Beyond Property: The Other Legal Consequences of Informal Relationships

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INTRODUCTION

It has often been said that there are three parties to every marriage: the two spouses and the state.[1] This aphorism reminds us that the state has a strong interest in the marital relationship and that this interest is reflected in pervasive legal regulation.[2] The parameters of informal relationships[3] are not so clear. Partners may not always share the same understandings of the significance of their relationship, legal or otherwise, and the state is also somewhat noncommittal about its role. Although nearly all states allow partners to bring contract-based claims against each other when their relationships come to an end and a small handful will impose economic obligations on cohabitants whose relationships are sufficiently marriage-like, most informal relationships begin and end without significant state oversight.[4]

To this point, scholars analyzing nonmarital relationships have largely focused on the challenge of determining the economic consequences of cohabitation. When it comes to the adults' horizontal relationship, as opposed to the vertical relationship between parent and child,[5] proposals to recognize greater rights have largely focused on *inter se* rights and obligations—the transfer of resources from one partner to another. Within that context, the primary challenge has been to identify at what point relationships should trigger economic obligations.

Yet property distribution, while significant, is only one piece of a much larger puzzle. For one thing, many partners will lack significant assets or will find those assets outweighed by their liabilities.[6] Moreover, property

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1. *See, e.g.*, Fearon v. Treanor, 5 N.E.2d 815, 816 (N.Y. 1936) ("There are, in effect, three parties to every marriage, the man, the woman[,] and the state.").

2. *See* Maynard v. Hill, 125 U.S. 190, 211 (1888) (declaring that unlike ordinary contracts, the marriage contract creates a "relation between the parties . . . which they cannot change" because of the public's "deep[] interest[]"); *see also* Obergefell v. Hodges, 135 S. Ct. 2584, 2601 (2015) (noting that "marriage is a keystone of our social order" and summarizing the various legal rights and responsibilities that turn on marital status).

3. By "informal," I mean relationships that have not been established through the use of formalities such as state-provided licenses and registries. Registered domestic partnerships and similar statuses, see, e.g., CAL. FAM. CODE § 297.5 (West 2019), are examples of formal nonmarital relationships. Conversely, common law marriages are informal relationships, at least until they have been recognized by the state. *See* Kaiponanea T. Matsumura, *Choosing Marriage*, 50 U.C. DAVIS L. REV. 1999, 2019–21 (2017).

4. *See* Kaiponanea T. Matsumura, *Consent to Intimate Regulation*, 96 N.C. L. REV. 1013, 1040-42 (2018).

5. For examples of articles discussing parental rights and obligations, see Cynthia Grant Bowman, *The New Illegitimacy: Children of Cohabiting Couples and Stepchildren*, 20 AM. U. J. GENDER, SOC. POL'Y & L. 437 (2011); Cynthia Grant Bowman, *The Legal Relationship Between Cohabitants and Their Partners' Children*, 13 THEORETICAL INQUIRIES IN LAW 127 (2012).

6. *See* Matsumura, *Consent to Intimate Regulation*, *supra* note 4, at 1039.

distribution is only one of the incidents of marriage.[7] Married people qualify for a wide range of benefits from the government as well as private employers. For many, these benefits, such as health insurance or Social Security, greatly eclipse the value of whatever the spouses can expect from each other at the end of their relationship. On the flip side, marriage imposes duties of support on the spouses and therefore affects spousal eligibility for means-tested benefits such as food stamps and financial aid.[8] If nonmarital partners are similarly situated to married couples, regulation comprised solely of economic duties will exclude many potentially relevant legal incidents.

This Article studies these other legal incidents of nonmarital relationships. It does so by analyzing two years' worth of recent cases involving disputes over the legal consequences of informal relationships.[9] Unsurprisingly, courts have been called on to resolve classic *inter se* disputes: claims between partners regarding the allocation of property. But disputes about the legal significance of informal relationships have also arisen in different contexts. Courts have also been called on to review determinations by insurance companies about eligibility under their plans, consider the viability of tort claims based on a party's relationship to the victim or tortfeasor, and analyze criminal charges based on the nature of the defendant's relationship to the alleged victim, among other things.[10]

These other types of disputes—beyond property—have much to teach about the regulation of informal relationships. As an initial matter, they establish that relationships are relevant to legal consequences that have escaped scholars' sustained attention. For instance, they show that questions about the legal significance of relationships do not only arise when those relationships end. They can also arise during ongoing relationships, for instance, when a partner is denied health insurance under a plan covered by the Employee Retirement Income Security Act (ERISA), or when a partner would like to sue for loss of consortium. These disputes also remind us that private entities such as employers and insurers frequently determine whether intimate relationships entitle partners to valuable benefits, like health or life

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7. *See* Obergefell, 135 S. Ct. at 2601 (listing the many rights, benefits, and responsibilities that flow from marriage, including rights pertaining to property, inheritance, taxation, parentage, taxation, evidence, and more).

8. *See* Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1276, 1310 (2014) (noting that lower income cohabiting couples could have more to lose from relationship recognition—including means-tested benefits like SSI and Medicaid—than they would gain from redistribution of property at the end of their relationships).

9. My universe of cases consists of all cases, state and federal, that included the terms "domestic partner!" or "cohabit!" between January 2017 and March 2019. I detail my methodology in Part I, *infra*.

10. *See infra* Part I.

insurance. Moreover, the cases reveal that although courts have struggled to identify when informal relationships should give rise to *inter se* obligations, they have successfully created a wide variety of tests to assess the legal significance of informal relationships outside the property context. Collectively, these cases repeatedly establish that informal relationships perform functions that are relevant to the imposition of legal consequences that flow from formal relationships. These findings suggest at least three subjects worthy of further study.

First, the private sphere has already begun to recognize informal relationships for some purposes, outpacing the law. Private entities administer valuable benefits based on relationship status and have therefore developed standards and procedures to identify which relationships qualify.[11] These determinations, which will only grow more frequent, are an overlooked source of social norms regarding nonmarital relationships. They may also provide evidence of relationship characteristics that can be relevant to determinations in other contexts, and may provide procedural opportunities for the state to assess the nature of the parties' relationship.

Second, courts often recognize relationships to impose legal burdens on one or both of the partners. Though these burdens arise in different factual contexts, within those contexts, courts seem more likely to find that a relationship exists for the purpose of denying a benefit or imposing a punishment, rather than awarding a benefit.[12] This observation raises concerns about the potential unfairness of asymmetric recognition.[13]

Third, and relatedly, because the incidents of informal relationship recognition flow from diverse sources, and turn on varying standards, relationships flicker on and off: for instance, the same relationship might be grounds to impose punishment for domestic abuse but not to sue for loss of consortium or to claim survivors benefits. Although this flickering can impose various costs, like lack of legal protections or security, it also provides freedom for partners to use their relationship opportunistically vis-à-vis third parties. A discussion of these benefits and drawbacks has been missing from broader regulatory debates.

These findings and implications support the central claim of this Article: that any proposal to regulate nonmarital relationships should consider whether and how to extend legal incidents of marriage—beyond property obligations—to people in informal relationships.

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11. *See infra* Part II.A.

12. *See infra* Part II.B.

13. *See* Aloni, *supra* note 8, at 1323–29 (analyzing the potential unfairness of deprivative recognition).

I. CURRENT LEGAL AND SCHOLARLY LANDSCAPE

This Part shows that when it comes to the question of regulating the horizontal relationship between partners in informal nonmarital relationships, courts and scholars have largely focused on *inter se* rights and obligations. Within that context, the primary challenge has been to determine the relationship features that should trigger those legal obligations.

States have taken three basic approaches to assigning *inter se* rights. Nearly all states allow nonmarital partners to enter into enforceable agreements regarding their respective economic rights and obligations,[14] an approach ushered in by the California Supreme Court's decision in *Marvin v. Marvin*.[15] Some states, like California, allow partners to establish contractual obligations through either express or implied agreements, and also recognize equitable remedies such as unjust enrichment.[16] Other states require cohabitant agreements to be express,[17] and still others additionally require agreements to be in writing.[18] A handful of states have additionally adopted a status-based approach, concluding that if the relationship at issue has certain features, like continuous cohabitation, a long duration, or the pooling of resources and services in furtherance of joint projects, it can be treated like a marriage for the purpose of equitably dividing what would have been considered marital property if the parties were married.[19] Finally, a few states still recognize common law marriage, which is created through the exchange of promises to be married in words of the present tense, plus, in most states, a requirement that the couple hold themselves out as married.[20] Although the determination that partners are common law spouses means that their relationship has the same consequences as formal marriage, the posture in which most common law marriage claims arise—at divorce or death—means

14. *See* Matsumura, *Consent to Intimate Regulation*, *supra* note 4, at 1040.

15. Marvin v. Marvin, 557 P.2d 106, 123 (Cal. 1976).

16. *See id.* at 122–23.

17. *See, e.g.*, Morone v. Morone, 413 N.E.2d 1154, 1157 (N.Y. 1980).

18. *See, e.g.*, Posik v. Layton, 695 So. 2d 759, 762 (Fla. Dist. Ct. App. 1997).

19. *See* Connell v. Francisco, 898 P.2d 831, 834–35 (Wash. 1995) (setting out the factors for establishing a committed intimate relationship and explaining the property consequences of finding that such a relationship existed); *see also* Boulds v. Nielsen, 323 P.3d 58, 62–63 (Alaska 2014) (looking for intent that the partners intended to share their property in a marriage-like relationship and classifying certain property as "partnership property" before dividing it); Eaton v. Johnson, 681 P.2d 606, 611 (Kan. 1984) (noting that courts have the inherent authority to equitably divide property between cohabitants); Shuraleff v. Donnelly, 817 P.2d 764, 768 (Or. Ct. App. 1991) (focusing on the nature of the cohabitants' relationship).

20. *See* Cynthia Grant Bowman, *A Feminist Proposal To Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 712–13 (1996). Nine U.S. jurisdictions still allow people to establish common law marriages. *See* Matsumura, *Choosing Marriage*, *supra* note 3, at 2006 n.35.

that the claims usually concern a putative spouse's entitlement to property from her partner or her partner's estate.[21] Thus, common law marriage claims are usually *inter se* claims.

In many states, this form of regulation—the resolution of property disputes—is the exclusive form of regulation of informal relationships. Most states do not grant cohabitants access to rights reserved to married couples such as standing to bring tort claims based on injuries to a partner or extend rights like intestate succession to people in informal relationships.[22] That said, a few states have begun to expand tort standing to people in informal relationships,[23] and a few others have extended benefits like paid family leave to nonmarital partners.[24] Those states, however, are in the extreme minority.

The scholarly discourse around informal relationships has shaped itself around this legal landscape. One prominent scholarly thread has focused on critiquing or defending the contract approach taken by *Marvin v. Marvin*.[25] Another wave of scholarly activity surrounded the adoption by the American Law Institute of the *Principles of the Law of Family Dissolution* in 2002 ("ALI Principles"), which proposed a status approach that would impose marriage-like property obligations on couples who cohabited for a fixed

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21. *See, e.g.*, Callen v. Callen, 620 S.E.2d 59, 62 (S.C. 2005) (property claim between divorcing spouses); *In re* Estate of Stodola, 519 N.W.2d 97, 98 (Iowa Ct. App. 1994) (claim by surviving spouse for a share of the decedent's estate).

22. *See* John G. Culhane, *A "Clanging Silence": Same-Sex Couples and Tort Law*, 89 KY. L.J. 911, 947–48, 951–53, 970 n.285 (2001); William N. Eskridge, Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1933–34 (2012).

23. *See, e.g.*, Dunphy v. Gregor, 642 A.2d 372, 380 (N.J. 1994) (allowing a woman to bring a claim for emotional distress based on injuries sustained by her fiancée); Graves v. Estabrook, 818 A.2d 1255, 1257 (N.H. 2003) (same).

24. *See, e.g.*, MASS. GEN. LAWS ch. 175M, §§ 1–2 (West 2019) (allowing, *inter alia*, a covered individual to take leave to care for a domestic partner, defined as someone "who is dependent [on] the covered individual"); NEW YORK STATE, PAID FAMILY LEAVE FOR FAMILY CARE, https://paidfamilyleave.ny.gov/paid-family-leave-family-care [https://perma.cc/EE8L-L3KE] (noting that leave benefits extend to unregistered domestic partners). *But see* Yuki Noguchi, *Paid Family Leave Gains Momentum in States as Bipartisan Support Grows*, NPR (Mar. 5, 2019) https://www.npr.org/2019/03/05/698336019/paid-family-leave-gains-momentum-in-states-as-bipartisan-support-grows [https://perma.cc/ZU27-3XVZ] (noting that only six states have passed paid family leave laws as of March 2019).

