

# Why the State Cannot “Abolish Marriage”: A Partial Defense of Legal Marriage

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*Does a liberal state have a legitimate interest in defining the terms of intimate relationships? Recently, several scholars have answered this question with a no and concluded that the state should abolish marriage, along with all other categories of intimate status. While politically infeasible, these proposals offer a powerful thought experiment. In this Article, I use this thought experiment to argue that the law cannot avoid relying on intimate-status norms and has legitimate reasons to retain an intimate status like marriage.*

*The argument has three parts. The primary lesson of the thought experiment is that the state cannot abolish intimate status. Even if a state abolished formal status registries, private law would recreate ad hoc status distinctions. As long as intimates can bring claims against one another in contract, tort, or restitution, ordinary private-law doctrines will require judges or juries to interpret the parties' legal rights in light of their relationship. The law might exempt intimates from these ordinary doctrines, but that would place a systemic status distinction at the heart of private law.*

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Second, these private-law tailoring doctrines inevitably rely on intimate status, because intimate norms are what moral philosophers call “imperfect duties.” A duty is imperfect when the actor has discretion to decide how and when to fulfill it. Whether a discretionary act fulfills an imperfect duty depends on whether it expresses the actor’s subjective commitment to the values and ends of the relationship. Consequently, the only way for a third party to make precise judgments about imperfect duties is to interpret the parties’ conduct in light of normative standards for that type of relationship. The law can enforce imperfect intimate duties only if it supplants the couple’s discretion to interpret their duties and replaces their commitment with legal sanctions.

Finally, marital status offers a way to manage the tension created by imperfect intimate rights. The law refuses to enforce marital rights in ongoing relationships, which prevents the state from displacing couples’ discretion and commitment. When a couple separates, they abandon their commitment and thus lose their discretionary authority. At that point, the state may use equitable and egalitarian norms to protect the former spouses’ legitimate expectations. This combination of deferred protection and equitable remedies offers a framework for legally protected imperfect rights.

#### INTRODUCTION

The same-sex marriage controversy has kept marriage at the forefront of our national consciousness. Yet we have made little headway on the most fundamental question about marriage law: Why regulate marriage at all? Courts have demanded that the states identify some purpose for marriage that does not apply equally to same-sex couples or to identify some other reason for withholding same-sex marriage that does not bottom out in opposition to homosexuality, whether based in theology, morality, or prejudice.<sup>1</sup> The arguments about tradition, procreation, and child rearing are now familiar, and few courts have found them convincing.<sup>2</sup> Consequently, these courts have found little need to inquire further into why the law regulates marriage.<sup>3</sup> This blind spot is partly a result of the parties’ litigating

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1. See, e.g., *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013) (citing as examples of inappropriate justifications “both moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality” (quoting H.R. REP. NO. 104-664, at 12–13 (1996)); *Baskin v. Bogan*, 766 F.3d 648, 668–69 (7th Cir. 2014), cert. denied, 135 S. Ct. 316 (2014); *In re Marriage Cases*, 183 P.3d 384, 399–400 (Cal. 2008); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 479–81 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862, 897–906 (Iowa 2009); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961–68 (Mass. 2003); *Lewis v. Harris*, 908 A.2d 196, 217–18 (N.J. 2006); *Andersen v. King Cnty.*, 138 P.3d 963, 982–84 (Wash. 2006).

2. See, e.g., *Baskin*, 766 F.3d at 668–71; *Bostic v. Schaefer*, 760 F.3d 352, 383–85 (4th Cir. 2014), cert. denied, 135 S. Ct. 308 (2014); *Kitchen v. Herbert*, 755 F.3d 1193, 1219–28 (10th Cir. 2014), cert. denied, 135 S. Ct. 265 (2014). But see *DeBoer v. Snyder*, 772 F.3d 388, 404–06 (6th Cir. 2014), cert. granted sub nom. *Obergefell v. Hodges*, 135 S. Ct. 1039 (2015).

3. See, e.g., *Baskin*, 766 F.3d at 658–60; *Varnum*, 763 N.W.2d at 883–84. Two notable recent exceptions that discuss the state’s interest in legal regulation of marriage are *In re Marriage Cases*, 183 P.3d at 421–26, and *Goodridge*, 798 N.E.2d at 954–57.

The Supreme Court in *Windsor* artfully dodged this question. The Court concluded that the Defense of Marriage Act’s definition of marriage as “a legal union between one man and one

positions: when the arguments against same-sex marriage come up short, the movements' proponents have little incentive to question the foundations of civil marriage. More fundamentally, however, the blind spot represents an implicit baseline assumption that there is *some* legitimate reason to regulate intimate relationships.<sup>4</sup> But what is it? Why may a liberal state legitimately dictate the terms of intimate relationships?

One promising way to start is to consider the opposite scenario: What if a state abolished civil marriage? In fact, a number of prominent theorists from across the political spectrum—from Judith Butler and Martha Fineman to Cass Sunstein and David Boaz—have suggested the state should “abolish marriage” as a legal category.<sup>5</sup> They do not merely want to replace the title “marriage” with a less controversial name like “civil unions.” They want the state to stop licensing relationships. Individuals may adopt whatever social, religious, or moral relationships they prefer, but the terms of those relationships would be legally enforceable only in tort, contract, or equity. These proposals to abolish marriage appeal to several shared arguments: the state has no legitimate reason to define the terms of intimate relationships, marriage law is an ineffective means to protect children and caregivers, and favoring marriages discriminates against cohabitants and single people.<sup>6</sup>

The proposal to abolish legal marriage is politically infeasible, at least in the United States. Nevertheless, the idea is instructive. It offers a unique way to investigate the state's interest in regulating intimacy. In this Article, I try to reimagine our legal world without predefined categories of legal status, and I draw three conclusions from this exercise. First, the law cannot avoid status-based norms, even if it abolished licensed status categories. Second, the law cannot avoid status because intimate relationships involve imperfect duties. Finally, marital status provides a reasonable scheme of legal protection for imperfect rights in intimate relationships.

The first, and most direct, lesson of trying to imagine a world without marriage is that the state cannot abolish intimacy status. As long as intimates have enforceable rights in private law, as proponents of abolishing marriage assume they will, these rights will be tailored to the nature of their relationships. Core principles of contract, tort, or equity require the state to examine the parties' relationship and impose judgments about appropriate duties for that category of relationship. Intimate relationships are just one among many classes of relationships that alter our

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woman,” 1 U.S.C. § 7 (2012), violated “due process and equal protection principles,” *Windsor*, 133 S. Ct. at 2693, because that Act had “the purpose and effect to disparage and to injure” a class of same-sex couples “whom [New York], by its marriage laws, sought to protect in personhood and dignity,” *id.* at 2696. This focus on animus avoided harder questions about why New York or the federal government are dignifying certain relationships and what bases governments may use to select which relationships to dignify. The evasion was short-lived, however. Now that the Court has granted certiorari for an appeal regarding state bans on same-sex marriage, *Obergefell*, 135 S. Ct. 1039, it will have to decide whether the sex of the couple is relevant for some legitimate interest served by state marriage law.

4. I use “intimate” to refer to any adult relationship that is personal, long term, and wide ranging, which includes but is not limited to sexual relationships.

5. See *infra* Part I.C.

6. See *infra* Part I.C.

private-law rights. The state could exempt intimates from these doctrines (or private law generally), but that exemption would also be a systemic status-based distinction. In short, abolishing legal marriage does not get the state out of the marriage business.

Second, the reason why the state cannot avoid status categories is that many intimate norms are what moral philosophers call "imperfect duties."<sup>7</sup> When private law enforces these imperfect intimate rights, public officials will inevitably vacillate between discerning the terms of parties' relationships and imposing normative judgments on couples. This tension is inevitable because many intimate duties are imperfect. A duty is imperfect when there are many permissible ways or occasions to fulfill it, leaving agents discretion to choose how and when to act. This discretion is limited by a requirement that the agent remain subjectively committed to fulfilling the duty. Legal judgments, however, require determinate rights to form the basis of damages or injunctive awards. Judges and juries cannot simply discern and enforce imperfect duties, which remain indeterminate until settled by the parties' own discretionary choices. The only way for the law to enforce imperfect intimate duties is by displacing spouses' discretion and commitment.

Legal marriage—or some similar legal status—offers one way to manage this tension. Under current marriage law, spouses cannot sue one another to enforce marital rights during the relationship.<sup>8</sup> I call this the "intact-marriage rule." A core feature of my argument for marital status, and a central contribution of this Article, is a limited defense of the intact-marriage rule. By withholding enforcement during marriage, the law avoids supplanting spouses' discretion and commitment, enabling spouses to maintain a legal relationship defined by imperfect duties. Yet marital status does not eliminate protection of spouses' imperfect rights; it simply defers that protection. Once spouses separate, they abandon their commitment and discretion, so the state can worry less about interfering with their ability to define their relationship and express their commitment.

Having deferred protection during marriage, what dissolution norms should the state use? The rationale for deferring protection also defines the basic contours of a divorce regime. It would be inappropriate to try to discern precise terms to enforce at divorce, since the law withholds enforcement so that spouses can maintain their indeterminate duties. Instead, the state assumes that intimates sustained their relationship because it was mutually beneficial, which justifies egalitarian default rules. However, couples may exercise their discretion to adopt clear expectations—in which case those expectations deserve protection, a goal that can only be effectuated with equitable discretion. In short, by combining deferred protection with egalitarian and equitable dissolution norms, marital status creates a framework of imperfect legal rights, something many political philosophers have rejected as impossible.<sup>9</sup>

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7. For a full definition of imperfect duties, see *infra* Part III.A. Despite the nomenclature, imperfect duties are not deficient. An imperfect duty can be more important and stringent than a perfect duty, which admits only one manner of performance.

8. See, e.g., *McGuire v. McGuire*, 59 N.W.2d 336 (Neb. 1953); see also *infra* notes 34–41 and accompanying text.

9. Kant and Mill, for example, argued that the law cannot or should recognize imperfect legal rights or duties. IMMANUEL KANT, *THE METAPHYSICS OF MORALS* Ak. 6:384–88 (1797), reprinted in *IMMANUEL KANT: PRACTICAL PHILOSOPHY* 353, 516–20 (Mary J. Gregor ed. & trans., Cambridge Univ. Press 1996); JOHN STUART MILL, *UTILITARIANISM* 61 (Batoche

The Article proceeds in four Parts. Part I explains the current regulation of intimate relationships and describes the proposals for abolishing marriage. Part II argues that even if the state abolishes marriage, core doctrines in tort, contract, and equity would still require status-based norms. Part III argues that the state inevitably relies on status norms because intimate relationships are characterized by imperfect duties and also describes the difficulties this reliance poses for legal enforcement. Part IV offers a limited defense of legal marriage, arguing that its combination of deferred protection and equitable dissolution is a reasonable way to create imperfect legal duties.

At the outset, I should make several limits of the Article clear. First, I do not engage directly in the same-sex marriage debate. The rationale that I articulate for marital status does not differentiate between same- and opposite-sex couples. However, that rationale is only one reason for marital status; other reasons might apply differently to same-sex relationships. Second, this Article is not a full defense of contemporary marriage law. This Article focuses on the regulation of rights between intimates. Marriage law does much more. It structures couples' relationships to third parties, creating default rights such as the power to make medical decisions.<sup>10</sup> It affects spouses' entitlements to public benefits, such as family leave or social security. The state also extols marriage and uses marriage's social value to discriminate against unmarried persons. These aspects of family law raise fundamental questions of distributive justice that I do not address here. If the state has no legitimate reason to regulate personal relationships, this problem is distinct from the expressive or distributional effects of marriage. Last, this Article does not address the relationship between marriage and children. A full account of relationship law must address the interaction between caregiver and relationship status. Nevertheless, the two may be considered separately.<sup>11</sup> Many intimate partners have no children, and many children are not raised by intimate partners. This Article addresses only whether the state has a direct interest in regulating adult intimate relationships according to the couple's status and, in particular, regulating these relationships through a status like marriage.

#### I. CURRENT LAW OF RELATIONSHIP REGULATION

Before trying to envision a world without status categories, it is important to see the breadth of existing relationship regulations. Current law regulates relationships, both licensed and unlicensed. This Part offers a birds-eye view of the legal regulation of relationships and then moves on to describe proposals to abolish these intimate-status rules.

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Books 2001) (1863).

10. See Mary Anne Case, Lecture, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1783 (2005).

11. See Cynthia Lee Starnes, *Lovers, Parents, and Partners: Disentangling Spousal and Co-Parenting Commitments*, 54 ARIZ. L. REV. 197 (2012).

*A. Licensed Relationships*

The range of relationship licenses has ballooned in the last twenty years, and the pace of change is rapid.<sup>12</sup> Marriage remains the paradigmatic status and the only status recognized in all American states, but many states now offer alternatives, including civil unions, reciprocal beneficiaries, and domestic partnerships. This subpart describes the current regime of licensed relationships in the United States.<sup>13</sup> At the outset, it is important to note that these statuses are exclusive: a couple can maintain only one status, and a person can maintain a status relationship with only one person at a time.<sup>14</sup>

## 1. Marriage

Despite its much-heralded decline, marriage retains vast popular appeal. A 2001 study predicted that almost 90% of American women would marry during their lifetimes.<sup>15</sup> Between 40% and 50% of American marriages end in divorce, but this implies that 50% to 60% last until death.<sup>16</sup> This section recounts the default rules governing marital relationships. Marriage law has legal phases. The state (1) polices entry into marriage; (2) provides benefits during marriage, but refuses to enforce marital rights; and (3) imposes equitable dissolution norms when the marriage ends. In later sections, I will argue that there are legitimate reasons to retain a status with this general structure.

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12. See William N. Eskridge Jr., *Family Law Pluralism: The Guided-Choice Regime of Menus, Default Rules, and Override Rules*, 100 GEO. L.J. 1881, 1883–86 (2012).

13. Cf. WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE? WHAT WE'VE LEARNED FROM THE EVIDENCE* 252–57 (2006) (describing alternative categorization).

14. E.g., COLO. REV. STAT. ANN. § 15-22-104 (West Supp. 2014) (exclusivity); COLO. REV. STAT. ANN. § 15-22-111(3) (West Supp. 2014) (automatic termination); HAW. REV. STAT. § 572B-2 (West Supp. 2013) (exclusivity); HAW. REV. STAT. § 572-1.7 (West Supp. 2013) (automatic termination). Exceptions exist when a state with new laws wants to avoid disrupting settled expectations. See, e.g., *Frequently Asked Questions*, STATE N.J. DEP'T HEALTH, <http://www.nj.gov/health/vital/faq.shtml#ssm> (last modified Nov. 14, 2014) (same-sex couples in civil unions or domestic partnerships may marry and retain their prior status).

15. Joshua R. Goldstein & Catherine T. Kenney, *Marriage Delayed or Marriage Forgone? New Cohort Forecasts of First Marriage for U.S. Women*, 66 AM. SOC. REV. 506, 506–07 (2001).

16. See Andrew J. Cherlin, *Demographic Trends in the United States: A Review of Research in the 2000s*, 72 J. MARRIAGE & FAM. 403, 404–05 (2010). These numbers hide increasing differences in marriage rates across racial, income, and educational divides, with non-Hispanic white and college-educated women being more likely to marry and less likely to divorce. See *id.* See generally Linda C. McClain, *The Other Marriage Equality Problem*, 93 B.U.L. REV. 921 (2013); Sara McLanahan, *Diverging Destinies: How Children Are Faring Under the Second Demographic Transition*, 41 DEMOGRAPHY 607 (2004).

## a. Entering Marriage

In most states, to be legally married, a couple must obtain a license and exchange vows before a licensed officiate. The state uses registration to ensure that fiancés are competent to accept marital obligations (of sufficient age, able to consent); to impose limits on who may marry (two persons who are unmarried, not close relatives, and of the opposite sex); and to keep track of who is entitled to marriage's benefits and burdens. Eleven states and the District of Columbia still recognize common-law marriages.<sup>17</sup> A common-law marriage exists if the spouses have the capacity to marry, have a present and mutual intent to marry, cohabit for a significant amount of time, and hold themselves out to the community as married.<sup>18</sup> Common-law spouses have the same rights and obligations as registered spouses.<sup>19</sup>

Most couples simply obtain a license and exchange vows. This means the terms of their marriage are set by default rules in marriage statutes, which I discuss below. However, a small minority of spouses enter premarital contracts. Most marriage rules regarding property and support are now soft default rules that parties may alter contractually, at least before marriage. Premarital agreements about property and support at divorce are enforceable, subject to a few mandatory rules and fairness limits.<sup>20</sup> For example, the parties cannot alter the grounds for divorce;<sup>21</sup> additionally, judges may review contracts for procedural defects, such as undue pressure or failure to disclose assets, and for substantive unfairness at the time of execution or (in a minority of states) at the time of divorce.<sup>22</sup> Unlike agreements made before marriage, "marital agreements" between spouses in an intact marriage are viewed with suspicion.<sup>23</sup> A few states enforce marital agreements under the same rules as

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17. Jennifer Thomas, Comment, *Common Law Marriage*, 22 J. AM. ACAD. MATRIMONIAL L. 151, 151 (2009) (listing current authorities). Inertia likely kept common-law marriage on the books, but Cynthia Bowman has argued that it should be more actively used to protect women who adopt vulnerable traditional roles. Cynthia Grant Bowman, *A Feminist Proposal To Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 754–70 (1996).

18. See Thomas, *supra* note 17, at 157–60.

19. 52 AM. JUR. 2D *Marriage* § 43 (2011). Common-law spouses occupy a space between licensed marriages and cohabitation. Unlike cohabitants, they must intend and hold themselves out as married. However, the state plays no role at entry and less of a role during marriage, because spouses typically seek legal recognition only in divorce petitions, in probate after one spouse's death, or if one spouse wants to assert an evidentiary privilege.

20. See Barbara A. Atwood & Brian H. Bix, *A New Uniform Law for Premarital and Marital Agreements*, 46 FAM. L.Q. 313, 318–24 (2012) (describing modern law regarding enforcement of premarital agreements).

21. UNIF. PREMARITAL & MARITAL AGREEMENTS ACT (UPMAA) § 10(b)(3) (2012).

22. The model codes, commentators, and statutes provide for differing procedural and substantive review, with significant disputes about the extent of disclosure required and the extent of ex ante or ex post fairness review. See Atwood & Bix, *supra* note 20, at 318–24, 330, 332–33, 339–44 (comparing procedural and substantive standards used by the Uniform Premarital Agreements Act (UPAA) section 6; the uniform acts as adopted; the American Law Institute (ALI) *Principles of the Law of Family Dissolution* sections 7.04–05; and the UPMAA section 9).

23. See *id.* at 324–28 (describing "unsettled and evolving" law regarding marital agreements).

premarital agreements,<sup>24</sup> but others impose stricter procedural requirements and more searching fairness review.<sup>25</sup>

#### b. During Marriage

During marriage, the state engages in a curious blend of intervention and nonintervention. On the one hand, married couples receive numerous legal benefits. The benefits can be categorized in various ways, but I find the “rough[] taxonom[y]” offered by Elizabeth Brake useful.<sup>26</sup> First, the state conditions monetary benefits (and some burdens) on marital status. For instance, married couples receive a special tax status and social security benefits.<sup>27</sup> Other laws “facilitate day-to-day maintenance of a relationship,” providing for sick leave, emergency decision-making powers, or immigration benefits.<sup>28</sup> This category also includes the default rules for assigning title and control over property during marriage.<sup>29</sup> Last, the law provides special protection for the widowed, through pension benefits, precedence in intestacy, and the right to bring wrongful-death claims.<sup>30</sup> All of these benefits, of course, affect

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24. See *id.* at 327–28 nn.85–88 (citing VA. CODE ANN. §§ 20-147 to -155 (2011); Stoner v. Stoner, 819 A.2d 529 (Pa. 2003)).

25. *Id.* at 324 n.67 (citing CAL. FAM. CODE § 1620 (West 2004 & Supp. 2012); MONT. CODE ANN. § 40-2-303 (2012); N.M. STAT. ANN. § 40-2-8 (2012); OKLA. STAT. tit. 43, § 205 (2012); S.D. CODIFIED LAWS § 25-2-13 (2012)); see also Bedrick v. Bedrick, 17 A.3d 17, 26–29 (Conn. 2011).

26. Elizabeth Brake, *Minimal Marriage: What Political Liberalism Implies for Marriage Law*, 120 ETHICS 302, 306–07 (2010). For an alternative grouping, see Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2090–92 (2005). For an impressive list, see Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 955–56 (Mass. 2003).

27. See *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (listing healthcare benefits, bankruptcy protections, and joint tax requirements). The *Windsor* plaintiff’s complaint concerned the spousal exemption from the estate tax, 26 U.S.C. § 2056(a).

28. See, e.g., 29 U.S.C. § 2612(a)(1)(C) (2012) (requiring employers to grant employees medical leave to care for their spouses, children, or parents); N.Y. PUB. HEALTH LAW § 2994-d (McKinney 2012) (assigning spouse or domestic partner as the primary default decision maker for an incapacitated person, aside from those assigned a guardian for mental-health reasons); 8 U.S.C.A. § 1186a (Supp. 2014) (authorizing conditional permanent-resident status for spouses). See generally Kerry Abrams, *Immigration Law and the Regulation of Marriage*, 91 MINN. L. REV. 1625, 1634–38 (2007) (discussing myriad ways that immigration law privileges spouses and fiancés and defines who qualifies for these favored statuses).

29. In the forty-one states that follow the title scheme, each spouse has decision-making authority over any property to which he or she holds title; in the nine states that follow community-property principles, each spouse holds an undivided one-half interest in all property acquired during marriage (except gifts or inheritances to one spouse, or profits from such separate property) and so has sole decision-making authority over most transactions. See Elizabeth De Armond, *It Takes Two: Remodeling the Management and Control Provisions of Community Property Law*, 30 GONZ. L. REV. 235, 261–67 (1994–95); Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 124–25 (2004).

