

Why the State Cannot “Abolish Marriage”

A Partial Defense of Legal Marriage Based on the Structure of Intimate Duties

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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 “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 equity, ordinary private law doctrines will require judges or juries to interpret the parties’ legal rights in light of the nature of their relationship. The state might exempt intimates from these ordinary legal doctrines, but that would place a systemic status distinction at the heart of private law.

Second, the reason private law cannot avoid intimate status is that many 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 re-

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places 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. After the couples separates, they abandon their commitment and lose their discretionary authority, so 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.

TABLE OF CONTENTS

I.	Introduction	3
II.	Current Law of Relationship Regulation	6
	A. Licensed Relationships	6
	B. Unlicensed Cohabiting Relationships.....	16
	C. The “Abolish Marriage” Position	23
III.	Imagining a World Without Intimate Status.....	28
	A. Tort	29
	B. Contract	33
	C. Unjust Enrichment and Restitution.....	38
	D. Why not Simply Refuse to Recognize Status?	40
IV.	Imperfect Duties and Status Norms.....	42
	A. The Content and Structure of Marital Obligations	44
	B. Legal Enforcement of Imperfect Obligations in Ongoing Relationships	49
V.	Marital Status as a Structure for Protected Imperfect rights	55
	A. Historical Justification for the Intact Marriage Rule	56
	B. Enforcement of Marital Obligations at Separation and Divorce	59
VI.	Objections to the Intact Marriage Rule.....	63
VII.	Conclusion	66

I. 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 for marriage law: why regulate marriage at all? Courts have demanded that opponents of same-sex marriage articulate a purpose for legal marriage, one that does not apply to same-sex couples and does not bottom-out in opposition to homosexuality, whether based in theology, morality or prejudice.¹ In contrast, same-sex marriage advocates have needed to argue only that same-sex relationships serve similar functions as opposite-sex relationships. This asymmetric burden is partly a doctrinal construct. Laws banning gay marriage violate the Equal Protection Clause if the state cannot identify relevant differences between same and opposite-sex couples. More fundamentally, however, this asymmetry rests on an implicit baseline assumption that the state has *some* legitimate reason to regulate intimacy.² What is it? What legitimate reason do liberal states have to dictate the terms of intimate relationships?³

One promising way to start is to consider the opposite scenario. What if a state abolished legal 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

¹ See, e.g., *United States v. Windsor*, 570 U.S. --, 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”); *Goodridge v. Dept. 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); *Varnum v. Brien*, 763 N.W.2d 862, 897-906 (Iowa 2009). When a state has civil unions with equal legal rights, the question is whether there is a legitimate interest in restricting the expressive and social benefits of the title “marriage”. In *re Marriage Cases*, 76 Cal. Rptr. 3d 683, 738-40 (Cal. 2008); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407, 479-481 (Conn. 2008).

² 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.

³ Justice Kennedy’s majority opinion in *Windsor*, 133 S. Ct. 2675, 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 woman,” 1 U.S.C. § 3 (2013), violated “due process and equal protection principles,” *id.* 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. By focusing on animus, the Court avoided the harder question of why New York or the federal government are in the business of dignifying intimate relationships. The reprieve is momentary. When a state law ban on same-sex marriage comes before the Court, it will have to decide whether the sex of the couple is related to whatever legitimate public interests state marriage law serves.

should “abolish marriage” as a legal category.⁴ 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 could adopt whatever social, religious or moral relationships they prefer, but the terms of their relationships would be legally enforceable only in tort, contract or equity. These proposals to abolish marriage rest on 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.

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 pre-defined categories of legal status. I draw three conclusions from this exercise. First, the state 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.

This immediate lesson of trying to imagine a world without marriage is that the state cannot abolish intimacy status. Proponents of abolishing marriage assume that intimates will have enforceable rights in private law. However, private law doctrines often tailor our rights to the nature of our relationships. Core principles of contract, tort or equity require the state to determine the parties’ relationship and impose judgments about appropriate duties for that category of relationships. Intimate relationships are one among many relationships that alter our 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.”⁵ When intimate rights are enforced in private law, public officials often vacillate between discerning the terms of parties’ relationship 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,

⁴ See *infra* notes 116-120.

⁵ 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.

however, require determinate rights. Judges or juries must specify the precise content of a couple's duties, but they cannot simply discern and enforce imperfect duties. These duties are indeterminate until settled by discretionary choices. The law can enforce imperfect intimate duties only if it displaces 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. 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. The intact marriage rule enables spouses to maintain a legal relationship of widely discretionary duties, limited primarily by their subjective commitment. Yet, marital status does not abandon protection of spouses' imperfect rights; it simply defers it. If spouses separate, they abandon their commitment and ongoing discretion, so the state can worry less about interfering with their liberty to define their relationship and their ability to express their commitment. Having deferred protection during marriage, what dissolution norms should the state use? This Article does not suggest a precise divorce regime, but it sketches certain contours. The law withholds enforcement so spouses can define their relationship with indeterminate duties, so it would be inappropriate to try to discern precise terms to enforce at divorce. Instead, the state may assume intimates entered and sustained their relationship because they believed it mutually beneficial, which makes egalitarian default rules appropriate. This conclusion is broadly consistent with modern divorce law, which gives judges wide discretion to divide property equitably, tempered by egalitarian default rules. In short, by combining deferred protection with equitable dissolution norms, marital status creates a framework of imperfect legal rights, something many political philosophers have thought was impossible.⁶

The Article proceeds in five parts. Section I explains the current regulation of intimate relationships and describes the proposals for abolishing marriage. Section II argues that even if the state abolishes marriage, core doctrines in tort, contract and equity would still require status based norms. Section III argues that the state inevitably relies on status norms because intimate relationships are characterized by imperfect duties and describes the difficulties this poses for legal enforcement. Section 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

⁶ John Stuart Mill, *UTILITARIANISM* 61 (Batoche Books ed. 2001) (1861); Immanuel Kant, *THE METAPHYSICS OF MORALS* AK 6:384-88 (1797), *reprinted in* *IMMANUEL KANT: PRACTICAL PHILOSOPHY* 517-520 (Mary Gregor trans. and ed., Cambridge University Press 1996).

legal duties. Section V considers two objections to deferring intimate rights during the marriage.

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, it is only one reason for marital status. Other reasons for regulating intimacy might apply differently to same-sex relationships. Second, this Article does not offer a full defense of marriage. This Article focuses on the regulation of rights between intimates. Marriage law does much more. It structures the couples' relationship to third parties, creating default rights such as the power to make medical decisions.⁷ It also affects spouses' entitlements to material benefits, such as family leave or social security. The state also extols marriage and uses marriage's social value to discriminate. These aspects of marriage law raise fundamental questions of justice, but I do not address them here. If the state has no legitimate reason to regulate intimate relationships, then this problem is distinct from the expressive or distributional effect of intimate regulations. Last, this Article does not address the relationship between marriage and children. A full account of relationship law must address the interaction of caregiver and relationship status. Nevertheless, the two may be considered separately.⁸ 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 maintaining status-based regulations of adult intimate relationships.

II. 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 ones. This section offers a birds-eye view of both, before moving on to describe proposals to abolish these intimate status rules.

A. *Licensed Relationships*

The range of relationship licenses has ballooned in the last twenty years, and the pace of change is rapid.⁹ Marriage remains the paradigmatic status and the only status recognized in all American states, but many states now offer alternatives, including civil unions, reciprocal bene-

⁷ See Mary Ann Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1783-84 (2004-2005).

⁸ See Cynthia Lee Starnes, *Lovers, Parents, and Partners: Disentangling Spousal and Co-Parenting Commitments*, 54 ARIZ. L. REV. 197 (2012).

⁹ 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).

ficiaries and domestic partnerships. This subsection describes the current regime of licensed relationships in the United States.¹⁰ 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.¹¹

1. Marriage

Despite its much-heralded decline, marriage retains vast popular appeal. A 2001 study predicted that almost 90% of American women will marry in their lifetime.¹² Between 40 and 50% of American marriages end in divorce, but this implies that 50 to 60% last until death.¹³ 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.

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, in most jurisdictions, of the opposite sex), and to keep track of who is entitled to marriage's benefits and burdens. Eleven states and the

¹⁰ See William N. Eskridge, Jr. & Darren R. Spedale, GAY MARRIAGE: FOR BETTER OR FOR WORSE? WHAT WE'VE LEARNED FROM THE EVIDENCE 252-55 (2006), for an alternative categorization.

¹¹ E.g. COLO. REV. STAT. §§ 15-22-104 (exclusivity), 15-22-111(3) (automatic termination) (2013); HAW. REV. STAT. §§ 572B-2 (exclusivity), 572-1.7 (automatic termination). Exceptions exist when a state with new laws wants to avoid disrupting settled expectations. E.g. Frequently Asked Questions, State of N.J. Dept. of Health, <http://www.nj.gov/health/vital/faq.shtml#ssm> (last accessed Feb. 9, 2013) (same-sex couples in civil unions or domestic partnerships may marry and retain their prior status).

¹² Goldstein, J. R., & Kenney, C. T., *Marriage delayed or marriage forgone? New cohort forecasts of first marriage for U.S. women*, AM. SOC. REV., Aug. 2001, at 506, 507.

¹³ Andrew Cherlin, *Demographic Trends in the United States: A Review of Research in the 2000s*, 72 J. MARRIAGE FAM. 405 (Jun. 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.* at 404-05. See generally Sara McLanahan, *Diverging Destinies: How Children Are Faring Under the Second Demographic Transition*, 41 DEMOGRAPHY 607 (2004); Linda McClain, *The Other Marriage Equality Problem*, 93 B.U. L. REV. 921 (2013).

District of Columbia still recognize common law marriages.¹⁴ 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.¹⁵ Common law spouses have the same rights and obligations as registered spouses.¹⁶

Most couples simply obtain a license and exchanges 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 to define their marital obligations. Most of marriages' rules are now soft default rules that parties may alter contractually. Premarital agreements about property and support are enforceable, subject to mandatory rules and fairness limits.¹⁷ The parties cannot, however, alter the grounds for divorce or eliminate a spouses' elective share.¹⁸ In addition, many states offer procedural protections such requiring fiancés to make ex ante disclosures or substantive protections through hardship or unconscionability review.¹⁹ Unlike agreements made before marriage, "marital agreements" between spouses in an intact marriage are viewed with suspicion.²⁰ A few states enforce marital agreements without restriction, but others view them as presumptively invalid or subject them to strict fairness review.

b. During Marriage

During marriage, the state engages in a curious blend of intervention and non-intervention. On the one hand, married couples receive numerous legal benefits. The benefits can be catego-

¹⁴ See Jennifer Thomas, *Common Law Marriage*, 22 J. AM. ACAD. MATRIMONIAL LAW 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. *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 720 (1996).

¹⁵ Thomas, *supra* note 14, at 157-160.

¹⁶ *Id.* 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.

¹⁷ Barbara A. Atwood & Brian H. Bix, *A New Uniform Law for Premarital and Marital Agreements*, 46 FAM. L.Q. 313, 318-324 (2012) (describing modern case law regarding enforcement of premarital agreements).

¹⁸ The elective share protects surviving spouses from disinheritance by giving them right to choose between their rights under their spouse's will or one-third of their spouse's estate.

¹⁹ Atwood & Bix, *supra* note 17, at 332-33, 339-44 (discussing procedural and substantive fairness standards considered and adopted by the UPMAA).

²⁰ *Id.* at 324-28 (describing "unsettled and evolving" law regarding marital agreements).

rized in various ways, but I find the “rough taxonomy” offered by Elizabeth Brake useful.²¹ First, the state conditions monetary benefits (and some burdens) on marital status. For instance, married couples receive special tax status and social security benefits. Other laws “facilitate day-to-day maintenance of a relationship,” such as sick leave, emergency decision-making powers or immigration benefits. This category also includes the default rules for assigning title and control over property during marriage.²² Last, the law provides special protection for the widowed, including pension benefits, precedence in intestacy and the right to bring wrongful death claims. All of these benefits, of course, affect spouses’ incentives for marital behavior. For instance, federal tax law reinforces the breadwinner marriage by rewarding couples with unequal salaries. In addition, as Kerry Abrams has documented, the law sometimes expressly requires intimates to structure their lives in particular ways.²³ Immigration authorities, for instance, have adopted intrusive tests to decide whether a formally valid marriage is “fraudulent,” which in practice require couples to prove they fulfill stereotypical marital roles.²⁴

On the other hand, American law takes a hands-off approach to the 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 agreements. Spouses may sue one another in tort and can be subject to criminal liability,²⁵ but they cannot sue to enforce “marital rights.” The classic cases concern the duty of spousal support. These courts held that a spouse could not bring an ac-

²¹ Elizabeth Brake, *Minimal Marriage: What Political Liberalism Implies for Marriage Law*, ETHICS Vol. 120.2 (2010), at 306-307. For an alternative list, see Cass Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2084, 2090-92 (2004).

²² Forty-two states follow the “title scheme,” in which each spouse owns any property to which he or she holds title. J. Thomas Oldham, DIVORCE, SEPARATION AND THE DISTRIBUTION OF PROPERTY § 3 (2005). In eight “community property” states, each spouse holds a one-half interest in all property, except property owned prior to the marriage, gifts or inheritances to one spouse, or profits from such property. *Id.* at §3.03.

²³ Kerry Abrams, *Marriage Fraud*, 100 CAL. L. REV. 1, 14-38 (2012).

²⁴ *Id.* at 30-37.

²⁵ Until recently, the spousal unity fiction precluded spouses from suing one another in tort at all. Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359, 364-66 (1988). 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, *Criminalizing Spousal Rape: The Diffusion of Legal Reform*, 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 CAL. L. REV. 1373, 1375, 1484-85 (2000) (citations omitted).

tion for financial support until the couple separates.²⁶ Some jurisdictions permit spouses to seek support if necessary to avoid “neglect.”²⁷ 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.²⁸ This rule applies during marriage and at divorce. The most striking limit in this respect is that some states will not enforce contracts between spouses for domestic services.²⁹ The traditional rationale for this rule is that spouses already have a mutual obligation of support, so a promise of support is insufficient consideration.³⁰ Other states, however, permit spouses to recover for services if they have an express contract.³¹ As a rule, however, spouses cannot enforce marital rights while their marriage is intact. I will

²⁶ *McGuire v. McGuire*, 157 Neb. 226 (1953); *Smith v. Smith*, 92 N.E.2d 418, 418-19 (Ohio Ct. App. 1949); *Commonwealth v. George*, 358 Pa. 118, 123 (1948). One unpublished California case concluded 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*, A132161, 2013 WL 1276119 (Cal. Ct. App. Mar. 28, 2013).