25. *See, e.g.*, Herma Hill Kay & Carol Amyx, Marvin v. Marvin*: Preserving the Options*, 65 CAL. L. REV. 937, 938 (1977) (discussing the developments that led to the *Marvin* decision and praising the opinion for delivering a "remedy appropriate for use in any state"); Ira Mark Ellman, *"Contract Thinking" Was* Marvin*'s Fatal Flaw*, 76 NOTRE DAME L. REV. 1365, 1367 (2001) (arguing that "contract is a poor model for intimate relations" and that status rules are preferable).

duration or were jointly raising a child.[26] In addition to these ongoing debates, in recent years scholars have also begun to question whether other relationships, such as those between intimate partners who do not live with each other, the polyamorous, or those in non-sexual relationships, might deserve legal recognition.[27]

Several interrelated themes pervade the scholarly discourse. First, the literature revolves around the challenge of determining the partners' *inter se* obligations. This focus makes sense in light of the fact that many of the early disputes involving nonmarital relationships, like *Marvin*, raised the issue whether the law would ever recognize legally enforceable obligations between cohabitants.[28] Cases like *Marvin* often involve partners, mostly women, who have made personal sacrifices for the sake of the relationship

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26. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 6.03–.06 (AM. LAW. INST. 2002). The *Notre Dame Law Review* published a collection of essays concurrently with the adoption of the ALI Principles. *See* J. Thomas Oldham, *Unmarried Partners and the Legacy of* Marvin v. Marvin, 76 NOTRE DAME L. REV. 1261, 1261–63 (2001) (summarizing contributions); *see also* Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815 (2005) (critiquing the ALI approach).

27. *See, e.g.*, Cynthia Grant Bowman, *Living Apart Together as a "Family Form" Among Persons of Retirement Age: The Appropriate Family Law Response*, 52 FAM. L.Q. 1 (2018) (focusing on people living apart in committed intimate relationships ("LATs")); John G. Culhane, *After Marriage Equality, What's Next for Relationship Recognition?*, 60 S.D. L. REV. 375, 383–87 (2015) (focusing on Colorado's designated beneficiary status, which allows relatives to designate each other as beneficiaries); Matsumura, *Consent to Intimate Regulation*, *supra* note 4, at 1034–36 (discussing LATs); Laura A. Rosenbury, *Friends With Benefits?*, 106 MICH. L. REV. 189 (2007) (proposing that the law recognize friends as family in various respects); Edward Stein, *Plural Marriage, Group Marriage and Immutability in* Obergefell v. Hodges *and Beyond*, 84 UMKC L. REV. 871, 874 (2016); Edward Stein, *Past and Present Proposed Amendments to the United States Constitution Regarding Marriage*, 82 WASH. U. L.Q. 611, 634 n.129 (2004); Sally F. Goldfarb, *Legal Recognition of Plural Unions: Is a Nonmarital Relationship Status the Answer to the Dilemma?*, 58 FAM. CT. REV. (forthcoming 2020). I leave to the side the significant body of scholarship analyzing same-sex couples and their impact on the recognition of nonmarital relationships such as domestic partnerships. *See, e.g.*, Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87 (2014). The same-sex relationship recognition movement significantly impacted nonmarital relationship recognition, *see* Grace Ganz Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 NOTRE DAME L. REV. 1265, 1268–69 (2001), and yielded deep insights about why nonmarital relationships are entitled to respect, *see* Nancy D. Polikoff, *Law that Values All Families: Beyond (Straight and Gay) Marriage*, 22 J. AM. ACAD. MATRIM. LAW. 85, 87–89 (2009). But much of that literature deals with the different problem of granting legal rights to couples who were affirmatively seeking recognition from the state, either through marriage or formal alternatives to marriage like domestic partnerships.

28. *Compare* Marvin v. Marvin, 557 P.2d 106, 110 (Cal. 1976), *with* Hewitt v. Hewitt, 394 N.E.2d 1204, 1211 (Ill. 1979) (declining to follow *Marvin* and holding that cohabitants could not enter into legally enforceable agreements).

and find themselves in vulnerable or inequitable positions when the relationship ends.[29] They therefore raise highly salient questions about welfare, fairness, and equality. That said, as Grace Ganz Blumberg pointed out over three decades ago, for all the attention paid to *inter se* obligations, "[l]ittle attention has been paid . . . to claims of unmarried cohabitants against third parties and the state, claims to benefits and rights that normally accrue as incidents of marriage."[30] Yet few heeded Blumberg's call to expand the debate: indeed, the ALI Principles, which Blumberg herself helped to draft,[31] explicitly disclaimed creating any legal claims against third parties or the state.[32] Rather, the ALI Principles declared that the "most important objective" regarding domestic partners was to resolve their "economic claims" and require partners to "assume some economic responsibility" for each other.[33]

Although the arguments continue to evolve, most of the recent scholarship on informal adult relationships continues to focus on *inter se* obligations.[34]

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29. *See, e.g.*, *Hewitt*, 394 N.E.2d at 1205 (involving a claim by a woman who lived with her partner for fifteen years, devoted her efforts to his professional advancement, and raised their three children based on the promise that he would share his earnings and property); Davis v. Davis, 643 So. 2d 931, 942–43 (Miss. 1994) (involving a claim by a woman in a thirteen-year relationship who raised the couple's daughter). For the claim that nonrecognition largely burdens women, see Bowman, *A Feminist Proposal To Bring Back Common Law Marriage*, *supra* note 19 at 711. For a more recent critique showing that the partner performing the "woman's work" generally loses, regardless of whether that person is actually a woman, see Albertina Antognini, *Nonmarital Coverture*, B.U. L. REV. (forthcoming 2019).

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

31. *See* Blumberg, *supra* note 27, at 1271 (noting that she drafted the domestic partnership provisions of the ALI Principles).

32. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.01, com. a (AM. LAW. INST. 2002) ("This Chapter governs financial claims between parties to a nonmarital relationship. It addresses the legal obligations that domestic partners . . . have toward one another at the dissolution of their relationship. Nothing in this Chapter creates claims against any other persons or the state.").

33. *See id.* § 6.02, com. b.

34. *See, e.g.*, Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1, 7 (2017) [hereinafter Antognini, *The Law of Nonmarriage*] (studying how courts resolve property disputes between nonmarital couples upon dissolution); Albertina Antognini, *Against Nonmarital Exceptionalism*, 51 U.C. DAVIS L. REV. 1891, 1894 (2018) [hereinafter Antognini, *Against Nonmarital Exceptionalism*] (analyzing how courts resolve property disputes between same-sex couples or couples in which the man seeks property from the woman); June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 57–58 (2016) (dividing the law of nonmarriage into two categories, one focusing on the horizontal relationship of the adults, and one focusing on parent-child obligations, and noting that the law regarding adult relationships focuses almost exclusively on property issues); Emily J. Stolzenberg, *The New Family Freedom*, 59 B.C. L. REV. 1983, 1987 (2018) (analyzing the judicial resolution of *inter se* disputes and examining the extent to which they reflect neoliberalism).

For instance, June Carbone and Naomi Cahn recently questioned the desirability of imposing *inter se* obligations at all given the expanded availability of marriage to same-sex couples and the evolving body of social science literature suggesting that many cohabiting couples remain financially independent.[35] In response, Courtney Joslin has argued that assumptions about individual choice that focus on a limited set of formal decision points fail to recognize "the actual family formation choices people have made."[36] The payoff of Joslin's expanded conception of choice is the imposition of economic obligations.[37]

A second theme in the literature is that within the context of *inter se* disputes, informal relationships are recognized infrequently. In several recent articles systematically examining cases dealing with economic claims by former cohabitants, Albertina Antognini has shown that these claims commonly fail.[38] These observations are consistent with other accounts, which have catalogued the failure of partners to establish the existence of agreements to divide property.[39] In previous work, I have agreed with these prognoses and have attributed these failures to the inability of parties and courts to properly apply contract doctrine in the intimate realm.[40] For scholars who support the expansion of *inter se* obligations, the low number of claims that succeed—infinitesimally low in comparison to the number of significant informal relationships that end every year and do not make it to the courts—is a cause for concern.

A third and related insight is that the reason nonmarital relationships are recognized infrequently is because of the absence of formalities and resulting uncertainty about which features of any given relationship should justify the

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35. Carbone & Cahn, *supra* note 34, at 59 (arguing that the law should recognize nonmarriage as a distinct status without imposing status obligations).

36. Courtney G. Joslin, *Autonomy in the Family*, 66 UCLA L. REV. 912, 915 (2019).

37. *See id.* at 922 (associating the expanded conception of autonomy and "equality within families and between different kinds of families" with increased "economic rights of former nonmarital partners"); *see also* Emily J. Stolzenberg, *Properties of Intimacy* (draft on file with author) (arguing that conceptualizing partners as individual property owners misconstrues the way in which property rights can be jointly conceptualized).

38. *See* Antognini, *The Law of Nonmarriage*, *supra* note 34, at 59–61 (noting the general trend in cases brought by female cohabitants); Antognini, *Against Nonmarital Exceptionalism*, *supra* note 34, at 1912 (noting that men who bring claims against women are less likely to prevail than same-sex partners).

39. *See* CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 50–53 (2010); Ira Mark Ellman, *Inventing Family Law*, 32 U.C. DAVIS L. REV. 855, 874 (1999) (concluding that most contract-based claims under *Marvin* fail); Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1402–03 (2001) (noting that "[o]nly a small percentage of cohabitants will have even a possibility of legal recovery when their relationships end").

40. *See* Matsumura, *Consent to Intimate Regulation*, *supra* note 4, at 1020–21, 1040–41.

imposition of the legal consequence of property distribution.[41] I have noted, within the contract context, that

> 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.[42]

Courts in the few states that impose obligations on relationships that bear similarities to marriage, like Washington, have likewise resorted to complicated, fact-based inquiries.[43]

Status-based reform proposals like the ALI Principles have attempted to address concerns about identification by using duration of cohabitation as a proxy for the types of relationships that should give rise to *inter se* obligations.[44] Explaining this approach, Ira Ellman, one of the drafters of the ALI Principles, argued that that it relies on "particular facts about the relationship, facts amenable to relatively easy establishment through objective evidence, that could form the basis of a presumptively correct result."[45] Unfortunately, the diversity of informal relationships, and the reasons that partners do not formalize them, have prevented scholars and lawmakers from agreeing on appropriate proxies.[46] Many have noted that a period of cohabitation alone—say two years—will say little about whether

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41. *See* Carbone & Cahn, *supra* note 34, at 95.

42. Matsumura, *Consent to Intimate Regulation*, *supra* note 4, at 1040.

43. For a recent example of a fact-intensive inquiry that ended in the establishment of a committed intimate relationship, see *In re* Turner, No. 50190-2-II, 2018 WL 1920072, at *1 (Wash. Ct. App. Apr. 24, 2018) (involving a four-year relationship marked by periods in which one partner worked full-time in California). Although the small handful of reported cases from Washington suggest that courts are sympathetic to partners seeking to establish committed intimate relationships, it is unclear how many cases are brought to the courts and how frequently adverse decisions are appealed.

44. *See* A.L.I., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03 (2019); BOWMAN, *supra* note 39, 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.").

45. Ellman, *Inventing Family Law*, *supra* note 39, at 876.

46. *See* Carbone & Cahn, *supra* note 34, at 99; Matsumura, *Consent to Intimate Regulation*, *supra* note 5, at 1037 (arguing that informal relationships are heterogenous and that even a proxy like cohabitation is over and under inclusive); Stolzenberg, *The New Family Freedom*, *supra* note 33, at 2048 (suggesting that cohabitation periods under two years might be insufficient to establish *inter se* obligations and that periods over five years would be sufficient but recognizing that durations in between would necessitate a more detailed factual inquiry).

the relationship actually should give rise to *inter se* obligations.[47] And, at any rate, approaches relying on relatively simple proxies have not, to this point, been adopted.

To be sure, a few scholars have argued that the law should more actively seek to regulate nonmarital relationships beyond imposing *inter se* obligations. Grace Ganz Blumberg and Nancy Polikoff have argued that to the extent nonmarital relationships share salient features with marital relationships, they should qualify for similar legal treatment.[48] And, extending the logic of the ALI Principles, Lawrence Waggoner has argued that couples "whose behavior demonstrates enough of a commitment to one another to declare that they have acquired marital rights" should be treated as married in every legally relevant sense.[49] These contributions, while valuable, focus insufficient attention on how states would actually identify couples for the purpose of imposing legal consequences, whether and why these consequences should rise and fall together, and how to administer these consequences in the absence of formal registration.[50] Therefore, these more sweeping proposals share the same basic challenge as the *inter se* context of identifying the people to whom rights should flow.

II. STUDY DESIGN

This Article intervenes in the literature by studying how disputes over informal relationships have arisen in courts in a recent, two-year period. I attempted to identify the full range of cases in which a party—whether one of the partners or a third party—sought the court's assistance in recognizing an informal relationship. Because other scholars have studied how these types of claims fare in the *inter se* context,[51] my purpose was to discover whether identification issues arise in contexts outside of *inter se* disputes, to provide

47. *See, e.g.*, Garrison, *supra* note 26, at 853–54 (arguing that length of the relationship does not ensure that cohabitation is associated with marital-like commitment or dependency).

48. Blumberg, *Cohabitation*, *supra* note 30, at 1140; Polikoff, *supra* note 27, at 87.

49. Lawrence W. Waggoner, *Marriage Is on the Decline and Cohabitation Is on the Rise: At What Point, if Ever, Should Unmarried Partners Acquire Marital Rights?*, 50 FAM. L.Q. 215, 238 (2016) (proposing a de facto marriage status that would impose all of the rights and obligations of marriage on qualifying couples).

50. Waggoner, for example, identifies various factors such as "intermingling finances, formalizing legal obligations, and having children together," as "important factors," *see id*. at 238, but spends less time defending why all the rights of marriage should necessarily rise and fall together. Polikoff explains why relationships besides marriage should be recognized for certain purposes, like workers' compensation benefits, health insurance, and Social Security survivors' benefits, but does not explain how the state would determine whether a relationship would qualify. Polikoff, *supra* note 27, at 87.

