sup>263</sup>

This certainty requirement as to the key terms authorizes legal intervention within a realm circumscribed by the parties’ preferences. Courts tend to analyze certainty in several different ways. They can look to whether the agreement specifies the key terms.<sup>264</sup> Terms that define a product or performance, allocate responsibilities between the parties, or specify a date for performance may be deemed essential.<sup>265</sup> Relatedly, courts ask whether the existing terms of the agreement provide a basis for determining whether a breach has occurred and, if so, what the remedy will be.<sup>266</sup> The focus of this inquiry is whether, in light of the broader goals of the parties, the parties have sufficiently manifested their intentions so that a court would have certainty about the parameters of those goals. Courts also analyze certainty by looking to see whether the parties have left open terms for future

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259. *See id.* at 508 n.2; *see also* Anthony J. Casey & Anthony Niblett, *Self-Driving Contracts* (unpublished manuscript) (on file with the North Carolina Law Review) (“Mutual assent has never required a complete understanding of – and assent to – every specific term in a contract by every party to a contract.”).

260. *See* Bix, *supra* note 191, at 261; Joo, *supra* note 26, at 163.

261. RESTATEMENT (SECOND) OF CONTRACTS § 33 (AM. LAW INST. 1981).

262. *Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher*, 417 N.E.2d 541, 543 (N.Y. 1981).

263. RESTATEMENT (SECOND) OF CONTRACTS § 33(2).

264. *See* § 33 cmt. a (“If the essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there is no contract.”); § 33 cmt. f (“The more important the uncertainty, the stronger the indication is that the parties do not intend to be bound.”).

265. *See, e.g., Acad. Chi. Publishers v. Cheever*, 578 N.E.2d 981, 984 (Ill. 1991) (concluding that a publication agreement for an anthology of short stories that did not describe the length and content of the proposed book, did not identify who would decide whether stories would be included, and did not specify a date for delivery of the manuscript, was missing key terms).

266. *See id.* (“Without setting forth adequate terms for compliance, the publishing agreement provides no basis for determining when breach has occurred.”).

agreement.<sup>267</sup> Agreements to agree are classic examples of indefinite agreements: language indicating the necessity of future negotiations or contemplating the existence of future agreements are not enforceable.<sup>268</sup> Once a court is convinced that the key terms are sufficiently certain, the court may infer missing terms based on past dealings, custom, or other objective methods of determination.<sup>269</sup>

The second doctrinal innovation is the acceptance of an objective theory of assent. The implementation of the objective theory provides a useful guide for balancing the need to honor subjective preferences with the function of objective authorization. Courts will look to the objectively manifested actions of the parties, rather than their internal preferences, to determine to what commitments the parties assented.<sup>270</sup> But contract law has not moved to complete objectivity: it still protects individual will by ensuring that contracting parties have a minimal level of mental capacity (i.e., making agreements by the insane voidable<sup>271</sup>); that a party's beliefs regarding a basic assumption on which the contract is made are in accord with the facts<sup>272</sup>; and that the commitment is not the product of undue influence or duress.<sup>273</sup> It also honors the shared subjective intent of the parties regarding the meaning of a contract term even if it departs from the objective meaning.<sup>274</sup> These limits on the objective view of consent ensure a

267. RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. c (“The more terms the parties leave open, the less likely it is that they have intended to conclude a binding agreement.”).

268. *See, e.g.*, 2004 McDonald Ave. Realty, LLC v. 2004 McDonald Ave. Corp., 858 N.Y.S.2d 203, 205 (N.Y. App. Div. 2008) (holding that a letter agreement that expressly said it was “not a binding agreement” with the exception of three provisions and contemplating the execution of a future lease agreement was not enforceable). *But see* U.C.C. § 2-305 (AM. LAW. INST. & UNIF. LAW COMM’N 1978) (allowing courts to supply an open price term in certain circumstances).

269. *See* Metro-Goldwyn-Mayer, Inc. v. Scheider, 360 N.E.2d 930, 931 (N.Y. 1976) (holding that the failure of an actor and studio to agree on a start date for the filming of a television series would not preclude the court from finding a binding agreement based on industry custom).

270. *See* Lucy v. Zehmer, 84 S.E.2d 516, 521 (Va. Ct. App. 1954); Barnett, *supra* note 199, at 303.

271. *See* RESTATEMENT (SECOND) OF CONTRACTS § 15; Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 464 (2000).

272. *See* RESTATEMENT (SECOND) OF CONTRACTS §§ 151–54.

273. *See id.* §§ 174–77; Perillo, *supra* note 271, at 471. The justification for these doctrines has shifted between “the interior of the mind of the promisor” (subjective) and “abuses of the bargaining process” (objective), but the doctrinal tests still look to the parties’ will and beliefs. Perillo, *supra* note 271, at 470–74.

274. *See* Barnett, *supra* note 199, at 652.

suitable relationship between will and conduct, while recognizing that, in some situations, the two will diverge.

These tools provide a convenient jumping-off point to examine the ideal relationship between individual will and legal authorization within the context of informal relationships. Like contract, intimate relationships involve two or more individuals with distinct autonomy interests.<sup>275</sup> Because many goals of a relationship cannot be achieved unilaterally, the relevant act of will must enlist the other. To accomplish this, just as in contract law, the act of will must be objectively manifested.

Moreover, given the innumerable interactions that characterize intimate relationships, many of which could be understood to involve some sort of exchange or the performance of obligations based on ill-defined standards, the law cannot require that every possible contingency be the product of a fully informed decision before authorizing legal intervention. Like contract law, authorization should flow from objectively manifested consent to key commitments. To the extent that subsidiary legal consequences flow from those commitments, hypothetical authorization is sufficient. As in the contract context, courts should be sensitive to the possibility that the partners might consent to separate and severable commitments. Within the context of adult intimate relationships, consent, in short, should be objective acts sufficient to authorize or waive an objection to the imposition of particular rights or obligations that relate to those acts.

This approach elevates the partners' conduct over their privately held intentions. It therefore invites the possibility that a partner could "trap" himself by doing or saying something that would lead to the imposition of obligations against his will. These risks are justified in part by the need to protect the reliance interests of the partners.<sup>276</sup> For example, if one partner says something that would reasonably induce the other partner to take action detrimental to his self-interest—e.g., "Why don't you just take that lower paying job so that we have more time to go on vacation; I can cover the rent"—the state's interest in protecting reliance interests might necessitate disregarding the subjective will of the one making the statement. But, as in the contract context, doctrines such as duress or mutual mistake

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275. See Matsumura, *supra* note 10, at 2026.

276. Cf. L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: I*, 46 *YALE L.J.* 52, 54 (1936) (explaining the concept of "reliance interest" in terms of a contractual relationship).

provide additional assurance that the conduct was the product of will.<sup>277</sup> They ensure that will does not stray too far from conduct.