30. See, e.g., N.Y. EST. POWERS & TRUSTS LAW § 4-1.1 (McKinney 2012) (preference for spouse in distribution of residual estate under intestacy); *Langan v. St. Vincent’s Hosp.* of N.Y., 802 N.Y.S.2d 476, 477 (App. Div. 2005) (holding that New York statute authorizing wrongful-death claim for “surviving spouse” did not include surviving partner of same-sex



spouses' incentives for marital behavior. For instance, federal tax law reinforces the breadwinner marriage by rewarding couples with unequal salaries.<sup>31</sup> In addition, as Kerry Abrams has documented, the law sometimes expressly requires intimates to structure their lives in particular ways.<sup>32</sup> Immigration authorities, for instance, have adopted intrusive tests to decide whether a formally valid marriage is "fraudulent"; to pass these tests, couples must prove that they fulfill stereotypical marital roles.<sup>33</sup>

On the other hand, American law takes a hands-off approach to spouses' duties with respect to one another. Spouses cannot enforce marital rights during their marriage. This limit applies to marital rights arising from status or agreement. Spouses may sue one another in tort and can be subject to criminal liability,<sup>34</sup> but they cannot sue to enforce "marital rights." The classic cases held that a spouse could not bring an action for financial support until the couple separated.<sup>35</sup> Some jurisdictions permit spouses to seek support if necessary to avoid "neglect."<sup>36</sup> In addition, courts will not enforce agreements about behavior during the marriage, such as agreements about sexual expectations, familial living arrangements, domestic services, or religious practices.<sup>37</sup> This rule applies during marriage and at

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civil union).

31. Lawrence Zelenak, *For Better and Worse: The Differing Income Tax Treatments of Marriage at Different Income Levels*, 93 N.C. L. REV. 783, 795–800 (2015).

32. See Kerry Abrams, *Marriage Fraud*, 100 CALIF. L. REV. 1, 14–38 (2012).

33. *Id.* at 30–37.

34. Until recently, the coverture fiction of spousal unity precluded spouses from suing one another in tort at all. See Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359, 363–66 (1989). These doctrines have been abolished or abrogated to specific causes of action in all but a minority of states. *Id.* at 359, 435–41. All states have eliminated the marital rape exemption, Jennifer McMahon-Howard, Jody Clay-Warner & Linda Renzulli, *Criminalizing Spousal Rape: The Diffusion of Legal Reforms*, 52 SOC. PERSP. 505, 513 tbl.1 (2009), although a majority still "criminalize a narrower range of [sexual] offenses if committed within marriage, subject the marital rape they do recognize to less serious sanctions, and/or create special procedural hurdles for marital rape prosecutions." Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1375 (2000) (footnotes omitted).

35. See, e.g., *McGuire v. McGuire*, 59 N.W.2d 336 (Neb. 1953); *Smith v. Smith*, 92 N.E.2d 418, 418–19 (Ohio Ct. App. 1949); *Commonwealth v. George*, 56 A.2d 228, 230–31 (Pa. 1948). One unpublished California case concluded that marital support obligations are enforceable during marriage even if the spouse is not destitute, but on special facts: the plaintiff sued her legally incompetent husband through her stepson, who was acting trustee of her husband's estate. *Weissberg v. Weissberg*, No. A132161, 2013 WL 1276119 (Cal. Ct. App. Mar. 28, 2013).

36. See *Commonwealth ex rel. DiPadova v. DiPadova*, 302 A.2d 510, 511 (Pa. Super. Ct. 1973).

37. See *Mary Ann Case*, *Enforcing Bargains in an Ongoing Marriage*, 35 WASH. U. J.L. & POL'Y 225, 226–27 (2011); Jonathan E. Fields, *Forbidden Provisions in Prenuptial Agreements: Legal and Practical Considerations for the Matrimonial Lawyer*, 21 J. AM. ACAD. MATRIMONIAL L. 413, 428–33 (2008); Reva B. Siegel, *The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930*, 82 GEO. L.J. 2127, 2197 n.248 (1994) (collecting cases); Laura P. Graham, Comment, *The Uniform Premarital Agreement Act and Modern Social Policy: The Enforceability of Premarital Agreements Regulating the Ongoing Marriage*, 28 WAKE FOREST L. REV. 1037, 1043–49 (1993) (collecting cases). The Uniform Law

divorce. The most striking limit in this respect is that some states will not enforce contracts between spouses for domestic services.<sup>38</sup> The traditional rationale for this rule is that spouses already have a mutual obligation of support, so a promise of support is insufficient consideration.<sup>39</sup> Other states, however, permit spouses to recover for services if they have an express contract.<sup>40</sup> As a rule, however, spouses cannot enforce marital rights while their marriage is intact. I will call this the “intact-marriage rule.”<sup>41</sup>

### c. Separation and Divorce

Separation marks a categorical divide. After a couple separates, a dependent spouse may become entitled to seek alimony or maintenance.<sup>42</sup> Separation lacks a

Commission’s UPAA, passed in 1983 and adopted by twenty-six states, indicates that couples may contract about “any . . . matter, including their personal rights and obligations, not in violation of public policy.” UPAA § 3(a)(8) (1983). Nevertheless, I have found no cases supporting the implications of section 3 that (1) premarital or marital agreements are enforceable during marriage or (2) premarital or marital agreements regarding ordinary life are enforceable. In the 2012 revision of the UPMAA, the drafters chose not to “expressly deal” with provisions regarding “obligations *inter se*.” Atwood & Bix, *supra* note 20, at 344.

38. *See, e.g.*, Mays v. Wadel, 236 N.E.2d 180, 183 (Ind. App. 1968) (refusing to enforce husband’s promise to pay for death-bed nursing services); Hughes v. Lord (*In re Estate of Lord*), 602 P.2d 1030, 1031 (N.M. 1979) (refusing to enforce wife’s promise to devise her estate to husband if he married her and cared for her during her illness); Kuder v. Schroeder, 430 S.E.2d 271, 273 (N.C. Ct. App. 1993) (refusing to enforce husband’s promise to support all of the family’s financial needs once he completed his master’s and law degrees if wife would forego her career to work as a teacher during his schooling).

39. *See, e.g.*, Borelli v. Brusseau, 16 Cal. Rptr. 2d 16, 17–20 (Ct. App. 1993) (refusing to enforce husband’s promise to bequeath wife a portion of his separate property if she cared for him in their home rather than send him to nursing home). The argument that a promise of support is insufficient consideration has been justly criticized. *See, e.g.*, Katharine Silbaugh, *Turning Labor into Love: Housework and the Law*, 91 Nw. U. L. Rev. 1, 30–33 (1996).

40. *See, e.g.*, Dade v. Anderson, 439 S.E.2d 353, 355 (Va. 1994).

41. Saul Levmore calls it a “love-it-or-leave-it rule,” but I think this term places undue emphasis on the remedy. Saul Levmore, *Love It or Leave It: Property Rules, Liability Rules, and Exclusivity of Remedies in Partnership and Marriage*, 58 LAW & CONTEMP. PROBS. 221, 225–26 (1995).

42. The common law permitted a wife to bring an action in equity for maintenance if the couple were separated and she was not at fault, which meant that the husband either abandoned her or drove her away through extreme cruelty. *See* HENDRIK HARTOG, *MAN AND WIFE IN AMERICA: A HISTORY* 6–11, 20–21 (2000) (discussing McGuire v. McGuire, 59 N.W.2d 336 (Neb. 1953); Cochran v. Cochran, 60 N.W. 942 (Neb. 1894); Earle v. Earle, 43 N.W. 118 (Neb. 1889)). Some states still recognize an action in equity for maintenance without divorce. *See, e.g.*, S.C. CODE ANN. § 20-3-130 (2014); Womack v. Womack, 449 S.W.2d 399, 401 (Ark. 1970) (citing Wood v. Wood, 15 S.W. 459 (Ark. 1891)); Honea v. Honea, 2003-CA-02410-COA (¶ 7) (Miss. Ct. App. 2004); McWilliams v. McWilliams, 537 A.2d 35, 36 (Pa. Super. Ct. 1988); *In re Marriage of Gannon*, 702 P.2d 465, 466 (Wash. 1985). Other states make a pending petition for legal separation or divorce the precondition for temporary maintenance (often called *pendente lite*, or “awaiting the litigation”). *See, e.g.*, Dick v. Dick (*In re Marriage of Dick*), 18 Cal. Rptr. 2d 743, 755 (Ct. App. 1993)

precise legal definition, but it is typically synonymous with ending the relationship or breaking up.<sup>43</sup> Spouses may be separated yet living in the same house, as long as they do not share personal or social activities.<sup>44</sup>

All American jurisdictions have no-fault divorce statutes, which allow spouses to divorce if their marriage is irretrievably broken because of “irreconcilable differences.”<sup>45</sup> Spouses may be required to wait for a statutory period ranging from six months to two years, which is lengthened if one spouse refuses consent.<sup>46</sup> Most courts do not question one spouse’s claim that the couple has “irreconcilable differences.”<sup>47</sup> Some states also retain “fault” grounds for divorce, including adultery, desertion, mental or physical cruelty, drunkenness, and nonsupport, although the primary difference is to shorten the waiting period.<sup>48</sup>

All of the states use loosely egalitarian default rules to divide marital property and to give dependent spouses limited support.<sup>49</sup> A vast majority of states divide all property obtained during the marriage “equitably.”<sup>50</sup> Family-court judges must

(discussing statutory provisions now found at sections 3600 and 3653 of the California Family Code); *Galvin v. Galvin*, 378 N.E.2d 510, 513 (Ill. 1978).

43. Historically, separation had a much more contested and varied meaning, because spouses often lacked the legal right or financial means to obtain a divorce, and “separated” wives in particular suffered under coverture doctrines that granted them rights only through their husbands. See HARTOG, *supra* note 42, at 38–39 (summarizing historical rights of separated spouses).

44. See, e.g., *Mackey v. Mackey*, 545 A.2d 362, 365 (Pa. Super. Ct. 1988) (holding that spouses were separated, though residing in the same home and sharing public areas, because they maintained private living quarters, no longer maintained “public social life,” and “[s]ignificantly, the parties stipulate[d] that they ha[d] not engaged in sexual relations” in three years). *Contra* *Baumann-Chacon v. Baumann*, 710 S.E.2d 431, 437 (N.C. Ct. App. 2011) (holding that action for separate maintenance requires living in separate domiciles); *Theisen v. Theisen*, 716 S.E.2d 271, 276 (S.C. 2011) (same).

45. For a history of divorce reform, see generally Herman Hill Kay, *From the Second Sex to the Joint Venture: An Overview of Women’s Rights and Family Law in the United States During the Twentieth Century*, 88 CALIF. L. REV. 2017 (2000); Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 82–91.

46. See generally Annotation, *Validity, Construction, and Effect of Statute Providing a “Cooling Off Period” or Lapse of Time Prior to Filing of Complaint, Hearing, or Entry of Decree in Divorce Suit*, 62 A.L.R.2D 1262, 1262–65 (1958) (describing state statutes requiring waiting periods).

47. JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 176–80 (2011).

48. *Id.* at 161–68. Although these are often listed as the traditional fault grounds, divorce was largely unavailable until the mid-eighteenth century, and adultery was the primary ground for divorce until the early twentieth century. HARTOG, *supra* note 42, at 26–28, 64–73.

49. Many argue that divorce norms are insufficiently egalitarian. See generally MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (1991) (arguing that divorce rhetoric supports formal equality over equality of outcomes).

50. Three community-property states divide all marital property equally and leave separate property with the title holder, while a few common-law states divide all of the couple’s property equitably regardless of its characterization as marital or separate. PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS § 4.09 Reporter’s Notes cmt. b (2000) [hereinafter ALI PRINCIPLES].

decide what division is fair based on numerous factors that attempt to value each spouse's relative need and his or her contribution to the marriage and to marital property.<sup>51</sup> Equitable divorce does not balance a couple's relationship ledger. Courts consider each spouse's contribution, but primarily to offset financial imbalances rather than to compensate spouses for their contributions.<sup>52</sup> Some equitable distribution states also have a presumption that marital property will be divided equally or that equal division will be the "starting point[]" for analysis.<sup>53</sup> Empirical analysis of divorce outcomes suggests that judges applying equitable distribution rules tend to converge on equal division as a general norm.<sup>54</sup>

Divorce courts also have the power to award alimony, though alimony awards are rare.<sup>55</sup> Alimony is no longer regarded as compensation for a promise of lifelong support, but no dominant alternative theory has emerged.<sup>56</sup> Many states follow a rehabilitative approach that awards only temporary alimony to help dependent spouses regain financial self-sufficiency.<sup>57</sup> Some states, however, use alimony to help spouses retain their marital standard of living. States may regard alimony as compensation for one spouse's foregone career opportunities, as a fair return on her contribution to the marriage, or as restitution for contributions to the spouses' future earning potential.<sup>58</sup> Unlike property divisions that take effect upon entry of

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51. *Id.* § 4.09 cmt. a.

52. See *Mahoney v. Mahoney*, 453 A.2d 527, 533 (N.J. 1982) ("Marriage is not a business arrangement in which the parties keep track of debits and credits, their accounts to be settled upon divorce.").

53. Frantz & Dagan, *supra* note 29, at 100–01 (identifying twelve states with a statutory presumption, four with a starting point, and three that require equal division). The ALI adopted a presumption of equal division. See ALI PRINCIPLES, *supra* note 50, § 4.09.

54. See Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401, 407–08, 452, 507 (1996) (study of judicial decisions and settlement outcomes in New York from 1980–90).

55. See Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 697 tbl.36 (1991) (finding that alimony was awarded in twelve percent of New York cases in 1984); Judith G. McMullen & Debra Oswald, *Why Do We Need a Lawyer?: An Empirical Study of Divorce Cases*, 12 J.L. & FAM. STUD. 57, 75 (2010) (alimony awarded in 8.6% of divorces in one county in Wisconsin). In 2012, only 385,000 Americans received alimony, yet, in 2011 alone, over 2.3 million Americans divorced. Compare U.S. CENSUS BUREAU, SOURCE OF INCOME IN 2012—PEOPLE 15 YEARS OLD AND OVER, BY INCOME OF SPECIFIED TYPE IN 2012 (2013), available at [http://www.census.gov/hhes/www/cpstables/032013/perinc/pinc08\\_000.htm](http://www.census.gov/hhes/www/cpstables/032013/perinc/pinc08_000.htm), with *Divorces in the Last Year by Sex by Marital Status for the Population 15 Years and Over*, U.S. CENSUS BUREAU, [http://factfinder2.census.gov/bkmk/table/1.0/en/ACS/12\\_5YR/B12503](http://factfinder2.census.gov/bkmk/table/1.0/en/ACS/12_5YR/B12503).

56. See Cynthia Lee Starnes, *Alimony Theory*, 45 FAM. L.Q. 271 (2011) (surveying theories of alimony); see also Carol Rogerson, *The Canadian Law of Spousal Support*, 38 FAM. L.Q. 69, 73–95 (2004).

57. Mary Frances Lyle & Jeffrey L. Levy, *From Riches to Rags: Does Rehabilitative Alimony Need To Be Rehabilitated?*, 38 FAM. L.Q. 3, 10–12 (2004). This approach was adopted in the Uniform Marriage and Divorce Act section 308, which influenced alimony reforms in the 1970s and 1980s. See *id.* at 8–10. A handful of states award alimony only if a spouse cannot meet her basic needs through employment or if the spouse has a physical or mental disability. *Id.* at 15–16.

58. See Starnes, *supra* note 56, at 280–87. It is controversial whether future earning

judgment, alimony rights may be adjusted if the parties’ financial positions change, such as when the payer loses a job or the payee remarries.<sup>59</sup> As a result, many argue that property division is a legal entitlement, while alimony is a form of privatized welfare.<sup>60</sup>

The states are split about whether marital misbehavior is relevant to property division or alimony. Sixteen states do not take account of marital misconduct (such as adultery or emotional abuse), because those states believe that adjudicating these disputes intrudes on marital privacy and wastes judicial resources on matters irrelevant to disentangling the spouses’ lives.<sup>61</sup> On the other hand, fifteen states permit courts to adjust the property division if one spouse’s behavior burdened the marriage or contributed to its breakup.<sup>62</sup> The property division may reflect “spousal abuse; child abuse; adultery; desertion; cruelty; nonsupport; failure to cooperate in the divorce case; attempted murder; fraudulent inducement to marry; and assorted other actions.”<sup>63</sup> Some states consider only egregious conduct, which includes repeated physical abuse, attempted murder, child abuse, or refusal to grant a religious divorce, but not “adultery, verbal abuse, or false statements with no clear economic effect on the marriage.”<sup>64</sup>

## 2. Civil Unions and Strong Domestic Partnerships

Eight states maintain a status with rights that are equivalent to marriage, but under a different name—either civil unions or domestic partnerships.<sup>65</sup> For simplicity, I will call these relationships “civil unions.” Civil unions carry the

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capacity should be a factor in determining an alimony award, an asset subject to equitable division, a factor in the equitable division, or should not be considered at all. *See Frantz & Dagan, supra* note 29, at 107–12; William M. Howard, Annotation, *Spouse’s Professional Degree or License as Marital Property for Purposes of Alimony, Support, or Property Settlement*, 3 A.L.R.6TH 447, 466–71 (2005).

59. MARIAN DOBBS, DETERMINING CHILD & SPOUSAL SUPPORT §§ 6:6, 6:25 (2014).

60. *See Frantz & Dagan, supra* note 29, at 105–06.

61. 2 BRETT R. TURNER, EQUITABLE DISTRIBUTION OF PROPERTY § 8:24 (3d ed. 2005 & Supp. 2013–14); Kristine Cordier Karnezis, Annotation, *Fault as Consideration in Alimony, Spousal Support, or Property Division Awards Pursuant to No-Fault Divorce*, 86 A.L.R.3D 1116, 1124–29 (1978).

62. 2 TURNER, *supra* note 61, § 8:24 (Alabama, Connecticut, Michigan, Mississippi, Missouri, North Dakota, Rhode Island, South Carolina, Texas, Vermont, Virginia, Wyoming, and the U.S. Virgin Islands); J. THOMAS OLDHAM, DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY § 13.02[1][a] (2006) (citing, in addition, Idaho and New Hampshire); Karnezis, *supra* note 61, at 1117, 1129–35.

63. 2 TURNER, *supra* note 61, § 8:26 (footnotes omitted).

64. *Id.* § 8:25 (identifying Kansas, North Dakota, and New York).

65. Hawaii, Illinois, and New Jersey recognize civil unions. HAW. REV. STAT. §§ 572B-1 to -11 (West Supp. 2013); 750 ILL. COMP. STAT. ANN. 75/1 to /90 (West Supp. 2014); N.J. STAT. ANN. §§ 37:1-28 to -36 (West Supp. 2014). California, the District of Columbia, Nevada, Oregon, and Washington recognize domestic partnerships. CAL. FAM. CODE §§ 297–299.6 (West Supp. 2014); D.C. CODE §§ 32-701 to -710 (LexisNexis 2012); NEV. REV. STAT. ANN. §§ 122A.010–.510 (LexisNexis 2010 & Supp. 2013); OR. REV. STAT. §§ 106.300–340 (2013); WASH. REV. CODE ANN. §§ 26.60.010–901 (West Supp. 2014).

same rights, obligations, benefits, and burdens of marriage—including access to public benefits and the divorce regime. Some states impose additional criteria on applicants to prove their interdependence, such as sharing a “common residence.”<sup>66</sup>

It is unclear whether civil unions represent a true alternative to marriage or are simply a transitional stage to equality for same-sex couples.<sup>67</sup> Four states limit civil unions to same-sex couples,<sup>68</sup> and two more limit these unions to same-sex couples or opposite-sex couples where at least one partner is over the age of sixty-two.<sup>69</sup> Only four jurisdictions permit same- and opposite-sex couples alike to enter civil unions.<sup>70</sup> Several states eliminated civil unions when they started recognizing same-sex marriages,<sup>71</sup> while others retained a civil-union registry.<sup>72</sup> Why would a couple prefer a civil union if marriage is available? Civil unions may appeal to those who want to avoid marriage’s connotations: its religious implications, its historical association with oppression of women and racial and sexual minorities, or its social signaling effects that can channel couples into traditional marital roles.

66. NEV. REV. STAT. ANN. § 122A.100(2)(a); WASH. REV. CODE ANN. § 26.60.030(1).

67. See, e.g., Barbara J. Cox, *But Why Not Marriage: An Essay on Vermont’s Civil Unions Law, Same-Sex Marriage, and Separate But (Un)Equal*, 25 VT. L. REV. 113, 147 (2000). *Contra* WILLIAM N. ESKRIDGE JR., EQUALITY PRACTICE: CIVIL UNIONS AND THE FUTURE OF GAY RIGHTS 121 (2002) (describing new forms of relationships in Europe as “sedimentary” because the new form is placed on top of the old, rather than replacing it). As of February 2015, same-sex couples may marry in thirty-seven states and the District of Columbia, and six states have marriage court rulings pending further action. *States*, FREEDOM TO MARRY, <http://www.freedomtomarry.org/states/> (last updated Feb. 6, 2015) (offering up-to-date information on the recognition of same-sex unions).

68. DEL. CODE ANN. tit. 13, § 202(3) (Supp. 2014); N.J. STAT. ANN. § 37:1-29; OR. REV. STAT. § 106.310(1); R.I. GEN. LAWS § 15-3.1-1(2) (2013).

69. CAL. FAM. CODE § 297(b)(4); WASH. REV. CODE ANN. § 26.60.030(2).

70. D.C. CODE § 32-701; HAW. REV. STAT. § 572B-2; 750 ILL. COMP. STAT. ANN. 75/10; NEV. REV. STAT. ANN. § 122A.100(2). Washington opened domestic partnerships to opposite-sex couples over sixty-two years of age. WASH. REV. CODE ANN. § 26.60.030.

71. See, e.g., CONN. GEN. STAT. ANN. § 46b-38r (West Supp. 2015) (civil unions automatically converted to marriages after specified date); DEL. CODE ANN. tit. 13, § 218 (Supp. 2014) (no civil unions issued after July 1, 2013, and all civil unions automatically converted to marriages on July 1, 2014); N.H. REV. STAT. ANN. §§ 457-A:1–8 (Supp. 2014) (repealed civil-union statute); R.I. GEN. LAWS § 15-3.1-3, -4 (2013) (provisions governing new civil-union licenses, repealed by Act of May 2, 2013, ch. 4, § 6); VT. STAT. ANN. tit. 18, §§ 5160–5165 (2012) (same).

72. See HAW. REV. STAT. § 572-1.7 (West Supp. 2013) (specifying rights for parties to marriages, civil unions, and reciprocal-beneficiary relationships); WASH. REV. CODE ANN. § 26.60.030 (amended by Act of Feb. 13, 2012, ch. 3, § 9, 2011–12 Wash. Sess. Laws 199, 203, to eliminate same-sex domestic partnerships but retain domestic partnerships if one party is over age sixty-two); *Hawaii Electronic Marriage and Civil Union Registration System*, STATE HAW. DEP’T HEALTH, <https://emrs.ehawaii.gov/emrs/public/home.html>; see also *Frequently Asked Questions*, STATE N.J. DEP’T HEALTH, <http://www.nj.gov/health/vital/faq.shtml#ssm>.

