

NONMARITAL CONTRACT LAW

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I. INTRODUCTION: NONMARRIAGE LAW

Some countries regulate nonmarriage and recognize some rights attached to this status.¹ The United States mainly holds a contract approach to nonmarriage;² that is, unmarried couples may protect their rights and property by entering into a contract.³

The canonic *Marvin v. Marvin* case opened the door for enforcement of nonmarital agreements.⁴ Justice Tobriner held that these agreements

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1. See *generally* GÖRAN LIND, COMMON LAW MARRIAGE: A LEGAL INSTITUTION FOR COHABITATION 828–61 (2008).

2. See Albertina Antognini, *Nonmarital Contracts*, 73 STAN. L. REV. 67, 69 (2021). It is important to note that by regulating marriage, the state also indirectly regulates nonmarriage. That is, by excluding nonmarital relationships, marriage law regulates not only marital relations but also, circumlocutiously, nonmarital relations. For example, unmarried couples are not entitled to marital rights even if they live in a committed marriage-like relationship. See LIND, *supra* note 1, at 840–43. Therefore, nonmarriage is not only subject to contract law but also indirectly to marriage law.

3. See Margaret Ryznar, *Unwanted Cohabitation Agreements*, 61 FAM. CT. REV. 73, 73 (2023); see also Gregg Strauss, *Why the State Cannot “Abolish Marriage”: A Partial Defense of Legal Marriage*, 90 IND. L.J. 1261, 1276–83 (2015).

4. See *Marvin v. Marvin*, 557 P.2d 106, 121–23 (Cal. 1976).

are generally enforceable, unless the agreement is “expressly and inseparably based upon an illicit consideration of sexual service.”⁵ However, some partners do not enter into an express contract,⁶ and oral or implied contracts are hard to prove.⁷ Yet even when partners do contract, courts refuse to enforce the contract for lack of consideration, public policy, vagueness, or after concluding there was a gratuitous promise.⁸ Moreover, courts selectively enforce nonmarital agreements, mainly enforcing economic, but not other terms.⁹

As there is no specific nonmarital contract law, the courts apply general contract law.¹⁰ However, contract law, which is based on bargains, arm’s length negotiations, and economic exchange between strangers, is ill-suited to apply to intimate relationships between romantic partners.¹¹ Furthermore, consent and freedom of contract, two basic concepts at the heart of contract law, are modeled after monetary agreements between two independent individuals who are strangers to one another.¹² Hence, they are inapt for contracts between intimates, and are also not gender neutral. Therefore, there is a need to endorse nonmarital contract law tailored to the interests and needs of nonmarital partners. This Article begins the project of envisioning such nonmarital contract law.

II. NONMARRIAGE LAW SCHOLARSHIP

Some scholars have argued that a status regime better suits nonmarital couples. The American Law Institute’s Principles of Family

5. *Id.* at 114.

6. See David Westfall, *Forcing Incidents of Marriage on Unmarried Cohabitants: The American Law Institute’s Principles of Family Dissolution*, 76 NOTRE DAME L. REV. 1467, 1474 (2001); see also Ryznar, *supra* note 3, at 76.

7. See Rabinowitz v. Suvillaga, No. 17 CVS 244, 2019 WL 386853, at *9 (N.C. Super. Ct. Jan. 28, 2019); see also Barr v. Larkin, No. KNLCV156024578S, 2017 WL 5930379, at *3 (Conn. Super. Ct. Nov. 7, 2017).

8. Antognini, *supra* note 2, at 78–80.

9. *Id.* at 77–78.

10. See, e.g., Sebastian v. Brackeen, No. 1 CA-CV 08-0244, 2009 WL 551222, at *1–3 (Ariz. Ct. App. Mar. 5, 2009); Breininger v. Huntley, No. 317899, 2014 WL 6602713, at *1–5 (Mich. Ct. App. Nov. 20, 2014); Combs v. Tibbitts, 148 P.3d 430, 435 (Colo. App. 2006); Wilcox v. Trautz, 693 N.E.2d 141, 145–48 (Mass. 1998).

11. See Marra v. Nazzaro, No. SC-501/CO, 2018 WL 280097, at *2 (N.Y. City Ct. Jan. 2, 2018) (“The things done for affection and transactions made in the course of and as a natural consequence of living together in a romantic relationship do not translate well into contract law.”); see also Sally Burnett Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399, 1405–07 (1984) (finding that contract law is ill-suited to apply to marital agreements).

12. Sharp, *supra* note 11, at 1406.

Dissolution rejected a contract approach and instead recognized cohabitants' economic rights based on status.¹³ Some scholars proposed a registration regime¹⁴ or a regulation regime.¹⁵ Other scholars suggested the use of contracts by both married and unmarried couples,¹⁶ supporting the move from status to contract by either marital agreements or cohabitation agreements. Kaiponanea T. Matsumura criticized the status-contract dichotomy,¹⁷ and June Carbone and Naomi Cahn endorsed two different regimes: one for marriage and another for nonmarriage.¹⁸ As for nonmarriage, they suggested that couples should be able to customize their own arrangements as they see fit.¹⁹ Unlike marriage, which is a fixed institution, nonmarriage is based on the parties' autonomy to shape their own relationship.²⁰ Similarly, Shahar Lifshitz suggested a pluralistic model which distinguishes between marriage and nonmarriage, but at the same time supports committed relationships between cohabitants.²¹ Under the pluralistic model, some, but not all, marriage law components would also apply to committed long-term cohabitations.²²

Some scholars criticized the application of contract law to nonmarital relations. Ira Ellman, for example, suggested that "contract is a poor model for intimate relations" since "couples do not in fact think of their

13. AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 6.03 (2002).

14. See generally John G. Culhane, *Cohabitation, Registration, and Reliance: Creating a Comprehensive and Just Scheme for Protecting the Interests of Couples' Real Relationships*, 58 FAM. CT. REV. 145 (2020); Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573 (2013). See also Courtney G. Joslin, *Nonmarriage: The Double Bind*, 90 GEO. WASH. L. REV. 571 (2022) (criticizing the U.S. approach to nonmarriage).

15. See Kaiponanea T. Matsumura, *Consent to Intimate Regulation*, 96 N.C. L. REV. 1013, 1025 (2018).

16. See Gregg Temple, *Freedom of Contract and Intimate Relationships*, 8 HARV. J.L. & PUB. POL'Y 121 (1985).

17. Kaiponanea T. Matsumura, *Unifying Status and Contract*, 56 U.C. DAVIS L. REV. 1571, 1603 (2023).

18. June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55 (2016); see also Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815 (2005) (arguing against the constructive approach to cohabitation).

19. Carbone & Cahn, *supra* note 18, at 108.

20. See *id.*

21. Shahar Lifshitz, *The Pluralistic Vision of Marriage*, in MARRIAGE AT THE CROSSROADS: LAW, POLICY, AND THE BRAVE NEW WORLD OF TWENTY-FIRST-CENTURY FAMILIES 260 (Marsha Garrison & Elizabeth S. Scott eds., 2012) [hereinafter Lifshitz, *The Pluralistic Vision of Marriage*]; see also Shahar Lifshitz, *Unbundling Marriage* (2023) (unpublished manuscript) (on file with author) (discussing committed relationships between cohabitants).

22. Lifshitz, *The Pluralistic Vision of Marriage*, *supra* note 21, at 273.

relationship in contract terms.”²³ Albertina Antognini showed that coverture is present in nonmarital cases:

[C]ourts addressing property distribution outside of marriage rely on doctrines that have their roots in coverture and, in the process, actively preserve and perpetuate the principles undergirding coverture in the nonmarital realm . . . [C]ourts insulate the sphere of the home from that of the market, declare that the labor done within the former has no monetary value, and prevent the homemaker from accessing any property as a result . . . [S]ervices that take on the form of homemaking or childrearing - duties undertaken by the wife under coverture - do not lead to any attendant property rights.²⁴

“The right to contract is limited by an intimate relationship not only within marriage but also, significantly, outside of it. By declining to recognize certain exchanges, namely those that involve services rendered, contract law extends the impediments created by status to relations that lack any such formal marker.”²⁵ Furthermore, Antognini argued that nonmarriage is not a separate legal category from marriage, but rather that nonmarriage law is tethered to marriage, either explicitly or implicitly.²⁶ Thus, the courts impose gendered norms on marital relations and on nonmarital relations, on same-sex relations, and on opposite-sex relations. This perpetuation of gender roles subordinates women and especially harms minority families, such as same-sex families.²⁷ Also, cohabitation contracts often favor the wealthier party—usually men.²⁸ *Marvin v. Marvin* is one such example, since Michelle

23. Ira M. Ellman, *Contract Thinking was Marvin's Fatal Flaw*, 76 NOTRE DAME L. REV. 1365, 1367 (2001).

24. Albertina Antognini, *Nonmarital Coverture*, 99 B.U. L. REV. 2139, 2144–45 (2019) [hereinafter Antognini, *Nonmarital Coverture*]; see also Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1, 60–61 (2017) [hereinafter Antognini, *The Law of Nonmarriage*].