*B. Determining the Scope of Obligation*

The preceding discussion established that consent justifies the imposition of obligations when a person objectively manifests the will to be bound to the key terms of a commitment or obligation. To argue that the law should impose obligations only after a person objectively consents to the key aspects of those obligations begs the question of how to identify the terms to which the parties have consented. I propose a different way of looking at the objects of consent in the nonmarital context. The aggregation of benefits in a single status has thwarted attempts to measure “fit” between conduct and functional categories. Rather than asking whether the partners have willed a marriage-like relationship, we should disaggregate the package of rights and obligations bound up in the status of marriage to determine the parties’ commitments. This argument gathers strength from two premises. First, marriage performs a variety of functions, not all of which necessarily rise and fall together. Second, elsewhere in the law, identical parties often engage in separate transactions, which have separate aims and require separate consents, and tools exist to determine whether they should rise and fall together.

The rights and obligations of marriage are ripe for disaggregation. Recall the reasons the law might seek to impose legal obligations on people in informal relationships. One party might ask a court to recognize the partner’s *inter se* obligations: his respective claims to property or support from the other.<sup>278</sup> Or he may seek some benefit typically reserved for married people, like the right to visit his partner in the hospital or to make medical decisions on his behalf. Or, the state may seek to hold him responsible when his partner applies for disability coverage or treat the partners the same as they would a married couple for the purpose of calculating their income tax.

Marriage groups these rights and obligations in a single package. All of these commitments are accessed by one act, the choice to

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277. These doctrines could be strengthened to provide greater protection if need be. For example, a doctrine akin to procedural or substantive unconscionability could raise the baseline for the commitments that would be reasonable for a person to make or the conditions under which the commitments were made.

278. See, e.g., *Marvin v. Marvin*, 557 P.2d 106, 110 (Cal. 1976) (en banc).

marry.<sup>279</sup> Although the default rule is that spouses share the income and property they accumulate during the marriage, they can alter most of their *inter se* obligations by agreement.<sup>280</sup> But most of the spouses' rights as against third parties or the state are beyond their power to contract: spouses cannot elect to file income tax returns as single<sup>281</sup>; they cannot avoid liabilities incurred by the other spouse for the benefit of the marriage.<sup>282</sup> As the Supreme Court observed in *Obergefell v. Hodges*,<sup>283</sup> marriage is “the basis for an expanding list of governmental rights, benefits, and responsibilities.”<sup>284</sup>

No one believes that spouses understand on a granular level the full package of rights and obligations that accompany marriage when they marry.<sup>285</sup> Yet the formal choice to marry has historically justified the imposition of those rights and obligations.<sup>286</sup> Although divorcing

279. See Matsumura, *supra* note 10, at 2033–35. Professor Gregg Strauss has demonstrated that social norms around marriage serve other functions beyond providing notice, namely that they enforce open-ended or “imperfect” duties during ongoing relationships. See Gregg Strauss, *Why the State Cannot “Abolish Marriage”*: A Partial Defense of Legal Marriage, 90 IND. L.J. 1261, 1310 (2015).

280. See, e.g., Barbara A. Atwood & Brian H. Bix, *A New Uniform Law for Premarital and Marital Agreements*, 46 FAM. L.Q. 313, 318–19 (2012) (noting that all American jurisdictions will enforce premarital agreements concerning economic consequences but that procedural and substantive requirements may differ); Sean Hannon Williams, *Postnuptial Agreements*, 2007 WIS. L. REV. 827, 832–38 (describing the legal treatment of agreements between spouses). *But see* Ralph C. Brashier, *Disinheritance and the Modern Family*, 45 CASE W. RES. L. REV. 83, 85 (1994) (noting the substantial limitations on disinheriting spouses).

281. See 26 U.S.C. § 7703 (2012); *Argyle v. Comm’r Internal Revenue*, 397 F. App’x 823, 824 (3d Cir. 2010) (holding that a married person who is neither divorced nor under a decree of separate maintenance is not entitled to single-filing status).

282. See, e.g., CAL. FAM. CODE § 910 (West, Westlaw through Ch. 10 of 2018 Reg. Sess.).

283. 135 S. Ct. 2584 (2015).

284. *Id.* at 2601. A quick glance at the Court’s list of marital rights and obligations reveals some that can be altered—such as medical decision-making authority—and others that cannot be—like professional ethics rules or workers’ compensation eligibility. *See id.*

285. See Polikoff, *supra* note 213, at 370–72 (asserting that the dramatic variations in state laws establishing obligations between spouses means couples generally remain unaware of the specific legal obligations attendant to marriage); *see also* Lynn A. Baker & Robert E. Emery, *When Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 440–41, 445 (1993) (finding that marriage-license applicants surveyed had “largely incorrect perceptions of the legal terms of the marriage contract as embodied in divorce statutes.”). Even if it were possible for people to know all of the legal rights accompanying marriage, the laws might change or the couple might move to a different state.

286. See MAXINE EICHNER, *THE SUPPORTIVE STATE* 103 (2010) (“In entering into a marriage, participants indicate their assent to a specific formal status that comes with a set of enforceable legal rights and responsibilities.”); Carbone & Cahn, *supra* note 21, at 93–95 (noting that the institutionalized expectations of marriage are well understood and deliberately chosen by those who marry). Of course, there is always room for

spouses may fight intensely about the consequences of those obligations, they rarely question their legitimacy.<sup>287</sup> That is because the act of entering marriage—most commonly accomplished through the execution of formalities like the performance of a marriage ceremony and signing of a marriage license—invokes a powerful set of social norms that substitute for the myriad legal details.<sup>288</sup>

The social norms around the institution of marriage minimize concerns about whether the act of choosing to marry reflects the subjective desires of the spouses to perform the basic duties of marriage, aligning the value of will with the function of authorization. As Elizabeth Scott has observed, marriage is accompanied by commitment norms that define marriage as a “lasting, cooperative, [and] intimate relationship,” with obligations running to spouses and children.<sup>289</sup> Much like in the contracts context, agreement to the “key terms” of marriage justifies the imposition of detailed rules governing property ownership, duties of support, and the various rules that will govern if the spouses divorce.<sup>290</sup>

In contrast, nonmarriage lacks norms that align behavior and law.<sup>291</sup> Therefore, it is nearly impossible to point to one act as justifying the imposition of the panoply of legal obligations that accompany marriage. With apologies to Leo Tolstoy, marriages are

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improvement. Professor Teri Dobbins Baxter has argued that states must do more to make marrying couples aware of the property rights that will govern their relationship and provide couples the opportunity to change those rights at the point they sign their marriage license. *See* Teri Dobbins Baxter, *Marriage on Our Own Terms*, 41 N.Y.U. REV. L. & SOC. CHANGE 1, 38 (2017).

287. The small number of cases in which spouses raise fraudulent inducement claims, as compared to the number of divorce cases within the same jurisdiction, supports this argument. A quick search in January 2018 of West’s Key Number Digest reveals sixty-nine California headnotes raising fraud as grounds for annulment (West Key Number 253, k321). In comparison, there were 4,998 California headnotes regarding community property obligations (West Key Number 253V, k751–k1070).