### 3. Registered Beneficiaries and Intermediate Domestic Partnerships

Five states have reciprocal-beneficiary or limited domestic-partnership laws.<sup>73</sup> Reciprocal beneficiaries do not receive property or support rights but do receive a set of reciprocal rights useful for people in intimate relationships.<sup>74</sup> They may receive inheritance rights, surrogate decision-making rights, hospital visitation rights, the right to sue for wrongful death, employment benefits, or the right to hold property as tenants by the entirety.<sup>75</sup>

Reciprocal-beneficiary status is easier to enter and exit than marriage, but the substantive limits on entry can be more onerous. To create a relationship, individuals need only fill out a form alleging that they are not in another recognized relationship and agreeing to assume the listed rights.<sup>76</sup> Colorado even supplies a model form that requires each party to initial the specific rights they intend to adopt or withhold.<sup>77</sup> Exiting the relationship is even easier. Either party may terminate the relationship unilaterally by filing a notice, which is effective immediately.<sup>78</sup> The beneficiary status can also terminate automatically if one of the beneficiaries enters another marriage or civil union.<sup>79</sup> Despite the ease of entry and exit, some states restrict reciprocal-beneficiary status to long-term cohabitants who are committed to mutual support.<sup>80</sup> Maryland even requires applicants to present two documents proving their

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73. See COLO. REV. STAT. ANN. § 15-22-106 (West 2011); HAW. REV. STAT. § 572C-4 (West Supp. 2013) (limiting reciprocal-beneficiary relationship to individuals prohibited from marrying—a prohibition which now applies only to family members covered by the incest prohibition); ME. REV. STAT. ANN. tit. 22, § 2710 (Supp. 2013); MD. CODE ANN., HEALTH-GEN. § 6-101 (LexisNexis 2009); WIS. STAT. ANN. § 770.01 (West 2009).

74. Eskridge calls these “unitive rules,” which are rules that “enforce or reflect the assumption that a married couple operate as a unit or a team, whose interdependence should be respected by the government.” Eskridge, *supra* note 12, at 1910.

75. See COLO. REV. STAT. ANN. § 15-22-106; see also HAW. REV. STAT. § 572C-4; Act effective July 30, 2004, ch. 672, 2003 Me. Laws 2126 (altering various code provisions to give domestic partners rights equivalent to spouses for inheritance, guardianship and protection from domestic abuse). Wisconsin gives domestic partners a variety of benefits but marriage’s property division rules. Howard A. Sweet, *Understanding Domestic Partnerships in Wisconsin*, WIS. LAW., Nov. 2009, at 6, 56. Notably, for the first three rights (inheritance, surrogate decision making, and visitation), parties have the power to designate the rights holder, but for the last three rights (wrongful death actions, employment benefits, and tenancy by the entirety), the law continues to specify the categories of possible rights holders.

76. See, e.g., HAW. REV. STAT. § 572C-5 (West 2008); ME. REV. STAT. ANN. tit. 22, § 2710(3).

77. COLO. REV. STAT. ANN. §§ 15-22-104 to -106 (West 2011 & Supp. 2013) (model contract).

78. See, e.g., COLO. REV. STAT. ANN. §§ 15-22-104, -111(3) (West Supp. 2013); HAW. REV. STAT. § 572C-7(a) (West Supp. 2013); ME. REV. STAT. ANN. tit. 22, § 2710(4) (also requires service in hand to the other partner).

79. See HAW. REV. STAT. § 572C-7(c).

80. See, e.g., ME. REV. STAT. ANN. tit. 22, § 2710(2) (applicants must be “domiciled together under long-term arrangements that evidence a commitment to remain responsible indefinitely for each other’s welfare”); MD. CODE ANN., HEALTH-GEN. § 6-101(a)(4) (LexisNexis 2009) (applicants must “[a]gree to be in a relationship of mutual interdependence in which each individual contributes to the maintenance and support of the other individual

interdependence, such as a mortgage, relationship contract, joint account, power of attorney, insurance policy, or will.<sup>81</sup>

#### 4. Limited Domestic-Partnership Registries

Numerous cities and counties in twenty-five states maintain domestic-partnership registries.<sup>82</sup> LGBT advocates convinced municipalities to enact the first registries in the 1980s, when state-level recognition was politically infeasible. Many cities also permit opposite-sex couples to register as domestic partners.<sup>83</sup> Domestic partnership registries cannot give the parties property or support rights, which are governed by state law, but many give partners hospital visitation rights and, for employees of the municipality or its contractors, employment benefits. Domestic partners may also receive surrogate decision-making rights.<sup>84</sup>

#### *B. Unlicensed Cohabiting Relationships*

Even couples who do not enter licensed relationships may have enforceable obligations. Despite the increasing prevalence of cohabitation—over eight million couples lived together without marrying in 2013; up from less than five million in 2000 and half a million in 1960<sup>85</sup>—the states have not developed a consistent regulatory scheme. Drawing on work by Ann Estin and Marsha Garrison, this subpart surveys the spectrum of legal regimes regulating cohabiting couples.<sup>86</sup> On one end, Georgia and Illinois deny cohabitants any legal remedies, even refusing to enforce

and the relationship, even if both individuals are not required to contribute equally to the relationship”).

81. MD. CODE ANN., HEALTH-GEN. § 6-101(b)(2).

82. The Human Rights Campaign maintains an updated list of domestic-partner registries. *City and County Domestic Partner Registries*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/entry/city-and-county-domestic-partner-registries>.

83. See, e.g., ANN ARBOR, MICH., CODE OF ORDINANCES tit. IX, ch. 110 (2013); ST. LOUIS, MO., CODE OF ORDINANCES § 8.37.050 (1994) (providing hospital and jail visitation privileges).

84. For example, New York recognizes domestic partners for purposes of surrogate decision making, N.Y. PUB. HEALTH LAW § 2965 (McKinney 2012); hospital visitation, N.Y. PUB. HEALTH LAW § 2805-q (McKinney 2012); workers' compensation and death benefits, N.Y. WORKERS' COMP. LAW § 4 (McKinney 2013); death in a terrorist attack, N.Y. EST. POWERS & TRUSTS LAW § 11-4.7(e)(2)–(3) (McKinney 2008); and conflict-of-interest analysis, N.Y. GEN. MUN. LAW § 811 (McKinney 2008).

85. Compare U.S. CENSUS BUREAU, TABLE UC1, OPPOSITE SEX UNMARRIED COUPLES BY LABOR FORCE STATUS OF BOTH PARTNERS (2013), available at <http://www.census.gov/hhes/families/files/cps2013/tabUC1-all.xls>, with 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, 89 (2004).

86. See Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1401–08 (2001); Marsha Garrison, *Nonmarital Cohabitation: Social Revolution and Legal Regulation*, 42 FAM. L.Q. 309, 315–22 (2008); see also J. Herbie DiFonzo, *How Marriage Became Optional: Cohabitation, Gender, and the Emerging Functional Norms*, 8 RUTGERS J.L. & PUB. POL'Y 521 (2011).



written relationship contracts.<sup>87</sup> On the other end, seven states impose property sharing or support obligations for cohabitants.<sup>88</sup> The remaining states regulate cohabitation using private-law remedies.<sup>89</sup> The states that permit cohabitants to enforce the terms of their relationship do so through (1) express and implied-in-fact contracts; (2) implied-in-law contracts, implied joint ventures, or new status-based remedies; and (3) general equitable remedies.<sup>90</sup>

I discuss each option below, but to appreciate the legal uncertainty, one needs a sense of the variation among cohabiting relationships. Social science research suggests that couples cohabit for numerous reasons that exhibit class and racial patterns.<sup>91</sup> Students and college-educated women regard cohabitation as a convenience or as a testing period for marriage, while less wealthy and educated women cohabit for financial reasons.<sup>92</sup> In addition, many women cohabit because they do not view their partners as of marriageable quality. A large percentage of cohabitants are wary divorcees.<sup>93</sup> African Americans and Hispanics are more likely to cohabit than white non-Hispanics, which Cynthia Bowman attributes to income inequality and greater cultural acceptance of consensual unions.<sup>94</sup> Of course, cohabitants often have different expectations for their relationship, and these expectations change over time. Given this laundry list of possible reasons for cohabiting, it is unsurprising that cohabitation is less stable than marriage. Half of cohabiting relationships in the United States end within five years.<sup>95</sup> Even in Europe, where cohabitation is more common and has greater social support, a majority of cohabiting relationships end in separation or marriage in less than five years.<sup>96</sup> In

87. *Rehak v. Mathis*, 238 S.E.2d 81, 82 (Ga. 1977); *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1211 (Ill. 1979).

88. See *infra* Part I.B.2.

89. See, e.g., *Salzman v. Bachrach*, 996 P.2d 1263, 1269 (Colo. 2000); *Boland v. Catalano*, 521 A.2d 142, 144–46 (Conn. 1987); *In re Marriage of Martin*, 681 N.W.2d 612, 619 (Iowa 2004); *Cates v. Swain*, 2010-CT-01939-SCT (¶ 21) (Miss. 2013).

90. This conceptual map was articulated in an influential 1976 case before the California Supreme Court, *Marvin v. Marvin*, 557 P.2d 106, 110 (Cal. 1976); see also *Marvin v. Marvin*, 5 Fam. L. Rep. (BNA) 3077 (Cal. Super. Ct. 1979). *Marvin* did not generate broad experimentation with implied or equitable remedies, see *Estin*, *supra* note 86, at 1401–08; *Garrison*, *supra* note 86, at 315–22, but its articulation of the available options still structures the legal imagination.

91. See generally *Smock & Manning*, *supra* note 85. For a survey of the empirical literature, see CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 102–23 (2010).

92. BOWMAN, *supra* note 91, at 103–04, 107–09.

93. *Id.* at 117 (in 51.5% of cohabiting relationships, at least one cohabitant has been divorced).

94. *Id.* at 110–17, 135–36.

95. ANDREW J. CHERLIN, THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY app. at 206 (2009). In addition, forty-nine percent of cohabiting couples will split within five years, compared to twenty percent of first marriages. *Cohabitation, Marriage, Divorce, and Remarriage in the United States*, VITAL & HEALTH STAT. (CDC, Wash., D.C.), July 2002, at 14, 17, available at [http://www.cdc.gov/nchs/data/series/sr\\_23/sr23\\_022.pdf](http://www.cdc.gov/nchs/data/series/sr_23/sr23_022.pdf).

96. Kathleen Kiernan, *Changing European Families: Trends and Issues*, in THE

contrast, only twenty-three percent of marriages in the United States end within five years, and a majority never divorce.<sup>97</sup> Given the variation among cohabiting relationships and their fragility, legal regulation is challenging, to say the least.

### 1. Breach of Contract

First, all but two American jurisdictions will enforce express cohabitation contracts.<sup>98</sup> However, these contracts are limited in several ways. Several states limit enforcement to express or written contracts, out of the same pragmatic concerns that underlie statutes of frauds, such as the ease of false allegations, the lengthiness of court battles, and the difficulty of determining precise terms.<sup>99</sup> In addition, while courts will acknowledge that cohabitants expect a sexual relationship, only promises severable from the sexual relationship can be enforced.<sup>100</sup> And, as in marital agreements, courts may refuse to enforce provisions governing everyday life. Robert Ellickson has observed that the commercial firms selling model cohabitation agreements advise clients that courts will not enforce clauses relating to “the day-to-day details” of their relationship, such as housecleaning, cooking, care of pets, or home decoration.<sup>101</sup> Nevertheless, California courts have enforced contract claims relating to domestic services,<sup>102</sup> and a Florida court has enforced a support agreement in which the cohabitant promised to “perform housework, yard work, provision[] the house, and cook[] for the parties.”<sup>103</sup>

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BLACKWELL COMPANION TO THE SOCIOLOGY OF FAMILIES 17, 20 (Jacqueline Scott, Judith Treas & Martin Richards eds., 2004).

97. CHERLIN, *supra* note 95, app. at 206; *see also supra* note 16.

98. The two jurisdictions that will *not* enforce express contracts are Illinois and Georgia. *See* *Rehak v. Mathis*, 238 S.E.2d 81, 82 (Ga. 1977); *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1208 (Ill. 1979).

99. *See, e.g.*, MINN. STAT. ANN. § 513.075 (West 2014); TEX. BUS. & COM. CODE ANN. § 26.01 (West 2009); *Posik v. Layton*, 695 So. 2d 759, 762 (Fla. Dist. Ct. App. 1997); *Kohler v. Flynn*, 493 N.W.2d 647, 649 (N.D. 1992); *Morone v. Morone*, 413 N.E.2d 1154, 1157 (N.Y. 1980) (written contracts).

100. *See, e.g.*, *Bergen v. Wood*, 18 Cal. Rptr. 2d 75, 79 (Ct. App. 1993) (“services as a social companion and hostess” insufficient consideration because they “are not normally compensated and are inextricably intertwined with the sexual relationship”); *Whorton v. Dillingham*, 248 Cal. Rptr. 405, 410 (Ct. App. 1988) (claim for services as “companion” severable from services for “chauffeur, bodyguard, secretary, partner and business counselor”). *But see* *Jones v. Daly*, 176 Cal. Rptr. 130, 133 (Ct. App. 1981) (promise to be “lover” rendered entire agreement, including domestic services, unenforceable).

101. Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L.J. 226, 313 (2006) (citing TONI IHARA, RALPH WARNER & FREDERICK HERTZ, *LIVING TOGETHER: A LEGAL GUIDE FOR UNMARRIED COUPLES* 3/3 (12th ed. 2004); KATHERINE E. STONER & SHAE IRVING, *PRENUPTIAL AGREEMENTS: HOW TO WRITE A FAIR AND LASTING CONTRACT* 2/7 (2004)).

102. *See Whorton*, 248 Cal. Rptr. at 410.

103. *Posik*, 695 So. 2d at 762; *see also* *Forrest v. Ron*, 821 So. 2d 1163, 1165 (Fla. Dist. Ct. App. 2002) (mother promised to move in with father of her child for a reconciliation period if he promised to pay for her to reestablish her own residence if it did not work out).

In addition to express contracts, several states permit cohabitants to bring limited claims based on implied-in-fact contracts. Even if the parties never expressed promises orally, a court may infer from their conduct that they intended to exchange services with the expectation of compensation.<sup>104</sup> Plaintiffs alleging implied-in-fact contracts face special hurdles. Due to their "special relationship," a cohabitant may have to rebut a presumption that the services were rendered gratuitously.<sup>105</sup> In addition, some states limit implied-in-fact contract claims to business or commercial services between cohabitants, expressly excluding domestic services.<sup>106</sup>

## 2. Conscriptive Rules

Estin identifies three groups of states that apply property-sharing rules to long-term cohabitants.<sup>107</sup> First, California, West Virginia, and Wisconsin apply a "generous" theory of implied-in-fact contracts.<sup>108</sup> Even if the couple did not intend to exchange services for compensation, a court may order support payments or a division of property if the couple's conduct manifested a mutual intention to share property or support one another long term. This theory has radical potential because it does not rely on an exchange of promises, promissory reliance, or unjust enrichment. However, several authors have noted that its impact on case law appears, at least anecdotally, to be limited.<sup>109</sup>

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104. See, e.g., *Cook v. Cook*, 691 P.2d 664, 667 (Ariz. 1984) (en banc); *Roznowski v. Bozyk*, 251 N.W.2d 606, 608–09 (Mich. Ct. App. 1977); *Hudson v. DeLonjay*, 732 S.W.2d 922, 928 (Mo. Ct. App. 1987); *Small v. Harper*, 638 S.W.2d 24 (Tex. App. 1982). Some courts reject the distinction between implied and express contracts, arguing that in both cases the court must use the parties' conduct to infer the precise content of their intended promises. *Cook*, 691 P.2d at 667; *Hudson*, 732 S.W.2d at 928; *Kozlowski v. Kozlowski*, 403 A.2d 902, 906 (N.J. 1979), *superseded by statute as recognized in Maeker v. Ross*, 99 A.3d 795 (N.J. 2014).

105. See, e.g., *Featherston v. Steinhoff*, 575 N.W.2d 6, 10 (Mich. Ct. App. 1997) (plaintiff failed to overcome presumption of gratuitousness to establish implied-in-fact contract); *Roznowski*, 251 N.W.2d at 608.

106. See, e.g., *Carnes v. Sheldon*, 311 N.W.2d 747, 751–52 (Mich. Ct. App. 1981) (declining to extend implied-in-fact contract theory to domestic services); *Tapley v. Tapley*, 449 A.2d 1218, 1219–20 (N.H. 1982).

107. Estin, *supra* note 86, at 1391–95; see also Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 818 n.7 (2005).

108. Estin, *supra* note 86, at 1391 n.64 (citing *Marvin v. Marvin*, 557 P.2d 106, 110 (Cal. 1976); *Goode v. Goode*, 396 S.E.2d 430, 439 (W. Va. 1990); *Watts v. Watts*, 405 N.W.2d 303, 313–14 (Wis. 1987)). Wisconsin is more of a joint-venture state, as it "does not recognize recompense for housekeeping or other services unless the services are linked to an accumulation of wealth or assets during the relationship." *Waage v. Borer*, 525 N.W.2d 96, 98 (Wis. Ct. App. 1994). New Jersey once recognized a similarly generous implied promise theory, *In re Estate of Roccamonte*, 808 A.2d 838, 845 (N.J. 2002), but those cases were overruled by an amendment to the statute of frauds providing that palimony agreements must be in writing, N.J. STAT. ANN. § 25:1–5(h) (West Supp. 2014).

109. See BOWMAN, *supra* note 91, at 42–43, 51 (discussing *Friedman v. Friedman*, 24 Cal. Rptr. 2d 892 (Ct. App. 1993); *Ward v. Jahnke*, 583 N.W.2d 656 (Wis. 1998); and *Waage*, 525 N.W.2d 96); Ira Mark Ellman, "Contract Thinking" Was Marvin's Fatal Flaw, 76 NOTRE DAME L. REV. 1365, 1370–72 (2001) (discussing *Friedman*).

Second, Kansas and Oregon have applied an implied joint-venture theory to cohabitants. Analogizing to business partnerships, these states divide cohabitants' property if they intended to manage their assets and expenses jointly for their common benefit.<sup>110</sup> Living together is evidence that the couple intended to manage their resources jointly, but it is less important than holding joint accounts, entering into joint transactions, or making "substantial economic and noneconomic contributions to the household."<sup>111</sup> If the court finds an implied joint venture, it will divide any assets acquired during the cohabitation equitably. This remedy, of course, is valuable only to the extent that the couple acquired divisible assets.

Last, Washington, and perhaps Nevada, have developed an alternative status-based regime for cohabiting couples.<sup>112</sup> These states will divide cohabitants' property according to community-property rules if the relationship sufficiently resembles a marriage (but will not award alimony). Courts evaluate the relationship according to traditional marital expectations, such as the duration and continuity of cohabitation, pooling of financial resources and services, contributions to joint projects, and the purposes of the relationship. The couple's intent is relevant, but the question is not whether they intended to exchange promises but whether they intended to adopt an interdependent relationship. In its 2001 *Principles of the Law of Family Dissolution*, the ALI recommended a similar approach. The ALI *Principles* treat an unmarried couple as "domestic partners" if they cohabit continuously for a defined period and jointly manage their household; have a common child; or meet a number of factors regarding financial independence, intimacy, and public reputation.<sup>113</sup> Domestic partners and married couples are subject to the same equitable division and alimony rules.<sup>114</sup> The ALI provision created substantial academic controversy and has not been adopted directly by any state.

Marsha Garrison, somewhat tendentiously, labels these three categories of rules "conscriptive" obligations.<sup>115</sup> The label is accurate for the new status rules and, perhaps, the "generous" implied-in-fact contracts. These doctrines consider the

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110. Estin, *supra* note 86, at 1391–93; Eaton v. Johnston, 681 P.2d 606, 610–11 (Kan. 1984); Beal v. Beal, 577 P.2d 507, 510 (Or. 1978). Oregon courts call these relationships "domestic partnerships." Beal, 577 P.2d at 512. Estin also includes Mississippi in this category because the Mississippi Supreme Court appeared to endorse a right to equitable division, Pickens v. Pickens, 490 So. 2d 872, 875–76 (Miss. 1986), but Mississippi subsequently limited that right to cohabitants who "had . . . either been married [before resuming cohabitation] or contended to have married," Nichols v. Funderburk, 2002-CT-00087-SCT (¶ 11) (Miss. 2004).

111. *In re Baker*, 223 P.3d 417, 421 (Or. Ct. App. 2009); see also *In re Greulich*, 243 P.3d 110, 115 (Or. 2010).

112. See *In re Marriage of Pennington*, 14 P.3d 764, 770–71 (Wash. 2000) (en banc); Connell v. Francisco, 898 P.2d 831, 835–36 (Wash. 1995) (en banc); W. States Constr., Inc. v. Michoff, 840 P.2d 1220, 1224 (Nev. 1992). Nevada's case law begins with implied-in-fact contract theory, Hay v. Hay, 678 P.2d 672, 674–75 (Nev. 1984), but recent cases deemphasize the implied exchange in favor of an inquiry into whether the couple "impliedly agreed to hold their property as though they were married." W. States Constr., 840 P.2d at 1224. But see Estate of Shapiro v. United States, 634 F.3d 1055, 1058 (9th Cir. 2011) (interpreting *Western States* to require consideration and holding that homemaker services should be sufficient).

113. ALI PRINCIPLES, *supra* note 50, § 6.03.

114. *Id.* §§ 6.05–.06.

115. Garrison, *supra* note 86, at 324.

couples' intentions but also impose duties on a couple regardless of their intentions. Of course, even here, the imposed duties are default rules that the couple can avoid through express contracts. The label is more misleading for the implied-contract and joint-venture doctrines. These doctrines direct courts to infer the parties' intent from their conduct. The law is not conscripting couples into a status they never contemplated but enforcing duties that they assumed with respect to one another. If, in fact, a couple avoided marriage precisely to avoid sharing obligations, the law should not imply a contract or partnership.

