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The "Essentials of Marriage": Reconsidering the Duty of Support and Services

Twila L. Perry†

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† Professor of Law and Judge Alexander T. Waugh, Sr. Scholar, Rutgers University School of Law-Newark. B.A., Mount Holyoke, M.S.W., Columbia, J.D., New York University. The research for this article was partially supported by funding provided by the Dean's Research Fund of Rutgers University School of Law-Newark.

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INTRODUCTION

What are, and what should be, the legal responsibilities of marriage? In this country, more than two million couples marry each year,¹ deeply in love and full of optimism about the future. Despite sobering statistics that suggest that more than half of the marriages entered into in any year will end in divorce, most people who marry believe that their own marriages will defy the odds and last for a lifetime.² In the typical wedding ceremony, the happy couple publicly vows to love and honor one another, remaining steadfast, “for better or for worse,” “for richer or for poorer,” “in sickness and in health,” “‘til death do us part.”³ These words, uttered so often, and by so many, are so familiar that most of us can recite them from memory.

Most people probably have clear social expectations of marriage. They expect, for example, that husbands and wives will share the same home, have monogamous sexual relations, and be economically interdependent. However, it is also probably true that very few people have a clear understanding of what the actual legal obligations of marriage are.⁴ In addition to the fact that there is no formal document that explains these duties and obligations to those planning...

⁴. Marjorie Maguire Shultz, Contractual Ordering of Marriage: A New Model for State Policy, 70 CAL. L. REV. 204, 230 n.6 (1982) (citing LENORE WEITZMAN, THE MARRIAGE CONTRACT, XV-XVII (1981)). Every state in the country requires that those seeking to marry apply for and sign a marriage license. HOMER CLARK, DOMESTIC RELATIONS 34 (2d ed. 1988). Through this requirement, the state authorizes and registers the marriage. The couple’s relationship also becomes subject to state regulation with respect to legal duties and responsibilities the spouses are deemed to owe each other during the marriage and that they may be held to in the event of a divorce. See, e.g., Baehr v. Levin, 852 P.2d 44, 58 (Haw. 1993), reconsideration granted in part, 875 P.2d 225 (Haw. 1993) (“[M]arriage is a state-confferred legal status . . . which gives rise to rights and benefits reserved exclusively to that particular relationship.”).
to marry, most engaged couples neither undergo detailed pre-marital counseling nor speak with an attorney prior to their wedding.\(^5\) Often couples become aware of the legal obligations of marriage only in the event of a crisis such as a long-term illness of one of the spouses, the onset of financial problems, or the breakdown of the marriage itself.

The naiveté of couples notwithstanding, the fact is that marriage imposes a number of important legal duties. In the event of a divorce, spouses may be required to divide the tangible economic wealth of the marriage, and one spouse may be obligated to provide the other with ongoing financial support. During the marriage, there are ongoing responsibilities, including obligations of cohabitation, sexual access, and sexual fidelity.

This Article will focus on one of the most important and probably one of the most vexing legal obligations of the ongoing marriage—the duty of support and services. Although the exact parameters of this duty are unclear, in general, the duty of support requires one spouse to provide the other with a minimum level of material support so as to prevent homelessness or starvation and to meet other basic human needs. The duty of services generally requires spouses to provide for the care of the home and the family and to provide companionship, including sexual companionship, to each other. Historically, the duty of support and services was gender specific—the husband had the duty of support, while the wife had the duty of services.\(^6\) Not surprisingly, today, the duty of support and services is mutual.\(^7\) The duty of support and services

\(^5\) The number of couples receiving pre-marital counseling may be increasing. According to a survey conducted by the Department of Health and Human Services, in recent years a number of states have proposed or passed policies that decrease marriage license fees or decrease waiting periods for couples who take marriage education courses or receive pre-marital counseling. U.S. DEP’T OF HEALTH AND HUMAN SERVICES, ASSISTANT SECRETARY FOR PLANNING AND EVALUATION, STATE POLICIES TO PROMOTE MARRIAGE, available at http://aspe.hhs.gov/hsp/marriage02/marr-rpt.htm.

In 1993, a study sought to explore claims that spouses only discover the terms of marriage upon divorce and that spouses often view state terms as unfair and unexpected. In the study, marriage license applicants and law students were surveyed about their knowledge of divorce statutes, knowledge of divorce statistics and their expectations for their own marriages. The study concluded that both groups had largely correct perceptions of the terms of the marriage contract as reflected in divorce statutes and that they had accurate perceptions of the likelihood of and effect of divorce on society in general. However, the study revealed that both groups had thoroughly idealistic expectations about their own marriages and the consequences should their own marriages end in divorce. The completion of a family law course by the law students was found not to diminish these expectations.

The study also found that only 4.5% of the marriage license applicants indicated any interest in consulting with an attorney before marriage about any issues pertaining to the marriage. Even after taking the family law course, only 11% of the law students stated that they would enter into a prenuptial agreement governing post-divorce finances. Baker & Emery, supra note 2, at 478.

6. The husband was to provide the family with food, clothing, shelter and as many of the amenities of life as he could manage, . . . either by management of his estates . . . or by working for wages or a salary. The wife was to be mistress of the household, maintaining the home with the resources furnished by the husband, and by caring for his children.

CLARK, supra note 4, at 250.

7. It is difficult to see any legitimate state purpose to be served by continuing to place upon the husband the sole duty of supporting his wife and children. For this reason, and on the authority of Orr v. Orr, it seems plain that the duty of support must constitutionally rest equally upon husband and wife. Id. at 252
and the duties of cohabitation, sexual access and monogamy are deemed by the law to be so important that they are often described as “the essentials of marriage.” The law does not permit spouses to waive or alter these obligations by private agreement, and the duties cannot constitute consideration for an interspousal contract.

This Article undertakes a long overdue examination of the relevance of the duty of support and services in a contemporary world in which values of equality and personal and sexual privacy have become increasingly important. It asks whether in light of changing ideas, values and expectations concerning intimate relationships, the duty of support and services should be discarded as an outmoded relic of a bygone era, or whether it should be retained, but redefined so as to make it more consistent with current values and expectations.