²⁷ *See Com. ex rel. DiPadova v. DiPadova*, 223 Pa. Super. 408, 410 (1973).

²⁸ *See Mary Ann Case, Enforcing Bargains in an Ongoing Marriage*, 35 WASH. U. J.L. & Pol’y 225, 227 (2011); Jonathan E. Fields, *Forbidden Provisions in Prenuptial Agreements: Legal and Practical Considerations for the Matrimonial Lawyer*, 21 J. AM. ACAD. MATRIM. LAW. 413, 429 (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, 1046 (1993) (collecting cases). The Uniform Law Commission’s *Uniform Premarital Agreement Act*, passed in 1983 and adopted by 26 states, states that couples may contract about “any . . . matter, including their personal rights and obligations, not in violation of public policy.” § 3(a)(8). Nevertheless, I have found no cases supporting the implications of § 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 *Uniform Premarital and Marital Agreement Act*, the drafters chose not to “expressly deal” with provisions regarding “obligations *inter se*”. Atwood & Bix, *supra* note 17 at 344.

²⁹ *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); *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 and cared for her during her illness); *Kuder v. Schroeder*, 110 N.C. App. 355, 357 (1993) (refusing to enforce husband’s promise to support all of the family’s financial needs once he completing his master’s and law degrees if wife would forego her career to work as a teacher during his schooling).

³⁰ *See, e.g. Borelli v. Brusseau*, 12 Cal. App. 4th 647, 650-54 (1st Dist.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 sending him to nursing home). This argument 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).

³¹ *Dade v. Anderson*, 439 S.E.2d 353, 356 (Va. 1994).

call this the “intact marriage rule.”³²

c. Separation and Divorce

Separation marks a categorical divide. After the couple separates, a spouse may bring an action for “maintenance.” Separation lacks a precise legal definition, but it is roughly synonymous with ending the relationship or breaking up.³³ Spouses may be separated yet living in the same house, as long as they do not share personal or social activities.³⁴

All American jurisdictions have no-fault divorce statutes, which allow spouses to divorce if their marriage is irretrievably broken because of “irreconcilable differences.”³⁵ Spouses may be required to wait for a statutory period from six months to two years, which is lengthened if one spouse refuses consent.³⁶ Most courts do not question one spouse’s claim that the couple has “irreconcilable differences.”³⁷ Some states also retain “fault” grounds for divorce, including adultery, desertion, mental or physical cruelty, drunkenness and non-support, although the primary difference is to shorten the waiting period.³⁸

All of the states use loosely egalitarian default rules to divide marital property and to give

³² Saul Levmore calls it a “love-it or leave-it rule,” but I think this 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, 226 (1995).

³³ 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. Henrik Hartog, MAN AND WIFE IN AMERICA 38-39 (2000) (summarizing historical rights of separated spouses).

³⁴ See, e.g. *Mackey v. Mackey*, 376 Pa. Super. 146, 153 (1988) (spouses were separated though residing in the same home and sharing public areas, because they maintained private living quarters, no longer maintain “public social life” and “[s]ignificantly, the parties stipulate that they have not engaged in sexual relations” in three years).

³⁵ For a history of divorce reform, see generally Herman Hill Kay, *From the Second Sex to the Joint Venture*, 88 Cal. L. Rev. 2017 (2000); Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79, 82-90.

³⁶ See generally 62 A.L.R.2d 1262-65 (1994) (describing state statutes requiring waiting period).

³⁷ Joanna L. Grossman & Lawrence M. Friedman, INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA, 176-80 (2011).

³⁸ *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 only ground for divorce until the early twentieth century. Hartog, *supra* note 33, at 26-28, 64-73.

dependent spouses limited support.³⁹ A vast majority divide all property obtained during the marriage “equitably.”⁴⁰ Family court judges must decide what division is fair, based on numerous factors that attempt to value each spouses’ relative need and their contribution to the marriage and to marital property.⁴¹ Equitable divorce does not balance a couple’s relationship ledger. Courts consider each spouse’s contribution, but primarily to offset financial imbalances rather than compensate spouses for their contributions.⁴² 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.⁴³ Empirical analysis of divorce outcomes suggests that judges applying equitable distribution rules tend to converge on equal division as a general norm.⁴⁴

Divorce courts also have the power to award alimony, though alimony awards are rare.⁴⁵ Alimony is no longer regarded as compensation for a promise of life-long support, but no dominant

³⁹ Many argue that divorce norms are insufficiently egalitarian. *See generally* Martha Albertson Fineman, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* (1994) (arguing divorce rhetoric supports formal over equality of outcomes).

⁴⁰ Three community property states divide all marital property equally and leave separate property with the title-holder, and a few common law states divide all of the couples property equitably regardless of its characterization as marital or separate. A.L.I. *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS* § 4.09 cmt. a (2002).

⁴¹ *Id.*

⁴² *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.”).

⁴³ Carolyn J. Frantz & Hanoch Dagan, *Properties of Marriage*, 104 COLUM. L. REV. 75, 105 (2004) (identifying ten states with a presumption, four with a starting point, and three additional that require equal division). The A.L.I. adopted a presumption of equal division. A.L.I. *PRINCIPLES*, *supra* note 40, § 4.09.

⁴⁴ Marsha Garrison, *How Do Judges Decide Divorce Cases? An Empirical Analysis of Discretionary Decision Making*, 74 N.C. L. REV. 401, 452, 507 (1996) (study of judicial decisions and settlement outcomes in New York from 1980-1990).

⁴⁵ Marsha Garrison, *Good Intentions Gone Awry: The Impact of New York's Equitable Distribution Law on Divorce Outcomes*, 57 BROOK. L. REV. 621, 697 (1991) (alimony awarded in 9% 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% of divorces in one county in Wisconsin). In 2012, only 385,000 Americans receive alimony, yet, in 2011, over 2.3 million Americans divorced and 248 million total were divorced. U.S. Census Bureau, 2012 Person Income Table of Contents, http://www.census.gov/hhes/www/cpstables/032013/perinc/pinc08_000.htm; Divorces in the Last Year by Sex by Marital Status for the Population 15 Years and Over, http://factfinder2.census.gov/bkmk/table/1.0/en/ACS/12_5YR/B12503.

alternative theory has emerged.⁴⁶ Many states follow a “rehabilitative approach” that awards on-ly temporary alimony to help dependent spouses regain financial self-sufficiency.⁴⁷ Some states, however, use alimony to help spouses retain their marital standard of living. States may regard alimony as compensation for one spouses’ foregone career opportunities, as a fair return on her contribution to the marriage, or as restitution for contributions to the spouses’ future earning potential.⁴⁸ Unlike property divisions that vest upon entry of judgment, alimony rights may be ad-justed if the parties’ financial positions change, such as if the payer loses a job or the payee re-marries.⁴⁹ As a result, many argue that property division is a legal entitlement while alimony is a form of privatized welfare.⁵⁰

The states are split about whether marital misbehavior is relevant to property division or ali-mony. Sixteen states do not consider marital misconduct (such as adultery or emotional abuse) arguing that adjudicating these disputes intrudes on marital privacy and wastes judicial resources on matters irrelevant to disentangling the spouses’ lives.⁵¹ On the other hand, thirteen states permit courts to adjust the property division if one spouses’ behavior burdened the marriage or contributed to its breakup.⁵² The property division may reflect “spousal abuse; child abuse; adul-tery; desertion; cruelty; nonsupport; failure to cooperate during a divorce, attempted murder,” or

⁴⁶ Cynthia Lee Starnes, *Alimony Theory*, 45 FAM. L.Q. 271 (2011) (surveying theories of alimony and models for reform); Carol Rogerson, *The Canadian Law of Spousal Support*, 38 FAM. L.Q. 69, 73-95 (2004-2005).

⁴⁷ Mary Frances Lyle & Jeffrey L. Levy, *From Riches to Rags: Does Rehabilitative Alimony Need to be Rehabilitated?* 38 FAM. L.Q. 3, 13 (2005). This approach was adopted in the Uniform Marriage and Divorce Act § 308, which influenced alimony reforms in the 1970s and 1980s. Lyle & Levy, 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 physically or mental disability. *Id.*, at 15.

⁴⁸ Starnes, *supra* note 46, at 280-87. It is controversial whether future earning 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. Frantz & Dagan, *supra* note 43, at 107-11; William Howard, *Spouse's Professional Degree or License as Marital Property for Purposes of Alimony, Support, or Property Settlement*, 3 A.L.R. 6th 447, § 3 (2005).

⁴⁹ Frantz & Dagan, *supra* note 43, at 105.

⁵⁰ *Id.*

⁵¹ Brett R. Turner, *EQUITABLE DISTRIBUTION OF PROPERTY ASSETS 3D*, § 8:24 (2005); Kristine Cordier Karnezis, *Fault as consideration in alimony, spousal support, or property division awards pursuant to no-fault divorce*, 86 A.L.R.3d 1116, §§ 3(b), 4 (originally published in 1978).

⁵² Turner, *supra* note 51, § 8:24 (Texas, Alabama, Connecticut, Michigan, Mississippi, Montana, Missouri, South Carolina, Vermont, Virginia, Wyoming, and the U.S. Virgin Islands); Oldham, *supra* note 25, § 13.02[1][a] (citing, in addition, Idaho and New Hampshire); Karnezis, *supra* note 51, §§ 3(a), 5-6.

substance abuse.⁵³ Three more states consider only egregious conduct, which would include repeated physical abuse, attempted murder, child abuse or refusal to grant a religious divorce, but not adultery, cruelty or isolated assaults.⁵⁴

2. Civil Unions and strong domestic partnerships

Ten states maintain a status with rights that are equivalent to marriage but under a different name – either civil unions or domestic partnerships. For simplicity, I will call these laws “civil unions.” Civil unions carry the same rights, obligations, benefits and burdens of marriage, including access to public benefits and the divorce regime.⁵⁵ Some states impose additional criteria on applicants to prove their interdependence, such as sharing a “common residence.”⁵⁶

It is unclear whether civil unions represent a true alternative to marriage or are simply a transitional stage to equality for same-sex couples.⁵⁷ Four states limit civil unions to opposite couples,⁵⁸ and two more limit them to same-sex couples or opposite sex couples over the age of 62.⁵⁹ Only four jurisdictions permit same and opposite-sex couples to enter civil unions.⁶⁰ Several

⁵³ Turner, *supra* note 51, § 8.26 (New York, Kansas, North Dakota).

⁵⁴ *Id.* § 8:25.

⁵⁵ Delaware, Hawaii, Illinois, New Jersey, Rhode Island and Vermont recognize civil unions. DEL. CODE tit. 13, §§ 201–17 (2012); HAW. REV. STAT. §§ 572B (2012); 750 ILL. COMP. STAT. 75/1–/90 (2010); N.J. REV. STAT. §§ 37:1-28 to -36 (2012); R.I. GEN. LAWS §§ 15-3.1 (2011); VT. STAT. tit. 15, §§ 1201–07 (2012). California, the District of Columbia, Nevada, Oregon, and Washington recognize domestic partnerships. CAL. FAM. CODE § 297-99; D.C. CODE §§ 32-701 to -710 (2010); NEV. REV. STAT. §§ 122A (2013); OR. REV. STAT. §§ 106.300-40 (2013); WASH. REV. CODE §§ 26.60 (2013).

⁵⁶ Wash. Rev. Code Ann. § 26.60.030(1); NEV. REV. STAT. §§ 122A.100.

⁵⁷ See e.g. Barbara Cox, *But Why Not Marriage: Some Thoughts on Vermont’s Civil Unions Law, Same-Sex Marriage, and Separate But (Un)Equal*, 25 VERMONT 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 July 2014, same sex couples may marry in nineteen states and the District of Columbia, and twelve states have pending rulings in favor of gay marriage. Freedom to Marry, Inc., *States*, <http://www.freedomtomarry.org/states/> (offering updated information on the recognition of same-sex unions).

⁵⁸ DEL. CODE tit. 13, § 202(3); N.J. REV. STAT. §§ 37:1-29; OR. REV. STAT. §§ 106.310; R.I. GEN. LAWS § 15-3.1-1;

⁵⁹ CAL. FAM. CODE § 297(4); WASH. REV. CODE §§ 26.60.030(5).

⁶⁰ HAW. REV. STAT. §§ 572B-2; 750 ILL. COMP. STAT. 75/10; NEV. REV. STAT. §§ 122A.100; D.C. CODE §§ 32-701. Effective June 30, 2014, Washington opened domestic partnerships to opposite sex couples. RCWA 26.60.030 (West 2014).

states eliminated civil unions when they started recognizing same-sex marriages,⁶¹ while others retained a civil union registry.⁶² Why would a couple prefer a civil union if marriage is available? Civil unions 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.

3. *Registered beneficiaries and intermediate domestic partnerships*

Five states have “reciprocal beneficiary” or limited “domestic partnership” laws.⁶³ Reciprocal beneficiaries do not receive property or support rights, but do receive a set of reciprocal rights useful for people in intimate relationships.⁶⁴ 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.⁶⁵

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.⁶⁶ Colorado even supplies a model form that requires each parties to initial the spe-

⁶¹Office of the Secretary of State, Washington, *Notice regarding same sex marriage and domestic partnerships*, <http://www.sos.wa.gov/corps/domesticpartnerships/Notice-regarding-same-sex-marriage-and-domestic-partnerships.aspx> (last accessed Dec. 16, 2013) (opposite-sex couples over 62 at the end of the effective date may retain their domestic partnership); Kimberly Blanton, *Unmarried Gay Couples Lose Health Benefits*, BOSTON GLOBE, Dec. 8, 2004, at A1.