Nevertheless, insofar as the doctrinal analysis for implied-contract or joint-venture doctrines is overinclusive, courts will impose duties on couples who did not intend to have them. Joint-venture cases consider factors similar to the new status rules, some of which are only loosely related to the couple's intent to adopt sharing obligations. Cohabiting, for instance, is a necessary element in all seven states that impose property sharing or support obligations on cohabitants, but living together is, at best, weak evidence of intentions to share property or services.<sup>116</sup> A couple could live together without exchanging services or exchange services without living together. Why not ask directly whether they intended to share services? Furthermore, some factors bear no clear relationship to sharing intentions. Why must claimants be a romantic couple at all?<sup>117</sup>

Despite their radical potential, the practical significance of these new cohabitation doctrines should not be overemphasized. Reported cases applying these rules are sparse, the courts have been hesitant to expand the rules, and the courts tend to impose substantial evidentiary burdens for successful claims.<sup>118</sup>

### 3. Restitution

Last, in recent years, states have expanded unjust enrichment or restitution to protect persons who contributed to property held by a cohabitant or provided services without payment.<sup>119</sup> The cohabitation cases that seem appropriate for restitution claims follow several standard fact patterns. Most cases involve real property (usually a shared home) and a plaintiff who either transferred the title to his or her home to a cohabitant, paid the purchase price or the mortgage for property titled only in the defendant's name, or made improvements to the defendant's property.<sup>120</sup> The plaintiff-cohabitant may also have worked for or with the defendant in a family

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116. *E.g.*, *Bergen v. Wood*, 18 Cal. Rptr. 2d 75, 78–79 (Ct. App. 1993) (concluding cohabitation is necessary). *But see* *Devaney v. L'Esperance*, 949 A.2d 743, 749–51 (N.J. 2008) (recognizing theoretical possibility of establishing marriage-like relationship without cohabitation but finding marriage-like relationship not present).

117. *Cf.* *Brenda Cossman & Bruce Ryder, What is Marriage-Like Like? The Irrelevance of Conjugality*, 18 CAN. J. FAM. L. 269, 273 (2001) (arguing that sex, once the defining feature of the "conjugal relations" accorded state benefits, is now less important under Canadian law).

118. *See* *Estin*, *supra* note 86, at 1400; *Garrison*, *supra* note 86, at 317–19.

119. *Candace Saari Kovacic-Fleischer, Cohabitation and the Restatement (Third) of Restitution & Unjust Enrichment*, 68 WASH. & LEE L. REV. 1407, 1419–24 (2011).

120. *See, e.g.*, *Salzman v. Bachrach*, 996 P.2d 1263, 1266 (Colo. 2000); *Mason v. Rostad*, 476 A.2d 662, 666 (D.C. 1984); *Cates v. Swain*, 2010-CT-01939-SCT, 2013 WL 1831783 (¶¶ 18, 20) (Miss. 2013).

business.<sup>121</sup> In other cases, the plaintiff paid for the couple's living expenses, such as the cost of food or rent.<sup>122</sup> The most difficult cases are those in which the cohabitant performed domestic services, which freed the defendant to pursue paid wage labor and accumulate property.<sup>123</sup>

Restitution doctrines have been stretched in various ways to cover some, but not all, of these scenarios. In 2011, the ALI adopted the *Restatement (Third) of Restitution and Unjust Enrichment*, which includes a provision relating to cohabitants.<sup>124</sup> Section 28 provides:

If two persons have formerly lived together in a relationship resembling marriage, and if one of them owns a specific asset to which the other has made substantial, uncompensated contributions in the form of property or services, the person making such contributions has a claim in restitution against the owner as necessary to prevent unjust enrichment upon the dissolution of the relationship.<sup>125</sup>

Section 28 is limited to cohabiting relationships that resemble marriage and does not extend to other cohabitants, like roommates, or personal relationships, like friends, siblings, or parents.<sup>126</sup> As noted in its comments, section 28 relaxes two general limits on restitution.<sup>127</sup> Cohabitants may recover transfers, even if they appear to have been voluntary gifts and even if the plaintiff reasonably could have negotiated a contractual exchange but deliberately chose not to. The drafters concluded that most transfers between cohabitants are made with a reasonable expectation of sharing in future benefits and that cohabitants should not be forced to enter contracts to avoid assuming the risk that the relationship will fall apart.<sup>128</sup>

Estin provides a useful grouping of the factual contexts in which cohabitants successfully recover in restitution. Cohabitants receive restitution for money or services contributed to the other's property or business,<sup>129</sup> but cohabitants typically fail to recover money or services that "can be characterized as part of the ordinary give-and-take of a shared life," such as domestic chores or living expenses.<sup>130</sup> Even if one cohabitant contributed more to the couple's domestic life, courts assume that

121. See, e.g., *Maglica v. Maglica*, 78 Cal. Rptr. 2d 101, 103–06 (Ct. App. 1998); *Suggs v. Norris*, 364 S.E.2d 159, 162–63 (N.C. Ct. App. 1988); *Harman v. Rogers*, 510 A.2d 161, 164–65 (Vt. 1986).

122. See, e.g., *Taylor v. Polackwich*, 194 Cal. Rptr. 8, 10–11 (Ct. App. 1983); *Castetter v. Henderson*, 113 So. 3d 153, 155 (Fla. Dist. Ct. App. 2013); *Ward v. Jahnke*, 583 N.W.2d 656, 661 (Wis. Ct. App. 1998).

123. See, e.g., *Murphy v. Bowen*, 756 S.W.2d 149, 151 (Ky. Ct. App. 1988); *Tapley v. Tapley*, 449 A.2d 1218, 1219–20 (N.H. 1982); *Kozlowski v. Kozlowski*, 395 A.2d 913, 919 (N.J. Super. Ct. 1978), *aff'd*, 403 A.2d 902 (N.J. 1979); *Morone v. Morone*, 413 N.E.2d 1154, 1155 (N.Y. 1980).

124. See 1 RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 28 (2011).

125. *Id.* § 28(1).

126. *Id.* § 28 cmt. b.

127. See *id.*

128. *Id.* § 28 cmt. c.

129. Estin, *supra* note 86, at 1399–401.

130. *Id.* at 1400.

the couple received a mutual benefit and refuse (as in marriage) to balance their relationship ledgers.

### C. The "Abolish Marriage" Position

The legal literature is full of suggestions to reform the law of intimacy. One limited proposal is to replace civil marriage with civil unions, leaving couples or religious groups to bestow the title "marriage."<sup>131</sup> Another is to create a "menu" of formal statuses, so that couples may choose the rights that best reflect their relationship.<sup>132</sup> A third, "functionalist" proposal would extend marriage-like rights to any relationship with similar characteristics.<sup>133</sup> The most radical proposal is simply to abolish marriage, along with all forms of legal status for intimate relationships. Influential theorists of various political persuasions have floated this proposal, including Judith Butler,<sup>134</sup> Martha Fineman,<sup>135</sup> Cass Sunstein and Richard Thaler,<sup>136</sup>

131. See, e.g., TAMARA METZ, UNTYING THE KNOT: MARRIAGE, THE STATE, AND THE CASE FOR THEIR DIVORCE (2010); Martha C. Nussbaum, *A Right To Marry?*, 98 CALIF. L. REV. 667, 695 (2010); Mary Lyndon Shanley, *Afterword*, in JUST MARRIAGE 109, 112–13 (Joshua Cohen & Deborah Chasman eds., 2004); Alan M. Dershowitz, Commentary, *To Fix Gay Dilemma, Government Should Quit the Marriage Business*, L.A. TIMES, Dec. 3, 2003, at 15.

132. See, e.g., Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 606–07 (2013); Eskridge, *supra* note 12, at 1979–85; Barbara Stark, *Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law*, 89 CALIF. L. REV. 1479, 1526 (2001). In a variant, Elizabeth Brake has proposed to retain the title "marriage" but disaggregate its legal norms and permit individuals to register multiple marriages with whatever subset of those norms they prefer. ELIZABETH BRAKE, *MINIMIZING MARRIAGE: MARRIAGE, MORALITY, AND THE LAW* 156 (2012). Brake would retain the legal status to secure rights with respect to the state and third parties, such as social security or employment leave, that support the primary good of "caring relationships." *Id.* at 181.

133. See, e.g., James Herbie DiFonzo, *Unbundling Marriage*, 32 HOFSTRA L. REV. 31, 65 (2003); Nancy D. Polikoff, *Ending Marriage as We Know It*, 32 HOFSTRA L. REV. 201, 225 (2003); Edward Stein, *Looking Beyond Full Relationship Recognition for Couples Regardless of Sex: Abolition, Alternatives, and/or Functionalism*, 28 LAW & INEQ. 345, 371–72 (2010) (positing that functional features include "emotional commitment and involvement; financial commitment and entanglement; mutual reliance for personal services including shelter, food, clothing, utilities, health care, etc.; how parties in a relationship have conducted themselves in their personal lives and held themselves out to society; their level of intimacy; and the totality of the relationship as evidenced by the dedication, caring, and self-sacrifice of the parties").

134. JUDITH BUTLER, ERNESTO LACLAU & SLAVOJ ŽIŽEK, *CONTINGENCY, HEGEMONY, UNIVERSALITY* 176–77 (2000).

135. MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 95–141 (2004); Martha Albertson Fineman, *The Meaning of Marriage*, in MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS 29, 57 (Anita Bernstein ed., 2006).

136. Cass R. Sunstein & Richard H. Thaler, *Privatizing Marriage*, 91 MONIST 377, 379, 386 (2008) (recommending replacing marriage with private contracts or, as a second-best alternative, with universal civil unions). Their proposal is, understandably, tentative. They later endorsed replacing marriage with civil unions as an accommodation to pragmatic political concerns. RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* 215–16 (2008). Sunstein had previously expressed a preference to retain marriage. Sunstein, *supra* note 26, at 2117–18.

and David Boaz.<sup>137</sup> Others have explored the proposal more thoroughly.<sup>138</sup> In these schemes, individuals may marry as a cultural, religious, or moral matter, but the states will no longer license specific types of relationships. These theorists would prefer for intimates to regulate their lives through contracts, although some of them also contemplate extending fiduciary or partnership law to intimate couples.<sup>139</sup> This subpart will discuss the proposal to abolish legal status relationships, noting the variety of normative concerns and exploring the proposed replacements for marriage.

The argument for abolishing marriage is that it no longer serves its intended functions, in part because those functions are no longer appropriate. A traditional purpose of marriage law—perhaps its primary one—was to enforce conventional norms regarding sexuality and gender. Marriage was a state license to engage in sexual behavior and reproduction, one that society used to enforce its vision of correct sexual behavior and gender roles, particularly against women and minorities.<sup>140</sup> The proponents of abolishing marriage argue that these uses of power are morally and legally inappropriate.<sup>141</sup> The law should not enforce gendered social norms, and adults should have the liberty to engage in sex, bear children, and structure their intimate relationships without state interference.

Of course, no one denies that marriage law could be used to protect dependent children and women. However, marriage policy is an inefficient tool for these purposes. If the state's concern is child welfare, supporting marriage is both over- and underinclusive. Not all children live with married adults, and not all married adults have children. Over forty percent of children born in the United States between 2006 and 2010 were born to unmarried women.<sup>142</sup> Even if a child is born to married parents, there is a twenty percent chance that those parents will divorce by her ninth birthday.<sup>143</sup> Childcare is also not limited to parents, as grandparents are the primary caregiver for four percent of children.<sup>144</sup> Moreover, while empirical evidence

137. David Boaz, *Privatize Marriage: A Simple Solution to the Gay-Marriage Debate*, SLATE (Apr. 25, 1997, 3:30 AM), [http://www.slate.com/articles/briefing/articles/1997/04/privatize\\_marriage.html](http://www.slate.com/articles/briefing/articles/1997/04/privatize_marriage.html).

138. See, e.g., Jessica Knouse, *Civil Marriage: Threat to Democracy*, 18 MICH. J. GENDER & L. 361, 417–18 (2012); Anibal Rosario-Lebrón, *For Better and for Better: The Case for Abolishing Civil Marriage*, 5 WASH. U. JURISPRUDENCE REV. 189, 251–52 (2013); Dorian Solot & Marshall Miller, *Taking Government out of the Marriage Business: Families Would Benefit*, in MARRIAGE PROPOSALS, *supra* note 135, at 70, 70–71; Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161, 1163 (2006).

139. E.g., Fineman, *supra* note 135, at 46–50, 58–60.

140. Case, *supra* note 10, at 1765–69.

141. See Fineman, *supra* note 135, at 57–59.

142. “Unmarried” includes sole (16.9%) and cohabiting parents (23.4%). Gladys Martinez, Kimberly Daniels & Anjani Chandra, *Fertility of Men and Women Aged 15–44 Years in the United States: National Survey of Family Growth, 2006–2010*, NAT'L HEALTH STAT. REP. (Nat'l Ctr. for Health Statistics, CDC, Wash., D.C.), Apr. 12, 2012, at 25 tbl.12, available at <http://www.cdc.gov/nchs/data/nhsr/nhsr051.pdf>.

143. Cherlin, *supra* note 16, at 408.

144. GRETCHEN LIVINGSTON, PEW RESEARCH CTR., AT GRANDMOTHER'S HOUSE WE STAY 5 (2013), available at [http://www.pewsocialtrends.org/files/2013/09/grandparents\\_report\\_final\\_2013.pdf](http://www.pewsocialtrends.org/files/2013/09/grandparents_report_final_2013.pdf).



suggests that children benefit from living with two parents, the effect is mediated by the quality of the adult relationship. Children raised by parents in abusive or high-tension relationships may benefit if their parents divorce,<sup>145</sup> and children living with lone parents score higher on welfare measures than those living with a stepparent or a parent's cohabitant.<sup>146</sup>

Marriage law may even interfere with the protection of women and children. Martha Fineman, the most influential family-law scholar to propose abolishing status, argues that marriage law distorts public policy with respect to dependents.<sup>147</sup> The public is obligated to care for children, the disabled, and the elderly because dependency is a universal human experience, and caretaking is necessary for social reproduction.<sup>148</sup> Yet, instead of subsidizing caretaking as a public good, marital policy shunts this obligation onto private families.<sup>149</sup> This privatization of dependency reinforces gender inequality because women are the vast majority of caretakers, and much of American law assumes a breadwinner family that reinforces this gendered division of labor.<sup>150</sup>

Last, marriage law can foster forms of direct and indirect discrimination. The title "married" has social signaling functions, which can be useful or detrimental. For instance, the presumption that marriages are monogamous can ease interactions with other adults. These signals can also serve less innocuous purposes. In part because people regard marriage as the most significant personal relationship, marriage often signifies social achievement. Marriage's prestige can be used as a tool to exclude disfavored groups, which reinforces both marriage's social status and the privileged position of favored classes.<sup>151</sup> Opponents of same-sex marriage, for instance, use the state's licensing scheme to denigrate same-sex relationships and, in the process, extol heterosexual marriage. Proponents of abolishing marriage argue that any state involvement in bestowing titles and benefits on specific relationships reinforces such exclusionary practices.<sup>152</sup>

In addition, marriage classifies adults into the categories of "single" and "married." Many relationships, from cohabitants to separated spouses to "open" marriages, do not fit neatly into this blunt dichotomy. This imprecision can lead to unfairness because many state and private benefits are contingent on marital status.<sup>153</sup>

145. E. MAVIS HETHERINGTON & JOHN KELLY, FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED 112 (2002).

146. The causal relationship, of course, is more complicated. See Susan L. Brown, *Marriage and Child Well-Being: Research and Policy Perspectives*, 72 J. MARRIAGE & FAM. 1059, 1062, 1066–67 (2010); Andrew J. Cherlin & Frank F. Furstenberg, Jr., *Stepfamilies in the United States: A Reconsideration*, 20 ANN. REV. SOC. 359, 372–73 (1994); Paula Fomby & Andrew J. Cherlin, *Family Instability and Child Well-Being*, 72 AM. SOC. REV. 181, 199 (2007).

147. Fineman, *supra* note 135, at 34–54; see also Serena Olsaretti, *Children as Public Goods?*, 41 PHIL. & PUB. AFF. 226 (2013).

148. FINEMAN, *supra* note 135, at 47–49.

149. *Id.* at 38, 46.

150. See *id.* at 37.

151. See, e.g., MARTHA C. NUSSBAUM, FROM DISGUST TO HUMANITY 131–32 (2010); Knouse, *supra* note 138, at 396–407 (2012).

152. See, e.g., Rosario-Lebrón, *supra* note 138, at 204–06.

153. Sunstein, *supra* note 26, at 2115–16.

Why, for instance, should one person receive social security benefits from a spouse that he never supported, while a second person cannot receive benefits from her committed, long-term cohabitant? Similarly, single people receive less compensation for the same employment because married persons gain more from insurance benefits. Such discrimination might be unfair for two reasons. Some theorists argue that, as a general matter, it is wrong to discriminate based on relationship status.<sup>154</sup> More plausibly, discrimination is problematic when relationship status is unrelated to the rationale for the underlying benefit. If the state abolished marriage, then marriage could no longer be a proxy for these benefits. Either benefits would be distributed based only on functionally relevant criteria or individuals could designate their beneficiaries.

In summary, despite otherwise divergent normative agendas, proponents of abolishing marriage typically appeal to three core arguments. First, individuals have a liberty right to structure their intimate relationships without state interference. Second, child welfare is an implausible justification for such interference, because the state has more effective and less distorting means to promote child welfare than imposing status-based duties between adults. Finally, marriage facilitates gender inequality and discrimination based on relationship status.<sup>155</sup> As is obvious from the foregoing summary, these theorists take marriage as their primary target, though they support abolishing relationship status generally.

It is essential to understand what these authors imagine the legal relationships between intimates would look like without status relations. (I will expand on this discussion in Part III.) For most theorists, contracts play the pivotal role. Libertarian reformers, such as Boaz, argue that intimate partners should govern their relationship through ordinary contract law.<sup>156</sup> In a similar vein, Sunstein recommends contractual ordering with tailored default rules: couples could enter contracts, which would be supplemented by “a menu of default rules, perhaps intended to mimic what most people would do, perhaps intended to force the parties to make their wishes clear, perhaps intended to protect those most in need of protection.”<sup>157</sup> Even liberal proponents of abolishing marriage envision contract law playing the central role. Martha Fineman argues that if intimate affiliates “want their relationships to have [legally enforceable] consequences, they should bargain for them.”<sup>158</sup>

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154. See, e.g., Claudia Card, *Gay Divorce: Thought on the Legal Regulation of Marriage*, HYPATIA, Winter 2007, at 24, 35.

155. Some argue that antimarriage advocates are primarily committed to a norm of relationship equality, but this equality norm contains both a liberty right and an antidiscrimination norm. See, e.g., Terry S. Kogan, *Competing Approaches to Same-Sex Versus Opposite-Sex, Unmarried Couples in Domestic Partnership Laws and Ordinances*, 2001 BYU L. REV. 1023, 1033 (2001) (“[U]nderlying the Equality Position is a belief that it is wrong for the State in general to dictate how couples should structure their private relationships. . . . [T]he Equality Position believes that those who choose to structure their relationships in a way other than marriage are still entitled to have those relationships supported with respect to certain essentials . . .”).

156. Boaz, *supra* note 137.

157. Sunstein, *supra* note 26, at 2116.

158. Fineman, *supra* note 135, at 58.

In addition, Sunstein and Fineman recognize that other areas of law might continue to play a role in intimate relationships. Fineman argues that "ameliorating doctrines" would be available to alleviate the potentially harsh results of pure private ordering on economically weaker parties.<sup>159</sup> Adult intimate relationships would be governed by general rules of contract, tort, equity, and, perhaps, even partnership and labor law. She declines to define this new legal regime in detail, but she does sketch a few of its contours. For instance, if a cohabitant provides services without a contract, then she can seek compensation through unjust enrichment, partnership default rules, or labor regulations. However, any rules devised for these purposes must "apply to all types of transactions between legally competent adults and . . . specific categories of affiliation [must] not be segregated for different treatment."<sup>160</sup>

Although Fineman acknowledges "pouring disputes that arise between sexual affiliates into the arenas of contract, tort, and criminal law would not leave the doctrines that now govern those areas of law untransformed,"<sup>161</sup> she offers only two examples of the likely transformations. First, tort law might develop ways to "compensate sexual affiliates for conduct endemic to family interactions but considered unacceptable among strangers," such as by modifying the "[n]orms that prohibit harassment (including stalking), verbal assault, and emotional abuse among strangers" so that they could "be applied in defining appropriate conduct between sexual intimates."<sup>162</sup> Second, if the state stops trying to limit reproduction to marriage, it might decriminalize sexual conduct and permit "enforceable individualized bargaining over sex outside of the marital contract."<sup>163</sup> Fineman suggests, in conclusion, that traditional doctrines will require reexamination where they make "assumptions about interactions between independent, equal, and autonomous individuals."<sup>164</sup>

In the next Part, I use these proposals to abolish marriage as a launching pad and explore what it would be like to subject intimate relationships to traditional contract, tort, and equity law. I do not intend to offer a systematic treatment of the necessary changes. Instead, I hope to identify a trend—namely, that even if the law abolished *ex ante* status categories, standard private-law doctrines would still require discrimination based on "categories of affiliation."

## II. IMAGINING A WORLD WITHOUT INTIMATE STATUS

Abolishing relationship licenses like marriage would not abolish the regulation of intimacy based on status; it would simply alter the regulatory regime.<sup>165</sup> The state

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159. *Id.*

160. *Id.*

161. *Id.* at 62.

162. *Id.* at 59.

163. *Id.* at 61.

164. *Id.* at 62.

165. See Patricia A. Cain, *Imagine There's No Marriage*, 16 QUINNIPIAC L. REV. 27 (1996). Cain argues that if the state abolished marriage, then everyone would be subject to the same rules as homosexual couples. *Id.* at 43. This is a reasonable response to alarmist reactions against the proposal to abolish marriage, but the comparison can be misleading. Cohabitation cannot be treated as a neutral baseline because it developed in dialogue with marriage,

cannot simply get out of the marriage business. As long as intimates can bring legal claims against one another in tort, contract, or equity, the law must determine who has obligations, how those obligations arise, how they change, and what their default content will be—and these legal rules will be tailored to the nature of our relationships. If a state abolished intimate-relationship licenses, then private law would refashion ad hoc categories of intimate status. In this Part, I describe central doctrines in tort, contract, and equity that tailor private-law rights to the nature of parties' relationships and require the law to use status-based norms. To be clear, I am not arguing in this Part for regulation through marital status or against regulation through private law, only that private-law regulation cannot avoid status-based norms.

### A. Tort

With few exceptions, the parties' intimate relationship is largely irrelevant for classic intentional torts. Assault, battery, and rape are as wrong when committed by an intimate partner as by a stranger (if not worse). The law has evolved slowly to reflect this moral equivalence. Every state has now abolished general spousal tort immunity. Tort claims for intimate rape or domestic violence remain rare, but states and activists are searching for ways to protect these victims.<sup>166</sup>

On the other hand, many modern intentional torts and negligence claims are explicitly tailored to the parties' relationship. Some intentional torts protect legal rights that are sensitive to the nature of our relationships. These relationship-sensitive torts often include a reasonableness element that permits juries to tailor claims to case-specific facts about the relationship. Other tort rules impose different legal duties on parties with a "special relationship," including parents, carriers, property owners, fiduciaries, lawyers, physicians, and others. Absent fundamental changes in tort law, tort claims between intimate couples will require the law to employ status-based norms.