51. *See* Antognini, *The Law of Nonmarriage*, *supra* note 34, *passim*.

a sense of how such claims fare in the courts, and to see what these other types of cases say about the prospect of regulating informal relationships.

To obtain these cases, I performed a Boolean terms and connectors search in the "All State & Federal" database on Westlaw which contains appellate-level decisions from all fifty states and the District of Columbia, as well as cases in federal courts, including specialty courts such as the U.S. Tax Court and Federal Bankruptcy Court. I searched for two phrases—"domestic /1 partner!" and "cohabit!"—within the period beginning on January 1, 2017, and ending on March 12, 2019. These phrases were intended to find permutations of the phrase "domestic partner" or "domestic partnership," as well as the verb "cohabit" and related nouns like "cohabitant" and "cohabitation." Because I was interested in informal relationships, I excluded from the results cases involving registered domestic partnerships where relationship recognition was not at issue because of the formal registration.[52] I also excluded cases where the search terms were used in passing and in an unrelated context, for example, where a statute used the phrase "spouse or domestic partner" but the case involved legally married spouses.[53] After sorting through the results, my search identified 141 cases in which courts analyzed an informal relationship to impose legal consequences.

A quick note about the limitations of this search: I do not attempt, nor do I claim, to identify every single case involving informal relationship recognition. I recognize, for example, that the label "cohabitant" might not encompass claims by adults who are living apart but want their relationship to be recognized. Moreover, I could have added additional search terms, like "committed intimate relationship," the label used by Washington courts for relationships that should trigger *inter se* obligations. However, I assumed for purposes of this Article that claimants would focus on well-established terms like "domestic partner" or "cohabitant" to describe the phenomenon at issue, thereby pulling in most, if not all, relevant cases.

Another caveat: little is known about the number of disputes that exist relative to the number of cases that result in the types of published opinions collected in this study. These cases therefore represent tips of icebergs of unknown size. That said, my goal was to generate a manageable universe of

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52. I used the phrase "domestic partner" notwithstanding the likelihood that search results would refer to formal domestic partnerships because people and courts sometimes colloquially refer to nonmarital relationships as domestic partnerships.

53. *See, e.g.*, *In re* Marriage of Salcedo, No. 35317-6-III, 2019 WL 852194, at *3 (Wash. Ct. App., Feb. 21, 2019) (marriage dissolution proceeding involving Washington's spousal maintenance statute, WASH. REV. CODE § 26.09.090, which refers to "[t]he age, physical and emotional condition, and financial obligations of the spouse or *domestic partner* seeking maintenance") (emphasis added).

cases from which to make the initial set of observations contained in this Article, not to support statistical claims.[54]

Of the 141 cases in this study, approximately 60% involved disputes over property obligations, either *inter se* claims or the termination of alimony due to cohabitation.[55] In the significant remainder of cases, courts scrutinized informal relationships to adjudicate eligibility for insurance and survivor benefits;[56] standing by non-biologically related individuals to assert parental rights;[57] standing to bring tort claims and to be sued as tortfeasors;[58] the appropriateness of domestic abuse charges;[59] and the availability of a testimonial privilege.[60] In all these cases, courts analyzed whether the

54. By limiting the time period of the search, I further excluded different types of cases that might arise less frequently. For examples of different types of cases not included in my study because of the time restriction, see, e.g., *Alliance Housing Assocs., LP v. Garcia*, No. 69191/2015, 2016 WL 6908354 (N.Y. Civ. Ct. Nov. 21, 2016) (concerning succession rights to rent-stabilized public housing), and *Dutko v. Colvin*, No. 15-cv-10698, 2015 WL 6750792 (E.D. Mich., Nov. 5, 2015) (concerning eligibility for Supplemental Security Income benefits).

55. Approximately one quarter of the cases involved *inter se* claims, eighteen based on either contract or a status like Washington's committed intimate relationship, and another fourteen based on common law marriage. The most common type of dispute in the sample of cases involved the termination of alimony. Many jurisdictions allow courts to terminate spousal support when the supported former spouse cohabits with a new partner. *See* Antognini, *Against Nonmarital Exceptionalism*, *supra* note 34, at 1909 (explaining the relationship between cohabitation-termination and *inter se* cases). Over a third of all results, fifty-five cases, involved this issue.

56. *See, e.g.*, Safeco Ins. Co. v. Hicks, No. C16-0202-LTS, 2018 WL 1832971 (N.D. Iowa Apr. 17, 2018); Dunn v. Robertson, No. 16-CV-818-PK, 2017 U.S. Dist. LEXIS 39118 (D. Or. Mar. 17, 2017); Engle v. Land O'Lakes, Inc., 331 F. Supp. 3d 943 (W.D. Mo. 2018); York v. Longlands Plantation, 818 S.E.2d 215 (S.C. App. Ct. 2018); Pozarski v. Wisconsin Ret. Bd., 2018 WI App 8, 379 Wis.2d 766, 909 N.W.2d 210.

57. For the purposes of this article, I focus on cases in which a putative parent argues that her parental status flows in part from her informal relationship with the child's mother. I exclude cases in which this argument depends on the inability of same-sex couples to marry and therefore benefit from the marital presumption because that argument depends at its core on marriage, not the nature of the parties' informal relationship. Cases matching this description include: Sinnott v. Peck, 180 A.3d 560 (Vt. 2017); Hawkins v. Grese, 809 S.E.2d 441 (Va. Ct. App. 2018).

58. *See, e.g.*, Ferry v. De'Longhi Am. Inc., 276 F. Supp. 3d 940 (N.D. Cal. 2017); *In re* Terrorist Attacks on September 11, 2001, No. 03-MDL-1570, 2017 WL 9533073 (S.D.N.Y. Aug. 8, 2017); Ayala v. Cty. of Imperial, No. 15-cv-397, 2017 WL 469016 (S.D. Cal. Feb. 3, 2017); Doyle v. Fernandez, No. CV-18-261, 2018 Me. Super. LEXIS 168 (Me. Super. Ct. Nov. 7, 2018); Moreland v. Parks, 191 A.3d 729 (N.J. Super. Ct. App. Div. 2018).

59. *See, e.g.*, State v. Carpenter, No. 18-0188, 2018 WL 6120248 (Iowa Ct. App. Nov. 21, 2018) (domestic abuse assault); State v. Wetter, No. 17-1418, 2018 WL 5839941 (Iowa Ct. App. Nov. 7, 2018) (cohabitation as defense to sexual abuse); State v. Bender, No. 17-0646, 2018 WL 1633514 (Iowa Ct. App. Apr. 4, 2018) (domestic abuse); Benson v. Lively, 544 S.W.3d 159 (Ky. Ct. App. 2018) (domestic violence protective order).

60. State v. Avila-Cardenas, No. 74100, 2017 WL 3588946 (Wash. Ct. App. 2017).

relationships at issue—with all of their idiosyncrasies—justified the relevant legal consequences.

These non-*inter se* cases share several common features. They implicate the interests of third parties rather than merely the partners themselves. Insurance coverage disputes require private entities to identify the correct beneficiaries and may result in the payment of claims that the entities could otherwise avoid. Tort claims expand liability for third parties and their insurers. And the domestic abuse cases make the relationship salient to the state's decision to charge a partner with a particular crime. These cases also invoke a variety of standards by which to assess the nature of the relationships at issue. Courts deploy a range of tests that overlap with, but can differ from, those traditionally used to determine the existence of *inter se* obligations. The following Part will highlight several detailed findings from these cases.

III. FINDINGS

The study described in the previous Part identified a significant body of cases raising nonmarital relationship identification issues outside of the *inter se* context. This Part discusses two sets of findings that have largely escaped scholarly attention: the fact that private entities are taking an active role in identifying relationships and assigning economic consequences on the basis of those determinations, and the fact that courts have consistently recognized informal relationships outside of the *inter se* context when necessary to serve the state's regulatory goals.

A. Private Identification of Informal Relationships

The cases in this study reveal that private entities like employers and insurers make determinations about nonmarital relationships that have significant consequences for the people in those relationships. Yet scholars have paid little attention to the fact that private entities make these determinations, the impacts of these determinations on private behavior, and the impact of these private determinations on the law.[61]

Assessment of informal relationships by private entities is widespread. Private entities sometimes offer benefits to people in nonmarital relationships. Many employers treat benefits like health insurance as part of

61. In contrast, scholars have analyzed the connection between legal recognition of nonmarital relationships and the consequences that might flow from that recognition in the private sphere. *See, e.g.*, NeJaime, *supra* note 27, at 146 (noting that LGBT-rights advocates hoped that local or state recognition of domestic partnerships would lead private actors to provide healthcare benefits to domestic partners).

an employee's compensation package.[62] Although there was some speculation that private employers would cut benefits to unmarried partners after the *Obergefell v. Hodges* decision legalizing same-sex marriage in 2015,[63] employers have actually increased coverage in recent years. According to a 2013 Bureau of Labor Statistics survey, 32% of employers provided health benefits to unmarried same-sex partners and 26% of employers provided those benefits to unmarried opposite-sex partners.[64] In 2018, those numbers increased to 41% for unmarried same-sex couples and 37% for unmarried opposite-sex couples.[65] These benefits are worth thousands of dollars per year: according to a 2017 Kaiser Family Foundation report, employers paid over $7500 more per year to cover families than single employees.[66] Employers may also provide life or accident insurance to surviving nonmarital partners.[67] Moreover, 17% of employers reported extending defined benefit retirement survivor benefits to unmarried same-sex and opposite-sex partners.[68] Collectively, these figures suggest that thousands of individuals are eligible for health insurance or other benefits based on their partner's employment and that some subset are taking advantage of these benefits.[69]

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62. *See* Elizabeth Ashack, *Employee-Sponsored Benefits Extended to Domestic Partners*, BUREAU OF LABOR STATISTICS (Mar. 28, 2014), https://www.bls.gov/opub/btn/volume-3/employer-sponsored-benefits-extended-to-domestic-partners.htm [https://perma.cc/E9DX-2TRP].

63. *See Domestic Partner Benefits After the Supreme Court Decision: 2015 Survey Results*, INT'L FOUND. OF EMP. BENEFIT PLANS, https://www.ifebp.org/bookstore/domestic-partnership-survey/Pages/default.aspx [https://perma.cc/P6YM-DGKG] (reporting that of the companies that provided benefits to unmarried same-sex couples before *Obergefell*, nearly 30% of survey respondents said that they were unlikely to continue such benefits after the decision).

64. *Unmarried Domestic Partners Benefits Fact Sheet, March 2013*, U.S. BUREAU OF LABOR STATISTICS, https://www.bls.gov/ncs/ebs_domestic2013.pdf [https://perma.cc/L24T-W8G7].

65. *See* BUREAU OF LABOR STATISTICS, EMPLOYEE BENEFITS SURVEY (2018), https://www.bls.gov/ncs/ebs/benefits/2018/ownership/civilian/table44a.htm [https://perma.cc/Z9ET-U6L5].

66. KAISER FAMILY FOUND., AVERAGE ANNUAL FIRM AND WORKER PREMIUM CONTRIBUTIONS AND TOTAL PREMIUMS FOR COVERED WORKERS FOR SINGLE AND FAMILY COVERAGE, BY PLAN TYPE, 2017, https://www.kff.org/report-section/ehbs-2017-summary-of-findings/attachment/figure%20a-12/ [https://perma.cc/YK4R-MVQX]. Of course, some portion of this increased expense can be attributed to dependents beyond the nonmarital partner.

67. In *Engle v. Land O'Lakes, Inc.*, 331 F. Supp. 3d 943, 955 (W.D. Mo. 2018), *rev'd*, 936 F.3d 853 (8th Cir. 2019), discussed *infra* notes 75–91 and accompanying text, the life insurance and accidental death benefits were worth $266,000, a significant amount.

68. *See* BUREAU OF LABOR STATISTICS, *supra* note 65.

69. To be sure, these benefits are not distributed evenly across the workforce. For example, 51% of unmarried opposite-sex partners of "management, professional, and related" employees qualify for health benefits; that number is 23% for "service" employees. Regionally, 56% of

Insurance plans typically allow partners to formally designate each other as beneficiaries. For instance, employers may require employees to execute domestic partner affidavits—forms completed by the employee attesting to the partner's eligibility under the relevant definition[70]—to establish eligibility for insurance benefits. Regardless of whether they insist upon completion of their own individualized forms or allow claimants to establish their relationships in other ways, private entities, not the state, are defining the characteristics of relationships that are eligible for valuable benefits, and are making the first and, in some cases, final, determinations. To be sure, marriage law casts a long shadow. Benefits typically extend to only one other individual, over the age of eighteen, competent to contract, not in another partnership or marriage, and not related in such a way that the couple would be disqualified from marrying.[71] By limiting coverage to a single marriage-eligible individual, private employers and insurers envision that recipients will be in a marriage-like relationship and that these relationships, like marriages, are sexual—why else would consanguinity matter?[72] Unlike marriage,[73] however, partners may establish the closeness of their relationship in different, nonexclusive ways. Some entities merely require a continuous period of cohabitation; others allow proof of financial interdependence

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opposite-sex unmarried partners of employees in the West qualify for health benefits in comparison to 26% in the Midwest. *See id.*

70. *See* Mila Araujo, *Understanding Domestic Partnerships and Domestic Partner Insurance*, BALANCE, https://www.thebalance.com/domestic-partner-insurance-101-2645680 [https://perma.cc/UE9G-4ZAX] (last updated Oct. 31, 2019) ("You may have to sign a form available from your health insurance administrator or employee benefits plan administrator that includes several declarations . . . ."); *Domestic Partner Benefit Eligibility: Defining Domestic Partners and Dependents*, HUMAN RIGHTS CAMPAIGN (2019), https://www.hrc.org/resources/domestic-partner-benefit-eligibility-defining-domestic-partners-and-depende [https://perma.cc/FVL4-KHWM] (noting the role of affidavits and employer definitions of domestic partnership eligibility).