288. *See* Matsumura, *supra* note 10, at 2048, 2051; *see also* Carbone & Cahn, *supra* note 21, at 93–95.

289. *See* Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1907–12 (2000); *see also* Scott & Scott, *supra* note 44, at 1251 (observing “the relative harmony between [spouses’] preferences and the societal norms and legal default rules that form the common understandings about marital behavior”); Robin Fretwell Wilson, “Getting the Government out of Marriage” *Post Obergefell: The Ill-Considered Consequences of Transforming the State’s Relationship to Marriage*, 2016 U. ILL. L. REV. 1445, 1476–77 (asserting that doing away with civil marriage would risk disrupting the positive norms that marriage has retained post-*Obergefell*).

290. This is not to say that marital behavior necessarily conforms to these norms. *See* Case, *supra* note 173, at 1765.

291. *See supra* Part I (describing the tremendous variation in how nonmarital relationships are structured).

(theoretically) all alike; every nonmarriage is nonmarital in its own way.<sup>292</sup>

Moreover, although the choice to marry suffices as consent to the various rights and obligations of marriage, the bundling of those rights and obligations is not necessarily optimal. Scholars have pointed out that marriage is bursting at the seams.<sup>293</sup> For example, Kerry Abrams has demonstrated that the use of marriage to award various public benefits has resulted in concerns that people will use marriage instrumentally, which has in turn promoted the proliferation of doctrines to detect marriage fraud.<sup>294</sup> If, in light of social trends and legal developments like no-fault divorce, marriage is no longer permanent, then it will raise the possibility of fraud and not always be the best vehicle for awarding benefits based on support or dependency.<sup>295</sup> Additionally, many of the laws that classify on the basis of marriage promote family structures based on gender norms that some may find offensive and that, at any rate, no longer describe the way that a majority of households operate.<sup>296</sup> Thus, regardless of

292. See LEO TOLSTOY, ANNA KARENINA 3 (Leonard J. Kent & Nina Berberova eds., Constance Garnett trans., Modern Library 2000) (1877) (“Happy families are all alike; every unhappy family is unhappy in its own way.”).

293. See Kerry Abrams, *Marriage Fraud*, 100 CALIF. L. REV. 1, 6 (2012) (“Simply put, we are asking marriage to do too much.”); Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL’Y & L. 307, 323–24 (2004) (challenging the perception of marriage as a “benevolent monolith” and proposing to disaggregate its functions); cf. James Herbie DiFonzo, *Unbundling Marriage*, 32 HOFSTRA L. REV. 31, 32 (2003) (predicting that “family law is moving from a conception of marriage as an institution with a uniform meaning to a more variegated view that assesses marriage in terms of discrete groupings, or ‘bundles,’ of rights and responsibilities”).

294. Abrams, *supra* note 293, *passim*.

295. See *id.* at 54–57.

296. See *id.* at 58–60. Consent historically operated to justify the imposition of all the legal rules comprising the marital status. See NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 11 (2002) (“The man and woman consented to marry, but public authorities set the terms of the marriage. . . . Once the union was formed, its obligations were fixed in common law.”). These legal rules systematically disadvantaged wives. See *id.* at 11–12. Rules like the marital rape exception, which made husbands legally exempt from raping their wives, see Jill Elaine Hasday, *Consent and Contest: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1375 (2000), were justified by the consensual nature of marriage. See *id.* at 1386–87. That is, the wife’s consent to sex was “conclusively inferred . . . from the couple’s initial agreement to marry.” *Id.* at 1387. Even setting aside the substantive unfairness of these rules, this example illustrates the dangers of inferring broad consent to every legal incident of marriage from the choice to marry. Where the rights of marriage exist at cross-purposes, there is a danger of offering marriage as a take-it-or-leave-it whole. Moreover, as scholars have observed in other contexts, there are likely cognitive limits on the amount of information to which one can consent in a single act. See generally Daniel Kahneman, *Maps of Bounded Rationality: Psychology for Behavioral Economics*, 93 AM. ECON. REV. 1449 (2003) (exploring the limited capacity of persons to process information); see, e.g., Omri Ben-Shahar & Carl E. Schneider, *The*



whether one would prefer to unbundle marriage or to leave it untouched, there are good reasons to analyze the functions separately outside of marriage.

Unmarried partners may make commitments piecemeal rather than wholesale. It seems unlikely based on the way most relationships unfold that people contemplate their commitments as a single, take-it-or-leave-it whole. Commitments are often incremental—e.g., deciding first to split the rent rather than agreeing to divide all property during the relationship as if married<sup>297</sup>—and unfold over time. Further, the commitments may cover distinct types of performances regarding, for example, childcare, domestic duties, or finances that the partners understand to be separate, and that can be completed independently of each other. Scholars studying lower income cohabiting couples report that unmarried couples with children will often live together for the benefit of their child and at the same time eschew financial entanglements.<sup>298</sup> These living situations demonstrate that childrearing and finances are not inherently linked: one can consent to one set of obligations without necessarily consenting to the other.

There are costs and benefits to treating a complex transaction as a series of separate agreements or one entire agreement. In some cases, the various commitments are part of a package deal to which the parties arguably would not have agreed if separate.<sup>299</sup> But recognizing separate agreements allows the parties to receive the benefit of bargains regarding completed performances even if some

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*Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 687 (2011) (discussing information overload within the context of consumer disclosure requirements); Karen Bradshaw Schulz, *Information Flooding*, 48 IND. L. REV. 755, 762 (2015) (analyzing the effects of information overload on consumer decision making). Whatever lessons these arguments provide when considering consent to marital obligations, they only strengthen the proposal to disaggregate the rights and obligations when determining consent to nonmarital regulation.

297. The latter sharing arrangement was the alleged agreement in *Marvin v. Marvin*, 557 P.2d 106, 110 (Cal. 1976) (en banc).

298. See Carbone & Cahn, *supra* note 21, at 96–97; see also EDIN & KEFALAS, *supra* note 97, at 106–09 (describing a couple jointly raising a child while avoiding financial commitments).

299. See, e.g., *Rudman v. Cowles Commc'ns, Inc.*, 280 N.E.2d 867, 873 (N.Y. 1972) (involving the attempt by the seller of a small business to a larger company to rescind the sale based on the breach of his employment agreement by that company). Leases were once treated as independent covenants, such that if the tenant failed to pay rent, the landlord could sue for the unpaid amounts yet would not be excused from providing possession. Those covenants are now treated as interdependent. See Henry E. Smith, *Modularity in Contracts: Boilerplate and Information Flow*, 104 MICH. L. REV. 1175, 1189 (2006).

aspects of the transaction fall through. Particularly in complex relationships, a modular approach—in which a complex system is broken down into pieces that perform separate functions relatively independently<sup>300</sup>—provides several benefits. As Henry Smith has pointed out, “modularity allows a system to manage uncertainty; because each module can function and develop in relative isolation, these processes can occur without the need to resolve uncertainty elsewhere in the system.”<sup>301</sup> The human mind is better able to grasp a complex phenomenon when the phenomenon is modular.<sup>302</sup>

Modularity provides a useful metaphor for informal relationships. Informal relationships are complex because they serve varied functions, involve a range of conduct, and depend on the subjective and changing views of at least two individuals, each with their own interests. At any given moment, the partners may disagree about the significance or “meaning” of their relationship, and the law might likewise struggle to categorize it. Modules, like financial arrangements or childcare schedules, are easier to identify. They reduce information and negotiation costs by allowing partners to identify and discuss discrete functions without having to reassess the entire relationship.<sup>303</sup>

Once we entertain the possibility of disaggregation, the challenge then becomes correctly determining whether the different commitments should rise and fall together or whether they can be teased apart. Again, contract doctrine provides some useful tools to answer that question.