⁶²HAW. REV. STAT. §§ 572-1.7 (2012) (specifying relation of marriage, civil unions and reciprocal beneficiaries); Office of the Governor of the State of Hawaii, *Marriage in Hawaii – FAQ*, <http://governor.hawaii.gov/blog/marriage-in-hawaii/>; State of N.J. Dept. of Health, *Frequently Asked Questions*, <http://www.nj.gov/health/vital/faq.shtml#ssm>.

⁶³COLO. REV. STAT. §§ 15-22-106; HAW. REV. STAT. § 572C-4 (2011) (limited to individuals prohibited from marrying, which now applies only to family members covered by the incest prohibition); ME. REV. STAT. tit. 22, § 2710; MD. CODE ANN. HEALTH-GEN. § 6-101 (2010); WIS. STAT. § 770 (2011).

⁶⁴Eskridge 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 10, at 1910.

⁶⁵HAW. REV. STAT. § 572C-4 (2011); COLO. REV. STAT. §§ 15-22-106; ME. PL 2003, c. 672, 2004 ME. LEGIS. SERV. Ch. 672 (H.P. 1152) (L.D. 1579) (altering various code provisions to give domestic partners rights equivalent to spouses for inheritance, guardianship and protection from domestic abuse). Wisconsin does not give domestic partners employment benefits. WIS. STAT. §§ 770.001 et seq. Notably, for the first three rights, parties have the power to designate the rights-holder, but for the last three rights, the law continues to specify the categories of possible rights-holders.

⁶⁶HAW. REV. STAT. § 572C-5; ME. REV. STAT. tit. 22, § 2710(3).

cific rights they intend to adopt or withhold.⁶⁷ Exiting the relationship is even easier. Either party may terminate the relationship unilaterally by filing a notice, which is effective immediately.⁶⁸ The beneficiary status can also terminate automatically if one of the beneficiaries enters another marriage or civil union.⁶⁹ Despite the ease of entry and exit, some states restrict reciprocal beneficiary status to long-term cohabitants who are committed to mutual support.⁷⁰ Maryland even requires applicants to present two documents proving their interdependence, such as a mortgage, relationship contract, joint account, power of attorney, insurance policy or will.⁷¹

4. *Limited domestic partnerships registries*

Numerous cities and counties in twenty-five states maintain “domestic partnership registries.”⁷² 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. Domestic partnership registries cannot give the parties’ property or support rights, which are governed by state law. They do 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.⁷³

B. *Unlicensed Cohabiting Relationships*

Even couples who do not enter licensed relationships may have enforceable obligations. Despite the increasing prevalence of cohabitation -- eight million couples lived together without

⁶⁷ COLO. REV. STAT. §§ 15-22-104, 15-22-106 (2011) (model contract)

⁶⁸ HAW. REV. STAT. § 572C-7(a); COLO. REV. STAT. § 15-22-104, 15-22-111(3); ME. REV. STAT. tit. 22, § 2710(4) (also requires service in hand to the other partner).

⁶⁹ HAW. REV. STAT. § 572C-7(c).

⁷⁰ ME. REV. STAT. 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 (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 and the relationship, even if both individuals are not required to contribute equally to the relationship”)

⁷¹ MD. CODE ANN., HEALTH-GEN. § 6-101.

⁷² 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>.

⁷³ For example, New York recognizes “domestic partners” for surrogate decision-making, NY GEN MUN § 2965, hospital visitation, N.Y. PUB. HEALTH LAW § 2805-q, workers compensation and death benefits, N.Y. WORKERS' COMP. LAW § 4; for death in terrorist attack, NY EST POW & TRST § 11-4.7, and for conflict of interest analysis. NY GEN MUN § 811.

marrying in 2013, up from less than five million in 2000 and half a million in 1960⁷⁴ -- the states have not developed a consistent regulatory scheme. Drawing on work by Ann Estin and Marsha Garrison, this section surveys the spectrum of legal regimes regulating cohabitating couples.⁷⁵ On one end, Illinois and Georgia deny cohabitants any legal remedies, even refusing to enforce written relationship contracts.⁷⁶ On the other end, seven states impose property sharing or support obligations to cohabitants. The remaining 41 states in between regulate cohabitation using private law remedies.⁷⁷ 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.⁷⁸

I discuss each option below, but to appreciate the legal uncertainty, one needs a sense of the variation among cohabitating relationships. Social science research suggests that couples cohabit for numerous reasons that exhibit class and racial patterns.⁷⁹ 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.⁸⁰ In addition, many women cohabit because they do not view their partners as marriageable quality. A large percentage of cohabitants are wary divorcees.⁸¹ African Americans and Hispanics are more likely to cohabit than White non-Hispanics, which Cynthia Bowman attributes to income inequality and greater

⁷⁴ Table UC1, *America's Families and Living Arrangements: 2013: Unmarried couples*, <http://www.census.gov/hhes/families/data/cps2013UC.html> (last accessed Jan. 24, 2014). See also 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).

⁷⁵ Ann L. 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. 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).

⁷⁶ *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1205 (Ill. 1979); *Rehak v. Mathis*, 238 S.E.2d 81, 82 (Ga. 1977).

⁷⁷ See, e.g. *Cates v. Swain*, -- So. 3d --, 2013 WL 1831783 (Miss. May 2, 2013); *In re Marriage of Martin*, 681 N.W.2d 612, 619 (Iowa 2004); *Salzman v. Bachrach*, 996 P.2d 1263, 1269 (Colo. 2000); *Boland v. Catalano*, 521 A.2d 142, 144-46 (Conn. 1987).

⁷⁸ This conceptual map was articulated in an influential 1976 case from the California Supreme Court, *Marvin v. Marvin*, 557 P.2d 106, 110 (Cal. 1976). See also *Marvin v. Marvin*, 5 Fam. L. Rep. 3079 (Cal. Ct. App. 1979). *Marvin* did not generate broad experimentation with implied or equitable remedies, see Estin, *supra* note 75, 1401-08; Garrison, *supra* note 75, 315-22, but its articulation of the available options still structures the legal imagination.

⁷⁹ See generally Smock & Manning, *supra* note 74. For a survey of the empirical literature, see Cynthia Bowman, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 103-123 (2010).

⁸⁰ Bowman, *supra* note 79, at 103-04, 107-109

⁸¹ *Id.* at 117 (in 51.5% of cohabiting relationships, at least one cohabitant has been divorced).

cultural acceptance of consensual unions.⁸² 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 cohabitating relationships in the United States end with separation or marriage in two years.⁸³ Even in Europe, where cohabitation is more common and has greater social support, a majority of cohabitating relationships end in less than five years.⁸⁴ In contrast, only 20% percent of marriages end within five years and a majority never divorce. 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.⁸⁵ However, these contracts are limited in several ways. Several states limit enforcement to express or to written contracts, out of pragmatic concerns typical for statutes of frauds, such as the ease of false allegations, the lengthiness of court battles and the difficulty of determining precise terms.⁸⁶ In addition, while courts will acknowledge that cohabitants expect a sexual relationship, only promises severable from the sexual relationship can be enforced.⁸⁷ 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

⁸² *Id.* at 110-17, 135-36.

⁸³ Andrew Cherlin, *THE MARRIAGE GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY*, 206 App. (2010). In addition, 49% of cohabitating couples will split within 5 years compared to 20% of first marriages. Bramlett MD and Mosher WD, *Cohabitation, Marriage, Divorce, and Remarriage in the United States*, Center for Disease Control, National Center for Health Statistics, Vital Health Stat. 23(22) (2002) http://www.cdc.gov/nchs/data/series/sr_23/sr23_022.pdf .

⁸⁴ Kathleen Kiernan, *Changing European Families: Trends and Issues*, BLACKWELL COMPANION TO THE SOCIOLOGY OF FAMILIES (Scott, Jacqueline, Judith Treas, and Martin Richards, eds. 2003).

⁸⁵ *Supra* note 76.

⁸⁶ MINN. STAT. § 513.075 (2007); TEX. BUS. & COM. CODE § 26.01 (2007); *Posik v. Layton*, 695 So.2d 759 (Fla. Dist. Ct. App.1997); *Kohler v. Flynn*, 493 N.W.2d 647, 649 (N.D. 1992). *Morone v. Morone*, 13 N.E.2d 1154 (N.Y. 1980) (written contracts).

⁸⁷ *Whorton v. Dillingham*, 248 Cal. Rptr. 405, 410 (Cal. App. 4th 1988) (claim for services as “companion” severable from services for “chauffeur, bodyguard, secretary, partner and business counselor”); *Bergen v. Wood*, 18 Cal. Rptr. 2d 75, 78-79 (Cal. App. 4th 1993) (“services as a social companion and hostess” insufficient consideration because they “are not normally compensated and are inextricably intertwined with the sexual relationship”). *But see Jones v. Daly*, 176 Cal. Rptr. 130, 133 (Ct. App. 1st 1981) (promise to be “lover” rendered entire agreement, including domestic services, unenforceable);

housecleaning, cooking, care of pets or home decoration.⁸⁸ Nevertheless, California courts have enforced contract claims relating to domestic services,⁸⁹ 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.”⁹⁰

In addition to express contracts, several states permit cohabitants to bring limited 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.⁹¹ 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.⁹² In addition, some states limit implied-in-fact contract claims to business or commercial services between cohabitants, expressly excluding domestic services.⁹³

2. *Conscriptive rules*

Estin identifies three groups of states that apply property-sharing rules to long-term cohabitants.⁹⁴ First, California, West Virginia and Wisconsin apply a “generous” theory of implied-in-fact contracts.⁹⁵ Even if the couple did not intend to exchange services for compensation, a court

⁸⁸ Ellickson, *Unpacking the Household*, 116 Yale L.J. 226, 313 (2006) (citing Ihara et al., *LIVING TOGETHER: A LEGAL GUIDE FOR UNMARRIED COUPLES* 3/3; Katherine Stoner & Shae Iving, *PRENUPTIAL AGREEMENTS* 2/7 (2004)).

⁸⁹ Whorton, 248 Cal. Rptr. at 410.

⁹⁰ Posik v. Layton, 695 So. 2d 759, 762 (Fla. Dist. Ct. App. 1997). *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 as a reconciliation period if he promised to pay for her to reestablish her own residence if it did not work out).

⁹¹ *See, e.g.*, Cook v. Cook, 691 P.2d 664, 667 (1984); Hudson v. DeLonjay, 732 S.W.2d 922, 928 (Mo. Ct. App. E.D. 1987); Roznowski v. Bozyk, 251 N.W.2d 606, 608-09 (Mich. Ct. App. 1977); Small v. Harper, 638 S.W.2d 24 (Tex. App. Houston 1st Dist. 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; Kozlowski v. Kozlowski, 403 A.2d 902, 906 (1979); Hudson, 732 S.W.2d at 928 (citations omitted).

⁹² Featherston v. Steinhoff, 226 Mich. App. 584, 592 (1997) (plaintiff failed to overcome presumption of gratuitousness to establish implied in fact contract); Roznowski, 73 Mich. App. at 409.

⁹³ *See, e.g.* Tapley v. Tapley, 122 N.H. 727, 730 (1982); Carnes v. Sheldon, 311 N.W.2d 747, 752 (Mich. Ct. App. 1981) (declining to extend implied-in-fact contract theory to domestic services).

⁹⁴ Estin, *supra* note 75, at 1391-95.

⁹⁵ *Id.* (citing Marvin, 557 P.2d at 110; 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. 1994). New

may order support payments or a division of property, if their 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.⁹⁶

Second, Kansas and Oregon have applied an implied joint venture theory to cohabitants. Using an analogy with business partnerships, these states divide cohabitants' property if they intended to manage their assets and expenses jointly for their common benefit.⁹⁷ 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 non-economic contributions to the household."⁹⁸ 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, courts in Washington and Nevada have developed an alternative status-based regime for cohabiting couples.⁹⁹ These states will divide cohabitant's property according to community property rules if the relationship sufficiently resembles a marriage (they will not award alimony). Courts evaluate the relationship according to traditional marital expectations: duration of cohabitation, pooling of financial resources and services, contributions to joint projects, the purposes of the relationship, whether they had children and how they described their relationship to others (citation). The couple's intent is relevant, but the question is not whether they had an agreement

Jersey once recognized a similarly generous implied promise theory, *In re Estate of Roccamonte*, 174 N.J. 381, 808 A.2d 838 (2002), but those cases were overruled by an amendment to the statutes of frauds providing that palimony agreements must be in writing. N.J.S.A. 25:1-5(h).

⁹⁶ Ira Mark Ellman, "Contract Thinking" Was Marvin's Fatal Flaw, 76 NOTRE DAME L. REV. 1365, 1370-72 (2001) (discussing *Friedman v. Friedman*, 24 Cal. Rptr. 2d 892 (Cal. Ct. App. 1993)); Bowman, *supra* note 79, at 42-43, 51 (discussing *Friedman*, Waage, 525 N.W.2d 95, and *Ward v. Jahnke*, 583 N.W.2d 656 (Wis. 1998)).

⁹⁷ Estin, *supra* note 75, at 1391; *Beal v. Beal*, 577 P.2d 507 OR (1978); *Eaton v. Johnston*, 681 P.2d 606, 610-11 (Kan. 1984). Oregon courts calls these relationships "domestic partnerships." 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*, 883 So. 2d 554, 558 (Miss. 2004). Cp..

⁹⁸ *In re Baker*, 223 P.3d 417, 421 (Or. 2009). See also *In re Greulich*, 243 P.3d 110, 115 (Or. 2010).

