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A Uniform Domestic Partnership Act: Marrying Business Partnership and Family Law

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A UNIFORM DOMESTIC PARTNERSHIP ACT: MARRYING BUSINESS PARTNERSHIP AND FAMILY LAW

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TABLE OF CONTENTS

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I. INTRODUCTION

Something old, something new
Something borrowed, something blue
And a silver sixpence in her shoe.[1]

This old English rhyme describes what a bride should wear on her wedding day and helps illustrate marriage's rich tradition and history. In recent decades, Americans have argued about who may marry and what marriage actually signifies—or should signify—in both legal and philosophical terms.[2] For almost as long, the rising divorce rate and increasing numbers of single parent families have fed concerns about the present viability of marriage as an institution that promotes domestic stability and economic security.[3]

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[1] These are the items that a bride takes with her to her wedding to bring good luck. Ask Yahoo!, http://ask.yahoo.com/20031027.html (last visited Feb. 15, 2007). We omit the sixpence from the following analysis, as the United Kingdom abandoned the coin in 1971. Chard Coins, The Story of the Sixpence, http://www.24carat.co.uk/sixpencesstoryframe.html (last visited Feb. 15, 2007). Commentators use the other familiar terms from this rhyme often in their discussions of marriage. *See, e.g.*, STEPHANIE COONTZ, MARRIAGE, A HISTORY 70, 123 (2005) (utilizing this rhyme to discuss central role of marriage in Western Europe).

[2] *See, e.g.*, Turner v. Safley, 482 U.S. 78, 94 (1987) (holding that right of inmate to marry is one protected by Constitution); Zablocki v. Redhail, 434 U.S. 374, 388 (1978) (finding that right to marry is of fundamental importance and cannot be interfered with significantly); Loving v. Virginia, 388 U.S. 1, 11 (1967) (holding that individual has choice of whether to marry someone of another race); *see also* Linda C. McClain, *Intimate Affiliation and Democracy: Beyond Marriage?*, 32 HOFSTRA L. REV. 379, 387 (2003) (illustrating role of sex stereotypes in institution of marriage); Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081, 2081 (2005) (discussing content and scope of right to marry). Of course, such discussions have even earlier roots. *See, e.g.*, BERTRAND RUSSELL, MARRIAGE AND MORALS 156–67 (1929) (advocating "trial" marriage).

[3] Statistics regarding the divorce rate vary. The U.S. Census Bureau reported that in 2004 there were 3.7 divorces for every 7.4 marriages. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2006, at 93 tbl. 117 (2005), *available at* http://www.census.gov/prod/2005pubs/06statab/vitstat.pdf. In 2002, the National Center for Health Statistics reported that 43% of first marriages end in separation or divorce. ROSE M. KRIEDER & JASON M. FIELDS, U.S. CENSUS BUREAU, NUMBER, TIMING, AND DURATION OF MARRIAGES AND DIVORCES: 1996, at 17 n.17 (2002), *available at* http://www.census.gov/prod/2002pubs/p70-80.pdf. A year earlier, it reported that in 1995, 33% of first marriages ended within ten years. MATTHEW D. BRAMLETT & WILLIAM D. MARSHER, NAT'L CTR. FOR HEALTH STATISTICS, DEPARTMENT OF HEALTH AND HUMAN SERVICES ADVANCE DATA NO. 323—FIRST MARRIAGE DISSOLUTION, DIVORCE, AND REMARRIAGE: UNITED STATES 5 (2001), *available at* http://www.cdc.gov/nchs/data/ad/ad323.pdf. One website declares that despite the popular belief that approximately 50% of marriages end in divorce, the U.S. divorce rate has declined to its current level of 38%. Americans for Divorce Reform, Divorce Rates, http://www.

Last year, the U.S. Census Bureau reported that almost 50% of household heads were not married in 2004[4]—up from almost 45% in 1990.[5] If this trend continues, unmarried heads of households will soon outnumber those who are married.[6] This trend has already become a reality in subsets of the population. For example, in African American families, unmarried heads of households have been the majority since 2000.[7] Although the National Center for Health Statistics reports that divorce rates are high, unmarried couples who cohabitate have an even lower success rate.[8] While one-third or more marriages will end in divorce within ten years, nearly 90% of relationships of unmarried couples who cohabitate will not last that long.[9]

Couples who marry do so for a variety of conscious and unconscious goals: (1) to demonstrate love and commitment, both to each other and in the eyes of the community; (2) to secure the parentage and welfare of their children; (3) to create an efficient and unified domestic economic enterprise; and (4) to obtain legal rights

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divorcereform.org/rates.html (last visited Feb. 15, 2007).

[4] The actual figure was 49.8%. U.S. Census Bureau, 2004 American Community Survey, General Demographic Characteristics: 2004, http://factfinder.census.gov/ (follow American Community Survey "get data" hyperlink; then follow 2004 American Community Survey "Data Profiles" hyperlink; then follow "Show Result" button) (last visited Feb. 15, 2007).

[5] The actual figure was 44.9%. U.S. Census Bureau, Household and Family Characteristics: 1990, http://factfinder.census.gov/ (follow Decennial Census "get data" hyperlink; follow 1990 Census tab; follow 1990 Summary Tape file 1 (STF1)-100-Percent data "Geographic Comparison" hyperlink; follow "Show Result" button) (last visited Feb. 15, 2007).

[6] Sam Roberts, *It's Official to Be Married Means to Be Outnumbered*, N.Y. TIMES, Oct. 15, 2006, § 1, at 22.

[7] Press Release, U.S. Census Bureau, Census Bureau Releases Update on Country's African American Population (Feb. 22, 2001), *available at* http://www.census.gov/Press-Release/www/releases/archives/income_wealth/000403.html (reporting that based on estimates for year 2000 only 48% of African American families were headed by married couples).

[8] Press Release, Nat'l Ctr. for Health Statistics, New Report Sheds Light on Trends and Patterns in Marriage, Divorce, and Cohabitation (July 24, 2002), *available at* http://www.cdc.gov/nchs/pressroom/02news/div_mar_cohab.htm; *see also* Marsha Garrison, *Reviving Marriage: Should We? Could We?* 20 (Brooklyn Law Sch., Legal Studies Paper No. 43, 2005), *available at* http://ssrn.com/abstract=829825 (arguing that cohabitation "represents only a station-stop on the way to either marriage or separation").

[9] *See* Garrison, *supra* note 8 (stating that "only about 10% of cohabitants who do not marry are still together five years later"). For an informative discussion of cohabitation and its affects on children, see Robin Fretwell Wilson, *Evaluating Marriage: Does Marriage Matter to the Nurturing of Children*, 42 SAN DIEGO L. REV. 847, 868–69 (2005).

and benefits based on their marital status.[10] Given that these marital goals are generally laudable,[11] but also acknowledging that neither marriage nor cohabitation actually facilitates these goals for vast numbers of Americans,[12] one wonders whether another form of private ordering would better achieve these goals.

This Article explores a domestic partnership model based on business partnership law as a vehicle to better serve modern couples and their families in private relationship ordering.[13] It proposes a

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[10] Turner v. Safley, 482 U.S. 78, 95–96 (1987); *see also* EVAN WOLFSON, WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE'S RIGHT TO MARRY 4–15 (2004) (discussing various goals of marital partners). For a discussion of state and federal government support of marriage and married people, see Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129, 141, 146, 149, 180 (2003). For two controversial discussions of the advantages of marriage, see generally LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY (2000) and JONATHAN RAUCH, GAY MARRIAGE: WHY IT IS GOOD FOR GAYS, STRAIGHTS, AND GOOD FOR AMERICA (2004). In 1997, Congress's General Accounting Office first cataloged the laws associated with marriage. It found 1,049 such associated laws. Letter from Barry R. Bedrick, Assoc. Gen. Counsel, Gen. Accounting Office, to Henry J. Hyde, Chairman, Comm. on the Judiciary, House of Representatives, *GAO / OGC-97-16 Defense of Marriage Act* (1997), *available at* http://www.gao.gov/archive/1997/og97016.pdf. An updated report from 2003 found 1,138 laws conferring rights or benefits associated with marriage. Letter from Dayna K. Shah, Ass. Gen. Counsel, Gen. Accounting Office, to Sen. Bill Frist, Senate Majority Leader, U.S. Senate, *GAO-04-353R Defense of Marriage Act: Update to Prior Report* (2004), *available at* http://www.gao.gov/new.items/d04353r.pdf.

[11] Citing statistics that children of low income married families are more financially secure and emotionally healthy, both Democrats and Republicans have favored plans to increase marriage among low income persons. *Bush May Propose Marriage Push*, CBS NEWS, Jan. 14, 2004, *available at* http://www.cbsnews.com/stories/2004/01/14/politics/main593122.shtml. In 2004, President Bush announced a 1.5 billion dollar initiative to that end. Robert Pear & David D. Kirkpatrick, *Bush Plans 1.5 Billion Drive for Promotion of Marriage*, N.Y. TIMES, Jan. 14, 2004, at A1; *see also* U.S. Dep't of Health and Human Servs. Admin. for Children and Families, ACF Healthy Marriage Initiative Mission Statement (2005) (discussing purpose of Healthy Marriage Initiative), http://www.acf.hhs.gov/healthymarriage/about/mission.html.

[12] *See infra* notes 55–144 and accompanying text.

[13] This proposal differs greatly from the ALI adoption and discussion of domestic partnership. *Cf.* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS 30–31 (2002) [hereinafter PRINCIPLES] (addressing domestic partnerships that result from non-marital cohabitation and related agreements that track marriage model). The ALI limited its review by explaining, "This Chapter [Domestic Partners] governs financial claims between parties to a non-marital relationship. It addresses the legal obligations that domestic partners, as defined for purposes of this Chapter, have toward one another *at the dissolution of their relationship*." *Id.* at 908 (emphasis added). In contrast, our proposal explores partnership formation and ex ante decision-making, as well as dissolution. Additionally, it allows for the intentional formation of domestic partnerships by couples who may not necessarily share a common residence. *Cf. id.* at 916 ("For the purposes of defining relationships to which this Chapter applies, domestic partners are two persons of the same

domestic partnership substitute for civil marriage and recommends that marriage continue—absent legal significance—under the exclusive control of religious institutions.[14] To further this argument, Part II—Something Old, reviews traditional reasons for marriage and explains that modern couples expect marriage to provide something other than couples anticipated historically.[15] In Part III—Something Blue, the Article details how modern marriage fails to serve many families.[16] In particular, many couples, both with and without children, cannot marry under contemporary law. Even if couples can marry, they are often ill served by the current marital structure. Specifically, although state marriage requirements are usually minimal, couples are often wholly ignorant of what their marital rights and obligations involve.[17] Moreover, many couples may not give serious thought to their goals and expectations,[18] or may fail to consider potential negative outcomes, such as dissolution.[19] If dissolution does occur, couples must then commit limited family assets to mediating or litigating the details

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or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as a couple.").

[14] Although marriage would no longer have legal significance, it might well continue to have moral, emotional, and communicative significance.

[15] *See infra* notes 27–54 and accompanying text.

[16] *See infra* notes 55–144 and accompanying text.

[17] *See* The Bride to Be Channel, Marriage Law Requirements by State, http://www.1800bride2b.com/articles/marriagelaws_chart.htm (last visited Feb. 15, 2007) (providing general license requirements by state).

[18] One recent high profile example of this was Britney Spears's "spur of the moment" marriage at a chapel in Las Vegas and subsequent annulment. *Britney Spears Marriage Annulled*, CNN, Jan. 5, 2004, http://www.cnn.com/2004/SHOWBIZ/Music/01/05/britney.spears.wedding.ap/. Many couples fail to discuss critical relationship issues before marriage. Eric V. Copage, *Marriage Is Not Built On Surprises*, N.Y. TIMES, Dec. 17, 2006, § 9, at 20; *Questions Couples Should Ask (Or With They Had) Before Marrying*, N.Y. TIMES, Dec. 17, 2006. Eric W. Copage, *On Bended Knee, With Questionnaire in Hand*, N.Y. TIMES, Jan. 14, 2007, § 9, at 8 (listing questions readers suggested would be spouses should ask each others).

[19] *See, e.g.*, Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439, 443 (1993) (describing survey results in which marriage license applicants had idealistic predictions about their own chances of getting divorced, even while accurately estimating average divorce rates); Ying-Ching Lin & Priya Raghubir, *Gender Differences in Unrealistic Optimism About Marriage and Divorce: Are Men More Optimistic and Women More Realistic?*, 31 PERSONALITY & SOC. PSYCHOL. BULL. 198, 200 (2005) (reporting study showing that both men and women are unrealistically optimistic about their chances of having a happy marriage). We thank Dr. Mollyann Brodie of the Henry J. Kaiser Family Foundation for her research assistance concerning this issue.

of divorce.[20] To make matters worse, many divorced families face economic hardships because of insufficient or delinquent financial maintenance.[21]

To address these concerns over the current state of marriage, the remaining sections of this Article introduce the Uniform Domestic Partnership Act. While addressing every eventuality remains beyond the scope of this Article, these sections and appendices provide a general overview of the proposal.[22] Specifically, Part IV undertakes a brief review of applicable traditional business partnership law[23] and explains how drafters might modify business partnership law to fit and support domestic and familial enterprises. Part V then describes how this new law would work (1) to secure the parentage and welfare of children (conceived of as analogous to limited partners), (2) to create an efficient and unified domestic economic enterprise, (3) to obtain legal rights and benefits based on a partnership status, and (4) to reduce the financial costs and mutual acrimony often associated with divorce.[24] APPENDIX A presents a partnership application that could serve to guide couples into one of four types of domestic partnership: (1) the enduring domestic partnership, (2) the provisional domestic partnership, (3) the filial domestic partnership, and (4) the caregiving domestic

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[20] *See* Jeffrey Evans Stake, *Mandatory Planning for Divorce*, 45 VAND. L. REV. 397, 418 (1992) (advocating pre- and antenuptials to reduce costs of divorce).

[21] Child support law expert, Drew Swank, reported:

> As of 1998, there were approximately 14 million parents in the United States who had custody of 22.9 million children who were eligible to receive child support. Only fifty-six percent of these custodial parents, however, had some type of child support order or agreement. Of these, fifty-nine percent received either none or only part of the ordered or agreed upon amount of child support. All told, $29.1 billion in child support was owed in 1997, but only $17.1 billion—fifty-nine percent—was paid. Thirty-two percent of custodial parents received no child support at all in 1997. By fiscal year 2000, the amount of child support paid dropped to fifty-six percent of what was owed.

Drew A. Swank, *The National Child Non-Support Epidemic*, 2003 MICH. ST. L. REV. 357, 358–59 (2003). *See* HERBERT JACOB, SILENT REVOLUTION: THE TRANSFORMATION OF DIVORCE LAW IN THE UNITED STATES 127–44 (1988) (discussing evolution of child custody in United States).

[22] We intend this Article to be the first in a series that explores the various aspects of our Uniform Domestic Partnership Act (UDPA).

[23] *See infra* notes 173–85 and accompanying text.

[24] *See infra* notes 279–356 and accompanying text.

partnership.[25] APPENDIX B provides sample provisions of the Uniform Domestic Partnership Act.[26]

II. SOMETHING OLD—MARRIAGE

> And what of Marriage, master? . . . .
> Love one another, but make not a bond of love.[27]

Today in America, most couples intend their marriage to be "a bond of love." They marry to express their love and commitment.[28] This concept of companionate marriage, however, is a relatively new phenomenon.[29]

> Until the late eighteenth century, most societies around the world saw marriage as far too vital an economic and political institution to be left entirely to the free choice of the two individuals involved, especially if they were going to base their decision on something as unreasoning and transitory as love.[30]

Before the late eighteenth century, marriage typically only served one or more of three goals: (1) to consolidate wealth and resources, (2) to forge political alliances, and (3) to consummate peace treaties.[31] Marriage also confirmed domestic roles: giving men legal and normative authority over women and children, as well as identifying which children could claim their parents' property.[32]

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[25] *See infra* APPENDIX A, § 2, at 213.

[26] *See infra* APPENDIX B, at 222–29. A modified version of this proposal is currently being considered by Indiana legislators for presentation in committee.

[27] Kahlil Gibran, *On Marriage*, *in* THE PROPHET 15 (1923). The passage ends, "Give your hearts, but not into each other's keeping./For only the hand of Life can contain your hearts./And stand together but not too near together:/For the pillars of the temple stand apart,/And the oak tree and the cypress grow not in each other's shadow." *Id.* at 16.

[28] LAWRENCE M. FRIEDMAN, PRIVATE LIVES: FAMILIES, INDIVIDUALS, AND THE LAW 7 (2004) (explaining that modern marriage "is supposed to be, above all, a matter of partnership and love").

[29] *See* COONTZ, *supra* note 1, at 5–7 (discussing evolution of love as reason for marriage).

[30] *Id.* at 5.

[31] *Id.* at 6.

[32] *Id.* at 7.

Marriage was not originally a Christian religious institution.[33] During its first thousand years, the Catholic Church did not consider marriage a sacrament and weddings were not celebrated in churches.[34] Only beginning in the ninth century did the Church periodically enforce rules against incestuous marriages between monarchs and nobles.[35] The Church's desire to prevent the consolidation of secular political power and wealth, rather than its disapproval of incest, however, actually prompted this new enforcement effort.[36] Not until 1215 did the Fourth Lateran Council declare that weddings had to take place in a church.[37] Common law marriage developed from the voiced intent of individuals—typically poor persons—to marry.[38] These individuals needed neither witnesses nor ceremony to create their unions.[39]

Consistent with the institution's secular roots, American law has never recognized marriage as a religious sacrament but only as a "civil contract."[40] Moreover, the colonies did not inherit into their system of laws Lord Hardwicke's Marriage Act of 1753, which formalized the requirements for a valid marriage in England and mandated many functions typically performed by (or in) the Church of England.[41] During colonial times, religious leaders who

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[33] *See* WOLFSON, *supra* note 10, at 7 (noting that Catholic Church did not concern itself with marriage for one thousand years).

[34] *Id.*; *see also* COONTZ, *supra* note 1, at 104 (discussing Church's lack of concern for marriage in lower class during Middle Ages).

[35] Barbara Kantrowitz, *Couples: State of Our Unions*, NEWSWEEK, Mar. 1, 2004, at 44, 44 (quoting Stephanie Coontz); *see also* COONTZ, *supra* note 1, at 88–103 (discussing aristocratic marriages in medieval Europe).

[36] *See* Kantrowitz, *supra* note 35, at 44 (discussing evolution of marriage from ninth century).

[37] *See* COONTZ, *supra* note 1, at 106–07 (stating Fourth Lateran Council's requirements for valid marriage). Coontz reported that until the twelfth century, the Church deemed a marriage "valid if entered into by mutual consent and then sealed by sexual intercourse." *Id.* at 106. In later years, consent became more important to the Church than consummation in validating marriage. *See* NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 10–11 (2000) (discussing formation of marital union).

[38] *See* COONTZ, *supra* note 1, at 104–06 (tracing marriage history of common, non-noble people).

[39] *See* FRIEDMAN, *supra* note 28, at 18 (discussing common law marriage as entered into by agreement).

[40] *Id.* at 17–18; *see also* U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion.").

[41] *See* FRIEDMAN, *supra* note 28, at 18–19 (discussing English statute barring informal marriages).

performed marriages, as authorized under local law, merely witnessed the commitment and verified the satisfaction of civil marriage license requirements.[42] Religious leaders continue to do the same today.[43]

Beginning in the seventeenth and eighteenth centuries, however, the institution of marriage changed in fundamental ways. In her recent book, *Marriage, a History: From Obedience to Intimacy or How Love Conquered Marriage*, Stephanie Coontz explains:

> But only in the seventeenth century did a series of political, economic, and cultural changes in Europe begin to erode the older functions of marriage, encouraging individuals to choose their mates on the basis of personal affection and allowing couples to challenge the right of outsiders to intrude upon their lives. And not until the late eighteenth century, and then only in Western Europe and North America, did the notion of free choice and marriage for love triumph as a cultural ideal.[44]

Coontz's study confirms that marriage was not primarily an expression of love and commitment, as it is today, until the late eighteenth century.[45] Her review demonstrates that for hundreds of years marriage served only the last three functions enumerated in the introduction: (1) to secure the parentage and welfare of children, (2) to create an efficient and unified domestic economic

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[42] *See* WOLFSON, *supra* note 10, at 5 (discounting spiritual significance of American weddings); *see, e.g.*, IND. CODE ANN. § 31-11-6-1 (West 2006) (defining who is legally allowed to solemnize marriage).

[43] *See, e.g.*, IND. CODE ANN. §§ 31-11-4-1 to -19 (West 2006) (setting forth marriage licenses and certificates requirements for Indiana).

[44] COONTZ, *supra* note 1, at 7.

[45] E.J. Graff, Senior Researcher at the Brandeis Institute for Investigative Journalism, concluded that "traditional" marriage resulted from common financial interests. *See* E.J. GRAFF, WHAT IS MARRIAGE FOR? 2 (2004) (discussing impact of money on marriage). She found that, as the American economy changed, "modern" marriage was born. *Id.* at 3. By 1850, when individuals could support themselves apart from their families of origin and marital partners, individuals focused more on "matters of the heart when choosing spouses." *Id.*

enterprise, and (3) to obtain legal rights and benefits based on marital status.[46]

Moreover, Coontz ably shows that love conquered marriage and, arguably, so did the church.[47] Even President Bush's official website proclaims, "Marriage is a sacred institution, and its protection is essential to the continued strength of our society."[48] If you ask anyone why he or she married, the spontaneous response will probably evidence marriage's expressive function of love and commitment—not its economic function to secure inheritance rights for children or to obtain joint filing status for a tax return.[49] As a 2004 *Newsweek* survey revealed, 46%—almost half of Americans polled—think marriage is primarily a "religious matter" rather than a "legal matter."[50]

Given that marriage and its associated law did not originally have the expressive and bonding function that usually motivates modern couples, one must ask whether this civil contract can adequately satisfy anticipated emotional and spiritual needs. Can the law even foster emotional and religious bonds or does it simply provide the structural framework within which bonds may grow or wither? Some would argue that the U.S. Constitution prohibits the endorsement of marriage because it has become primarily a "religious matter,"[51] and therefore its "establishment" violates the First Amendment. Additionally, family law scholar Ira Ellman suggests:

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[46] *See* COONTZ, *supra* note 1, at 34–48 (discussing theories of origin for marriage).

[47] *See id.* at 5 (discussing emergence of love-based marriage).

[48] Proclamation by George W. Bush, President, U.S., Marriage Protection Week, 2003 (Oct. 3, 2003), http://www.whitehouse.gov/news/releases/2003/10/20031003-12.html.

[49] *See, e.g.*, Letter from Barry R. Bedrick to Henry J. Hyde, *supra* note 10, Enclosure 1, at 3–4 (detailing numerous tax consequences associated with marriage).