It is common for parties to enter multiple separate agreements rather than a single, compound transaction. A manufacturer like Foxconn may enter into an agreement with a seller like Apple to provide different models of iPhones and iPads over the course of many years, each product with its own prices and specifications.<sup>304</sup> In a merger or acquisition, the buyer and target will execute an acquisition

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300. Smith, *supra* note 299, at 1176 (“[M]odularity is a device to deal with complexity by decomposing a complex system into pieces (modules), in which communications (or other interdependencies) are intense within the module but sparse and standardized across modules.”).

301. *Id.* at 1177.

302. *See id.* at 1179.

303. The effect of modularization on reducing information costs and streamlining negotiation has been amply explored in the contract literature. *See, e.g.*, Joshua Fairfield, *The Cost of Consent: Optimal Standardization in the Law of Contract*, 58 EMORY L.J. 1401, 1176–77 (2009); Smith, *supra* note 299, at 1177.

304. *See, e.g.*, David Barboza, *How China Built ‘iPhone City’ with Billions in Perks for Apple’s Partner*, N.Y. TIMES (Dec. 29, 2016), <https://www.nytimes.com/2016/12/29/technology/apple-iphone-china-foxconn.html> [<https://perma.cc/S2VG-CMF6> (dark archive)].

agreement—for instance an asset purchase agreement, stock purchase agreement, or merger agreement—but may also execute a variety of stand-alone agreements covering, for instance, confidentiality, the transfer of intellectual property, or the future employment of key individuals.<sup>305</sup> A professor with an annual contract may accept additional compensation from her home institution to create and teach an online course.<sup>306</sup>

Courts have come up with tests to determine whether commitments form part of the same agreement such that they rise or fall together. Whether the agreement is entire or separate turns “primarily on the intention of the parties, the subject matter of the agreement, and the conduct of the parties.”<sup>307</sup> The touchstone of the inquiry is whether the parties intended a single assent to an entire transaction, or a separate assent to each of several things.<sup>308</sup> In answering that question, courts have examined the overlap between the “nature and purpose” of the agreements; whether each agreement is supported by separate consideration; and whether the obligations triggered by the agreements will be discharged by the same or different occurrences.<sup>309</sup> Applying this test, the United States Court of Appeals for the Eleventh Circuit held that a provision in which a seller agreed to transfer real property to a buyer for a specified price, and a provision in which the seller agreed to pay the broker a commission, were two separate agreements even though set forth in a single document.<sup>310</sup> One agreement was for the sale of real property; the other was for an employment contract.<sup>311</sup> The two provisions rested on different consideration: the exchange of money for property

305. See Cathy Hwang, *Unbundled Bargains: Multi-Agreement Dealmaking in Complex Mergers and Acquisitions*, 164 U. PA. L. REV. 1403, 1411–16 (2016).

306. See, e.g., RUTGERS UNIV., DRAFT LETTER AGREEMENT FOR ONLINE COURSE WITH FULL-TIME FACULTY (2012), <http://senate.rutgers.edu/OnlineCourseAgreementLetterDraftRePearson.pdf> [https://perma.cc/TQP2-ADNR].

307. *Stanley Works v. Wichita Falls Indep. Sch. Dist.*, 366 S.W.3d 816, 827 (Tex. Ct. App. 2012).

308. See *id.*; see also *Rudman v. Cowles Commc'ns, Inc.*, 280 N.E.2d 867, 873 (N.Y. 1972). In cases involving written agreements, the form of the agreements—whether memorialized in a single or different documents—can serve as evidence of intent, see *Schron v. Grunstein*, 917 N.Y.S.2d 820, 824 (N.Y. Sup. Ct. 2011), although courts have concluded that a single written document actually contained multiple separate agreements, see, e.g., *In re Gardinier, Inc.*, 831 F.2d 974, 976 (11th Cir. 1987).

309. *In re Gardinier*, 831 F.2d at 976; see also *Wood v. Unified Gov't of Athens-Clarke Cty.*, 818 F.3d 1244, 1247 (11th Cir. 2016) (quoting *Piedmont Life Ins. Co. v. Bell*, 116 S.E.2d 63, 72 (Ga. Ct. App. 1961)) (noting that under Georgia law, a contract is separate if “the quantity, service, or thing is to be accepted by separate performances”).

310. See *In re Gardinier*, 831 F.2d at 976.

311. *Id.*

in one case, and different money for services in the second.<sup>312</sup> These types of inquiries could easily be adapted to the intimate context. Agreements about childcare responsibilities would be presumptively distinct from decisions about the pooling of assets unless the facts suggested that the partners saw those decisions as related, for example, if one partner reduced his work responsibilities and shortly thereafter began to perform a greater share of childcare.

Disaggregation questions the relatedness of different obligations, but it does not presuppose that the parties intended commitments to be separate. In *Hewitt v. Hewitt*,<sup>313</sup> for example, a woman lived with a man for fifteen years in a marriage-like relationship, raising the couple's three children and devoting her efforts to enhancing his professional standing in reliance on his promise to share his earnings and property with her.<sup>314</sup> Under her version of events, her decision to support the couple's children was part of an arrangement that included the pooling of income and property.<sup>315</sup> She would not have entered the relationship at the outset without all of these functions being linked. A court could consider that evidence in determining the scope of legal obligations to which the parties consented through their conduct.

In sum, when seeking to impose legal obligations on people in nonmarital relationships, the law can and should see those obligations as something less than a marriage-like whole. With those obligations more precisely identified, courts can inquire whether the parties objectively manifested their desire to perform the key aspects of those obligations.

#### IV. APPLYING THE CONSENT FRAMEWORK

Consent—in particular, the two-pronged approach set forth in the previous Part—offers a superior justificatory rationale for regulating intimate relationships. This Part demonstrates how consent theory can both improve the assignment of *inter se* obligations and ground the extension of state-provided rights and obligations based on characteristics of the relationship.

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312. *Id.*

313. 394 N.E.2d 1204 (Ill. 1979).

314. *Id.* at 1205.