⁹⁹ *W. States Constr., Inc. v. Michoff*, 840 P.2d 1220, 1222 (Nev. 1992); *Connell v. Francisco*, 898 P.2d 831, 835-36 (Wash. 1995). Nevada's case law began with an implied-in-fact contract theory, but now places less emphasis on the inferred agreement. Cp. *Hay v. Hay*, 678 P.2d 672, 675 (Nev. 1984) with *Estate of Shapiro*, 634 F.3d 1055.

or contract but whether they intended to adopt an interdependent relationship. In its 2001 *Principles of Family Dissolution*, the American Law Institute recommended a similar approach. The ALI *Principles* treat an unmarried couple as “domestic partners” if they cohabitated continuously for a defined period and jointly managed their household; have a common child; or meet a number of factors regarding financial independence, intimacy and public reputation. Domestic partners and married couples are subject to the same equitable division and alimony rules. This 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. The label is accurate for the new status rules and, perhaps, the “generous” implied-in-fact contracts. These doctrines consider the 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 trying to enforce obligations 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, but living together is, at best, weak evidence of intentions to share property or services.¹⁰⁰ 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?¹⁰¹

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

¹⁰⁰ E.g., *Bergen*, 14 Cal. App. 4th at 859 (concluding cohabitation is necessary); *But see Devaney v. L'Esperance*, 195 N.J. 247, 257 (2008) (recognizing theoretical possibility of establishing marriage-like relationship without cohabitation, but finding marriage like relationship not present).

¹⁰¹ *Cp. Brenda Cossman & Bruce Ryder, What is Marriage-Like Like--The Irrelevance of Conjugal*, 18 CAN. J. FAM. L. 269 (2001) (arguing that sex, once the defining feature of the “conjugal relations” accorded state benefits, is now less important under Canadian law).

been hesitant to expand them, and the courts tend to impose substantial evidentiary burdens for successful claims.¹⁰²

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.¹⁰³ The cohabitation cases that suggest restitution claims follow several standard fact patterns. Most cases involve real property, usually a shared home. Either the plaintiff 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.¹⁰⁴ The plaintiff cohabitant may also have worked for or with the defendant in a family business.¹⁰⁵ In other cases, the plaintiff paid for the couples' living expenses, such as the cost of food or rent. 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.¹⁰⁶

Restitution doctrines have been stretched in various ways to cover some, but not all, of these scenarios. In 2011, the A.L.I. adopted the Restatement (Third) of Restitution and Unjust Enrichment that covers cohabitants. 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.¹⁰⁷

Section 28 is limited to cohabiting relationships that resemble marriage and does not extend

¹⁰² Garrison, *supra* note 75, 317-19; Estin, *supra* note 75, at 1400.

¹⁰³ Candace Saari Kovacic-Fleisher, *Cohabitation and the Restatement (Third) of Restitution & Unjust Enrichment*, 68 WASH. & LEE L. REV. 1407, 1419-25 (2011).

¹⁰⁴ See, e.g. Cates v. Swain, -- So. 3d --, 2013 WL 1831783 (Miss. May 2, 2013) (cohabitant could recover money contributed to purchase and improvement of joint residences); Salzman, 996 P.2d at 1266; Mason v. Rostad, 476 A.2d 662, 666 (D.C. 1984).

¹⁰⁵ See, e.g. Maglica, 78 Cal. Rptr. 2d at 103-06; 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);

¹⁰⁶ 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); Koklowski, 395 A.2d at 919; Morone, 13 N.E.2d at 595; Castetter v. Henderson, 113 So.3d 153,155 (Fla. Dist. Ct. App. 2013).

¹⁰⁷ Restatement (Third) of Restitution and Unjust Enrichment § 28 (2011).

to other cohabitants, like roommates, or personal relationships, like friends, siblings or parents.¹⁰⁸ As noted in its comments, § 28 relaxes two general limits on restitution.¹⁰⁹ Cohabitants may recover transfers, even if they appear to have been voluntary gifts and even if the plaintiff reasonably could have, but deliberately chose not to, negotiate a contractual exchange. The authors 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.¹¹⁰

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,¹¹¹ 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.¹¹² Even if one cohabitant contributed more to the couple's domestic life, courts assume that 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 marriage with civil unions, leaving couples or religious groups to bestow the title "marriage."¹¹³ Another is to create a "menu of options" by formalizing the alternative statuses, so couples may choose the rights that best reflect their relationship.¹¹⁴ A third "functionalist" pro-

¹⁰⁸ *Id.*, cmt. b.

¹⁰⁹ *Id.*, cmt. b.

¹¹⁰ *Id.*, cmt. c.

¹¹¹ *Id.* at 1399-1402.

¹¹² *Id.*

¹¹³ Cp. Martha C. Nussbaum, *A Right To Marry?*, 98 CALIF. L. REV. 667, 695 (2010); Tamara Metz, *UNTYING THE KNOT: MARRIAGE, THE STATE, AND THE CASE FOR THEIR DIVORCE* (2010) (arguing for a); Mary Shanley, *AFTERWARD, JUST MARRIAGE* 112-13 (2004); Alan M. Dershowitz, *To Fix Gay Dilemma, Government Should Quit the Marriage Business*, L.A. TIMES, (Dec. 3, 2003) at B15.

¹¹⁴ Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 606-07 (2013); Eskridge, *supra* note 10, at 1879-86; Barbara Stark, *Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law*, 89 CAL. L. REV. 1479, 1482 (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. *MINIMIZING MARRIAGE: MARRIAGE, MORALITY AND THE LAW*, 158 (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.

posal would retain marriage and extend similar rights to any relationship with similar characteristics.¹¹⁵ The most radical proposal is simply to abolish relationship status. Influential theorists of various political persuasions have floated this proposal, including Judith Butler,¹¹⁶ Martha Fineman,¹¹⁷ Cass Sunstein and Richard Thaler,¹¹⁸ and David Boaz.¹¹⁹ The proposal has been explored more extensively by others.¹²⁰ In these proposals, individuals may marry as a cultural, religious or moral matter, but the state will no longer license specific types of relationships. These theorists would prefer intimates regulate their lives through contracts, although some of them also contemplate extending equity, partnership and even employment law to intimate couples.¹²¹ This section will discuss this proposal to abolish status relationships, noting the variety of normative concerns and their 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. Mar-

¹¹⁵ Nancy D. Polikoff, *Ending Marriage As We Know It*, 32 HOFSTRA L. REV. 201, 225 (2003); James Herbie DiFonzo, *Unbundling Marriage*, 32 HOFSTRA L. REV. 31, 65 (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) (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.”);

¹¹⁶ Judith Butler, *Competing Universalities*, in CONTINGENCY, HEGEMONY, UNIVERSALITY 137, 176-77 (2000).

¹¹⁷ Martha Albertson Fineman, *The Meaning of Marriage*, in MARRIAGE PROPOSALS 29-69 (Anita Bernstein ed. 2006); THE AUTONOMY MYTH: A THEORY OF DEPENDENCY 95-141 (2004).

¹¹⁸ Cass Sunstein & Richard Thaler, *Privatizing Marriage*, 91 MONIST 377, 379, 386 (2008) (recommending replacing marriage with private contracts or, as a second best, with universal civil unions). Their proposal is, understandably, tentative. They later endorse replacing marriage with civil unions, as an accommodation to pragmatic political concerns, Cass Sunstein & Richard Thaler, NUDGE 216 (2009), and Sunstein had previously expressed a preference to retain marriage. Cass Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2084, 2117-18 (2004).

¹¹⁹ David Boaz, *Privatize Marriage: A Simple Solution to the Gay-Marriage Debate*, SLATE (Apr. 25, 1997), <http://www.slate.com/id/2440/>.

¹²⁰ Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161 (2006); Dorian Solot & Marshall Miller, *Taking Government Out of the Marriage Business: Families Would Benefit* 70-71, in MARRIAGE PROPOSALS (Anita Bernstein ed. 2006); Jessica Knouse, *Civil Marriage: Threat to Democracy*, 18 MICH. J. GENDER & L. 361, 417-18 (2012); Anibal Rosario-Lebron, *For Better and for Better: The Case for Abolishing Civil Marriage*, 5 WASH. U. JURISPRUDENCE REV. 189, 251-52 (2013).

¹²¹ Fineman, *The Meaning of Marriage*, *supra* note 117, at 58.

riage was a state license to engage in sexual behavior and reproduction, which society used to enforce its vision of correct sexual behavior and gender roles, particularly against women and minorities.¹²² The proponents of abolishing marriage argue that these are morally and legally inappropriate uses of power in a liberal state. 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. Aside from the narrative problems, marriage law is no longer an effective tool for these purposes, as evidenced by the prevalence of sex and child rearing outside of marriage.

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 under-inclusive. Not all children live with married adults, and not all married adults have children. Over 40% of children born in the United States between 2006 and 2010 were born to unmarried women.¹²³ Even if a child is born to married parents, there is a 20% chance they will divorce by her ninth birthday.¹²⁴ Childcare is also not limited to parents, as grandparents are the primary caregiver for four percent of children.¹²⁵ Moreover, while empirical evidence 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 from divorce,¹²⁶ and children living with lone parents score higher on welfare measures than those with a stepparent or a parent's cohabitant.¹²⁷

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.¹²⁸ The public is obligated to care for children, the disabled and the elderly, because dependency is a universal human experience and care-

¹²² Case, *supra* note 7, at 1765-69.

¹²³ "Unmarried" includes sole (16.9%) and cohabiting parents (23.4%). National Survey of Family Growth, Centers for Disease Control and Prevention, http://www.cdc.gov/nchs/nsfg/key_statistics/b.htm#birthsmothers (retrieved September 23, 2013).

¹²⁴ Cherlin, *supra* note 13, at 409.

¹²⁵ Gretchen Livingston, *At Grandmother's House We Stay*, Pew Research, Social & Demographic Trends (Sept. 4, 2013), <http://www.pewsocialtrends.org/2013/09/04/at-grandmothers-house-we-stay/> (last accessed Sept. 30, 2013).

¹²⁶ E. Mavis Hetherington and John Kelly, FOR BETTER OR WORSE: DIVORCE RECONSIDERED ____ (2002).

¹²⁷ *Id.* at ____ . Cherlin, *supra* note 83, at 19-24.

¹²⁸ Fineman, *supra* note 117, 35-54. *See also* Serena Olsaretti, *Children as Public Goods?*, 41 PHIL. & PUB. AFF. 3 (2013).

taking is necessary for social reproduction. Yet, instead of subsidizing caretaking as a public good, marriage policy shunts this obligation onto private families. Moreover, 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.

Last, marriage law can foster forms of direct and indirect discrimination. The title “married” has social signaling functions that can be useful or detrimental. For instance, the presumption that marriages are monogamous can ease interactions with other adults. This signaling value can also serve less innocuous purposes. In our society and many others, people regard marriage as the most significant relationship, and consequently, marriage often signifies social achievement. This prestige can be used to exclude others and, in turn, is reinforced by such exclusion. 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 on relationships reinforces such exclusionary practices.

In addition, marriage classifies adults into “single” or “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. Why, for instance, should a 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 benefit 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.¹²⁹ More plausibly, discrimination is problematic when relationship status is unrelated to the rationale for the underlying benefit. If the state abolished marriage, it 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

¹²⁹ See, e.g. Claudia Card, *Gay Divorce: Thought on the Legal Regulation of Marriage*, 22 *HYPATIA* 24-38 (2007).

to promote child welfare than imposing status-based duties between adults. Finally, marriage facilitates gender inequality and discrimination based on relationship status.¹³⁰

As is obvious in the foregoing discussion, these authors take marriage as their primary target. While they support abolishing relationship status generally, many of their criticisms apply to marriage in particular. Nevertheless, it is essential to understand what they imagine the legal relationships between intimates would look like without status relations. (I will expand on this discussion in Section 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.¹³¹ 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.”¹³² 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.”¹³³

In addition, Sunstein and Fineman recognize that other areas of law might continue to play a role in intimate relationships. Because Fineman discusses this topic in greater detail, I will focus on her account. She argues that “ameliorating doctrines” would be available to alleviate the potentially harsh results of pure private ordering on economically weaker parties.¹³⁴ 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 transac-

¹³⁰ Some argue that anti-marriage advocates are primarily committed to a normative 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, 1031-36 ([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.”).

¹³¹ *See* Boaz, *supra* note 119.

¹³² Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2116 (2005).

¹³³ Fineman, *supra* note 117, at 58.

¹³⁴ *Id.*

tions between legally competent adults and . . . specific categories of affiliation will not be segregated for different treatment.”¹³⁵

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 govern those areas of law untransformed,” she offers only two examples of the likely transformations.¹³⁶ 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 norms that prohibit harassment, verbal assault, and emotional abuse among strangers” so that they could “be applied in defining appropriate conduct between sexual intimates.”¹³⁷ Second, if the state stops trying to limit reproduction to marriage, it might decriminalize sexual conduct and permit “enforceable individualized bargaining over sex outside the marital contract.”¹³⁸ She suggests, in conclusion, that traditional doctrines will require reexamination where they make “assumptions about interactions between independent, equal and autonomous individuals.”¹³⁹

In the next section, 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.”

III. IMAGINING A WORLD WITHOUT INTIMATE STATUS

The state cannot get out of the marriage business. Abolishing relationship licenses like marriage would not abolish the regulation of intimacy based on status; it would simply alter the regulatory regime.¹⁴⁰ As long as intimates can bring legal claims against one another in tort, contract, or equity, private law will determine who can have obligations, how they arise, how they change, and what their default content will be. Moreover, private law tailors these rules to the nature of

¹³⁵ *Id.*

¹³⁶ *Id.* at 62.

¹³⁷ *Id.* at 59.

¹³⁸ *Id.* at 61.

¹³⁹ *Id.* at 62.

¹⁴⁰ 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 are now. This is a reasonable response to alarmist reactions against the proposal to abolish marriage, but the comparison can be misleading because cohabitation law develops in dialogue with marriage sometimes by analogy, sometimes by opposition. Cohabitation law is not a neutral baseline.

our relationships. If a state abolished intimate relationship licenses, then private law would re-fashion ad hoc categories of intimate status. In this section, 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 section for regulation through marital status or against regulation through private law, only that private law regulation cannot avoid status-based norms.

A. *Tort*

Tort law often draws distinctions based on the parties' intimate relationship. Relationships are irrelevant for many classic intentional torts, but they are central to modern intentional torts and negligence. Absent fundamental changes in tort law, tort law claims between intimate couples will require the law to employ status-based norms.

With few exceptions, the parties' relationship rarely affects 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.¹⁴¹ On the other hand, other aspects of tort law are explicitly tailored to the parties' relationship. A set of intentional torts protects 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.