[50] Karl Agne, An Analysis of Public Polling-Week Ending February 27, 2004, http://72.14.203.104/search?q=cache:nns4QMf85akJ:www.democracycorps.com/weekly/Public_Polling_Report_March_1_2004.rtf+newsweek+poll+feb+20+marriage+%22legal+matter%22&hl=en&gl=us&ct=clnk&cd=1; Brian Braiker, A Tighter Race, NEWSWEEK, Feb. 21, 2004, http://www.msnbc.msn.com/id/4333712/.

[51] U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion."); *see, e.g.*, RAUCH, *supra* note 10, at 40–54 (arguing that modern marriage mandates secular doctrine); Joseph William Singer, *Same Sex Marriage, Full Faith and Credit and the Evasion of Obligation*, 1 STAN. J. C.R. & C.L. 1, 9, 36 (2005) (suggesting that Free Exercise Clause may require states to permit people to marry in either religious ceremonies or in nonreligious commitment ceremonies).

> Most of what we do for our parents, our children, our spouses, and our siblings is not governed by law. Yet these nonlegal obligations to our families are powerful. We may feel they constrain us far more than do our legal obligations. If that is the case, who needs law? What can it add? . . . The short answer is straightforward: for families, . . . we sometimes want to buttress social norms that have become too weak to command compliance. And so we substitute legal commands for the faded ties of affection. Yet we surely know that law cannot really replace affection. It can, at best, sustain only a few of the functions normally maintained by the intact family.[52]

Suppose that Ellman is correct: What functions of marriage can sustain the institution if law cannot regulate affection? The answer must be only those functions marriage served for thousands of years before it became an expression of religious and companionate association. Even if Ellman is wrong and the law can regulate affection, how often does law serve as a gentle, subtle tool that fosters warm, nurturing relationships?[53] By corollary, how has the law failed what the Bible proclaims we should "let not man put asunder"?[54]

III. SOMETHING BLUE—PROBLEMS WITH MARRIAGE

In her historiography of marriage, Stephanie Coontz describes how modern marriage, prompted by love and influenced by dramatic social change, led to new issues in the nineteenth and twentieth centuries. She explains:

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[52] Ira Ellman, *Why Making Family Law Is Hard*, 35 ARIZ. ST. L.J. 699, 700 (2003).

[53] For an interesting discussion of whether marriage affects the relationships of fathers and their children, see Wilson, *supra* note 9, at 864–79 (citing Kimberly A. Yuracko, *Does Marriage Make People Good or Do Good People Marry?*, 42 SAN DIEGO L. REV. 889, 893–94 (2005)).

[54] *Matthew* 19:6.

> No sooner had the ideal of the love match and lifelong intimacy taken hold than people began to demand the right to divorce. No sooner did people agree that families should serve children's needs than they began to find the legal penalties for illegitimacy inhumane. Some people demanded equal rights for women so they could survive economically without having to enter loveless marriages. Others even argued for the decriminalization of homosexual love, on the ground that people should be free to follow their hearts.[55]

In this passage, Coontz notes several examples of how modern marriage often fails to serve many families: unilateral divorce, failure to accept nonmarital children, gender inequality, and the failure to recognize homosexual love.

A. UNILATERAL DIVORCE

The demand for divorce increased in the twentieth century and ultimately led to the elimination of fault as a prerequisite for divorce.[56] As Professors Eric Rasmusen and Jeffrey Stake explain, this evolution affected the terms of dissolution as well as the grounds for divorce.[57] As a consequence, courts awarded less maintenance and granted women fewer privileges.[58] Rasmusen and Stake conclude:

> [T]he legal reforms radically changed the incentives married persons confronted. With no assurance that a marriage would continue and no security for either party in the judicially determined terms of divorce, the parties to a marriage remained nearly as financially insecure after marriage as they had been when single. Spreading

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[55] COONTZ, *supra* note 1, at 8.

[56] For a brief history of no-fault divorce, see CARL E. SCHNEIDER & MARGARET F. BRINIG, AN INVITATION TO FAMILY LAW 348–49 (1995).

[57] Eric Rasmusen & Jeffrey Evans Stake, *Lifting the Veil of Ignorance: Personalizing the Marriage Contract*, 73 IND. L.J. 453, 455–56 (1998).

[58] *Id.* at 457.

> of financial losses within the marital unit could no longer be relied upon when one spouse had the option to bail out of a household in difficulty. Devoting time and energy to producing assets useful to the marriage became riskier. A career became a safer bet for either party. People across the country responded to those new incentives, spending more time at the office and less at home.[59]

From this description of the no-fault divorce revolution, one can anticipate several repercussions on the goals facilitated by marriage.

First, marriage ceases to create an efficient and unified domestic enterprise because spouses can no longer trust that their marriage will sustain them, even if they devote significant energy to it. Each spouse is free to take advantage of the marital investment through a unilateral no-fault divorce. Poverty statistics reveal that divorce correlates closely with financial crisis. In 2001, almost a quarter (23.4%) of children and their single custodial parents lived below the poverty level.[60] While this percentage dropped from 33.3% in 1993, the rate remained four times higher than that for married couples living with related children (6.1%).[61] Moreover, these poverty rates demonstrate gender inequality. Whereas the poverty rate for custodial fathers was 14.7% in 2001, it was 25% for custodial mothers.[62]

Second, if the individuals spend more time at the workplace to insure against potential economic loss resulting from divorce, then arguably they are not demonstrating (or at least are demonstrating less) love and commitment to each other and the marriage.[63] Thus,

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[59] *Id.* at 459 (footnotes omitted).

[60] TIMOTHY S. GRALL, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, CUSTODIAL MOTHERS AND FATHERS AND THEIR CHILD SUPPORT: 2001, at 3 (2003), *available at* http://www.census.gov/prod/2003pubs/p60-225.pdf.

[61] *Id.*

[62] *Id.*

[63] In essence, the adjustment of time at work is a form of agency cost. The more effort that partners expend protecting themselves, the less successful, other things being equal, the partnership. For an example in the business partnership context, see, Nicholas Georgakopoulos, Meinhard v. Salmon *and the Economics of Honor*, 1999 COLUM. BUS. L. REV.

no-fault divorce and its new dissolution terms frustrate two of the four goals of modern marriage.

This no-fault divorce system also thwarts the remaining two marriage goals. The rise in the divorce rate that followed the advent of no-fault divorce obviously thwarts the fourth reason for marriage, the acquisition of legal rights and benefits.[64] Lastly, children also suffer as a result of no-fault divorce. For years, scholars have decried the plight of children and custodians who fall into poverty because of the financial consequences of divorce.[65] Children often suffer in other ways from divorce; they may have more "behavioral, emotional, health, and academic problems than children in intact families."[66] These problems may continue into adulthood. One study based on a meta analysis of other studies involving more than 81,000 individuals concluded that "adults who experienced parental divorce exhibited lower levels of well-being than did adults whose parents were continuously married."[67] Professor Daniel Lichter, an Ohio State sociologist, found that families headed by unwed mothers who marry and divorce also endure higher rates of poverty than

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137–64 (showing how partners ex ante would prefer broad fiduciary duties thereby reducing cost of self-protection measures such as monitoring other partner).

[64] While divorce affects many marital benefits, it does not erase all of them. For example, a father of a child "legitimated" by marriage can still inherit post-divorce from that child who later dies. *See, e.g.*, IND. CODE ANN. § 31-14-7-1 (West 2006) (providing that marriage creates presumption of paternity for child born during marriage); § 29-1-2-1 (authorizing intestate distribution to surviving parents).

[65] *See generally* GRALL, *supra* note 60 (describing poverty rates of custodial parents). It is possible that divorce does not lead to financial crisis but merely correlates with it and that divorced parents might find themselves living below the poverty level had they never married or had they never divorced. Given the loss of the economies of a single household, however, we are willing to assume causation in addition to correlation.

[66] Donna Ruane Morrison & Andrew J. Cherlin, *The Divorce Process and Young Children's Well-Being: A Prospective Analysis*, 57 J. MARRIAGE & FAM. 800, 800 (1995). As with the effect of divorce on finances, although correlation has been established, causation is much less clear. There may also be differences for male and female children. For example, Morrison and Cherlin found little negative effect of divorce on girls once they controlled for prior family characteristics, but found negative effects for boys. *Id.*; *see also* Katherine Shaw Spaht, *For the Sake of the Children: Recapturing the Meaning of Marriage*, 73 NOTRE DAME L. REV. 1547, 1552 (1997–1998) (noting that married mother and father in home result in measurable "physical, emotional, psychological, and economic" benefits to children) (citations omitted).

[67] Paul R. Amato & Bruce Keith, *Parental Divorce and Adult Well-being: A Meta-analysis*, 53 J. MARRIAGE & FAM. 43, 43 (1991) (finding that strongest effects were in "status, psychological adjustment, behavior/conduct, and educational attainment").

families of unwed mothers who never married.[68] Thus, marriage that ends in divorce impacts not only spouses but entire families in numerous ways.[69]

B. FAILURE TO ACCEPT NONMARITAL CHILDREN

Among other past legal injustices, the common law once deemed a child born out of wedlock "filius nullius" (nobody's child).[70] A nonmarital child belonged to no one and could not inherit from either her mother or father.[71] The common law followed a wrathful God, "visiting the iniquity of the fathers upon the children."[72] Marriage protected children from suffering such a terrible legal fate.

Times have since changed in several important ways for nonmarital children. First, on the legal front, any law that discriminates against a nonmarital child faces heightened (intermediate) scrutiny by federal courts.[73] The "statutory classification must be substantially related to an important governmental objective" to survive this review.[74] Addressing this

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[68] Jeff Grabmeier, *Government's Marriage Promotion Policies Likely to Fall Short Without Emphasis on Reducing Unwed Childbearing, Study Suggests*, OHIO ST. RES. NEWS, May 5, 2003, http://researchnews.osu.edu/archive/promarry.htm.

[69] Whether or not parents marry and divorce, the collection of child support remains a huge problem for children and their custodians. In fiscal year 2004, parents owed $28 billion in child support but only about $16.5 billion (59%) was collected and distributed. U.S. DEP'T OF HEALTH & HUMAN SERVICES, CHILD SUPPORT ENFORCEMENT, FY 2004 PRELIMINARY REPORT (2005), http://www.acf.dhhs.gov/programs/cse/pubs/2005/reports/preliminary_report/. Thus, obligors owed but did not pay $11.5 billion (41%). *Id.* Total arrearages reported for all years amounted to $102 billion. *Id.*

[70] Jana Singer, *Marriage, Biology, and Paternity: The Case for Revitalizing the Marital Presumption*, 65 MD. L. REV. 246, 249 (2006).

[71] RALPH C. BRASHIER, INHERITANCE LAW AND THE EVOLVING FAMILY 125 (2004); *see also* Linda Kelly-Hill, *Equal Protection Misapplied: The Politics of Gender and Legitimacy and the Denial of Inheritance* (manuscript at nn.99–107 and accompanying text, on file with the authors).

[72] *Exodus* 20:5; *but see Ezekiel* 18:20 ("The son shall not bear the iniquity of the father, neither shall the father bear the iniquity of the son: the righteousness of the righteous shall be upon him, and the wickedness of the wicked shall be upon him.").

[73] Clark v. Jeter, 486 U.S. 456, 461 (1988). Of course, courts using heightened scrutiny can still validate a law that discriminates against nonmarital children. *See, e.g.*, Nguyen v. INS, 533 U.S. 53, 53–54 (2001) (validating deportation of nonmarital child whose father was American citizen because of important governmental interest in facilitating identification of parent-child relationships).

[74] *Clark*, 486 U.S. at 461.

classification, the Supreme Court explained, "We again reject the argument that 'persons will shun illicit relations because the offspring may not one day reap the benefits' that would accrue to them were they legitimate."[75]

Second, more unmarried mothers are giving birth to children than ever before. In 2002, a record 34% of births were by unwed women.[76] More than twice as many unmarried African American women gave birth than married African American women did.[77] The percentage of births to unmarried mothers for all races has almost doubled since 1980, when the rate was 18.4%.[78] As such, the second marital goal—the "legitimation"[79] and protection of children—does not have evidentiary support when significant numbers of people have children outside of marriage.[80] At least a third of child-bearing American women or their sexual partners have not married despite pregnancy.[81]

C. FAILURE TO RECOGNIZE HOMOSEXUAL LOVE

Americans are finally acknowledging the reality of homosexual love. Indeed, one need only read some of the reviews for the 2005 acclaimed movie, *Brokeback Mountain*, to conclude that society finally recognizes the bonds of love found in gay and lesbian relationships.[82]

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[75] Lalli v. Lalli, 439 U.S. 259, 265 (1978) (quoting Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 173 (1972)).

[76] NAT'L CTR. FOR HEALTH STATISTICS, CENTER FOR DISEASE CONTROL NATIONAL VITAL STATISTICS REPORT, 10 tbl. C (2003), *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr52/nvsr52_10.pdf.

[77] *Id.* at 49 tbl. 13. Sixty-eight percent of African American women giving birth were unmarried. The percentage for whites was 28.5%. *Id.*

[78] *Id.* at 10 tbl. C.

[79] While children born out of wedlock still sometimes are called "illegitimate," many family law scholars are now referring to these children as "nonmarital." *See, e.g.*, ROBERT H. MNOOKIN & D. KELLY WEISBERG, CHILD, FAMILY, AND STATE 886 (2005) (indexing "illegitimate children" as "nonmarital children").

[80] The figures for 2002 confirm 4,022,000 live births. Of those, 594,000, or almost 15%, were to Black mothers. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2006, at 65 tbl. 75 (125th ed. 2006), *available at* http://www.census.gov/prod/2005pubs/06statab/vitstat.pdf. Approximately 1,366,000 children were born to unwed mothers in 2002. Of these, 405,000, or almost 30%, were to Black mothers. *Id.* at 69 tbl. 82.

[81] *See supra* note 76 and accompanying text.

[82] *Brokeback Mountain* appeared on more critics' Top 10 lists than any other movie

> It's a deeply felt, emotional love story that deals with the uncharted, mysterious ways of the human heart just as so many mainstream films have before it. The two lovers here just happen to be men.[83]
>
> What is truly distinctive about "Brokeback Mountain" is that it brings to life a love story that, after all these years of love stories, is essentially new to mainstream movies, and it does so without special pleading or sentimentality.[84]

While these reviews laud the artistic reach of the film, another highlight its financial promise:

> Despite the cracks about gay cowboys on late-night TV and chin-stroking about whether it would play in Peoria, "Brokeback Mountain" is poised to be not just one of the most praised films of the 2005 Oscar class -- it will

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released in 2005. *See* Metacritic.com, 2005 Critics' Picks (2005), http://www.metacritic.com/film/awards/2005/toptens.shtml (indicating *Brokeback Mountain* appeared on thirty-five top ten lists, six more than any other film).

[83] Kenneth Turan, *The New Frontier of 'Brokeback' Is Vast and Heartfelt*, L.A. TIMES, Dec. 9, 2005, part E, at 1. Another reviewer commented, "It is simply one of the greatest love stories in film history." Joe Williams, *Story of Hidden Love Reveals Stellar Performances*, ST. LOUIS POST-DISP., Dec. 6, 2005, *available at* http://www.stltoday.com/stltoday/entertainment/reviews.nsf/movie/story/EC397CFC0D8B06DD862570D8006FF193?OpenDocument.

[84] Peter Rainer, *Cowboys Saddled with a Secret*, CHRISTIAN SCI. MONITOR, Dec. 9, 2005, at 11. But compare Stephen Holden, *Riding the High Country, Finding and Losing Love*, N.Y. TIMES, Dec. 9, 2005, at 11, wherein Mr. Holden doubts that American culture has fully accepted homosexual love:

> "Brokeback Mountain" is not quite the period piece that some would like to imagine. America's squeaky closet doors may have swung open far enough for a gay rodeo circuit to flourish. But let's not kid ourselves. In large segments of American society, especially in sports and the military, those doors remain sealed. The murder of Matthew Shepard, after all, took place in "Brokeback" territory. Another recent film, "Jarhead" (in which Mr. Gyllenhaal plays a marine), suggests how any kind of male behavior perceived as soft and feminine within certain closed male environments triggers abuse and violence and how that repression of sexual energy is directly channeled into warfare.

Id.

> become one of the most profitable movies of the year, and a mainstream one at that.[85]

This economic forecast suggests that even heterosexuals are willing to pay money to consider the issue of homosexual love.

State law, driven by both courts and legislatures, also is evolving to recognize gay and lesbian couples.[86] In 1997, Hawaii became the first state to extend some of the legal benefits of marriage to "reciprocal beneficiaries," adult homosexual couples and couples who cannot otherwise marry.[87] Soon thereafter in 1999, the Vermont

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[85] John Lippman, *Mining 'Brokeback Mountain': To Make a Hit, Studio Wooed Women, Weighed Venues; New York's Microclimates*, WALL ST. J., Jan. 27, 2006, at W6. Wikipedia also details the movie's financial success:

> *Brokeback Mountain*'s theatrical run lasted for 133 days and grossed $83,043,761 in North America and $95,000,000 abroad, adding up to a worldwide gross of more than $178 million. It is the top-grossing release of Focus Features, ranks fifth among the highest-grossing westerns, and eighth among the highest-grossing romantic dramas (1980-Present).

Brokeback Mountain, Wikipedia, http://en.wikipedia.org/wiki/Brokeback_Mountain (footnotes omitted) (last visited Feb. 15, 2007).

[86] Internationally, other countries are recognizing same-sex couples. *See, e.g.*, Halpern v. Toronto, 65 O.R.3d 161, 200 (2003) (holding that marriage in Ontario must include same-sex unions); Note, *Developments in the Law—The Law of Marriage and Family: Inching Down the Aisle: Differing Paths Toward the Legalization of Same-Sex Marriage in the United States and Europe*, 116 HARV. L. REV. 2004, 2004–05 (2003) (noting that although in 1989 no countries recognized same-sex marriage, in 2001 and 2003 respectively the Netherlands and Belgium approved same-sex marriage, and that other Western European countries have granted "same-sex couples many of the same rights that opposite-sex couples enjoy through traditional marriage"); Anjuli Willis McReynolds, Comment, *What International Experience Can Tell U.S. Courts About Same-sex Marriage*, 53 UCLA L. REV. 1075, 1092–1102 (2006) (surveying same-sex marriage in other countries).

[87] *See* HAW. REV. STAT. ANN. § 572C-1 (LexisNexis 2005) (explaining purpose of reciprocal beneficiaries chapter). Hawaii defined eligible parties by explaining:

> In order to enter into a valid reciprocal beneficiary relationship, it shall be necessary that:
> (1) Each of the parties be at least eighteen years old;
> (2) Neither of the parties be married nor a party to another reciprocal beneficiary relationship;
> (3) The parties be legally prohibited from marrying one another under chapter 572;
> (4) Consent of either party to the reciprocal beneficiary relationship has not been obtained by force, duress, or fraud; and
> (5) Each of the parties sign a declaration of reciprocal beneficiary relationship as provided in section 572C-5.

Id. § 572C-4.

Supreme Court held in *Baker v. Vermont*[88] that the state's ban on same-sex marriage denied homosexual couples the benefits and protections afforded heterosexual married persons, in violation of the Vermont Constitution.[89] The Vermont legislature responded by enacting a civil union statute for gay and lesbian couples that confers all the benefits and protections of Vermont marriage to those who form civil unions.[90] In *Goodridge v. Department of Public Health*,[91] the Supreme Judicial Court of Massachusetts opined that the state must open marriage to eligible gay and lesbian couples; a civil union statute would not suffice in Massachusetts.[92]

Most recently, the New Jersey Supreme Court took a stance similar to Vermont's approach to marital rights.[93] It held that the legislature must amend the New Jersey marriage statutes or enact other legislation to give committed same-sex couples the same rights and benefits afforded opposite-sex couples.[94] New Jersey already has a domestic partnership statute that grants same-sex couples some rights and benefits.[95] This statute does not provide identical rights, however. Under *Lewis*, the legislature had 180 days to fashion a completely congruent scheme for same-sex couples.[96] On December 21, 2006, New Jersey adopted a civil union statute that affords same-sex couples all the rights and responsibilities of marriage but not the title.[97]

Several other states have legislatively enacted statutes that grant marriage-like benefits to some couples. Connecticut has a civil union statute.[98] California provides for domestic partnership and associated marriage-like benefits.[99] To date, Massachusetts

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[88] 744 A.2d 864 (Vt. 1999).

[89] *Id.* at 886. At issue was the Common Benefits Clause. VT. CONST. ch. I, art. 7.

[90] VT. STAT. ANN. tit. 15, § 1204 (2002).

[91] 798 N.E.2d 941, 968 (Mass. 2003) (holding state had failed to articulate rational reason for banning same-sex marriage in violation of Massachusetts Constitution).

[92] *In re* Opinions of the Justices to the Senate, 802 N.E.2d 565, 571 (Mass. 2004).

[93] Lewis v. Harris, 908 A.2d 196, 221 (2006).

[94] *Id.* (citing to Connecticut and Vermont civil union statutes).

[95] N.J. STAT. ANN. § 26:8A-1 (West Supp. 2006).

[96] *Lewis*, 908 A.2d at 224.

[97] *Gay Civil Unions Legalized in New Jersey*, CBS NEWS, Dec. 21, 2006, http://www.cbsnews.com/stories/2006/12/21/politics/main2289236.shtml.

[98] CONN. GEN. STAT. ANN. § 46b-38aa (West Supp. 2006).

[99] CAL. FAM. CODE § 297 (West 2004) (effective Jan. 1, 2005).

remains the only state that will marry same-sex couples. In response, many states have amended their state constitutions to ban the recognition of same-sex marriages, including those performed in Massachusetts.[100]

Ironically, as views have polarized over the question of whether gays and lesbians should be able to use the word "marriage" to describe their relationships, the once radical demand for same-sex civil unions has become a compromise position. Most recent opinion polls show a clear majority in favor of legal recognition of such civil unions, if not support for same-sex "marriage."[101] One businessman told Coontz, " 'Let them have the same rights as me and my wife, ...' 'Just don't call it marriage.' "[102]

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[100] In 2004, thirteen states amended their constitutions to limit marriage and its associated benefits to opposite-sex couples. NAT'L CTR. FOR LESBIAN RIGHTS, MARRIAGE, DOMESTIC PARTNERSHIPS, AND CIVIL UNIONS: AN OVERVIEW OF RELATIONSHIP RECOGNITION FOR SAME-SEX COUPLES IN THE UNITED STATES 10–11 (2005), http://www.nclrights.org/publications/pubs/marriage_equality0905.pdf (discussing Arkansas, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah).

On November 8, 2006, seven more states voted to amend their constitutions to ban same-sex marriage. Elizabeth Mehren, *What to Make of the Marriage Votes?*, L.A. TIMES, Nov. 9, 2006 (discussing Colorado, Idaho, South Carolina, South Dakota, Tennessee, Virginia, and Wisconsin), available at 2006 WLNR 19425051. Only Arizona defeated such a proposed amendment. *Id. See also* Ronald J. Krotoszynski, Jr. & E. Gary Spitko, *Navigating Dangerous Constitutional Straits: A Prolegomenon on the Federal Marriage Amendment and the Disenfranchisement of Sexual Minorities*, 76 U. COLO. L. REV. 599, 639–40 (2005) (reviewing federal constitutional amendment proposals and suggesting that Defense Of Marriage Act (DOMA)-type amendment might result in "the end of state-sanctioned marriage").