315. *Id.* The Illinois Supreme Court ultimately held that the woman failed to state a claim for relief because of a public policy against the recognition of contracts between cohabitants. *Id.* at 1211. This rule, which is at odds with the approach of a majority of states, was recently affirmed in *Blumenthal v. Brewer*, 69 N.E.3d 834, 849–60 (Ill. 2016).

*A. Reforming Current Approaches*

The most immediate payoff of orienting regulation around consent is in reforming existing approaches to the resolution of *inter se* disputes between partners or their estates at the end of the relationship. These claims arise when partners have joined their lives in certain respects and seek the law's assistance to help disentangle their respective rights. Because this context often requires the law to impose legal obligations over the parties' disagreement, consent is critical.

Returning to a hypothetical from the Introduction of the Article, recall Anna and Ben, who have lived together for approximately a decade and who have six-figure salaries each (although Anna's is higher). Assume that the couple also jointly purchased a home, contributing slightly different amounts to the down payment but paying the mortgage equally. Regarding that home purchase, Anna spent more time reviewing legal documents while Ben spent more time updating and maintaining the property. Now imagine that Anna and Ben break up.

Under an implied contract approach, the scope of relief would depend on the promises alleged by the parties.<sup>316</sup> Ben, as the lower earning partner, might bring a variety of claims. He could seek equitable division of the couple's income during the course of the relationship under the theory that the couple agreed that they would own everything fifty-fifty. He could instead assert a claim for an equal division of the couple's shared real property. Or he could claim he is owed remuneration for his nonfinancial contributions.

The first, and broadest, claim is similar to the one brought in *Marvin* and has been repeatedly rejected by the courts.<sup>317</sup> Ben could argue that the fact that he covered the couple's living expenses when Anna was in law school evinces the couple's intent to create marital-like property rights, but their tendency to keep their finances separate would weigh against that evidence. The second claim for equal division of the property might be belied by their unequal contributions. And although courts increasingly rely on the doctrine of unjust enrichment to reimburse partners' financial contributions,<sup>318</sup>

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316. See *Marvin v. Marvin*, 557 P.2d 106, 118 n.16 (Cal. 1976) (en banc) (noting that the difference between an express and implied contract is the absence of "direct words of the parties" and a focus instead on "acts and conduct" under the circumstances).

317. See Antognini, *supra* note 20, at 30.

318. See Carbone & Cahn, *supra* note 21, at 64–68 (providing an overview of cases examining the theory of unjust enrichment in the context of unmarried couples); Candace Saari Kovacic-Fleischer, *Cohabitation and the Restatement (Third) of Restitution & Unjust*

courts struggle to value nonfinancial contributions and usually reject or discount them.<sup>319</sup> Regarding the third claim, the unjust enrichment remedy would quantify and reimburse their respective financial contributions but might not reach much further.

The model of consent advanced in this Article suggests refinements to the implied contract approach. First, except in exceptional circumstances, parties should avoid bringing broad claims about intending to create quasi-marriages. The consent lens explains why claims analogizing to marriage are less likely to prevail than the ones alleging concrete exchanges supported by the facts.<sup>320</sup> Disaggregated claims would make courts more comfortable about granting relief and would help to develop a body of case law regarding the types of conduct typically giving rise to more limited obligations. Second, and relatedly, courts should be more receptive to arguments alleging these discrete legal consequences. In the absence of express promises, the critical inquiry should be whether the facts suggest that the parties consented to that legal consequence; this represents a shift of focus from a futile inquiry into subjective intent to whether the state action is justified. For example, although it would be difficult to prove agreement by Anna and Ben to own their real property fifty-fifty given their unequal financial contributions, a court should be able to consider whether the circumstances indicate consent by Anna to an equal division of the property based on Ben's nonfinancial contributions. Statements through the years about the equality of their contributions, or suggesting the partners understood that Ben was making an in-kind contribution, could suffice as proof.

Focusing on consent also suggests reforms for jurisdictions pursuing status approaches. Under the current status approaches, a court will analogize the relationship to marriage, either by looking at factors that suggest a marriage-like relationship<sup>321</sup> or by presuming

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*Enrichment*, 68 WASH. & LEE L. REV. 1407, 1419 (2011) (asserting that “many cases decided in the later part of the twentieth century and the first decade of the twenty-first century have allowed one cohabitant from a terminated relationship to recover from the other” under an unjust enrichment theory).

319. See Antognini, *supra* note 20, at 43–46 (concluding that courts often consider nonfinancial contributions in nonmarital relationships as “less valuable than financial contributions”).

320. See Carbone & Cahn, *supra* note 21, at 67 (explaining that “states continue to vary in their willingness to address claims arising from nonmarital cohabitation,” but suggesting that courts are showing a greater willingness to untangle ownership of assets of nonmarried couples).

321. Under the Washington meretricious relationship line of cases, the court assesses whether the relationship was “marital-like” based on “continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint

that their lengthy cohabitation means they are domestic partners.<sup>322</sup> Depending on whether their relationship is sufficiently marriage-like, either all the income and property acquired during their relationship, as well as their liabilities, will be subject to equitable distribution, or none of it will. A presumption based on cohabitation would likely favor equitable distribution in this context: the law would divide Anna's surplus earnings with Ben and might even subject her to obligations of support.<sup>323</sup>

The lens of consent reveals the shortcomings of the status approach. The parties' acts make it unlikely that Anna intended to divide her earnings over the course of the relationship, and especially unlikely that she foresaw the relationship giving rise to an ongoing duty of support. A status modeled on marriage, though, provides two options: recognize these rights in full or not at all. Neither outcome aligns with the ways that Anna and Ben lived their lives. The legal consequences stray too far from the parties' subjective preferences, threatening their autonomy. Applying the principles of consent articulated in the previous Part, states interested in pursuing a status approach must recognize the existence of disaggregated rights and obligations. This weighs in favor of providing a plurality of statuses or a range of legal consequences stemming from a determination that an informal partnership exists to address the diversity of nonmarital relationships.<sup>324</sup>

The correctness of this solution becomes more obvious when thinking about another hypothetical couple from the Introduction,

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projects, and the intent of the parties." *Connell v. Francisco*, 898 P.2d 831, 834 (Wash. 1995) (en banc) (citing *In re Marriage of Lindsey*, 678 P.2d 328, 331 (Wash. 1984) (en banc)); see, e.g., *Latham v. Hennessey*, 554 P.2d 1057, 1059 (Wash. 1976) (en banc); *In re Marriage of DeHollander*, 770 P.2d 638, 641 (Wash. Ct. App. 1989). If the relationship is "marital-like," the court will identify the property acquired during the relationship and make an equitable division. *Connell*, 898 P.2d at 835–36.

322. Under the ALI approach, Anna and Ben's lengthy cohabitation would trigger a presumption that the couple shared a life together. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03(3) (AM. LAW INST. 2002). If the party contesting the relationship failed to rebut the presumption, the same rules governing division of marital property would apply, see § 6.05, and Ben, as the lower earning partner, would potentially be entitled to compensatory payments (spousal support), see § 6.06.