Our society is in a period of rapid change with respect to patterns and choices concerning intimate relationships. Many people are skeptical about what they consider to be the traditional roles of husbands and wives, and would like more power to structure their marriages in accordance with their own preferences. There is also more skepticism about marriage. An increasing number of couples are cohabiting rather than marrying. People are marrying later, and the divorce rate has risen to levels far beyond those of a generation ago. In addition, an increasing number of marriages are remarriages.

In Orr v. Orr, 440 U.S. 268 (1979), the United States Supreme Court held that a state statute authorizing alimony only for wives was a violation of the Equal Protection Clause. See also, Beal v. Beal, 388 A.2d 72 (Me. 1978); Thaler v. Thaler, N.Y.S.2d 815 (1977). Some state statutes specifically provide that the duty of support rests on both husband and wife. E.g., CAL. CIV. CODE § 4300 (West 1994); CONN. GEN. STAT. ANN. § 46b-37 (West 1995).

Professor Homer Clark has also observed that “[i]t also seems to follow that if the duty of support may not be imposed on the husband alone, the duty to render marital services may not be imposed on the wife alone.” CLARK, supra note 4, at 303. Moreover, the fact that claims for loss of consortium—which grew out of the duty of services—can be brought by either husband or wife, also indicates that the duty of services is now mutual. See JOHN DEWITT GREGORY ET AL., UNDERSTANDING FAMILY LAW 85 n.151 (2001) (noting that forty-one states and the District of Columbia allow either spouse to recover for loss of consortium). Under the traditional rule, as noted by Professor Lenore Weitzman, “only the husband could sue for loss of consortium when a party injured his wife. The husband’s right was founded, at least in part, on the notion that a married woman was the property of her husband and owed him household as well as sexual services.” WEITZMAN, supra note 4, at 20. Today, however, since “the obligations of support and presumably all other obligations of marriage have been held to be equal for husbands and wives as a matter of constitutional law, consortium refers to the total of tangible and intangible relationships prevailing between husbands and wives.” CLARK, supra note 4, at 382.

8. See, e.g., Marion Crain, Where Have All the Cowboys Gone? Marriage and Breadwinning in Postindustrial Society, 60 OHIO ST. J. 1877, 1906 (2000) (“Where gender roles in marriage were once clear, now they must be constantly negotiated and renegotiated.”).

9. Between 1980 and 1999, the number of cohabitating couples rose from 1,589,000 to 4,486,000. Cohabiting couples are defined by the Bureau of the Census as two unrelated persons of the opposite sex sharing the same household. CENSUS, supra note 1, at 48.

10. In 1970, the median age at first marriage was 20.8 years old for women and 23.2 years old for men. By 2000, the ages had risen to 25.1 years and 26.8 years respectively. JASON FIELDS & LYNN CASPER, U.S. CENSUS BUREAU, AMERICA’S FAMILIES AND LIVING ARRANGEMENTS: MARCH 2001.

11. CENSUS, supra note 1, at 59 (demonstrating that with the exception of one year—1995—the divorce rate has exceeded one million couples per year since 1975).
Finally, although no state in the nation yet permits same-sex marriage, in recent years, more and more same-sex couples are openly living together, sometimes with children. And while the majority of Americans still do not favor same-sex marriage, support for making that option available is likely to increase in light of the fact that a majority of Americans now believe that sexual conduct should not be the subject of state regulation and that people should be protected from discrimination based on sexual orientation. The duty of support and services, as presently construed, unnecessarily conflicts with the kind of modern ideas about personal life choices illustrated by these social and demographic trends.

Part One of this Article examines the historical background of the doctrine of "the essentials of marriage" and the duty of support and services and locates these doctrines in a contemporary context. Part Two argues that what might be considered the modernization of the duty of support and services—its move to formal gender-neutrality—is not sufficient to purge the doctrine of its sexist and discriminatory historical roots and to make it compatible with modern values, needs and expectations. I examine three contexts to illustrate the constraints the duty of support and services continues to place on individual choice: contracts governing on-going marriages, the effect of post-divorce relationships on alimony modification, and the continuing ban on same-sex marriage.

With respect to contracts governing the ongoing marriage, I argue that the doctrine of support and services places unwarranted restrictions on the ability

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13. The Census Bureau has estimated that in 1998 there were 1,674,000 same-sex partnerships in the United States, and that 167,000 same-sex couples reported that they had children fifteen years old or younger living with them. U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS (1998).
16. I recognize that each of these contexts raises potentially significant constitutional issues involving, for example, the right to privacy, the right to freedom of association, and the meaning of the right to marry. The law continues to evolve with respect to each of these areas. The 1960s marked the beginning of a major shift in family law from a system characterized predominately by state regulation to one in which the courts began to carve out important areas of privacy with respect to individual choice concerning intimate relationships. Cases such as Griswold v. Connecticut, 381 U.S. 479 (1965), Eisenstadt v. Baird, 405 U.S. 438 (1972), and Roe v. Wade, 410 U.S. 113 (1973) were important in establishing the principle that there is a realm of privacy and autonomy with respect to some personal decisions upon which the state may not intrude. The courts continue to struggle with the tension between privacy and autonomy on the one hand, and the state interest in marriage and other intimate relationships on the other. The focus of this Article will not be on the potential constitutional issues, but on the power of the state common law doctrine of support and services to impose substantial, and I argue, unwarranted limitations on important personal choices.
of couples to enter into contracts that reflect their own preferences with respect to the structure of their marriages, even in situations in which the public interest is not affected. Women suffer a greater disadvantage than men as a result of these limitations because of the persistence of traditional marital roles. I then explore the effect of the doctrine of support and services on the issue of alimony termination or modification when an alimony recipient remarries or cohabits. Here I argue that although the institution of alimony is generally viewed as growing out of the duty of spousal support, the duty of services plays a critical, although generally unacknowledged, role when alimony is sought to be terminated or modified for these reasons. The result is that unwarranted limitations have been placed on the right of divorced people to engage in post-divorce intimate relationships. Again, as a practical matter, women are disproportionately affected because ex-wives are more likely to be alimony recipients than are ex-husbands.

The last section of Part Two examines the impact of the doctrine of support and services on one of the most significant limitations on personal choice: the ban on same-sex marriage. As currently interpreted, the doctrine of support and services assumes heterosexual sexual activity as an integral, if not legally necessary, part of marriage. It therefore provides support for the continuing restriction of marriage to heterosexual couples at a time when public opposition to discrimination on the basis of sexual orientation is growing.