[101] For example, a Pew Research Center survey conducted in July 2005 found that while a majority opposed "allowing gays and lesbians to marry legally," only 42% opposed "allowing gay and lesbian couples to enter into legal agreements with each other that would give them many of the same rights as married couples." PollingReport.com, Law and Civil Rights, http://www.pollingreport.com/civil.htm (last visited Feb. 15, 2007). Similar results were found in surveys conducted in 2005 for the Boston Globe, ABC News/Washington Post, CNN/USA Today, and CBS News/New York Times. *Id.* For a recent in-depth compilation of public opinion polls regarding attitudes towards same-sex couples and homosexuality, including historical trends, see generally Karlyn H. Bowman, Am. Enter. Inst., *Attitudes About Homosexuality and Gay Marriage*, http://www.aei.org/docLib/20050520_HOMOSEXUALITY0520.pdf.

[102] COONTZ, *supra* note 1, at 275.

D. GENDER INEQUALITY

> Wives should be subordinate to their husbands as to the Lord. For the husband is head of his wife just as Christ is head of the church, he himself the savior of the body. As the church is subordinate to Christ, so wives should be subordinate to their husbands in everything.[103]

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and *cover*, she performs everything; . . . and her condition during her marriage is called her *coverture*.[104]

Once, marriage meant the obliteration of a woman's legal identity. The doctrine of coverture described the collapse of the wife's legal status into that of her husband upon marriage.[105] For all practical purposes, married women lost control of any property they owned or acquired.[106] The only benefit (for children) under that system was that husbands were financially responsible for any of their wives' "debts," including among these "debts," stepchildren.[107] Beginning in the nineteenth century, the passage of women's property acts began to restore the legal status of married women.[108] It was not until after 1971, however, that the Supreme Court

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[103] *Ephesians* 5:22–24.

[104] 1 WILLIAM BLACKSTONE, COMMENTARIES 442 (William Draper Lewis ed., 1897). The "feme covert" described the married woman whose identity was "covered" by that of her husband. COONTZ, *supra* note 1, at 115. The doctrine of coverture served as the basis of American domestic-relations law until the passage of the married women property acts beginning in the mid-nineteenth century. *Id.* at 186.

[105] COONTZ, *supra* note 1, at 186. In the thirteenth century, Henry de Bracton described a married couple as one person—the husband. *Id.*

[106] *But see* FRIEDMAN, *supra* note 28, at 197 n.65 (explaining that expensive legal maneuvering might ease or avoid restrictions of coverture).

[107] MNOOKIN & WEISBERG, *supra* note 79, at 145.

[108] LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 208–11 (1985). Mississippi was the first to pass such a law in 1839. ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 233 (1997).

consistently interpreted the Constitution's Equal Protection Clause to protect women.[109] Moreover, many states did not repeal or overturn vestiges of sexist marital roles and marital disabilities until very recently. For example, New York retained a marital rape exemption until 1984.[110]

Marriage continues to invoke the memory and sometimes the reality[111] of the subordinated role of women. For example, the website family.org, which the conservative group Focus on the Family sponsors, explicitly addresses marital roles:

> When it comes to marriage, women typically find themselves playing three roles — wife, mother and worker (either in the home, office or both). Men, meanwhile, are expected to be the primary family provider, protector and spiritual leader. These roles may have become blurred in the age of feminism and liberation, yet we've found that traditional distinctions between men and women are still essential. Recognizing

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[109] U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."). *See* Stanton v. Stanton, 421 U.S. 7, 10, 14–15 (1975) (invalidating Utah statute that created different ages of majority for males and females); Reed v. Reed, 404 U.S. 71, 74 (1971) (holding that Idaho statute violated Equal Protection Clause because it arbitrarily favored men over women to serve as administrators of estates).

[110] People v. Liberta, 474 N.E.2d 567 (N.Y. 1984); WOLFSON, *supra* note 10, at 64. In the seventeenth century, Lord Hale said, "[T]he husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract." 1 SIR MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 629 (1736).

[111] The Book of Common Prayer (1789) provided that the wife should obey her husband.

> I *N.* take thee *M.* to my wedded husband, to have and to hold, from this day forward, for better for worse, for richer for poorer, in sickness and in health, to love, cherish, and obey, till death us do part, according to God's holy ordinance; and thereto I give thee my troth.

THE PROTESTANT EPISCOPAL CHURCH BOOK OF COMMON PRAYER 255 (1789), *available at* http://justus.anglican.org/resources/bcp/1789/Marriage_1789.htm. The 1979 version omits the wife's vow to obey. THE EPISCOPAL CHURCH BOOK OF COMMON PRAYER 427 (1979), *available at* http://holycross-raleigh.org/bcp/427.html. *See generally* William McGarvey, D.D., *An Historical Account of the American Book of Common Prayer*, http://justus.anglican.org/resources/bcp/mcgarvey1.htm (last visited Feb. 15, 2007) (describing history of the American Book of Common Prayer). Some modern marriage vows retain the promise to obey, however. *See* bible.org, Sample Wedding Vows, http://www.bible.org/page.asp?page_id=2436 (last visited Feb. 15, 2007) (providing four samples in which the bride vows to obey her husband but in which the husband does not similarly promise to obey his wife).

> these respective roles is vital not only for a proper understanding of God's design for human life, but also for the survival of the family and of society as a whole.[112]

Focus on the Family emphasizes distinct roles for husbands and wives in order to make clear that biological differences matter in marriage.[113] In fact, according to Focus on the Family, sex roles matter so much that their suppression endangers the survival of the family and society as a whole![114]

A debate rages over whether modern companionate marriage can survive contemporary work towards gender equality. Advocates for traditional marriage, including Focus on the Family's founder, Dr. James Dobson, insist that gender differences do not mean that one sex is superior to the other.[115] They suggest, instead, that biologically determined sex differences complement each other. When society recognizes and adheres to these sex differences, marriage as an institution grows stronger.

In contrast, some postmodern feminists such as Jessica Knouse might characterize the genetic traits to which Focus on the Family refers as gender stereotypes. Knouse argues:

> Although sex stereotypes have been almost entirely eradicated from the legal definition of marriage . . . they

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[112] Focus on the Family, Roles in Marriage, http://www.family.org/married/topics/a0025090.cfm (last visited Oct. 25, 2006).

[113] In discussing genetic differences, Dr. Dobson, founder of Focus on the Family, explains:

> He likes excitement, change, challenge, uncertainty and the potential for huge returns on a risky investment. She likes predictability, continuity, safety, roots, relationships and a smaller return on a more secure investment. These contrasting inclinations work to a couple's best advantage. She tempers his impulsive, foolish tendencies, and he nudges her out of apathy and excessive caution. . . . Related to this is a woman's emotional investment in her home, which usually exceeds that of her husband. She typically cares more than he about the details of the house, family functioning and such concerns.

Focus on the Family, Answer: How Do Men and Women Differ Emotionally?, http://family-topics.custhelp.com/cgi-bin/family_topics.cfg/php/enduser/std_adp.php?p_faqid=1085 (last visited Feb. 15, 2007).

[114] *See* Focus on the Family, *supra* note 112 and accompanying text.

[115] Dobson stated, "It is clear from even this cursory examination, however, that God made two sexes, not one, and he designed them to fit together hand in glove. Neither is superior to the other, but each is certainly unique." Focus on the Family, *supra* note 112.

> remain strong within the cultural definition of marriage. Therefore, although conformity is no longer legally mandated, it may still be culturally required. I propose that the persistence of sex stereotypes in society is largely facilitated by the continued existence of the legal institution of marriage. As postmodern theory dictates, a word "cannot . . . be reconceptualized outside the bounds of its historical determinants." Thus, "marriage"—the predominant institution through which conformity with sex stereotypes has been legally mandated—cannot be culturally disassociated from historical sex stereotypes. Redefinition is impossible. . . . . In order to eradicate the stereotypes, the legal institution of marriage must be abolished.[116]

Relying on the work of Martha Fineman, Knouse imagines a "de-sexualized regime" in which the state might recognize different types of relationships, including "an adult taking care of an elderly parent, a sister and brother, or two friends."[117] But Knouse proffers no specific plan for implementing these new legal categories.

What result from this debate? If Knouse is correct, Americans would benefit from a new system of private domestic ordering. Even if Dobson and Focus on the Family are correct about gender differences, female emotional investment in the home and marriage is still a poor financial strategy given U.S. divorce and poverty statistics.[118] If Focus on the Family wants to protect women who

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[116] Jessica Knouse, *Using Postmodern Feminist Legal Theory to Interrupt the Reinscription of Sex Stereotypes Through the Institution of Marriage*, 16 HASTINGS WOMEN'S L.J. 159, 172–74 (2005). Arguably, George W. Bush agrees that marriage cannot be redefined successfully. He stated, "[M]arriage cannot be severed from its cultural, religious, and natural roots without weakening the good influence of society." Mike Allen & Alan Cooperman, *Bush Backs Amendment Banning Gay Marriage*, WASH. POST, Feb. 25, 2004, at A1.

[117] Knouse, *supra* note 116, at 175 (citing MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES 143–76 (Routledge 1995) and Michael Bronski, *Why Do Gays Want to Say "I Do?": Fighting for Marriage Is Like Fighting Over Yesterday's Leftovers*, Z MAG., Oct. 2003, at 55, 58).

[118] For example, custodial mothers (31%) were twice as likely as custodial fathers (14.9%) to receive some form of public assistance. GRALL, *supra* note 60, at 1. While it is possible that women were twice as likely to seek aid, one could also conclude that they were poorer.

prefer "a smaller return on a more secure investment," then perhaps it might agree to reserve marriage for God and his or her faithful and promote civil domestic partnership for women and men who prefer "excitement, change, challenge, uncertainty and the potential for huge returns on a risky investment."[119]

E. THE INSTITUTIONAL FAILURE—PERSONALIZED

If one is still unconvinced that civil marriage is obsolete, then consider a few more problematic examples of the institutional failure of marriage. Suppose that best friends, Alice and Betty, lose their husbands during the war in Iraq. Each is a single woman, and neither can afford to rear her children on survivor benefits. They realize that if they could "marry" and one brought in a salary while the other cared for the children in a communal home, they could make ends meet by taking advantage of tax and other "marital" benefits. They cannot marry, however, because they are the same sex and cannot even form a civil union in a state like Vermont because they are not homosexual.[120]

Suppose again that a priest, Colin, who is sworn to celibacy, wants to support his live-in housekeeper, Dolores, who has devoted herself to the rectory and his service for many years. He figures that if they could "marry," Dolores would at least receive his Social Security survivor benefits when he died.[121] They cannot marry, however, because he would lose his parish and they might both find themselves homeless. Of course one might argue that the Church,

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[119] Focus on the Family, *supra* note 113.

[120] *See* VT. STAT. ANN. tit. 15, § 1202 (2001) (requiring individuals be same sex to form a civil union); *see also supra* notes 103–19 and accompanying text. While the Vermont civil union statute does not explicitly require that the individuals be homosexual, the legislative findings make clear that the legislature contemplated homosexual, same-sex couples. Gen. Assemb. of Vt., H. 847, Act. No. 91 Sec. 1 (2000), http://www.leg.state.vt.us/docs/2000/acts/ACT091.HTM. They are replete with references to gays and lesbians and, by implication, homosexual couples. *See, e.g.*, Legislative Finding 9 ("Despite longstanding social and economic discrimination, many gay and lesbian Vermonters have formed lasting, committed, caring and faithful relationships with persons of their same sex. These couples live together, participate in their communities together, and some raise children and care for family members together, just as do couples who are married under Vermont law.").

[121] SOC. SEC. ADMIN., SURVIVORS BENEFITS (2006) http://www.socialsecurity.gov/pubs/10084.pdf.

not the law, prevents these two from marrying. But Colin is a priest because of a deeply felt avocation; he would deny his identity even to consider marrying Dolores. Given his religious convictions, it would be a sham for him to marry Delores. Indeed, it might resemble the marriage of a gay man to a woman.[122] Our culture does not value the Church-family that Colin and Dolores have created for themselves and for the service of the greater community. If society acknowledged and supported their nonsexual family, one could imagine that Colin and Dolores might even adopt hard-to-place children.

Now consider Eric and Frank, a couple who have been together fifteen years and who would like to have children. They live and marry in Massachusetts. Suppose further that Frank's sister, Gina, agrees to serve as a surrogate, donating an egg to be fertilized by Eric's sperm, so that Eric and Frank can have children who are biologically related to both of them. Frank stays home to care for their infant twins, Hank and Isabella. What happens when Eric's employer transfers him to its central office in Ohio? Ohio will not recognize their marriage.[123] Hank and Isabella might lose a father[124] because Frank never formally adopted the children. He did not have to adopt them in Massachusetts since he was married to Eric, agreed to the assisted reproduction, and was listed on the children's birth certificates.[125] It is not clear whether Eric and Frank need (or can) do anything to ensure that their children retain both legal parents no matter where the family resides.

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[122] "Mixed-orientation marriages" is a term used to describe a marriage of a heterosexual and homosexual. Katy Butler, *Many Couples Must Negotiate Terms of "Brokeback" Marriages*, N.Y. TIMES, Mar. 7, 2006, at F5 (citing EDWARD O. LAUMANN ET AL., THE SOCIAL ORGANIZATION OF SEXUALITY (1990)). Some estimate that between 2% and 4% of ever-married American women have been or are in such marriages. *Id.*

[123] *See* OHIO REV. CODE ANN. § 3101.01(C)(1) (West 2005) (establishing "strong public policy" against recognition of same-sex marriages). Ohio law not only bans same-sex marriage but also prohibits the provision of state benefits to same or opposite sex domestic partners. *Id.* at (C)(3); *see also* James Dao, *Ohio Legislature Passes Ban on Same-Sex Marriages*, N.Y. TIMES, Feb. 24, 2004, at A6, http://sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2004/02/04/MNGFU4OFIS1.DTL.

[124] Assume that Gina was only a surrogate and egg donor and was not listed on the final birth certificates.

[125] *See* MASS. GEN. LAWS ANN. ch. 210, § 1 (West 2006) ("If the petitioner has a husband or wife living, competent to join in the petition, such husband or wife shall join therein, and upon adoption the child shall in law be the child of both.").

This example and the two before it demonstrate that marriage law fundamentally fails to provide for alternative families.[126] This legal failure affects a large number of families. The 2000 Census revealed that only 23.5% of households consist of married adults living with their own children.[127] Thus, more than three quarters of our nation's households are not so-called "traditional" families.

In addition to encouraging ex ante family planning and negotiation, the goal of our Uniform Domestic Partnership Act is to promote and support a variety of familial groups. In particular, the Act is designed to promote families that care for children and the elderly; nurture people who might otherwise live outside of so-called "traditional" families; keep children, parents, and other adults off public assistance; and model family values of love, responsibility, and mutual support. Instead of strengthening families, current American laws discriminate against many who form loving, secure families, even without legal recognition and benefits.

Review another case. Suppose that José and Kathy marry and hope to conceive a child, as well as care for José's three children by a prior marriage. Unbeknownst to them, state law permits the state to consider Kathy's earnings and assets when setting child support for José's children,[128] support that will allow his ex-wife to remain in graduate school indefinitely, or until the children are emancipated. As a result, Kathy and José find that they can barely pay the heating bill on their larger home, let alone afford another child. If Kathy and José divorce, a court will probably lower his child support obligation. Ironically, Kathy and José could then afford another child. In this slightly perverse situation, divorce law might actually motivate a couple to conceive a child out of wedlock.

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[126] At least one prominent commentator has argued that even polygamy "isn't necessarily worse than the current American alternative." John Tierney, *Who's Afraid of Polygamy?*, N.Y. TIMES, Mar. 11, 2006, at A14, *available at* http://select.nytimes.com/2006/03/11/opinion/11tierney.html.

[127] U.S. CENSUS BUREAU, PROFILES OF GENERAL DEMOGRAPHIC CHARACTERISTICS, 1 tbl. DP-1 (2001), http://www2.census.gov/census_2000/datasets/demographic_profile/0_United_States/2kh00.pdf.

[128] *See* OR. REV. STAT. ANN. § 109.053 (West 1990) (requiring stepparent to be responsible for expenses of stepchild). A 2002 survey by John Mayoue revealed that sixteen states had stepparent support statutes. John C. Mayoue, *Stepping In to Parent*, 25 FAM. ADVOC. 36, 42 (2002).

Let us stay with Kathy and José for a moment. Further assume that they do not have another child but that Kathy takes an active role parenting José's children. They move with the children to a state that does not regulate stepparents vis-à-vis their stepchildren.[129] Eight years later, Kathy and José divorce. Can Kathy be obligated to pay child support? Can Kathy obtain visitation rights? What if the children want to continue seeing her? The answers to these questions are generally "no," and "too bad," so long as Kathy has not formally adopted the children. She could not have adopted them, however, unless the biological mother had died or terminated her parental rights,[130] or a court had terminated those rights.[131] Absent adoption, Kathy has no right to maintain a legal relationship with José's children post-divorce.

Finally, take the case of Lisa and Mike. They marry and, after the birth of their daughter, divorce. Lisa is appalled to learn that her state will not require Mike, a partner in a prestigious law firm, to pay their daughter's college expenses.[132] Had Lisa known of this eventuality before they married, or more importantly had she known that Mike might be unwilling to contribute, she might have insisted on a prenuptial agreement that would have provided for any child's post-secondary education in case of divorce. For Lisa and Mike's daughter, the law failed to accomplish what the couple might have chosen ex ante had they anticipated and negotiated this issue.

Lisa's case also raises another important flaw with modern marriage. Although propertied couples often carefully negotiated the terms of premarital agreements centuries ago,[133] modern couples

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[129] *See generally* Mary Ann Mason & Nicole Zayac, *Rethinking Stepparent Rights: Has the ALI Found a Better Definition?*, 36 FAM. L.Q. 227 (2002) (concluding that most stepparents have no duty to support their children before or after divorce from custodial parent); Mary Ann Mason, *The Modern American Stepfamily: Problems and Possibilities*, *in* ALL OUR FAMILIES (Mary Ann Mason et al. eds. 1998).

[130] *See, e.g.*, IND. CODE ANN. § 31-35-1-1 (West 2006) (providing for voluntary termination of parental rights by parent).

[131] *See, e.g.*, IND. CODE ANN. § 31-35-2-3 (West 2006) (providing for termination of parental rights by probate court).

[132] *See, e.g.*, TEX. FAM. CODE ANN. § 154.001 (Vernon 2002) (listing conditions for court ordered parental child support).

[133] *See, e.g.*, Jennifer Drobac, *The "Perfect" Jointure: Its Formulation After the Statute of Uses*, 19 CAMBRIAN L. REV. 26, 26 (1988) (discussing creation of jointures between husband and wife). Civil marriage, with its legal significance, historically best served those persons who negotiated the economic and legal consequences of their alliance. Typically, parents and

rarely do.[134] Even if couples educate themselves regarding their state law—an unlikely prospect—they may find their effort worthless if they move and then divorce in another state. In the case of Eric and Frank above, they need not even divorce. The new home state may have very different provisions than the original state where the marriage occurred. The lack of national uniformity regarding domestic relations law introduces a frustrating element in our very mobile society. Thus, Lisa and Mike might decide in Indiana that they do not need a prenuptial contract to provide for their children's college expenses.[135] By the time they have children and divorce in Texas, however, they will need one.[136]

Because many couples do not negotiate ex ante how their lives will change if they divorce, they unwittingly accept the defaults of divorce law and future discretionary judgments from the bench. For example, even though the tender years presumption that directed custody of young children to women was found unconstitutional years ago,[137] the vast majority of women still receive primary custody of children upon divorce.[138] The majority of men who want custody of their children are usually out of luck.[139] In 1990, for

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other community members, such as guild leaders, managed those negotiations. FRIEDMAN, *supra* note 28, at 6. "Marriage was once a matter for the kinfolk to decide, not the woman and the man." *Id.* "Marriage had so many economic and social ramifications for all social classes that people generally believed it would be foolish to make such a momentous decision entirely on their own." COONTZ, *supra* note 1, at 117.

[134] A 2002 survey by Lawyers.com found that only 1% of married or affianced Americans had entered into prenuptial agreements. Lawyers.com, A Study About Prenuptial Agreements, http://family-law.lawyers.com/A_Study_About_Prenuptual_Agreements.html. Another study suggests that between 5–10% of those marrying have such agreements. Beth Potier, *For Many, Prenups Seem to Predict Doom*, HARV. GAZETTE, Oct. 16, 2003, http://www.news.harvard.edu/gazette/2003/10.16/01-prenup.html.

[135] *See* IND. CODE ANN. § 31-16-6-2 (West 2006) (providing for payment of post majority educational expenses in some cases).

[136] *See supra* note 132 and accompanying text.

[137] *See, e.g.*, *Ex parte Devine*, 398 So. 2d 686, 695–96 (Ala. 1981) (holding that tender years presumption represents unconstitutional gender-based classification).

[138] *See, e.g.*, GRALL, *supra* note 60, at 1 (reporting that Census Bureau found that 84.4% of custodial parents were mothers while only 15.6% were fathers).

[139] According to one study, 32% of fathers wanted sole custody and another 35% wanted joint custody of their children. Solangel Maldonado, *Beyond Economic Fatherhood: Encouraging Divorced Fathers to Parent*, 153 U. PA. L. REV. 921, 974 (2005) (citing ELEANOR E. MACCOBY & ROBERT H. MNOOKIN, DIVIDING THE CHILD: SOCIAL AND LEGAL DILEMMAS OF CUSTODY 99–100 (1992)). In some cases, these men did not even ask for custody. *Id.* at 974 (citing Leslie A. Cadwell, Note, *Gender Bias Against Fathers in Custody? The Important*

example, only 9% of fathers received sole custody and only 16% received joint custody.[140] Presumably, more dads would opt in advance to retain custody of their children in the event of divorce. And even though a prenuptial agreement regarding custody of children is not binding upon a court in any jurisdiction,[141] certainly courts should at least consider the preference of the parties expressed in an ex ante agreement as they contemplate their partnership.[142] No state currently requires, as a prerequisite to marriage, a plan for the division of assets, let alone a custody preference declaration.[143]

As the above discussion patently demonstrates, marriage fails many families. In hope of a remedy, this Article offers a legal substitute that could serve domestic partners just as the Uniform Partnership Act has served business partners in this country for many years.[144]

Difference Between Outcome and Process, 18 VT. L. REV. 215, 244–45 (1993)).

[140] SALLY C. CLARKE, NAT'L CTR. FOR HEALTH STATISTICS, MONTHLY VITAL STATISTICS REPORT: ADVANCE REPORT OF FINAL DIVORCE STATISTICS, 1989 AND 1990, at 5 (1995), http://www.cdc.gov/nchs/data/mvsr/supp/mv43_09s.pdf.