323. See § 5.04 (providing for compensatory payments for the loss of "marital" living standard depending on the income discrepancy and duration of the relationship).

324. Clare Chambers has come to a similar conclusion, although she has not focused much attention on how the state would identify to couples for whom the statuses would apply—under my analysis, consent would provide the answer. See Clare Chambers, *The Limitations of Contract*, in AFTER MARRIAGE: RETHINKING MARITAL RELATIONSHIPS 51, 74–77 (Elizabeth Brake ed., 2016).

Camille and David. Because they live under the same roof and share a child, Camille and David would almost certainly be treated under the ALI Principles as domestic partners, meaning they would be subject to marital property rules upon the breakdown of their relationship.<sup>325</sup> Yet Camille, like the working-class individuals on whom her character is based,<sup>326</sup> likely took steps to avoid financial entanglements because she did not want to entwine her fate with David's. She may have kept the lease in her name and her earnings in a separate checking account. Moreover, although David contributed some money to buy things for their child and may even have purchased things for the household from time to time, Camille did not come to personally depend on his financial contributions. To subject them to a monolithic status that would redistribute the couple's property would likely contravene their wishes and expose parties like Camille to disabling legal consequences. That said, their conduct could justify the creation of co-parenting obligations.<sup>327</sup> Consent explains why the law could recognize the relationship for some purposes but not others.<sup>328</sup>

#### B. *Recognizing Rights and Obligations from the State*

Although the bulk of judicial attention has focused on the resolution of *inter se* disputes, marriage comes with rights and obligations designed to nourish the relationship, support the family, and advance other objectives like privatizing dependency.<sup>329</sup> Unlike in the *inter se* context, nonmarital partners may actually agree about the nature of their relationship—i.e., that it involves commitment, intimacy, or mutual support. But with rare exceptions, states currently award these rights based on formal status, granting rights to those

325. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03(2) (declaring persons domestic partners when they have maintained a common household with their common child for a continuous period of time set by state rule).

326. See *supra* text accompanying note 97; see *supra* Section I.A.3.

327. See, e.g., Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 225–31 (2015) (proposing broader co-parenting rights for nonmarital parents).

328. June Carbone and Naomi Cahn have criticized the tendency of the law to treat nonmarital couples inconsistently with regard to parental and property rights. See Carbone & Cahn, *supra* note 21, at 58–59 (advocating for a “unified approach” to both parental and property rights in the nonmarriage context). This Article's focus on consent could explain and justify those inconsistent outcomes.

329. See, e.g., Courtney G. Joslin, *Family Support and Supporting Families*, 68 VAND. L. REV. EN BANC 153, 176–77 (2015); Laura A. Rosenbury, *Federal Visions of Private Family Support*, 67 VAND. L. REV. 1835, 1837 (2014).



who have married or have registered for alternate statuses, like domestic partnerships, and withholding rights from those who have not.<sup>330</sup> Courts have upheld the state's prerogative to associate certain rights and benefits with marriage without having to offer those rights to people in informal relationships.<sup>331</sup>

There are justifications for this differential treatment beyond the promotion of marriage or disapproval of nonmarital relationships.<sup>332</sup> A state might worry about partners fraudulently claiming benefits and then denying obligations when it suits them.<sup>333</sup> Adjudicating eligibility would also impose burdens on the courts or government agencies.<sup>334</sup> These concerns are serious and deserve deep treatment beyond the scope this Article provides. But both point to a more fundamental problem to which consent is relevant: What are the criteria for awarding the rights and obligations, and how can we tell if they have been satisfied? Put another way, how do we identify those partners to whom rights should flow?

Scholars advocating for the extension of rights such as workers' compensation, Social Security, inheritance, and favorable tax treatment to partners in informal relationships have not satisfactorily

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330. See, e.g., *Holguin v. Flores*, 18 Cal. Rptr. 3d 749, 756, 758–60 (Cal. Ct. App. 2004) (upholding the denial of standing to sue for wrongful death because the plaintiff was not married and reasoning that the state had adequate reasons to distinguish between married and unmarried people).

331. See *id.*; see also Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2083–84 (2005) (arguing that the right to marriage is merely a right of access to whatever panoply of benefits a state decides to associate with the status). *But see* Joslin, *supra* note 21, at 481–87 (arguing that the denial of certain rights, like some ability to create shared interests in property, could violate a right to nonmarriage).

332. For examples of these traditional justifications, see *Charron v. Amaral*, 889 N.E.2d 946, 949 (Mass. 2008) (quoting *Feliciano v. Rosemar Silver Co.*, 514 N.E.2d 1095, 1096 (Mass. 1987)); *Elden v. Sheldon*, 758 P.2d 582, 586 (Cal. 1988); Blumberg, *supra* note 29, at 1144–46 (claiming that the marital requirement in the Social Security context was motivated by moral considerations). Numerous scholars have questioned whether developments in the law have undercut these morality-based arguments.

333. See *Abrams*, *supra* note 293, at 6 (“In short, because marriage became easier to get in and out of, and because there were more benefits attached to it, people had greater incentives to use it instrumentally.”); see also *PNC Bank Corp. v. Workers’ Comp. Appeal Bd. (Stamos)*, 831 A.2d 1269, 1281 (Pa. Commw. Ct. 2003).

334. See *Elden*, 758 P.2d at 587 (refusing to extend standing to sue for loss of consortium to cohabitants in part because “[i]t would require a court to inquire into the relationship of the partners”). Some scholars who advocate for the expansion of rights to people in informal relationships do not expect the burden to be too overwhelming. See, e.g., Bowman, *supra* note 105, at 32, 32 n.118. The existence of a burden on the courts does not make the burden unwarranted or illegitimate; it burdens the courts to perform factfinding in run-of-the-mill breach of contract actions, but such actions are still permitted.

answered these questions.<sup>335</sup> To the extent that they propose entry requirements for these various rights at all, these scholars tend to settle on cohabitation for a predetermined time period.<sup>336</sup> The problem is that cohabitation is a muddy indicator of the partners' subjective views about the relationship, as discussed above.<sup>337</sup> The usefulness of cohabitation further decreases if duration matters: people may gradually consolidate two separate living situations, making it unclear when they begin sharing the same household.<sup>338</sup> The reliance on cohabitation stems from the rejection of consent. But that rejection has led away from productive answers to the questions posed in the previous paragraph. To wit: in the most detailed extant analysis of the relationship between objective conduct and state-provided benefits like Social Security, Grace Blumberg has argued that the purpose of those benefits is to "ensure that certain persons likely to have been dependent on the worker are supported by an earmarked fund."<sup>339</sup> But rather than looking to signs of dependency or economic integration, Blumberg has proposed that the government look to cohabitation<sup>340</sup> which, as discussed in Part I.A, could be accompanied by very little financial dependency.