25. Antognini, *supra* note 2, at 74.

26. Albertina Antognini, *Against Nonmarital Exceptionalism*, 51 U.C.D. L. REV. 1891, 1891 (2018) [hereinafter Antognini, *Against Nonmarital Exceptionalism*].

27. Kaiponanea T. Matsumura, *Public Policing of Intimate Agreements*, 25 YALE J.L. & FEMINISM 159, 159 (2013).

28. Erez Aloni, *The Puzzle of Family Law Pluralism*, 39 HARV. WOMEN'S L.J. 317, 321 (2016); see also Judith T. Younger, *Lovers' Contracts in the Courts: Forsaking the Minimum Decencies*, 13 WM. & MARY J. WOMEN & L. 349, 427 (2007); Emily J. Stolzenberg, *Properties of Intimacy*, 80 MD. L. REV. 627, 634 (2021) (property law favors title).

Marvin did not receive palimony from Lee Marvin.²⁹ As such, the power dynamics between men and women is apparent in both marital and nonmarital agreements.³⁰

Contract law as currently applied to nonmarital agreements does not protect women as they bargain in the shadow of a patriarchal society. This criticism raises serious arguments against a contractual approach to nonmarital relations. However, scholarship has not addressed the possibility of shaping special nonmarital contract law to accommodate nonmarital partners.³¹ This Article aims to begin this project.

III. NONMARITAL CONTRACT LAW

Kaiponanea T. Matsumura argued that nonmarital law is underdeveloped because marriage is rooted in our culture as habitus.³² This Article aims to develop nonmarital contract law, a first step in developing nonmarital law.³³ Nonmarital contract law provides nonmarital couples the benefits of a contract regime, while at the same time attending to the criticism outlined above on the failure of contract law to protect the autonomy and rights of nonmarital couples. As many couples cohabit without marriage,³⁴ exercising their right not to marry,³⁵

29. *Marvin v. Marvin*, 176 Cal. Rptr. 555, 559 (Cal. Ct. App. 1981). For a more recent similar case involving rapper, 50 Cent, see *Tompkins v. Jackson*, No. 104745/2008, slip op. at 14 (N.Y. Sup. Ct. Feb. 3, 2009).

30. For the gender aspects of cohabitation agreement see Elizabeth Kingdom, *Cohabitation Contracts: A Socialist-Feminist Issue*, 15 J.L. & Soc'y 77 (1988); Elizabeth Kingdom, *Cohabitation Contracts and the Democratization of Personal Relations*, 8 FEM. LEGAL STUD. 5 (2000); Sharon Thompson, *Cohabitation Contracts and Gender Equality*, in RESEARCH HANDBOOK ON MARRIAGE, COHABITATION AND THE LAW 352 (Rebecca Probert & Sharon Thompson eds., 2024).

31. See generally Hanoeh Dagan, *Intimate Contracts and Choice Theory*, 18 EUR. REV. CONTRACT L. 104 (2022) (discussing contracts between intimates); Jennifer K. Robbennolt & Monika Kirkpatrick Johnson, *Legal Planning for Unmarried Committed Partners: Empirical Lessons for a Preventive and Therapeutic Approach*, 41 ARIZ. L. REV. 417 (1999) (discussing therapeutic jurisprudence to help nonmarital couples).

32. Kaiponanea T. Matsumura, *The Marital Habitus*, 99 WASH. U. L. REV. 2033, 2035–36 (2022).

33. This Article will only address nonmarital agreements. For nonmarital law beyond nonmarital agreements, see generally Kaiponanea T. Matsumura, *Beyond Property: The Other Legal Consequences of Informal Relationships*, 51 ARIZ. ST. L.J. 1325 (2019).

34. Barbara Atwood & Naomi Cahn, *Nonmarital Cohabitants: The U.S. Approach*, 44 HOUS. J. INT'L L. 191, 192 (2022); see also Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309, 313 (2008).

35. See Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 FORDHAM L. REV. 1509, 1541–47 (2016); Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425, 487 (2017).

it is important to have a specific law setting their rights, privileges, and duties.³⁶

Currently, courts apply general contract law, insensitive to the context of nonmarital relations. Thus, general contract law is inapt to capture the uniqueness of intimate relations and therefore is ineffective at addressing nonmarital contracts. However, specific nonmarital contract law would be tailored to nonmarital relations and therefore can resolve the problems nonmarried couples face. That is a contextual contract law that would be apt to nonmarital relations.

This nonmarital contract law will collapse the binary between intimacy and economics or between family and market. As applied today general contract law preserves this binary and therefore does not supply good solutions for nonmarital relations. Breaking this dichotomy, nonmarital contract law will address both the economic and the emotional aspects of nonmarital relations.

Developing detailed and comprehensive nonmarital contract law is beyond the scope of this short Article. To begin this project, the following are five proposed guiding principles for nonmarital contract law, both general and more specific: The first general principle is applying contextual contract law, tailored to the varied nonmarital relationship. The second general principle is analyzing nonmarital agreements as relational contracts, since general contract law is modeled after arm's length economic transactions between strangers and therefore inapt to deal with contracts between intimates. In addition to these general principles, contract doctrines should also be amended to address the specific interests and needs of nonmarried couples. The third principle is broadening the doctrine of consideration to include housework and other noneconomic benefits. The fourth principle is broadening the doctrine of duress to include emotional pressures. Contract law alone cannot protect vulnerable partners in intimate relations, and therefore the last principle is applying protective mandatory rules. The following elaborates on each of these guiding principles. It should be noted that these principles make nonmarital contract law harmonious and consistent, and therefore the

36. For the different approaches to nonmarriage (including equity, unjust enrichment, constructive trust, civil unions and domestic partners, common law marriage and the Uniform Cohabitants Economic Remedies Act), see generally Atwood & Cahn, *supra* note 34. For the Uniform Cohabitants Economic Remedies Act, see generally Barbara Ann Atwood & Naomi R. Cahn, *The Uniform Cohabitants' Economic Remedies Act: Codifying and Strengthening Contract and Equity for Nonmarital Partners*, 57 FAM. L.Q. 1 (2024). For restitution claims, see generally Emily Sherwin, *Love, Money, and Justice: Restitution Between Cohabitants*, 77 U. COLO. L. REV. 711 (2006); Candace Saari Kovacic-Fleischer, *Cohabitation and the Restatement (Third) of Restitution & Unjust Enrichment*, 68 WASH. & LEE L. REV. 1407 (2011).

next sections also address the reconciliation of potential conflicts or tensions between the different principles.

A. Contextual Contract Law

Larry A. DiMatteo and Blake D. Morant supported a contextual theory of contract law that “recognizes the need for flexible rules for different contractual contexts and the elastic application of those rules across contexts.”³⁷ Others suggested that “scholars and practitioners should take into account the context of contract law, and consequently, contract law itself needs to be reformulated in light of this context.”³⁸ Debora Threedy alluded to the importance of the context of gender and other social hierarchies to contract law.³⁹ Contextual contract law is also important in addressing varied nonmarital agreements.

Nonmarital relations are diverse:⁴⁰ some short-term and some long-term;⁴¹ some a trial period anticipating marriage and some an alternative

37. Larry A. DiMatteo & Blake D. Morant, *Contract in Context and Contract as Context*, 45 WAKE FOREST L. REV. 549, 554 (2010); see also Larry A. DiMatteo, *Contract Stories: Importance of the Contextual Approach to Law*, 88 WASH. L. REV. 1287, 1310–12 (2013).

38. Alberto Salazar Valle, *The Complex Context of Contract Law*, 42 OSGOODE HALL L.J. 515, 519 (2004); see Daniel D. Barnhizer, *Context as Power: Defining the Field of Battle for Advantage in Contractual Interactions*, 45 WAKE FOREST L. REV. 607, 613, 630–31 (2010). For legal context generally, see Martha Minow & Elizabeth V. Spelman, *In Context*, 63 S. CAL. L. REV. 1597 (1990).