[141] *See, e.g.*, *In re* Marriage of Singleteary, 687 N.E.2d 1080 (Ill. App. Ct. 1997) (holding that court was not bound by parties' agreement regarding child support); *see also* UNIF. MARRIAGE AND DIVORCE ACT § 309, 9A U.L.A. 573 (Supp. 2006) (listing factors that court might consider when awarding child support and not referencing prior agreement by parties).

[142] *Cf.* Guzman v. Guzman, 854 P.2d 1169, 1174 (Ariz. Ct. App. 1993) (ruling that "[p]arties to a dissolution proceeding may enter into a binding contractual agreement for support payments that are not required by law"); Obermiller v. Obermiller, 795 S.W.2d 624, 625 (Mo. Ct. App. 1990) (finding that stipulations in separation agreement as to custody, visitation, and support are only advisory and are not binding on the court).

[143] *See* The Bride to Be Channel, *supra* note 17 (listing marriage requirements and making no mention of plan for division of assets or custody preference declaration). Professor Mary Ann Mason argues that custodial parents should be permitted to assign to a stepparent the authority to make decisions, for example, concerning a child's medical treatment and education. She suggested that "[a]nother alternative would allow a parent to designate that a stepparent has the authority in these situations, perhaps through the use of a standardized 'stepparent authority' form at the time of marriage or later, as the family desires." Mason & Zayac, *supra* note 129, at 245.

[144] *See infra* notes 173–85 and accompanying text (discussing partnership law generally).

IV. SOMETHING BORROWED—PARTNERSHIP LAW

A. THE SEARCH FOR A NEW MODEL

As noted previously, several states are experimenting with novel legal forms for domestic unions.[145] The problem with these experiments is that they segregate homosexual couples from heterosexual ones and create parallel but unequal systems.[146] Moreover, these new forms fail to provide for all of the families that we envision serving. Finally, legislatures have stretched the marriage model without providing a coherent national law to order the functioning of these new families as they move across state borders.[147]

Business partnership law provides fertile ground for innovation in the domestic sphere.[148] Judge Cardozo could almost have been thinking of a married couple when he wrote in the seminal partnership case, *Meinhard v. Salmon*, "[f]or each [partner], the venture had its phases of fair weather and of foul. The two were in

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[145] *See supra* notes 86–100 and accompanying text.

[146] *See, e.g.*, WOLFSON, *supra* note 10, at 129 (highlighting why civil unions are separate from and unequal to marriage). Massachusetts is the only state that does not segregate homosexual couples. *See supra* note 91 and accompanying text.

[147] The only relevant federal law permits states to ignore other states' acts and judicial proceedings "respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other state . . . ." 28 U.S.C. 1738C (2000). Ohio amended its constitution, in part, to prevent the recognition of same sex unions formed in other states. *See* Ohio Const. art. XV § 11 (directing state officials not to recognize "a legal status for relationships of unmarried individuals that intends to approximate . . . marriage").

[148] *See infra* notes 173–85 and accompanying text. Of course, others have similarly drawn parallels between some aspects of business partnership and marriage. *See, e.g.*, Mary Anne Case, Lecture, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1777–78 (2005) (analogizing between marriage licenses and corporate charters and offering the utility of noncorporate forms such as partnership); Martha M. Ertman, *Marriage As a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 84 (2001) (exploring how close corporations, limited liability companies and business partnerships resemble marriage, polyamory and cohabitation); Cynthia Lee Starnes, *Mothers as Suckers: Pity, Partnership, and Divorce Discourse*, 90 IOWA L. REV. 1513, 1535–38 (2005) (applying Revised Uniform Partnership Act partnership principles to issues of marriage and parenting); Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Disassociation Under No-Fault*, 60 U. CHI. L. REV. 67, 120–30 (1993) (advocating reform of divorce laws based on Revised Uniform Partnership Act); *see also* UNIF. MARRIAGE AND DIVORCE ACT, Prefatory Note, 9A U.L.A. 161 (1998) ("The distribution of property upon the termination of a marriage should be treated, as nearly as possible, like the distribution of assets incident to the dissolution of a partnership.").

it jointly, for better or worse."[149] Other courts have made express comparisons, such as in *Haggett v. Hurley*: "Partnership is often called a contract, as marriage is often spoken of as a contract; but it is rather a relation, a status, somewhat as marriage is a relation or status."[150] Business partnership law is analogous enough to marriage that it offers some conceptual continuity. Looking to partnership law also helps to jettison the subordination baggage of marriage and to incorporate the fiduciary and other attractive aspects of partnership law discussed in this Part.

One characteristic that both marriage and business partnership share is the dual nature of the role of the partners. This Article interprets the partner/spouse roles using contractarian and status perspectives. American jurists have long referred to marriage as a "civil contract."[151] Partnership similarly has a long history as a contractual relationship.[152] Unlike other forms of contract, however, marriage provides personal definition and identity—both for the spouses as well as for third parties. Thus, marriage is also a status.[153] Similarly, the roles and duties of business partners are not only fixed by the contract, but also by their status as partners.[154]

Lawrence M. Friedman explains the evolution of family law in these terms:

> Family law has indeed moved from status to contract—in the sense, as Milton Regan has put it, first, that the "law is more willing to enforce agreements that tailor family life to individual preference"; and second,

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[149] Meinhard v. Salmon, 164 N.E. 545, 546 (1928).

[150] Haggett v. Hurley, 40 A. 561, 563 (Me. 1898) (comparing "marriage partners" and business partners).

[151] Maynard v. Hill, 125 U.S. 190, 210–11 (1888) ("[M]arriage is often termed by text writers and in decisions of courts a civil contract."); FRIEDMAN, *supra* note 28, at 17; *see also* SAMUEL WILLISTON & RICHARD LORD, A TREATISE ON THE LAW OF CONTRACTS, § 62:26 n.75 (2005) (citing cases that analogize marriage to partnership agreement).

[152] *See, e.g.*, Ward v. Thompson, 63 U.S. 330, 333 (1859) (referring to "contract of partnership").

[153] FRIEDMAN, *supra* note 28, at 18; *see also Maynard*, 125 U.S. at 210–11 (noting that marriage is "something more than a mere contract"); WILLISTON & LORD, *supra* note 151, § 62:26 n.81 (citing courts that have viewed marriage "as hybrid in nature, being both a contract as well as a status").

[154] *See, e.g.*, Malvern Nat'l Bank v. Halliday, 192 N.W. 843, 846 (Iowa 1923) (observing that although partnership has its origin in contract, it creates status).

> that "the law is more solicitous in general of individual choices in family matters."[155]

In keeping with this trend, our proposal, detailed below in Part V, allows participants in domestic partnerships to identify easily an agreement that most suits them. The participants' status is that of domestic partners. This status is not rigidly determinative of their respective rights and obligations, however, because we propose several forms of domestic partnership rather than just the traditional husband and wife model. Moreover, partners can negotiate in advance for terms that suit their respective and communal needs.

Business partners once crafted their relationships using only state general partnership laws. Now they can choose to form limited partnerships, limited liability partnerships, or limited liability limited partnerships.[156] States have developed different standard forms of business partnerships to meet different parties' needs. Likewise, in the domestic sphere, marriage alone is no longer adequate. Under our proposal, domestic partners make explicit ex ante choices and select rights and obligations determined by contract, based on and aided by the applicable standard forms.

If family is moving from status to contract, as have business partnerships, why not simply adopt a strict contract model for domestic partnership? Why not design a HAVE IT YOUR WAY® system of domestic ordering?[157] The problems already noted with

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[155] FRIEDMAN, *supra* note 28, at 6.

[156] In the business context, parties could also abandon the partnership form completely and instead form a corporation or limited liability company. There are in fact many more potential forms for business associations, particularly when one considers the varying rules in each of the fifty states and the association's chosen tax status. *See, e.g.*, Robert W. Hamilton, *Entity Proliferation*, 37 SUFFOLK U. L. REV. 859, 860 (2004) (noting that number of available business forms, "while not infinite, would certainly be very large"); William H. Clark, Jr., *What the Business World Is Looking for in an Organizational Form: The Pennsylvania Experience*, 32 WAKE FOREST L. REV. 149, 150–51 (1997) (noting that Pennsylvania had only five basic business forms in 1980 but ten forms by 1997). In addition to these ten forms, the limited liability company might be added to this list. *See, e.g.*, Limited Liability Company Law of 1994, 15 PA. CONST. STAT. §§ 8901–8998 (2001) (discussing limited liability company as business form).

[157] HAVE IT YOUR WAY is a registered trademark of Burger King Brands, Inc. (U.S. only) and Burger King Corp. (outside U.S.). Burger King, http://www.bk.com/#menu=6,-1.-1 (last visited Oct. 23, 2006).

marriage law[158] reflect, in part, the predominance of individual choices and the neglect of the economic, emotional, and security needs of some of the less powerful or subordinate family members, generally children and spouses without paid employment.

Martha Fineman argues that caretaking is the most important function assumed by modern families and the one that deserves state recognition and subsidy.[159] We agree. She suggests abolishing marriage in favor of a system in which adult sexual affiliates would negotiate their relationship using contract law.[160] This proposal has appeal because it acknowledges the need for front-end negotiations and investment to secure favorable contract terms[161]—a function once performed in the marriage model by parents and kin.

By compelling those people who want to enter into domestic partnerships to consider and reach agreement ex ante regarding their views on having and raising children, the state might reduce the likelihood of unwanted (or less wanted) children. Similarly, by compelling people ex ante to consider and agree to terms regarding the possible dissolution of their partnership, the state could reduce the acrimony and the expense associated with such a termination.[162] One might also hope that the ex ante consideration of the nature and form of the partnership relation would reduce the likelihood of both dissolution and unhappy partnerships.

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[158] *See supra* notes 55–144 and accompanying text.

[159] Videotape: Conference on Marriage, Democracy, and Families, (Mar. 14, 2003) (showing Martha Albertson Fineman presenting her paper, *The Meaning of Marriage*, at Panel on "Intimate Affiliation and Democracy: Beyond Democracy?") (on file with Hofstra Law Review); *see also* McClain, *supra* note 2, at 413 (noting Fineman's contention that caring for dependent family members is most important contemporary functioning of families).

[160] Martha Albertson Fineman, *Why Marriage?*, 9 VA. J. SOC. POL'Y & L. 239, 261 (2001); Martha Albertson Fineman, *The Meaning of Marriage*, *in* MARRIAGE PROPOSALS: QUESTIONING A LEGAL STATUS 29, 43, 57 (Anita Bernstein ed. 2006).

[161] The marriage of Lucy Stone and Henry Blackwell in 1855 is an early example of front-end negotiations. Before their wedding, they agreed that a panel of arbitrators would decide questions such as child custody if they were to separate. The arbitrators would treat the parties as equals, instead of subordinating the wife under then existing laws. *See* E. Gary Spitko, *Reclaiming the "Creatures of the State": Contracting for Child Custody Decisionmaking in the Best Interests of the Family*, 57 WASH. & LEE L. REV. 1139, 1140–42 (2000) (suggesting use of arbitration to avoid subordinative law).

[162] *See generally* Jeffrey Evans Stake, *Mandatory Planning for Divorce*, 45 VAND. L. REV. 397 (1992) (arguing in favor of requiring couples to determine ex ante the economic consequences of their divorce).

Granted, requiring potential domestic partners to reach agreement *before* the state will permit them to become domestic partners imposes transaction costs on the potential domestic partners. They must devote time and limited cognitive resources to the endeavor and the contractual process may force them to discuss areas of disagreement that they would rather keep concealed.[163] But several factors justify or minimize these costs.[164]

First, the considerable benefits achieved outweigh the costs. These benefits include fuller disclosure, advanced planning, and deliberation concerning the consequences of dissolution.[165] Some states agree and have imposed analogous transaction costs on potential spouses before marriage. For example, in an attempt to strengthen marriage and reduce divorce rates, Minnesota offers a discount on the marriage license fee to couples who undergo counseling.[166] As part of its state-recognized covenant marriage, Louisiana requires premarital counseling.[167] To the degree that

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[163] Penalty default rules serve to compel contracting parties to disclose information. *See* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989).

[164] Although legal scholars have tended to favor minimizing transaction costs, *see* David M. Driesen & Shubha Ghosh, *The Functions of Transaction Costs: Rethinking Transaction Cost Minimization in a World of Friction*, 47 ARIZ. L. REV. 61, 68–84 (2005), they "should take the benefits that transaction costs purchase into account." *Id.* at 103. *See also* Douglas W. Allen, *An Inquiry into the State's Role in Marriage*, 13 J. ECON. BEHAV. & ORG. 171, 177–79 (1990) (suggesting that state's role in regulating marriage is to reduce couples' transaction costs).

[165] Sunstein and Thaler argue that "it is both possible and desirable for . . . public institutions to influence behavior while also respecting freedom of choice." Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism is Not an Oxymoron*, 70 U. CHI. L. REV. 1159, 1159 (2003). A policy is paternalistic "if it attempts to influence the choices of affected parties in a way that will make choosers better off," *id.* at 1162, and one way to influence choices is to set the welfare maximizing default. *Id.* at 1161. Our proposal is paternalistic in the sense that it intends to set a welfare maximizing default, however, given the importance of the choices, we expect only a limited impact from this aspect of the plan. We see a much bigger advantage from people actively considering the choices that they will face in their domestic partnership.

[166] *See* MINN. STAT. § 517.08 (2006) (establishing marriage license fee of $100 for couples who do not undergo counseling and $30 for those who "[complete] at least 12 hours of premarital education").

[167] LA. REV. STAT. ANN. § 9:273(1) (2000) (stating that couple entering into covenant marriage must sign declaration of intent including recitation that they have received premarital counseling). These proposals are not limited to the United States. The Australian Prime Minister John Howard recently "encouraged" pre-marriage classes as a way to reduce the divorce rate. Mirka Bagaric, *Time to End the Divorce Between Loyalty and the Family*

many churches already require pre-marriage counseling, our proposal imposes very little additional burden on potential spouses.[168]

Second, the check-off-the-box application minimizes extra costs. The four standard forms are meant to reflect the majoritarian preference for each type of domestic partnership as much as possible. Potential spouses who truly want to avoid the up front transaction costs can simply opt for the most appropriate standard form. Third, the imposition of such up front transaction costs may also reduce future expenses of dissolution.[169]

Despite the advantages of a contractual approach, Linda McClain legitimately questions whether contract law can preserve the value of "adult-adult *inter*dependency."[170] She asserts that "[a]long with interdependency are bundled other goods associated with adult-adult intimate affiliation: goods such as commitment, friendship, relational responsibility, and taking an interest in the well-being of another person."[171] These are not "goods," but are instead critical aspects of familial adult relationships that require the protection and status classification of domestic partners. We add here that simple contract law also fails to respond to the needs of children who are not typically parties to prenuptial agreements or domestic contracts.[172] Thus, even though family law has moved from status

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Law, http://www.onlineopinion.com.au/view.asp?article=4104 (last visited Feb. 15, 2007).

[168] The Catholic Church is well known for requiring pre-marriage counseling. *See generally* GREGORY F. AUGUSTINE PIERCE, PERSPECTIVES ON MARRIAGE (1997) (providing worksheets for pre-marriage counseling). Many, if not most, Protestant churches also require such counseling. For example, Spirit Restoration, which claims to be the "premier, ecumenical Christian website," asserts that "most clergy [in Protestant churches] require a serious pre-marriage counseling program with the engaged couple." Understanding Observances and Rites of Religions, http://www.spiritrestoration.org/Church/Holidays/Understanding_observances_and_rites_of%20religions.htm (last visited Feb. 15, 2007).

[169] At least one Australian legislator is on the record supporting this argument. *See* Patricia Karvelas, *Politicians Want to Get Between Your Sheets*, AUSTRALIAN, Feb. 14, 2006, at 11 (quoting Employment Minister Kevin Andrews: "We pay effectively billions of dollars a year in the costs of marriage and relationship breakdown so I think there is a real role to play up front [with pre-marriage education] in trying to help people make the best decisions in the first place").

[170] McClain, *supra* note 2, at 414.

[171] *Id.* at 415.

[172] *But cf.* Spitko, *supra* note 161, at 1204 (arguing that courts should generally enforce custody and visitation decisions resulting from contractually agreed arbitration).

to contract, we propose preserving the status-based responsibilities and privileges made more concrete via business partnership law.

B. INTRODUCTION TO PARTNERSHIP LAW

Before describing our four domestic partnership models, we briefly review here the history and details of business partnership law. Either the 1914 or 1997 version of the Uniform Partnership Act governs partnerships in nearly all states.[173] Where relevant, this Article highlights the differences between the two. Courts use common law principles,[174] including most importantly those of agency,[175] to fill in the inevitable gaps of coverage and interpretation in general partnership law.

Commentators generally argue that partnerships should be viewed either as primarily contractarian (parties voluntarily contract among themselves)[176] or as primarily relationship-based (parties, by becoming partners, agree "to advance the collective interest and not the short term individual interest of the

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[173] Louisiana is the only state that does not follow variants of the Uniform Partnership Act. *See* Unif. P'ship Act, Nat'l Conf. of Comm'rs on Unif. State Laws, http://www.nccusl.org/update/uniformact_factsheets/uniformacts-fs-upa9497.asp (last visited Feb. 15, 2007) (listing states that have adopted the Act). We shall refer to the earlier version as the UPA, and the 1997 version as the Revised Uniform Partnership Act, or RUPA. The UPA itself borrowed heavily from the English Partnership Act of 1890, which was based on common law. Donald J. Weidner, *Pitfalls in Partnership Law Reform: Some United States Experience*, 26 J. CORP. LAW 1031, 1031 (2001). It was expressly intended to provide guidance on how a partnership could run its affairs and be properly terminated. Commissioners Prefatory Note to the Uniform Partnership Act (1914). The 1997 version was prepared by the National Conference of Commissioners on Uniform State Laws. A majority of states now generally follow RUPA, but as many states have introduced their own provisions or have failed to promulgate RUPA's provisions, uniformity has been imperfect. *See* Robert W. Hillman et al., THE REVISED UNIFORM PARTNERSHIP ACT, 531–32 (2003) (listing states); *see also* Allan W. Vestal, *"Assume a Rather Large Boat . . .": The Mess We Have Made of Partnership Law*, 54 WASH. & LEE L. REV. 487, 518 (1997) (noting and criticizing lack of uniformity among RUPA states).

[174] *See* UNIF. P'SHIP ACT § 104(a) (1997), 6 U.L.A. 78 (2001) ("Unless displaced by particular provisions of [this act], the principles of law and equity supplement [this act]."); UNIF. P'SHIP ACT § 5 (1914) (amended 1997), 6 U.L.A. 391 (2001) ("In any case not provided for in this act the rules of law and equity . . . shall govern.").

[175] UNIF. P'SHIP ACT § 4 (1914) (amended 1997), 6 U.L.A. 386 (2001).

[176] J. Dennis Hynes, *Fiduciary Duties and RUPA: An Inquiry into Freedom of Contract*, 58 LAW & CONTEMP. PROBS. 29, 31 (1995); Larry E. Ribstein, *The Revised Uniform Partnership Act: Not Ready for Prime Time*, 49 BUS. LAW. 45, 57 (1993).

partner").[177] This distinction becomes most relevant in determining the fiduciary duties of the partners, with contractarians arguing for fewer, less onerous, and more waivable duties. The UPA generally reflects a relationship-based approach, whereas RUPA is far more contractarian.[178]

Regardless of the choice of a contractarian or relationship-based approach, partnership law is, for the most part, a system of default rules, or a standard-form agreement.[179] It is enabling, in that parties are generally free to agree on other *inter se* provisions that may better suit them.[180] For example, many partnerships do not divide all profits equally (e.g., law firms that compensate partners based on lock-step seniority or "eat-what-you-kill") or allow equal voting (e.g., partnerships that are run by executive committees). Partners may not, however, contract away all of their fiduciary duties.[181]

Many partnerships, especially larger ones, prepare often complex partnership agreements intended to govern their relationship in lieu of or in addition to their state's partnership act. These agreements are analogous to prenuptial or postnuptial agreements.[182] For these

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[177] Allan W. Vestal, *Fundamental Contractarian Error in the Revised Uniform Partnership Act of 1992*, 73 B.U. L. REV. 523, 527 (1993).

[178] Allan W. Vestal, *Should the Revised Uniform Partnership Act of 1994* Really *Be Retroactive?*, 50 BUS. LAW. 267, 280 (1994).

[179] *See* Creel v. Lilly, 729 A.2d 385, 397 (Md. 1999) ("[B]oth UPA and RUPA only apply when there is either no partnership agreement governing the partnership's affairs, the agreement is silent on a particular point, or the agreement contains provisions contrary to law.").

[180] RUPA § 103(b) explicitly states what provisions cannot be waived by the parties. UNIF. P'SHIP ACT § 103(b) (1997), 6 U.L.A. 73 (2001). UPA does not make this clear. *See* Donald J. Weidner & John W. Larson, *The Revised Uniform Partnership Act: The Reporters' Overview*, 49 BUS. LAW. 1, 2 (1993) (noting that under UPA "it is not clear which rules are merely default rules and which rules are mandatory rules").

[181] RUPA both limits fiduciary duties and allows some contracting around them. Delaware may have gone the furthest in permitting the waiving of fiduciary duties. Section 15-103 of Delaware's Revised Uniform Partnership Act, DEL. CODE ANN. tit. 6 (2005), expressly provides a list of non-waivable provisions that does not include the duty of loyalty. *Id.* § 15-103. In addition, it states that "[i]t is the policy of this chapter to give maximum effect to the principle of freedom of contract." *Id.* § 15-103(d); *see also* Gelfman v. Weeden Investors, L.P., 792 A.2d 977, 987 (Del. Ch. 2001); Hynes, *supra* note 176, at 459–64 (discussing Delaware as state most likely to uphold a partnership agreement that completely waives duty of loyalty).

[182] As in the business world, evidence of duress, undue influence, or coercion may void such agreements. *See generally* Lenore J. Weitzman, *Legal Regulation of Marriage: Tradition and Change*, 62 CAL. L. REV. 1169 (1974) (discussing voidability of pre- and

partnerships—both business and domestic—it is economically efficient to alter the standard form agreement. Default rules govern those who have entered into partnerships more casually, or even inadvertently, or those for whom the economic value of the partnership does not warrant the costs of a bespoke agreement.[183] These rules are generally intended to be majoritarian; they are the rules that the parties would have chosen ex ante had the parties themselves considered the matter.[184]

Partnership law also governs a partnership's relationships with third parties.[185] These laws are generally enabling, except that the partnership and any third party have to reach agreement in order to change the rules. Partners alone cannot change the laws for themselves.

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postnuptial agreements). Further, they must be "made by competent parties, supported by consideration, comply with any applicable statute of frauds and be consistent with public policy." Emy Sigler, Comment, Elgar v. Probate Appeal: *The Probate Court's Implied Powers to Construe and to Enforce Pre-Nuptial Agreements*, 9 CONN. PROB. L.J. 145, 148 (1994).