By requiring the state to articulate a relationship between conduct and different state-provided benefits that the state seeks to target, consent provides an improved framework for solving the

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335. See, e.g., POLIKOFF, *supra* note 21, at 146–207 (arguing to extend to nontraditional couples rights relating to health insurance, medical decision making, hospital visitation, protected medical leave, Social Security, workers' compensation—and, upon death or dissolution—financial and custody rights); Blumberg, *supra* note 29, at 1137–59. Allowing people to formally opt into statuses that provide these rights would be a straightforward solution. See, e.g., Jessica R. Feinberg, *The Survival of Nonmarital Relationship Statuses in the Same-Sex Marriage Era: A Proposal*, 87 TEMP. L. REV. 45, 64–70 (2014) (proposing the creation of official nonmarital statuses at the state level for which couples could sign up). The problem is that the solution would not reach many, if not most, people in informal relationships. See Bowman, *supra* note 105, at 32.

336. See *supra* note 42.

337. See *supra* Section I.A. As a case in point, Professor Bowman has recently proposed extending certain rights to people in LAT relationships because of the essential qualities of many of those relationships. See Bowman, *supra* note 105, at 33. But her proposal has not spelled out how the state actors who administer those rights would identify which LAT couples qualify. See *id.*

338. See, e.g., Waggoner, *supra* note 21, at 240 (proposing that courts should consider the duration of a cohabiting relationship but failing to set forth a specific timeframe for when a couple becomes de-facto-married).

339. Blumberg, *supra* note 29, at 1147.

340. *Id.* at 1148 ("I recommend, therefore, that an unmarried co-habitant who can demonstrate that she shares or shared a common household with an insured worker be entitled to Social Security derivative benefits as though she were a current, former, or surviving spouse of the insured worker.").

identification problem. The remainder of this Section sketches a vision of how consent can ground the extension of rights to people in informal relationships, focusing in particular on the challenges of identification and norm development. Determining whether a person has consented to a legal obligation involves determining the scope of the obligation and the relevant justificatory act.

Laws that classify based on relationship status should be based upon rational distinctions between single individuals and people in relationships.<sup>341</sup> In other words, there should be some articulable reason or justification for the classification, whether it involves providing Social Security survivor benefits or the joint filing of an income tax return. To be sure, lawmakers seldom articulate official justifications for their classifications, and, even when they do, those justifications may be so broad that they are of limited use.<sup>342</sup> But the law does not speak clearly about the reasons it classifies based on marriage because it has rarely been called on to do so. Moreover, when necessary, scholars and courts have demonstrated that it is possible to analyze statutory schemes and identify the motivating considerations.<sup>343</sup> For example, the federal government will consider informal relationships when determining eligibility for Supplemental Security Income (“SSI”) benefits.<sup>344</sup> The Social Security Administration will treat a couple as married if they “live together in the same household” and “lead people to believe that [they] are husband and wife.”<sup>345</sup> Courts have found that the SSI regulation is rooted in the assumption that two people living together in a marital-like relationship will provide financial support to the other: that they will pool their finances.<sup>346</sup> Workers’ compensation insurance makes

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341. See Krause, *supra* note 43, at 276, 278 (arguing that under a “pragmatic, rational approach,” the law should “ask what social functions of a particular association justify extending what social benefits and privileges,” such that “[m]arried and unmarried couples who are in the same *factual* positions [would] be treated alike.”).

342. See, e.g., 29 U.S.C. § 2601(b)(1) (2012) (stating that one purpose of the Family & Medical Leave Act is “to promote the stability and economic security of families”).

343. See generally Blumberg, *supra* note 29, at 1126 (examining laws governing “benefits and rights that normally accrue as incidents of marriage”); Stephen D. Sugarman, *What Is a “Family”? Conflicting Messages from our Public Programs*, 42 FAM. L.Q. 231 (2008) (analyzing various government programs like food stamps and public housing and identifying the purposes of treating individuals as part of a recognized family unit).

344. See Aloni, *supra* note 6, at 1291–94 (explaining that “parties do not have to be legally married to be considered spouses for the purposes of SSI eligibility—they only need to hold themselves out as a married couple”).

345. See 20 C.F.R. § 416.1806(a)(3) (2017).

346. The Court of Appeals for the Seventh Circuit upheld lower benefits for cohabitant applicants because “two people living together can live more economically than they

employers responsible for workers' actual dependents—those who receive significant financial support from the insured or are financially interdependent.<sup>347</sup> These characteristics (e.g., pooling finances or providing financial support) should set the parameters of the legal treatment at issue; they should define the legal obligation.

Although people in nonmarital relationships often fail (or choose not) to formalize their relationships, they frequently perform acts that the state could deem relevant to the legal obligations just described. Sometimes, they identify themselves by affirmatively seeking a benefit. Arizona, for example, once allowed state employees to claim health insurance benefits for a nonmarital partner with whom the employee had cohabited for at least a year and created financial interdependency.<sup>348</sup> To obtain coverage, the employee had to submit a “Qualified Domestic Partner Affidavit” including three of the following forms of proof:

- i. Having a joint mortgage, joint property tax identification, or joint tenancy on a residential lease;
- ii. Holding one or more credit or bank accounts jointly, such as a checking account, in both names;
- iii. Assuming joint liabilities;
- iv. Having joint ownership of significant property, such as real estate, a vehicle, or a boat;
- v. Naming the partner as beneficiary on the employee's life insurance, under the employee's will, or employee's retirement annuities and being named by the partner as beneficiary of the partner's life insurance, under the partner's will, or the partner's retirement annuities; and
- vi. Each agreeing in writing to assume financial responsibility for the welfare of the other, such as durable power of attorney; or
- vii. Other proof of financial interdependence as approved by the Director.<sup>349</sup>

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would if each lived alone.” *Smith v. Shalala*, 5 F.3d 235, 239 (7th Cir. 1993) (quoting H.R. REP. NO. 92-231, at 150, *as reprinted in* 1972 U.S.C.C.A.N. 4989, 5136). Embedded in this statement is the assumption that the partners benefit from economies of scale—that they integrate their finances. Another justification appears to be fraud prevention. *See Weinberger v. Salfi*, 422 U.S. 749, 777 (1975) (noting “[t]he danger of persons entering a marriage relationship not to enjoy its traditional benefits, but instead to enable one spouse to claim benefits upon the anticipated early death of the wage earner”).

347. *See* Blumberg, *supra* note 29, at 1140–44.

348. *See* *Collins v. Brewer*, 727 F. Supp. 2d 797, 799–800 (D. Ariz. 2010), *aff'd*, *Diaz v. Brewer*, 656 F.3d 1008 (9th Cir. 2011) (setting forth criteria that must be satisfied in order to obtain health coverage).

349. *Id.* at 800.

The Arizona experience demonstrates that nonmarital partners will identify themselves to claim a discrete benefit and may do so in a way that reveals characteristics that the law values—in this case, financial interdependency. Were it available, partners would likely claim loss of consortium for injuries suffered by the other<sup>350</sup> or apply for benefits like Fair Housing Act loans.<sup>351</sup> In doing so, they would make representations about functions their relationship performs: that it involves support, financial partnership, stability, etc.