71. *See* Araujo, *supra* note 70 (noting that eligibility requirements could vary by employer, but summarizing common types of requirements, most of which presume a marriage-like relationship); *Domestic Partner Benefit Eligibility: Defining Domestic Partners and Dependents*, *supra* note 70 (describing the recommended content of domestic partner affidavits).

72. *See, e.g.*, *Sample Policy Form #PRUQAK*, PRUDENTIAL INS. CO. (2000), https://assets2.hrc.org/files/assets/resources/Sample-Policies-Prudential.pdf?_ga=2.154410943.625944771.1565743012-1831402372.1565208886 [https://perma.cc/6SX5-Z72X] (providing the domestic partner eligibility requirements).

73. By referring to marriage-like relationships, I mean what people understand to be an "ideal" marriage. As scholars, such as Milton Regan, Jr., have observed, actual married couples "may maintain strictly separate financial accounts, or not practice sexual exclusivity, and will still be regarded as married for legal purposes. . . . [T]hose who formally assume marital status have the freedom to arrange their intimate lives as they wish without fear of jeopardizing the benefits flowing from marriage." Milton C. Regan, Jr., *Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation*, 76 NOTRE DAME L. REV. 1435, 1448 (2001); *see also* Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1765 (2005).

without cohabitation; others require the partners to affirm the closeness of their relationship.

In addition to formal designations, some private entities will also engage in functional, ex-post determinations of eligibility.[74] In *Engle v. Land O'Lakes, Inc.*, a plan administrator interpreted its policy to allow a cohabitant to identify herself as the plan beneficiary even when the insured failed to designate a beneficiary in advance.[75] The case involved a dispute between the decedent's mother, Sharon Engle, the personal representative of the decedent Terry Engle's estate, and Terry's partner, Jaclyn Jones, over a $133,000 life insurance benefit and a $133,000 accidental death benefit.[76] After Terry died in an automobile accident, Unum Life Insurance Company of America (Unum) contacted Terry's employer to identify his beneficiary.[77] Terry did not have a beneficiary designation form, so Unum eventually contacted Sharon for information to help determine Terry's beneficiary.[78] Sharon identified Jaclyn as Terry's domestic partner.[79] Unum then contacted Jaclyn and requested that she fill out a "Domestic Partner Affidavit," in which Jaclyn declared that she was Terry's domestic partner at the time of his death.[80] Unum ultimately approved the claim and paid the $266,000 in benefits to Jaclyn.[81] Sometime thereafter, Sharon had an unexplained change of heart and challenged Unum's payment of the benefits to Jaclyn.[82]

Unum defended its decision based on two different provisions in its plan.[83] The first, dubbed the "spousal enlargement" provision, stated that "'Spouse' wherever used includes domestic partner."[84] It defined "domestic partner," in turn, as "the person named in your declaration of domestic partnership," and described eligibility requirements including the sharing of a permanent residence for at least six months preceding the declaration.[85] A second

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74. In addition to the *Engle* case discussed in this paragraph, see *Union Sec. Ins. Co. v. Blakely*, 636 F.3d 275 (6th Cir. 2011) (involving a claim by a putative domestic partner to life insurance proceeds where the decedent failed to designate a beneficiary in advance).

75. 331 F. Supp. 3d 943 (W.D. Mo. 2018), *rev'd*, 936 F.3d 853 (8th Cir. 2019).

76. *Id.* at 946–50.

77. *Id.* at 947–48.

78. *Id.* at 948.

79. *Id.*

80. *Id.*

81. *Id.* at 949.

82. *Id.*

83. *Id.* at 951.

84. *Id.* at 950.

85. *Id.* at 951 (emphasis omitted). The entire provision stated as follows:

> Your domestic partner is the person named in your declaration of domestic partnership. You must execute and provide the plan administrator with such a

provision stated that if the insured died without designating a beneficiary, Unum could pay the benefit to the estate, or to the "spouse."[86] Unum argued that the plan language regarding beneficiary designations did not preclude it from making a factual determination that someone was a domestic partner.[87] Unum claimed that its investigators could determine whether a person met the domestic partner requirements through its investigatory process, and had *successfully done so in the past*, just as it did in this case.[88]

The trial court concluded that Unum's interpretation of its plan was unreasonable.[89] It reasoned, in language worth quoting in full:

> By arguing that an individual seeking benefits may deem themselves to be a domestic partner of a covered employee, Unum potentially opens themselves up to a host of individuals who claim to be domestic partners with no meaningful way to assess such a claim. One can understand why an employee would need to designate a domestic partner. Where an employee does not name a beneficiary then the Plan allows for payment to an estate or to certain family members. Those family members are spouse, child or children, mother or father, or sisters or brothers. The specified family members are consistent with the general rules of descent. . . . In all of these instances the relationship is easily verifiable through governmental sources. That is not the case for a domestic partner.[90]

The trial court's decision effectively substituted the court's preference for formalities and traditional family statuses for the insurer's willingness to examine the facts regarding the insured's relationship to an alleged domestic

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> declaration which states and gives proof that the domestic partner has had the same permanent residence as you for a minimum of 6 consecutive months prior to the date insurance would become effective for that domestic partner. You must not have signed a declaration of domestic partnership with anyone else within the last 6 months of signing the latest declaration of domestic partnership. Also, the domestic partner must be at least 18 years of age, competent to contract, not related by blood closer than would bar marriage, the sole named domestic partner, not married to anyone else and the declaration of domestic partnership must be approved and recorded by the plan administrator. You may not cover your domestic partner as a dependent if your domestic partner is enrolled for coverage as an employee.

Id. at 951–52 (emphasis omitted).

86. *Id.* at 950–51.
87. *Id.* at 954–55.
88. *Id.* at 955.
89. *Id.* at 950.
90. *Id.* at 954.

partner. As such, the decision was later overruled by the Eighth Circuit for failing to defer to the plan administrator's interpretation of the policy.[91]

Engle illustrates that private entities make benefits determinations based on informal relationships. In other situations, the private entity may be agnostic regarding the person to whom it must pay a benefit. In such situations, the decision will be made by the courts or another state actor. One example is *York v. Longlands Plantation*,[92] involving a workers' compensation claim brought under a state statutory scheme that allows the factfinder to determine "questions of dependency . . . in accordance with the facts . . . at the time of the accident."[93] In the opinion, unfortunately thin on factual detail, the court leaves open the possibility that a nonmarital partner in a turbulent, on- and off-again relationship might be able to establish either that she had a common law marriage with the decedent or that she was dependent on him for a period of three months or more.[94] Insurers may also bring actions in interpleader to determine which of several eligible individuals is the proper beneficiary, thereby leaving resolution to the beneficiaries and the courts.[95] In almost all of these situations, the insurer will have made a preliminary determination that beneficiary status is sufficiently unclear under its policy to request the court's involvement.

In still other situations, private entities may identify nonmarital relationships for the purpose of denying benefits. Homeowners and automobile insurance policies routinely limit liability coverage for injuries to "household" or "family" members.[96] These exclusion provisions do not always define those terms.[97] Insurance companies therefore have a significant financial incentive to establish that nonmarital partners fall within these types of policy exclusions. If one nonmarital partner seeks to bring a claim against another based on that partner's negligence, the insurer may seek to establish that the partner is a family member, or that their patterns of cohabitation

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91. Engle v. Land O'Lakes, Inc., 936 F.3d 853, 857 (8th Cir. 2019).

92. 818 S.E.2d 215 (S.C. Ct. App. 2018).

93. *See* S.C. CODE ANN. §§ 42-9-110 to -120 (2019).

94. *See* S.C. CODE ANN. § 42-9-120; *York*, 818 S.E.2d at 286.

95. *See, e.g.*, Protective Life Ins. Co. v. Betts, No. 8:16-cv-1292-T-JSS, 2017 WL 1376182, at *2 (M.D. Fla. Apr. 17, 2017); Dunn v. Robinson, No. 3:16-CV-818-PK, 2017 WL 1042467, at *1 (D. Or. Mar. 17, 2017).

96. *See* Jennifer Wriggins, *Interspousal Tort Immunity and Insurance "Family Member Exclusions": Shared Assumptions, Relational and Liberal Feminist Challenges*, 17 WIS. WOMEN'S L.J. 251, 252 (2002).

97. *Id.* at 256 n.28 (noting that the standard State Farm homeowner's policy at the time excluded claims by "relatives" who were "residents of your household" but failed to define what it meant by "relatives"); *see also* MGA Ins. Co. v. Goodsell, 2005 S.D. 118, ¶ 6, 707 N.W.2d 483, 484–85 (S.D. 2005) (involving a clause excluding claims by "relatives residing with a permissive driver").

amount to living in the same household. This is especially true if the exclusion specifically refers to domestic partners.

Safeco Insurance Co. of Illinois v. Hicks presents this very issue.[98] Jane Gosch was riding on a motorcycle driven by her partner, Paul Hicks, the insured, at the time of an accident.[99] Safeco, the insurer, filed a declaratory judgment action seeking to settle its obligations for payment under the insurance policy; specifically, it determined that because Gosch was Hicks's "domestic partner," she was excluded from the policy's liability coverage.[100] This placed Gosch in the position of arguing that her ongoing relationship was not a "domestic partnership" as defined. The exclusion defined "domestic partner" as:

> [A] person living as a continuing partner with you and:
>
> a. is at least 18 years of age and competent to contract;
>
> b. is not a relative; and
>
> c. shares with you the responsibility for each other's welfare, evidence of which includes:
>
> (1) the sharing in domestic responsibilities for the maintenance of the household; or
>
> (2) having joint financial obligations, resources, or assets; or
>
> (3) one with whom you have made a declaration of domestic partnership or similar declaration with an employer or government entity.
>
> Domestic partner does not include more than one person, a roommate whether sharing expenses equally or not, or one who pays rent to the named insured.[101]

Under this definition, a formal declaration was only one way to demonstrate that the partners shared the responsibility for each other's welfare. Evidence that the partners shared domestic responsibilities or were financially interdependent could also suffice.

Gosch made two arguments. First, she argued that she paid Hicks rent in the form of household duties, which would categorically exclude her as a domestic partner.[102] Hicks owned the home in which the couple lived and paid

98. No. C16-0202-LTS, 2018 WL 1832971 (N.D. Iowa Apr. 17, 2018).
99. *Id.* at *1.
100. *Id.*
101. *Id.* at *6.
102. *Id.* at *5.

the mortgage.[103] Gosch resided with Hicks for approximately three years before the accident at issue and did the laundry, vacuuming, cleaning, tending to the plants, and washing dishes.[104] She argued that although she did not give Hicks money, she tendered her services in exchange for living at the house.[105] Relying on dictionary definitions, the court construed the term "pay rent" to mean the transmission of a fixed sum of money in exchange for the use and occupancy of property.[106] It therefore concluded that Gosch had not paid rent.[107]

Second, Gosch argued that she and Hicks had separate financial lives.[108] The court discussed in detail the factual complexities of the relationship. It noted on the one hand that Hicks and Gosch had lived together for four years and that the relationship was a sexual one.[109] In addition to the division of labor discussed above, the partners both purchased groceries and household supplies; their names were both on the title, registration, and insurance policy for a 2014 Chevy Cruze; Hicks was the primary beneficiary of Gosch's 401(k) account, and Gosch was the primary beneficiary of Hicks's life insurance account, for which Gosch paid the premiums; they were each other's emergency contacts; and they had taken at least two vacations together.[110] On the other hand, the couple did not have any joint bank accounts or credit cards; Gosch's ex-husband and daughter were the beneficiaries of her life insurance policy; Gosch was not a beneficiary under Hicks's will or his 401(k); they had separate health insurance; they did not consult each other about spending habits; and they treated a previous transfer of money as a loan, which was repaid.[111] The court held that these facts overwhelmingly established that Gosch was Hicks's domestic partner as defined by the insurance policy.[112] Although there could have been more evidence establishing a domestic partner relationship, such as the filing of a formal domestic partner declaration with an employer or complete integration of their accounts, they unquestionably shared domestic responsibilities and financial obligations.[113]

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103. *Id.* at *2.
104. *Id.*
105. *Id.* at *6.
106. *Id.*
107. *Id.* at *7.
108. *Id.* at *8.
109. *Id.* at *7.
110. *Id.* at *7–8.
111. *Id.* at *8.
112. *Id.* at *9.
113. *Id.* at *10.

Collectively, these cases reveal different contexts in which private actors condition valuable benefits on informal relationships, calling attention to practices that are undoubtedly widespread. They show that the entities at times engage in fact-specific determinations to identify eligible nonmarital partners, and make initial determinations that may ultimately be reviewed by the courts. And they also suggest that for every dispute brought to a court's attention, many more analogous matters are resolved privately. Finally, these cases show that an entity's motivations to recognize or deny the existence of the relationship can vary depending on the circumstances.