[183] Sometimes potential partners or their lawyers do not want to negotiate different provisions for fear of ruining a relationship. As Klein and Giulati note, "[e]xperienced practitioners are sensitive to the risk that focusing excessively on difficult organizational issues and engaging in hard bargaining on behalf of clients may undermine trust and cooperation and spoil a deal." William A. Klein & Mitu Gulati, *Economic Organization in the Construction Industry: A Case Study of Collaborative Production Under High Uncertainty*, 1 BERKELEY BUS. L.J. 137, 172 (2004). The parties, or their lawyers, may fear that focusing on potential problems will result in a partner withdrawing. Given the high divorce rate, *see supra* note 3 and accompanying text, marriages are analogous. We would not be disappointed if our proposal resulted in some domestic partnerships not being formed that otherwise would have been formed.

[184] *See* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 15 (Harvard Univ. Press 1991) (arguing that "corporate law should contain the terms people would have negotiated, were the costs of negotiating at arm's length for every contingency sufficiently low"); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 372 (Little, Brown & Co. 3d ed. 1986) (arguing that default rules should supply "standard contract terms that the parties would otherwise have to adopt by express agreement"); *cf.* Ayres & Gertner, *supra* note 163, at 91 (arguing that some default provisions, namely penalty defaults, are actually intended not to be majoritarian, but rather "to give at least one party to the contract an incentive to contract around the default rule and therefore to choose affirmatively the contract provision they prefer"). *But see generally* Eric A. Posner, *There Are No Penalty Default Rules in Contract Law* (Univ. of Chi. Law & Econ., Olin Working Paper No. 237, 2005), *available at* http://ssrn.com/abstract=690403 (arguing that penalty default rules, while theoretical possibilities, do not actually exist in the real world).

[185] *See, e.g.*, UNIF. P'SHIP ACT § 301, 6 U.L.A. 107 (1997) (specifying partner's power to bind partnership with respect to third parties).

C. FORMATION

The UPA defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit."[186] *Person* is a broad term and includes "individuals, partnerships, corporations, and other associations."[187] Thus, other partnerships or corporations can be partners. Co-ownership is not defined in either the UPA or RUPA, but refers to functional ownership, such as rights of control, as opposed to legal ownership. Business is also defined broadly to include "every trade, occupation, or profession."[188]

Unlike other business forms, the law does not require statutory filings or other formalities to form a partnership.[189] In fact, parties can form a partnership without meaning to accept its rights and obligations and without realizing that the law has labeled their relationship a partnership.[190] Although subjective intent and

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[186] UNIF. P'SHIP ACT § 6(1), 6 U.L.A. 393 (1914) (amended 1997); *see also* Comm'r v. Tower, 327 U.S. 280, 286 (1946) (stating that "[a] partnership is generally said to be created when persons join together their money, goods, labor, or skill for the purpose of carrying on a trade, profession, or business and when there is community of interest in the profits and losses"); Ward v. Thompson, 63 U.S. 330, 333 (1859) (defining partnership as a contract "where parties join together their money, goods, labor, or skill, for the purposes of trade or gain, and where there is a community of profits"). Associations such as corporations or limited liability companies formed under other statutes are excluded from partnership. UNIF. P'SHIP ACT § 6(2), 6 U.L.A. 393 (1914) (amended 1997); *see also* UNIF. P'SHIP ACT § 202(a), 6 U.L.A. 92 (1997) ("[T]he association of two or more persons to carry on as co-owners a business for profit forms a partnership, whether or not the persons intend to form a partnership.").

[187] UNIF. P'SHIP ACT § 2, 6 U.L.A. 377 (1914) (amended 1997).

[188] *Id.*

[189] *See id.* §§ 6–7 (setting forth factors for determining whether or not partnership exists). If the partnership is doing business under an assumed name, then an assumed name certificate is required. *See, e.g.*, TEX. BUS. & COM. CODE ANN. § 36.11 (Vernon 2000) ("Any . . . partnership . . . which regularly conducts business or renders professional services under an assumed name . . . shall file in the office of the Secretary of State . . . .").

[190] *See, e.g.*, ROBERT W. HILLMAN ET AL., THE REVISED UNIFORM PARTNERSHIP ACT § 202 (2001) ("[Addition to RUPA] of the phrase, 'whether or not the persons intend to form a partnership,' merely codifies the universal judicial construction of UPA Section 6(1) that a partnership is created by the association of persons whose intent is to carry on as co-owners a business for profit, regardless of their subjective intention to be 'partners.' Indeed, they may inadvertently create a partnership despite their expressed subjective intention not to do so."). For example, if Paul says he is going to buy a lottery ticket and Paula asks him to buy one for her as well, a court may find that a partnership has been formed, with the result that either party can claim half of what the two tickets are worth. *See, e.g.*, Fitchie v. Yurko, 570 N.E.2d 892, 900–01 (Ill. App. Ct. 1991) (upholding trial court's splitting of lottery winning under joint venture analysis); Castilleja v. Camero, 414 S.W.2d 424, 426 (Tex. 1967) (upholding agreement to purchase lottery ticket and divide proceeds as partnership); *see also*

subjective awareness are probative but not dispositive, the parties' relationship itself must be voluntary and consensual (even if they did not intend to become partners in the legal sense).[191] "[A]t the heart of the partnership concept, is the principle that partners may choose with whom they wish to be associated."[192] The partnership begins when two or more parties manifest their intentions—expressly or implicitly—of doing business together (provided they have not deliberately chosen a different business form).[193]

The two key elements in establishing the existence of a partnership are that the parties share the profits and control of the business.[194] Sharing in the profits of a business, which is subject to exceptions such as whether the profit is to pay a debt or wages,[195] creates a rebuttable presumption that there is a partnership.[196] Sharing gross returns, however, does not establish a rebuttable presumption of a partnership.[197] A partner does not need to actually

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infra note 299 and accompanying text (discussing unintentional formation of domestic partnership).

[191] *See, e.g.*, Beckman v. Farmer, 579 A.2d 618, 627 (D.C. Cir. 1990) ("[A]lthough the manner in which the parties themselves characterize the relationship is probative, the question ultimately is objective [intent].") (citing ALAN R. BROMBERG & LARRY E. RIBSTEIN, BROMBERG AND RIBSTEIN ON PARTNERSHIP § 2.05(c), at 2:36 (1988)).

[192] Dawson v. White & Case, 672 N.E.2d 589, 591–92 (N.Y. 1996) (internal quotation omitted) (quoting Gelder Med. Group v. Webber, 363 N.E.2d 573, 577 (N.Y. 1977)).

[193] *See* UNIF. P'SHIP ACT § 202 cmts. 1–2 (1997), 6 U.L.A. 95–96 (2001) (discussing that partnership can be created regardless of subjective intention to be partners and partnership form exists even if another form does not). One can also become a partner by estoppel, if one acts or represents oneself as a partner, or allows another to do so, and a third party relies on the representations. UNIF. P'SHIP ACT § 308 (1997), 6 U.L.A. 128–29 (2001); UNIF. P'SHIP ACT § 16, 6 U.L.A. (1914) (amended 1997), 6 U.L.A. 661–62 (2001).

[194] *See, e.g.*, Wood v. Phillips, 823 So. 2d 648, 653 (Ala. 2001) ("There is no settled test for determining the existence of a partnership. That determination is made by reviewing all the attendant circumstances, including the right to manage and control the business."); Gangl v. Gangl, 281 N.W.2d 574, 580 (N.D. 1979) ("Control is an indispensable component of co-ownership which, when combined with profit sharing, strongly suggests the existence of a partnership.").

[195] The full list of exceptions includes profits received in payment for a debt, wages, or rent, to a representative of a deceased partner as an annuity, as interest on a loan, or as consideration for the sale of property. UNIF. P'SHIP ACT § 7(4) (1914) (amended 1997), 6 U.L.A. 418 (2001).

[196] *Id.*

[197] *Id.* § 7(3), 6 U.L.A. 418 (2001).

exercise control to create a partnership; merely having the power to control is adequate.[198]

When parties form a partnership, it is normally understood to be either at will, for a term, or for a specific undertaking.[199] The type of partnership is relevant for determining the rights of partners upon its end.[200]

If a partnership exists, terms required by law to protect the rights of third parties bind the partners.[201] They cannot waive or vary the state's default rules absent agreement to the contrary.[202]

D. OPERATIONS

1. Partner Is an Agent of the Partnership. Each partner is an agent of the partnership for business purposes and can bind the partnership, unless the partnership agreement limits the partner's authority to do so and the party with whom the partner is dealing is aware of the partner's limited authority.[203] A partner's act that does not appear consistent with the carrying on of the business does not bind the partnership, absent authorization by the partnership.[204] As an agent, the partner has fiduciary responsibilities towards the

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[198] *See, e.g., Gangl*, 281 N.W.2d at 580 (discussing that partner must have right to exercise control in management of business but may entrust that control exclusively in his associates).

[199] *See* UNIF. P'SHIP ACT § 101 cmt. (1997), 6 U.L.A. 62–63 (2001) (stating that if partners did not agree that partnership should expire at end of definite term or upon completion of a particular undertaking, then partnership is at will).

[200] *Id.*

[201] *See id.* § 103(b)(10) (1997), 6 U.L.A. 73 (2001) (stating that partnership agreement may not restrict third party rights).

[202] *Id.* § 103 cmt. 1, 6 U.L.A. 74 (2001).

[203] UNIF. P'SHIP ACT § 9(1) (1914) (amended 1997), 6 U.L.A. 553 (2001) (showing relationship of partner in partnership business). A partner does not, however, have authority to put partnership property in trust to satisfy creditors, dispose of the business's goodwill, confess a judgment, submit a claim or liability to arbitration, or do anything that would make it impossible to carry on the partnership's ordinary business. *Id.* § 9(3). Agency is useful here for reasons of efficiency, particularly for larger partnerships.

[204] *Id.* § 9(2).

partnership,[205] requiring that she conduct all partnership affairs with appropriate diligence, skill, and competence.

A partner's wrongful act within the ordinary course of business or with the partnership's authorization is imputed to the partnership.[206] Such wrongful acts result in the partnership's joint and several liability.[207]

2. Management. Partners have equal rights to manage and control the partnership.[208] A majority of partners may make decisions regarding ordinary course-of-business matters,[209] but the law requires unanimity for any other type of decision or to act contrary to any provision of the partnership agreement.[210] (Of course in a two person partnership there is no difference between unanimity and majority rule.) The UPA and RUPA require unanimity for another party to join the partnership.[211] Parties do not have to exercise their rights and may contract them away. A partner also has a property right in her participation in management.[212]

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[205] *See* RESTATEMENT (SECOND) OF AGENCY § 1(1) (1958) ("Agency is the fiduciary relation which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control and consent by the other to so act."). A fiduciary is "a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking." *Id.* § 13 cmt. a.

[206] *See* UNIF. P'SHIP ACT § 13 (1914) (amended 1997), 6 U.L.A. 600 (2001) (showing when partners wrongful acts bind partnership); *see also id.* § 14, 6 U.L.A. 611 (2001) (requiring partnership bound by partner's breach of trust).

[207] *Id.* § 15, 6 U.L.A. 613 (2001).

[208] *Id.* § 18(e), 6(II) U.L.A. 101 (2001); *see, e.g.*, Parks v. Riverside Ins. Co. of Am., 308 F.2d 175, 180 (10th Cir. 1962) (upholding right of each partner to have equal vote in partnership). Exclusion of a partner from participation in the partnership's management will be grounds for dissolution. *See, e.g.*, Winston & Strawn v. Nosal, 664 N.E.2d 239, 246 (Ill. App. Ct. 1996) (finding that "wrongful exclusion or 'freeze out' of one partner . . . will be grounds for judicial dissolution of the partnership"). Furthermore, the right to participate in management does not require that there be any realistic chance of affecting partnership decisions. *See, e.g.*, G & S Inv. v. Belman, 700 P.2d 1358, 1365 (Ariz. Ct. App. 1984) (holding that consent of deceased general partner is not necessary to partnership decisions).

[209] UNIF. P'SHIP ACT § 18(h) (1914) (amended 1997), 6(II) U.L.A. 101 (2001).

[210] *Id.*; Covalt v. High, 675 P.2d 999, 1002 (N.M. Ct. App. 1983) (quoting UNIF. P'SHIP ACT § 18(h) (1914) (amended 1997), 6(II) U.L.A. 107 (2001)); *see also* Nat'l Biscuit Co. v. Stroud, 106 S.E.2d 692, 695 (N.C. 1959) (holding that majority of partnership was required to restrict the authority of partner in conducting partnership's ordinary business).

[211] UNIF. P'SHIP ACT § 18(g) (1914) (amended 1997), 6(II) U.L.A. 101 (2001).

[212] *Id.* § 24, 6(II) U.L.A. 291 (2001).

3. Information. Partners must disclose "true and full information" regarding anything affecting the partnership if so requested by any other partner.[213] Some courts have used even stronger language to define this obligation. For example, the California Supreme Court observed that a partner may not obtain any advantage by the "slightest misrepresentation [or] concealment" from her copartner, regardless of any request.[214] The UPA imputes to all parties one partner's knowledge of any partnership matter, except in cases of fraud against the partnership.[215]

4. Liabilities. All debts that the partnership cannot pay from partnership assets become the personal liability of the partners.[216] Assuming that all partners are solvent, a partner shares in partnership losses in a pro rata proportion equal to their share of the profits.[217] A new partner is, however, only liable for the partnership's preexisting obligations to the extent that partnership property can satisfy the obligations.[218] Partners are not entitled to compensation for their work on behalf of the partnership.[219]

E. PROPERTY

A partnership owns all property brought in or contributed to the partnership, all property acquired in the name of the partnership, and all property acquired with partnership funds unless the partnership indicates otherwise.[220] Partners are liable as fiduciaries to the partnership for any profit or benefits derived from the

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[213] *Id.* § 20, 6(II) U.L.A. 188 (2001); *see, e.g.*, Hooper v. Yoder, 737 P.2d 852, 859 (Colo. 1987) (noting that "[e]ach partner has the right to demand and expect from the other a full, fair, open and honest disclosure of everything affecting the relationship" (citation omitted)).

[214] Leff v. Gunter, 658 P.2d 740, 744 (Cal. 1983).

[215] UNIF. P'SHIP ACT § 12 (1914) (amended 1997), 6 U.L.A. 595 (2001).

[216] The liability may be joint or joint and several depending on the type of debt. *Id.* § 15, 6 U.L.A. 613 (2001). The distinction is relevant only in terms of the procedures creditors take to reach a partner's assets. RUPA simply provides that "partners are liable jointly and severally for all obligations of the partnership." UNIF. P'SHIP ACT § 306(a) (1997), 6 U.L.A. 117 (2001).

[217] UNIF. P'SHIP ACT § 18(a) (1914) (amended 1997), 6(II) U.L.A. 101 (2001).

[218] *Id.* § 17, 6 U.L.A. 681 (2001).

[219] *Id.* § 18(f), 6(II) U.L.A. 101 (2001). Partners are entitled to compensation for work performed in the winding up of the partnership. *Id.*

[220] *Id.* § 8(1)–(3), 6 U.L.A. 532 (2001).

partnership or its property.[221] A partner has three property rights: (1) rights in specific partnership property, (2) the interest in the partnership itself, and (3) rights to participate in the management of the partnership.[222] Of most importance here is a partner's right as a co-owner with the other partners in specific partnership property. This interest is also known as a "tenant in partnership."[223] A partner may only use the property for partnership purposes, unless the other partners consent to her personal use.[224] A creditor may not attach or execute a partner's right in specific partnership property based on a claim solely against the partner.[225] Likewise, the right in specific partnership property is not subject to several personal encumbrances that may burden marriage or family relationships (such as "dower, curtesy, or allowances to widows, heirs, or next of kin").[226]

F. FIDUCIARY DUTIES

Partners have robust fiduciary obligations to each other[227] and are often viewed as trustees with respect to copartners.[228] One court described the duties owed as "the utmost good faith and loyalty."[229] The general purpose is to ensure scrupulously fair dealing among

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[221] *Id.* § 21, 6(II) U.L.A. 194 (2001).

[222] *Id.* § 24, 6(II) U.L.A. 291 (2001).

[223] *Id.* § 25(1), 6(II) U.L.A. 294 (2001); *see* Kraus v. Kraus, 164 N.E. 743, 744 (N.Y. 1928) (Cardozo, C.J.) (discussing partners' use of property as tenant in partnership).

[224] UNIF. P'SHIP ACT § 25(2)(a) (1914) (amended 1997), 6(II) U.L.A. 294 (2001).

[225] *Id.* § 25(2)(c) (stating that "partner's right in specific partnership property is not subject to attachment or execution").

[226] *Id.* § 25(2)(e).

[227] The duty of loyalty is most relevant to our discussion; however, partners also owe each other a duty of care. The duty of care is sometimes "limited to refraining from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law." UNIF. P'SHIP ACT § 404(c) (1997), 6 U.L.A. 143 (2001). Some courts, however, apply a more familiar negligence standard. *See, e.g.*, Rosenthal v. Rosenthal, 543 A.2d 348, 352 (Me. 1988) (stating that partner's duty of care is "[t]o act with that degree of diligence, care and skill which ordinarily prudent persons would exercise under similar circumstances in like positions").

[228] *See, e.g.*, Leff v. Gunter, 658 P.2d 740, 744 (Cal. 1983) (stating partners are to act as trustees for one another). *But cf.* Larry E. Ribstein, *Are Partners Fiduciaries?*, 2005 U. ILL. L. REV. 209, 213 (arguing that courts' references to broad fiduciary duties are frequently "just a way to help rationalize a result the court would, and could, have reached on other grounds").

[229] Cardullo v. Landau, 105 N.E.2d 843, 845 (Mass. 1952).

partners, reflecting that their relationship is one of trust and confidence.[230] Judge Cardozo in the well-known case[231] of *Meinhard v. Salmon*, (over)stated that:

> Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.[232]

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[230] *See, e.g.*, Hooper v. Yoder, 737 P.2d 852, 859 (Colo. 1987) (stating partners are in relationship of trust and confidence). It is interesting to note that courts consider parties to a prenuptial agreement as mutual fiduciaries. *See, e.g.*, Sogg v. Nev. State Bank, 832 P.2d 781, 784 (Nev. 1992) (finding "presumed fiduciary relationship" between fiancées); Gail Frommer Brod, *Premarital Agreements and Gender Justice*, 6 YALE J.L. & FEMINISM 229, 262 (1994) (stating that most states hold parties negotiating prenuptial agreement to "highest standards of good faith and fair dealing").

[231] The case has often been cited. Shephardizing the case on Westlaw on October 21, 2006 reveals 2890 total cites. One commentator concluded: "*Meinhard* has aged well. No case of its period is of comparable contemporary influence in the business law area . . . [and it] continues to guide courts in determining the duties business partners owe one another." Robert W. Hillman, *Business Partners as Fiduciaries: Reflections on the Limits of Doctrine*, 22 CARDOZO L. REV. 51, 53 (2000); *see also* Ribstein, *supra* note 228, at 210 (referring to Cardozo's words as "perhaps the most famous judicial expression of fiduciary duties").

[232] 164 N.E. 545, 546 (N.Y. 1928) (citations omitted). The distinction between "joint adventurer" and partner is not crystal clear, but may merely reflect that the joint venture has a narrower scope than the partnership. *See* Annotation, *What Amounts to Joint Adventure*, 138 A.L.R. 968 (1942) (stating joint adventure is sometimes regarded as partnership). Joint adventurers would thus, if anything, have *weaker* fiduciary duties than partners.

According to at least one state court, this standard still controls.[233]

In an early case the Supreme Court provided examples of what partners cannot do:

> The general principles . . . admit of no question, it being well settled that one partner cannot, directly or indirectly, use partnership assets for his own benefit; that he cannot, in conducting the business of a partnership, take any profit clandestinely for himself; that he cannot carry on the business of the partnership for his private advantage; that he cannot carry on another business in competition or rivalry with that of the firm, thereby depriving it of the benefit of his time, skill, and fidelity without being accountable to his copartners for any profit that may accrue to him therefrom; that he cannot be permitted to secure for himself that which it is his duty to obtain, if at all, for the firm of which he is a member; nor can he avail himself of knowledge or information, which may be properly regarded as the property of the partnership, in the sense that it is available or useful to the firm for any purpose within the scope of the partnership business.[234]

The RUPA, because it is more contract oriented than the UPA, has a generally narrower set of fiduciary duties.[235] The duties of care and loyalty are a partner's only fiduciary duties under the RUPA.[236] To meet the duty of care, a partner must simply refrain "from engaging in grossly negligent or reckless conduct, intentional misconduct, or a knowing violation of law."[237] The duty of loyalty requires that a partner not appropriate partnership opportunities or property, not deal with the partnership as an adversely

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[233] *In re* Cupples, 952 S.W.2d 226, 235 (Mo. 1997) (en banc) (stating Cardozo's standard still controls).

[234] Latta v. Kilbourn, 150 U.S. 524, 541 (1893).

[235] *See* Della Ratta v. Larkin, 856 A.2d 643, 650, 659 n.15 (Md. 2004) (opining that "RUPA narrowly defines the fiduciary duties of partners").

[236] UNIF. P'SHIP ACT § 404(a) (1997), 6 U.L.A. 143 (2001).

[237] *Id.* § 404(c).

interested party, and not compete with the partnership before its dissolution.[238] The RUPA's approach to fiduciary duties was probably the most controversial change from the UPA.[239] Interestingly, although a majority of states have implemented a version of the RUPA, some of those states have retained a traditional fiduciary view of partners' obligations.[240]

Courts have decided numerous partnership fiduciary duty cases, with the outcome invariably depending upon the specific facts.[241] Often, especially in appropriating partnership opportunity cases (as in the *Latta v. Kilbourn* and *Meinhard v. Salmon* cases cited above) and partnership competition cases, the scope of the business agreed to by the partners determines the case's resolution. A breach of fiduciary duty can result in a partner's liability even after the termination of the partnership.[242]

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[238] *Id.* § 404(b). For a criticism of this limited contractarian approach to fiduciary duties, see J. William Callison, *Blind Men and Elephants: Fiduciary Duties Under the Revised Uniform Partnership Act, Uniform Limited Liability Company Act, and Beyond*, 1 J. SMALL & EMERGING BUS. L. 109, 123–60 (1997) (noting that limited contractarian approach departs from prior law, is too uncertain, and undermines enforcement).

[239] *See, e.g.*, Callison, *supra* note 238 (criticizing RUPA's fiduciary duty approach); Claire Moore Dickerson, *Is It Appropriate to Appropriate Corporate Concepts: Fiduciary Duties and the Revised Uniform Partnership Act*, 64 U. COLO. L. REV. 111, 146 (1993) (stating that RUPA clearly rejects concept that partner must act " 'solely on behalf of the partnership' "); Lawrence E. Mitchell, *The Naked Emperor: A Corporate Lawyer Looks at RUPA's Fiduciary Provisions*, 54 WASH. & LEE L. REV. 465, 474–75 (1997) (suggesting that RUPA § 404(e) permits partner to further his own interest without violating his fiduciary duty); Larry E. Ribstein, *The Revised Uniform Partnership Act: Not Ready for Prime Time*, 49 BUS. LAW. 45, 52–55 (1993) (discussing RUPA's provisions for revised fiduciary duties); Vestal, *supra* note 177, at 535–37 (criticizing changes as radical and unnecessary).