#### 1. Relationship-Sensitive Torts

Many tort claims necessarily use standards tailored to the parties' relationship, which inevitably involves normative judgments about correct behavior for each type of relationship. Status plays this role most clearly for torts that require outrageous or offensive behavior. Consider the tort of intentional infliction of emotional distress (IIED). A plaintiff is entitled to compensation for emotional injuries if a defendant's "extreme and outrageous conduct intentionally or recklessly causes severe emotional harm."<sup>167</sup> Intimate partners are uniquely positioned to harm one another emotionally, which makes intimate relationships a natural source of IIED claims. However, to

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sometimes by analogy, sometimes by opposition.

166. See *supra* note 34 and accompanying text.

167. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 46 (2012). Daniel Givelber argues that the elements of IIED claims reduce to disputes over whether behavior is outrageous, which is a social or moral judgment about tolerable behavior, and therefore IIED is not really a compensatory tort but a punitive deterrent. Daniel Givelber, *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 51–54 (1982).

adjudicate an IIED claim between intimate parties, the law must decide what behavior is "extreme and outrageous" in the context of their relationship. How could tort law make these judgments without status-based norms? I am not the first person to raise these questions, of course.

Ira Ellman and Stephen Sugarman have argued that we should not permit IIED claims between spouses because there can be no judicially administrable standard for outrageous marital behavior.<sup>168</sup> Ellman and Sugarman argue that the law has two options, neither of which is acceptable. Extreme and outrageous conduct may be defined "internally" according to the parties' relationship or "externally" according to social conventions. The internal standard is meant to respect marital privacy and diversity but has the opposite effect.<sup>169</sup> The standards of particular relationships are too difficult to discern because they tend to be "informal," "unarticulated" and evolving.<sup>170</sup> Breakups color the parties' memories, and the lawsuit creates incentives to distort the facts. Faced with such conflicting evidence, fact finders have little option but to fill in the gaps using their personal or social norms. An external standard of conduct fares no better. A couple may be content with behavior that looks extreme or outrageous to outsiders, because relationships involve "complex emotional bargains" that may "depart from the social conventions" of ordinary relationships.<sup>171</sup> "Privacy norms" prevent us from holding spouses liable for conduct they believed was "within the bounds of the marriage."<sup>172</sup> Moreover, external standards are likely abstract, which invites judges and juries to measure conduct using ideal rather than minimal standards.<sup>173</sup> While this argument dismisses too quickly the possibility of minimal objective standards,<sup>174</sup> Ellman and Sugarman identify a fundamental

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168. Ira Mark Ellman & Stephen D. Sugarman, *Spousal Emotional Abuse as a Tort?*, 55 MD. L. REV. 1268, 1341-42 (1996). Ellman and Sugarman conclude that the law should ban IIED claims between spouses, except when emotional harm is caused by a small list of acts that are otherwise actionable crimes or torts. *Id.* at 1343. I am less interested in their ultimate conclusion than in their argument.

169. *See id.* at 1318-22 (discussing *Massey v. Massey*, 807 S.W.2d 391 (Tex. App. 1991)). *Massey* approved an IIED jury instruction stating that

[t]he bounds of decency vary from legal relationship to legal relationship. The marital relationship is highly subjective and constituted by mutual understandings and interchanges which are constantly in flux, and any number of which could be viewed by some segments of society as outrageous. . . . In your deliberation on the questions, definitions and instructions that follow, you shall consider them only in the context of the marital relationship of the parties to this case.

*Massey*, 807 S.W.2d at 400.

170. Ellman & Sugarman, *supra* note 168, at 1321-22.

171. *Id.* at 1323-24.

172. *Id.* at 1322.

173. *Id.* at 1325-26.

174. They discuss cases involving conduct to which no one ought to be subject regardless of past acquiescence, such as being locked out of the house in the winter, *Hakkila v. Hakkila*, 812 P.2d 1320, 1321 (N.M. Ct. App. 1991), withholding financial resources, public and private humiliation, *Massey*, 807 S.W.2d 391, and sexual humiliation, *Twyman v. Twyman*, 855 S.W.2d 619, 620 (Tex. 1993). Their hesitance rests on wariness of distrust of juries and a desire to restrict remedies to divorce, but in our hypothetical world divorce is not an option.

problem. Our beliefs about proper intimate behavior are often indeterminate; consequently, the law has difficulty defining even minimal standards of intimate conduct without relying on social or moral norms.

This problem, however, is not limited to marriage or intimate relationships; it arises for any IIED claim. Imagine a personal assistant suing his boss, a student suing his teacher, or a homeowner suing his neighbor. As the *Restatement (Third) of Torts* recognizes, judgments under the extreme-and-offensive standard require contextual determinations about the parties' relationship, authority, vulnerability, motivations, and past conduct.<sup>175</sup> Liberal theorists are naturally reticent to articulate or impose norms on intimate couples, but there is no viable alternative for IIED claims, even if the state abolished formal status categories.

The law might try to limit consideration to the parties' explicit intentions. However, few relationships (intimate or not) are governed solely or even primarily by explicit norms. Our expectations are incomplete. They are abstract, vague, mutable, and contextual, and couples often have divergent expectations. This kind of indeterminacy is not a problem in personal relationships; couples can fill in their expectations on the fly, making contextual judgments based on evolving values. Yet this indeterminacy does cause problems for legal enforcement. The law must make determinate judgments. The only way for the law to fill in these gaps is to make the same type of judgments that intimates ordinarily make for themselves. The fact finder must interpret the couple's relationship in light of the couple's values and in light of normative judgments about what is appropriate for that kind of relationship.

Similar difficulties arise with respect to privacy torts, such as intrusion on solitude. One may sue another "who intentionally intrudes, physically or otherwise, upon [his] solitude or seclusion . . . or his private affairs or concerns . . . if the intrusion would be highly offensive to a reasonable person."<sup>176</sup> Searching another person's closet without his consent is a paradigmatic intrusion on solitude. But is such a search equally unreasonable regardless whether the closet belongs to a stranger, acquaintance, friend, lover, roommate, or spouse?<sup>177</sup> Part of this difference can be explained by consent. Once I give someone permission to enter my bedroom, his choice to exceed that privilege by searching my closet is less offensive than if he lacked consent to enter my bedroom at all. Ultimately, however, privacy torts exceed implied consent and rest on shared public conventions.<sup>178</sup> Our privacy law begins with conventional norms about what one shares with strangers, reporters, employers, party guests, friends, roommates, lovers, and spouses. Individuals have the power to redraw these boundaries, and that power may even be necessary to form intimate relationships.<sup>179</sup> Nevertheless, the default boundaries are set by social norms for

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175. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 46 cmt. d (2012).

176. RESTATEMENT (SECOND) OF TORTS § 652B (1977).

177. See *Sanders v. ABC, Inc.*, 978 P.2d 67, 73 (Cal. 1999) ("Privacy for purposes of the intrusion tort must be evaluated with respect to the identity of the alleged intruder and the nature of the intrusion."). Similar questions arise when a plaintiff objects to an intrusion into the space that he or she shares with another person, such as a roommate or cohabitant.

178. See Shaun B. Spencer, *Reasonable Expectations and the Erosion of Privacy*, 39 SAN DIEGO L. REV. 843, 851–60 (2002).

179. See Charles Fried, *Privacy (A Moral Analysis)*, in *PHILOSOPHICAL DIMENSIONS OF*

people in specific kinds of relationships. In the context of privacy torts, the reasonable-person standard incorporates these social norms, just as the outrageous-conduct standard does for IIED claims.

## 2. Tort Law and Special Relationships

The second class of relationship differences in tort law involves special relationships that alter the parties’ duties or the relevant standards of care. The default rule in negligence is that everyone has a duty to use reasonable prudence to avoid causing harm to others but no positive duty to help or protect others.<sup>180</sup> The law changes this default for parties with a “special relationship”: carriers and passengers, innkeepers and guests, businesses and invitees, employers and employees, landlords and tenants, prisons and prisoners, professionals and clients,<sup>181</sup> and children and parents.<sup>182</sup> Special relationships typically arise from voluntary undertakings in which the defendant has assumed greater power, has a distinctive ability to prevent injury, or has induced the plaintiff into a situation of dependency. These relationships can raise or lower the defendant’s standard of care or create an affirmative duty for a defendant to prevent harm from befalling the plaintiff.

If the state abolishes licensed status categories, would intimacy be recognized as a special relationship? It might seem odd, if the state abolished formal status categories, for tort law to recreate distinctions between types of intimate relationships. However, this tension would be inevitable. Even if intimacy does not carry special tort duties, negligence law will still regulate intimacy using a status-based assumption—namely, that intimate duties are more like duties to strangers than to employees, tenants, or clients. Consider, for example, the duty to rescue. If intimates are legal strangers, then they have no positive duty to aid one another in emergencies. This is certainly contrary to common moral intuitions. We have a positive moral duty to aid our spouses, a duty stronger than a carrier’s duty to aid passengers. Should a person be liable for not throwing a life preserver to his

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PRIVACY: AN ANTHOLOGY 203, 209 (Ferdinand David Schoeman ed., 1984).

180. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 37 (2012).

181. *Id.* § 40; *see also* W. PAGE KEETON, DAN B. DOBBS, ROBERT E. KEETON & DAVID G. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS § 56 (5th ed. 1984).

182. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 40 cmt. o (2012) (“One likely candidate for an addition to recognized special relationships is the one among family members . . . particularly among those residing in the same household . . .”). A minority of states subject parental decisions to the ordinary standard of reasonable care, another minority apply a general standard of care unless the claim involves parental supervision or discretion, while roughly half maintain a parental immunity from suit with limited exceptions. *See* DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 358 (2d ed. 2011); Romualdo P. Eclavea, Annotation, *Liability of Parent for Injury to Unemancipated Child Caused by Parent’s Negligence—Modern Cases*, 6 A.L.R.4TH 1066, 1078–87, 1113–25 (1981). Compare Elizabeth G. Porter, *Tort Liability in the Age of the Helicopter Parent*, 64 ALA. L. REV. 533 (2013) (arguing for a general standard of reasonable parental care), with David Pimentel, *Criminal Child Neglect and the “Free Range Kid”*: Is Overprotective Parenting the New Standard of Care?, 2012 UTAH L. REV. 947 (arguing that criminal child-neglect standards threaten to impose disputable parenting ideals).

husband (hopefully now his ex-husband)? The law would have to define the scope of this affirmative duty. Should he also be liable for refusing to help pay for his husband's medical care? Similar questions arise for premises liability. Should a person be liable for failing to warn her boyfriend about her broken front step? What if the boyfriend stayed over regularly for the past month?<sup>183</sup> Intimacy is an appropriate candidate for special tort duties, since spouses and cohabitants often have a unique ability to prevent injuries to one another and a moral responsibility to do so. Whether the law decides to treat intimates like strangers or carriers or professionals, the choice reflects a status-based conception of our obligations. We rarely think of "legal strangers" as a status, but it is a mistake to think that the default status is neutral. It is simply the default.

Assuming that intimates may file tort claims against one another, the state must decide how their intimacy affects their rights. In the status quo, tort law's standards for offensive behavior and for reasonable prudence are often tailored to the nature of parties' relationships. If tort law ignored intimacy, intimacy would be the anomaly. Moreover, ignoring intimacy would not mean avoiding status distinctions. Choosing to limit intimate parties' tort duties to the minimal standards of legal strangers is itself a status-based judgment.

### B. Contract

Proponents of abolishing marriage contend that if intimates want their relationship to have legal consequences, then they should enter contracts.<sup>184</sup> As we have just seen, relationships often alter tort duties even without contracts. Nevertheless, the proponents of abolishing marriage correctly note that spouses and cohabitants exchange economically valuable services.<sup>185</sup> Couples cook meals, mow lawns, clean laundry, fix computers, repair homes, plan vacations, balance checkbooks, make investments, and care for one another during illnesses. All of these services could be outsourced. Instead, they become bundled into status obligations. Could these intimate duties be enforced through contract without intimacy-based distinctions?<sup>186</sup>

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183. Under the traditional rule, an owner's liability to visitors depends on the entrant's status, although roughly half of the states have adopted a unitary standard of reasonable care for all entrants. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 51 Reporters' Note cmt. a (2012). The unitary standard rejects categorical status determinations but is not blind to relationship differences, because whether the owner took reasonable precautions depends on what kind of risks the boyfriend is exposed to in virtue of their relationship.

184. See Cain, *supra* note 165, at 46–48; Fineman, *supra* note 135, at 58. Presumably, these authors are not thinking about fiduciary relationships created by contract. When individuals contract to create relationships of trust and confidence, the law often imposes fiduciary obligations on the parties. The contract creates the relationship that gives rise to status obligations.

185. The law often ignores the value of these services, particularly the services associated with women. Silbaugh, *supra* note 39, at 5–7.

186. Many scholars have addressed whether marriage is a contract and whether the law should allow spouses to alter their marital duties contractually. See, e.g., Barbara A. Atwood, *Marital Contracts and the Meaning of Marriage*, 54 ARIZ. L. REV. 11 (2012); Brian H. Bix, *Private Ordering and Family Law*, 23 J. AM. ACAD. MATRIMONIAL LAW. 249 (2010). The question I am asking is slightly different—that is, whether law could recognize contracts



While it is more natural to recognize that tort law imposes duties on individuals, contract law—the paradigm of voluntary legal obligations—also tailors its rules to the nature of our relationships. Ordinary contract doctrines regarding formation, interpretation, and remedies inevitably embroil the law in judgments about the character of relationships.<sup>187</sup>

### 1. Contract Formation

Consider, first, what is required for intimate partners to enter binding contracts for economic services such as domestic or wage labor. The first hurdle is formation—offer, acceptance, and consideration. Where are the offer and the acceptance? Intimate partners rarely make explicit arrangements for dividing economic services, and even when they do, their arrangements fluctuate. Marriage is the closest most couples come to a moment of agreement, but few couples have an explicit sense of what their marital life will be like. Even sophisticated couples with intricate prenuptial agreements rarely divvy up ordinary household tasks. Similarly, cohabitants may decide to move in together and make agreements about rent or bills, but they rarely negotiate chores. More typically, couples gradually extend the time they spend together until they are effectively cohabitants. If intimate partners are going to regulate their economic lives by contract, almost all of these agreements will be implied-in-fact contracts for which the court infers the parties' promises from their conduct.

In addition, the provision of economic support (domestic and wage) in intimate relationships raises difficulties under standard consideration doctrines.<sup>188</sup> Under the predominant modern rule, consideration is "the exchange or price requested and received by the promisor for its promise."<sup>189</sup> When intimate partners perform services for one another, their intention is often precisely *not* to bargain for something in exchange.<sup>190</sup> Part of the moral and social ideal of intimate

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between intimates without tailoring rules to the nature of their relationship.

187. Elizabeth Scott and Robert Scott have argued that current marriage law approximates the default rules that hypothetical spouses would select if seeking to maximize their cooperative surplus. Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1301 (1998). Such arguments support, rather than contradict, my position. If contract law needs special default rules for intimate relationships, the state is thus necessarily categorizing relationships and regulating their terms.

188. Some courts have argued that spouses have a preexisting marital duty to provide such domestic support, so that promise cannot be consideration. *E.g.*, *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16, 18–20 (Ct. App. 1993) (refusing to enforce a husband's promise to bequeath his wife a portion of his separate property if she provided nursing for him in the home rather than in a nursing home). This argument has been justly criticized, Silbaugh, *supra* note 39, at 30–33, but whatever its merits, it would not apply if the law abandoned a status-based regime of marital obligations. Similarly, the modern view on marital and premarital agreements dispenses with a consideration requirement, but this is recognized as an exception. *See, e.g.*, UPMAA § 6 (2012).

189. 3 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 7:2, at 19 (4th ed. 2008).

190. One might think of the promise to marry as the exchange, particularly if one restricts one's attention to prenuptial agreements. However, antenuptial agreements or adjustments to the division of responsibilities in an ongoing relationship do require additional consideration. *See* *Bedrick v.*

relationships—at least in marriage-like relationships—is that couples exchange services freely, as an aspect of being in the relationship. Couples often expect reciprocity and equal contributions, but they rarely price their contributions or seek to maximize the return on those contributions.<sup>191</sup> Even if the law decides to characterize wage or labor services in relationships as if they had been bargained for, it is unclear how to characterize the bargained-for benefits. Most couples view domestic services as an integral part of their relationship. Spouses share income and chores as part of sharing a home and a life. Lovers may agree to cohabit because it facilitates their sexual relationship. Attempts to isolate a particular exchange of wage or domestic labor from the wider relational benefits may distort the function of the exchange. Contractual consideration cannot be limited to the exchange of unpaid and paid labor; if couples were forced to rely on contracts, contract law would need ways to identify and value these expected benefits.

To enter binding express contracts, intimate partners would have to make offers regarding financial, homemaking, caretaking, and domestic services. They would need to place an economic value on their contributions to the relationship and bargain for services in return. Intimates can arrange their domestic lives in this fashion, as if they were independent contractors. However, the proposal to abolish legal marriage requires them to adopt this stance, on pain of lacking any legal protection when their relationship ends. If the goal of abolishing marriage is to avoid imposing status-based norms on couples, then it is essential to realize that relying on contract law still forces intimates to structure the terms of their relationship to meet the demands of contract.

## 2. Contract Terms and Performance

Consider, next, the likely terms of intimate contracts. To isolate what should be an easy case for contractual enforcement, consider a childless marriage between two men who have roughly equal salaries, share a home, and want an equal division of domestic labor. The terms of their “agreement” would have several notable features. First, the couple would be unlikely to bargain for a specific quantity or quality of services. How much sympathy would you feel for a plaintiff who claimed his husband breached their contract because he agreed to cook meals but skipped one day a week? Or worse, because his cooking was mediocre?

Second, the terms of their relationship will likely come in relatively indivisible bundles. Although they might hire distinct landscapers, cooks, or housekeepers, the couple are more likely to agree to share these activities en masse. Once they agree to share labor, one spouse cannot then outsource his part to a contractor, even if the contractor would do a better job.

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Bedrick, 17 A.3d 17, 27 n.5 (Conn. 2011) (suggesting, without deciding, that postnuptial agreements require consideration); *Bratton v. Bratton*, 136 S.W.3d 595, 600 (Tenn. 2004).

191. See MILTON C. REGAN, JR., *ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE* 24–26 (1999). I am not implying that domestic labor is not economically valuable; this argument applies equally to financial contributions through wage labor. Silbaugh, *supra* note 39, at 10–11, 26–27 (arguing that both unpaid housework and wage labor have relational and leisure components and that injustice results because only housework is equated with emotional expression).

Third, the terms of their agreement are likely to fluctuate because those terms are deeply contingent and open ended. Even if they have divided their tasks equally ex ante, ensuring an equal division of labor during a relationship requires significant flexibility. The burden of these tasks varies over time: there are fewer dishes when they eat out, the yard requires less maintenance in winter, a new home may require more work, and wage-work commitments fluctuate. The couple must also decide how much they value home cooking, yard maintenance, interior decorating, and their careers. These valuations change over time. In ordinary contracts, a promisor assumes the risk that the facts or his values will change, altering the cost or value of his bargained-for promises. In marriage, however, both spouses face this risk. Indeed, couples often make their commitments precisely to survive such drastic changes to the bargain.

The case is more complicated still. So far, I have assumed that the spouses' exchanges are limited to domestic services of the kind for which there is a market substitute. In fact, their exchange of services is one part of a general commitment that includes relationship maintenance, shared activities, and emotional and physical care. If one spouse fails to participate in these personal aspects of the relationship, why not conclude that he has breached the contract? It would be difficult to place a value on the domestic services without regard to the relational aspects. If the subjective value of a home depends on the presence of his husband, why should he not protect that value in a contract? When their domestic services are enforceable in contract, then the personal or sexual aspects of their relationship should be enforceable as well.<sup>192</sup> In one case, a court found that the plaintiff was excused from her promise to perform housework because the defendant breached the agreement by bringing another woman into their home.<sup>193</sup>

If the precise terms of the spouses' marriage are enforceable, that will affect their incentives during their marriage. Each husband would have an incentive to keep track of who pays for dinner, cleans the dishes, or mows the lawn.<sup>194</sup> They need an accurate tally, both because nonperformance can justify a future demand for compensation and because sufficient nonperformance can be a material breach that justifies ending the relationship and seeking damages. If one partner falls short, the other would have an incentive to insist on prompt performance; otherwise, a court might later interpret his acquiescence as a rescission of the original arrangement.<sup>195</sup> If the personal or relational aspects of their relationship are enforceable as well, then those aspects too must be monitored. When one stops contributing to the relationship, that breach may justify his husband's decision to breach other aspects, such as providing domestic services.<sup>196</sup>

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192. Legal enforcement of sexual or relational aspects of intimate relationships can be unsavory. In *Spires v. Spires*, the court refused to enforce a contract in which a woman explicitly agreed to assume a subordinate role and engage in sexual acts intended to be degrading. 743 A.2d 186 (D.C. 1999).

193. *Posik v. Layton*, 695 So. 2d 759, 762 (Fla. Dist. Ct. App. 1997).

194. Regan has argued at length that individualistic mental accounting is inconsistent with intimacy. REGAN, *supra* note 191, at 70–73; MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* 146–47 (1993).

195. *Cf.* 3 WILLISTON, *supra* note 189, § 7:37 (discussing mutual agreement to modify contract as a rescission and reentry into a new contract).

196. *See Posik*, 695 So. 2d at 762 (finding cohabitant's decision to move in with third party

Other types of commercial relationships face similar problems: difficulty monitoring quality and quantity of performance, provision for a variety of tasks through a single relationship, and open-ended obligations whose cost and value change over time.<sup>197</sup> These difficulties can stump highly sophisticated private actors. However, these difficulties do not show that it is impossible or unwise to regulate relationships through contracts. Rather, they show that shunting intimate relationships into contract law would not end the state's role in defining intimacy. Either intimates would shape their relationships to accommodate contract default rules, or the law would reshape contract default rules to accommodate the nature of intimate relationships.