B. State Identification of Informal Relationships

The cases in the study also show that state actors are being asked to identify informal relationships for reasons beyond imposing *inter se* obligations. The two most common contexts in this study were imposing criminal punishment and questioning standing to sue for various torts. These cases reveal that courts frequently recognize informal relationships to impose criminal punishments and have been somewhat receptive to expanding tort liability outside of formal relationships. They also show that while the tests for identifying the relevant informal relationships in these different contexts are not identical, they are substantially similar.

1. Criminal Consequences

Intimate relationships can be the basis for the imposition of civil restraining orders[114] and criminal prosecutions.[115] The criminal consequences of informal relationships arose relatively frequently in my sample of cases, comprising around 20 of the 141 cases.[116] In the criminal context, law enforcement officers, prosecutors, and courts assess the relationship with or without the cooperation of both partners.[117]

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114. *See, e.g.*, CAL. FAM. CODE §§ 6200–6257 (West 2019) (setting forth the circumstances under which the court may issue a restraining order against an intimate partner or former partner).

115. *See, e.g.*, CAL. PENAL CODE § 243 (West 2019) (making relationship status relevant to sentencing for the crime of battery); CAL. PENAL CODE § 273.5 (West 2019) (defining the crime of domestic assault).

116. It is worth noting that many restraining orders and domestic violence prosecutions are not appealed, so the actual number of instances in which informal relationships trigger criminal consequences is undoubtedly much higher.

117. Unlike in the insurance context where informal partners' interests are usually aligned against the third-party insurer, the partners' interests may be opposed to each other in the criminal context: one seeks a restraining order against the other or wants to assist the government's

Cohabitation can be the basis for a domestic abuse charge. Iowa, for instance, defines domestic abuse as assault "between household members who resided together at the time of the incident" or resided together within the previous year.[118] Courts have held that "household members" means more than two people who share the same roof.[119] Rather, it refers to an intimate relationship marked by the following factors:

> [W]hether [the defendant and victim] had sexual relations while sharing the same living quarters; whether they shared income or expenses; whether they jointly used or owned property together; whether they held themselves out as husband and wife, the continuity and length of their relationship, and any other facts shown by the evidence bearing on their relationship with each other. Although cohabiting does not have a specific definition, it is something more than persons just living together in the same place ("roommates") and something less than persons living together as spouses.[120]

In *State v. Bender*, the defendant argued that he and the victim were not cohabitants and that their relationship was purely sexual.[121] The court of appeals rejected this argument, pointing to the trial court's findings that the defendant had stayed with the victim for at least two months on and off, and at least three weeks continuously before the assault; was developing a relationship with the victim and her children; left personal items at her residence, including his phone, tablet, toiletries, electronic cigarettes, and mail; essentially shared living expenses; had no other permanent address at the time; and spent the majority of his nights at her apartment.[122] The fact that the living arrangement was not necessarily permanent did not mean that they were not cohabiting.[123]

Benson v. Lively provides another example of a case in which a relatively short period of cohabitation supported an underlying finding of domestic violence, this time in support of the issuance of a protective order.[124]

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prosecution. However, in the criminal context, the state, as a third party, is ultimately interested in the relationship to serve its own ends, namely the protection of citizens and the punishment of wrongdoing. *See* Erin R. Collins, *The Evidentiary Rules of Engagement in the War Against Domestic Violence*, 90 N.Y.U. L. REV. 397, 404–12 (2015).

118. State v. Bender, No. 17-0646, 2018 WL 1633514, at *1 (Iowa Ct. App. Apr. 4, 2018).

119. *Id.*

120. *Id.* (citing State v. Virgil, 895 N.W.2d 873, 880 (Iowa 2017); State v. Kellogg, 542 N.W.2d 514, 517–18 (Iowa 1996)).

121. *Id.*

122. *Id.*

123. *See id.*

124. 544 S.W.3d 159, 164–65 (Ky. Ct. App. 2018).

Kentucky allows a "member of an unmarried couple who are living together or have formerly lived together" to file for a protective order.[125] Courts have interpreted the "living together" requirement to refer to cohabitation and have adopted a set of factors that are virtually identical to Iowa's.[126] The respondent argued that the petitioner failed to establish the cohabitation requirement because the couple had only lived together for six to seven weeks prior to their breakup, and he was also married to another woman at the time.[127] The court held, first, that the respondent's marriage could not "act as a shield" in this context, and that there was no minimum period of time to establish cohabitation, especially since the couple had engaged in a sexual relationship over the course of six years.[128] The opinion did not address any of the other indicia of cohabitation, many of which, like holding themselves out as married or jointly owning property, would likely have cut against such a finding.

Relationship status can also potentially be exculpatory. In Iowa, for example, "cohabitating as husband and wife" is a defense to the crime of sexual abuse of a minor.[129] Iowa courts have held open the possibility that this language could refer to cohabitation in addition to formal marriage. In *State v. Wetter*, the defendant, Chance Wetter, was convicted of having sex with a minor.[130] One of the elements of the charged crime was that "the persons were not cohabiting as husband and wife at the time of the sex act."[131] The court noted that the statute could be interpreted to mean that "the defendant and victim 'cohabited as though they were married but were not in fact necessarily married' at the time of the sex act," and that, under this interpretation, nonmarital cohabitation might excuse the offense.[132] But it held that Wetter could not prove that he cohabited with the alleged victim.[133] Both Wetter and the girl testified that he moved into the girl's bedroom and that he left his personal belongings, ate meals, and even received his mail there for approximately three months.[134] But the girl's mother, with whom she lived, testified that she never saw Wetter and that he did not have a key

125. *Id.* at 164 (citing KY. REV. STAT. ANN. § 403.750 (West 2016)).

126. *See id.* at 165 ("(1) sexual relations between the parties while sharing the same living quarters; (2) sharing of income or expenses; (3) joint use or ownership of property; (4) whether the parties hold themselves out as husband and wife; (5) the continuity of the relationship; and (6) the length of the relationship").

127. *Id.*

128. *Id.*

129. State v. Wetter, No. 17-1418, 2018 WL 5839941, at *1 (Iowa Ct. App. Nov. 7, 2018).

130. *Id.* at *1.

131. *Id.* at *2 (citing IOWA CODE § 709.4(1)(b)(3)(d) (2013)).

132. *Id.*

133. *See id.*

134. *Id.* at *1.

to the residence.[135] Moreover, Wetter provided a different address when applying for employment.[136] The court held that even if Wetter did live with the alleged victim for three months during which time they engaged in sexual relations, "there was no sharing of income or expenses or joint ownership of the home or other property."[137] They also failed to hold each other out as husband and wife.[138] Finally, the fact that their relationship lasted a mere three months "undercut[] . . . the continuity and duration . . . considerations."[139] The court therefore upheld the conviction.[140]

Relatedly, an informal relationship could conceivably be the source of an immunity like the marital privilege, although, perhaps unsurprisingly, a court recently rejected that suggestion. In *State v. Avila-Cardenas*, the defendant appealed his conviction for first-degree murder on several grounds, one of which was that the prosecution solicited the testimony of his longtime partner over his objection.[141] The defendant argued that the court should have extended the marital privilege to her testimony because the couple lived together and held themselves out as married.[142] Indeed, the prosecution built its case around testimony that the police elicited from her when they went to the couple's shared residence.[143] The court, however, observed that the statutory privilege extended to spouses or registered domestic partners and concluded that the relationship fit neither category.[144]

Cases arising in the criminal law context do not typically enter discussions about the regulation of nonmarital relationships.[145] But the factors used to determine whether individuals are intimate partners for the purposes of punishment are substantially similar to those that are used to identify domestic partners for insurance benefits or the imposition of *inter se*

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135. *Id.*

136. *Id.*

137. *Id.* at *2.

138. *Id.*

139. *Id.*

140. *Id.* at *3. It is worth noting that the standard of review led the court to interpret the evidence in the light most favorable to the State. *Id.* at *2.

141. State v. Avila-Cardenas, No. 74100–4–I, 2017 WL 3588946, at *1, *11 (Wash. Ct. App. Aug. 21, 2017).

142. *See id.* at *11.

143. *See id.* at *1.

144. *Id.* at *11. Although the court devoted little analysis to this issue, it distinguished the situation where a couple might have contracted to marry in good faith without satisfying the state's formal requirements. *See* State v. Denton, 983 P.2d 693, 696 (Wash. Ct. App. 1999) (holding that the failure to obtain a marriage license, where the couple solemnized their marriage in a religious ceremony, would not bar the defendant's invocation of the marital privilege).

145. A partial exception is Eskridge, *supra* note 22, at 1932–33, identifying the phenomenon of heightened criminal consequences for the abuse of nonmarital partners but largely ignoring its regulatory aspects.

obligations. All of these contexts, for example, look to whether the relationship involved sexual and emotional intimacy, the duration of the relationship, and the pooling of resources to trigger the relevant legal consequences.[146] Moreover, the law protects intimate partners from domestic abuse because the intimacy inherent in the relationship can leave the partners more vulnerable to abuse than if the relationship were casual.[147] One state court explained that cohabitants require protection because their relationships involve "financial support and consortium," which the court defined as "mutual respect, fidelity, emotional support, affection, society, cooperation, solace, comfort, aid to each other, friendship, conjugal relations and companionship."[148] These are the same values cited by scholars in support of the imposition of *inter se* obligations.[149] To be sure, there are other justifications for domestic violence laws, such as putting an end to the historic subordination of women and perpetuation of gender-based violence.[150] That said, the extension of legal protections to victims regardless of sex, like men in same-sex relationships, reveals that the elimination of gender-based violence is not the sole concern; the laws also address the vulnerabilities occasioned by intimacy.[151]

Broadening the study of informal relationships to the criminal context also shows that informal relationships are recognized more frequently than a focus

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146. Compare the factors presented in *State v. Bender*, No. 17-0646, 2018 WL 1633514, at *1 (Iowa Ct. App. Apr. 4, 2018), with the discussion of the factors relevant to the determination that partners are "domestic partners" for private insurance purposes, *supra* notes 108–11, the factors relevant to the imposition of *inter se* obligations in Washington, *Connell v. Francisco*, 898 P.2d 831, 834 (Wash. 1995) (looking at factors such as "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 whether they are in a committed intimate relationship).

147. *See* Ochoa v. State, 355 S.W.3d 48, 54 (Tex. Ct. App. 2010) ("In contrast to relationships such as casual acquaintanceships or ordinary fraternizations, dating relationships pose a greater danger of one [partner] repeatedly abusing the other" because of their romantic and intimate nature); Ireland v. Davis, 957 S.W.2d 310, 312 (Ky. Ct. App. 1997) (emphasizing that protections arise because of intimacy rather than physical proximity alone); *see also* CAL. PENAL CODE § 243(e)(4) (West 2019) (noting that domestic violence crimes "merit special consideration when imposing a sentence so as to display society's condemnation for these crimes of violence upon victims with whom a close relationship has been formed").

148. State v. Yaden, 692 N.E.2d 1097, 1101 (Ohio Ct. App. 1997).

149. *See, e.g.*, Ellman, *supra* note 25, at 1378 (arguing that nonmarital partners should owe each other duties of support because they shared their lives together, not only financially but also by treating the relationship as "qualitatively distinct from the relationship either party had with any other person," and engaging in physical intimacy, such that the relationship "wrought change in the life of either or both parties") (citations and quotation marks omitted).

150. *See* Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 2–3 (2009).

151. *See Ochoa*, 355 S.W.3d at 54.

on the *inter se* cases would suggest.[152] After engaging in fact-intensive inquiries that should feel familiar to scholars studying *inter se* disputes, courts in this context seem quite willing to find that partners are cohabiting, even when their relationships are relatively short-lived or sporadic.[153] If the assumption is that courts are somehow institutionally incapable of considering whether a relationship is of such a nature as to merit legal consequences, these separate contexts should, at a minimum, be in conversation.[154]

2. Civil Consequences

Several cases in the sample involved tort claims brought by nonmarital partners. In these cases, nonmarital partners asked courts to extend standing to sue beyond the boundaries of formal marriage. Historically, most courts have refused to recognize that the intimacy inherent in informal relationships should give partners standing to sue for loss of consortium or negligent infliction of emotional distress when their partners are injured or killed.[155] In a leading case, *Elden v. Sheldon*, the California Supreme Court provided three reasons for refusing to extend standing to sue to people in informal relationships, notwithstanding the potential for extreme emotional reliance: first, to avoid undermining the state's ability to promote marriage;[156] second, to save courts the trouble of determining the significance of the parties' emotional connections;[157] and third, to limit the scope of liability to a small class of plaintiffs.[158] Relatedly, courts have refused to extend standing to sue for wrongful death beyond certain formal relationships,[159] reasoning that the

152. *See supra* notes 112–115 and accompanying text.

153. *See* Benson v. Lively, 544 S.W.3d 159, 165 (Ky. Ct. App. 2018) (deeming the partners cohabitants after a period of only six or seven weeks).

154. Of course, there may be reasons for the law to be more wary about the redistribution of property than the imposition of criminal punishments that result in the deprivation of liberty. Generally speaking, however, the Court has considered interests in personal liberty to be more important than interests in property. *Cf.* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 25–27 (1981) (surveying the Court's holdings and concluding that "an indigent's right to appointed counsel . . . has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation").