On the flip side, partners make representations about the absence of a relationship to claim a benefit or avoid an obligation. These instances, too, provide information about characteristics of the relationship. For example, the federal government will consider informal relationships when determining eligibility for SSI benefits or student loans.<sup>352</sup> When applying for these benefits, partners may proceed as if single, omitting any mention of their relationships. They may also object to determinations that their relationships should affect their entitlement to benefits, in the process revealing and denying critical features.<sup>353</sup>

If the couple represents that their relationship qualifies for a right based on a certain characteristic, they often will have consented to the imposition of obligations based on that characteristic. Returning to an opening hypothetical, if Camille and David were to open a joint checking account and name each other as beneficiaries in their wills and then apply for insurance coverage for David from Camille's employer,<sup>354</sup> those acts would be strong evidence of pooling finances that the Social Security Administration could take into account if one of them applied for SSI benefits. Conversely, if the state is willing to impose a disability based on that function—i.e., mutual financial support—the parties should have a strong claim to rights that are awarded based on that same function. Equality

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350. See, e.g., *Fitzsimmons v. Mini Coach of Bos., Inc.*, 799 N.E.2d 1256, 1256–57 (Mass. 2003) (involving the attempt by a cohabitant in a ten-year relationship to recover for injuries sustained by her partner).

351. See *Let FHA Loans Help You*, U.S. DEP'T HOUSING & URB. DEV., <https://www.hud.gov/buying/loans> [<https://perma.cc/UK9Q-FMWX>] (explaining FHA loans are insured by Federal Housing Administration, enabling lenders to “offer [prospective homeowners] a better deal”).

352. See Aloni, *supra* note 6, at 1294–95.

353. See, e.g., *Dutko v. Colvin*, No. 15 CV-10698, 2015 WL 6750792, at \*1 (E.D. Mich. Nov. 5, 2015) (revealing that the couple had cohabited for over twenty years and that the applicant received health insurance coverage through her “boyfriend’s” employer and purchased a house together).

354. Assuming, of course, that such coverage were available.

presupposes that cases that are similar in one normatively relative respect should be treated the same regarding that respect.<sup>355</sup>

Admittedly, these functions are too broad to be of immediate use. For instance, the denial of a student loan to a person in an informal relationship based on mutual financial dependency and support does not point to which of the rights based on mutual financial dependency and support the couple may be entitled (like the Family Medical Leave Act, Social Security survivors benefits, or state income tax credits). But as courts, lawmakers, and agencies consider these claims, they would have the opportunity to define with more particularity how rights and obligations relate and to generate norms about what types of acts lead to the imposition of what types of legal obligations.

This Section shows that the same consent framework that should guide the determination of *inter se* obligations between nonmarital partners provides a new way of thinking about a heretofore vexing question: when to extend state-provided rights and obligations to people in informal relationships. An added benefit of this approach is that it not only enables a more focused inquiry about legal obligations but minimizes the consequences of error. The trouble with all-or-nothing status approaches is that the determination that a couple is in a marriage-like relationship imposes the full panoply of spousal property and support obligations.<sup>356</sup> When one partner disputes the creation of legal obligations, the consequence of an adverse determination is significant. If the question is more particularized—e.g., whether the couple agreed to share equally in a specific piece of property or intertwine their finances closely enough that the law should recognize the standing of one to sue for injuries to the other—the consequences do not extend as far. A consent framework promises to create norms around informal relationships while simultaneously minimizing the potential for significant infringements on individual rights.

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355. Stefan Gosepath, *Equality*, STAN. ENCYCLOPEDIA PHIL. § 2.1 (June 27, 2007), <https://plato.stanford.edu/entries/equality/> [<https://perma.cc/8EKX-VWU7> (dark archive)]; see also Garrison, *Is Consent Necessary?*, *supra* note 25, at 820 (arguing against the departure from the principle of symmetry in the law of family obligation without good cause).

356. As discussed in Section I.B., the Washington and ALI approaches impose the *inter se* obligations of marriage. Some proposals go further, treating qualifying couples as married for all purposes. See, e.g., BOWMAN, *supra* note 13, at 222; Waggoner, *supra* note 21, at 241.

## CONCLUSION

Informal relationships pose a complicated regulatory puzzle: to do nothing will leave people without legal protections that, at least in the context of marriage, are thought to strengthen relationships and protect vulnerable partners; to do too much will impose obligations against the will of one or both partners. If it is going to regulate these relationships at all, the law must decide what rights and obligations to impose, and when in the relationship these rights should begin. Proxies like cohabitation or the duration of the relationship are vastly over- and under-inclusive. The insistence that obligations flow only from the will of the parties has also led to implementation problems. This Article has demonstrated that the answers to the puzzle must consider consent, not ignore it.

Reclaiming the concept of consent and defining it is the first step to solving the puzzle. But it only raises other important questions. A key benefit of formality is administrability—formalities provide a convenient means to identify those to whom rights should flow.<sup>357</sup> Any attempt to regulate informal relationships will have to contend with the burdens of providing such recognition. Although there was some fear that recognizing *Marvin*-type claims would overwhelm the courts,<sup>358</sup> those fears have not come to pass. Yet if the regulatory system were more effective at recognizing rights, it stands to reason that more people would attempt to establish them. Further, courts and lawmakers would have to generate standards by which to assess the parties' conduct, raising questions about resources as well as comparative institutional competency. And this all presupposes that the law *should* regulate informal relationships. The descriptive work in Part I reveals that there may be reasons to recognize certain types of relationships—for instance, relationships involving significant income disparity and resultant dependency on the part of one partner—but not others, like those involving lower-income individuals for whom recognition could result in deprivation of property rights and valuable benefits. Accompanying the question of *when* to regulate is the question of *whether* the state should do so.<sup>359</sup> These interconnected questions deserve further attention.

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357. See Clarke, *supra* note 16, at 771–72 (noting that formalities streamline decision making).

358. See *Marvin v. Marvin*, 557 P.2d 106, 123–24 (Cal. 1976) (en banc) (Clark, J., concurring and dissenting) (speculating that allowing express and implied contract claims between cohabitants would “surely generate undue burdens on our trial courts”).

359. See Krause, *supra* note 43, at 297 (calling this the “ultimate question on the road to partnership legislation” but declining to answer it).

2018]      *CONSENT TO INTIMATE REGULATION*      1083

Lest these daunting questions stall the endeavor in its tracks, I close by focusing on the benefits of a consent approach to informal relationship recognition. Approaching regulation through the lens of consent provides the impetus to identify the various packages of rights and duties and to identify the conduct relevant to those rights and duties. It also reveals the ways in which those rights are only incompletely provided to unmarried partners, highlighting the nature and injustice of their exclusion. And it provides insights into the dominant regulatory form of intimate relationships, marriage. If one size does not fit all nonmarital relationships, those insights provide additional reasons to question whether the law optimally regulates marriage.