Part Three addresses the critical question of remedy. It asks whether given the fact that the duty of support and services increasingly conflicts with modern values and aspirations, the duty should be abolished altogether. After exploring some of the issues that might be raised by such a course, I argue that the duties of support and services should be uncoupled. The duty of services, including its sexual component, should be eliminated, and the duty of support should be redefined in order to permit more freedom to those who are married, divorced, or who wish to enter into same-sex marriages to structure their intimate relationships as they choose.

Finally, Part Four briefly discusses the implications of the proposed changes in the duty of support and services for other structures of intimate relationships including domestic partnerships, cohabitation contracts, civil unions, and common law marriage.

Because many of the cases dealing with "the essentials of marriage" are somewhat older cases, many people may think that this doctrine has little relevance to the present. Nothing could be further from the truth. Indeed, there is an urgent need for reconsideration of the duty of support and services as family law continues to struggle with questions of autonomy, choice, and privacy versus the interest of the state in regulating intimate relationships. Not all contemporary cases discuss the legal obligations of marriage in the language of "the essentials of marriage" or "the duty of support and services." But the
persistence of the traditional and deeply entrenched ideas reflected in these doctrines and the inextricable link between them and the problem of gender hierarchy results in the doctrine of support and services undergirding rules in family law that seem increasingly archaic. By unpacking the doctrine of support and services to reveal how fundamental it is to the regulation of marriage and other intimate relationships, I hope to challenge the law to address and redefine a doctrine that currently imposes unjustified limitations on decisions that should be considered private.

An exploration of the duty of support and services requires that we ask many questions. Is the duty of support and services one duty or two? If they are two separate duties, how do they differ? The courts often use the phrase "support and services" as a single idea. Treating the doctrines separately, however, is helpful in understanding how they operate and how they might be changed. Most importantly, this comprehensive examination of the duty of support and services requires exploration of several underlying issues that go to the very core of the meaning of marriage. What should the legal obligations of spouses be to each other? How and when is the public interest implicated in this question? What symmetry should there be, if any, between the legal benefits of marriage and its legal obligations? Is the structure of marriage itself inextricably tied to expectations about gender and sexual orientation? To what extent does and should divorce represent a clear and clean severing of all legal obligations between former spouses? What should the limits of the law be in encouraging couples to behave toward each other in ways that are likely to meet each other's physical and emotional needs?

To begin this discussion, let us turn to an examination of the "essentials of marriage" and the relationship of the duty of support and services to that doctrine.17

17. This article will not address the duty of parents to support their children. Parents owe a legal duty to provide financial support for their children and to provide for their children's physical and emotional needs. These duties may be enforced, when necessary, by the state through civil or criminal proceedings for child neglect, and in extreme cases, child abuse. The duty of spousal support and the duty of parents to support their children raise some common issues. In both cases, there is the question as to what kind of conduct should trigger government intervention into the family unit. In both cases, choices concerning the use of financial resources in the family are a function of many factors, including personal values and cultural mores. Most people would probably consider the duty of a parent to support his or her children to be a more important issue than the spousal duty of support because of children's economic dependency. Still, issues concerning the duty of spousal support are important both because of the practical limitations the doctrine imposes on personal choice as discussed in this article, and because of the way in which examination of the doctrine sheds light on the question of what marriage is and what it might become.

I should also note here that although there are well established general rules governing some of the issues examined in this Article, state statutes and judicial decisions reflect a wide variety of approaches and nuances. It would be impossible for this article to incorporate all of them. What I seek to do here is to focus on the role that the duty of support and services has played and continues to play in the ideas and values underlying the general rules governing certain aspects of marriage. The goal is to raise critical questions about values, assumptions, and expectations concerning marriage that are widely shared, and that are increasingly being challenged.
I. THE "ESSENTIALS OF MARRIAGE"

The law has long embraced the idea that marriage involves certain essential elements and duties. Some of these elements of marriage are deemed so important that courts hold that a marriage entered into without them is invalid and the law does not permit a couple to waive or alter these elements by private agreement.

A. The "Essentials of Marriage"

There is no finite list of the essential elements and duties of marriage, but some can be gleaned from two basic contexts: the law of annulments and the law governing the ability of married couples to contract with respect to the obligations of the ongoing marriage.

1. The "Essentials of Marriage" and the Law of Annulments

The law of annulments illustrates what the law has considered to be the indispensable requirements for marriage. Traditionally, courts have granted annulments in cases in which a party could prove that a marriage lacked one of the "essential" elements without which a valid marriage cannot be contracted. Under this rule, a marriage could be annulled if a court found that there had been "fraud in the essentials," a doctrine that has generally been applied to matters involving sex or religion. Concealed impotence, for example, was a

18. It is not easy to generalize about the legal obligations of marriage. As Professors Walter Wadlington and Raymond O'Brien have noted:

Historically, states have imposed a framework of rights and duties upon married persons, but the imposition has been piecemeal. ... Determining the extent of state involvement in the husband-wife relationship can require searching through an amorphous group of statutes and cases that often deal with small parts of many different subjects including contracts, torts, property, criminal law and child custody, to name but a few. WALTER WADLINGTON & RAYMOND C. O'BRIEN, FAMILY LAW IN PERSPECTIVE 32 (2001).

19. CLARK, supra note 4, at 107, 126.

20. Some states have given the definition of "fraud in the essentials" a wider meaning—viewing it as a subjective rather than an objective inquiry. Under this interpretation, the question is whether there were aspects of the marriage deemed so important to a particular person that, but for these elements, that person would not have entered into the marriage. See, e.g., Kober v. Kober, 211 N.E.2d 817, 189 (N.Y. 1965) ("any fraud is adequate which is 'material, to the degree that, had it not been practiced, the party deceived would not have consented to the marriage' and is 'of such a nature as to deceive an ordinarily prudent person.'"); CLARK, supra note 4, § 2.15, at 110-111 (2d ed. 1988).