I will begin with relationship-sensitive torts. These tort law claims necessarily use standards tailored to the parties' relationship, and this tailoring inevitably involves normative judgments about appropriate behavior for their 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. A plaintiff is entitled to compensation for emotional injuries if a defendant's "extreme and outrageous conduct intentionally or recklessly causes severe emotional harm."¹⁴² Intimate partners are uniquely positioned to harm one another emotionally, which

¹⁴¹ *Supra* note 28.

¹⁴² RESTATEMENT (THIRD) OF TORTS § 46. Daniel Givelber argues that the elements of IIED claims reduce to disputes over whether behavior is "outrageous," which is a social or moral judgment

makes intimate relationships a natural source of IIED claims. However, to 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.¹⁴³ Ellman and Sugarman argue that the law has two options, neither of which is acceptable. Extreme and outrage 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.¹⁴⁴ The standards of particular relationships are too difficult to discern, because they tend to be “informal,” “unarticulated” and evolving.¹⁴⁵ 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 social conventions” of healthy relationships.¹⁴⁶ “Privacy norms” prevent us from holding spouses liable for conduct they believed was “within the bounds of the marriage.”¹⁴⁷ Moreover, external standards are likely abstract, which invites judges and juries to measure conduct using ideal rather than minimal standards.¹⁴⁸ While this argument dismisses too quickly the possibility of minimal objective

about tolerable behavior, and therefore IIED is not really a compensatory tort but a punitive deterrent. *The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct*, 82 COLUM. L. REV. 42, 49-54 (1982).

¹⁴³ Ira Mark Ellman and Stephen D. Sugarman, *Spousal Emotional Abuse as a Tort?* 55 MD. L. REV. 1268, 1341-42 (1996). They 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. I am less interested in their ultimate conclusion than in their argument.

¹⁴⁴ *Id.* at 1320-22 (discussing *Massey v. Massey*, 807 S.W.2d 391, 400 (Tex. App. 1991)). *Massey* approved an IIED 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 understanding and interchanges which are constantly in flux, and any number of which could be viewed by some segment 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.”

¹⁴⁵ *Id.* at 1321-22.

¹⁴⁶ *Id.* at 1323-24.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 1325-26.

standards,¹⁴⁹ Ellman and Sugarman identify a fundamental problem. Our beliefs about proper intimate behavior are often indeterminate and, consequently, the law has difficulty defining even minimal standards of intimate conduct without relying on social or moral norms.

This problem, however, is not distinct 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 person suing his neighbor. As the Restatement (Third) of Torts recognizes, judgments under the extreme and offensive standard requires contextual judgments about the parties' relationship, authority, vulnerability, motivations and past conduct.¹⁵⁰ 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 stater 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 their values and in light of normative judgments about what is appropriate for that kind of relationship.

Similar difficulties arise in 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."¹⁵¹ Searching another person's closet without his consent is a paradigmatic intrusion on solitude. Yet, is such a search equally unreasonable if the closet belongs to a stranger, acquaintance, friend, lover, roommate or spouse?¹⁵² Part of this difference can be explained by consent. Once I

¹⁴⁹ 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 snow, 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.

¹⁵⁰ Restatement (Third) of Torts: Phys. & Emot. Harm § 46, cmt. d. (2012).

¹⁵¹ Restatement (Second) of Torts § 652B (1977).

¹⁵² *Sanders v. Am. Broad. Companies, Inc.*, 20 Cal. 4th 907, 918, 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

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.¹⁵³ 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.¹⁵⁴ Nevertheless, the default boundaries are set by social norms for people in specific kinds of relationships. In privacy torts, the reasonable person standard incorporates these social norms, just as the outrageous conduct standard does for IIED claims.

What about the second class of relationship differences in tort law, the “special relationships”? 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.¹⁵⁵ The law alters 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 clients¹⁵⁶ and children and parents.¹⁵⁷ 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 to the plaintiff.

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.

¹⁵³ Shaun B. Spencer, *Reasonable Expectations and the Erosion of Privacy*, 39 SAN DIEGO L. REV. 843, 851-60 (2002).

¹⁵⁴ Charles Fried, *Privacy (A Moral Analysis)*, in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 203, 209 (Ferdinand David Schoeman, ed., 1984).

¹⁵⁵ Restatement (Third) of Torts § 37 (2012).

¹⁵⁶ *Id.* § 40. See also W. Page Keeton et al., PROSSER AND KEETON ON TORTS § 56 (5th ed. 1984).

¹⁵⁷ Restatement (Third) of Torts § 40, cmt. o (2012) (“One likely candidate for an addition to recognize 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. Romualdo P. Eclavea, *Liability of parent for injury to unemancipated child caused by parent’s negligence—modern cases*, 6 A.L.R.4th 1066 §§ 3, 13 (Originally published in 1981); Dan B. Dobbs, Paul T. Hayden and Ellen M. Bublick, THE LAW OF TORTS § 358 (2d ed.). *Cp.* Vincent R. Elizabeth G. Porter, *Tort Liability in the Age of the Helicopter Parent*, 64 ALA. L. REV. 533 (2013) (arguing for 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 (2012) (arguing that criminal child neglect standards threaten to impose disputable parenting ideals).

If the state abolishes licensed status categories, would intimacy be recognized as a “special relationship”? It might seem odd, once the state abolished formal status categories, for tort law to recreate distinctions between types of intimate relationships. However, this tension will remain regardless. 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 our duty to aid passengers. Should a person be liable for not throwing a life preserver to his 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? If the boyfriend stayed over regularly for the past month?¹⁵⁸ 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 moral responsibility to do so. Whether the law decides to treat intimates like strangers or like 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. Under current law, 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

¹⁵⁸ A roughly equal number of states maintain traditional status-duties premises liability rules as have adopted a unitary standard of reasonable care for all entrants. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 51 Rpt. Note Cmt. a. (2012). Under a unitary standard, the question is whether a possessor took reasonable precautions, which in this hypothetical would depend on the extent of the couple’s relationship and her boyfriend’s exposure to risk.

legal consequences, then they should enter contracts.¹⁵⁹ As we have just seen, relationships often alter our tort duties even without contracts. Nevertheless, the proponents of abolishing marriage correctly note that spouses and cohabitants exchange economically valuable services.¹⁶⁰ We 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 out-sourced. Instead, they become bundled into status obligations. Could these intimate duties be enforced through contract without intimacy-based distinctions?¹⁶¹ 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 nature of our relationships.¹⁶²

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 most couples have little 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

¹⁵⁹ Fineman, *supra* note 117, at 58; Cain, *supra* note 140, at 46-48. Presumably, these authors are not thinking about fiduciary relationships created by contract. When individuals contracts create relationships of trust and confidence, often the law imposes fiduciary obligations on the parties. Contract gives rises to status obligations.

¹⁶⁰ The law often ignores the value of these services, particularly the services associated with of women. Silbaugh, *supra* note 31.

¹⁶¹ 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 AZ. L. REV. 11 (2012); Brian H. Bix, *Private Ordering and Family Law*, 23 J. AM. ACAD. MATRIM. LAW. 249 (2010). The question I am asking is slightly different, whether law could recognize contracts between intimates without tailoring rules to the nature of their relationship.

¹⁶² 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. *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1284-94 (1998). Such arguments demonstrate, rather than contradict, my argument. If contract law needs special default rules for intimate relationships, the state is categorizing relationships and regulating their terms.

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 them will be implied-in-fact contracts, in 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.¹⁶³ Under the predominant modern rule, consideration is "the exchange or price requested and received by the promisor for its promise."¹⁶⁴ When intimate partners perform services for one another, their intention is often precisely not to bargain for something in exchange.¹⁶⁵ It is integral to the moral and social ideal of intimate relationships that we offer our services freely, as part of being in that relationship. That does not mean we do not expect reciprocity. We expect our partners to contribute, and we hope to receive as much as we give. Many of us expect our partners to contribute an equal amount, but we want them to offer the contribution freely. Intimates do not value their contributions to the relationship and seek to maximize the return on that contribution.¹⁶⁶

Even if the law decides to treat economic services as bargained-for in a relationship, it is unclear how to characterize the bargained-for benefits. Two people might simply trade economic services, but most couples view their provision of domestic services as an intricate part of their relationship, including all of its attendant benefits. Spouses often agree to share income and chores as part of sharing a home and a life, not simply because division of labor is efficient. Lov-

¹⁶³ Some courts have argued that spouses have a pre-existing 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 (1st Dist.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 31, 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.* *Formation Requirements*, UNIF. PREMARITAL & MARITAL AGREEMENT ACT § 6 (2012).

¹⁶⁴ 3 Williston on Contracts § 7:2 (4th ed.)

¹⁶⁵ One might think of the promise to marry as the exchange, particularly if one restricts attention to prenuptial agreements. However, antenuptial agreements or adjustments to the division of responsibilities in an ongoing relationship will require additional consideration. *Bratton v. Bratton*, 136 S.W.3d 595, 600 (Tenn. 2004); *Bedrick v. Bedrick*, 17 A.3d 17, 27 n.5 (Conn. 2011) (noting, without deciding, whether continuing marriage is consideration).

¹⁶⁶ *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 30, 10-11, 26-27 (arguing both unpaid housework and wage labor have relational and leisure components and injustice results when only housework is equated with emotional expression).

ers may agree to cohabit because it facilitates their sexual relationship. It is artificial to view the exchange of wage or domestic labor in isolation from these other benefits, because the wider benefits may be precisely the point of the exchange. If the exchange of unpaid and paid labor between intimate partners is enforceable in contract, then the consideration cannot be limited to those services. Contract law would need some way to identify and value these expected benefits.

To create a binding contract, intimate affiliates would have to make one another 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 intimates 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 this “agreement” have several notable features. First, the couple is 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 a relationship come in relatively indivisible bundles. Wealthy couples may hire landscapers, cooks or housekeepers, but the average couple agrees to share these activities en masse. In any case, if spouses have agreed to share labor, one spouse cannot then “hire out” his part to a contractor, even if the contractor would do a better job.

Third, the terms of the agreement fluctuate because they are deeply contingent and open-ended. Even if spouses divide their tasks explicitly *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 the couple eats 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 the exchanged promises. In a rela-

tionship, however, both parties 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, the parties' exchange of services is one part of a general commitment that includes relationship maintenance, shared activities, emotional and physical care. Cohabitants often face this challenge to their contracts. When 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 one's partner, why should one not be permitted to protect that value in a contract? When domestic services are enforceable in contract, then the personal or sexual aspects of their agreements should be enforceable as well.¹⁶⁷ 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.¹⁶⁸

If the precise terms of a marriage are enforceable, it will affect spouses' incentives during the relationships. Each partner would have an incentive to keep track of who pays for dinner, cleans the dishes or mows the lawn.¹⁶⁹ They need an accurate tally because non-performance can justify a future demand for compensation and because sufficient non-performance 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 her acquiescence as a rescission of the original arrangement.¹⁷⁰ If the personal or relational aspects of their relationship are enforceable as well, then that too must be kept track of. When one spouse stops contributing to the relationship, that breach may justify her wife in breaching other aspects, such as providing domestic services.¹⁷¹

Other types of commercial relationships face similar problems: difficulty monitoring quality

¹⁶⁷ 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. App. 1999).

¹⁶⁸ Posik, 695 So. 2d at 762.

¹⁶⁹ Regan has argued at length that individualistic mental accounting is inconsistent with intimacy. Regan, *supra* note 166, at 70-73; *FAMILY LAW AND THE PURSUIT OF INTIMACY* 147 (1993).

¹⁷⁰ 3 Williston on Contracts § 7:37 (4th ed.) (discussing mutual agreement to modify contract as a rescission and reentry into a new contract).

¹⁷¹ Posik, 695 So. 2d at 762 (finding cohabitant's decision to move in with third party was anticipatory breach, despite lack of contract language).

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.¹⁷² These difficulties can stump highly sophisticated private actors. However, these difficulties do not show that 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 often do not meet traditional standards for enforceable contracts, it is natural to think that equitable remedies can provide supplemental protection.¹⁷³ Fineman, for instance, suggests that intimate affiliates may use equitable doctrines like unjust enrichment to alleviate harsh contract rules.¹⁷⁴ 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 the plaintiff conferred on the defendant a benefit, which it would be unjust to allow the defendant to retain.¹⁷⁵ 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 can reasonably expect. This depends, in part, on whether they 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.

¹⁷² 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 (notes 1-4 and accompanying text).

¹⁷³ Enforceable contracts (whether express or implied-in-fact) and restitution are exclusive remedies, so that even a limited relationship contract should preclude recovery under quasi-contract or unjust enrichment. 1 Williston on Contracts §§ 1:6, 68:1 (4th ed.).

¹⁷⁴ Fineman, *supra* note 117, at 57.

¹⁷⁵ Restatement (Third) of Restitution and Unjust Enrichment § 1 (2011); 26 Williston on Contracts § 68:5 (4th ed.).

The controversy over restitution claims between cohabitants is a controversy about the norms and expectations for cohabitating relationships.¹⁷⁶ Courts relax two standard doctrines of restitution for cohabitants: retaining a gratuitously transferred benefit is not unjust and restitution is not a substitute for readily available contracts.¹⁷⁷ The reporters' comments in the Restatement argue that these rules should be relaxed, because cohabitants make transfers expecting their relationship to continue and to share in the transferred benefits.¹⁷⁸ 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.¹⁷⁹ In response, Professor Sherwin argues that cohabitants can easily protect themselves with "off the rack" legal relations like loans or shared title, and cohabitants should be able to maintain relationships with less commitment.¹⁸⁰ 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

¹⁷⁶ Cp. Robert C. Casad, *Unmarried Couples and Unjust Enrichment: From Status to Contract and Back Again?* 77 MICH. L. REV. 47, 55 (1978) with Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 891-94 (2005). Casad argues 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." In response, Garrison argues 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.

¹⁷⁷ Restatement (Third) of Restitution and Unjust Enrichment § 2 (2011)

¹⁷⁸ *Id.* cmt. c.

¹⁷⁹ Hanoch Dagan, *Restitution and Relationships*, 92 BOSTON U. L. REV. 1034, 1038-43 (2012).