### *C. Unjust Enrichment and Restitution*

Since intimate relationships rarely meet traditional standards for enforceable contracts, it is natural to think that equitable remedies can provide supplemental protection.<sup>198</sup> Fineman, for instance, suggests that intimate affiliates may use equitable doctrines like unjust enrichment to alleviate harsh contract rules.<sup>199</sup> Restitution could become generally available for intimate parties, but restitution law openly relies on moral judgments about the nature of our relationships.

The core of any restitution claim is that (1) the plaintiff conferred on the defendant a benefit and (2) it would be unjust to allow the defendant to retain that benefit.<sup>200</sup> Before intimate partners can recover in restitution, the law must explain when it is unjust for one intimate to retain benefits received in a relationship. That explanation cannot avoid judging parties' behavior in light of their beliefs about the relationship and in light of expectations typical for that kind of relationship. For example, say that Caleb and Dan live together for three years with no contract. Caleb takes Dan on several expensive vacations and helps build a porch on Dan's house. When they break up and part ways, is Dan unjustly enriched? That depends on what benefits Caleb expected and what he could have reasonably expected. The answer turns, in part, on whether Caleb and Dan were spouses, boyfriends, lovers, brothers, friends, or roommates. One cannot understand such transfers by isolating them from judgments about what people owe one another in the context of particular relationships.

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was anticipatory breach, despite lack of contract language).

197. There is vast literature on incomplete contracts, including discussion of various avoidable and unavoidable reasons that contracts are incomplete. *See, e.g.*, Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641, 1641–43 (2003).

198. Enforceable contracts (whether express or implied in fact) and restitution are exclusive remedies, so even a limited relationship contract should preclude recovery under quasi contract or unjust enrichment. *See* 1 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 1:6 (4th ed. 2012); 26 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 68:1 (4th ed. 2003).

199. Fineman, *supra* note 135, at 57–58.

200. 1 RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 1 (2011); 26 WILLISTON, *supra* note 198, § 68:5.

The controversy over restitution claims between cohabitants is a controversy about the norms and expectations for cohabiting relationships.<sup>201</sup> Courts relax two standard doctrines of restitution for cohabitants: in this context, retaining a gratuitously transferred benefit can be unjust, and restitution can be a substitute for readily available contracts.<sup>202</sup> The Reporter's Notes in the *Restatement (Third)* argue that it is appropriate to relax these rules, because cohabitants make transfers expecting that their relationship will continue and that they will share in the transferred benefits.<sup>203</sup> This fact about expectations only begins to answer the fundamental question: Are these reasonable expectations that merit legal protection? What behavior should the law demand of cohabitants? Professor Dagan argues that restitution should be used to facilitate relationships of trust by ensuring that one party to an ongoing relationship does not unfairly take advantage of the other's contributions.<sup>204</sup> In response, Professor Sherwin argues that cohabitants can easily protect themselves with "off-the-rack" legal relations like loans or shared title and that cohabitants should be able to maintain relationships with less commitment.<sup>205</sup> This debate between Dagan and Sherwin, on which the *Restatement* has taken a controversial position, is about what behavior is reasonable in cohabitation relationships.

If the state abolishes relationship licenses, restitution law will replicate similar debates for all intimate litigants. Before a court can decide whether it is unjust for the defendant to retain benefits from the relationship, the court must make judgments about the level and type of commitment in the relationship. Consider Caleb and Dan again. The court must discern the couples' beliefs about their roles in the relationship. Caleb increased the value of Dan's house by building the porch, but perhaps Caleb often did the handy-man work while Dan performed domestic services. Moreover, the nature of their relationship colors the nature of the transfer. Assume they have no prior division of labor: Caleb's choice to build the porch appears in a different light if they were long-term, committed partners who shared everything than if they had an off-and-on-again relationship in which Caleb frequently but unsuccessfully tried to get Dan to commit.

Restitution law cannot avoid interpreting transfers by reference to the terms of the couples' relationship and general norms regarding relationships of that type. Sherwin notes that the cohabitation section of the *Restatement (Third)* requires judges to engage in "particularistic" moral judgments about the relationships, in contrast with

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201. Compare Robert C. Casad, *Unmarried Couples and Unjust Enrichment: From Status to Contract and Back Again?*, 77 MICH. L. REV. 47, 55 (1978) (arguing that neither cohabitant can be unjustly enriched when both "probably contemplated that the benefits they would receive—material and non-material—would offset the burdens they undertook" and "[n]either party anticipated paying for the material benefits received"), with Garrison, *supra* note 107, at 891–94 (arguing that restitution is appropriate when a cohabitant "gains a significant, unearned benefit or suffers a significant, uncompensated loss"). Garrison's test appears relationship neutral, but judgments about what is "unearned" or "uncompensated" rest on expectations about what cohabitants owe one another in the relationship.

202. 1 RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 2 (2011).

203. *Id.* Reporter's Note cmt. c.

204. Hanoch Dagan, *Restitution and Relationships*, 92 B.U. L. REV. 1035, 1038–42 (2012).

205. Emily Sherwin, *Love, Money, and Justice: Restitution Between Cohabitants*, 77 U. COLO. L. REV. 711, 721–22, 727 (2006).

the *Restatement's* general strategy to define rules for specific factual scenarios.<sup>206</sup> She frames this approach as objectionable, but it is inevitable. A court cannot interpret a transfer between cohabitants without understanding their relationship. As I argued regarding IIED claims and implied contract terms, judgments about the nature of a relationship cannot be restricted to the couple's express beliefs. Their beliefs are often indeterminate until applied using norms about appropriate behavior in this type of relationship.

#### *D. Why Not Simply Refuse To Recognize Status?*

Could there be a more straightforward answer? Maybe private law could simply ignore intimate relationships. This proposal seems consistent with the desire to abolish formal status categories. It also seems to avoid entangling the state in the details of intimate relationships.

Despite its initial appeal, this proposal is remarkably difficult even to formulate, because many causes of action require judgments about appropriate intimate behavior. One might argue, as Ellman and Sugarman do for IIED claims, that we should prohibit these types of claims between intimate parties.<sup>207</sup> This proposal, of course, is not relationship blind. It creates a fundamental legal distinction based on affiliation. To identify plaintiffs barred from bringing IIED claims, the law must distinguish intimacy from other relationships: friendship, roommates, coworkers, partnership, employment, etc. Moreover, the proposal avoids imposing legal duties on intimates by giving them a unique legal *privilege*. Intimates would become immune from ordinary legal duties, such as to avoid inflicting emotional harm or to fulfill implied promises.

Instead, the proposal might be that intimates can bring these claims, but their intimate relationship cannot be considered when evaluating the alleged conduct. For example, spouses could bring IIED claims, but judgments about the "outrageousness" of their conduct cannot depend on the couple's marriage. This proposal does not obviate the need to categorize intimate affiliates. The fact finder must now distinguish which expectations flow from the intimate relationship rather than from other legally relevant relationships. Officials must ask a new counterfactual question: would it have been outrageous for the parties to engage in similar conduct if they were not intimates? Assume a stereotypical fact pattern in which a husband demeans his wife while they are in the company of others, locks her out of the house, and denies her access to their checking account. Does it make sense to decide this case by asking whether such conduct would have been unreasonable between friends, housemates, or economic partners? I doubt this question can lead to coherent judgments, but even if it could, those judgments still involve distinctions based on intimacy. Deliberate ignorance is often self-defeating in this fashion. To ignore isolated aspects of the world, you must be particularly attentive to precisely those aspects you want to ignore.

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206. *Id.* at 731, 735. Sherwin is also concerned that contextual judgments leave too much freedom to apply the fact finder's values and lead to inconsistent results that distort litigation incentives. *Id.* at 733–35.

207. *See supra* notes 168–74.

Similar problems would arise in contract law. Officials might try to ignore intimate relationships when judging whether one party exerted coercive pressure or whether their contract includes unconscionable terms. The law might exempt intimate affiliates from these rules or might isolate the legally pertinent features of their relationship from its intimate aspects. The first option seems to avoid imposing specific duties on intimates. Unfortunately, it does so by imposing one general disability: contracts between intimates are limited to their explicit terms. The law must still define the category of "intimate relationships" that it subjects to this demanding default rule, one that it does not impose on other contracting parties. The second option seeks, in quixotic fashion, to isolate the intimate from the nonintimate features of a relationship. This is the approach adopted by many states for cohabitation contracts.<sup>208</sup> When an intimate couple enters a contract, courts may consider their promises to share finances and cohabit because nonintimates can perform these actions; however, courts must ignore that the couple chose to cohabit and share finances in order to facilitate their intimate relationship, even when that purpose shapes their behavior and expectations.

Attempts to render private law blind to intimate relationships are self-defeating. The state would need to define categories of intimacy to decide which relationships or aspects of relationships are exempt from ordinary law. Contrary to the goal of neutrality, this general exemption would continue to define the couple's legal obligations based on their intimate status.

This extended hypothetical has two lessons. The primary lesson is that abolishing formal status categories does not abolish status-based regulation. Intimacy is one of many relationships that alter our rights in contract, tort, and equity. If the state abolished formal status categories, private law would recreate status norms. Either courts would use common-law methods to articulate default rules, or juries would use reasonableness tests to enforce conventional norms.<sup>209</sup> A state could exempt intimates from these private-law doctrines, but that would create a systemic status-based distinction. Intimates would be subject to a pervasive legal disability, and the law would still have to define the types of relationships subject to this disability. In short, abolishing marriage will not get the state out of the marriage business.

The second lesson is that when parties seek to enforce rights tied closely to their intimate relationship, the law oscillates between discerning the terms of their relationship and imposing normative judgments on the couple. This oscillation is most evident in IIED and unjust-enrichment claims, but it is present in contract law as well. The law can try to restrict its attention to a couple's actual expectations, but their expectations are often indeterminate precisely where law demands answers. To enforce intimate rights, the law fills these gaps with status-based norms.

This Part has not explained why private-law rules will inevitably rely on status or why legal enforcement oscillates between private and status norms. Nor does this Part provide any argument for a legal status like marriage. However, the oscillation offers a clue to explaining why the state cannot avoid status norms, and this explanation is the next step in reconstructing a liberal justification for marital status.

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208. See *supra* Part I.B.1.

209. Although the drawbacks of these legal processes are apparent, I am not arguing that status norms are less objectionable when defined by a legislature than by judges or juries.

## III. IMPERFECT DUTIES AND STATUS NORMS

One reason the law cannot avoid using intimate-status norms is that intimate relationships involve imperfect duties. The nature of imperfect relationship duties forces the law to oscillate between respecting each unique relationship and imposing norms on couples.<sup>210</sup> This Part defines imperfect duties, explains their inherent indeterminacy, and identifies the challenges that they pose for legal enforcement.

One important caveat: I rely on a deliberately shallow theory of marriage. I assume marriage involves imperfect duties, but I hope to bypass theories about the value or ground of those duties. Marriage may be valuable because it is a relationship of love and self-sacrifice,<sup>211</sup> an economic partnership,<sup>212</sup> an “egalitarian liberal community,”<sup>213</sup> or a commitment grounded in natural sex and gender roles,<sup>214</sup> and marital obligations may be grounded in consent, promises, reliance, dependence, or natural law. Instead of engaging these debates, I want to rely on common assumptions about the structure of marital duties, substantiated only by appeal to widespread marital norms.<sup>215</sup> Because I begin with such a contingent conception of intimate relationships, one may legitimately worry that the resulting theory of marriage law is applicable only to a narrow cultural perspective. I can say little at the outset to allay such fears, except that I strive to point out the more controversial assumptions. Most importantly, I assume one central limitation: relationship duties must be minimally reciprocal. While this premise rules out fundamentally hierarchical or patriarchal conceptions of marriage, I regard this as a reasonable limit, since my overall project is to reconstruct a liberal justification for legal marriage.

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210. The oscillation is also exacerbated by family law’s commitment to both liberalism and communitarianism and its resulting uncertainty about whether and when the law may legitimately impose values on families.

211. Wardle, *supra* note 45, at 122.

212. Sanford N. Katz, *Marriage as Partnership*, 73 NOTRE DAME L. REV. 1251, 1251–52 (1998).

213. Frantz & Dagan, *supra* note 29, at 81–94.

214. See, e.g., Don S. Browning, *A Natural Law Theory of Marriage*, 46 ZYGON 733, 739–41 (2011).

215. My hope is that this approach allows the argument to serve as a site of overlapping consensus between various theories of marriage. See JOHN RAWLS, *The Idea of an Overlapping Consensus*, in POLITICAL LIBERALISM 133, 134–72 (expanded ed. 2005). Rawls argued that even divergent religious and moral perspectives may converge on intermediate premises for political decision making. JOHN RAWLS, *The Idea of Public Reason Revisited*, in POLITICAL LIBERALISM, *supra*, at 440, 466–74. One might worry that imperfect duties are too controversial for this purpose, since the perfect-imperfect distinction is often associated with deontological moral theory; however, Mill and other consequentialists have developed accounts of imperfect duties broadly consistent with my discussion. See MILL, *supra* note 9, at 61; Douglas W. Portmore, *Imperfect Reasons and Rational Options*, 46 NOÛS 24 (2012) (arguing that many practical reasons are imperfect because they can be pursued in many equally rational ways over the course of a life); Walter Sinnott-Armstrong, *You Ought To Be Ashamed of Yourself (When You Violate an Imperfect Moral Obligation)*, 15 PHIL. ISSUES 193 (2005) (arguing that a duty is imperfect if better consequences would result were agents to feel ashamed rather than guilty for not performing enough of a type of act).



### A. The Content and Structure of Marital Obligations

The day-to-day life of marriage involves a tangle of overlapping moral norms, including sexual fidelity, emotional fidelity, economic support (including financial and domestic services), emotional support, and relationship maintenance.<sup>216</sup> This list contains various types of norms. It includes moral rights between spouses as well as rights between spouses and third parties. It also includes expectations about spouses' conduct and feelings. These attitudes are less naturally described as rights, but they have a similar structure and invoke similar moral attitudes such as guilt, shame, and resentment. For instance, spouses should care about one another, so a person may feel justly resentful if her wife forgets her birthday, and her wife should be contrite. These moralized attitudes often depend on ideals of virtue, such as more or less implicit conceptions of the good spouse, boyfriend, friend, or lover.

While these relationship norms differ in many respects, most of them involve what moral philosophers call "imperfect duties." Imperfect duties have two defining characteristics: (1) substantial latitude in the required conduct and (2) an intrinsic connection to subjective motivations. While several conceptions of the imperfect-perfect distinction exist, their shared insight is that some duties permit greater latitude in their performance.<sup>217</sup> Perfect duties require or prohibit specific conduct. Classic perfect duties include the duty not to murder and the duty to pay a debt.<sup>218</sup> Imperfect duties, in contrast, leave the agent with greater discretion. She has latitude to decide when, how, or how often to fulfill her imperfect duties. Even when she recognizes an appropriate chance to fulfill an imperfect duty, she may choose not to fulfill it now, in this manner. The most commonly cited imperfect duty is the duty of charity. Anyone with excess money should donate to charity sometimes, but each person may decide to whom, when, and how much to donate. Moreover, even if a person recognizes that a certain cause is worthy of charity, she may choose to forgo donating now in favor of supporting other similarly worthy causes in the future.<sup>219</sup>

216. I harbor no pretenses that this list is exhaustive or that any member is necessary. Many marriages lack some of these norms, but anything we commonly recognize as a marriage has many of them. If the norms of other intimate relationships lack these features, then the argument that I develop for state forbearance and equitable dissolution does not apply to those relationships. I make no judgment about the value of those relationships.

217. See, e.g., Thomas E. Hill, Jr., *Kant on Imperfect Duty and Supererogation*, 62 *KANT-STUDIEN* 55 (1971); George Rainbolt, *Perfect and Imperfect Obligations*, 98 *PHIL. STUD.* 233 (2000). Not all accounts of imperfect duties make latitude their core feature. Mill argued that imperfect duties also lack correlative moral claims or claim holders, Mill, *supra* note 9, at 48–49, and some recent philosophers have considered this a defining feature of imperfect duties, e.g., ONORA O'NEILL, *CONSTRUCTIONS OF REASON: EXPLORATIONS OF KANT'S PRACTICAL PHILOSOPHY* 189–93, 224–32 (1989). This categorization obscures important distinctions, because one can have duties to specific persons without determinate content and free-floating duties with determinate content.

218. As these examples show, the imperfect-perfect distinction is orthogonal to the more familiar positive-negative distinction. Perfect duties often require forbearance, such as refraining from theft, but can also require positive action, such as paying a debt. Imperfect duties often require actions, such as the duty of beneficence, but may also require forbearance, such as the duty not to harm the environment.

219. Imperfect duties need not be less stringent than perfect duties. Some scholars have

Following George Rainbolt, I assume that the imperfect-perfect distinction is one of degree.<sup>220</sup> All duties admit more or less latitude, and this latitude may vary across multiple dimensions of the required conduct. Rainbolt identifies five nonexhaustive dimensions: time, place, manner, object or person, and number of required acts.<sup>221</sup> Even perfect duties admit some discretion on some dimensions. A debtor may be obligated to pay a particular amount to a particular person by a particular date, yet the debtor may retain discretion to choose whether to pay early or on the due date and whether to pay in a lump sum or in installments. Likewise, no imperfect duties are fully indeterminate. Imperfect duties have minimal thresholds. While I have substantial discretion to decide how much money to donate and which charities to support, I fail my obligation if I donate only a pittance or donate only to worthless causes. Moreover, even a wide imperfect duty may require specific action in particular factual contexts. For instance, a parent's duty to support his child's development is imperfect, but if he has not attended any of his daughter's sporting events this year, then he is obligated to attend her final soccer match.

Most marital duties involve latitude that places them on the imperfect side of the scale. The marital duty with the least latitude is likely sexual fidelity (assuming there is such a duty). Spouses are obligated not to engage in or pursue sexual acts with any third party. The category of sexual acts may be vague, but one could argue that spouses should avoid even borderline sexual acts. Aside from sexual fidelity, most marital duties involve significant latitude. Spouses have a duty of economic support, but they may choose what quality of life to maintain, what kind of services to provide, and how integrated they want their economic life to become. The duty of emotional support offers still more latitude. Spouses may expect one another to perform some caring acts, but they must find ways to support one another and judge when such support is appropriate. The duty to contribute to the relationship permits even more latitude, including discretion to decide which activities to share, how many, and how often.

Despite this latitude, marital norms often have corresponding claims and claimholders.<sup>222</sup> For example, one owes emotional and financial support to one's

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argued that perfect duties always trump imperfect ones, because a perfect duty will require specific action while imperfect duties will permit action on some other occasion, e.g., Susan C. Hale, *Against Supererogation*, 28 AM. PHIL. Q. 273, 276 (1991), but such arguments conflate precision with stringency. The category of supererogatory acts is also sometimes conflated with imperfect obligations. *But see* Marcia Baron, *Imperfect Duties and Supererogatory Acts*, 6 ANN. REV. L. & ETHICS 57 (1998) (arguing against this conflation).

220. Rainbolt, *supra* note 217, at 238–42.

221. *Id.* at 247.

222. Many marital duties have correlative “claim rights” in a strict Hohfeldian sense: *A* has a claim right against *B* that *B* must perform some act if and only if *B* has a duty to *A* to perform that act. *See* GEORGE W. RAINBOLT, *THE CONCEPT OF RIGHTS* 25–30 (2006) (presenting a contemporary definition of Hohfeldian claim rights). I assume here that one's spouse is the correlative duty holder. It is an open question whether spouses might also have a duty to the state to fulfill their marital obligations, a question I do not consider here. In addition to claim rights, spouses also have privileges and powers with respect to one another. *A* has a privilege to do some act if *B* has no right to prevent *A* from doing it. For instance, Caleb has a privilege to open Dan's closet if and only if Dan has no right that Caleb not open the closet. Spouses also receive certain powers to alter one another's rights and duties. Caleb can accept a dinner invitation for the couple, creating a weak duty for Dan to attend.

spouse. When Caleb's father dies, Caleb can expect, request, and demand support from his husband Dan. A third party can remind Dan of his duty to support Caleb and judge Dan's character poorly for failing to do so, but the third party cannot demand that Dan fulfill his duties. Not all duties have corresponding claim rights in this fashion. Often, no one has a right to demand that we fulfill our duties. Importantly, many of the classic imperfect duties lack correlative claim holders. I have an imperfect duty to give to charity, but no particular charity can demand that I donate to it. Imperfect marital duties, however, cannot plausibly be understood in this fashion.

Nevertheless, the frequent latitude in imperfect duties translates into slack in the correlative moral claims. Because the person subject to an imperfect duty often has discretion to decide how, when, or how often to perform, the claim holder generally has no right to demand a specific kind, time, or amount of performance. Even when some occasion presents a clear opportunity to fulfill an imperfect duty, the agent may forgo performance, as long as she plans in good faith to fulfill the duty on another occasion or in another manner.<sup>223</sup> For example, Amy may skip her wife Beth's family reunion to fulfill work obligations, as long as she plans to attend family holidays. Beth may be justly disappointed, but she has no right to demand that Amy attend the reunion. This latitude in imperfect duties leaves individuals substantial discretion to specify the precise content of their own marital duties and rights.

The example of Amy and Beth also illustrates the second major feature of imperfect duties: imperfect duties are tightly connected to subjective moral motivations. This subjective commitment requires doing enough and doing it in the right way. For example, parents have a duty to support their children's development. This duty does not require a single-minded focus on their children's activities. However, a father can reveal his lack of commitment either by missing too many recitals or by attending the recitals yet never putting down his smartphone. The father may deeply wish for his son to do well, but he has placed some other value above his son's musical development. Accordingly, we should add a second aspect to our definition of imperfect obligations: subjective commitment. Agents manifest their subjective commitment by performing sufficient acts of the relevant type in an appropriate manner.

A similar requirement attaches to marital duties. Spouses may often forgo opportunities to fulfill their imperfect marital duties, but if they do not do enough or if they fail to maintain proper attitudes, then they are not truly committed. This is a trope of romantic comedies: A workaholic frequently cancels date night with his wife, but she forgives him because she understands how much he values his work. Yet her patience finally snaps when he spends an entire date on his phone. The hapless husband thinks she is overreacting, but in fact, she has concluded that he is no longer committed to their marriage. Even if he loves her and wants to remain married, he has not made their marriage a priority in his life. By exercising their discretion to judge how and when to fulfill their imperfect duties, intimates define their vision of the relationship and demonstrate their commitment to it. Spouses need

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223. Philosophers disagree about whether one may forgo an opportunity to perform imperfect duties only if one will instead fulfill competing duties, or whether one may forgo the opportunity simply to pursue other inclinations. See THOMAS E. HILL, JR., *HUMAN WELFARE AND MORAL WORTH* 220–22 (2002) (discussing the debate).

discretion to act in ways that express their commitment, and their commitment is what constrains the latitude in their conduct.