As Professor Max Rheinstein has noted:

the tendency of American courts] has been... to limit essentiality to those facts which relate to the sex aspects of the marriage, such as affliction with venereal disease, false representations by the woman that she is pregnant by her partner, concealed intent not to consummate the marriage or not to have intercourse likely to produce progeny, also concealed intent not to go through with a promise to follow the secular conclusion of the marriage with a religious ceremony considered by the other party essential to relieve intercourse from the stigma of sin.

ground for annulment, as were misrepresentations concerning pregnancy and representations by a spouse that he or she would go through with a religious ceremony following a civil ceremony or that he or she would practice a certain religion.\(^2\) Other types of fraud, such as misrepresentations concerning wealth, character, or social status have generally not been held sufficient to void a marriage.\(^2\) Now that no-fault divorce has made divorces much simpler to obtain, annulments are much less common than they were in earlier times. Still, the doctrine of fraud in the essentials continues to be useful in shedding light on the meaning of the phrase, "the essentials of marriage."

2. The "Essentials of Marriage" and Contracts Governing the Ongoing Marriage.

The second context that aids in understanding the concept of "the essentials of marriage" involves prenuptial or postnuptial contracts governing the terms of marriage. Courts have considered whether the contract constitutes an attempt to change the "essentials" of marriage, by which they meant the duty of support and services or other duties pertaining to matters such as sex or cohabitation.\(^2\) Contracts that altered or waived these duties were held unenforceable. Thus, courts have invalidated contracts between spouses addressed to matters in the ongoing marriage such as sexual relations,\(^2\) domicile,\(^2\) financial support,\(^2\) and domestic services.\(^2\)

\(21\) CLARK, supra note 4, at 102 (annulment permitted where impotence has been concealed). See, \(e.g.,\) Bilowit v. Dolitsky, 304 A.2d 774, 776-77 (N.J. Super. Ct. Ch. Div. 1973) (granting an annulment where a husband misrepresented his willingness to comply with the requirements of his wife's religious beliefs).

\(22\) See, \(e.g.,\) Johnston v. Johnston, 22 Cal. Rptr. 253 (Ct. App. 1993) (annulment denied where husband "turned out to be, in the eyes of his wife, a lazy, unshaven disappointment with a drinking problem"). See also RHEINSTEIN, supra note 20, at 95 ("Annulments have rarely ever been granted for fraudulent misrepresentations of character, past life, or social standing and hardly ever for misrepresentations on matters of property or income.").

\(23\) Commentators have also described the reciprocal duties owed in marriage. Carol Weisbrod cites Max Radin for this description of marital duties: "(1) cohabitation, (2) sexual access, (3) sexual fidelity, (4) conjugal kindness. In addition, (5) the husband owes the wife maintenance and support, and (6) the wife owes the husband the duty of household management." Carol Weisbrod, The Way We Live Now: A Discussion of Contracts and Domestic Arrangements, 1994 UTAH L. REV. 777, 781 n.20, 797.

The elements of common law marriage also contribute to our understanding of what the law considers to be the "essentials of marriage." Although the definitions of common law marriage vary by state, most definitions include an agreement to marry, some requirement of cohabitation, and the requirement that the couple hold themselves out as married or undertake the obligations of marriage. \(See\) CLARK, supra note 4, at 48.

\(24\) See, \(e.g.,\) Favrot v. Barnes, 332 So.2d 873 (La. App. 1976), cert denied, 431 U.S. 966 (1981) (refusing to enforce contract governing sexual relations between spouses); Hangar v. Hangar, Civ. No. D138274 (D.C. Super Ct. 1974) (refusing to uphold a clause in a separation agreement permitting parties to conduct themselves as "sole and unmarried" to the extent that it would bar a divorce action based on adultery committed during the time the parties were separated).

\(25\) The fact that the law traditionally required a wife to follow her husband to the domicile of his choice indicates that cohabitation was deemed an "essential of marriage." \(See\), \(e.g.,\) Crosby v. Crosby, 434 So.2d 162 (1983) (striking down, on equal protection grounds, a statute requiring a wife to accompany her husband to the domicile of his choice. The fact that twenty-five states and the District of
The classic case illustrating the rule against interspousal contracts governing the ongoing marriage is *Graham v. Graham*. In *Graham*, a husband and wife entered into an agreement that the husband would quit his job in order to accompany his wife on her travels. In return, the wife agreed to pay him the sum of $300 per month. When the couple divorced and the husband sought to enforce the agreement, the court held that such an agreement could not change "the essential obligations of marriage," which at that time included the duty of the husband to support his wife financially, and a duty on the part of the wife to accompany her husband to the domicile of his choice. Although the duties of marriage have been made gender neutral since the time of Graham, an agreement in which spouses waive the duty of support would still be unenforceable.

B. The "Essentials of Marriage" and the Duty of Support and Services

1. The Historical Context

As noted earlier, under common law, the duties of husbands and wives were rigidly defined by gender. The husband had a duty of support and the wife had a duty of services. This meant, as a practical matter, that the husband had the responsibility to support his wife financially, and the wife had a duty to provide her husband with domestic services. This division of labor was a part of the "essential obligations of marriage."
of the then dominant “cult of domesticity” and “separate spheres” ideologies, both of which reflected the belief that the proper role of wives was limited to taking care of the home.

The reasons for this historical division of labor between spouses are clear. The division reflected a combination of moral precepts based on religious teaching, stereotypes about the natural proclivities of men and women, and practical realities. In order for a household to survive, there had to be a source of income. Also, the home had to be physically maintained, which required tasks such as cooking, cleaning, and the rearing of children. Finally, the reality that women had virtually no opportunities in the workplace made the support/services division of labor between a married couple inevitable.

As a practical matter, the husband’s duty of support was implemented through the doctrine of necessaries, which was also rigidly structured along gender lines. Under the doctrine of necessaries, if a husband neglected his duty to provide his wife with the necessities of life, he was liable, under principles of restitution, to pay a merchant who supplied the necessary goods to her. The doctrine of necessaries was extremely important because at common law, a woman basically forfeited her legal existence upon marriage. As a result, a wife could not contract on her own for food, clothing, or medical needs. Like services. 4. The wife is responsible for child care, the husband for child support. WEITZMAN, supra note 4, at 2.