[240] *See* Michael Haynes, Comment, *Partners Owe to One Another a Duty of the Finest Loyalty . . . or Do They? An Analysis of the Extent to Which Partners May Limit Their Duty of Loyalty to One Another*, 37 TEX. TECH. L. REV. 433, 454–71 (2005) (evaluating Texas, Delaware, Ohio, Illinois, California, and New York).

[241] *See* Rexford Rand Corp. v. Ancel, 58 F.3d 1215, 1219 n.7 (7th Cir. 1995) (noting that "[i]n a partnership the extent of the fiduciary duty owed by one partner to another varies from case to case depending on the circumstances").

[242] The Oregon Supreme Court used this colorful metaphor:

> When a partner wrongfully snatches a seed of opportunity from the granary of his firm, he cannot, thereafter, excuse himself from sharing with his copartners the fruits of its planting, even though the harvest occurs after they have terminated their association. The stewardship of the erring member dates from the initial appropriation and continues until he is exonerated by a proper accounting.

Fouchek v. Janicek, 225 P.2d 783, 793 (Or. 1950).

G. TERMINATION

Any partner can withdraw from any partnership at any time.[243] The consequences of withdrawing, however, vary depending on whether it was done rightfully or wrongfully. In addition, the ending of any partnership is really a process with three separate parts. Under the UPA, there is first a "dissolution," followed by the "winding up," and finally the "termination."[244]

The UPA uses the term "dissolution" to refer to the "change in the relation of partners" that results when a partner "ceases to be associated" with the partnership.[245] For example, a partner's death or a court order will cause the dissolution of the partnership.[246] Likewise, the completion of a partnership's particular undertaking or the expiration of the specified terms will cause dissolution.[247] On the other hand, if the partners agree otherwise or continue to act like partners, the partnership becomes a partnership at will.[248] The term "winding up" is the process of resolving all of the partnership's outstanding obligations.[249] When all obligations have been resolved, only then does the partnership terminate.[250]

Any partner always has the *power*, merely by express will, to cause dissolution (and thus initiate a winding up and termination).[251] The partner may not, however, have the *right* to

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[243] As a partnership is a form of contract, breach is permitted. Courts will almost never, however, order specific performance, in the sense of forcing people to remain against their wishes in a partnership. *See, e.g.*, *In re* Ben Franklin Hotel Associates, 186 F.3d 301, 310 (3d Cir. 1999) (noting that "[r]arely, if ever, will a court specifically compel the performance of a partnership contract because that contract is essentially personal in character"); Logan v. Logan, 675 P.2d 1242, 1249 (Wash. Ct. App. 1984) (same). A court may order alternative remedies that will yield an economically similar result.

[244] In an attempt to avoid confusion, the RUPA uses the terms "dissociation," "dissolution," and "winding up" to replace "dissolution," "winding up," and "termination." UNIF. P'SHIP ACT § 601 (1997), 6 U.L.A. 163–64 (2001). Confusion remains, and the terms are often used imprecisely. *Cf.* Estate of McKay's, 343 N.E.2d 45, 51 (Ill. App. Ct. 1976) (noting inherent ambiguity in "terminate" and "winding up").

[245] UNIF. P'SHIP ACT § 29 (1914) (amended 1997), 6(II) U.L.A. 349 (2001).

[246] *Id.* § 31(4), (6), 6(II) U.L.A. 370 (2001).

[247] *Id.* § 31(1).

[248] *Id.* § 23, 6(II) U.L.A. 289 (2001).

[249] *See, e.g.*, Scholastic, Inc. v. Harris, 259 F.3d 73, 84–85 (2d Cir. 2001) (distinguishing "winding up" from "termination").

[250] *See, e.g.*, *id.* at 85 (noting that "termination" occurs when "partnership is wound up").

[251] UNIF. P'SHIP ACT § 31(2) (1914) (amended 1997), 6(II) U.L.A. 370 (2001); *see, e.g.*, Collins

cause dissolution. This is true when a dissolution would result in the partnership's termination prior to the completion of an agreed term or the accomplishment of a specific undertaking.[252] Unless the partners intend otherwise, under both the UPA and RUPA a partner may sever her relationship with the partnership at will without suffering any penalty.[253]

Exercising the power of dissolution without the right to do so results in wrongful dissolution, in which case other partners are entitled to seek damages.[254] A partner who does not have the right to cause dissolution may instead seek a court order.[255] Courts have wide discretion to grant dissolution.[256] A court shall decree a dissolution if a partner is of unsound mind,[257] can no longer perform her part of the partnership agreement,[258] is guilty of wrongdoing that prejudices the continuation of the business,[259] willfully or persistently breaches the partnership agreement,[260] or behaves in such a way that continuing the business is not reasonably practicable.[261] A court can also decree a dissolution if the

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v. Lewis, 283 S.W.2d 258, 261 (Tex. App. 1955) (noting that "there always exists the power" to terminate at will). RUPA uses the term dissociation. *See* UNIF. P'SHIP ACT § 602(a) (1997), 6 U.L.A. 169 (2001) ("A partner has the power to dissociate at any time, rightfully or wrongfully, by express will . . . .").

[252] *See, e.g.*, *Collins*, 283 S.W.2d at 261 (distinguishing "legal right" from "power"). Courts will often imply a term or the accomplishment of a specific undertaking in order to avoid opportunistic dissolutions. *See, e.g.*, Owen v. Cohen, 119 P.2d 713, 716–17 (Cal. 1941) (finding that procedure for dissolution did not disrupt "competitive spirit" of bidding).

[253] UNIF. P'SHIP ACT § 803(a) (1997), 6 U.L.A. 199 (2001); UNIF. P'SHIP ACT § 31 (1914) (amended 1997), 6(II) U.L.A. 370 (2001).

[254] UNIF. P'SHIP ACT § 38(2) (1914) (amended 1997), 6(II) U.L.A. 487 (2001).

[255] *Id.* § 32(1) ("On application by . . . a partner the court shall decree a dissolution whenever . . . .").

[256] Weissman v. Henkin, 34 A.2d 907, 909 (Pa. 1943).

[257] UNIF. P'SHIP ACT § 32(1)(a) (1914) (amended 1997), 6(II) U.L.A. 404 (2001).

[258] *Id.* § 32(1)(b).

[259] *Id.* § 32(1)(c).

[260] *Id.* § 32(1)(d). Refusing to allow a partner to participate in management is one example of this. *See, e.g.*, Herman v. Pepper, 166 A. 587, 588 (Pa. 1933) (noting that exclusion from management is undoubtably grounds for dissolution).

[261] UNIF. P'SHIP ACT § 32(1)(d) (1964) (amended 1997), 6(II) U.L.A. 404 (2001). This is the "jerk" provision. Courts do not want to require people to continue in partnership with grossly unreasonable and unpleasant partners. *See, e.g.*, Owen v. Cohen, 119 P.2d 713, 715 (Cal. 1941) (holding that lower court was justified in granting dissolution where "breach between the partners was due in large measure to defendant's persistent endeavors to become the dominating figure of the enterprise and to humiliate plaintiff before the employees and customers").

partnership's business cannot be profitable[262] or through the catchall that "[o]ther circumstances render a dissolution equitable."[263]

Dissolution does not result in the immediate end of the partnership. Before ending, the partnership will complete any work in progress, settle with creditors, sell all assets, and divide any remainder among the partners.[264] The partnership's business may be sold as a going concern or the assets may be sold separately.[265]

Partnership assets are allocated first to creditors other than partners, second to repay loans from partners, and third to repay partners' capital contributions.[266] Any remaining profits are distributed to the partners.[267] Partners may have to contribute additional amounts to satisfy the partnership's liabilities.[268] When all of the partnership's obligations have been addressed, the partnership terminates.[269]

If the dissolution was wrongful, the wrongdoer suffers both a loss of all of her interest in the goodwill of the business[270] and is liable for a breach of contract action and resulting contract damages.[271] Confusingly, even if dissolution is not wrongful (e.g., the dissolution

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[262] UNIF. P'SHIP ACT § 32(1)(e) (1914) (amended 1997), 6(II) U.L.A. 404 (2001).

[263] *Id.* § 32(1)(f).

[264] *See, e.g., id.* § 30, 6(II) U.L.A. 354 (2001) (postponing partnership's end until "winding up of partnership affairs is completed"); Scholastic, Inc. v. Harris, 259 F.3d 73, 84 (2d Cir. 2001) (noting that activities of partnership in dissolution are limited). Under RUPA, the dissociation of a partner from an at-will partnership does not necessarily result in the winding up and termination of the partnership. UNIF. P'SHIP ACT § 601 cmts. 1, 8 (1997), 6 U.L.A. 164–65 (2001).

[265] Kinney v. United States, 228 F. Supp. 656, 662 (W.D. La. 1964) (differentiating sale of assets and sale as going concern).

[266] UNIF. P'SHIP ACT § 40(b) (1914) (amended 1997), 6(II) U.L.A. 509 (2001).

[267] *Id.*

[268] *Id.* § 40(d). Partnerships do not operate under a limited liability regime. *See id.* (requiring partners contribute proportionate shares to cover insolvent partner's liabilities).

[269] *Id.* § 30, 6(II) U.L.A. 354 (2001). *See, e.g., In re* Weiss, 111 F.3d 1159, 1166 (4th Cir. 1997) (noting that partners cannot escape obligations by dissolving partnership).

[270] UNIF. P'SHIP ACT § 38(2)(c)(II) (1914) (amended 1997), 6 U.L.A. 481 (2001). The goodwill of the business can be thought of as the value of the business above and beyond the value of the business's assets. 38A C.J.S. *Goodwill* § 2 (2006). Generally goodwill is the difference between the business's liquidation value and its value as a going-concern. *Id.* Under RUPA, the wrongdoer is entitled to her share of any goodwill. *See* UNIF. P'SHIP ACT § 701 (amended 1997), 6 U.L.A. 175 (2001) (providing that wrongdoer receives going-concern value less damages for wrongful dissociation).

[271] UNIF. P'SHIP ACT § 38(2) (1914) (amended 1997), 6 U.L.A. 487–88 (2001). *See, e.g.*, Geczy v. Lachappelle, 636 P.2d 604, 608 (Alaska 1981) (upholding award of damages for breach of contract).

of a partnership at will) and contract damages are unavailable, damages may still be available on a breach of fiduciary duty theory.[272]

V. SOMETHING NEW—UNIFORM DOMESTIC PARTNERSHIP

If families are truly the bedrock of our nation's strength,[273] then we need to foster families of all kinds. In particular, if families function primarily to provide care and support,[274] then we should subsidize and protect the people willing to assume those domestic responsibilities.[275] Marriage, however, has evolved to emphasize love, self-fulfillment, and companionship, and is less likely to promote economic security, responsibility, familial alliance, and domestic sacrifice than it did hundreds of years ago.[276] Thus,

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[272] *See, e.g.*, Page v. Page, 359 P.2d 41, 44 (Cal. 1961) (stating that power to dissolve "must be exercised in good faith"); Meehan v. Shaughnessy, 535 N.E.2d 1255, 1261 n.6 (Mass. 1989) (observing that plaintiff may still have remedy even if dissolution of partnership at will was not wrongful).

[273] President Bush's website declares:

> THE IMPORTANCE OF FAMILY: The President and Mrs. Bush believe parents and family are the first and most important influence in every child's life, providing a foundation of love and support. The President's FY 2006 budget supports families in many ways, including:
> - Promoting Responsible Fatherhood: The President requested $40 million for a new fatherhood initiative to be awarded in competitive grants to faith-based and community organizations for skill-based marriage and parenting education, and other services that help fathers provide emotional and financial support to their children.
> - Encouraging Healthy Marriages: The President has requested $100 million for a state-based competitive matching grant program to support healthy marriages, and an additional $100 million for research, demonstration projects, and technical assistance on family formation and healthy marriage activities.

News Release, The White House, Fact Sheet: Making a Difference For America's Youth (Mar. 7, 2005), http://www.whitehouse.gov/news/releases/2005/03/20050307-5.html.

[274] *See supra* notes 159–60 and accompanying text.

[275] *See* Edward A. Zelinsky, *Deregulating Marriage: The Pro-Marriage Case for Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1161, 1163–66 (2006) (arguing that state sponsored marriage should be abolished); *cf.* Bernstein, *supra* note 10, at 211–12 (examining whether state-sponsored marriage should be abolished in favor of private ordering, but concluding that civil marriage offers compelling benefits).

[276] Marsha Garrison suggested that cohabitation expresses an " '*individualistic ethic* . . . in which personal happiness and fulfillment hold the highest value.' " Garrison, *supra* note 8, at 22 (quoting Kathryn Edin et al., *A Peek Inside the Black Box: What Marriage Means for Poor Unmarried Parents*, 66 J. MARRIAGE & FAM. 1007, 1011 (2004)).

Americans need a new option, a unifying structure that does not carry the baggage of subordination and that can facilitate economic and strategic legal planning to benefit loving domestic partners. Americans need an option that satisfies constitutional strictures and leaves marriage to the exclusive control of the religious institutions.[277] Domestic partnership, based on traditional business partnership law, provides a near-perfect structure.[278] Moreover, domestic partners can still choose to marry (without legal effect), assuming that their chosen religious institution will perform a marriage ceremony for them.

A. THE PROPOSAL—OVERVIEW

This Article proposes a legal regime for ordering domestic partnerships based on the UPA: the Uniform Domestic Partnership Act (UDPA).[279] Under this new system, a domestic partnership is simply "an association of two (2) adult persons to form a single economically and emotionally supportive family."[280] An additional requirement is that no person may be in more than one domestic partnership at a time.[281] Note that per this definition, these couples

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[277] Edward Zelinsky also argues in favor of leaving marriage to churches, and he favors no role for the state in any form of domestic union. Zelinksy, *supra* note 275, at 1163–66.

[278] Other scholars have promoted different structures. For example, Judith Stacey recommends registered kinship based on an adult-adult dyad. *See generally* JUDITH STACEY, IN THE NAME OF THE FAMILY: RETHINKING FAMILY VALUES IN THE POSTMODERN AGE (1996) (illustrating effectiveness of nontraditional family models); JUDITH STACEY, BRAVE NEW FAMILIES: STORIES OF DOMESTIC UPHEAVAL IN LATE TWENTIETH-CENTURY AMERICA (1990) (examining two families; recognition of nuclear family); Judith Stacey, *Toward Equal Regard for Marriages and Other Imperfect Intimate Affiliations*, 32 HOFSTRA L. REV. 331 (2003) (exploring families in nonmarriage contexts).

[279] Again, we cannot anticipate every nuanced application of our proposal in an article of this length; however, we attempt here to provide an overview sufficient to begin an academic conversation about our proposal. Illustrative provisions of the Uniform Domestic Partnership Act are attached as APPENDIX B.

[280] *See infra* APPENDIX B, § 6. *Cf.* UNIF. P'SHIP ACT § 6(1) (1914) (amended 1997), 6 U.L.A. 393 (2000) (defining a business partnership).

[281] *See infra* APPENDIX B, § 18(e). Conceivably, one could serve as a partner in more than one domestic partnership, just as business partners may belong to more than one business partnership. Business partners, however, run the risk of breaching their fiduciary duty of loyalty when they belong to partnerships engaged in similar businesses. Lawyers, for example, almost never belong to more than one law partnership at the same time. This Act is predicated on the assumption that a domestic partner's fiduciary duties to the other partner and to any limited partners effectively preclude participation in more than one. In

are not necessarily sexually intimate nor do they necessarily live in the same residence.[282] This definition allows for commuter families that are split geographically, perhaps because of jobs or family responsibilities, but whose members still consider themselves a familial unit. Although we believe that this definition is a highly defensible compromise based on the caregiving functions of a family, we note that our proposal still has advantages even if it uses a different definition of domestic partnership. Reasonable people might favor a definition that is narrower (perhaps requiring that the domestic partners be romantically involved) or broader (perhaps to allow more than two adults to form a single domestic partnership).

Most couples (like many small business partnerships) lack the resources—time, cognitive ability,[283] and technical expertise to negotiate their own custom-made domestic partnership agreement. Additionally, they lack the financial resources to hire experts. Our proposal serves societal interests and encourages family unity when governments recognize standardized domestic partnership options, created via a uniform partnership application and based on what parties would likely choose for themselves if they had the resources.[284] More precisely, we recommend four standard domestic partnership models because there are four typical structures for domestic ordering. These different models have somewhat different majoritarian preferences.[285] A couple's ex ante choices, effectuated

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addition, a partner participating in multiple domestic partnerships raises equitable problems, such as for the allocation of health benefits.

[282] *But cf.* PRINCIPLES, *supra* note 13, at 916 (defining domestic partners as two persons who share same residence).

[283] In particular, we note that people getting married suffer from an optimistic bias. *See* Baker & Emery, *supra* note 19, at 443 (observing that almost 100% of couples report before their marriage that they will not get divorced, notwithstanding actual divorce rate of roughly 50%). Of course, an optimistic bias is not limited solely to marriage. *See generally* David Dunning et al., *Flawed Self-Assessment: Implications for Health, Education and the Workplace*, 5 PSYCHOL. SCI. IN THE PUB. INT. 69 (2004) (reviewing data "showing that people's perceptions of their skills, knowledge, personality, and character often do not mesh with objective reality").

[284] *See supra* notes 166–68 and accompanying text.

[285] *See generally* Larry E. Ribstein, *A Standard Form Approach to Same-Sex Marriage*, 38 CREIGHTON L. REV. 309 (2005) (presenting some theoretical arguments in favor of an "interstate market for standard forms" of marriage, without taking a position on what provisions such standard forms should contain); *see also* Krotoszynski & Spitko, *supra* note 100, at 606–08 (arguing in favor of state experimentation regarding domestic and civil rights issues).

by their check-off-the-box responses on the application, dictate the appropriate partnership form.[286]

Based on our assessment of the likely goals and needs of significant numbers of potential families, we propose the following four standard forms for domestic partnerships:[287] the enduring, provisional, filial, and caregiving domestic partnerships.

The enduring domestic partnership, as its name suggests, is intended to continue until one of the partners dies. It may terminate earlier, however, if one pursues that option. An enduring domestic partnership unites couples who intend to stay childless and are vulgarly known today by the acronym "DINKS"—double income no kids. This partnership form closely resembles the current institution of state supported marriage. Although intended for people who plan to spend their lives together, the enduring partnership would entail minimum mutual obligations in the event of dissolution before death.[288] In essence, it would be analogous to an at-will business partnership.

The provisional domestic partnership serves those partners who wish to form a domestic partnership but are not sure that they want to commit to each other for life. A provisional domestic partnership replaces "trial marriages"[289] and might also be popular with those couples who view cohabitation as a type of trial marriage.[290] Broadly speaking, this type of partnership is analogous to hand fasting,[291] Indonesian contract marriage,[292] or the mut'a.[293] Because

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[286] *See infra* APPENDIX A.

[287] These four standard forms need not be set in stone. States should monitor form usage and make appropriate modifications or expand the number of these standard forms based on experience with the needs of families.

[288] In the event the couple does have children, both partners would be obligated to provide for the children.

[289] *See* Deborah Schupack, *'Starter' Marriages: So Early, So Brief*, N.Y. TIMES, July 7, 1994, at C1 (quoting term suggested by Margaret Mead in 1960s describing marriage of finite period during which couple could decide whether they would have children and form permanent union); *see also Betel Nuts Beat Out Flower for Aboriginal Lovebirds*, TAIPEI TIMES, Feb. 14, 2006, at 2, *available at* http://www.taipeitimes.com/News/taiwan/archives/2006/02/14/2003292956 (discussing similar practice among Tao People, Taiwanese aborigines).

[290] *See* Paul Storer, *Catholic Students Explore Perspectives on Cohabitation*, CATHOLIC EXPLORER, Feb. 16, 2006, http://www.catholicexplorer.com/explore4325/atd/catholic-students-explore.shtml (showing that cohabitating couples view that relationship as "trial marriage").

[291] *See* 6 THE OXFORD ENGLISH DICTIONARY 1072 (2d ed. 1989) ("Formerly treated as an uncanonical, private, or even probationary form of marriage."); Wikipedia, Handfasting,

a provisional domestic partnership lasts for only one year and is renewable annually if the partners so choose, this type of partnership is analogous to a business partnership for a term.[294]

The filial domestic partnership, as the name indicates, benefits those couples who intend to rear children together and the children themselves. In the event that the partners have children, either naturally, with the assistance of reproductive technologies, or through adoption, the children become domestic dependents. The partners must support their children in a manner consistent with their ex ante promises, but in no case less generously than the state-mandated floor. This type of domestic partnership is analogous to a business partnership for a particular undertaking, e.g., raising children to emancipation, with the wrinkle that the adults are like general partners whereas the children are like limited partners—beneficiaries of fiduciary obligations without any right of control.

A second type of domestic partnership modeled loosely on a business partnership for a particular undertaking is the caregiving domestic partnership. While we regard all forms of domestic partnership as having a caregiving aspect, this form favors adults who agree in advance to divide income earning and domestic caregiving—or partnership maintaining—tasks unequally. It serves so called traditional couples, based on the Ozzie and Harriet model,[295] with one partner working outside the home and the other

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http://en.wikipedia.org/wiki/Handfasting (last visited Feb. 15, 2007) (discussing Celtic origins and modern practices).

[292] *See* Julie Chao, *No Wedded Bliss: Indonesia Women Seek Rights*, ATLANTA J.-CONST., Apr. 10, 2005, at C4 (describing contract marriages, common in some parts of Indonesia, as merely temporary relationship, lasting between a week and a year, and lacking legal recognition, even though performed by Muslim cleric).

[293] The mut'a or "temporary marriage" was a pre-Islamic, Middle Eastern convention designed to allow sexual outlets for men and women under certain circumstances without subjecting them to the otherwise harsh penalties for nonmarital sex. . . . . In these temporary marriages the man and woman had no obligation toward each other once the contract was over. But if the woman bore a child as a result of the relationship, that child was legitimate and was entitled to share in the father's inheritance.

COONTZ, *supra* note 1, at 29.

[294] *See* Garrison, *supra* note 8, at 20 (noting that cohabitation typically lasts less than 1.5 years).

[295] *The Adventures of Ozzie and Harriet* was a long running television program that is now

in the home. It also serves persons, such as siblings or the adult child and parent, who cannot now marry but can form unions, such as those currently allowed in several states.[296] The parties may specify a term of years or other end date for this partnership such as the occurrence of a particular event or they may choose to commit for life. If a partner terminates this partnership before the anticipated term end, the income earner meets support obligations until the domestic caretaker or dependent retools for the marketplace or enters another domestic partnership.

In the next subparts, we look at how couples form and operate domestic partnerships, address liabilities, and deal with the consequences of termination.