155. *See* Culhane, *supra* note 22, at 947–48, 951–53; Eskridge, *supra* note 22, at 1933.

156. Elden v. Sheldon, 758 P.2d 582, 586 (Cal. 1988).

157. *See id.* at 587.

158. *See id.* at 588.

159. *See, e.g.*, Holguin v. Flores, 18 Cal. Rptr. 3d 749, 759–60 (Ct. App. 2004) (denying an unmarried cohabitant standing to sue for wrongful death).

tort protects inheritance rights, not dependency, even though the relevant harm would arise by virtue of an heir's dependency on the decedent.[160]

California courts have continued to uphold that state's rigid approach. In *Ferry v. De'Longhi America, Inc.*, Patrick Ferry brought a claim for wrongful death after a heater manufactured by the defendant allegedly caught fire in the bedroom he shared with his partner, Randy Sapp, causing serious burn injuries that eventually claimed Sapp's life.[161] Ferry and Sapp had lived together without interruption for over twenty-eight years at the time of the accident.[162] In 1993, they were married in a ceremony performed at the First Unitarian Church of San Francisco and would have obtained a marriage license had it been possible to do so at the time.[163] They shared all personal and business assets and made each other the sole beneficiaries of their respective estates.[164] But because they did not formally marry or register their partnership when those options became available, and admittedly had no intention of legally formalizing their relationship at the time of the accident, the court had no choice but to dismiss Ferry's claim.[165]

That said, a few courts recognized that partners in informal relationships should have standing to bring tort claims based on the emotional intimacy of their relationship. *Moreland v. Parks* involved a claim for negligent infliction of emotional distress brought by Valerie Benning after her partner's daughter was hit by a pickup truck while holding Benning's hand while waiting to cross the street.[166] Benning and her partner, I'Asia Moreland, had dated for two years and had shared a residence for a year at the time of the accident.[167] Although Benning lacked a formal relationship to Moreland or her daughter, the court followed an earlier case involving a woman whose fiancée was killed in front of her in a roadside accident.[168] In that case, the New Jersey Supreme Court provided factors for determining the "intimacy and familial nature" of an informal relationship, including: "(1) the duration of the relationship; (2) the degree of mutual dependence; (3) the extent of common

160. *See* Steed v. Imperial Airlines, 524 P.2d 801, 805 (Cal. 1974) (rejecting the argument that the wrongful death tort protected dependency, concluding instead that it protected heirs from injuries that they may sustain as a result of the decedent's death).

161. Ferry v. De'Longhi America, Inc., 276 F. Supp. 3d 940, 943 (N.D. Cal. 2017).

162. *Id.*

163. *Id.*

164. *Id.*

165. *See id.* at 947. Saying its "hands are tied," the court noted that California courts had consistently upheld the state's strict standing requirements, and that "the act of obtaining a marriage license is an administrative burden that all couples must bear if they wish to avail themselves of the legal rights and privileges of a formal marriage." *Id.* at 952.

166. Moreland v. Parks, 191 A.3d 729, 731 (N.J. Super. Ct. App. Div. 2018).

167. *Id.* at 732.

168. *Id.* at 737.

contributions to a life together; (4) the extent and quality of shared experience; and (5) whether the plaintiff and the decedent (or seriously injured person) 'were members of the same household, their emotional reliance on each other, the particulars of their day to day relationship, and the manner in which they related to each other in attending to life's mundane requirements.'"[169]

A federal court has also taken a functional approach—albeit considerably narrower—in determining whether unmarried cohabitants can claim solatium damages under the Foreign Sovereign Immunities Act (FSIA). Recovery under the FSIA is limited to "immediate family"—spouses, parents, siblings, and children.[170] However, some courts have stretched this requirement in "those rare cases in which the parties at issue had lived in the victim's immediate household and had been in other important respects like a spouse, parent, sibling, or child to the victim."[171] In *In re Terrorist Attacks on September 11, 2001*, the court sought to provide a systematic framework for analyzing the "rare cases" in light of the thousands of victims of the September 11 terrorist attacks.[172] To determine whether a fiancée or domestic partner could recover, the court identified four factors: "(1) the duration of the relationship; (2) the degree of mutual financial dependence and investments in a common life together; (3) the duration of cohabitation; and (4) the presence or absence of a formal engagement."[173] The court clarified that cohabitation might not matter for fiancées if the couple did not cohabit for personal or religious reasons unrelated to the closeness of the relationship.[174] It also held that same-sex partners would not need to demonstrate that they were formally engaged since few jurisdictions recognized same-sex relationships in 2001.[175] However, the court largely closed this class to heterosexual couples who were not formally engaged, reasoning that "much of the basis of granting solatium damages to fiancée claimants is the certainty that they would have been married . . . but for the terrorists' tortious actions."[176] Applying this standard, a different judge in the

169. *Id.* at 737–38 (quoting Dunphy v. Gregor, 642 A.2d 372, 378 (N.J. 1994)).

170. *In re* Terrorist Attacks on September 11, 2001, No. 03-MDL-1570, 2017 WL 9533073, at *3 (S.D.N.Y. Aug. 8, 2017).

171. *Id.* (quoting Estate of Heiser v. Islamic Rep. of Iran, 659 F. Supp. 2d 20, 29 (D.D.C. 2009)).

172. *Id.*

173. *Id.* at *6 (citing Surette v. Islamic Rep. of Iran, 231 F. Supp. 2d 260, 267 (D.D.C. 2002), which adapted the factors from Graves v. Estabrook, 818 A.2d 1255, 1262 (N.H. 2003), in which the New Hampshire Supreme Court recognized the standing by a decedent's fiancée to pursue a negligent infliction of emotional distress claim).

174. *Id.*

175. *Id.*

176. *Id.*

same case held that a surviving same-sex partner who lived together with the decedent for seven years, shared bank accounts, was in the process of building the couple's shared home, and made plans to celebrate her 50th birthday in Europe with the decedent was functionally equivalent to a spouse and entitled to $12,500,000 in damages.[177]

Neither *Moreland* nor *In re Terrorist Attacks* broke new ground looking beyond formal categories to recognize informal relationships within their jurisdictions.[178] They do show, however, that courts continue to recognize informal relationships where emotional distress claims are involved. And by focusing on facts establishing cohabitation, financial dependency, and the establishment of a common life together, the factors they employ offer guidance to future courts open to extending the functional analysis to other torts.[179] Moreover, the factors that courts examine overlap with the factors used in the criminal context, and clearly bear on the question of *inter se* obligations.

IV. FURTHER IMPLICATIONS

Building on the observations in the previous Part, this Part focuses on three sets of insights: the potential impacts of widespread privatized relationship recognition; the impacts of recognition for the purpose of punishing or depriving a nonmarital partner of a valuable benefit; and the consequences—for partners as well as the state—of inconsistent recognition, what I call "flickering." These insights should inform policy debates surrounding the recognition of informal relationships going forward.

A. Alternative Sources of Norms and Procedural Opportunities

The fact that private entities are making determinations about informal relationships with significant financial consequences has several implications for nonmarital regulatory policy.

177. *In re* Terrorist Attacks of September 11, 2001, No. 03-MDL-1570, 2018 U.S. Dist. LEXIS 158369, at *553–54 (S.D.N.Y. Sept. 13, 2018).

178. *See supra* note 169 (citing *Dunphy*, 642 A.2d at 378); *supra* note 173 (citing *Surette*, 231 F. Supp. 2d at 267).

179. *See* Culhane, *'Clanging Silence*,*' supra* note 22, at 952 (arguing that the logic of the loss of consortium tort favors functional recognition).

Private actors are an overlooked source of norms regarding nonmarital relationships.[180] On the most basic level, employers reflect social trends but they also influence them. For instance, several commentators have suggested that large corporations' support for marriage equality influenced social norms that in turn buoyed legal advocacy.[181] Melissa Murray has argued that the adoption of paid family leave by influential companies such as Amazon, American Express, and Netflix prompted politicians to discuss paid leave reform and to propose legislation at the state and federal level.[182] As Murray has noted, these private developments may generate impacts regardless of whether the entities consciously intend to change laws or norms.[183] The growing recognition by private entities that informal relationships are consequential may therefore lend support to legal reform efforts that recognize nonmarital relationships.

Private recognition may also have more particularized impacts. Eligibility requirements communicate what features of nonmarital relationships are important in a way that could cause people to associate those traits and the types of benefits that follow. For example, the touchstone of employment benefits such as insurance coverage is financial interdependency. Model domestic partner affidavit forms provided by the Human Rights Campaign deem people eligible based on different showings of financial interdependency, only one of which is cohabitation.[184] As discussed in Part I, previous reform proposals like the ALI Principles have treated cohabitation as the proxy for legal obligations.[185] But the practices of private entities could make direct proof of financial interdependency the relevant evidence of relationships worthy of recognition for the purpose of offering financial benefits. This could in turn give rise to the widespread understanding that relationships other than marriage deserve recognition to the extent that the parties are providing mutual financial support.

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180. *See* Clare Huntington, *The Institutions of Family Law*, at 13–16, 19–20 (draft on file with author) (observing that role that institutional analysis plays in fields other than family law and calling on family law scholars to study the ways in which legal and nonlegal institutions promote family norms).

181. *See, e.g.*, Suzanne B. Goldberg, *Obergefell at the Intersection of Civil Rights and Social Movements*, 6 CAL. L. REV. CIR. 157, 164 n.39 (2015); Emily Cadei, *How Corporate America Propelled Same-Sex Marriage*, NEWSWEEK, Jun. 30, 2015, https://www.newsweek.com/2015/07/10/shift-corporate-america-social-issues-become-good-business-348458.html [https://perma.cc/Z9PM-VGGL].

182. Melissa Murray, *Consequential Sex: #MeToo,* Masterpiece Cakeshop*, and Private Sexual Regulation*, 113 NW. U. L. REV. 825, 843–45 (2019).

183. *See id.* at 845, 848.

184. *See supra* note 71.

185. *See supra* text accompanying note 25.

Another emergent norm might be one of fragmentation and election. Employees have the power to designate their relationship's significance for the purpose of a particular entitlement but not others, like health insurance but not life insurance or vice versa. Moreover, they can change their elections over time, either when they experience a qualifying life event like marriage, divorce, or the birth of a child, during so-called "open enrollment" periods, or, for some benefits, at any time.[186] These features empower people to customize the consequences of their relationships in a way that a monolithic status like marriage might not.[187] Within this context, formalities—in the form of domestic partner affidavits, beneficiary designations, and the like—play an important role in the administration of benefits. The channeling of elections into designated moments, whether the beginning of one's employment or open enrollment periods, only serves to heighten the notion that the legal significance of one's relationship is subject to a great deal of individual control.

Beyond their impacts on social norms, private recognition also presents underappreciated procedural opportunities. First, to the extent that the entities require partners to execute forms, those forms could serve as prima facie evidence of the characteristics that the law seeks to reward or burden in other contexts. If one partner declares that the other is financially dependent on her, such that the partner's employer should subsidize the other's healthcare, that representation could be relevant to any rule that makes financial dependency relevant. In the *Safeco* case discussed above, for example, the domestic

186. *See* Jeremy Vohwinkle, *Take Advantage of Your Employer's Open Enrollment Period*, BALANCE, https://www.thebalance.com/take-advantage-of-your-employer-s-open-enrollment-period-1289677 [https://perma.cc/Y5FC-4UHL]; *During Open Enrollment, Be Open to Retirement Savings Opportunities*, FIN. INDUSTRY REG. AUTHORITY, http://www.finra.org/investors/highlights/open-enrollment-retirement-saving-opportunities [https://perma.cc/QUR7-2R67]. Employees are often prevented from changing most benefits elections—like health insurance—outside of these designated periods. *See, e.g.*,); University of Arizona Human Resources, Updating Dependents and Beneficiaries, U. ARIZ., https://hr.arizona.edu/employees-affiliates/benefits/insurance-benefits/updating-dependents-and-beneficiaries [https://perma.cc/MD9F-9E8Q] ("Normally, you are only able to change your insurance coverage once a year during open enrollment."). Other beneficiary designations, like those associated with retirement accounts or life insurance, can be changed at any time. *See, e.g.*, Dunn v. Robinson, No. 16-cv-818-PK, 2017 WL 1042467, at *3–4 (D. Or. Mar. 17, 2017) (providing a process by which beneficiary designations can be changed immediately, but noting that changes made during open enrollment would take effect at the beginning of the next calendar year).

187. Of course, this argument depends on the assumption that marriage is a monolithic status. Spouses technically have the ability to make most of the same elections that nonmarital partners do, for instance, whether to designate one's spouse as the beneficiary on a life insurance policy or to opt for family health insurance coverage. My guess is that spouses are likely to designate each other as beneficiaries; if that guess is wrong, then the norm of fragmentation and election would be even more consequential.

partner exclusion called for the factfinder to determine that an accident victim was in fact a domestic partner based on the facts of their relationship, but made a domestic partnership affidavit filed with an employer an alternative method of proof.[188] One could imagine that these affidavits could also serve as evidence of financial support for the government, when, for example, eligibility for means-tested benefits like Supplemental Security Income comes into question.[189]

Second, moments of election can be useful for other administrative purposes. One problem with the current system of nonmarital relationship recognition is that it focuses on what Courtney Joslin has called "a very limited array of decision points: the formal decision to marry (or its absence) and decision to enter into an agreement to share (or its absence)."[190] Enrollment periods can potentially expand the number of decision points. They provide opportunities for parties to make representations about the nature of their relationships which could be leveraged by the state: as mentioned above, representations made to private entities could be used to satisfy the law's requirements, or lawmakers could make their own forms available to employees at these moments.[191] They also provide opportunities to supply information about the legal consequences of the elections.[192]

In sum, private actors have increasingly made nonmarital relationships relevant to the receipt of significant benefits. Proposals to regulate informal relationships should take these developments into account, both in terms of how they are affecting substantive understandings of nonmarital relationships, and for the procedural opportunities that private administration presents.