32. See, e.g., Bradwell v. Illinois, 83 U.S. (16 Wall.) (1873). In Bradwell, the Supreme Court upheld the denial of admission of the plaintiff to the bar because of her gender. The court stated that: [T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman.... The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.... The paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother.


A recent California case addressing the traditional roles of husbands and wives under common law noted that this division of labor also reflected the common law doctrine of coverture in which a married woman gave up her independent legal identity. One of the characteristics of coverture was that it deemed the wife economically helpless and governed by an implicit exchange: “The husband, as head of the family, is charged with its support and maintenance, in return for which he is entitled to the wife’s services in all those domestic affairs which pertain to the comfort, care, and well-being of the family.”

Borelli v. Brusseau, 16 Cal. Rptr. 2d 16, 22 (Ct. App. 1993) (Poche, J., dissenting, citing Ritchie v. White [citation omitted]).

33. CLARK, supra note 4, at 250.


35. CLARK, supra note 4, at 265. The doctrine of necessaries was not based on the law of agency. The husband was liable for his wife’s necessities whether or not he authorized or apparently authorized her purchases. His liability was imposed by the law on the basis of the principles of restitution and quasi-contract. Id. See generally Margaret Mahoney, Economic Sharing During Marriage: Equal Protection, Spousal Support and the Doctrine of Necessaries, 22 J. FAM. L. 221.

36. CLARK, supra note 4, at 286-88 (describing the legal disabilities of married women at common law).

37. See Cheshire Medical Center v. Holbrook, 663 A.2d 1344 (N.H. 1995). At common law the wife had no property that she could use to pay for necessaries, therefore the doctrine was only available
the duty of support, the necessaries doctrine was gender based. Husbands were
obligated to pay for the necessaries of their wives, but wives did not have a
corresponding obligation to pay for the necessaries of their husbands.

Beginning in the 1960s, the courts struck down a variety of gender
discriminatory doctrines in family law. Both the duty of support and the
doctrine of necessaries came under constitutional scrutiny and both were, for
most part, made gender neutral. 38

2. Support and Services Today

a. The Duty of Support

What does the duty of support within marriage mean today? The
necessaries doctrine is still "used surprisingly often, especially in cases
involving medical care, where it seems clear that third party medical providers
can depend on the rule."39 There are also cases holding that one spouse has a
duty to summon medical care for the other in circumstances where it appears
that such care is necessary. 40 Aside from medical care, it is not totally clear
what kinds of goods and services are deemed to be necessaries. However, there

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38. CLARK, supra note 4, at 251. See, Orr v. Orr, 440 U.S. 268 (1979) (holding unconstitutional a
state statute authorizing alimony for wives only). Some state statutes also specifically provide that the
duty of support is mutual as between spouses. See Schilling v. Bedford County Mem. Hosp., 303 S.E.2d
905 (Va. 1983) (holding gender-based necessaries doctrine unconstitutional and leaving it to the
legislature to impose an alternative rule); Memorial Hospital v. Hahaj, 430 N.E.2d 412, 415-16 (Ind. Ct.
App. 1982) (extending necessaries doctrine to both spouses); United States v. O’Neill, 478 F. Supp. 853
(Id. Pa. 1979). See also, CAL. CIV. CODE § 5100 (1983); Bix, supra note 30, at 164 (noting that
"states have removed the vast majority of stereotype-ridden, sex-based duties and obligations under
which, for example . . . the wife was obligated to follow the husband’s choice of domicile"). See
generally Paul Benjamin Linton, State Equal Rights Amendments: Making a Difference or Making a
amendments on spousal obligation of support); Note, The Unnecessary Doctrine of Necessaries, 82

1996) ("Virtually all of the necessaries doctrine cases concern hospitals or clinics seeking to collect
debts resulting from medical services rendered to spouses, often during a last illness."). Cases applying
the necessaries doctrine to medical care include Cheshire Med. Ctr. v. Holbrook, 663 A.2d 1344 (N.H.
1995) and N.C. Baptist Hosp. v. Harris, 354 S.E.2d 471 (N.C. 1987). However, some courts have
abolished the doctrine and have held that the creditors must seek relief under contract law. See, e.g.,
Credit Services, 621 So. 2d 928 (Miss. 1993).

40. See, e.g., People v. Robbins, 443 N.Y.S. 2d 1016 (1981) (noting that the duty is not an
unlimited one—a spouse who is competent can refuse medical treatment).
are cases that have applied the doctrine to expenses for a spouse's legal defense. In one case, a husband was required to pay legal expenses incurred by his wife in obtaining an order of protection against him. Courts attempting to apply the doctrine of necessaries in a world of increasing formal gender neutrality now must grapple with the question of whether the liability for necessaries is sole, joint and several, primary, or secondary. Some states also have so-called "family expense statutes," which generally provide that the expenses of the family, including the education of the children, are chargeable against the property of both spouses. Finally, criminal remedies exist in all states for non-support of children and in nearly half of all states for non-support of a spouse.

One particularly interesting aspect of the duty of support is that while the courts have indicated that the couple cannot waive the duty, neither can either spouse enforce it against the other during the pendency of their marriage. Here the classic case is an old one, but the principle retains Vitality. In McGuire v. McGuire, a 1953 case, a wife sought to have the court award her "suitable maintenance and support money" from her husband while they were living together. The spouses lived together on a farm in rural Nebraska and the husband's level of frugality had simply become more than the wife could bear. The court declined to grant the wife's petition, stating that "[t]he living standards of a family are a matter of concern to the household and not for the courts to determine. . . . As long as the home is maintained and the parties are living as husband and wife, it may be said that the husband is legally

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41. E.g., State v. Clark, 88 Wn.2d 533 (1977); Read v. Read, 119 Colo. 278, (1949). See Missoula YMCA v. Bard, 983 F.2d 933 (Mont. 1999) (stating that whether or not an item is a "necessary" is a case-by-case inquiry, but holding that a husband may be liable for his wife's legal fees incurred in obtaining an order of protection).