39. Debora L. Threedy, *Dancing Around Gender: Lessons from Arthur Murray on Gender and Contracts*, 45 WAKE FOREST L. REV. 749 749–50 (2010).

40. Atwood & Cahn, *supra* note 34, at 216–17; see also Naomi Cahn & June Carbone, *Blackstonian Marriage, Gender, and Cohabitation*, 51 ARIZ. ST. L.J. 1247, 1279 (2019); Jessica R. Feinberg, *The Survival of Nonmarital Relationship Statuses in the Same-Sex Marriage Era: A Proposal*, 87 TEMP. L. REV. 70, 96 (2014–2015); Kaiponanea T. Matsumura, *Breaking Down Status*, 98 WASH. U. L. REV. 671, 703 (2021); Shahar Lifshitz, *Married Against Their Will? Toward a Pluralist Regulation of Spousal Relationships*, 66 WASH. & LEE L. REV. 1565, 1569 (2009); Pamela J. Smock & Wendy D. Manning, *Living Together Unmarried in the United States: Demographic Perspectives and Implications for Family Policy*, 26 LAW & POL’Y 87, 97 (2004).

41. See, e.g., *Kozikowska v. Wykowski*, No. FM-09-2617-08, 2012 WL 4370430, at *1 (N.J. Super. Ct. App. Div. Sept. 26, 2012) (twenty-year relationship); *Bumb v. Young*, No. 63825, 2015 WL 4642594, at *1 (Nev. Aug. 4, 2015) (twenty-two-year relationship); *Armao v. McKenney*, 218 So. 3d 481, at *483 (Fla. Dist. Ct. App. 2017) (over-forty-year relationship); *Wilcox v. Trautz*, 693 N.E.2d 141, 143 (Mass. 1998) (twenty-five-year relationship); *Gunderson v. Golden*, 360 P.3d 353, 354 (Idaho Ct. App. 2015) (over-twenty-year committed relationship); *Meyer v. Jeffries*, No. EO70773, 2019 WL 6710854, at *4 (Cal. Ct. App. Dec. 10, 2019) (nearly thirty-year relationship); *Goode v. Goode*, 396 S.E.2d 430, 431 (W. Va. 1990) (twenty-eight-year relationship). But see *Soderholm v. Kosty*, 676 N.Y.S.2d 850, 851 (N.Y. Just. 1998) (less-than-two-year informal “live-in” relationship between two college students).

to marriage;⁴² some conservative and some nontraditional;⁴³ some similar to marriage and some a rejection of marriage; some committed and some less so;⁴⁴ some between same-sex couples and some between opposite-sex couples; some between equal partners and some characterized by power dynamics and dependency; some including children and some not; some where the partners share and commingle their finances and property and some where the partners maintain separate ownership and title; some in which intimate partners also act as business partners and some not.⁴⁵ Partners cohabit for various reasons: some reject marriage, some want to avoid marriage law obligations, some do not want to lose their benefits, some cohabit for a trial period anticipating marriage, and some cannot marry, some are not aware of the difference between marriage and nonmarriage, and sometime there is disagreement between the partners with one wishing to get married while the other does not. Some agreements are entered into during the nonmarital relationship, and some after separation,⁴⁶ some agreements are written and some oral, some are express and some implied. Furthermore, nonmarriage is not only gendered, but also racial.⁴⁷ In addition, until recently, same-sex couples could not marry⁴⁸ (and, in some states, there are still anti-same-sex marriage laws on the books).⁴⁹

Contextual nonmarital contract law will be tailored to these varied and diverse relationships. It will both respect the parties' autonomy and freedom to shape their relationship as they see fit and maintain the difference between marriage and nonmarriage. For example, the length

42. See Renata Forste, *Prelude to Marriage or Alternative to Marriage? A Social Demographic Look at Cohabitation in the U.S.*, 4 J.L. FAM. STUD. 91, 91–92 (2002).

43. For a traditional relationship, see *In re Domestic Partnership of Joling*, 443 P.3d 724, 728 (Or. Ct. App. 2019) and *Goode*, 396 S.E.2d at 436.

44. Sharon Sassler, *The Process of Entering into Cohabiting Unions*, 66 J. MARRIAGE & FAM. 491, 497–99 (2004); Eleanor Brown et al., *The Price of Exit*, 99 WASH. U. L. REV. 1897, 1897–98 (2022).

45. See, e.g., *Baron v. Suissa*, 90 N.Y.S.3d 220, 222 (App. Div. 2018); *Pearce v. Allen*, No. B269744, 2018 WL 897054, at *1–2 (Cal. Ct. App. Feb. 15, 2018).

46. See, e.g., *Pfeiff v. Kelly*, 623 N.Y.S.2d 965, 966 (N.Y. App. Div. 1995); *Combs v. Tibbitts*, 148 P.3d 430, 432, 434 (Colo. App. 2006); *Putz v. Allie*, 785 N.E.2d 577, 579–80 (Ind. Ct. App. 2003).

47. Amanda Jayne Miller & Sharon Sassler, “Don’t Force My Hand”: *Gender and Social Class Variation in Relationship Negotiation*, 51 ARIZ. ST. L.J. 1369, 1390 (2019); R.A. Lenhardt, *Race Matters in Research on Nonmarital Unions: A Response to Amanda Jayne Miller’s and Shannon Sassler’s “Don’t Force My Hand”: Gender and Social Class Variation in Relationship Negotiation*, 51 ARIZ. ST. L.J. 1317, 1322 (2019).

48. See *Obergefell v. Hodges*, 576 U.S. 644, 681 (2015).

49. See, e.g., Sophie Austin, *California Still Has An Anti-Gay Marriage Law on the Books. Voters Could Remove It Next Year*, ASSOCIATED PRESS (July 13, 2023, 5:24 PM), <https://apnews.com/article/california-samesex-marriage-equality-voters-ballot-2552934177cf9bb82a9bfa11eb9f1e38>.

of the relationship is a factor in the amount of palimony; dependency in an unequal relationship is also a factor in palimony or duress; in extreme cases, the harmful breakup of a committed long-term relationship should result in damages for emotional distress; and breakup of a marriage-like relationship should result in property division as in marriage. Thus, in one case of an over twenty-year marriage-like relationship, during which the couple had two children and the woman was financially dependent on her partner, the judge awarded the woman palimony for the remainder of her life and divided the property and joint bank account between the partners.⁵⁰ This is a context specific decision and, under a different factual scenario, the result would have been different.

In contrast, short-term relationships, with each party keeping his or her separate property, will result in neither palimony nor nonpecuniary damages at separation. In these cases, there is less change of circumstances and dependency, and therefore less need to protect weaker parties. The court should respect the parties' choice of economic regime, whether they kept separate properties and finances or commingled their assets. For example, in one case of an over forty-year relationship during which the partners commingled their funds and assets, the judge divided these equally between the parties.⁵¹ This too is a contextual ruling tailored to the parties' oral agreement.⁵² However, in *Marvin v. Marvin*, after a five-year relationship, Ms. Marvin was denied both palimony and rehabilitative award since the court concluded that there was no contractual obligation to pay maintenance, there was no fiduciary obligation with respect to property, and there was not unjust enrichment.⁵³ Thus, although Ms. Marvin might have deserved some financial award, there is a big difference between these two relationships that consequently deserve a different remedy.

Contextual nonmarital contract law means no one-size-fits-all law, but rather law tailored to the varied nonmarital relationships. For example, social norms in patriarchal society stand in the background of opposite-sex couples' agreements, while social norms in a heteronormative society stand in the background of same-sex couples' agreements.⁵⁴ Similarly, a separation agreement entered into after the breakup of the relationship is different from a nonmarital agreement

50. Kozikowska v. Wykowski, No. FM-09-2617-08, 2012 WL 4370430, at *4 (N.J. Super. Ct. App. Div. Sept. 26, 2012).

51. Armao v. McKenney, 218 So. 3d 481, 485 (Fla. Dist. Ct. App. 2017).

52. See *id.*

53. Marvin v. Marvin, 122 Cal. App. 3d 871, 873, 875–76 (Cal. Ct. App. 1981).

54. See generally Sharmila Roy Grossman, *The Illusory Rights of Marvin v. Marvin for the Same-Sex Couple Versus the Preferable Canadian Alternative*—M. v. H., 38 CAL. W. L. REV. 547 (2002).

entered into at the beginning of the relationship. Thus, rather than a strict nonmarital status, contract law doctrines should be shaped and applied in a contextual manner in accordance with the different types of nonmarital relations.