¹⁸⁰ Emily Sherwin, *Love, Money, and Justice: Restitution Between Cohabitants*, 77 U. COLO. L. REV. 711, 731-36 (2006).

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, rather than the Restatement's general strategy to define rules for specific factual scenarios.¹⁸¹ She frames this as an objection, 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.

While initially attractive, the proposal is remarkably difficult even to formulate, because many causes of action require contextual judgments about appropriate intimate behavior. One might argue, as Ellman and Sugarman do for IIED claims, that we should prohibit these type of claims between intimate parties.¹⁸² 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: friends, roommates, coworkers, personal assistants, etc. Moreover, while the proposal avoids imposing legal duties on intimates, it creates a unique legal *privilege*. Intimates are 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 couples' 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 counter-factual

¹⁸¹ *Id.* at 735. Sherwin is also concerned that contextual judgments leave too much freedom to apply the fact-finders values and lead to inconsistent results that distort litigation incentives.

¹⁸² See *infra* Part III.A.

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 other's company, 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, they 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.

Similar problems would arise in contract law. Officials might try to ignore intimate relationships when judging whether one party exerted coercive pressure, whether they entered a long-term relational contract, or whether their contract is unconscionable. 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: intimates contracts are limited to explicit terms. The law must define the category of "intimate relationships" that it subjects to this demanding default rule, which it does not impose on other contracting parties. The second option seeks quixotically to isolate intimate from non-intimate features of our relationships. This is the approach adopted by many states for cohabitation contracts.¹⁸³ When a couple enters a premarital contract, their intention to share finances and cohabit would matter (presumably because these aspects can be shared by non-intimates), but not the reason for these choices that shapes their behavior and their 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. And, contrary to the goal of neutrality, this general exemption continues 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 de-

¹⁸³ See *infra* Part II.B.1.

fault rules or juries would use reasonableness tests to enforce conventional norms.¹⁸⁴ 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 section 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 section 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.

IV. IMPERFECT DUTIES AND STATUS NORMS

The state cannot avoid relying on intimate status norms, even in private law, because intimate relationships involve imperfect duties. A duty is imperfect when the agent has discretion to choose how and when to fulfill it, a discretion limited by subjective commitment to perform. The law struggles to handle imperfect duties. The only way to enforce intimate duties is to supplant the agent's discretion to specify the content of the duty and replace the agent's subjective commitment with legal sanctions. As long as intimates have enforceable rights in their relationships, the law will oscillate between striving to enforcing the terms of relationships and imposing status norms on couples.¹⁸⁵ This section defines imperfect duties in the marital context, explains their inherent indeterminacy and identifies the challenges that they pose for legal enforcement.

Several more words of caution. The theory of marriage I rely on is deliberately shallow. I assume marriage involves imperfect moral duties, but I do not develop a full theory of marriage.

¹⁸⁴ Although these legal processes have apparent drawbacks, I am not arguing that status norms are less objectionable when defined by a legislature than by judges or juries.

¹⁸⁵ The oscillation is exacerbated by incomplete commitment to either liberalism or communitarianism, as family law state struggles to decide when and whether it may legitimately impose teleological values on citizens.

Marriage may be valuable because it is a relationship of love and mutual self-sacrifice,¹⁸⁶ an economic partnership,¹⁸⁷ a “liberal egalitarian community”,¹⁸⁸ or a union of naturally complementary gender roles.¹⁸⁹ Marital obligations may be grounded in promises, reliance, dependence or natural law. I hope to bypass these debates about the value or ground of marital norms, starting instead with common assumptions about their content and structure. I rely only on the claim that marriage involves imperfect duties, a claim I substantiate only by appeal to widespread marital norms.¹⁹⁰ My dry, structural account of marital duties needs to be embedded in a deeper theory to explain why marriage is valuable. Fortunately, marital duties are broadly imperfect on most of the above theories. My hope is that this argument can serve as a site of overlapping consensus between more comprehensive theories of marriage.¹⁹¹

The inclusiveness of any argument, of course, has limits. My argument begins with a culturally contingent conception of intimate relationships. There is a legitimate concern that the resulting theory applies only within 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 as I proceed. There is, however, one central limitation. The argument assumes intimate relationships are minimally reciprocal. Neither spouse should be subordinated to the other, such that spouses’ unilateral choices can fully determine the content of the other’s duties. This premise rules out fundamentally hierarchal or patriarchal conceptions of marriage. I regard this as a reasonable limit,

¹⁸⁶ Wardle, *supra* note 35, at 122.

¹⁸⁷ Sanford N. Katz, *Marriage as Partnership*, 73 NOTRE DAME L. REV. 1251, 1252 (1998).

¹⁸⁸ Frantz & Dagan, *supra* note 43, at 81-94.

¹⁸⁹ Don Browning, *A Natural Law Theory of Marriage*, ZYGON 46.3 (Aug. 2011).

¹⁹⁰ Another question arises whether an account of imperfect duties must assume a moral theory. The perfect-imperfect distinction is often associated with deontological moral theory, but Mill and other consequentialists have developed accounts of imperfect duties broadly consistent with my discussion. See Mill, *supra* note 6, at 61; Walter Sinnott-Armstrong, *You Ought to Be Ashamed of Yourself (When You Violate an Imperfect Moral Obligation)*, PHIL. ISS. 15, at 193-204 (2005) (arguing a duty is imperfect if better consequences result when agents to feel shameful rather than guilty for failing to perform enough of a type of acts); Douglas Portmore, *Imperfect Reasons and Rational Options*, NOUS 46:1, at 24-60 (2012) (arguing many practical reasons are imperfect because they can be pursued in numerous equally rational ways over the course of one’s life). My emphasis on duties may conflict with a broader virtue or care ethics approach, but I suspect that any theory of right action in virtue ethics will bear striking similarities to the two core features of imperfect duties, latitude and commitment.

¹⁹¹ John Rawls, POLITICAL LIBERALISM 134-172 (1993) (Expanded Ed. 2005). One of Rawls’ insights in *Political Liberalism* was that even divergent religious and moral perspectives may converge on intermediate premises for political decision-making. Because marriage law is part of the basic structure, political arguments about it should be subject to general constraints of public reason. John Rawls, *The Idea of Public Reason Revisited*, § 5, in POLITICAL LIBERALISM: EXPANDED ED. 466-73 (2005).

since the project is to reconstruct a liberal justification for marriage law.

A. *The Content and Structure of Marital Obligations*

Any description of intimate moral norms is controversial, but I hope to draw on broad and commonly recognized ones. I focus primarily on marriage-like relationships, because investigating the structure of marital norms illuminates intimate norms more generally. If the norms for other intimate relationships lack these features, then the argument for state forbearance simply does not apply. That does not imply any judgment about the value of such relationships.

The day-to-day life of marriage involves a tangle of overlapping moral norms. I suggest the following tentative examples: sexual fidelity, emotional fidelity, economic support (including financial and domestic services), emotional support and relationship maintenance. 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 some of them. The list evidently contains various types of norms. It includes moral rights and duties between the spouse and toward third parties. Spouses also harbor expectations about one another's behavior and feelings. These expectations are less naturally described as "rights," but they have a similar structure and involve similar moralized attitudes like guilt, shame and resentment. For instance, because spouses should care about one another, a person may feel resentful if her wife forgets her birthday and her wife should be contrite. Moralized attitudes of this sort often depend on ideals of virtue, such as more or less implicit conceptions of the good spouse (boyfriend, friend or lover). Although these marital norms differ in many respects, most have two aspects that confound legal enforcement: (1) imperfect duties with (2) correlative claims.

Most important, many marital norms are imperfect duties. Imperfect duties have two defining characteristics: substantial latitude in the required conduct and an intrinsic connection to subjective motivations. Several conceptions of the imperfect-perfect distinction exist, but most are driven by the shared intuition that some duties permit greater latitude in their performance.¹⁹² Perfect duties leave little or no latitude. The duty not to murder or steal and the duty to pay a

¹⁹² Thomas Hill, *Kant on Imperfect Duty and Supererogation*, *KANT-STUDIEN* LXXII, at 55-76 (1971); George Rainbolt, *Perfect and Imperfect Obligations*, *PHIL. STUD.* 98, at 233-256 (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, *supra* note 6, at 48-49, and some philosophers consider this a defining feature of imperfect duties. E.g. Onora O'Neill, *CONSTRUCTIONS OF REASON* 189-192, 224-232 (1989). This categorization obscures important distinctions, because one can have duties to specific persons without determinate content and free-floating duties with determinate content.

debt are perfect duties.¹⁹³ Any time an act would qualify as murder, the agent is obligated not to do it. Imperfect duties, in contrast, leave agents with greater discretion. She has latitude to decide when, how or how often to fulfill her imperfect duties. Moreover, even if she recognizes an appropriate chance to fulfill her imperfect duty, she may still choose not to fulfill it now, in this manner. Philosophers often regard charity as a paradigmatic imperfect duty. The wealthy should donate money sometimes but may forgo many opportunities. Each person may decide to whom, when and how much to donate. Moreover, even if a well-off person recognizes that a certain cause is worthy of charity, she may choose not to donate, as long as similarly opportunities are likely to arise in the future.¹⁹⁴

Following George Rainbolt, I assume that the imperfect-perfect distinction is one of degree. All duties admit more or less latitude, and this latitude may vary across multiple dimensions of the required conduct. Rainbolt identifies five non-exhaustive dimensions: time, place, manner, object or person, and number of required acts. Even perfect duties admit some discretion on some dimensions. A debtor may be required to pay a particular amount to a particular person by a particular date, yet still retain discretion to choose whether to pay early or on the due date, in a lump sum or in installments. Likewise, no imperfect duties are fully indeterminate. 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. Imperfect duties have minimal thresholds. Moreover, even a widely 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 his daughter's sporting events this year, then he is obligated to attend her final soccer match.¹⁹⁵

¹⁹³ 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 some also require positive action, such as paying a debt. Imperfect duties are often positive, such as the duty of beneficence, but may be negative, such as the duty not to harm the environment.

¹⁹⁴ Imperfect duties need not be less stringent than perfect duties. Some have argued that perfect duties always trump imperfect ones, because a perfect duty will require specific action while an imperfect duty will permit action on some other occasion, Susan Hale, *Against Supererogation*, AM. PHIL. Q. 28(4), 276 (1991), but such arguments conflate precision with stringency. Another intuition associated with imperfect obligations is that one can go "above and beyond" their requirements, so they are sometimes invoked to explain supererogatory actions. Marcia Baron, *Imperfect Duties and Supererogatory Acts*, ANN. REV. L. & ETHICS 6, 57-71 (1998) (arguing against this conflation).

¹⁹⁵ Most imperfect duties involve vague act-types, but imperfect duties should not be reduced to vagueness. An act-type is vague if it has some clear instances and non-instances but also borderline cases in which there is no answer whether an act-token falls under the type. The borderline admits of discretion, in the specific sense that the choice is unguided by whatever features characterize the type.

Most marital duties are imperfect. The marital duty with the least latitude is likely sexual fidelity. Assuming spouses have this duty, they are obligated not to engage in (or pursue) any 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. Unlike sexual fidelity, most marital rights and duties offer significant latitude. Spouses have a duty of economic support, but they must choose what quality of life to maintain, what kind of services to provide one another and how integrated they want their economic life to become. The duty of emotional support offers more latitude. Spouse may expect one another to perform some caring acts, but spouses 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 the latitude of marital norms, they often involve corresponding claims and claim-holders. A marital duty of support is owed specifically to one’s spouse.¹⁹⁶ When Caleb’s father’s dies, only Caleb is entitled to expect, request or demand support. A third-party can remind Dan of his duty to Caleb, and he may judge Dan’s character poorly if he fails to fulfill it, but the third-party has no ability to demand Dan fulfill his duties. In fact, many marital duties have correlative “claim rights” in strict the Hohfeldian sense.¹⁹⁷ A has a claim right against B that B perform some act if and only if B has a duty to A to perform that act.¹⁹⁸ Consider, for example, a spouse’s right to economic support. Amy has a right against Beth that Beth provide economic support, which means Beth has a duty to Amy to provide support her. Not all duties have corresponding claim rights in this fashion. Often, no one has a right to demand that we fulfill our duties. Many imperfect duties lack correlative claim-holders. I have an imperfect duty to give to charity, but no specific charity can demand that I donate to it. Imperfect marital duties, however, cannot plausibly be understood in this fashion. Amy owes her duty of support to Beth, and Beth has a

¹⁹⁶ It is an open question whether spouses might also have a duty to the state to fulfill marital duties, a question I do not intend to prejudge here.

¹⁹⁷ George W. Rainbolt, *THE CONCEPT OF RIGHTS 25-29* (2006) (describing consensus contemporary definition of Hohfeldian 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 that A not do 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, which means that Dan now has a duty to attend.

¹⁹⁸ This definition assumes that omission is a way of performing some act. Intimate rights may be a right that one’s spouse perform an action, or not, and one right might include both components. A right to fidelity, for example, might include a right that one’s partner not enter other romantic entanglements and a right that he cultivate this romantic attachment.

correlative claim to Amy's support.

Our imperfect marital duties involve correlative moral claims with claim-holders, yet latitude in the duties translates into slack in the claims. When the subject of an imperfect duty has discretion to decide how, when or how often to perform, the correlative claim-holder can have no right to demand a specific kind, time or amount of performance. For example, one has an imperfect duty to support one's spouse economically, and one's spouse has a correlative right to economic support. However, if one spouse has no duty to provide a particular kind or amount of support, then the other cannot have a right to demand a specific kind or amount of support. Moreover, even if some occasion presents a reasonable opportunity for fulfill one's imperfect duty, the agent may often maintain in good faith that she planned to fulfill the duty on another occasion or in another manner. As long as other similar opportunities are likely to arise in the future, the agent may decide not to perform the duty now in light of other values.¹⁹⁹ For example, even if Amy believes that attending her wife Beth's family reunion would be an appropriate way to support her, Amy may skip the reunion to fulfill work obligations, as long as she plans to attend family holidays. Beth may be disappointed, but she has no right to demand that Amy attend the reunion, as long as both Amy and Beth recognize that Amy remains committed to the relationship. Because many marital duties are imperfect, spouses have substantial discretion to specify the precise content of their marital duties and rights.