42. E.g., Cheshire Med. Ctr. v. Holbrook, 663 A.2d 1344 (N.H. 1995) (holding that the necessaries doctrine imposes reciprocal responsibilities on husbands and wives and that a medical provider must first seek payment from the spouse receiving the services before pursuing collection from the other spouse). Accord, Landmark Med. Ctr. v. Gauthier, 635 A.2d 1344 (N.H. 1995); Jersey Shore Med. Ctr.-Fitkin Hosp. v. Baum's Estate, 417 A.2d 1003 (N.J. 1980). This position appears to represent the emerging trend. ELLMAN ET AL., supra note 37, at 139. But see N.C. Baptist Hosps. v. Harris, 334 S.E.2d 471 (N.C. 1987) (holding that the doctrine of necessaries applies equally to both spouses, and noting that "marriage involves shared wealth, expenses, rights, and duties"). Some courts have struggled with the question gender-neutrality. In Marshfield Clinic v. Discher, 314 N.W.2d 326 (Wis. 1982), the court held that husbands were primarily liable for the debts of either spouse, and said that this approach satisfied the intermediate level of equal protection scrutiny because in this society, women generally earn less than men. See also Borgess Med. Ctr. v. Smith, 386 N.W.2d 684 (Mich. App. 1986) (holding the wife liable where the husband's estate was insolvent); Swidzinski v. Schultz, 493 A.2d 93 (Pa. Super. Ct. 1985). The recent cases which have affirmed the common law doctrine have found the constitutional issue not to be before the court. Davis v. Baxter Cty. Regional Hosp., 855 S.W.2d 303 (Ark. 1993); Shands Teaching Hosp. v. Smith, 497 So. 2d 644 (Fla. 1986).

43. CLARK, supra note 4, at 257. Such statutes are broader than the common law doctrine of necessaries since they apply to "expenses" rather than "necessaries." D. KELLY WEISBERG & SUSAN FREILICH APPLETON, MODERN FAMILY LAW: CASES AND MATERIALS 263 (2d ed. 2002).

44. CLARK, supra note 4, at 269.

45. 59 N.W. 2d 336 (Neb. 1953).
supporting his wife and the purpose of the marriage relation is being carried out.\(^46\)

The court’s statement in *McGuire* illustrates the important point that, whenever possible, the courts deliberately permit the definition of the duty of financial support within marriage to remain vague. As long as basic survival needs are met and the situation does not threaten physical harm to one of the spouses, the expectation is that each married couple will work out the definition of "support" in their own marriage without judicial intervention. The question of access of the spouses themselves to the material wealth of the marriage is treated as a private matter. There is a strong belief that judicial intervention into disputes of such a nature would violate principles of marital autonomy, hopelessly entangle the courts in the day-to-day marital relationship and place an undue burden on judicial resources.

\(b. \text{The Duty of Services}\)

The law is clear that spouses owe each other a duty of services. Although the precise parameters of this duty are not crystal clear, it appears to encompass matters such as caring for the home and children and providing social companionship, including sexual companionship to the other spouse.

That the duty of spouses to each other encompasses a sexual component seems clear.\(^47\) There are many indications that the law considers sexual relations between spouses to be one of the "essential" duties of marriage. It has been noted, for example, that "the refusal of husband or wife without any adequate excuse to have ordinary marriage relations with the other party to the contract strikes at the basic obligations springing from the marriage contract."\(^48\) As discussed earlier, concealed impotence is a ground for the annulment of a marriage.\(^49\) It is also the case that refusal to engage in sexual relations can be grounds for divorce in some states, based on theories of desertion, constructive

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46. 59 N.W. 2d at 342; see also Commonwealth v. George, 56 A.2d 228 (Pa. 1948). In this case, the wife asked the court to order her husband to pay her a certain sum each month so that she might purchase items of food and clothing for herself and her children, and so that she could have spending money without having to request it from her husband. The court declined, stating that "the arm of the court is not empowered to reach into the home and to determine the manner in which the earnings of the husband shall be expended." *Id.* at 231.

47. See, e.g., Ostriker v. Ostriker, 609 N.Y.S.2d 922, 923 (App. Div. 1994) (sexual relations are among "the basic obligations arising from the marriage contract"); see also Zagarow v. Zagarow, 430 N.Y.S.2d 247, 250 (Sup. Ct. 1980) (stating that "marital sexual relations...are, per se, part of the essential structure of marriage"); Cox v. Cox, 493 S.W.2d 371, 373 (Mo. Ct. App. 1973) ("sexual intercourse is an inherent right of marriage").


49. See supra notes 21-22 and accompanying text.
abandonment, and cruelty.50 The fact that courts refuse to enforce contracts that seek to regulate sexual relationships between spouses also indicates that the courts regard sex as an "essential" of marriage.51

It should be noted that the same principle of non-intervention by the courts that is usually discussed in cases dealing with the duty of support also applies in the context of the duty of services. How, as a practical matter, would a court decide whether the duty of services was, in fact, being fulfilled? Were the house clean enough? Were the dinners tasty? Was the quantity and quality of sexual activity satisfactory? Although in the era in which fault divorce was the exclusive divorce remedy, an accumulation of extreme and willful failures in these areas might have had some relevance to the proof of a fault ground,52 in the era of no-fault divorce, these kinds of matters are increasingly irrelevant. Divorce is now available to a spouse who is unhappy for any reason, or for no particular reason at all. Moreover, as a practical matter, there is no action a court could take then, or now, to intervene effectively to enforce the duty of services in an ongoing marriage. The problems the courts would face here are obvious and even more problematic than the issues that would be involved in attempting to enforce the duty of support.

II. EVOLVING CONCEPTS OF MARRIAGE, CHANGING PATTERNS OF INTIMATE RELATIONSHIPS, AND THE DUTY OF SUPPORT AND SERVICES

The duty of support and services, as traditionally interpreted, is not compatible with evolving values and expectations concerning the freedom people should have to make choices about their intimate lives. The next section of this Article will examine the ways in which the current interpretation of the duty of support and services constrains choice in three areas: marital contracts, the post-divorce intimate relationships of alimony recipients, and same-sex marriage.


51. A contract to forego sexual intercourse in marriage is unenforceable. Graham v. Graham, 33 F. Supp. 936, 938 (E.D. Mich. 1940) (citing RESTATEMENT OF THE LAW OF CONTRACTS § 587); see also ELLMAN ET AL., supra note 37, at 114-15 (noting that modern courts are likely to retain the view that sexual relations constitute one of the "essentials" of marriage that cannot be modified by contract).