Contextual nonmarital law does not mean inconsistency and uncertainty. It means that legal rules would be tailored to the interests and needs of the different couples and have just results. It will be sensitive to the specificities of the relationship and will not impose generic rules that do not fit the parties' particular understandings and wishes. It will also acknowledge and honor the agreement made by the parties. In fact, a one-size-fits-all law will be inconsistent since it applies one rule to different relationships and will lead to unjust results. It will also be uncertain because it disregards the parties' agreement.

Protecting the welfare of children is also an important public policy consideration when dealing with nonmarital agreements. Interpretation of agreements in these cases will take into account the informal understandings and trust between the partners, who did not put them in writing. Unconscionability is a tool for protecting vulnerable parties in nonmarital relations in cases of power dynamics or changed circumstances. Using the public policy, interpretation and unconscionability doctrines, the judge can tailor nonmarital contract law to the agreement before the court.

While the remaining four principles may seem contradictory at first sight, a contextual approach, as demonstrated above, means applying different rules to different nonmarital relationships and thus reconciling potential contradictions. For example, mandatory rules seem at odds with contextual contract law. However, these rules would only apply to certain relationships under certain circumstances (for example, to long-term committed relationships). Since mandatory rules would not apply to all relationships—and when they do, they would apply differently to different relationships—they would reflect, rather than contradict, contextual contract law. Therefore, the following four principles should be read in light of this contextual approach. For example, relational contract law is more suitable for long-term committed relationships, and less for short-term relationships.

B. Relational Contract

Courts apply general contract law to nonmarital agreements.⁵⁵ However, nonmarital relationships are more akin to a relational contract,

55. See sources cited *supra* note 10.

a committed long-term relationship to pursue shared goals.⁵⁶ Nonmarital agreements are not arm's length discrete transactions between strangers. Moreover, similar to agreements between married couples,⁵⁷ agreements between unmarried couples are based on intimate relationships embedded in social norms and understandings.

Scholars advocated using relational theory to address issues of gender and power dynamics.⁵⁸ Sharon Thompson developed a feminist relational contract theory applicable in the family setting.⁵⁹ Building on relational autonomy and relational contract theories, she argued that freedom, autonomy, and consent should consider gender power imbalance between intimate parties, and the context of the relationship of trust, emotional support, investment in the relationship, and dependency between the parties.⁶⁰ Thompson's theory rejected the neoliberal notion of autonomy, which is based on rational decision of self-interested individuals, and gave it a feminist meaning, preserving women's agency on the one hand and protecting women from their choices made under the constraints of patriarchy on the other.⁶¹ It rejected binaries such as consent/no consent, and was based on the lived reality of women's relationships in our society.⁶² It also rejected the bargain approach, focusing instead on the dynamics of the relationship.⁶³ Moreover, it gave autonomy and consent a richer and more complex meaning embedded in the social context of the relationship.⁶⁴ Applying

56. For relational contracts generally, see IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980), and IAN R. MACNEIL, *THE RELATIONAL THEORY OF CONTRACT: SELECTED WORKS OF IAN MACNEIL* (David Campbell ed., 2001).

57. For information about agreements between married couples and marriage as a relational contract, see generally Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225 (1998).

58. See Mairead Enright, *Contract Law*, in GREAT DEBATES IN GENDER AND LAW 1, 8 (Rosemary Auchmuty ed., 2018); Patricia A. Tidwell & Peter Linzer, *The Flesh-Colored Band Aid—Contracts, Feminism, Dialogue and Norms*, 28 HOUS. L. REV. 791, 795–97 (1991); Linda Mulcahy, *The Limitations of Love and Altruism—Feminist Perspectives on Contract Law*, in FEMINIST PERSPECTIVES ON CONTRACT LAW 1, 2 (Linda Mulcahy and Sally Wheeler eds., 2005); John Wightman, *Intimate Relationships, Relational Contract Theory, and the Reach of Contract*, 8 FEMINIST LEGAL STUD. 93, 93–94 (2000).

59. See Sharon Thompson, *Feminist Relational Contract Theory: A New Model for Family Property Agreements*, 45 J.L. & SOC'Y 617, 617–19 (2018) [hereinafter Thompson, *Feminist Relational Contract Theory*]; Sharon Thompson, *Using Feminist Relational Contract Theory to Build upon Consentability: A Case Study of Prenups*, 66 LOY. L. REV. 55, 56 (2020) [hereinafter Thompson, *Using Feminist Relational Contract Theory*].

60. See sources cited *supra* note 59.

61. Thompson, *Feminist Relational Contract Theory*, *supra* note 59, at 640–42.

62. Thompson, *Using Feminist Relational Contract Theory*, *supra* note 59, at 63–64.

63. *Id.* at 72–73.

64. *Id.* at 61–62.

this theory would yield a new perspective on nonmarital agreements, since it empowers women, who are usually the disadvantaged party to nonmarital agreements.

As a nonmarital agreement is a long-term relational contract between intimates, the court should apply a heightened duty of good faith and allow contract modification when circumstances change. This will also allow courts to tailor a fair solution when the couple breaks up.

In a case brought before the court, one partner told the other that “she was going to be ‘looked after.’”⁶⁵ However, the court concluded that “those statements were too ambiguous to constitute an expression of intent to provide financial support for the rest of her life.”⁶⁶ The court did not recognize that, in an intimate relationship that lasted for more than a decade, one does not use specific and accurate language as if it were a business contract.⁶⁷ In romantic, long-term relationships there are informal and flexible understandings between the parties that are not reduced to contractual terms. Therefore, the court should analyze these agreements as relational contracts. Furthermore, intimate relationships between cohabitants include nonpecuniary terms alongside economic terms. The court examined the contract as if it were a discrete contract rather than a contract with a person whom the partner called a “life partner.”⁶⁸

The parties’ agreement is embedded in both the couples’ interrelations with each other and intra relations with third parties. Thus, the courts should impose a heightened duty of good faith in cases of intimate relationships. For example, in a case mentioned in the previous section in which the woman was financially dependent on her partner in an over twenty-year marriage-like relationship, the court awarded palimony for the remainder of her life.⁶⁹ Furthermore, breach of a promise in this context is much more hurtful and damages the mutual commitment compared to a purely business context. For example, compensation for emotional distress caused by breach of the promise seems warranted in extreme cases. Though nonpecuniary damages are rare in contract law, nonmarital relations should be the exception.⁷⁰

65. Barron v. Meredith, No. A145849, 2017 WL 772444, at *2 (Cal. Ct. App. Feb. 28, 2017).

66. *Id.* at *3.

67. *See id.* at *4.

68. *See id.* at *3.

69. *See* Kozikowska v. Wykowski, No. FM-09-2617-08, 2012 WL 4370430, at *1, *13 (N.J. Super. Ct. App. Div. Sept. 26, 2012).

70. *See, e.g.,* Stephenson v. Szabo, 20 Pa. D. & C.4th 97, 101–02 (1992) (refusing to award damages in this case because the behavior was not extreme and outrageous); Martinez v. Avila, 20SMCV01248, 2021 Cal. Super. LEXIS 72101, at *10–11 (Cal. Super.

Long-term nonmarital relations are based on trust, informal understanding, social norms, cooperation, and codependency. The parties' obligations do not only flow from the contract, but also from social norms embedded in social inequalities and gendered structures of society. The court should take this context into account, and not treat it as a discrete contract between individuals. Thus, as the next section shows, the court should not exclude housework from contract law and should not treat it as a gratuitous part of the relationship carried out without any intention of being compensated for it. As Macneil and feminists applying relational theory of contract taught us, these social norms and relational aspects are important.⁷¹ Courts should look beyond the bargain and the written contract and consider the dynamics of the relationship.

Furthermore, in long-term intimate relations changes in circumstances are likely to accrue, and the parties adjust their understandings and behavior accordingly. Therefore, the court should not enforce the original agreement that was modified by the parties' behavior. Instead, the court should help the parties alter their agreement rather than enforce an old agreement that is now unfair due to changed circumstances. The parties' understandings go beyond the agreement, and they are dynamic and everchanging as the parties' relationship develops over time.⁷² As the example in the former section showed, after a forty-year relationship during which the partners commingled their funds and assets, the judge equally divided these funds and assets between the parties.⁷³ This decision took into account the parties' behavior and relationship and treated their capital as jointly owned.⁷⁴ The court's interpretation and application of contract law should fit this relational context, as neoclassic contract law based on discrete agreements between strangers fails to capture the relational aspects of these agreements between intimates. These examples stress the need to tailor contract law to fit long-term committed relationships between cohabitants. However, short-term relations should be addressed by other contract law rules.