This example of Amy and Beth also illustrates the second major feature of imperfect duties. Imperfect duties are tightly connected to subjective moral motivations. Doing enough in the right way is part of maintaining subjective commitment. For example, parents have a duty to support their children's development. Parents need not adopt a single-minded focus on their children's activities, but a father who never attends his son's recitals violates that duty. In addition, his conduct reveals his commitments. The father could fail similarly by attending but then never putting down his smart phone. While he may deeply desire or wish for his son to do well, he has not committed to supporting his son's musical development. Accordingly, we should add a second aspect to our definition of imperfect obligations. The agent has a duty to maintain a subjective commitment, which the agent manifests by performing sufficient acts of the relevant type in an appropriate manner.

In the marital context, subjective commitment to the marriage requires spouses to act to ful-

¹⁹⁹ Philosophers disagree about whether one may forgo an opportunity to perform imperfect duties only to fulfill other competing duties, or whether one may forgo the opportunity simply to pursue other inclinations. See Thomas Hill, *Meeting Needs and Doing Favors*, HUMAN WELFARE AND HUMAN WORTH 220-22 (2002).

fill their duties on a sufficiently frequent basis in the right way. Although a spouse may choose not to perform some actions that could fulfill his imperfect marital duties, if he does not do enough and do them with the right attitude, then he is not truly committed. This is a frequent 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 guiding end in his life. Performing enough of one's duties in the right way is tightly connected to, maybe even constitutive of, subjective commitment. 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 discretion to act in ways that express their commitment, and their commitment is what constrains the latitude in their conduct.

This notion of subjective commitment is, admittedly, uninspiring. Unfortunately, greater elaboration would mire us in controversy about the nature of commitment for imperfect duties in general and for imperfect marital duties in particular. Kant's theory of imperfect duties is undoubtedly the most influential. He explains the commitment underlying all imperfect duties as adopting an end. The categorical imperative requires all rational agents to adopt certain ends, in particular self-development and others' happiness.²⁰⁰ A duty is perfect if a proposed action is inconsistent with adopting a required end, imperfect if adopting ends require some action without determining precisely how or to what extent one must act.²⁰¹ Imperfect duties leave agents "playroom ... for free choice" about how to fulfill the end.²⁰² Extending this account to marriage (although Kant did not), one might argue that marriage involves each spouse adopting the other's ends. Whether an action (relevant to the marriage) is morally worthy depends on whether it is consistent or inconsistent with adopting one's spouses' ends as one's own.²⁰³ Because it is usually possible to facilitate a person's well-being in numerous ways, marital duties will rarely gener-

²⁰⁰ Immanuel Kant, *THE METAPHYSICS OF MORALS* AK 6:384-88, in *IMMANUEL KANT: PRACTICAL PHILOSOPHY* 516-18 (Mary Gregor trans. & ed. 1996).

²⁰¹ *Id.* at 6:390-91 (521-22). See also Hill, *supra* note 199, at 206 (explaining that to adopt an end means to make it "a serious, major, continually relevant, life-shaping end").

²⁰² *Id.* at AK 6:390 (521).

²⁰³ Kant regards marriage as primarily a legal contract to use one another's body, because he argues that a mutual exchange is the only way to use rightfully a person's body (another's or one's own). *Id.* at AK 6:277-280 (426-429). The Kantian theory that I sketch, in contrast, makes marriage look more like a special case of beneficence. *Id.* at AK 6:469-73 (584-88).

ate strict rules of conduct.

Most of us crave a more romantic account of the subjective commitment underlying imperfect duties. We expect romantic love from our spouses. The love-based conception of marriage, despite its recent vintage in Western life, is now pervasive.²⁰⁴ Spouses expect one another to act in ways that manifest affection. This expectation can affect judgments about imperfect duties. It is not sufficient to simply throw a party for your spouses' birthday; the day needs to have especially personal or romantic moments. Despite its prominence as an ideal, romantic love is not necessary for intimate relationships. Nevertheless, 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 section 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 substantial latitude in performance. This 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.²⁰⁵ This part explores the difficulties created by efforts to enforce imperfect obligations. These difficulties are particularly salient when considering enforcement in ongoing relationships.

²⁰⁴ See Stephanie Cootz, *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 late eighteenth and twentieth centuries).

²⁰⁵ Kant, *supra* note 6; Mill, *supra* note 6.

3. Discretion and the specification of duties

The latitude in imperfect obligations causes the first, and most serious, problem for legal enforcement of marital obligations. Because spouses have wide discretion in imperfect duties, it is often impossible, in principle, for a third party to specify their content. Spouses can fulfill their duties in different ways on different occasions. Even if a spouse recognizes that this 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 a lower threshold. 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 not 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. Moreover, even a single act or omission, in the right circumstances, can clearly violate an imperfect duty. For instance, no one can be committed to supporting their spouse financially without trying to help meet the spouse's basic needs.²⁰⁶

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 is discerning whether a new home is appropriate for their 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 can reason-

²⁰⁶ The dispute between the court in *McGuire v. McGuire* and its critics is, at least in part, about the limits of this vague threshold. The court did not want to adjudicate disputes about whether a decent standard of living included indoor plumbing, while its critics are comfortable assuming the husband fell below the minimal level of support. See *supra* note 26. Other courts have specified the minimal threshold as a standard of neglect. See *supra* note 27.

bly 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 their precise content, a conscientious official might ask what decision the couple would have made if they were not disagreeing. 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. The imagined hypothetical cannot simply reconstruct the couple's decision. It involves judgments about the best shape for the couple's ongoing relationship, which must rely 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.

4. Coercion and the adoption of ends

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. These commitments determine whether a discretionary act fulfills the imperfect duty. Because it is impossible to force a person to maintain subjective commitment, it is impossible to coerce someone to fulfill an imperfect duty. At best, coercion can force the 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. The possibility of legal sanctions for performing or not certain acts alters individuals' motivational sets. The law can create new incentives to act one way or another but cannot force a person to act for a particular reason or on a particular motive. Only deeply intrusive types of coercion – such as medicinal interventions – can force a person to act on a particular motive. Of course, this problem applies to perfect moral duties as well, assuming that full compliance with even perfect moral duties may require acting on appropriate moral motivations. The conflict with enforcement of imperfect duties is distinctive, 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 really 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 to fulfill them in the manner 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. 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.²⁰⁷

Litigation also creates psychological tension. As other writers have noted, litigation encourages an adversarial posture that conflicts with the motives for affection and cooperation in intimate relationships. The tension is real but is not a fundamental problem. It may not apply to particular couples and specific disputes. Moreover, as Mary Ann Case has argued, couples often use

²⁰⁷ Non-legal 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. However, non-legal enforcement can cross the same line as legal enforcement. Even if Caleb no longer cares about his husband 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 a spouse realizes that he must rely on self-help or social sanctions in this way, he faces the same dilemma as a legal plaintiff.

psychologists or religious counselors to negotiate disputes.²⁰⁸ The psychological tension created by litigation not qualitatively different than the tension from non-legal 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.

5. *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.²⁰⁹ 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.²¹⁰ If the parties litigate this issue, the fact-finder must judge whether the request was reasonable in light of the parties’ past practice and commercial standards in the relevant community.²¹¹ 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 this couple, based on either the fact-finders judgment or on community standards for 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 that relationship.

²⁰⁸ Case, *supra* note 28, 250-255.

²⁰⁹ The indeterminacy created by vagueness is distinct from the discretion of imperfect duties. All imperfect duties must involve general act-types, but these types need not be vague. An agent may have discretion to determine which of act-tokens of the non-vague type to pursue.

²¹⁰ UCC § 2-306(1).

²¹¹ Thomas 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, 590-60 (1995-1996).

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.²¹² A similar rule is not promising for marriage. Marriage lacks any natural decision-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?²¹³

For still other vague duties, the law limits judicial review to non-vague 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. The law might treat vague intimate obligations similarly – in fact, this is the approach adopted by states that enforce a duty of support to prevent “neglect.”²¹⁴ Unfortunately, this approach runs headlong into the second conceptual problem described above. When child protection agencies intervene to protect children from neglect, they typically terminate the relationship.²¹⁵ In contrast, a spousal suit to enforce rights *inter se* assumes the relationship should persist. 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, but it has several flaws.²¹⁶ First, explicit agreements are not necessarily less vague. Spouses might even agree explicitly to the standard package of vague marital duties. Instead, the proposal must be to enforce only express agreements relating to non-vague

²¹² Stephen Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 88-89, (2004) (arguing 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).

²¹³ 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. *Kitteredge v. Kitteredge*, 803 N.E. 2d 306, 313 (Mass. 2004).

²¹⁴ See *supra* note 27.

²¹⁵ Child protection agencies sometimes substitute their judgment for the parent's decisions on a specific topic but leave the child with the parent under agency supervision.

²¹⁶ UNIF. PREMARITAL & MARITAL AGREEMENT ACT § 6 (2012).

duties. Rather than a duty of domestic support, for instance, the spouses might 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?

* * * *

In Section II, I argued that abolishing intimate status would not prevent the state from categorizing relationships and imposing status norms on couples. In this section, I have argued that the law cannot eliminate intimate status because intimate relationships involve imperfect duties. Imperfect marital duties require spouses to perform some acts but leaves discretion to determine when and how to act, cabined by a subjective commitment. These imperfect marital duties confound legal enforcement. Legal enforcement requires determinate judgments, which means a state official must supplant the couple's discretion to specify their precise duties using contextual normative judgments. Moreover, legal enforcement substitutes coercive sanctions for the subjective commitment that underlies their imperfect marital duties.

Some philosophers have argued that these conflicts entail that imperfect duties cannot be legally enforceable. That is an overstatement. Intimate rights could be enforced in private law, but such direct legal enforcement requires giving officials authority that conflicts with defining features of ongoing relationships. Marital status, in contrast, provides a more flexible way to create enforceable imperfect duties.

V. MARITAL STATUS AS A FORM OF IMPERFECT LEGAL RIGHTS

Intimate relationships involve imperfect rights that deserve legal protection, yet these rights 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.²¹⁷ 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 the underlying legal relationship.²¹⁸ Some would welcome a similar rule in marriage, and there is ample reason for skepticism about the intact marriage rule. Nevertheless, I argue that the intact marriage rule is reasonable, as long as it is combined with egalitarian dissolution rules.

Accordingly, Section A clears away some underbrush, explaining and rejecting traditional justifications for the intact marriage rule. Section B argues that a combination of the intact marriage rule and egalitarian dissolution rules provides a way to accommodate imperfect duties, while protecting the interests of the parties that enter these relationships. I am not arguing that marriage is a state-free space. As I argued above, the state cannot avoid relying on status norms, so the question is when and how to do so. The state’s decision to defer legal enforcement creates the space for autonomy during marriage. When the law recognizes this spousal authority, equitable and egalitarian default remedies are appropriate. To be clear, my aim is not to defend marriage law in all its facets. The goal is to identify an implicit rationale behind existing law, with the understanding that its full articulation may require substantial revisions of law. In particular, I suspect that divorce law undervalues gendered contributions to marriage and, to the extent these divorce remedies are not egalitarian, they should be reformed.

C. *Historical Justification for the Intact Marriage Rule*

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.²¹⁹ Similar doctrines were used to rationalize the civil and criminal spousal immunity that gave husbands legal permission to use their wives’ bodies.²²⁰ Even into the late twentieth century, the law continued to protect domestic

²¹⁷ See *infra* § A.1.b.

²¹⁸ Traditional partnership law made final accounting a condition for legal claims between partners, but the Revised Uniform Partnership Act eliminated this rule. Rev. Uniform Partnership Act § 405 (2013-2014 ed.).

²¹⁹ Tobias, *supra* note 25, at 364-65.

²²⁰ See Hasday, *supra* note 25 at 1484-85; Reva B. Siegel, “The Rule of Love”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996).

abusers with privacy doctrines²²¹ and spousal rapists with an assumption that consent to marriage was a blanket consent to sex.²²² 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 spouses' right to bodily integrity is as strong with respect to her spouse as to strangers. Any contact with another person's body without their consent is a battery, and marriage no longer serves as a blanket proxy for actual consent. Moreover, this right 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.

In light of these changes, one might have expected the intact marriage rule to dissolve as well. Yet, it persevered. Its official rationale shifted. Contemporary courts argue that the intact marriage rule protects marital privacy.²²³ Privacy is a deeply ambiguous concept in legal discourse, but none of the senses of marital privacy convincingly support the intact marriage rule.²²⁴

Privacy often refers to spatial or informational privacy.²²⁵ 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

²²¹ Siegel, *supra* note 220, at 2130, 2151-74.

²²² Hasday, *supra* note 25, 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.

²²³ Mentry v. Mentry, 142 Cal. App. 3d 260, 268 (1983).

²²⁴ Ken Gormley, *One Hundred Years of Privacy*, 1992 WIS. L. REV. 1335, 1340 (1992) (identifying five distinct legal elements of the right to privacy); Judith Thomson, *The Right to Privacy*, PHIL. & PUB. AFFAIRS 4.4 312-315 (1975) (arguing each element of the moral right to privacy is better explained by other distinct rights).

²²⁵ Gormley, *supra* note 224, at 1343-74 (arguing that spatial and informational privacy are protected primarily by property, tort and Fourth Amendment law).

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 couples' 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 protected married couples' right 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.²²⁶ 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.²²⁷ The intact marriage rule might be thought to protect "marital privacy," in this sense of decisional autonomy.

Non-interference 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.

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 marital rights. Either spouses 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. But why would couples prefer not to have enforceable rights and duties during the marriage?

²²⁶ *Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965).

²²⁷ Gormley, *supra* note 224, at 1404-05, 1412-17.

Law and economics scholars have argued that the intact marriage rule is an efficient majoritarian default rule. Two hypothetically rational spouses would select a rule against legal enforcement of marital rights, because judges would do a poor job of discerning couples' highly contextual marital arrangements, making legal sanctions less efficient than internalized norms, self-help and social sanctions.²²⁸ Feminist scholars have responded that requiring spouses to rely on self-help or social enforcement empowers husbands to fill the vacuum of state power with physical, economic and social power.²²⁹ I address this debate in Section D, but I think the efficiency debate misses the more pervasive challenge to legal enforcement posed by imperfect marital duties.