52. In general, proving the grounds of mental cruelty, desertion or incompatibility required a finding of continuous, sustained, and extreme conduct on the part of a spouse. See CLARK, supra note 4, at 500-12.
A. Contracts Governing the Ongoing Marriage

Married couples have long been permitted to enter into separation agreements at the end of their marriages and antenuptial contracts governing the disposition of property upon death, but until the 1970s, the law refused to recognize the validity of antenuptial contracts governing the disposition of property in the event of divorce. There was apparently a belief that the stability of marriages would be undermined if spouses knew in advance what the financial consequences of divorce would be. The law now permits antenuptial and other contracts between spouses with respect to a variety of matters, but, as noted earlier, couples are not permitted to contract away the "essentials" of marriage, one of which is the duty of support and services. The question is: what does this mean as a practical matter?


54. SCHNEIDER & BRINIG, supra note 3, at 382 (noting that such contracts were thought to preserve marriage by removing from it a potential source of dispute).

55. See, e.g., Unander v. Unander, 506 P.2d 719, 720 (Or. 1973); Posner v. Posner, 233 So. 2d 381 (Fla. 1970). Reasons the courts changed their position included the rising rate of divorce and an acknowledgment that some of the reasons courts permitted antenuptial contracts governing the death of a spouse were equally applicable to the possibility of divorce. As the court noted in Posner, With divorce such a commonplace fact of life, it is fair to assume that many prospective marriage partners whose property and familial situation is such as to generate a valid antenuptial agreement settling the property rights upon the death of either, might want to consider and discuss also—and agree upon, if possible—the disposition of their property and the alimony rights of the wife in the event their marriage, despite their best efforts, should fail. 233 So. 2d at 384.

It would appear that the same rationale would also apply to support the argument that spouses should be permitted more freedom to contract with respect to the ongoing marriage. For example, contracting with respect to compensation for household work would permit a spouse to decrease some of the risks associated with long-term performance of the role of traditional homemaker.

56. See, e.g., Norris v. Norris, 174 N.W.2d 368, 369-70 (Iowa 1970) (noting that courts believed that premarital agreements encouraged divorce). According to Professors Carl Schneider and Margaret Brinig, courts "feared that these agreements might make divorce more attractive to one party and more perilous to the other." SCHNEIDER & BRINIG, supra note 3, at 382.

57. Married couples can enter into agreements concerning property and services not considered "essential" to the marriage relationship. For example, spouses may agree that one spouse's gardening service will maintain the grounds of the other spouse's office complex. See, e.g., Lewis Becker, Premarital Agreements: An Overview, in PREMARRITAL AND MARITAL CONTRACTS 1, 5-8 (Edward L. Winer & Lewis Becker eds., 1993). A number of state statutes specifically permit interspousal contracts concerning property rights. SHULTZ, supra note 4, at 231 (citing the statutes).


Section 587 of the RESTATEMENT (FIRST) OF CONTRACTS (1932) states:

A bargain between married persons or persons contemplating marriage to change the essential incidents of marriage is illegal. Illustrations: 1. A and B who are about to marry agree to forego sexual intercourse. The bargain is illegal. 2. In a state where the husband is entitled to determine the residency of a married couple, A and B who are about to marry agree that the wife shall not be required to leave the city where she then lives. The bargain is illegal.

Section 190(1) of the RESTATEMENT (SECOND) OF CONTRACTS (1981) states:

A promise by a person contemplating marriage, or by a married person, other than as part of an enforceable separation agreement, is unenforceable on grounds of public policy if it would
An example is helpful. Let us assume that a couple has decided to follow a traditional division of labor in their marriage. After much discussion, they have decided that the husband will be the traditional breadwinner, and the wife will devote her efforts primarily to the care of the home and children. However, the couple would like to enter into an agreement that requires the husband to place a certain amount of money into an account each year as compensation for the wife. Such action reflects the sacrifices she has made with respect to her own career opportunities and is an acknowledgment of her contributions to the family unit. Let us assume that the couple has agreed that this money belongs solely to the wife and that it would remain separate from any other property that the couple might seek to divide in the event of a divorce.

Courts have consistently held such agreements to be unenforceable because the performance of household duties by a spouse constitutes a preexisting legal duty. Thus, there is no consideration for the agreement. In this analysis, the state posits an underlying policy rationale: having one spouse as the first line of recourse to provide financial support for the other protects the public fisc.

*Borelli v. Brousseau*, 59 a 1993 California case, further illustrates how this principle continues to constrain the ability of married couples to structure their marriage according to their own preferences. In *Borelli*, a husband who had suffered a debilitating stroke entered into an agreement with his wife that he would leave her certain property in exchange for her caring for him at home, rather than sending him to a nursing home. The wife fulfilled her end of the bargain, caring for her husband at home until his death. However, the husband did not keep his promise—he left most of his property to his daughter from a previous marriage. After the death of the husband, the wife brought an action to have the contract enforced. 60 The court denied enforcement, holding that the wife’s caring for her husband during his illness was a pre-existing duty that could not constitute consideration for the contract.

The opinion in *Borelli* provides a good illustration of the way in which the doctrine of support and services is not adequate to address issues that may arise between married couples in a contemporary context. The court states that the duty to provide support is a mutual duty of spouses and that this duty includes caring for a spouse who is ill. 61 The court goes on to say that support “means more than the physical care someone could be hired to provide,” it “also encompasses sympathy, comfort, love companionship and affection.” 62 Significantly, the court does not draw a clear distinction between support and services. It notes that “when necessary spouses must provide uncompensated

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60. Id.
61. Id. at 18-19.
62. Id. at 20.
protective supervision services for each other"\textsuperscript{63} and that the cause of action for loss of consortium is rooted in the idea that there are services that spouses owe each by virtue of the marriage relationship. However, in \textit{Borelli}, the court’s decision does not turn on the characterization of care for the husband as constituting support as opposed to services. In the court’s view both are preexisting duties, and thus neither could serve as consideration for an interspousal contract.