Admittedly, this weak notion of subjective commitment is uninspiring. Yet greater elaboration would mire us in controversy about the nature of the commitment underlying imperfect duties—and marital duties in particular. Kant offers the most influential theory of imperfect duties, and he explains their underlying commitment as adopting an end. The categorical imperative requires all rational agents to adopt certain ends, in particular self-development and the happiness of others.<sup>224</sup> A duty is imperfect when agents have “playroom . . . for free choice” about how to fulfill these ends.<sup>225</sup> More precisely, a duty is perfect if the proposed action would always be inconsistent with adopting the required end and imperfect if adopting the end requires some action without determining precisely how or to what extent one must act.<sup>226</sup> Extending this account to marriage (though Kant did not), one might argue that marriage involves each spouse adopting the other’s ends. Whether marital conduct is morally worthy depends on whether it is consistent or inconsistent with adopting one’s spouse’s ends as one’s own.<sup>227</sup> Because it is usually possible to support another person’s ends in numerous ways, marital duties will rarely generate strict rules of conduct.

Most of us crave a more romantic account of the subjective commitment underlying imperfect duties. We expect romantic love. This love-based conception of marriage, despite its recent vintage in Western life, is now pervasive.<sup>228</sup> Spouses expect one another to act in ways that manifest affection. This expectation can affect judgments about imperfect duties. It is not sufficient to throw a party for your spouse’s birthday; the day needs to have especially personal or romantic moments. Despite the prominence of this ideal, romantic love is not necessary for intimate relationships. On the other hand, it is hard to imagine long-term, personal relationships without pervasive emotional attachments. A full theory of marriage must explain how adopting ends, love, and care relate to moral duties in adult, intimate relationships. My argument, however, will rely only on the more limited notion of subjective commitment described above. This minimal account is consistent with a broad range of moral visions for marriage. Recognizing that this assumption is controversial, I regard the adoption of ends, love, and care as specialized versions of, or supplements to, this minimal sense of commitment.

This subpart has offered a skeletal account of moral rights and duties in marriage-like relationships. Marriage creates imperfect marital duties and rights, yet these duties and rights leave spouses with substantial latitude in performance. This

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224. KANT, *supra* note 9, Ak. 6:384–88, at 516–20.

225. *Id.* Ak. 6:390, at 521.

226. *Id.* Ak. 6:390–91, at 521–22; *see also* HILL, *supra* note 223, at 206 (explaining that to adopt an end means to make it “a serious, major, continually relevant, life-shaping end”).

227. Kant regards marriage as primarily a legal contract to use one another’s bodies, because he argues that a mutual exchange is the only way to rightfully use a person’s body. KANT, *supra* note 9, Ak. 6:277–80, at 426–29. The Kantian theory that I sketch, in contrast, makes marriage look more like a special case of beneficence. *Id.* Ak. 6:469–73, at 584–88.

228. *See generally* STEPHANIE COONTZ, MARRIAGE, A HISTORY: HOW LOVE CONQUERED MARRIAGE (2005) (describing social, economic, and legal conditions that allowed love-based marriage to evolve and come to dominate between the late eighteenth and twentieth centuries).

latitude is constrained by the requirement that spouses maintain appropriate subjective commitments.

### *B. Legal Enforcement of Imperfect Obligations in Ongoing Relationships*

Imperfect duties are a chronic hassle for legal enforcement. Because agents have discretion to determine the content of their duties, the law struggles to define rules and identify violations. Moreover, the state's coercive mechanisms conflict with the subjective commitment that justifies and limits the agent's discretion. These difficulties have led preeminent philosophers, including Kant and Mill, to conclude that imperfect duties are not legally enforceable.<sup>229</sup> This Part explores the difficulties created by efforts to enforce imperfect obligations. These difficulties are particularly salient in light of enforcement in ongoing relationships.

#### 1. Discretion and the Specification of Duties

The latitude in imperfect obligations causes the first, and most serious, problem. Because spouses have wide discretion in imperfect duties, it is often impossible, in principle, for a third party to specify the content of those duties. Spouses can fulfill their duties in different ways on different occasions. Even if a spouse recognizes that a particular occasion is an appropriate chance to fulfill her duty, she may choose to forgo performance, as long as other opportunities will arise. When an act or omission falls in this zone of discretion, a third party simply cannot determine whether the act or omission fulfilled the agent's imperfect duty.

On the other hand, third parties may be able to identify blatant violations. Imperfect duties have lower thresholds. Sometimes, anyone who can reasonably claim to be committed to performing a duty must avoid or perform certain actions. One way to clearly violate an imperfect duty is by failing to act over a significant amount of time. For example, no one could claim to be committed to supporting his husband's career while never attending any of his husband's work events. In the right circumstances, even a single act or omission can clearly violate an imperfect duty. For instance, no one can be committed to supporting her spouse financially without trying to help meet her spouse's basic needs.<sup>230</sup>

Absent conduct outside the realm of acceptable latitude, however, it is impossible for a third party to judge whether specific acts or omissions violate imperfect marital duties. Consider Caleb and Dan again. Dan wants to buy a new house, but Caleb wants to invest the money for retirement. Dan files a lawsuit claiming that Caleb's refusal to buy the new home violates his duty of financial support. A new home, Dan argues, would be more consistent with their standard of living. A third party cannot, in principle, resolve this dispute. The problem is not epistemic. The problem is not that a third party would have difficulty identifying the couples' agreement or

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229. KANT, *supra* note 9; MILL, *supra* note 9.

230. Disputes will inevitably arise about the lower limit of this vague threshold, as one might argue that a minimally decent home required indoor plumbing in 1953. See *McGuire v. McGuire*, 59 N.W.2d 336, 338, 342 (Neb. 1953) (stating that husband had duty to maintain home but holding that choice whether to provide indoor bath, toilet, or kitchen fell within discretion to decide minimal standard of living).

deciding whether a new home is appropriate for their agreed-upon standard of living. The problem is that Caleb and Dan have discretion to choose how to fulfill their support obligations in light of their desired standard of living and allocation of resources. Ideally, Caleb and Dan would decide jointly. But until they make that decision, there is no precise answer about what level of support Caleb must provide. If, in contrast, Caleb had refused to help Dan buy basic groceries, then one could reasonably conclude that Caleb is not committed to fulfilling his support obligations.

A state could press the point and try to enforce imperfect duties in this zone of discretion. To specify the duties' precise content, a conscientious official might ask what decision the couple would have made outside a dispute. Unfortunately, this counterfactual judgment has no clear answer. The official might use the couple's past practices to project their future decisions. However, they made those past decisions assuming that they would have future opportunities to reinterpret the relationship and adjust its terms. Their past arrangements do not govern the present dispute. Any attempt to reconstruct the couple's hypothetical decision will require judgments about the best shape for the couple's ongoing relationship based on external standards: the official's values, community standards, or a hypothetical rational couple.

The discretion in imperfect intimate duties explains why the law cannot avoid status and why legal judgments vacillate between contextual decisions and status norms. To adjudicate intimate disputes, a fact finder must settle the couple's disagreements about their imperfect duties. These legal decisions inevitably require judgments about how couples ought to live. At best, the law can judge the parties' relationships in light of their past conduct and general norms for that type of relationship. Not incidentally, this is what the couple does for themselves when considering their intimate duties.

## 2. Coercion and Commitment

The second problem with enforcing marital duties relates to the connection between imperfect duties and subjective commitments. Imperfect duties require agents to act on certain subjective commitments, whether adopting a particular end or acting out of love.<sup>231</sup> These commitments determine whether a discretionary act fulfills an imperfect duty. Because it is impossible to force a person to maintain commitment, it is impossible to coerce someone to fulfill imperfect duties. At best, the law can force a person to complete acts consistent with the imperfect duty.

This difficulty is a variant of a familiar problem: virtue cannot be coerced. Legal coercion is a blunt instrument. Legal sanctions alter individuals' motivational sets by creating new incentives to act one way or another. However, the law cannot force a person to act for a particular reason or on a particular motive.<sup>232</sup> Only deeply intrusive

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231. See *supra* Part III.A.

232. See, e.g., MICHAEL S. MOORE, *PLACING BLAME: A THEORY OF THE CRIMINAL LAW* 758–59 (2010); Heidi M. Hurd, *When Can We Do What We Want?*, 29 *AUSTL. J. LEGAL PHIL.* 37, 57–58 (2004). My point is limited to discrete acts of enforcement; I do not deny that legal coercion can be designed to cultivate motivations over the long term. See Danny Scoccia, *Moral Paternalism, Virtue, and Autonomy*, 78 *AUSTRALASIAN J. PHIL.* 53, 55–56 (2000). Perhaps a general threat of coercion could incentivize short-term compliance for the wrong reasons, and this compliance could habituate spouses to eventually act for the right reasons.

coercion or long-term education can make someone act on a particular motive. Of course, this problem will apply to perfect moral duties as well, if complying with perfect duties requires acting on appropriate moral motivations. The conflict with enforcement of imperfect duties is distinct, however, because the subjective commitment is essential to determining whether the external conduct satisfies the duty.

For a similar reason, litigation is inimical to imperfect obligations. If acting on the right sort of commitments is constitutive (at least in part) of fulfilling marital duties, then it is difficult to sue while also asserting that the relationship still exists. Marital litigation is both conceptually and psychologically difficult, but only the conceptual difficulty is significant.

Take the conceptual problems first. To claim that a spouse violated his marital duties, it is not sufficient for the plaintiff to assert that the defendant failed to fulfill his marital obligations on a few occasions or in the manner the plaintiff expected. Such choices are within the latitude of imperfect duties. To file a valid suit, the plaintiff must assert that the defendant failed to meet even the minimal thresholds of a marital duty. The law can police these minimal thresholds, assuming it is possible to identify some acts that are necessary to qualify as committed at all. However, the plaintiff's assertion that his husband fell below this minimal threshold entails that his husband is not subjectively committed to the relationship. To bring a valid claim to enforce marital duties during a marriage, a plaintiff spouse must simultaneously assert that his spouse has abandoned the marriage. Moreover, the lawsuit assumes his spouse will not fulfill his marital obligations without coercion. If legal sanctions are necessary to induce the defendant to perform his marital duties, then even if he complies with the legal judgment, he is not acting for the right reasons or with the right motives and, hence, not fulfilling his imperfect duties.<sup>233</sup> The plaintiff spouse seeks to deprive the defendant of the discretion necessary to exercise his commitment. A person who performs services ordered by an authority out of concern for sanctions is, at best, a servant or employee. Not only is the plaintiff spouse asserting that the defendant is no longer committed to the marriage, the plaintiff is seeking to create a relationship in which the defendant spouse cannot participate in the marriage.<sup>234</sup>

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Such an institutional perspective is not, however, the one typically adopted by individuals seeking to vindicate their legal rights.

233. Suppose that Caleb refuses to contribute at any household chores, and Dan sues to enforce his imperfect marital rights. If Caleb merely performs the chores ordered by a judicial decree, then he is acting in ways consistent with what some committed spouses might do, but he is not living out of his commitment. His conduct can exhibit his commitment only if he is free to choose the nature of his performance.

234. Nonlegal enforcement mechanisms can, but need not, involve a similar conceptual tension. Self-help and social sanctions work best when both spouses are committed to the relationship and care about one another's feelings. A guilt trip is most effective when the other person cares about your feelings, so that even grudging performance is evidence of remaining commitment. However, nonlegal enforcement can cross the same line. Even if Caleb no longer cares about his marriage to Dan, Caleb may refrain from marital misbehavior simply because Dan's guilt trips are annoying or because Caleb would be ashamed in front of his friends. If Dan realizes that he must rely on self-help or social sanctions in this way, he faces the same dilemma as when he relies on legal sanctions.

Litigation also creates psychological tension. As is often noted, litigation encourages an adversarial posture that conflicts with the motives for affection and cooperation. The tension is real but is not a fundamental problem. It may not apply to particular couples and specific disputes. Moreover, as Mary Anne Case has argued, couples often use psychologists or religious counselors to negotiate disputes.<sup>235</sup> The psychological tension created by litigation is not qualitatively different from the tension created by nonlegal enforcement. In addition, although our legal system is adversarial, that is not a necessary feature of legal interventions. Alternative dispute resolution mechanisms might reduce the conflicting incentives of the adversarial process.

### 3. Vagueness in Imperfect Duties

These first two problems exacerbate a third, practical problem. Many intimate duties are irreducibly vague—that is, they involve concepts with indeterminate borderline cases.<sup>236</sup> For instance, spouses should help clean their shared house, but assistance comes in degrees, and there is no precise threshold for distinguishing sufficient from insufficient assistance. Ordinarily, vagueness is not a serious challenge for law. Many legal duties are vague, and the law has standard strategies to construe vague duties. Unfortunately, these standard legal methods are ill suited for imperfect intimate obligations because of the two conceptual problems described above.

The law sometimes resolves vague duties using reasonableness tests. For instance, in a commercial requirements contract, a purchaser has a right to buy any number of units it needs for each installment, as long as the order is not “unreasonably disproportionate” to a prior estimate or normal prior amounts.<sup>237</sup> If the parties litigate this issue, the fact finder must judge whether the request was reasonable in light of the parties’ past practices and commercial standards in the relevant community.<sup>238</sup> Such reasonableness tests give a third-party fact finder authority to make judgments in the vague boundaries. The state could use similar reasonableness tests to resolve vague marital duties. For example, a fact finder might specify how much support each spouse must provide by asking what standard of living is reasonable for the couple, based either on the fact finder’s judgment or on community standards for

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235. Case, *supra* note 37, 250–55.

236. The indeterminacy in vague concepts is distinct from the indeterminacy in imperfect duties. A concept is vague if it has borderline cases, among which it is unclear whether the concept applies. Ralf Poscher, *Ambiguity and Vagueness in Legal Interpretation*, in *THE OXFORD HANDBOOK OF LANGUAGE AND LAW* 128 (Peter M. Tiersma & Lawrence M. Solan eds., 2012). Often a vague concept, like baldness, is scalar—such that one can say that one person is balder than another without being able to identify a line between people who are and are not bald. When a case falls in this zone of uncertainty for a vague moral concept, there is no answer about the moral status of the act. Although imperfect duties often involve vague concepts, they also carry a different kind of discretion: even among clear cases, agents have discretion to decide whether to perform the act or not.

237. U.C.C. § 2-306(1) (2011–12).

238. Cf. Thomas A. Diamond & Howard Foss, *Proposed Standards for Evaluating When the Covenant of Good Faith and Fair Dealing Has Been Violated: A Framework for Resolving the Mystery*, 47 *HASTINGS L.J.* 585, 590–600 (1996).



similar couples. Of course, this procedure runs into the first problem described above: it requires a third party to make the discretionary judgments about imperfect duties that spouses entrust to one another. Having the power to make such discretionary decisions is part of being in a marital relationship.

A second legal method swings to extreme deference. Sometimes the law ignores the content of an agent's decision, unless there were flaws in the decision-making process. For example, courts will not review business judgments by corporate directors unless the directors lacked any relevant information or had a conflict of interest.<sup>239</sup> A similar rule holds little promise for marriage. Marriage lacks any natural decision-making procedures, and only an implausibly strong duty of loyalty would require spouses to put marriage before all other loyalties. In marginal cases, questions about a duty of loyalty would replicate the substantive question. Does a spouse violate her duty of loyalty if she decides to forgo a lavish vacation to support her adult child, friend, or charity?<sup>240</sup>

For still other vague duties, the law limits judicial review to nonvague cases. This result can be achieved by codifying the minimal requirements or by lowering the standard of review. For example, child-protection agencies will intervene to enforce a child's rights to adequate care when her parents deny her life-saving blood transfusion but not when they refuse potentially life-saving vaccines.<sup>241</sup> The law might treat vague intimate obligations similarly—in fact, this approach has been adopted by states that enforce a duty of support to prevent "neglect."<sup>242</sup> Unfortunately, this approach runs headlong into the second conceptual problem described above: it proposes to enforce imperfect duties during the relationship only if the defendant's performance is so deficient that it demonstrates he has abandoned the commitment that defines the relationship. It is somewhat perverse to create a cause of action during relationships while limiting it to contexts in which the relationship is substantively over.

Last, the law might enforce imperfect marital obligations only insofar as spouses formalize them in express or written agreements. This compromise was adopted by the Uniform Premarital and Marital Agreements Act,<sup>243</sup> but such a compromise has several flaws. First, explicit agreements can be equally vague. Spouses might agree

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239. Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 88–89, 100 (2004) (arguing that the business judgment rule is a second-order rule against judicial review absent bad faith or procedural errors, rather than a liability rule that lowers the standard of care or an evidentiary rule placing the burden of proof on plaintiffs).

240. A duty of loyalty is essential when the marriage is winding down. Doctrines about diminution of the marital estate rely on similar fiduciary theory. Spouses may ordinarily use marital assets for personal ends, but spouses face greater restrictions on personal use of marital assets when the relationship is likely to end soon. See *Kittredge v. Kittredge*, 803 N.E. 2d 306, 313 (Mass. 2004).

241. John Alan Cohan, *Judicial Enforcement of Lifesaving Treatment for Unwilling Patients*, 39 CREIGHTON L. REV. 849, 868 (2006); Ross D. Silverman, *No More Kidding Around: Restructuring Non-Medical Childhood Immunization Exemptions To Ensure Public Health Protection*, 12 ANNALS HEALTH L. 277, 282–83 (2003).

242. See *supra* note 36 and accompanying text.

243. See UPMAA § 6 (2012).

explicitly to the standard package of vague marital duties. Instead, the proposal must be to enforce only express agreements relating to nonvague duties. Spouses may not agree to provide one another with domestic support, for instance; instead, they must agree to a precise division of domestic labor. This proposal is more workable but still flawed. Most important, it mischaracterizes intimate duties. Under this proposal, intimates can have enforceable obligations only if they transform their imperfect duties into perfect ones. Presumably, they do that by agreement. The only obligations the law will enforce are explicit promissory obligations, even if intimate duties have another moral basis, such as reliance, status, or love. In addition, this proposal can result in unfairness. It enforces only intimate obligations capable of and likely to be the subject of express agreements. Spouses often make agreements about division of property but ignore questions created by the division of domestic and wage labor. Why enforce certain aspects and leave others floating in the wind?

The law cannot avoid imposing intimate-status norms on couples, because intimate relationships involve imperfect duties. To render legal judgments, a judge or jury must supplant the couple's discretion with its own normative judgment and replace the couple's subjective commitment with coercive sanctions. Mill and Kant argued that these conflicts mean that imperfect duties, as a general matter, are never legally enforceable.<sup>244</sup> That is an overstatement. Intimate rights can be enforced (even in private law), but doing so requires officials to exercise legal authority that conflicts with aspects of ongoing relationships. Marital status, in contrast, provides a more flexible way to create enforceable imperfect duties.

#### IV. MARITAL STATUS AND IMPERFECT LEGAL DUTIES

Intimate relationships involve rights and expectations that deserve legal protection, yet these rights and expectations cannot be enforced without imposing status norms on couples. Marital status offers a way to manage this tension. The law's refusal to enforce marital rights during marriage avoids displacing the spouses' discretion and commitment, while its egalitarian and equitable divorce remedies protect marital rights in ways consistent with their imperfect nature. These two aspects of marital status combine to create a legal framework for imperfect legal rights. Marital status allows spouses to maintain indeterminate legal duties without losing legal protections.

The core of this argument, and a central contribution of this Article, is a limited defense of the intact-marriage rule—the rule that spouses cannot sue to enforce marital rights until they separate.<sup>245</sup> Tort, contract, and equity have no analogous rules. The default rule in private law is that individuals can sue to vindicate their legal rights without repudiating their underlying legal relationship.<sup>246</sup> There is ample reason for skepticism about the intact-marriage rule, especially given its historical pedigree. Accordingly, subpart A clears away some underbrush, explaining and rejecting traditional justifications for the intact-marriage rule. Subpart B argues that

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244. See *supra* note 9.

245. See *infra* Part IV.A.

246. See Case, *supra* note 37, at 226 (citing Levmore, *supra* note 41, at 221, 249). Traditional partnership law made final accounting a condition for legal claims between partners, but the Revised Uniform Partnership Act eliminated this rule. UNIF. P'SHIP ACT § 405 (1997).

a combination of the intact-marriage rule and egalitarian dissolution rules offers a way to create legal remedies for imperfect duties. To be clear, I am not arguing that marriage is a law-free or state-free space. The law cannot avoid relying on status norms; the question is when and how to do so. Moreover, my aim is not to defend marriage law in its entirety, but to articulate the implicit rationale behind its general structure. Once clear, this rationale may justify revision of particular legal standards.

*A. The Intact-Marriage Rule: Historical Justification, Contemporary Objections, and Responses*

The history of the intact-marriage rule offers ample reasons to be wary. The intact-marriage rule developed in the coverture regime. Coverture's patriarchal norms supplied its first rationalization: a married woman's legal personality was subsumed into that of her husband, so allowing her to sue him would be like allowing him to sue himself.<sup>247</sup> Similar doctrines were used to rationalize the civil and criminal spousal immunity that gave husbands legal permission to use their wives' bodies.<sup>248</sup> Even into the late twentieth century, the law continued to protect domestic abusers with privacy doctrines<sup>249</sup> and spousal rapists with an assumption that consent to marriage was blanket consent to sex.<sup>250</sup> The process took far too long, but the law has largely eliminated the fiction of legal unity and most of its remnants, including spousal immunity. These formal changes do not ensure protection, but they are a start. They also have significant expressive meaning. A spouse's right to bodily integrity is as strong with respect to her spouse as to strangers. Any contact with another person's body without consent is a battery, and marriage no longer serves as a blanket proxy for actual consent. Moreover, the right of bodily integrity can be enforced during relationships. A person can sue his or her spouse for battery or negligence committed during the marriage and can even sue without a legal separation.<sup>251</sup>

In light of these changes, one might have expected the intact-marriage rule to dissolve as well. Yet it persevered, though its primary rationale shifted. Contemporary courts reason that the intact-marriage rule protects marital privacy.<sup>252</sup> Privacy is a deeply ambiguous concept in legal discourse, but none of the senses of marital privacy convincingly supports the intact-marriage rule.<sup>253</sup>

247. See Tobias, *supra* note 34, at 364–65.

248. See Hasday, *supra* note 34, at 1484–85; see also Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996).

249. Siegel, *supra* note 248, at 2130, 2150–74.

250. See Hasday, *supra* note 34, at 1396–99. Even after feminist pressure forced states to alter these doctrines, some states maintained a presumption that sex in marriage was consensual, rebuttable only with evidence of separation or resistance. *Id.* at 1484–85.