1. Formation. To create a domestic partnership, participants must complete and sign a relatively simple check-off-the-box application form and pay any applicable state or federal fees.[297] APPENDIX A is an example of such an application form. Unlike the general partnership, but like more recently enacted business forms,[298] a domestic partnership commences only if the parties act intentionally in forming the partnership.[299] Once the clerk gives the

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viewed as "an idealized portrait of the American nuclear family." The Museum of Broadcast Communications, The Adventures of Ozzie and Harriet, http://www.museum.tv/archives/etv/A/htmlA/adventuresof/adventuresof.htm (last visited Feb. 15, 2007). Harriet was viewed as the quintessential 1950s homemaker whereas Ozzie was the breadwinning paterfamilias. *Id.*

[296] *See supra* notes 82–102 and accompanying text.

[297] We anticipate that states would charge a fee similar to that charged for marriage licenses. These fees currently range from $4 in Massachusetts to Florida's $88.50, lowered to $56 if the couple takes a four hour course. The Bride to Be Channel, *supra* note 17. We also anticipate that Congress could adopt this system to be administered by the federal Department of Health and Human Services. If the government created a federal database for partnership administration, it could better monitor demographics, statistical information, child support compliance, and census information. *But see also* Krotoszynski & Spitko, *supra* note 100, at 601, 606–08 (arguing against federalization of marriage law in response to narrowing, rather than expansion, of rights for same-sex partners).

[298] *See, e.g.*, TEX. REV. CIV. STAT. ANN. art. 6132b, § 3.08(b) (Vernon 1996) (amended 1997) (illustrating limited liability partnership act); MODEL BUS. CORP. ACT § 201 (1984) (requiring filing for creation of corporation); UNIF. LTD. LIAB. CO. ACT § 202 (1996), 6A U.L.A. 578 (2003) (requiring filing articles of organization with Secretary of State); UNIF. LTD. P'SHIP ACT § 201 (2001), 6A U.L.A. 33 (2003) (setting forth procedural requirements for formation of limited partnership). Even RUPA, applicable to general partnerships, provides for voluntary state filings regarding partnership authority. UNIF. P'SHIP ACT, § 105(a) (1997), 6 U.L.A. 80 (2001).

[299] *See supra* notes 189–202 and accompanying text. An unintentional domestic partnership would be the rough equivalent of a common law marriage based on cohabitation. Common law marriage, however, is now defunct in most states for a variety of reasons. *See*

application his approval, essentially a ministerial action designed to ensure that the putative domestic partners have answered each question,[300] the government issues a domestic partnership license after a seventy-two hour cooling off period.[301]

The application form includes sections for the disclosure of all existing separate assets and liabilities, for the declaration of children and other dependents, and for the voluntary, confidential declaration of health issues such as HIV, alcoholism, and genetic risk factors.[302] Obviously, each party has a duty of disclosure to the other party, and partnership law would construe any failure to meet this duty against the non-discloser.[303] Thus, for example, if a party

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Sonya C. Garza, *Common Law Marriage: A Proposal for the Revival of a Dying Doctrine*, 40 NEW ENG. L. REV. 541, 543–45 (2006) (citing reasons for decline and noting that only twelve U.S. jurisdictions now recognize it); *see also* JUDITH AREEN, FAMILY LAW 144 (5th ed. 2006) (explaining that common law marriage became less acceptable as society grew and became more complex). Like many states that have rejected common law marriage, we too reject the unintentional formation of domestic partnerships. We are proposing our system to formalize relationships so that people must consider their relationship before such formalization—goals which are not served by unintentional actions. Of course we understand that, of those states which do recognize common law marriage, almost all require intentionality. *See, e.g.*, TEX. FAM. CODE ANN. § 2.401(a) (Vernon 2005) (requiring either declaration of marriage or representation to others of marriage). *But see* UTAH CODE ANN. § 31-1-4.5 (listing no specific intent requirements). Requiring a state or federal filing also serves this formalization function.

[300] In the event that the states or the United States establish a national database for domestic partnerships, state clerks could also verify that neither partner has either undisclosed domestic dependents or a preexisting domestic partnership that has not been terminated. The prospect of a national database may become more likely if Congress passes Louisiana Senator Mary Landrieu's Proud Father Act, scheduled to be introduced in late 2006. The legislation will create a national registry of unwed fathers to protect their parental rights. *See* Tamar Lewin, *Unwed Fathers Fight for Babies Placed for Adoption by Mothers*, N.Y. TIMES, Mar. 19, 2006, at A1 (making reference to proposed litigation).

[301] Many states allow cooling-off periods for certain kinds of contracts. *See, e.g.*, IND. CODE ANN. § 24-5-10-8 (West 2006) (allowing for a cancellation period for consumer transactions completed at home). A cooling-off period is equally justifiable in the domestic partnership scenario. Although the check-off-the-box approach should reduce impulsive actions, a cooling-off period allows for additional deliberation. Some states allow for the annulment of marriages and could provide for the annulment of a domestic partnership. *See, e.g.*, IND. CODE ANN. § 31-11-10 to -11 (West 2006) (providing for annulment of voidable marriage).

[302] *See* APPENDIX A.

[303] Requiring spousal disclosure or actual knowledge is consistent with some applications of current marriage law. *See, e.g.*, Randolph v. Randolph, 937 S.W.2d 815, 821 (Tenn. 1996) ("[T]he spouse seeking to enforce an antenuptial agreement must prove, by a preponderance of the evidence, either that a full and fair disclosure of the nature, extent, and value of his or her holdings was provided to the spouse seeking to avoid the agreement, or that disclosure was unnecessary because the spouse seeking to avoid the agreement had independent

fails to list an asset as existing individual property, the law would consider the asset a partnership asset. In the event of a breach of fiduciary duty claim, a court would consider any knowing or negligent failure to list a preexisting liability—perhaps a gambling debt, or a child by a prior relationship.[304]

2. Operations. A partner is an agent for the general partnership for the purpose of its business.[305] For domestic partnerships, we construe the scope of a partnership's "business" very narrowly to avoid potentially perverse outcomes.[306] We would not, for example, want to impose liability on an innocent partner for the gambling debts or torts of the other partner. Our proposal limits domestic partner agency to decisions regarding the partnership or other partner's welfare when the other partner is incapacitated or otherwise unable to make rational decisions.[307] Thus, a domestic partner typically has no authority to act for the partnership except in the case of a partner's incapacitation.[308]

As a result of a domestic partner's limited authority and to be consistent with current marriage law, third parties can enforce contracts only against the maker and not against the other domestic partner or against the partnership as a whole.[309] A contractor

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knowledge of the full nature, extent, and value of the proponent spouse's holdings.").

[304] *See infra* notes 339–45.

[305] UNIF. P'SHIP ACT § 9(1) (1914) (amended 1997), 6 U.L.A. 553 (2001).

[306] Kahlil Gibran emphasized that the parties to a marriage must retain their own form and strength in order to bolster the union. GIBRAN, *supra* note 27. We agree that partners will better serve a union if they can retain some autonomy while building a family. We also want to avoid the recreation of the *feme covert*—a woman under the protection of her husband. Most importantly, the "business" of these partnerships is the creation of happy families. People, not institutions, make emotionally supportive families. Thus, the partnership has no business other than supporting the people who make the family, if they should need that support.

[307] *See, e.g.*, IND. CODE ANN. § 16-36-1-5 (West 2006) (authorizing spouse to provide consent for medical treatment when patient is incapable of so consenting).

[308] A business partner's ability to act for the partnership is limited if the partnership so agrees and if the third party with which the business partner is dealing has knowledge of the lack of authority. UNIF. P'SHIP ACT § 9(1) (1914) (amended 1997), 6 U.L.A. 553 (2001). The default is thus that each domestic partner lacks authority, and that third parties know this.

[309] There is a broad exception for necessary expenses, such as medical treatment, incurred for a spouse or minor child—the doctrine of necessaries—that we would retain. *See, e.g.*, Yale Diagnostic Radiology v. Estate of Harun Fountain, 838 A.2d 179, 182–83 (Conn. 2004) (acknowledging doctrine of necessaries despite repeal of statutory codification of rule following state's adoption of Uniform Commercial Code); Schmidt v. Mut. Hosp. Serv., Inc., 832 N.E.2d 977, 983 (Ind. Ct. App. 2005) (holding that parents were obliged to pay for child's

wishing to hold both domestic partners liable on the contract must ensure that they both contractually agree to be parties. Those persons who want their domestic partner to serve as an agent more broadly can grant a standard power of attorney. Similarly, domestic partnership will not change the current legal regime for tort victims. Any victim of a domestic partner's tort can seek recovery only from the tortfeasor.[310]

The default management scheme for a domestic partnership tracks that of the business partnership. Each partner has "equal rights in the management and conduct" of the domestic partnership.[311] Although domestic partners will doubtless perform different tasks and allocate responsibilities in varying ways, the UDPA favors equality among participants from the outset.[312] Partnership decisions require unanimity (or at least an agreement to disagree and consensus concerning a planned course of action).[313]

As in the business partnership context, domestic partners must disclose "true and full information" to each other.[314] This obligation applies not only in the context of partnership formation discussed previously,[315] but also as an ongoing duty. For example, a partner who incurs significant gambling debt or enters into an inconsistent, extra-partnership relationship has a clear duty of disclosure. Less clear is the disclosure obligation of a partner who is flirting with the idea of entering into an extra-partnership relationship. The legal presumption, however, remains in favor of disclosure. Despite this disclosure duty, the state has no authority to police the inner workings of a domestic partnership, unless or until either party raises a breach of fiduciary duty claim in the context of a dissolution proceeding, discussed *infra*.

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medical care under doctrine of necessaries regardless of their religious objections to treatment).

[310] *See, e.g.*, IND. CODE ANN. § 31-11-7-4 (West 2006) ("A husband is not liable for the contracts or torts of his wife."). Naturally, if both domestic partners are the tortfeasors, then recovery against both would be appropriate.

[311] UNIF. P'SHIP ACT § 18(e) (1914) (amended 1997), 6(II) U.L.A. 101 (1001).

[312] Dobson recognizes the equality of spouses, even in allocating the homemaker's role to the woman. *See* Focus on the Family, *supra* note 112 and accompanying text.

[313] UNIF. P'SHIP ACT § 18(h) (1914) (amended 1997), 6(II) U.L.A. 101 (2001).

[314] *Id.* § 20, 6(II) U.L.A. 188 (2001).

[315] *See supra* note 299 and accompanying text.

3. Property. We propose that partners handle property in the same way that community property states deal with marital property.[316] Generally speaking, disclosed individual gifts or inheritances and preexisting individual assets remain separate assets,[317] but all income earned during the existence of the domestic partnership or given to the domestic partnership by any party is domestic partnership income, and any asset purchased therewith becomes a domestic partnership asset.[318] This characterization of assets applies regardless of the names appearing on title documents. The default ownership interest of domestic partnership income (and thus domestic partnership assets purchased with that income) is equal.[319] Domestic partners, however, just like general partners, can vary that split ex ante.[320]

With respect to creditors and bankruptcy, our proposal results in little change. The UDPA treats real property owned by domestic partners in the same way as property owned by a general partnership: a creditor of solely one partner cannot attach or execute against that partner's share of the asset.[321] In modern property terms, the domestic partners hold real property via a tenancy by the entirety.[322] By contrast, a creditor can attach a

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[316] *See, e.g.*, CAL. FAM. CODE § 760 (West 2004) (declaring all property acquired by spouse during marriage to be community property); *see also* Roselli v. Rio Cmtys. Serv. Station, Inc., 787 P.2d 428, 433 (N.M. 1990) (holding that each spouse has right to manage and dispose of community's personal property subject to a fiduciary duty to other spouse). The nine community property states in the United States are Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. Sheri Stritof & Bob Stritof, Community Property States, http://marriage.about.com/od/finances/g/property.htm (last visited Feb. 15, 2007).

[317] Any preexisting individual asset that is not disclosed in the formation document is presumed to be a gift to the domestic partnership.

[318] In community property states, an individual's premarriage assets can become community property if the assets are commingled with family assets or used for the marriage, in which case a gift to community property is presumed. *See, e.g.*, CAL. FAM. CODE § 852(d) (West 2004) (providing that requirements for transmutation of property do not apply to commingled community and separate assets).

[319] *Id.* § 751.

[320] *See infra* APPENDIX A.

[321] *See supra* notes 220–26 and accompanying text.

[322] *See, e.g.*, IND. CODE ANN. § 32-17-3-1 (West 2006) (providing contract between husband and wife for real property creates tenancy by the entirety). One commentator provides:

> The primary difference between tenancy by the entirety and joint tenancy is that joint tenants may deal with the property as they wish. If one joint tenant decides to convey her interest in the property, that interest is

debtor partner's share of other assets, subject to any other applicable laws,[323] but cannot typically attach the debtor's domestic partner's assets. A domestic partner would have all the potential "marital benefits" available under the U.S. bankruptcy code.[324]

4. Children. The possibility of parenting children creates an obvious and enormous distinction between business partnerships and domestic partnerships. Securing the welfare of children has always been an important function of marriage—one that in recent times it has failed to perform adequately[325]—and is also one of the important motivations for this proposal. Accordingly, the UDPA provides default rules designed to protect and benefit children.[326] Although clearly not property and rarely thought of as a burden, children bear some similarities to both property and liabilities.

As with liabilities, domestic partners are jointly responsible for all necessary maintenance of children.[327] Parent partners may

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> conveyed, and the joint tenancy is destroyed. In tenancy by the entirety, each tenant effectively owns the entire estate. Therefore, neither can deal with the property independently of the other. The main advantage of this difference is that judgment creditors of one party cannot enforce their liens against the property. If the debtor spouse dies first, the lien can never be enforced against the property. Of course, if the non-debtor spouse dies first, the lien could be enforced.

Thomas O. Moens, Attorney, Moens Law Offices, Tenancy by the Entirety (Mar. 9, 2005), http://www.thomasmoens.com/tenancy_by_the_entirety.htm.

[323] States vary in terms of the exemptions provided for jointly held assets. For example, Indiana provides exemptions for certain kinds of annuities, life insurance, and retirement plans. *See* IND. CODE ANN. § 27-1-12-14 (1998) (providing exemption for life insurance); § 27-2-5-1(b) (restricting alienation by beneficiary); § 34-6-2-131 (providing exemption for retirement plans); *see also* 29 U.S.C. § 1056(d)(1) (2000) (providing exemption for pension plans).

[324] *See* Mechele Dickerson, *To Love, Honor and (Oh!) Pay: Should Spouses Be Forced to Pay Each Other's Debts?*, 78 B.U. L. REV. 961, 964 (1998) (describing "marital benefits" in bankruptcy code, including the right to "file a joint petition; . . . shield specific types of property from creditors; include expenses for a non-debtor spouse in a bankruptcy budget; and . . . protect a non-debtor spouse from certain debt collection activities"). Professor Dickerson questions the practice of promoting marriage through the bankruptcy code, even assuming that promoting marriage may be good public policy. *Id.* at 964–66.

[325] *See supra* notes 71–81 and accompanying text.

[326] Domestic partners can, of course, just like business partners, agree to arrangements that unilaterally provide additional protection or benefits for third parties. Some filial domestic partners, for example, might believe that paying for their children to attend college is a worthwhile expense, deciding that a mutual commitment to such an expense might prevent opportunistic behavior later.

[327] Partners are presumed to be parents of children born during the partnership unless evidence establishes a lack of biological parentage.

waive this duty only to the degree that the non-waiving partner can adequately provide for the children. Children, referred to as domestic dependents under this proposal, are in some respects similar to limited partners. Provided for under several versions of the Uniform Limited Partnership Act,[328] limited partners are owed fiduciary duties.[329] Unlike general partners, however, limited partners have no right to manage or control the partnership.[330] Domestic dependents likewise have no right to manage or control the domestic partnership.

The duty of care owed domestic dependents also loosely resembles the management of business property. Recall that a general partner cannot assign or transfer the right to participate in management, including the management of a partnership's property.[331] Domestic partners similarly enjoy the right (and duty) to participate in the raising of the children.[332] Parents cannot typically waive this duty—absent the approval of a court or relevant child protection authority—which is consistent with the "best interests of the child" standard.[333] Our proposal reduces the risk of an economically stronger domestic partner compelling a weaker domestic partner to cede access to and control of the children in the

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[328] *See generally* UNIF. LTD. P'SHIP ACT § 408 (2001), 6A U.L.A. 62 (2001) (explaining rights and duties of partners); REVISED UNIF. LTD. P'SHIP ACT § 403 (1976), 6A U.L.A. 365 (2001) (amended 1985) (RULPA) (same). Most states now follow either RULPA or the Amendments to RULPA.

[329] General partners in fact owe even greater fiduciary duties to limited partners than partners mutually owe each other in a general partnership, because in the limited partnership context a general partner will typically have exclusive power to control and manage the partnership. *See, e.g.*, Palmer v. Fuqua, 641 F.2d 1146, 1155 (5th Cir. 1981); Ebest v. Bruce, 734 S.W.2d 915, 921 (Mo. Ct. App. 1987) (noting that general partners are accountable as trustees to limited partners).

[330] *See* UNIF. LTD. P'SHIP ACT § 303 (2001), 6A U.L.A. 46 (2001) (explaining that limited partners are not liable for limited partnership's obligations unless he is also general partner or participates in control of business). Limited partners are typically limited to a right to obtain partnership information, *id.* § 305, 6A U.L.A. 51 (2001), and in unusual situations to bring a derivative suit against the general partnership on behalf of the partnership itself. *Id.* §§ 1001–1004, 6A U.L.A. 102–03 (2001). Typically, a limited partner who exercises control over the partnership loses the benefits of being a limited partner. *Id.* § 303, 6A U.L.A. 46 (2001).

[331] UNIF. P'SHIP ACT § 27(1) (1914) (amended 1997), 6(II) U.L.A. 332 (2001).

[332] *See infra* APPENDIX A.

[333] This proposal also is not radical. *See, e.g.*, *In re* Marriage of Jackson, 39 Cal. Rptr. 3d 365, 372 (2006) ("A court cannot enter a judgment terminating parental rights based solely upon the parties' stipulation that the child's mother or father relinquishes those rights.").

event of dissolution. Courts will give weight to ex ante designations of custody made apparent on a partnership application. Of course, a judge could terminate a domestic partner's access to a child against that domestic partner's wishes if the judge found termination to be in the best interests of the child.[334] As under the current family law system, the best interests of the child control final determinations.

Sometimes both partners change their minds about whether they want children. Other times only one domestic partner might change his mind. Occasionally unintended children are conceived. Table 1 addresses how the UDPA treats such children, unintended at the time of the formation of domestic partnership. In all cases involving unplanned children, the standard of proof is clear and convincing evidence to reduce the chances of opportunistic behavior.[335]

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[334] *See generally* Jenina Mella, *Termination of Parental Rights Based on Abuse or Neglect*, *in* 9 CAUSES OF ACTION 483 (2d ed. 2005). No compensation would be due a partner whose access to a child was involuntarily terminated because such a termination would necessarily involve the partner's fault. That same partner might still owe child support as a continuing duty, however.

[335] The "clear and convincing" standard, necessitates that the parent attempting to avoid responsibility prove that the child is not his or her biological relation. Typically, DNA evidence will suffice to relieve a party of responsibility for a child.

TABLE 1 PROVISIONS FOR CHILDREN, UNINTENDED AT THE TIME OF PARTNERSHIP FORMATION[336]

CIRCUMSTANCES RE CONCEPTION*	PRIMARY FINANCIAL RESPONSIBILITY FOR THE CHILD[337]	B'S FINANCIAL RESPONSIBILITY IF A HAS INADEQUATE RESOURCES	IMPACT ON PARTNERSHIP
Both partners welcome the unplanned child	Both partners	N/A	Partnership agreement modified to default (filial domestic partnership)
Neither partner intended conception—no "fault"	Both partners	N/A	Default
Partner A was negligent	A	B is responsible	Probably none (negligence unlikely to be a material breach)
Partner A was negligent & B is NOT the DNA co-parent	A (and the other biological parent)	B is NOT responsible	Grounds for dissolution (waiver of breach allowed)
Partner A acted intentionally	A	B is responsible	Grounds for dissolution (waiver of breach allowed)
Partner A acted intentionally & B is NOT the DNA co-parent	A (and the other biological parent)	B is NOT responsible	Grounds for dissolution (waiver of breach allowed)
A's undisclosed knowledge of a pregnancy or child, or a reckless disregard, at the time of formation	A (and the other biological parent)	B is NOT responsible	Grounds for dissolution (waiver of breach allowed)

**Either partner, or a third party, has standing to disprove Partner B's parental relation to establish another's parenthood. Establishing parenthood must take place within two years of when the partner or putative parent knows, or should have known, of the actual parentage of the child.*[338]

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[336] Domestic partners, regardless of type, in their initial filing are asked whether they intend to have children. This table applies only to those partners who do not so intend or to children conceived in breach of a partner's fiduciary duty (e.g., adultery).

[337] Parental rights, such as visitation rights, are granted to Partner B only if B accepts joint primary liability when B is otherwise not legally required to do so.

[338] *See, e.g.*, IND. CODE ANN. § 31-14-5-3 (2003) (limiting paternity contests to two year period following birth of child).

5. Fiduciary Duties. Business partners owe a robust fiduciary duty of loyalty to each other—or "the punctilio of an honor the most sensitive"[339] in Judge Cardozo's talismanic words.[340] Their relationship is one of trust and confidence.[341] Likewise, domestic partners should have a relationship of trust and confidence.[342] Accordingly, they too are bound to each other by a broad duty of the "finest loyalty" for the duration of the domestic partnership.[343] Extending general partnerships, domestic partners' fiduciary duties expand to protect any children[344]—the domestic dependents (or limited partners)[345]—regardless of whether the adults' domestic partnership survives.

6. Termination. Any business partner can withdraw at any time from any partnership, whether the form is at-will, for a term, or for a particular undertaking, thereby dissolving the partnership.[346] The consequences of dissolution, however, vary depending on whether the partner's withdrawal was rightful or wrongful.[347] Wrongful withdrawal can result in damages to the other partner, which the wrongfully withdrawing partner may be obligated to cover.[348]

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[339] Meinhard v. Salmon, 164 N.E. 545, 550 (N.Y. 1928).

[340] Daniel Kleinberger refers to Cardozo's words as "probably the most often quoted passage in all of partnership law." DANIEL S. KLEINBERGER, AGENCY, PARTNERSHIPS, AND LLCS 259 (2d ed. 2002).

[341] *Id.*

[342] Of course, domestic partners should also have a relationship of fidelity, faith, and honor. These terms, along with loyalty, form the "basic vocabulary" of fiduciary law. Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 829–30 (1983) (noting that "[c]ourts regulate fiduciaries by imposing a high standard of morality upon them" and that "[t]his moral theme is an important part of fiduciary law").

[343] The fiduciary duty of care is not independently relevant to our proposal. Intentional misconduct, knowing violations of the law, and perhaps repeated reckless conduct might, however, sometimes result in a breach of the duty of loyalty.