Ct. Dec. 7, 2021) (discussing breach of duty arising out of a preexisting relationship as a means of recovering damages).

71. See *supra* notes 56–59 and accompanying text.

72. See, e.g., *Kozlowski v. Kozlowski*, 403 A.2d 902, 906 (N.J. 1979) (“Parties entering this type of relationship usually do not record their understanding in specific legalese. Rather, as here, the terms of their agreement are to be found in their respective versions of the agreement, and their acts and conduct in the light of the subject matter and the surrounding circumstances.”).

73. See *Armao v. McKenney*, 218 So. 3d 481, 484–85 (Fla. Dist. Ct. App. 2017).

74. See *id.*

C. Formation

Contracts between nonmarital partners are sometimes deemed unenforceable by courts who find that companionship⁷⁵ or love and affection⁷⁶ do not qualify as consideration. In other cases, contracts are not enforced since the promise is gratuitous,⁷⁷ and such promises qualify as gifts rather than as enforceable contracts, while other promises are not sufficiently definite to form a contract.⁷⁸ And yet other contracts are not enforced because they violate public policy.⁷⁹ Contracts for illicit sex,⁸⁰ or cohabiting with one person while married to another,⁸¹ are unenforceable because they are contrary to good morals. In addition, it is difficult to prove oral contracts⁸² and to show detrimental reliance on a promise to establish a promissory estoppel claim.⁸³ The courts maintain the separation between marriage and nonmarriage and between contractual relations and intimate relations.⁸⁴ Furthermore, nonmarital

75. See *Pizzo v. Goor*, 857 N.Y.S.2d 526, 526 (App. Div. 1st Dept. 2008) (finding that a contractual provision for “companionship (both platonic and sexual)” did not constitute consideration); *Bergen v. Wood*, 18 Cal. Rptr. 2d 75, 79 (Ct. App. 1993) (holding a lack of consideration because “services as a social companion . . . are not normally compensated and are inextricably intertwined with the sexual relationship”).

76. See *Williams v. Ormsby*, 966 N.E.2d 255, 263–64 (Ohio 2012) (“[L]ove and affection alone [are not] consideration for a contract.”); *Rose v. Elias*, 576 N.Y.S.2d 257, 258 (App. Div. 1991) (“[L]ove and affection [are] insufficient consideration for defendant’s promise to purchase an apartment.”).

77. See, e.g., *Williams*, 966 N.E.2d at 264–65; *Breining v. Huntley*, No. 317899, 2014 WL 6602713, at *4 (Mich. Ct. App. Nov. 20, 2014).

78. See, e.g., *Tompkins v. Jackson*, No. 104745/2008, 2009 WL 513858, at *13–14 (N.Y. Sup. Ct. Feb. 3, 2009); *Sebastian v. Brackeen*, No. 1 CA-CV 08-0244, 2009 WL 551222, at *2 (Ariz. Ct. App. Mar. 5, 2009); *Soderholm v. Kosty*, 676 N.Y.S.2d 850, 852–53 (Justice Ct. 1998); *Sands v. Menard*, 887 N.W.2d 94, 109 (Wis. Ct. App. 2016).

79. See, e.g., *Gunderson v. Golden*, 360 P.3d 353, 355 (Idaho Ct. App. 2015); *Barron v. Meredith*, No. A145849, 2017 WL 772444, at *3 (Cal. Ct. App. Feb. 28, 2017); *Marra v. Nazzaro*, 58 Misc. 3d 1206(A), 6–8 (N.Y. City Ct. 2018). See generally Harry G. Prince, *Public Policy Limitations on Cohabitation Agreements: Unruly Horse or Circus Pony?*, 70 MINN. L. REV. 163 (1985). For the context of assisted reproductive technologies, see generally Matsumura, *supra* note 27.

80. See *Marvin v. Marvin*, 557 P.2d 106, 106 (Cal. 1976); *Pfeiff v. Kelly*, 623 N.Y.S.2d 965, 967 (App. Div. 1995); see also Albertina Antognini & Susan Frelich Appleton, *Sexual Agreements*, 99 WASH. U. L. REV. 1807, 1812 (2022).

81. See *Rose v. Elias*, 576 N.Y.S.2d 257, 258 (App. Div. 1991).

82. See, e.g., *Tompkins v. Jackson*, No. 104745/2008, slip op., at 14 (N.Y. Sup. Ct. Feb. 3, 2009); *Meyer v. Jeffries*, No. E070773, 2019 WL 6710854, at *11 (Cal. Ct. App. Dec. 10, 2019).

83. See, e.g., *Breining v. Huntley*, No. 317899, 2014 WL 6602713, at *8 (Mich. Ct. App. Nov. 20, 2014).

84. See *Rose*, 576 N.Y.S.2d at 258.

agreements are selectively enforced, enforcing mainly economic but not other terms.⁸⁵

Not enforcing nonmarital contracts has devastating distributive consequences, since the property division and the economic terms decided by the parties are invalidated by the court. Furthermore, not enforcing nonmarital contracts is gendered, since women are more negatively affected than men.⁸⁶ In fact, by restricting the right to contract, courts put women in a position similar to coverture.⁸⁷ What's more, as housework, care work, and affection do not qualify as consideration, the formation of a contract is also gendered to the disadvantage of women.⁸⁸ In other words, drawing the line between enforceable contracts and unenforceable informal deals is gendered.⁸⁹ Not enforcing contracts maintains the market-home binary and perpetuates the stereotypes of good women who do their housework altruistically with no expectation from their partner, since this is their relational duty to their partner.⁹⁰

The general doctrine of consideration is ill-suited for nonmarital contracts. Therefore, there is a need for a broad and inclusive notion of consideration that includes housework and other noneconomic benefits. Thus, the court should develop an expansive doctrine of consideration that will include domestic chores and nonpecuniary benefits that are typical in an intimate romantic relationship.⁹¹ Moreover, as intimate relations typically include nonpecuniary terms, these terms should also be enforced alongside economic terms. Noneconomic relational aspects are even present in commercial bargains, and should therefore be included when these aspects are at the basis of intimate relations. Furthermore, as addressed in the previous section, in an intimate relationship, the parties do not use precise legal phrases typical to business contracts.⁹² They use informal language that is sometimes vague and amorphous.⁹³ This informal language should not a priori be considered as too indefinite to form a contract, and the courts should

85. See Antognini, *supra* note 2, at 127.

86. *Id.* at 138.

87. See generally Antognini, *Nonmarital Coverture*, *supra* note 24.

88. See *id.* at 2169.

89. See *id.*

90. See *id.*

91. See, e.g., *Williams v. Ormsby*, 966 N.E.2d 255, 265–67 (Ohio 2012) (Pfeifer, J., dissenting).

92. See, e.g., *Barron v. Meredith*, No. A145849, 2017 WL 772444, at *3 (Cal. Ct. App. Feb. 28, 2017).

93. See *id.* (“Although Meredith allegedly told Barron that she was going to be ‘looked after,’ it was not unreasonable for the court to conclude that those statements were too ambiguous to constitute an expression of intent to provide financial support for the rest of her life.”).

consider whether, despite its vagueness, the terms are still specific enough and thus enforceable. This is a contextual decision that should be tailored to the circumstances of the relationship as presented to the court. This expansion of the doctrine of consideration will enable enforcement of promises in the family sphere and enable couples to tailor their relations to their needs.

Alternatively, the court should enforce nonmarital agreements under the doctrine of promissory estoppel.⁹⁴ In many cases, in which one partner made a promise to the other partner, and on which the latter relied to her detriment, it is just to enforce such promise.⁹⁵ In one case, a woman underwent IVF using her partner's sperm after her partner promised her that they would raise the child together, that he would pay for the procedure, and that he would support her and the child for life.⁹⁶ However, after she got pregnant, he ended the relationship.⁹⁷ After the child was born he supported her for three months and then stopped paying.⁹⁸ The court rejected both the woman's contract claim, for lack of consideration, and her promissory estoppel claim, for lack of reliance.⁹⁹ This case demonstrates the importance of enforcing promises under the doctrine of promissory estoppel. The woman went through the IVF process and pregnancy based on her belief that they were in this together, and that now the court should not let her partner break his promise after their child was born and leave her without his promised support.¹⁰⁰ Though they cohabited for a short period, going through IVF should qualify as reliance and his promise should be enforced.¹⁰¹ Also, the partner's three months of payment showed that he felt committed to her and their baby.¹⁰² It is unjust to let the partner forgo his promise to support her and their child. The court should balance these factors and enforce the promise to award her some support, even if not for life. The justice element provides the court with the flexibility to enforce the

94. RESTATEMENT (SECOND) OF CONTRACTS § 90 (AM. L. INST. 1981) ("A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.").