251. See *supra* note 34 and accompanying text.

252. See *supra* notes 35–37 and accompanying text; see also Case, *supra* note 37, at 235–36; Twila L. Perry, *The "Essentials of Marriage": Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1, 13–14 (2003).

253. See, e.g., Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1340 (identifying five distinct legal species of the right to privacy); Judith Jarvis Thomson, *The Right to Privacy*, 4 PHIL. & PUB. AFF. 295, 312–14 (1975) (arguing that each element of the moral right to privacy is better explained by other distinct rights).

“Privacy” often refers to spatial or informational privacy.<sup>254</sup> A couple enjoys marital privacy in this sense if they have a physical space secluded from intrusion or if information about their marital life is shielded from disclosure. However, the intact-marriage rule does little to protect physical spaces such as the marital home. Marital rights are unenforceable during the relationship, regardless of where those rights are pertinent—the home, market, or workplace. This confusion between enforceability and spatial privacy is facilitated by the rule that marital duties are enforceable after spouses separate. However, separation here is a spatial metaphor. Spouses can live in the same residence while being separated or in different countries without being separated. What matters is when they stop being a couple, which is a normative relation.

The intact-marriage rule also does little to shield information about spouses’ lives from public disclosure. One might argue that lawsuits require spouses to reveal sensitive information about their relationship, and if *inter se* claims were common, then spouses might be discouraged from sharing freely. However, the intact-marriage rule offers only modest protection for private information. A spouse may bring the same claim after separation, and this lawsuit will involve as much if not more disclosure. Moreover, an unhappy spouse may air the couple’s secrets during their marriage and, because of the intact-marriage rule, will often remain immune from liability until they separate.

Privacy, particularly in American law, has an additional meaning because of the due process right to privacy. When the Supreme Court held in *Griswold* that the Constitution protects married couples’ rights to access contraception, the majority latched onto the idea that laws banning contraception threatened to invade the marital bedroom and disclose information about marital sex lives.<sup>255</sup> While concern for spatial and informational privacy influenced the Court, the due process right to privacy is now recognized as a misnamed liberty right against government interference with specified actions.<sup>256</sup> The intact-marriage rule might be thought to protect marital privacy in this sense of decisional autonomy. Indeed, the central intact-marriage cases express concern with the court determining how the family (or the husband) decide to spend their resources.<sup>257</sup>

Noninterference offers a more promising start, but here one must be careful. The constitutional right to privacy protects individuals from unwanted governmental interference. In litigation between spouses, governmental interference is not a significant concern. The plaintiff is asking the court to intervene. The spouses have reached an impasse, and at least one of them wants the court to define and enforce their duties. It is no response at all for a court to say that the government should not interfere out of respect for their marriage. The spouses disagree about their respective marital rights. Refusing to clarify and protect these rights does not demonstrate respect for their marriage—indeed, the plaintiff is likely to conclude that the court is not taking her marital rights seriously.

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254. See Gormley, *supra* note 253, at 1343–74 (arguing that spatial and informational privacy are protected primarily by property, tort, and Fourth Amendment law).

255. *Griswold v. Connecticut*, 381 U.S. 479, 484–86 (1965).

256. See Gormley, *supra* note 253, at 1404–05, 1412–16.

257. *E.g.*, *Commonwealth v. George*, 56 A.2d 228, 231 (Pa. 1948).

Nevertheless, the intact-marriage rule could be a policy designed to reduce the government's role in ongoing marriages more generally. On this theory, the state refuses to enforce marital rights in order to facilitate a specific conception of relationships, either one that the state prefers or one it assumes that couples prefer. The intact-marriage rule facilitates a conception of relationships within which it is preferable for spouses to interpret and enforce their own marital rights. Spouses either compromise or separate. The intact-marriage rule is not about immunity or privacy or respect for the individual litigant's marriage—it is about the state's refusal to intervene to settle and enforce ongoing spousal obligations so that spouses may decide for themselves the nature of their relationship.

Feminist scholars have objected that such marital autonomy does not benefit husbands and wives equally. When the law refuses to enforce marital duties, it empowers husbands to fill the vacuum of state power with physical, economic, and social power.<sup>258</sup> This feminist objection is partly correct, particularly in the common-law states that allocate control of assets during marriage based on title. Nevertheless, the force of this objection is blunted once one sees the role of the intact-marriage rule in the broader system to enforce imperfect marital duties, as I describe in Part IV.B. Accordingly, I want to respond to this feminist argument here on its own terms, at least sufficiently to forestall the objection.

I have encountered two versions of the argument that the intact-marriage rule disadvantages women. The first, simpler objection is that the intact-marriage rule places an unfair burden on injured spouses. The victim-spouse (usually the wife) is forced to choose between relinquishing her marital rights to retain the marriage and vindicating her marital rights by abandoning it. In contrast, the offending spouse (usually the husband) may continue violating his wife's marital rights while maintaining the benefits of marriage.<sup>259</sup>

Despite its initial plausibility, this argument relies on an incomplete framing of the problem. The fairness of a rule that denies unhappy spouses legal enforcement cannot be judged entirely *ex post*. Elizabeth and Robert Scott have offered a more persuasive and subtle analysis.<sup>260</sup> They argue that two hypothetically rational spouses would select a rule against legal enforcement of marital rights during the marriage.<sup>261</sup> Whether spouses should prefer intramarital legal sanctions depends on whether such "formal sanctions would provide a more efficient substitute for, or a complement to, informal normative sanctions."<sup>262</sup> Spouses have three informal mechanisms to encourage cooperation: internalized norms, self-help, and social sanctions.<sup>263</sup> Spouses internalize moral norms about caring, promising, and fairness,<sup>264</sup> which they can reinforce with a self-help reward for cooperation or punishment for defection.<sup>265</sup>

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258. See Case, *supra* note 37, at 228–34.

259. See *id.* at 250–55.

260. Scott & Scott, *supra* note 187, at 1284–95.

261. *Id.* at 1269–70; see also Levmore, *supra* note 41, at 226.

262. Scott & Scott, *supra* note 187, at 1294.

263. Robert A. Pollak, *Comment On Mary Anne Case's Enforcing Bargains in an Ongoing Marriage*, 35 WASH. U. J.L. & POL'Y 261, 268–71 (2011) (summarizing Scott & Scott, *supra* note 187).

264. See *id.* at 268.

265. Scott & Scott, *supra* note 187, at 1284–87.

When moral motives and cooperative incentives are not enough, spouses can appeal to social enforcement.<sup>266</sup> Friends, extended family, coworkers, and churches encourage cooperation and censure inappropriate behavior. Signaling tools like engagements, weddings, and rings encourage social recognition, monitoring, and enforcement.<sup>267</sup> In some cases, couples may use pastors or psychologists for informal adjudication through counseling and mediation.<sup>268</sup>

Compared to these informal mechanisms, legal enforcement is a blunt instrument. Scott and Scott argue that each couple's highly specific pattern of cooperation, defection, and retaliation usually leads them to settle on "highly contextualized and precise" rules for distributing the benefits of their marriage.<sup>269</sup> A third party is unlikely to adjudicate disputes about these interactions accurately or efficiently. Moreover, "[l]egal adjudication is structured as a single iteration zero-sum game," which leads parties to adopt an adversarial posture that conflicts with the "harmony, reciprocity, and solidarity" needed for cooperative relationships.<sup>270</sup> Scott and Scott conclude that a rational couple would choose not to permit "intramarital" legal enforcement because it would provide few additional incentives to cooperation.<sup>271</sup>

The Scotts' more complete story responds to the simple objection, but it opens the door to a more targeted criticism. Mary Anne Case has argued that the lack of legal enforcement in marriage fosters gender inequality: because gendered relationships remain the social norm, couples with egalitarian relationships have weaker moral and social incentives.<sup>272</sup> A husband who fails to fulfill his equal bargain will feel guilty for breaking his promise and shameful for failing to fulfill his ideal, but he can assuage his conscience by thinking he did more than most men do.<sup>273</sup> Moreover, the community is unlikely to reinforce his guilt. Pastors, counselors, family, and friends are likely to substitute their own conventional gendered norms for the couple's uncommon expectations.<sup>274</sup> Judges, on the other hand, are more likely to enforce egalitarian relationships, both because judges have internalized legal norms about enforcing agreements and resisting discrimination and because trial judges are subject to appellate review.<sup>275</sup> Legal enforcement of marital rights during marriage (at least those derived from marital bargains), Case argues, would help empower spouses who adopt egalitarian relationships.

While I am open to greater enforcement of express marital contracts, I remain suspicious of the more general claim about enforcement of intramarital duties generally. Enforcement is a double-edged sword that would involve the law in unequal bargains. Divorce law's current rules tend toward equal treatment and could be reformed to support greater substantive equality without sacrificing formal

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266. Pollak, *supra* note 263, at 269; *see also* Scott & Scott, *supra* note 187, at 1288, 1293.

267. Scott & Scott, *supra* note 187, at 1289.

268. Levmore, *supra* note 41, at 244; *see also* Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453, 464 (1998).

269. Scott & Scott, *supra* note 187, at 1287.

270. *Id.* at 1294-95.

271. *Id.* at 1295.

272. Case, *supra* note 37, at 254-55.

273. *Id.* at 254.

274. *Id.* at 255.

275. *See id.*

equality or autonomy. Divorce law could, for instance, help alleviate the gendered division of labor by increasing protection for a caretaking spouse's reliance interests. In contrast, if spouses may enforce marital obligations during relationships, then family law would have to face a stark choice between equality and autonomy. Many couples live in traditional, gendered relationships.<sup>276</sup> The state would either lend its coercive power to enforce these unequal marital arrangements or bluntly impose egalitarian default rules on more traditional couples. This choice is another instance of the tradeoff repeated throughout this Article, particularly in Part II.

The law of marriage has stumbled upon a way to finesse this choice. The intact-marriage rule is not a simple preference for marital autonomy that sacrifices spouses' equality. The law does not abstain from enforcement during marriage so that couples may define the relationship as they see fit. Rather, the law's choice to abstain during marriage is tied to the scheme of remedies it offers at dissolution. The law defers enforcement so that spouses can maintain the discretion necessary to have imperfect duties, but it can pair this deferral with equitable remedies at divorce that preserve the spouses' equality.

### *B. Enforcement of Marital Obligations at Separation and Divorce*

Despite the limits of the existing justifications for the intact-marriage rule, it is part of a sensible legal approach to imperfect marital duties. Unlike attempts to enforce marital rights directly on analogy with tort or contract law, the intact-marriage rule avoids displacing the couple's discretion and commitment during their marriage. The intact-marriage rule does eliminate legal protections, however, because it is simply one part of a larger scheme of imperfect legal duties. The law replaces enforcement during marriage with protection of spouses at divorce. The remaining questions, then, are as follows: (1) why do postseparation remedies not face the same problems as enforcement during marriage, and (2) what kind of divorce remedies can reconcile deferred rights with the parties' equality?<sup>277</sup>

#### 1. Why Separation Marks a Categorical Divide

Why does separation mark a categorical divide? One possible explanation of the categorical divide is that intimate obligations are conditioned on the existence of the relationship. Intimates owe one another relational duties only while their relationship continues. To pursue this argument, one would need a full theory of marriage to explain why some, but not all, marital duties are conditional. Separation extinguishes the duties of fidelity and domestic support and weakens the duty of emotional support, but separation also triggers the duty of financial support. In addition, the full theory would need to explain how these conditional marital duties interact with

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276. Case acknowledges this problem but downplays it, arguing that unequal agreements will likely receive cool reception with judges. *Id.* at 245–50.

277. I deliberately refer to separation rather than divorce. There is no reason intrinsic to the account developed so far that would require a state to permit divorce, in the sense of an absolute right to remarry. There are good reasons for such a right, but they derive from concern for autonomy of citizens. Cf. Jeremy Waldron, *When Justice Replaces Affection: The Need for Rights*, 11 HARV. J.L. & PUB. POL'Y 625, 631–35 (1988).

unconditional ones. For instance, a theory that conceives of marriage primarily as an exchange of wage labor for domestic labor must explain why the former, but not the latter, is enforceable after the marriage.

A more plausible justification is that the state abstains during marriage to respect the parties' imperfect duties, but their separation undercuts the two conceptual problems with enforcing imperfect duties. First, once spouses separate, the state need not worry about usurping their power to define their relationship. The couple no longer entrust one another with latitude in specifying their imperfect duties. The actions they have taken in the past to fulfill their imperfect obligations are set. They no longer have privileged authority to interpret their past conduct or relate it to their future performance. After their separation, if the parties disagree about their marital obligations, the state cannot defer to either spouse's beliefs. For example, because a separated couple has abandoned their project of shared finances, neither spouse can claim authority to decide how to allocate the duty of financial support between their current and future needs. Of course, a divorce court must still interpret their financial obligations. The interesting question, which I tackle below, is how a state should decide which norms to use.

Second, after a couple separates, the state need not worry about interfering with spouses' abilities to act on the right kind of motivations. Separation ends the subjective commitment that underlies imperfect duties in intimate relationships. This distinction explains, in part, differential treatment of intimate duties. Some duties, such as the duties of care and fidelity, involve such extensive latitude that motivation plays a decisive role in identifying sufficient performance. Whether an outside attachment is inconsistent with marital fidelity is a contextual judgment, admitting of few if any general rules. One can say little more than that spouses should avoid emotional entanglements that interfere with their commitment to one another, unless the parties expressly define their required conduct. For duties like this, terminating the relationship ends the duty. Other intimate duties, however, are less inextricably tied to the motivation for the required conduct. The duty of financial support permits less latitude than the duty of fidelity, so its boundaries are less dependent on the underlying motivations.

While separation removes the two conceptual obstacles to legal protections for imperfect marital rights, the practical problem of vagueness remains. However, we saw four potential responses to vague rights: reasonableness tests, procedural tests, low standards of review, and enforcement of explicit agreements only.<sup>278</sup> Separation does not remove the potential unfairness of the fourth method, but it does alleviate the problems with the other three. Reasonableness tests and procedural tests are problematic during the relationship because they replace the parties' discretion with that of a judge or jury. In postseparation litigation, however, there is no alternative to substituting some third party's judgment for the parties' discretion. Separation also removes the tension between trying to enforce only fundamental failures (nonvague instances) while maintaining the relationship. After the separation, of course, this conceptual tension no longer exists.

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278. See *infra* Part III.B.



## 2. Which Dissolution Norms Are Appropriate

If separation marks a categorical divide because it ends the couple's discretion and commitment, what implications does this have for the appropriate remedies? The dominant scheme of divorce law in America is equitable division with egalitarian presumptions.<sup>279</sup> Judges have discretion to divide property "equitably," with a thumb on the scale for equal divisions and with the ability to offset unfairness with ad hoc property adjustments and alimony awards.<sup>280</sup> The rationale for the intact-marriage rule supports—in broad strokes—this core structure of the divorce law. Equitable distribution rules give judges flexibility to effectuate spouses' marital duties when they are discernible, while egalitarian presumptions recognize that—from the state's perspective—spouses enter and exit marriage as equal citizens. These two aspects of modern divorce law are a coherent response given the state's lack of enforcement during the relationship.

Equitable distribution schemes give judges authority to interpret the couple's relationship.<sup>281</sup> As we saw in Parts II and III, this is an unavoidable feature of legal protection. The state defers protection during the relationship so couples can define their imperfect marital duties, but in the divorce context neither spouse's disputed beliefs about their relationship can be controlling. Equitable distribution rules entrust judges to look at the relationship as a whole and determine each spouse's intimate duties. Typical statutes list up to fifteen relevant factors, including various dimensions of need, the parties' contributions, and their marital standard of living.<sup>282</sup> The statutes rarely explain, however, what weight judges should give to each factor or how the factors interact.<sup>283</sup> Rather than isolating specific transactions, the statutes encourage judges to view the couple's relationship as a whole. In short, equitable distribution gives courts wide discretion to try to discern how the parties have allocated their respective imperfect obligations, both now and in the future.<sup>284</sup>

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279. See *infra* Part I.A.1.c.

280. The balance between protecting rights and equality is difficult to strike, and many have argued that formal rhetoric of equality in alimony and equitable discretion has undervalued gender equality. See, e.g., Penelope E. Bryan, *Reasking the Woman Question at Divorce*, 75 CHI.-KENT L. REV. 713 (2000). See generally FINEMAN, *supra* note 49. Insofar as the default rules are not fully egalitarian, that suggests an argument for revising those laws.

281. In a sense, "equitable" is a deliberate fudge. The consensus on equitable distributions might be an instance of what Cass Sunstein calls an "incompletely theorized agreement," both because the principle is underspecified and because it is a mid-level principle that commentators embrace without agreeing about what justifies it or how to apply it in particular cases. Cass R. Sunstein, *Commentary, Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733, 1739 (1995).

282. See, e.g., N.J. STAT. ANN. § 2A:34-23.1 (West 2010); 23 PA. CONS. STAT. ANN. § 3502 (West 2010).

283. Some statutes describe factors as mandatory or discretionary, but that does not explain what weight to give the factors. See 2 TURNER, *supra* note 61, § 8:1.

284. A full defense of equitable discretion at divorce must respond to the likelihood that judicial decisions will reflect judicial biases more than the parties' relationship. See Stark, *supra* note 132, at 1503-06.

Despite equitable discretion, the modern tendency is toward equal divisions.<sup>285</sup> What justifies this egalitarian default? One cynical answer is that equal division is easier, but I think there is a deeper reason. The answer lies in the spouses' transformation from legal strangers to a married couple and back. From the state's perspective, spouses are—first and foremost—citizens. The law can justifiably assume that its citizens enter, maintain, and leave marriage as equals. During marriage, the state suspends ordinary private law so that spouses can commit to a comprehensive relationship characterized by imperfect duties. At divorce, when spouses seek to resume their status as legal strangers, the state should not let one spouse unfairly benefit from the decision to suspend the ordinary rules that ensure citizens' formal equality. Accordingly, the state's egalitarian default rules need not be justified as a way to encourage egalitarian or partnership marriages.<sup>286</sup> Rather, egalitarian default rules can be justified as a fair way to disentangle lives intertwined through unenforceable obligations.

Another way to see the appropriateness of an equitable regime with egalitarian defaults is to imagine the alternatives. Formulated as ideal ends of a spectrum, the law's alternatives are (a) to enforce the precise norms of the couple's relationship or (b) to impose the state's view of appropriate relationship norms. Why not enforce, as best one can, the terms of the couple's actual marriage? Because doing so would be inconsistent with the legal status of their relationship.

The absence of enforcement during marriage enables spouses to regulate their relationship through imperfect duties that resist enforcement through private law. It would be incongruous for the state, then, to strive to identify and enforce the latest terms of a couple's relationship, as if they were ordinary private litigants after all. On the other end of the spectrum, the state might simply impose on divorcing couples its preferred conception of appropriate long-term relationships. That vision might be a liberal egalitarian community, a partnership model of marriage as a labor-division tool, or a traditional model of marriage as a lifelong bargain for mutual support. Yet insofar as the state is willing to impose its normative vision at divorce, it is less clear why the state should be willing to forbear during the relationship. Instead, equitable distribution schemes permit the law to enforce intimate duties insofar as they are discernable, filling in the large gaps using egalitarian default rules based on a presumption of equal citizenship.

Relationships involve claim rights, but those claim rights correlate with imperfect duties that leave intimates significant discretion regarding the manner, time, and occasions for performance. By exercising their discretion, intimates define their vision of the relationship and demonstrate their commitment to it. Legal enforcement of ongoing intimate duties conflicts with maintaining the relationship, replacing the

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285. See *supra* Part I.A.1.c. This argument does not differentiate among theories about what makes divorce "egalitarian," either as an abstract aim (i.e., whether to seek outcome or formal equality) or for particular rules (e.g., whether enhanced earning capacity should be subject to division). Sometimes these are debates about the parties' obligations, in which case little can be said as a general matter. Sometimes they are about whether to use divorce rules to alleviate gender equality in marriages and the workplace. While the family should be regulated as a matter of basic justice, I think one can separate the use of family law as a tool to improve gender equality from enforcing the obligations of the parties.

286. See Frantz & Dagan, *supra* note 29, at 95–96.

intimates' discretion with the court's judgment and their commitment with sanctions. This conflict supplies a legitimate reason—albeit not a definitive one—for a state to defer enforcement of intimate rights during ongoing relationships. Deferring enforcement enables intimates to maintain a relationship characterized by imperfect duties, leaving them space to define their relationship. Once the couple separates, these reasons lose most of their force, because the spouses have abandoned their commitment and its accompanying discretion. Legal divorce norms can be guided by the same reasons that justified deferring marital rights. The egalitarian defaults express the state's view that neither party should take unfair advantage of the period of deferred legal protections, while the equitable discretion allows judges to tailor their rulings when the parties exercise their discretion to adopt clear expectations. This basic structure of marital status—deferred protection and egalitarian dissolution—enables spouses to maintain legal relationships defined by imperfect duties.

### CONCLUSION

The state cannot abolish marriage, in the sense of abolishing status norms. Of course, a state could abolish marriage and other intimate licenses, but then private law would either recreate similar intimacy categories or create a systemic exception for "intimate relationships." Tort, contract, and equity incorporate status distinctions because intimacy carries special duties that presumptively affect legal rights. Yet this incorporation of intimacy into private law presents a recurring problem: How can officials enforce indeterminate intimate rights without imposing normative judgments on intimate parties?

A closer look at intimate duties explains why the law cannot avoid status norms. Many intimate norms are imperfect duties, which leave intimates wide discretion to decide how and when to act, subject to a duty to remain subjectively committed to fulfilling their duties. These imperfect duties play havoc with legal enforcement, especially during a relationship. Legal enforcement requires officials to supplant individuals' discretion to specify their imperfect intimate duties and their subjective commitment to the relationship. The only way to specify these imperfect duties is to categorize the parties' relationship and make moral or social judgments about appropriate behavior in that type of relationship.

Marital status offers a reasonable resolution of this dilemma by coupling deferred protections with equitable remedies. By deferring protection until the relationship ends, the state avoids displacing couples' discretion and commitment. Once a couple separates, they abandon their commitment and discretion, so divorce courts may exercise authority to protect the couple's marital rights and expectations. Divorce law uses equitable and egalitarian remedies—not because the law assumes marriages should be equal but because such remedies can maintain the formal equality between spouses when the ordinary protections of private law are suspended. Marital status enables couples to adopt relationships of imperfect legal duties.