D. Enforcement of Marital Obligations at Separation and Divorce

The intact marriage rule is part of a sensible legal approach to imperfect marital duties. As I argued in Section III, direct enforcement of marital rights conflicts with spouses' discretion to decide how and when to fulfill their imperfect marital duties and with the subjective commitment that cabins this discretion. These conflicts are especially prominent for claims brought during marriage. The intact marriage rule, by refusing to settle spouses' disagreements about their marital rights, avoids displacing their discretion and commitment during the marriage. However, such state abstention is only one part of a scheme for imperfect rights. The law replaces ongoing enforcement with protection of marital rights at divorce. When spouses separate, they abandon their commitment and its accompanying discretion. The law may use egalitarian defaults to fill in the gaps in their expectations, subject to equitable discretion that tailors rules when the parties' arrangements are clear. This basic structure of marital status – deferred protection and egalitarian dissolution – enables spouses to maintain legal relationships defined by imperfect duties.

The problems for enforcement of marital rights in ongoing relationships were laid out in detail in Section III. The remaining question is how can legal protection after separation avoid these problems.²³⁰ Justifying marital status requires answering two questions. Why does separation mark a categorical divide for legal protection, and why are equitable or egalitarian divorce remedies appropriate although they still impose norms on couples?

²²⁸ Scott & Scott, *supra* note 162; Levmore, *supra* note 32, at 226.

²²⁹ Case, *supra* note 28, at 227.

²³⁰ I refer to separation rather than divorce deliberately. 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. See Jeremy Waldron, *The Need for Rights*, 11 HARV. J.L. & PUB. POL'Y 625, 631-35 (1988).

1. Why separation marks 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 the relationship continues. To fully 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 duty of fidelity and domestic support and weakens the duty of emotional support, but separation triggers the duty of financial support. In addition, the full theory would need to explain how these conditional marital duties interact with 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 spouses' understanding. 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 their ability 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 the motivation plays a decisive role in identifying sufficient performance. Whether an outside attachment is inconsistent with marital fidelity is a highly contextual judgment, admitting of few if any general rules. One can say little more than 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.

Separation removes the two principled 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 enforcing only explicit agreements. 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 post-separation 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 (non-vague instances) while maintaining the relationship. After the separation, of course, this conceptual tension no longer exists.

2. *What 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. 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.²³¹ 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 give effect to 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.²³² 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 the imperfect marital duties, but in the divorce context, neither spouse's disputed understanding of their relationship can be controlling. Equitable distribution rules entrust judges to look at the relationship as a whole and determine

²³¹ 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. Penelope Bryan, *Reasking the Woman Question at Divorce*, 75 CHI. KENT L. REV. 713 (2000). See generally Fineman, *supra* note 39. Insofar as the default rules are not fully egalitarian, that suggests an argument for revising those laws.

²³² In a sense, "equitable" is a deliberate fudge. The consensus on "equitable distributions" is an instance of what Cass Sunstein calls an "incompletely theorized agreement," because the principle is under-specified and because it is a mid-level principle without agreement about what justifies it or how to apply it in particular cases. *Incompletely Theorized Arguments*, 108 Harv. L. Rev. 1733, 1739 (1995).

each spouses' intimate duties. Typical statutes list eight to ten relevant factors, including various dimensions of need, the parties' contributions, and their marital standard of living. The statutes rarely explain, however, what weight judges should give to each factor or how they interact. They encourage judges to view the couple's relationship as a whole, rather than isolate specific transactions. In short, equitable discretion gives courts wide discretion to try to discern how the parties' have allocated their respective imperfect obligations, both now and in the future.²³³

Despite equitable discretion, the tendency is toward equal divisions.²³⁴ What justifies using egalitarian default rules? One cynical answer is simply 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. It can justifiably assume that its citizens enter, maintain and leave marriage as equals. During marriage, the state suspends the ordinary private law rules that ensure formal equality between citizens, 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. Accordingly, the state's egalitarian default rules need not be justified as a way to encourage an egalitarian or a partnership conception of marriage (of course, such rationales causally factored in these decisions).²³⁵ 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 their 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

²³³ A full defense equitable discretion at divorce must respond to the likelihood that judicial decisions will reflect judicial biases more than the parties' relationship. Stark, *supra* note 114, at 1503.

²³⁴ See *supra* § I.A.1.c. This argument does not differentiate among theories about what makes divorce "egalitarian", either as an abstract aim (whether to seek outcome or formal equality) or for particular rules (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.

²³⁵ See, e.g., Frantz & Dagan, *supra* note 44, at 95-96.

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, or 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, however, 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 rights that correlate with imperfect duties that leave intimates significant discretion regarding the manner, time and occasions for performance. By exercising that 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 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. The state's dissolution norms can be guided by the same reasons it defers 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 these egalitarian default norms to the parties' relationship.

VI. OBJECTIONS TO THE INTACT MARRIAGE RULE

While I cannot offer a full defense of the intact marriage rule, I want to forestall two common objections. The first rests on what I regard as a misunderstanding, so I address it quickly. The second requires more attention.

First, aspects of my argument sound similar to the ideology of marital privacy used to rationalize legal rules that oppress women. While my argument has some resemblance to historical marital privacy doctrines, it is conceptually and normatively distinct. Nothing I have said assumes, as traditionalists claim, that marriage has necessary or natural norms or that marriage's norms are or should be immune from legal influence. While I have argued that marital status cre-

ates leeway for spouses to define their marriage, I have taken pains to emphasize that marriage is not a “law-free space.” This space is sustained by the political decision not to subject intimate rights to ordinary private law. Moreover, my argument that the state should refrain from enforcing marital rights does not apply to rights that spouses have against all citizens, such as a right of bodily integrity.

That said, I have argued that marriage laws reflect a typical feature of intimate relationships: namely, that they involve imperfect duties. I offered no theory to explain why intimate norms are often imperfect duties; instead, I drew this assumption from a survey of typical intimate norms. My intuitions on this score might be wrong. Perhaps many people structure their intimate relationships using perfect duties. For those relationships, my argument for the intact marriage rule and equitable divorce do not apply. So it goes with assumptions. In a similar vein, one might object that this assumption simply postpones the deeper question of whether intimate relationships defined by imperfect duties are valuable. We could reduce our factual, moral and legal vulnerability by entering less comprehensive relationships with more determinate content.²³⁶ On the other hand, we might lose valuable forms of life. This debate about the value of intimate relationships is beyond the scope of this Article. This Article assumes only that individuals currently enter intimate relationships characterized by pervasively imperfect obligations, and their obligations affect their existing legal rights.

Second, one might argue that the intact marriage rule creates unfair marital incentives that reinforce gender inequality. I have encountered two versions of this argument. The first, more general objection is that the intact marriage rule places an unfair burden on the injured spouse. The victim, usually cast as a wife, must choose between relinquishing her marital rights to retain the marriage and vindicating her marital rights by abandoning it. In contrast, the offending husband may continue violating his wife’s marital rights and maintain the benefits of marriage.²³⁷ Despite its initial plausibility, the force of this argument relies on an incomplete picture of spouses’ incentives. Whether it is fair to deny disaffected spouses legal enforcement cannot be evaluated entirely from an entirely *ex post* perspective.

Elizabeth Scott and Robert Scott have offered a persuasive response to this objection.²³⁸ Legal and non-legal incentives can be substitutes, and a rational choice between them depends on

²³⁶ Some theorists have begun considering the difficult question of whether to encourage unbundling of intimate relationships. Brake, *MINIMIZING MARRIAGE*, *supra* note 114; James Herbie DiFonzo, *Unbundling Marriage*, 32 *HOFSTRA L. REV.* 31 (2003).

²³⁷ Case, *supra* note 28, at 250-255.

²³⁸ Scott & Scott, *supra* note 162, at 1284-94.

an *ex ante* assessment of their relative efficiency to encourage cooperative marital behavior. Spouses have three extra-legal mechanisms to incentivize cooperation: internalized norms, self-help and social sanctions.²³⁹ Spouses internalize moral norms about caring, promising and fairness, so that guilt and shame provide incentives for cooperative marital behavior.²⁴⁰ Spouses supplement these “internal” motivations with self-help means to reward cooperation and punish defection. Assuming rational actors, a pattern of reciprocal cooperation between spouses should lead to equilibrium at a set of “highly contextualized and precise” rules to distribute benefits and burdens of marriage to maximize the couple’s cooperative surplus.²⁴¹ Last, because moral motives and cooperative incentives cannot override all temptations, spouses rely on social enforcement.²⁴² 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.²⁴³ In some cases, couples may use pastors or psychologists for informal adjudication through counseling and mediation.²⁴⁴

Whether couples should also want enforceable rights during marriage depends on whether such “formal sanctions would provide an efficient substitute for, or a complement to, informal normative sanctions.”²⁴⁵ Scott and Scott argue that because a couples’ cooperative equilibrium depends on their own highly specific pattern of cooperation, defection and retaliation, a third party is unlikely to adjudicate their disputes accurately or efficiently. Moreover, “legal adjudication is structured as a single iteration zero-sum game,” which leads parties to adopt an adversarial posture in conflicts with the “harmony, reciprocity and solidarity” needed for cooperative relationships.²⁴⁶ They conclude that a rational couple would choose not to permit “intramarital” legal enforcement because it would provide few additional incentives to cooperation.

This more complete story responds to the general objection, but opens the door to a more targeted feminist criticism. Mary Anne Case has argued that the lack of legal enforcement fosters a gendered division of labor.²⁴⁷ Gendered relationships remain the social norm, so couples with

²³⁹ 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 162).

²⁴⁰ *Id.* at 268.

²⁴¹ Scott & Scott, *supra* note 162, at 1284-87.

²⁴² *Id.* at 1288, 1293; Pollak, *supra* note 239, at 269.

²⁴³ Scott & Scott, *supra* note 162, at 1289.

²⁴⁴ Levmore, *supra* note 32, at 226; Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453, 464 (1998).

²⁴⁵ Scott & Scott, *supra* note 162, at 1294.

²⁴⁶ *Id.*

²⁴⁷ Case, *supra* note 28, at 254-55.

egalitarian relationships have weaker moral and social incentives. A husband who fails to live up to his equal bargain will feel guilty for breaking his promise and shameful for failing to fulfill his ideal, but he can assuage his conscience with the thought that he did more than most men. Moreover, the community is unlikely to reinforce his guilt. Social authorities such as pastors, counselors, family and friends are more likely to substitute typical gendered norms for the couple's unconventional egalitarian expectations. This is likely as a statistical matter and likely because men have an incentive to preserve gendered norms. Judges, in contrast, are more likely to enforce egalitarian relationships. Unlike pastors or counselors, judges have internalized legal norms that demand enforcement of agreements and non-discrimination. Moreover, appellate review can reinforce conformity to these ideals. Permitting legal enforcement of marital rights during marriage, Case argues, would help empower spouses who want to adopt egalitarian relationships.

Enforcement of intramarital bargains, however, would be a double-edged sword. While current law does not enforce egalitarian agreements during marriage, it does impose default rules at divorce that tend towards equal treatment. Divorce law does not formally discriminate, and its rules can be reformed to support more substantive equality without sacrificing formal equality or autonomy. For instance, divorce law could help alleviate the gendered division of labor by providing greater protection for caretaking spouses' reliance interests.²⁴⁸ As I argued above, divorce law has legitimate reasons to follow egalitarian defaults irrespective of the couple's relationship. In contrast, spouses could enforce ongoing marital obligations, family law must face a stark choice between equality and autonomy. Many couples live in traditional, gendered relationships, likely more than egalitarian ones.²⁴⁹ If the law enforces marital rights during the relationship, it would either lend state coercion to enforce unequal marital arrangements or bluntly impose egalitarian default rules contrary to the couple's understanding. This choice is another instance of the tradeoff repeated throughout this Article. To enforce intimate rights, the state must interpose its vision of the couple's obligations. The pairing of deferred rights with equitable remedies provides a way to manage this tension between citizens' right to define their intimate obligations and intimates' right to equality as citizens.

VII. CONCLUSION

²⁴⁸ Admittedly, this arrangement places part of the burden for the gender gap on men who are more likely to be in the work force, but this seems fair since men benefit from the gender gap both in absolute wage and through the caretaker spouse's choice to forego paid labor.

²⁴⁹ Case acknowledges this problem but downplays it, arguing that unequal agreements will likely receive cool reception with judges. *Supra* note 28, 245-50.

The state cannot abolish marriage, in the sense of abolishing status-based norms. Private law tailors our legal rights to the nature of our relationships. If a state abolished status licenses, private law would either develop intimacy categories or create a systemic exception for “intimate relationships.” Tort, contract and equity incorporate status distinctions because intimacy carries special duties, duties that presumptively affect legal rights. However, the incorporation of intimacy into private law presents a recurring problem: how can officials enforce contextual and indeterminate intimate rights without imposing social and moral judgment on intimate parties?

A closer look at intimate duties explains both why legal enforcement vacillates and why it cannot ultimately avoid status norms. Many intimate norms are imperfect duties that leave intimates wide discretion to decide how and when to fulfill them. This plays havoc with legal enforcement, especially during a relationship, because officials must supplant the intimates’ discretion to specify their intimate duties and their commitment to the relationship. The only way for legal officials to specify a couple’s imperfect duties is by categorizing their relationship and imposing moral or social norms.

Marital status offers a reasonable resolution of this dilemma. By deferring intimate rights until the relationship ends, the state avoids displacing couples’ discretion and imposing on their commitment. If they separate, they abandon this commitment and lose this discretion, so the state can step back in and give officials discretion to protect imperfect intimate rights. The state can legitimately use egalitarian default rules to protect marital rights, not because egalitarian rules envision a particular theory of a good marriage, but because egalitarian rules are an appropriate way to ensure the equality of citizens when the state permits them to defer the legal protection of their rights. Marriage—or some status with marriage’s tripartite structure—allows couples to adopt relationships of imperfect legal duties.