[344] *See generally* Elizabeth S. Scott & Robert E. Scott, *Parents as Fiduciaries*, 81 VA. L. REV. 2401 (1995) (developing model of parents as fiduciaries and applying model to family law today).

[345] General partners also owe fiduciary duties to limited partners. *See* UNIF. LTD. P'SHIP ACT § 408(1), 6A U.L.A. 62 (2001) (requiring that general partners owe only duty of loyalty and care to other limited partners).

[346] *See supra* notes 243–72 and accompanying text.

[347] *See supra* notes 243–72 and accompanying text.

[348] *See supra* notes 243–72 and accompanying text. Partners may also opt ex ante to impose not only damages but also a financial penalty on a partner who wrongfully withdraws or materially breaches a fiduciary duty. *See supra* notes 243–72 and accompanying text. Damages and penalties accrue in addition to any anticipated support obligations following a rightful withdrawal or mutually agreed upon termination. *See supra* notes 243–72 and

We propose a similar scheme for the dissolution and termination of domestic partnerships. Any domestic partner can dissolve a domestic partnership at any time simply by filing a petition with the court.[349] When the court grants the petition, the domestic partnership terminates.[350] If the other domestic partner voluntarily agrees, the dissolution is not wrongful and there are no special penalties beyond any regular termination results specified on the original domestic partnership form. As under traditional divorce law, the UDPA may entitle either the dissolving or cooperating partner with financial support beyond the unwinding of the partnership.

For an enduring domestic partnership in which both parties pursue careers outside the home, we envision no such continuing support liabilities, unless unintended children are born.[351] Similarly, if a provisional domestic partnership ends before the year elapses, a partner may owe damages, but the quantum of damages is unlikely to be high.[352] Potential for a larger financial settlement appears much more likely in the filial domestic partnership or caregiving domestic partnership when one domestic partner is more likely to have left the field of paid employment to provide other benefits to the partnership. Dissolving a domestic partnership never ends the domestic partners' obligation towards any domestic dependents.

If, however, the domestic partners do not agree on dissolution, and either the term of the partnership has not expired (provisional domestic partnership) or the domestic dependents are not yet adults (filial domestic partnership), the early dissolution may be wrongful.

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accompanying text.

[349] After all, a domestic partner who no longer wishes to be part of the domestic partnership is unlikely to provide effective emotional support. The period between dissolution and termination is analogous to the unwinding period of general partnership law.

[350] We, perhaps optimistically, anticipate that termination will usually be a relatively simple matter since partners will have elected, ex ante, the terms of dissolution. *See infra* APPENDIX B, § 32.

[351] *See supra* notes 336–37 and accompanying text. As explained in Table 1, a domestic partner might owe support for a child only if the other partner has inadequate resources.

[352] Again, however, if an unintended child or pregnancy results from this partnership, continuing financial support may be owed to the child's custodial parent.

A partner who terminates early and wrongfully may face penalties consistent with what the parties agreed ex ante.

Alternatively, a domestic partner faced with a material breach of fiduciary duties may, just as in the business partnership, seek a court order for dissolution.[353] Consistent with the language of the UPA, courts should grant dissolution if a domestic partner is "guilty of such conduct as tends to affect prejudicially the carrying on" of the domestic partnership,[354] or "willfully or persistently" breaches the domestic partnership agreement, or "otherwise so conducts himself in matters relating to the partnership" that "it is not reasonably practicable to carry on" the domestic partnership.[355] The court could also decree a dissolution if "circumstances render a dissolution equitable."[356] Such a court order, if granted, both dissolves the partnership and prevents a finding of wrongful dissolution against the partner seeking the court order. In appropriate circumstances, where the breach of fiduciary duties is sufficiently egregious, a court might impose additional penalties.

B. THE INSTITUTIONAL INNOVATION—PERSONALIZED

The UDPA could provide a consistent, national family law model. Although a good idea in theory, how would it work in reality? The transition period actually would be relatively straightforward. Present day marriage with no-fault divorce and civil unions most resemble the enduring domestic partnership. Accordingly, transitional law would place any existing marriage or civil union into that category by default in order to minimize changes to existing spouses' legal rights and obligations. Spouses may, however, by mutual agreement, opt into other forms of domestic partnership by filing the appropriate form. [357]

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[353] *See supra* notes 257–63 and accompanying text. We anticipate that a partner could move for dissolution absent a material breach when, for example, a partner becomes incapacitated. *See* UNIF. P'SHIP ACT § 32(1)(a)–(c) (1914) (amended 1997), 6(II) U.L.A. 404 (2001) (explaining that dissolution is allowed when partner is declared lunatic, becomes incapable of performing partnership duties, or is guilty of conduct prejudicial to partnership).

[354] UNIF. P'SHIP ACT § 32(1)(c) (1914) (amended 1997), 6(II) U.L.A. 404 (2001).

[355] *Id.* § 32(1)(d).

[356] *Id.* § 32(1)(f).

[357] For the possible financial benefit of children we would hope that married parents would

Let us return to our couples from Part III.E.[358] Alice and Betty might choose not to form a filial partnership because neither wants to be responsible for paying support should the other "fall in love" and opt to dissolve their partnership to form a new one with a romantic lover. They love each other and their children dearly but are not homosexual and therefore want flexibility to enter into a romantic domestic partnership at some future point. Under these circumstances, a provisional domestic partnership might work well for them.

If they decide down the road that they like their arrangement, they can renew with a caregiving domestic partnership for a five year duration that will see them through the high school graduation of the youngest child. Assume that by this time Betty has been out of the work force for awhile and knows she will need to update her skills to reenter the job market. Alice promises to continue supporting Betty for another year should they choose not to renew in five years while Betty prepares for reentry. A common provision is a year of support for every two years of domestic service and loyalty,[359] but Betty feels that she can be ready in one year. Should they choose to remain together for longer, they will need to reassess their circumstances and affirmatively make new arrangements.

Father Colin and Dolores also agree to a caregiving domestic partnership. When he retires, she continues to care for him, and the two collect and share their modest pensions from the Church. When either dies, the other remains financially solvent by collecting the Social Security survivor benefits.[360]

Eric, Frank, Isabella, and Hank have very different lives under our proposal; they can all be much more secure. Eric and Frank

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affirmatively choose to transition into filial domestic partners. *See infra* APPENDIX A (listing domestic partnership forms).

[358] *See supra* notes 120–26 and accompanying text.

[359] *See* Jana B. Singer, *Divorce Reform and Gender Justice*, 67 N.C. L. REV. 1103, 1117–18 (1989) (explaining income sharing after couples separate and proposing one year of income sharing for two years of marriage).

[360] In response to *Lewis v. Harris*, 908 A.2d 196, 221 (2006), some conservative New Jersey legislators have proposed extending "equal benefits" to homosexual couples, siblings, and others in domestic partnerships. This proposal seems consistent with our approach for couples like Alice and Betty and Colin and Dolores. Geoff Mulvihill, *N.J. Conservatives Float Same-Sex Rights Bill*, WASHINGTONPOST.COM, Nov. 27, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/11/27/AR2006112701079_pf.html.

choose a filial domestic partnership recognized in every state and based on business partnership law. Their children are domestic dependents, and because they were born during the partnership, they are presumed children of the partnership.[361] Should either partner choose to terminate the partnership before the children become emancipated,[362] Eric will owe Frank child and partner support until the youngest child reaches emancipation and for a term beyond that time for Frank to prepare to reenter the paid workforce.[363] Although the end of a domestic partnership, like the end of almost any close personal relationship, is unlikely to be happy, ex ante planning reduces the chance of acrimony because Frank and Eric have thought about and addressed the key termination issues in advance. Of course, if either materially breaches his fiduciary duty of loyalty, the other can seek a court-ordered termination and impose penalties against the transgressing partner. The court's charge will include minimizing the negative impact on Hank and Isabella, the domestic dependents.

Lisa and Mike also select a filial domestic partnership because, even though they both work, they intend to have children. They think that one of them might want to leave the workforce, even temporarily, to care for those children at home. Thus, they want flexibility and protection to enable them to make responsible parenting choices. Since they hope to remain together for life, they decide in advance that their partnership will become an enduring one once their children are emancipated. However, they also agree in advance that they will each contribute to their children's college and graduate education in proportion to their earning capacities. They agree that this obligation will end when each child reaches the age of twenty-five.

Kathy and José enter into an enduring domestic partnership. Under this agreement, Kathy is not liable for the support of José's

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[361] *See supra* note 326 and accompanying text.

[362] Some domestic partners might choose an even longer period, such as the earlier of the child's completing college or turning twenty-five.

[363] Or perhaps Frank has a large trust fund. Then Frank and Eric might agree to waive child and partner support either at the formation of the domestic partnership or afterwards. Of course, such a waiver would be valid with respect to Hank and Isabella only to the extent Frank remains solvent and can adequately provide for them.

children unless Kathy and José both opt on the partnership application to share all of José's parenting rights and liabilities.[364] If they do not so opt initially, they can later change their agreement by filing an amendment with the clerk's office. José remains liable for the financial support of these children and his former partner (i.e., ex-wife), if a court ordered any support previously. If Kathy gives birth to a child, the law presumes the child is of their partnership and has the benefits of a limited partner as a domestic dependent.[365] Neither Kathy nor José can opt out of support obligations to that child.

While not comprehensive, this survey of how domestic partnerships might work in practice offers a glimpse of how partnership law might better facilitate domestic ordering for the protection of all families.

VI. CONCLUSION

Domestic partnership gives people the ability to organize their domestic lives and to protect their loved ones financially. It does not guarantee a "happily ever after" ending. Nothing, not even marriage, can guarantee that. A Uniform Domestic Partnership Act would secure, however, the parentage and welfare of children born to a partnership and also better provide for stepchildren. Additionally, this proposal would encourage people to negotiate ex ante, in an efficient and economical way, to structure their domestic lives. Finally, state and federal governments could subsidize and foster familial bonding by conferring rights and privileges on those individuals who form partnerships to care for each other and dependents. Governments could endorse familial sacrifice and loyalty without making judgments about sexuality and other private conduct that may have no bearing on the health of the family. Anne Roiphe once wrote, "I know that family life in America is a

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[364] José cannot give away what he does not hold, namely his former partner's parenting rights and liabilities. However, a court might later award Kathy those rights if the mother materially breaches her fiduciary duties to the children.

[365] José or another person can rebut the presumption of paternity via a DNA challenge. However neither sperm nor egg donors, identified by name or anonymously by contract, have the right to challenge parentage.

minefield, an economic trap for women, a study in disappointment for both sexes."[366] If her assessment is true, and it may very well be, let's change American family life starting today.

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[366] ANNE ROIPHE, LOVINGKINDNESS 131 (Summit Books, 1987).

APPENDIX A: DOMESTIC PARTNERSHIP APPLICATION

1. APPLICANT INFORMATION	
APPLICANT	CO-APPLICANT
Name: Last, First Middle Former Name	Name: Last, First Middle Former Name
Birthplace, City & State Birth Date	Birthplace, City & State Birth Date
Street Address	Street Address
Intended Partnership Residence	Intended Partnership Residence
Occupation	Occupation
Current Partnership Status □ Never Partnered □ Previously Partnered - Partnership terminated by □ Elapse of 1 Year (Provisional Only) Date of termination _____ □ Court decree Court file number: _____ City granted in: _____ □ Partner's Death	Current Partnership Status □ Never Partnered □ Previously Partnered - Partnership terminated by □ Elapse of 1 Year (Provisional Only) Date of termination _____ □ Court decree Court file number: _____ City granted in: _____ □ Partner's Death
Applicant's First Parent's Name: Last, First Former Name	Co-Applicant's First Parent's Name: Last, First Former Name
Residence, City, State	Residence, City, State
Second Parent's Name: Last, First Former Name	Second Parent's Name: Last, First Former Name
Residence, City, State	Residence, City, State
I DECLARE THAT ALL INFORMATION PROVIDED IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE: _____ APPLICANT SIGNATURE Date:_____	I DECLARE THAT ALL INFORMATION PROVIDED IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE: _____ CO-APPLICANT SIGNATURE Date:_____

THE FOLLOWING INFORMATION WILL NOT BE AVAILABLE TO THE GENERAL PUBLIC.
THIS IS A LEGAL DOCUMENT.
YOUR ANSWERS AND ANY ATTACHED SHEETS WILL HAVE LEGAL CONSEQUENCES.
PLEASE CONSIDER YOUR CHOICES CAREFULLY.

2. PARTNERSHIP FORM

What form of partnership do you wish to enter? (check only one) [NOTE: These category descriptions are meant as a guide only.]

☐ ENDURING DOMESTIC PARTNERSHIP—most appropriate for couples who both work for taxable income and who do NOT intend to have children

☐ PROVISIONAL DOMESTIC PARTNERSHIP—most appropriate for couples who wish to try domestic partnership for a one year period

☐ FILIAL DOMESTIC PARTNERSHIP—most appropriate for couples who intend to have children together

☐ CAREGIVING DOMESTIC PARTNERSHIP—most appropriate for couples who plan to have only one partner work full-time for taxable income and who do NOT intend to have children

3. CHILDREN [NOTE: A COURT CAN USE THIS INFORMATION IN AWARDING CUSTODY.]

List current pregnancies, children under age 18, and adult dependents for whom you are financially responsible:

APPLICANT	CO-APPLICANT

If either applicant already has one or more minor children, do both applicants agree to share formal, legal parenting rights and responsibilities (including financial support) for those children?

YES ☐ NO ☐ N/A ☐ IF YES, attach a separate sheet describing any firm agreements.

Do you intend to have additional children during the partnership? ☐ YES ☐ NO
IF YES:

How many? (check one) ONE ☐ TWO ☐ THREE ☐ FOUR ☐ MORE THAN FOUR ☐

Who will be the primary caregiver for young children? (check one)
APPLICANT ☐ CO-APPLICANT ☐ BOTH ☐ ANOTHER CARE PROVIDER ☐

If this partnership terminates before all children reach age 18, who will have custody of minor children? (check one)

APPLICANT ☐ CO-APPLICANT ☐ BOTH ☐

Please confirm that you have discussed parenting issues (e.g., religious training and education, corporal discipline, financial support for post-secondary education, etc.):

YES, WE HAVE DISCUSSED PARENTING ISSUES ☐
Attach a separate sheet describing any firm agreements.

IF NO:

Have you discussed how to prevent an unintended pregnancy? YES ☐ N/A ☐

Have you discussed what you will do about an unintended pregnancy? YES ☐ N/A ☐

4. ASSETS AND LIABILITIES

List any individually held assets (e.g., land, homes, cars, stocks, jewelry, etc.):
[Attach additional sheets if necessary. NOTE: ANY ASSETS NOT LISTED WILL BE PRESUMED TO BE PARTNERSHIP ASSETS.]

APPLICANT	CO-APPLICANT

List any individual liabilities (e.g., mortgages, child support, former partner support, car loans, student loans, gambling debts, etc.):

APPLICANT	CO-APPLICANT

5. HEALTH AND ASSOCIATED DECLARATIONS

Have you disclosed any significant physical or mental disabilities or conditions (e.g., known genetic risks, HIV/AIDS or other transmissible diseases, cancers, schizophrenia, etc.):

APPLICANT (check one)	CO-APPLICANT (check one)
Has nothing to disclose ☐	Has nothing to disclose ☐
Has disclosed condition(s) ☐ including:	Has disclosed condition(s) ☐ including:
_____	_____

Attach a separate sheet if you wish to make specific confidential disclosures.

6. MISCELLANEOUS PARTNERSHIP RIGHTS AND DUTIES

Optional: Describe below or on a separate sheet any special agreements (e.g., "We will visit our respective parents every other year."; "Partners will divide household chores equally.")

7. DURATION AND TERMINATION

[NOTE: A court may use this information to determine partner obligation after dissolution.] Complete this section based upon your selection in Section 2. **ANSWER ONLY ONE OF A, B, C, OR D.**

A. IF YOU CHOOSE **AN ENDURING DOMESTIC PARTNERSHIP**

DURATION: An Enduring Partnership is intended to last for life.

We intend to stay together for life ☐

We have agreed to a different duration ☐ How long? _____

ASSETS & LIABILITIES: Upon termination (because of death without a will, term expiration, or dissolution),

We will divide partnership assets and liabilities equally ☐

We have agreed to an unequal division ☐ Attach a description of your agreement.

SUPPORT: If either partner terminates the domestic partnership before the time indicated above:

Neither partner will owe the other continuing financial support ☐

We have agreed to different support provisions ☐ Attach a description of your agreement.

B. IF YOU CHOOSE **A PROVISIONAL DOMESTIC PARTNERSHIP**

DURATION: A Provisional Partnership is intended to last for one year. After a year, unless the partners agree to renew, the partnership will automatically terminate.

ASSETS & LIABILITIES: Upon termination (because of death without a will, term expiration, or dissolution),

We will divide partnership assets and liabilities equally ☐

We have agreed to an unequal division ☐ Attach a description of your agreement.

SUPPORT: If either partner terminates the domestic partnership before the time indicated above:

Neither partner will owe the other continuing financial support ☐

We have agreed to different support provisions ☐ Attach a description of your agreement.

C. IF YOU CHOOSE **A FILIAL DOMESTIC PARTNERSHIP**

DURATION: A Filial Partnership is intended to last until the emancipation of the youngest child, when it becomes a Caregiving Partnership. You may select a different option. We choose (check one):

A Caregiving Partnership ☐ An Enduring Partnership ☐ OR Termination ☐

ASSETS & LIABILITIES: Upon termination (because of death without a will, term expiration, or dissolution),

We will divide partnership assets and liabilities equally ☐

We have agreed to an unequal division ☐ Attach a description of your agreement.

[OPTION C. IS CONTINUED ON THE NEXT PAGE.]

C. IF YOU CHOOSE **A FILIAL DOMESTIC PARTNERSHIP** (CONTINUED)

SUPPORT: If either partner terminates the domestic partnership before the time indicated above, and one partner has primary child care responsibilities, the other partner will owe the caregiving partner continuing financial support

Until the youngest child is emancipated or for one year for every two years of partnership, whichever is longer ☐

We have agreed to different support provisions ☐ Attach a description of your agreement.

D. IF YOU CHOOSE **A CAREGIVING DOMESTIC PARTNERSHIP**

DURATION: A Caregiving Partnership is intended to last for life.
We intend to stay together for life ☐

We have agreed to a different duration ☐ How long? _____

ASSETS & LIABILITIES: Upon termination (because of death without a will, term expiration, or dissolution),

We will divide partnership assets and liabilities equally ☐

We have agreed to an unequal division ☐ Attach a description of your agreement.

SUPPORT: If either partner terminates the domestic partnership before the time indicated above, the primary income earning partner will owe the caregiving partner or adult domestic dependent continuing financial support

For one year for every two years of partnership ☐

We have agreed to different support provisions ☐ Attach a description of your agreement.

8. FIDUCIARY DUTIES

CHILD SUPPORT: In all cases with any partnership, if you have parented a child you will be responsible to support the child should that child need support.

At partnership termination, a court may alter the above distributions and any partner financial agreements if they would result in undue hardship or unfairness. If there is an early termination, do you want the court to consider the circumstances that led up to the termination? (e.g., infidelity, addition, undisclosed liabilities, etc.) (check one)

No, we want a no-fault partnership ☐

Yes, consider all circumstances ☐

Yes, consider the circumstances listed on the attached sheet ☐

APPENDIX B: SELECTED PROVISIONS OF THE UNIFORM DOMESTIC PARTNERSHIP ACT

ARTICLE 1. DOMESTIC PARTNERSHIPS

Chapter 1. Uniform Domestic Partnership Act

§ 1

SHORT TITLE

Sec. 1. This chapter may be cited as the Uniform Domestic Partnership Act.

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§ 6

DOMESTIC PARTNERSHIP DEFINED

Sec. 6. (1) A domestic partnership is an association of two (2) adult persons to form a single economically and emotionally supportive family. A family is defined as a group consisting of parents and their children or a group of persons who typically live together and have a shared commitment to a domestic relationship.

(2) A marriage performed in any state is an enduring domestic partnership under this chapter, unless the parties opt for a different domestic partnership form prior to January 1, 2008; and this chapter shall apply to domestic partnerships except insofar as the statutes relating to such domestic partnerships are inconsistent with this chapter.

***

§ 18

RULES DETERMINING RIGHTS AND DUTIES OF PARTNERS

Sec. 18. The rights and duties of the partners in relation to the domestic partnership shall be determined, subject to any agreement between them, by the following rules:

(a) Any partner contributions, whether by way of capital or advances to the domestic partnership property shall be presumed a gift to the domestic partnership and partners shall share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and except as provided in section 15(2) of this chapter, each partner must contribute toward the

losses, whether of capital or otherwise, sustained by the domestic partnership according to her share in the profits.

(b) All partners have equal rights in the management and conduct of the domestic partnership.

(c) No partner is entitled to remuneration for conducting the domestic partnership activities.

(d) Any difference arising as to ordinary matters connected with the domestic partnership activities may be decided by one partner; but no act in contravention of any agreement between the partners may be done rightfully without the consent of the other partner.

(e) Persons may serve as a domestic partner in only one domestic partnership at a time. No partner shall enter into another domestic partnership until a prior partnership is terminated.

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§ 20

DUTY OF PARTNERS TO RENDER INFORMATION

Sec. 20. Partners shall render on demand true and full information of all things affecting the domestic partnership to the other partner or the legal representative of that partner.

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§ 29

DISSOLUTION DEFINED

Sec. 29. The dissolution of a domestic partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the family's activities.

§ 30

DOMESTIC PARTNERSHIP NOT TERMINATED BY DISSOLUTION

Sec. 30. On dissolution the domestic partnership is not terminated, but continues until the winding up of domestic partnership affairs is completed.

§ 31

CAUSES OF DISSOLUTION

Sec. 31. Dissolution is caused:

(1) Without violation of the agreement between the partners:

(a) By the termination of the definite term or particular undertaking specified in the domestic partnership application or agreement.

(b) By the express will of any partner when no definite term or particular undertaking is specified.

(c) By the expulsion of a partner from the family bona fide in accordance with such a power conferred by the domestic partnership application or agreement between the partners.

(d) By mutual consent of the partners.

(2) In contravention of the agreement between the partners, where the circumstances do not permit a dissolution under any other provision of this section, by the express will of any partner at any time.

(3) By any event which makes it unlawful for the activities of the domestic partnership to be carried on or for the members to carry it on in domestic partnership.

(4) By the death of any partner.

(5) By decree of court under section 32 of this chapter.

§ 32

DISSOLUTION BY DECREE OF COURT

Sec. 32. On application by or for a partner, the court shall decree a dissolution whenever:

(1) A partner has been declared mentally incompetent in any judicial proceeding.

(2) A partner becomes in any other way incapable of performing the partner's part of the domestic partnership agreement.

(3) A partner has been guilty of conduct that tends to affect prejudicially the family or the carrying on of the partnership.

(4) A partner willfully or persistently commits a breach of the domestic partnership agreement, or otherwise acts in matters relating to the family so that it is not reasonably practicable to carry on the domestic partnership with that partner.

(5) Other circumstances render a dissolution equitable.