95. See, e.g., *Smith v. Carr*, No. CV 12-3251, 2012 WL 3962904, at *4 (C.D. Cal. Sept. 10, 2012).

96. *Id.* at *1.

97. *Id.* at *2.

98. *Id.*

99. *Id.* at *4-8.

100. See *id.* at *1-2. See generally Orit Gan, *A Feminist Economic Perspective on Contract Law: Promissory Estoppel as an Example*, 28 MICH. J. GENDER & L. 1 (2021).

101. See *Smith*, 2012 WL 3962904, at *1.

102. See *id.* at *2.

promise to some extent and award either reliance damages or expectation damages. Enforcement of nonmarital agreements under the doctrine of promissory estoppel will result in the enforcement of more—but not all—nonmarital contracts.

The justice element of promissory estoppel and a cautious expansion of consideration will ensure fair enforcement of nonmarital agreements.¹⁰³ It will also allow the flexibility to enforce the promises to the extent needed to avoid injustice.¹⁰⁴ It will also allow the court flexibility to award either reliance damages or expectation damages as justice requires.¹⁰⁵ Therefore, it will enable the court to enforce promises contextually. Enforcing such promises, by either a broad doctrine of consideration or by promissory estoppel, will better reflect the parties' intentions and will help unmarried partners (especially women) financially.¹⁰⁶ It will value women's work and refute the stereotypes of good, altruistic women who serve their men gratuitously without any intention of receiving something in return, and of bad, gold digger women who extort from their men money they do not deserve.¹⁰⁷ It will also refute the gender roles in intimate relations, according to which unpaid domestic labor is women's responsibility.¹⁰⁸ Furthermore, it will also refute the dichotomy of either an economic contract or an intimate relationship.¹⁰⁹ This will also relax the market-home binary and expand contract law to the domestic sphere. Lack of consideration prevents married and unmarried women from enforcing promises their partners made to them.¹¹⁰ Therefore, enforcing more promises in the domestic sphere will better their position vis-à-vis their partners and help them financially.

While this section has suggested expanding the doctrine of consideration, it did not sketch a detailed notion of such an inclusive doctrine of consideration. Will it include emotional labor?¹¹¹ Will it

103. See generally Orit Gan, *The Justice Element of Promissory Estoppel*, 89 ST. JOHN'S L. REV. 55 (2015).

104. See *id.* at 73–74.

105. See *id.* at 95–96.

106. See Orit Gan, *Contract Law, Equality and the State*, 72 CLEV. ST. L. REV. 889, 914–15 (2024).

107. See Katharine Silbaugh, *Commodification and Women's Household Labor*, 9 YALE J.L. & FEMINISM 81, 85 (1997) [hereinafter Silbaugh, *Commodification*]; Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 NW. U. L. REV. 1, 28 (1996) [hereinafter Silbaugh, *Turning Labor into Love*].

108. See Silbaugh, *Turning Labor into Love*, *supra* note 107, at 31–32.

109. See Nancy Folbre & Julie A. Nelson, *For Love or Money—or Both?*, 14 J. ECON. PERSPS. 123, 131 (2000).

110. See, e.g., *Borrelli v. Brusseau*, 16 Cal. Rptr. 2d 16, 18 (Ct. App. 1993).

111. See *Williams v. Ormsby*, 966 N.E.2d 255, 264 (Ohio 2012); Hila Keren, *Considering Affective Consideration*, 40 GOLDEN GATE U. L. REV. 165, 172 (2010).

include bureaucratic work?¹¹² How will it avoid commodification of women's labor?¹¹³ In this short Article, I only provide guiding principles which will need to be further developed. Future work will address these questions and expand on these principles in more detail.

D. Defenses

Nonmarital partners sometimes raise contract law defenses when seeking relief from their separation contract obligations. Duress is one of these defenses, however, it is usually rejected.¹¹⁴ For example, in one case involving a same-sex couple, the court denied a woman's duress claim since she complied with the contract for three years; she did not raise the duress claim until the trial; she was represented by counsel; and she signed the contract after negotiations during which several drafts were exchanged.¹¹⁵ Though the court acknowledged the emotional pain in separation, it nevertheless applied general duress law.¹¹⁶ While declaring that "[o]n the breakup of their relationship, both women were confronted with pain, resentment and emotional loss,"¹¹⁷ the court concluded that

[t]his does not appear to be a case where one party totally dominated the other, or had the leverage to force the other to act against her will. Each party had a desired objective, and was willing to make concessions to achieve it. That is the essence of every contract negotiation.¹¹⁸

The court further concluded that the emotional turmoil did not amount to duress and that the partner's compliance with the agreement for three years ratified the contract.¹¹⁹

The general doctrine of duress is ill-suited to address emotional pressures and, in intimate relationships, duress may be a result of such pressure.¹²⁰ Thus, in nonmarital agreements, duress should be broader and include coercion beyond economic pressures. In the above case, the court may have reached the right result, however, it should have been

112. See Elizabeth Emens, *Admin*, 103 GEO. L.J. 1409, 1433 (2015).

113. See Silbaugh, *Commodification*, *supra* note 107, at 85; Silbaugh, *Turning Labor into Love*, *supra* note 107, at 81.

114. See Orit Gan, *Contractual Duress and Relations of Power*, 36 HARV. J.L. & GENDER 171, 205–06 (2013).

115. *Silver v. Starrett*, 674 N.Y.S.2d 915, 918–21 (Sup. Ct. 1998).

116. See *id.* at 919.

117. *Id.*

118. *Id.* at 918.

119. *Id.* at 920.

120. Gan, *supra* note 114, at 218.

more attentive to the emotional stress and pain typical to a breakup of intimate relations. A more complex examination of the parties' consent under conditions of intimate relations is warranted, especially with respect to a long-term relationship. For example, the court concluded that the contract was beneficial to both parties and served both parties' objectives and interests.¹²¹ However, it failed to examine the power dynamics between the parties, the dependency of one on the other, and the abuse of trust in intimate relationships. Therefore, negotiating a separation agreement with legal representation does not necessarily mean consent when you are in a weak, vulnerable position.¹²² Furthermore, after a fourteen-year relationship, it may take some time to get over a breakup. Thus, complying with the separation agreement while recovering from the separation does not necessarily indicate consent.¹²³ In the same manner, not immediately claiming duress, and raising this defense at trial for the first time, may also be the result of the partner's recovering from a very emotional breakup.¹²⁴ A nonmarital agreement is not a business contract and a longer time may be needed to rescind such an agreement. In another case, one partner claimed he signed the separation agreement under duress since he was stressed and depressed.¹²⁵ The court rejected his duress claim stating that "[h]is testimony does not establish that his free will was overcome."¹²⁶ The court should have taken into account the eleven-year relationship between the partners during which they commingled assets and worked together in a jewelry store.¹²⁷ The court should also have considered that he was stressed because the other partner would not leave the apartment without signing the separation agreement.¹²⁸ A decision regarding duress should be made only after weighing these economic and noneconomic factors. Duress might still be rejected in this case, but only after a thorough examination of the emotional stress beyond economic coercion.¹²⁹ These two examples also show the need for a contextual doctrine of duress.

The courts should endorse a more complex and robust duress law that is sensitive to the power dynamics between romantic partners. This will enable courts to police the misuse of power by men and protect women's

121. See *Silver*, 674 N.Y.S. 2d at 921.

122. Sharp, *supra* note 11, at 1428.

123. *Id.* at 1432.

124. See Gan, *supra* note 114, at 218. *But see* Sharp, *supra* note 11, at 1430.

125. Putz v. Allie, 785 N.E.2d 577, 582 (Ind. Ct. App. 2003).

126. *Id.*

127. See *id.* at 581.

128. See *id.* at 582.

129. See *id.*

rights upon separation.¹³⁰ It will also ensure that parties meaningfully consent to the contract and that contracts are not one-sided. Duress law is limited and based on a masculine model, and therefore excludes coercion experienced by women (whether married¹³¹ or unmarried). Broadening the doctrine of duress and including women's perspectives and lived experience will empower them to avoid one-sided exploitive contracts.