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188. Safeco Ins. Co. v. Hicks, No. C16-0202-LTS, 2018 WL 1832971, at *6 (N.D. Iowa Apr. 17, 2018).

189. *See, e.g.*, Dutko v. Colvin, No. 15-cv-10698, 2015 WL 6750792, at *3 (E.D. Mich. Nov. 5, 1015) (relying on the fact that the SSI applicant received health insurance coverage through her partner's employer as proof that she was "married" to her partner for the purposes of determining eligibility).

190. Joslin, *supra* note 36, at 915; *see also* Stolzenberg, *supra* note 37 [draft at 56] (making a similar point).

191. *See supra* text accompanying note 186.

192. Scholars have observed that married couples often lack knowledge of the legal consequences of the decision to marry and have explored the consequences of providing more information. *See, e.g.*, Lynn A. Baker, *Promulgating the Marriage Contract*, 23 U. MICH. J. L. REFORM 217, 218 (1990). I recognize that many have questioned the effectiveness of benefits enrollment periods in actually prompting people to make beneficial selections or changing their designations. That said, these election periods still hold unexplored potential.

B. Asymmetric Recognition

As the cases discussed in Part III illustrate, the state and private entities may recognize an informal relationship for the purpose of burdening rather than benefiting the partners. Given that marriage triggers both benefits and burdens, the imposition of burdens based on informal relationships is not unforeseeable, though it is underappreciated.[193] Although the sample of cases in this study is too small to arrive at a definitive conclusion, the cases suggest that courts readily recognize relationships for the purpose of imposing a punishment or depriving a partner of a benefit.[194] In contrast, they less frequently recognize a relationship for the purpose of awarding a benefit.[195] Within these varied contexts, then, relationships are being recognized asymmetrically.

These observations build on a phenomenon that Erez Aloni has called "deprivative recognition": recognition of a nonmarital relationship for the purpose of depriving the partners of a legal benefit, such as Supplemental Security Income or federally subsidized student loans.[196] Aloni notes that partners recognized by the state for these purposes rarely receive legal benefits as a result of state recognition because they are not in formally recognized relationships; yet, their relationship may count against them for the purposes of qualifying for government-sponsored benefits or continuing to receive alimony from a previous relationship.[197] Albertina Antognini has expanded on this analysis within the context of termination of alimony. She has shown that with few exceptions, courts readily conclude that a former spouse's informal relationship should terminate alimony payments from the other ex-spouse.[198] This trend contrasts with the general reluctance courts display in imposing *inter se* support obligations.[199] Thus, in many

193. *See* Regan, *supra* note 73, at 1438–39 (noting that most scholarly analysis of nonmarital couples focuses on the extension of benefits, but "a fuller debate would consider not only when domestic partners should be given rights, but also when they should assume certain responsibilities").

194. *See supra* text accompanying notes 74–151.

195. *See supra* text accompanying notes 90–177.

196. *See* Aloni, *supra* note 8, at 1282; *see also* Blumberg, *Cohabitation*, *supra* note 30, at 1138 (making a similar observation about informal relationships being used to impose disabilities but not to receive benefits).

197. *See* Aloni, *supra* note 8, at 1281–82, 1285–99. There are some exceptions to this phenomenon. The Social Security Administration recognizes common law marriages if validly contracted in the relevant state. *See, e.g.*, Renshaw v. Heckler, 787 F.2d 50, 52 (2d Cir. 1986). Partners who do not formally marry but who satisfy the elements of common law marriage in the dwindling number of the states that still recognize it may have their relationships recognized ex post by the federal government and receive valuable benefits as a consequence.

198. *See* Antognini, *The Law of Nonmarriage*, *supra* note 34, at 21–30.

199. *See id.* at 8 and *passim*.

jurisdictions, the same relationship would likely terminate alimony but fail to justify the distribution of property.

The criminal cases I discussed in the previous Part show that recognition can be not only deprivative but punitive: they can trigger or heighten punishment. As part of a coherent system of relationship recognition, instances of punitive recognition are not problematic. But systematically asymmetric outcomes should raise concerns. For example, the court in *State v. Bender* held that two months of sporadic cohabitation, including just three weeks leading up to the offense in question, could satisfy the definition of cohabitation, supporting a domestic violence charge.[200] In *Benson v. Lively*, cohabitation period of six or seven weeks was sufficient.[201] In contrast, the court in *State v. Wetter* held that the defendant's relationship with his victim was not sufficiently serious enough to establish cohabitation as a defense to the crime of sex with a minor, even though Wetter had cohabited with the alleged victim for a period of three months.[202] To be clear, there were other facts at play in all of these cases that could justify these disparate outcomes. But reading them together leaves the impression that the relationship in *Wetter* would easily ground a prosecution for domestic assault. And these examples certainly reflect predictable tendencies: state actors may have an interest in defining crimes broadly and exceptions narrowly in order to capture the widest possible range of wrongful conduct.[203]

The data points in the insurance context are also too small to establish a pattern. Yet, the *Safeco* court concluded that the relationship in question met the definition of a domestic partnership for the purposes of denying one of the partners coverage under the other's insurance policy[204] in contrast to the *Engle* trial court, which refused to find that a surviving partner met the policy definition of a domestic partner for purposes of obtaining survivor benefits.[205] These two outcomes align with the insurers' economic incentives: insurers have a financial incentive in defining exclusions broadly in order to minimize liability. One would therefore expect them to identify as many relationships as possible as meeting these definitions. In contrast, where the insurer must

200. *See* State v. Bender, No. 17-0646, 2018 WL 1633514, at *1 (Iowa Ct. App. Apr. 4, 2018).

201. Benson v. Lively, 544 S.W.3d 159, 165 (Ky. Ct. App. 2018).

202. *See* State v. Wetter, No. 17-1418, 2018 WL 5839941, at *2 (Iowa Ct. App. Nov. 7, 2018).

203. *See* William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 509–10 (2001) (summarizing the dynamics that lead to the expansive reach of criminal law).

204. Safeco Ins. Co. of Ill. v. Hicks, No. C16-0202-LTS, 2018 WL 1832971, at *5–10 (N.D. Iowa Apr. 17, 2018).

205. Engle v. Land O'Lakes, Inc., 331 F. Supp. 3d 943 (W.D. Mo. 2018), *rev'd* 936 F.3d 853, 857 (8th Cir. 2019).

pay a benefit regardless of the identity of the recipient, the insurer may, as in *Engle*, be more willing to recognize informal relationships.[206] In *Engle*, it was the court, not the insurer, that interpreted the policy language so as to defeat the surviving partner's claim.[207]

Across these contexts, the cases establish that courts recognize relationships frequently when asked to do so in order to impose burdens. This recognition stands in stark contrast to the *inter se* context: it seems highly unlikely that any court would find the facts of these cases sufficient to impose *inter se* obligations between the partners. If these outcomes hold true across a larger sample of cases, as seems likely, the phenomenon of asymmetric recognition should be addressed.

First, as a general matter, asymmetric recognition can give rise to the impression that the legal system treats informal relationships inconsistently and therefore lacks legitimacy. "[T]he Rule of Law implies the intelligibility of law as a morally authoritative guide to human conduct," which in turn requires "the consistent application of sound principles of political morality reflected in authoritative legal materials."[208] The inconsistent application of similar legal tests could undermine the authoritativeness of those tests. I say "similar" because these contexts do differ, even if only slightly. The law might choose to make certain relationships relevant to the crime of domestic assault while taking a slightly different view of the relationships that might immunize a person from prosecution for having sex with a minor. Thus, this is not a case of courts refusing to treat like cases alike.[209] Yet inconsistent outcomes that systematically disfavor people in informal relationships can give rise to the perception of unfairness.

Asymmetric recognition may also reveal the influence of extraneous moral views or policy considerations—views that are not explicit justifications for the legal rules at issue.[210] To be clear, I do not contend for purposes of this Article that states lack the power to criminalize intimate partner violence or are obligated to immunize people in committed relationships from the crime of sex with a minor. But the fact that courts have entertained that cohabitation might provide such an immunity, yet have refused to recognize the existence of a cohabiting relationship under circumstances that would likely have

206. *See Engle*, 331 F. Supp. 3d at 955.

207. *See id.*

208. Richard H. Fallon, Jr., "*The Rule of Law" as a Concept in Constitutional Discourse*, 97 COLUM. L. REV. 1, 21–22 (1997) (citing RONALD DWORKIN, LAW'S EMPIRE 93 (1986)).

209. *See* Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 543 (1982) (noting that equality claims depend on an initial determination that two people are alike, even before attempting to justify the moral judgment that they ought to be treated alike).

210. *See* Aloni, *supra* note 8, at 1324 (criticizing the influence of morality divorced from the purposes of the legal rules).

satisfied the elements of cohabitation for the purposes of prosecuting domestic abuse,[211] suggests that the court was motivated by an external moral judgment, perhaps skepticism about teenage sexual agency or other views about sex.[212] The *Engle* case provides another example of this phenomenon. In that case, Unum, the insurer, was willing to interpret its policy to perform an *ex post* determination of beneficiary status and claimed that it performed this inquiry regularly.[213] But the court, in deciding if Unum's interpretation of its policy language was reasonable, invoked its own set of considerations that directly contradicted Unum's self-professed business practices: "Unum potentially opens themselves up to a host of individuals who claim to be domestic partners *with no meaningful way to assess such a claim*."[214] Although Unum was obligated to interpret its policy in a non-arbitrary way, nothing in ERISA obligated it to adopt a single, clear-cut method of identifying a potential beneficiary. Aside from whether the court's decision was ultimately correct, the opinion reveals that the court interposed its own policy considerations.

Asymmetric recognition may also promote inequality by insufficiently protecting relationships worthy of protection. States claim to prosecute domestic abuse because of the closeness of the relationships at issue and the vulnerability that closeness engenders.[215] These traits are relevant to other incidents of relationship recognition, like standing to sue for negligent infliction of emotional distress. Yet, as discussed above, only a minority of states allow partners in informal relationships to bring these claims.[216]

If informal relationships are being recognized asymmetrically, and that asymmetry is either unwarranted or is producing unfair outcomes, future reform efforts should address it. Advocates could challenge the denial of standing to bring various tort claims not by analogizing the relationships at

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211. Compare the facts of *State v. Bender*, 918 N.W.2d 501 (Iowa Ct. App. 2018) with *State v. Wetter*, 924 N.W.2d 876 (Iowa Ct. App. 2018), discussed above. The cases are certainly distinguishable; for instance, Bender had no other permanent address, *see Bender*, 918 N.W.2d at *1, while Wetter provided a different address when applying for a job, *see Wetter*, 924 N.W.2d at *1. Yet I get the sense, at least, that a court confronting the facts in *Wetter* would not hesitate to deem Wetter a cohabitant in order to prosecute him for domestic abuse.

212. *Cf.* Andrew Gilden, *Cyberbullying and the Innocence Narrative*, 48 HARV. C.R.-C.L. L. REV. 357, 362–63 (2013) (noting the persistence of the belief that minors are sexually innocent and lack sexual agency).

213. Engle v. Land O'Lakes, Inc., 331 F. Supp. 3d 943, 955 (W.D. Mo. 2018).

214. *See id.* at 954 (emphasis added).

215. *See* Collins, *supra* note 117, and accompanying text; *see also* Eskridge, *supra* note 21, at 1932 (noting that the old default against prosecuting domestic violence has been "substantially reversed" because of the recognition that "abuse by a family member or intimate partner tends to be more destructive than abuse by strangers").

216. *See* Collins, *supra* note 117.

issue to marriage—a failed strategy[217]—but by analogizing to cases in which courts have imposed punishment based on cohabitation and their underlying rationales. Because courts have often pointed to legislative intent as a reason not to expand tort standing beyond traditional categories, efforts should be made to address asymmetry through legislation. Courts and legislatures have already begun to rein in spousal or household exclusions in the insurance context[218] and could do so for domestic partners as well.

C. Relationship "Flickering"

I have previously noted how inconsistencies in marriage laws between jurisdictions can cause marriages to flicker on and off.[219] Definitions and incidents of marriage vary between the states as well as between the states and the federal government. For instance, a couple lawfully married under state law might not be recognized as married for federal immigration purposes; a cohabiting couple might be deemed married for the purpose of determining SSI benefits; a marriage between first cousins might become invalid as the couple crosses state lines.[220]

Scholars have argued that these inconsistencies can undermine individual liberty and subject people to unequal burdens.[221] This is the crux of the asymmetric recognition problem discussed in the previous Section. Until same-sex marriage was legalized nationwide, the experience of married same-sex couples vividly illustrated these unequal burdens, as couples' marriages would not be recognized by other states and the federal government for a whole range of purposes, including taxation, social security benefits, parentage, and divorce. In addition to these harms, I have argued that a negative consequence of flickering is informational. Marriage law depends for its legitimacy on people understanding the consequences of their conduct and conforming their conduct accordingly. The inconsistent

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217. *See, e.g.*, Elden v. Sheldon, 758 P.2d 582, 585–86 (Cal. 1988) (involving the argument by the plaintiff that cohabitation was like marriage and that he should be treated as a de facto spouse).

218. *See, e.g.*, Transamerica Ins. Co. v. Royle, 656 P.2d 820, 823 (Mont. 1983) (holding that the state's Motor Vehicle Safety Responsibility Act outlawed household exclusion clauses).

219. *See* Kaiponanea T. Matsumura, *The Integrity of Marriage*, 61 WM. & MARY L. REV. __ (forthcoming 2020) (draft at 24) ("For those in liminal relationships, however—cohabitants, same-sex couples, foreign nationals, first cousins—marriage flickers on and off."). I borrow the term from Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, 6 UNBOUND: HARV. J. LEGAL LEFT 1, 52–53 (2010) (arguing that because marriage results in effects that depend on a variety of actors and actions unfolding over time, the legal incidents of the marriage flicker).

220. *See* Matsumura, *The Integrity of Marriage*, *supra* note 219, at 490–94.

221. *See* Courtney G. Joslin, *Federalism and Family Status*, 90 IND. L.J. 787, 822 (2015).

application of marriage laws makes it more difficult to communicate marriage's legal content.[222]

But the flickering of marriage may not be entirely negative. Nonmarital partners may benefit when their relationships are not recognized by the state, especially if their relationships would disqualify them from means-tested benefits.[223] And, Courtney Joslin has argued that variations in legal definitions of marriage can enable the type of legal experimentation that results in positive long-term changes, the legalization of same-sex marriage being one prominent example.[224]

The cases discussed in previous Parts show that informal relationships flicker just as marriages do. One cause of the flickering is the plethora of sources from which the consequences of the relationship flow. As discussed above, benefits flow from a variety of private sources, including insurance companies and employers, as well as the State. Each of these sources, in turn, might administer a different set of recognition requirements. For instance, a person's employer might define "domestic partner" differently than that person's automobile insurance provider, which might define the concept differently than the state's domestic violence law. This Article does not discuss cases in which one of the partners seeks redistribution of property based on a contract, committed intimate relationship, or common law marriage, but those requirements vary as well. Thus, a single state, like California, might treat a relationship differently for the purposes of allowing recovery for loss of consortium, imposing criminal liability for domestic violence, and recognizing an implied agreement to divide property upon breakup.

Moreover, especially within the private sphere, partners have a significant degree of agency regarding these different consequences. In the *Engle* case discussed above, the insurer searched for a surviving domestic partner under the policy definition because the decedent had failed to designate a beneficiary.[225] But the decedent could have designated a beneficiary, which would have produced a different outcome. And nothing would prevent a person from designating different beneficiaries for her various benefits.

All told, then, the same relationship might be treated radically differently for these various purposes. As with marriage, flickering can mean deprivation. Partners could be exposed to inconsistent treatment: the same

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222. *See* Matsumura, *The Integrity of Marriage*, *supra* note 219.

223. *See* Aloni, *supra* note 8, at 1285–89 (revealing different ways that couples may benefit from nonrecognition).

224. *See* Joslin, *supra* note 221, at 816.

225. *See* Engle v. Land O'Lakes, Inc., 331 F. Supp. 3d 943, 947–48 (W.D. Mo. 2018).

woman whose application for SSI benefits is denied because of her partner's income[226] might be unable to recover for his untimely death.[227]

Unlike marriage, however, there is likely less of an expectation that nonmarriage is an integrated status. After all, many people in informal relationships could choose to marry if they wanted a fuller package of relational rights, a fact that has not escaped courts' attention.[228] And while many, if not most, partners slide into their nonmarital relationships rather than actively choosing to remain unmarried, that fact could confirm the notion that partners lack the expectation that their relationships will result in a consistent set of legal consequences.[229] In the nonmarital context, flickering is something that the partners might expect, if they think about their relationships in legal terms at all.

Moreover, flickering may actually be advantageous to some partners. In abolishing common law marriage, a Pennsylvania court bemoaned the fact that parties could use it as "a legal raincoat they can put on and take off as changing circumstances dictate."[230] Providing examples of this distasteful behavior, the court noted that "couples have told one side of the family that they were married and the other side that they were not, depending upon what each collection of relatives might approve. Other couples may swear in applying for benefits that they are man and wife, but file tax returns averring under penalty of perjury that they are single."[231] The latter conduct is indeed problematic—it is wrongful to misrepresent one's marital status for the purpose of obtaining benefits and illegal to misrepresent facts under penalty

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226. *See, e.g.*, Dutko v. Colvin, No. 15-CV-10698, 2015 WL 6750792 (E.D. Mich., Nov. 5, 2015).

227. *See supra* note 153–167 and accompanying text (summarizing the majority approach to standing to sue for various torts).

228. *See, e.g.*, Holguin v. Flores, 18 Cal. Rptr. 3d 749, 757 (Cal. Ct. App. 2004) (denying a wrongful death claim brought by a surviving heterosexual cohabitant on the ground that they "always had the right to marry").

229. A wealth of social science research indicates that unmarried couples drift into their relationships rather than intentionally choosing a relationship status with a particular set of expectations for what that relationship will entail. *See* SHARON SASSLER & AMANDA JAYNE MILLER, COHABITATION NATION: GENDER, CLASS, AND THE REMAKING OF RELATIONSHIPS 151 (2017); Carbone & Cahn, *supra* note 34, at 95; Joslin, *supra* note 36, at 972. Scholars have disagreed about the significance of these findings. June Carbone and Naomi Cahn argue that the lack of shared expectations regarding the legal significance of the relationship weighs against the imposition of legal obligations. *See* Carbone & Cahn, *supra* note 34, at 95–103. Courtney Joslin sees the absence of a mutual, formal decision not to marry as evidence that the partners have not necessarily rejected marriage-like obligations. *See* Joslin, *supra* note 36, at 971–74. But both sides would likely agree that the current state of legal regulation leaves nonmarital partners with little reason to expect that their relationships will be treated like marriages in every sense.

230. PNC Bank Corp. v. W.C.A.B. (Stamos), 831 A.2d 1269, 1281 (Pa. Commw. Ct. 2003).

231. *Id.*

of perjury[232]—but it is less clear what is wrong with characterizing one's relationship to reap social advantages. Moreover, it would be decidedly *legal* to apply for employment benefits as domestic partners under the employer's eligibility requirements but file taxes as single. The patchwork of eligibility requirements therefore provides partners with tools to maximize the financial, social, and legal benefits that flow from relationship status. Research on nonmarital couples suggests that partners may be doing some of this intuitively, for instance, moving in together for the purpose of raising a child, but avoiding financial entanglements because of concerns about the other's financial irresponsibility.[233] All of this is to say that from the perspective of partner autonomy, the flickering of nonmarital relationships is not as much of a problem as it is in marriage: it may actually be a value that the law could protect.

This discussion of benefits and harms has focused thus far on the partners' perspective. But the flickering of relationships may also interfere with a state's regulatory goals. It might, as the Pennsylvania court worried, encourage people to use their intimate relationships opportunistically, an outlook the court deemed "inappropriate."[234] Moral intuitions about the purpose of intimate relationships likely explain the court's view, namely that marriage and, by extension, intimate relationships, have some sort of essential quality,[235] or that the purpose of these relationships should be

232. Employers typically ask employees to certify their relationship status when requesting benefits. *See, e.g.*, Prudential Ins. Co., *Sample Qualified Adult Coverage Policy*, *Qualified Adult Health Care Certification Form* 11–12, https://assets2.hrc.org/files/assets/resources/Sample-Policies-Prudential.pdf [https://perma.cc/Q27G-4RYH] (requiring employees to "certify the accuracy of the information submitted on this form" and noting that "if any of the information is not true and correct, Prudential reserves the right to take disciplinary action").

233. *See* Carbone & Cahn, *supra* note 34, at 97.

234. *PNC Bank*, 831 A.2d at 1281 (calling it "astonishing" that parties would "seem to see nothing particularly inappropriate in their chameleon-like behavior").

235. *See* Matsumura, *The Integrity of Marriage*, *supra* note 219, at 8–9 (revealing that many court decisions have assumed that marriage has a core or essential meaning, one that has never been fully articulated). Many scholars have questioned the legitimacy and wisdom of tying valuable benefits to relationship status and have noted that opportunistic behavior flows predictably from such a regime. *See, e.g.*, Kerry Abrams, *Marriage Fraud*, 100 CALIF. L. REV. 1 (2012). Opportunism might be especially warranted where the underlying distribution of benefits is unfair.

altruistic rather than economically advantageous.[236] I do not agree that these are compelling concerns[237] but some state actors clearly do.[238]

The fact that a single relationship can result in different and inconsistent consequences also interferes with people's ability to understand the legal consequences of informal relationships. Elizabeth Scott and Robert Scott have argued that the diversity of nonmarital relationships (including both the *motives* for cohabiting and the *structure* of those relationships) "likely deters the development of collaborative networks that reinforce behavioral expectations promoting care and interdependence."[239] Elizabeth Scott and other scholars, myself included, have analyzed at length the ways in which norms contribute to legal regulation of intimate relationships.[240] To the extent that it would be beneficial to develop norms—for instance, that particular features of a relationship should give rise to particular duties—the flickering of relationships would be an impediment. That is because neither the partners' social networks, nor the partners themselves, will know which features of the relationship subject them to particular legal consequences. If

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236. *See, e.g.*, Coleman v. Burr, 93 N.Y. 17, 25 (N.Y. 1883) ("It would operate disastrously upon domestic life and breed discord and mischief if the wife could contract with her husband for the payment of services to be rendered for him in [the] home; if she could exact compensation for services, disagreeable or otherwise, rendered to members of his family; if she could sue him upon such contracts and establish them upon the disputed and conflicting testimony of the members of the household. To allow such contracts would degrade the wife by making her a menial and a servant in the home where she should *discharge marital duties in loving and devoted ministrations* . . . .") (emphasis added); Borelli v. Brusseau, 16 Cal. Rptr. 2d 16, 20 (Cal. Ct. App. 1993) (holding that a wife must personally provide nursing home-type care for her ailing husband and therefore could not enter into a contract to provide that care in exchange for property).

237. *See* Kaiponanea T. Matsumura, *Public Policing of Intimate Agreements*, 25 YALE J.L. & FEMINISM 159 (2013) (criticizing the use of the public policy doctrine to promote the separation of domestic and economic spheres).

238. Even if courts do not particularly care about the social norms that develop around informal relationships to regulate relationships *qua* relationships, they may seek to regulate informal relationships in order to shore up marital norms. *See* Matsumura, *The Integrity of Marriage*, *supra* note 219, at 16–20 (discussing the process by which social norms around marriage change or become deinstitutionalized).

239. Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COLUM. L. REV. 293, 361 (2015) (citing Stephen L. Nock, *A Comparison of Marriages and Cohabiting Relationships*, 16 J. FAM. ISSUES 53, 55 (1995) (arguing that cohabitation is under-institutionalized)); *see also* Matsumura, *supra* note 4, at 1066 (arguing that "nonmarriage lacks norms that align behavior and law. Therefore, it is nearly impossible to point to one act as justifying the imposition of the panoply of legal obligations that accompany marriage").

240. *See, e.g.*, ERIC A. POSNER, LAW AND SOCIAL NORMS *passim* (2000); Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers To Parent*, 153 U. PA. L. REV. 921 (2005) (studying social norms in the family context); Matsumura, *supra* note 219, at 476–77; Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901 (2000).

states intend to regulate informal relationships, the law must take a more consistent and coherent approach.

V. CONCLUSION: TOWARD A UNIFIED SYSTEM OF FUNCTIONAL REGULATION

The study at the center of this Article questions several themes that have dominated the discussion about horizontal nonmarital relationship recognition to this point: that the pressing policy issue is the imposition of *inter se* obligations; that informal relationships go widely unrecognized; and that few workable standards exist for identifying relationships for the purpose of imposing legal consequences. Indeed, I have endeavored to show that regulation beyond *inter se* disputes is not only worthwhile and possible but must be considered more fully in debates about relationship recognition. Beyond making this broad point, I have identified three specific areas deserving of more consideration: the role of private entities in performing regulation; the impacts of asymmetric recognition; and the impacts that inconsistent recognition—flickering—has on regulatory projects.

Beyond these specific contributions, these cases studied in this Article help to paint a picture of the interrelationships between the different traits of informal relationships that may be relevant to legal obligations. Private entities, for instance, associate economic interdependency with eligibility for health and survivor benefits. States recognize that the combination of physical proximity and emotional and sexual intimacy can magnify the seriousness of abuse. If these associations make sense, then economic interdependency could also justify the extension of state-provided benefits meant to support a dependent, like social security; and emotional and sexual intimacy could justify standing to sue for loss of consortium or emotional distress, both of which recognize the emotional bonds between family members.

These other instances of informal relationship recognition—beyond property—prove that the law is currently capable of rising to the challenge of instituting a more comprehensive, and fairer, system of regulating nonmarital relationships.