Duress is only one defense and other doctrines, such as unconscionability and undue influence, should be developed in a similar manner. For example, in one case a misrepresentation claim was dismissed because it was not specific.¹³² The partner argued that the other partner represented that "he would take care of her" and the court ruled that this was not particular enough.¹³³ Though the court might have reached the right conclusion, it is important to note that, in a ten-year romantic relationship, couples most likely do not use specific language as if they were strangers conducting business together. As mentioned earlier regarding consideration, couples in a long-term relationship have informal understandings and deals.¹³⁴ Therefore, the requirement of specificity and particularity should be tailored to this intimate context though not abolished altogether. That is, the court should require some specificity that takes into account the context of intimate nonmarital relationship. Like duress, the doctrine of misrepresentation should also be contextual.

Consent is a complex concept and, as it is the basis of contractual obligations, the courts need to develop a more robust notion of consent.¹³⁵ Similarly, a new concept of freedom and autonomy is also needed.¹³⁶ This more complex doctrine of duress will be sensitive to emotional pressures that hinder both consent and freedom of contract.¹³⁷ In nonmarital relations these concepts should be shaped differently than in economic contracts. Consent is emotional and relational, not merely a rational

130. See Gan, *supra* note 114, at 199–201.

131. See, e.g., *Biliouris v. Biliouris*, 852 N.E.2d 687, 692–93 (Mass. App. Ct. 2006).

132. *Rabinowitz v. Suvillaga*, No. 17 CVS 244, 2019 WL 386853, at *11 (N.C. Super. Ct. Jan. 28, 2019).

133. *Id.*

134. See discussion *supra* Part C.

135. See Orit Gan, *The Many Faces of Contractual Consent*, 65 *DRAKE L. REV.* 615, 626 (2017); Emily J. Stolzenberg, *Nonconsensual Family Obligations*, 48 *B.Y.U. L. REV.* 625, 682 (2022); Gillian K. Hadfield, *An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law*, 146 *U. PA. L. REV.* 1235, 1248 (1998).

136. See Emily J. Stolzenberg, *The New Family Freedom*, 59 *B.C. L. REV.* 1983, 1987 (2018).

137. See Gan, *supra* note 135, at 631.

choice between two alternatives, and freedom and autonomy are set in a patriarchal society which subordinates women and limits their liberty and choices.¹³⁸

Parties are embedded in both intra-familial relationships and social relationships, which shape both their autonomy and consent. Thus, a more realistic notion of consent and autonomy would yield better analysis of nonmarital separation agreements. As in the previous section on the doctrine of consideration, this section provided the foundation for broadening the doctrine of duress. More work is needed to further develop in more detail expansion of duress law so that it is more inclusive and more suitable for agreements between intimates.¹³⁹

E. Mandatory Rules

Whereas marriage is highly regulated, few statutes refer to nonmarriage. For example, several U.S. states require nonmarital agreements to be in writing.¹⁴⁰ Both legislators and regulators should address this lacuna. Furthermore, nonmarital law is largely judge-made law,¹⁴¹ and legislation, if enacted, could preserve the rights of nonmarital couples at separation. Moreover, as parties bargain in the shadow of the law,¹⁴² it is also essential to provide background rules that will set the parties' contracts. Default rules might not protect underprivileged parties since the other party would contract around these rules.¹⁴³ Thus, because there are often power imbalances between nonmarital partners, it is important to empower the weaker party and police the misuse of power by privileged parties by creating mandatory rules.¹⁴⁴ For example, separation after years of cohabitation is often a difficult time—especially for vulnerable domestic women—and homemakers may find themselves without any assets after years of providing domestic services. Mandatory rules policing property allocation at separation and valuing women's contribution to the welfare of the family will prevent distributive

138. Orit Gan, *Spousal Agreements and Patriarchal Bargains: A Wife's Guarantee of Her Husband's Business Debts*, 18 EUR. REV. CONT. L. 175, 189, 195 (2022).

139. See Gan, *supra* note 114, at 198–201.

140. See, e.g., MINN. STAT. §§ 513.075–.076; N.J. STAT. § 25:1-5; TEX. BUS. & COM. § 26.01.

141. Atwood & Cahn, *supra* note 34, at 216. *But see supra* note 2 and accompanying text.

142. See Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 968 (1979).

143. See Thompson, *supra* note 30, at 360–64 (opting out of The Family Law (Scotland) Act 2006).

144. Antognini, *Against Nonmarital Exceptionalism*, *supra* note 26, at 1962.

injustice and women's poverty.¹⁴⁵ Domestic women should be protected at separation, and their years of contributing to the family and providing care work and housework should be valued. These regulations should be tailored to long-term committed marriage-like relationships and should not apply to short-term cohabitations.

As for requiring written agreements, this may harm women since this means that oral contracts will not be enforced. Moreover, as nonmarital relations are based on trust, and as the understandings and promises between the partners are seldom in writing, women also face difficulties enforcing oral promises.¹⁴⁶

Statutes protecting children at separation are also warranted.¹⁴⁷ Separation agreements should safeguard the rights of children (for example for maintenance) in nonmarital families. Furthermore, death of one of the partners is also a difficult time that may leave the surviving partner in a vulnerable position.¹⁴⁸

Legislation dealing with property ownership at separation, child support, and rights upon the death of one of the parties provide an important background to agreements between nonmarital partners. The same holds true for social welfare¹⁴⁹ and tax laws,¹⁵⁰ applicable to both traditional and nontraditional families. These laws will aid women not only at separation or death, but may also impact the relationship, as they provide backup rules for the relationship.

Other needed background rules are anti-discrimination laws demanding that same-sex couples receive the same treatment as opposite sex couples. Notwithstanding the achievements of the LGBTQ community, as some same-sex couples choose not to marry (or in some countries cannot marry) it is important to ensure they are not treated

145. Though unjust enrichment claims are applicable in nonmarital relations, they do not present a perfect solution in these cases. See Atwood & Cahn, *supra* note 34, at 200–93.

146. See Antognini, *supra* note 2, at 103; see, e.g., *Mechura v. McQuillan*, 419 N.W.2d 855, 859 (Minn. Ct. App. 1988).

147. See Wendy D. Manning, *Cohabitation and Child Wellbeing*, in 25 THE FUTURE OF CHILDREN 51, 3–4 (2015); Clare Huntington, *Nonmarital Families and the Legal System's Institutional Failures*, 50 FAM. L. Q. 247, 250 (2016); Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 171 (2015); Serena Mayeri, *Marital Supremacy and the Constitution of the Nonmarital Family*, 103 CALIF. L. REV. 1277, 1279–83 (2015). See generally Pamela Laufer-Ukeles, *The Children of Nonmarriage: Towards a Child-First Family Law*, 40 YALE. L. & POL'Y REV. 384, 464 (2022).

148. See Richard L. Kaplan, *Preferencing Nonmarriage in Later Years*, 99 WASH. U. L. REV. 1957, 1963 (2022).

149. See Grace Ganz Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 NOTRE DAME L. REV. 1265, 1309–10 (2001).

150. See Keeva Terry, *Divorce Without Marriage: Taxing Property Transfers Between Cohabiting Adults*, 89 U. CIN. L. REV. 882, 906 (2021).

differently than similar heterosexual couples.¹⁵¹ As in the case of the above mandatory rules, these background rules will indirectly influence same-sex relationships.

The courts should apply mandatory rules that preserve the rights of underprivileged parties (usually homemakers and children) at the end of the relationship. Prohibiting contracting around these rights will reduce the chances of abusive, oppressive, and exploitive nonmarital agreements, and unjust results at separation. Though not a perfect solution to one-sided agreements, it will improve the protection provided to domestic, vulnerable women. Carol Rose argued that, since women tend to cooperate or are perceived as cooperators in negotiations, men will always have the upper hand in negotiations.¹⁵² Therefore, background rules empowering women are important.

Preserving freedom of contract and the parties' autonomy to negotiate the terms of their relationship is important but not absolute. In cases of power imbalance between the parties, the law needs to intervene and police misuse of power. Freedom of contract does not justify enforcing abusive, one-sided contracts, and consent to these contracts in a patriarchal society is questionable. As parties negotiate in the shadow of a patriarchic society, the legislature should make sure they negotiate in the shadow of protective laws. In cases of committed, long-term, nonmarital relationships that are similar to marriage, regulation should provide nonmarried women the protection it provides married women at separation. This is a balanced approach that preserves freedom of contract on the one hand while protecting vulnerable parties on the other. This is also contextual since it is tailored to these—but not other—marriage-like relationships. Couples who reject marriage should be excluded from marital law. Mandatory rules would protect vulnerable partners in marriage-like relationships but would not impose marital obligations on the couples who rejected marriage.

Contract law's protection (using doctrines such as unconscionability, duress, undue influence, and public policy) is not enough and should be supplemented by protective legislation.¹⁵³ These mandatory rules would combine contract law protection with protective legislation. For example,

151. Grossman, *supra* note 54, at 547–49 (exemplifying what can happen to members of the LGBTQ community without anti-discrimination laws).

152. See Carol M. Rose, *Bargaining and Gender*, 18 HARV. J.L. & PUB. POL'Y 547, 549–50, 562 (1995).

153. See Carol S. Bruch, *Nonmarital Cohabitation in the Common Law Countries: A Study in Judicial-Legislative Interaction*, 29 AM. J. COMPAR. L. 217, 218–19 (1981) (discussing how both legislation and court decisions shape nonmarital law); Grossman, *supra* note 54, at 568 (“It is only from within this framework [of combined case law and legislation] that legal recognition can be achieved for same-sex relationships.”).

a statute requiring independent legal counseling would result in courts refusing to enforce nonmarital agreements that did not comply with this requirement. Though not a perfect solution, it can help in cases where the couples enter a formal written agreement. Mandatory rules still maintain a contractual regime and not a status or registration regime. However, mandatory rules also provide legal protection for vulnerable parties.¹⁵⁴ It is a warranted limitation of freedom of contract for public policy reasons, such as preserving equality for LGBTQ people.¹⁵⁵ Nonmarital law should not rely solely on contract law, and the legislators and the courts together should improve the legal protection of the many couples who cohabit without marriage. This will advance equality (of dependent women, for example) and refute the private-public binary. For example, support payments can be derived from either a nonmarital contract or from regulation. This combination of contract and regulation will empower underprivileged women.¹⁵⁶ Therefore, nonmarital contract law would not only refute the intimate-contract binary (for example, by broadening the doctrine of consideration to enforce promises in the intimate sphere)¹⁵⁷ but also the private-public binary (for example, by enacting mandatory rules that combine both contract law regime and protective regulation).¹⁵⁸

CONCLUSION

Nonmarital contract law has many advantages: it preserves the difference between marriage and nonmarriage, it maintains the partners' autonomy to choose between a menu of options, and it provides them freedom of contract to tailor their own relationship. At the same time, it protects vulnerable partners and polices the terms of the relations in cases of unfair one-sided contract conditions.

It is important to preserve different social options, among them marriage and nonmarriage.¹⁵⁹ However, the distinction between

154. See Grossman, *supra* note 54, at 560 (describing “uncertain and dangerous” environment that judicial enforcement of nonmarital contracts alone engenders).

155. See generally Robin West, *The Right to Contract as a Civil Right*, 26 ST. THOMAS L. REV. 551 (2014) (arguing that there is no tension between freedom of contract and antidiscrimination).

156. Gan, *supra* note 106, at 932–33.

157. See *id.* at 918.

158. See *id.*

159. See Herma Hill Kay & Carol Amyx, *Marvin v. Marvin: Preserving the Options*, 65 CALIF. L. REV. 937, 977 (1977); Courtney G. Joslin, *Autonomy in the Family*, 66 UCLA L. REV. 912, 914–15 (2019); Raymond C. O'Brien, *Marital Versus Nonmarital Entitlements*, 45 ACTEC L.J. 79, 81–83 (2020) (describing the benefits of marriage); J. Herbie DiFonzo, *How Marriage Became Optional: Cohabitation, Gender, and the Emerging*

marriage and nonmarriage should not be hierarchal.¹⁶⁰ These are two different arrangements, providing a set of options with no one option better than the other. Applying marital law to couples who rejected marriage goes against their will.¹⁶¹ Furthermore, nonmarital contracts do not only offer an alternative to (the status of) marriage, but also enable couples to create nontraditional relationships and families. Nontraditional families (such as same-sex couples) can use contract law to create and protect their family, and to maintain some rights and benefits of traditional families.¹⁶² Nonmarital contract law is contextual to fit numerous different relations. It is important to allow partners to shape their relationship as they see fit. Once criminalized, cohabitation is common nowadays¹⁶³ and deserves legal protection.

At the same time, nonmarital contract law avoids gendered stereotypes and values care work and housework, mostly performed by women. Domestic work is not a womanly duty (whether in or outside of marriage), but something that affects property distribution. This does not mean commodification of women's work that will harm them. Rather, this has a positive distributive impact on women, since their work will be valued, they will be in a better position when negotiating with their partners, and the law will respect their agreed upon economic allocations and property division. It will empower women and same-sex couples and promote their equality. Not valuing these domestic contributions means distributive injustice harmful to women in traditional families doing domestic gendered roles.

Functional Norms, 8 RUTGERS J.L. & PUB. POL'Y 521, 531 (2011) (describing the importance that any type of family holds to people); Katharine K. Baker, *What is Nonmarriage?*, 73 SMU L. REV. 201, 211–13 (2020) (growing call for legal recognition of nonmarital families); Melissa Murray, *Obergefell v. Hodges and Nonmarriage Inequality*, 104 CALIF. L. REV. 1207, 1210 (2016); Melissa Murray, *Accommodating Nonmarriage*, 88 S. CAL. L. REV. 661, 676–77 (2015); *see also* Shahar Lifshitz, *A Potential Lesson from the Israeli Experience for the American Same-Sex Marriage Debate*, 22 BYU J. PUB. L. 359, 361–62 (2008) (describing Israeli understanding of marriage law).

160. *See generally* Clare Huntington, *Family Law and Nonmarital Families*, 53 FAM. CT. REV. 233, 233 (2015) (“A fundamental mismatch between marital family law and nonmarital family life undermines relationships in nonmarital families . . .”).

161. *See* Lifshitz, *supra* note 40, at 1576. *But see* Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1159–70 (1981) (suggesting assimilation of marriage and nonmarriage).

162. *See* Deborah Zalesne, *The Contractual Family: The Role of the Market in Shaping Family Formations and Rights*, 36 CARDOZO L. REV. 1027, 1035–38 (2015); Martha M. Ertman, *Contractual Purgatory for Sexual Minorities: Not Heaven, but Not Hell Either*, 73 DENV. U. L. REV. 1107, 1138–40 (1996). *See generally* MARTHA M. ERTMAN, *LOVE'S PROMISES: HOW FORMAL AND INFORMAL CONTRACTS SHAPE ALL KINDS OF FAMILIES* (2015).

163. Huntington, *supra* note 160, at 233; Martha L. Fineman, *Law and Changing Patterns of Behavior: Sanctions on Non-Marital Cohabitation*, 1981 WIS. L. REV. 275, 275 (1981).

Nonmarital contract law also goes against the market-family/contract-intimacy (or the public-private) binary. It brings contract law into intimate relations. Maintaining the market-home binary has devastating economic consequences for domestic women and leads to distributive injustice. It perpetuates the status quo, in that it favors the privileged party, usually men. Excluding familial contracts from contract law by not enforcing nonmarital contracts is not neutral nonintervention but rather disrespect of the parties' agreement. As Jill Hasday observed, economics and intimacy are not separated, rather, intimate relations are already included in economic exchanges.¹⁶⁴ Nonmarital contract law would make these exchanges fair and egalitarian.

Neoclassical contract law may be ill-suited for agreements between intimates. However, nonmarital contract law is not rigid cold contract law that governs economic transactions between businesses and arm's length agreements between strangers. It is based on a relational and feminist notion of autonomy and consent. It celebrates and fosters the intimate relations between the parties. It protects and preserves the committed relations between the partners but does not impose duties beyond the parties' commitments. It is sensitive to gender dynamics and other social hierarchies, and it is contextual and sensitive to the relational aspects of the agreements. One-sided exploitive agreements are not enforced, and the courts police abusive and unfair agreements—thus promoting distributive justice and equality.

At present, the law provides limited support for nonmarital couples.¹⁶⁵ The legal options available today are: recognizing nonmarriage status or equitable remedies; not allowing nonmarital contracts at all; or applying general contract law. As discussed, nonmarital contract law is a better option for varied and numerous reasons. This Article begins the project of nonmarital contract law by outlining guiding principles for such law.

164. Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 492 (2005); see also Martha M. Ertman, *Exchange as a Cornerstone of Families*, 34 W. NEW ENG. L. REV. 405, 419 (2012) (describing the "pair bond" as a crucial cornerstone to society). But see Hila Keren, *Can Separate Be Equal? Intimate Economic Exchange and the Cost of Being Special*, 119 HARV. L. REV. F. 19, 20 (2005).

165. Zalesne, *supra* note 162, at 1030; Ann Laquer Estin, *Unmarried Partners and the Legacy of Marvin v. Marvin: Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1384 (2001).