Clearly the court’s decision in \textit{Borelli} prevents spouses from making certain contracts that they might wish to make. An alternative approach might claim that if one spouse, at the request of the other, decides to provide care personally rather than through a nursing home or a hired professional, such services should be deemed adequate consideration to support the kind of interspousal contract at issue in \textit{Borelli}. It may sound cynical, but it is true: by caring for the ill partner personally, the other spouse is giving up something of value. This may be especially so today when personally providing care to an ill spouse may mean foregoing workplace opportunities and the many short-term and long-term benefits that employment typically provides.

Another aspect of the court’s decision illustrates the problem of applying a traditional concept of the duty of support and services to a contemporary context. In the \textit{Borelli} opinion, the court declares that the duty of support can “no more be delegated to a third party than the statutory duties of fidelity and mutual respect.”\textsuperscript{64} Taken at face value, this statement would mean that one spouse cannot hire an outside party to perform domestic services for the other spouse who has fallen ill. The dissent in the case points out the obvious problem with this view, when it states that under the majority opinion, if Hillary Clinton had become ill, President Clinton would have been expected to take time away from his official duties to care for her personally.\textsuperscript{65}

Although it is not at all clear that the \textit{Borelli} court is motivated by sexism, or that the court would not have reached the same decision had the genders been reversed, it is not difficult to see how the court’s expectations of the wife are deeply rooted in assumptions about gender roles in marriage. The majority opinion likely assumes that most women are at home anyway and are therefore available to provide full time care to sick family members. However, today the majority of married women are in the workforce.\textsuperscript{66} In many middle and upper class families, the majority of household services are performed by neither the husband nor the wife. Instead, they are performed by paid employees. Often the incomes of both the husband and the wife are necessary to meet household

\textsuperscript{63}. \textit{Id.} at 18 (quoting \textit{Miller v. Woods}, 196 Cal. Rptr. 69, 80 (Cal. Ct. App. 1983)).

\textsuperscript{64}. \textit{Id.} at 20.

\textsuperscript{65}. \textit{Id.} at 24 (dissenting opinion).

\textsuperscript{66}. Census data reveals that in the year 2000, 68.8\% of married women with children under the age of 18, and 59.9\% of married women with children under the age of 6 were in the workforce. \textit{CENSUS, supra} note 1, at 374.
bills and neither spouse would be available to personally perform the kind of services needed in *Borelli* if one spouse became ill. The idea that the duty of support and/or services is non-delegable is simply not practical in today’s world.

In taking the position that the duty of support (which the court assumes encompasses a duty of services) is non-delegable, the court in *Borelli* makes no meaningful distinction between the duty of support and the duty of services. However, an argument could be made that there are legitimate distinctions to be made between the two. For example, although it might be appropriate to hold that a spouse cannot delegate to a third party the duty to render emotional support to the other spouse, the duty to provide the physical care necessitated by illness should be delegable if delegation is a practical and effective alternative.

However, the definitional problem does not end here. What exactly is support, and what exactly constitute services? When the duties of support and services are gender neutral, the lines of demarcation between the two concepts are not clear. Is emptying the bedpan of an ill spouse support or service? Is providing emotional support to one’s spouse support or service? Emotional support may be as essential as physical support in recovering from an illness. The court in *Borelli* would probably not deem the distinction between support and services or between physical support and emotional support to be important because it would consider all of them to be equally non-delegable. However, in light of the changing nature of marriage and the continuing evolution of gender roles, there are good reasons to begin to attempt to distinguish the duty of support from the duty of services and to ask what legal duties and obligations are necessary and practical and which are obsolete.

The issues in *Borelli* illustrate that the doctrine of support and services is in need of clarification or redefinition. The present fit between the current interpretation of the duty of support and services, the evolving structure of marriage, and contract law is not a good one. While the law should permit a wider range of freedom for spouses to contract with each other, there is a need for modification of contract principles and/or the development of new principles appropriate for this context.67

There are a number of practical, troubling consequences to the current rule that domestic services cannot constitute consideration for a contract between spouses. First of all, the rule prevents couples from entering into contracts that they may believe can provide for more fairness and equality within their own marital relationship, even when the contract contemplated does not undermine

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67. The difficulty in applying traditional principles of contract law to contracts between spouses is recognized by the Uniform Pre-Marital Agreement Act and the Uniform Marital Property Act, neither of which require consideration for marital agreements or modification of pre-marital agreements. HARRY KRAUSE, FAMILY LAW 57 (2d ed. 1996).
the public interest. For example, both the contract in *Borelli* and the earlier example in which spouses agree to set aside a certain amount of money periodically in payment for one spouse's contributions to the home are agreements of limited scope. The parties are not attempting to disclaim any financial responsibilities to each other that would jeopardize the public fisc. Under both agreements, for example, if one spouse became ill during the marriage, the other would still be liable for the costs of necessary medical care under applicable state and/or federal law.

The agreement in *Borelli* or an agreement in which one spouse is compensated for household services is, in truth, little different from contracts involving a loan between spouses—a claim that the law does enforce. Moreover, permitting couples to enter into these kinds of limited contractual arrangements does not present a danger that the courts will become embroiled in the day-to-day disputes of a marriage. The contracts envision money damages as remedies; they do not raise thorny problems of specific enforcement. In addition, such contracts can include provisions for mediation and/or arbitration so that the costs of enforcement, should disputes arise, would be borne by the couple rather than by the public. Finally, the law can make it clear that contracts that would require inappropriate or unrealistic judicial involvement if litigation arose would simply not be enforceable.

A legitimate argument can be made that the kind of contract at issue in *Borelli* is contrary to the public interest in that it undermines the ideals of trust, caring, and sacrifice generally believed to be important to the success of marriage. It can be argued that the public interest in marriage is not simply financial, but that it extends to an interest in morality and social stability. From this perspective, permitting the kind of contract the couple entered into in *Borelli* might set a bad example of how people in a marriage should treat each other.

Indeed, it appears that although the decision of the court is framed in the language of the duty of support and services, what really drives the decision is social policy. The court in *Borelli* appears to want to make a clear statement that married couples have made a commitment to care for each other in times of ill health. It seems clear that the judges in that case felt that any statement by

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69. Most states give spouses broad power to contract with each other. E.g., N.Y. GEN. OBLIG. L. § 3-301 (McKinney 2001); OHIO REV. CODE § 3103.05 (2000); FLA. STAT. ANN. § 708.09 (West 2000).
70. Examples include contract provisions addressing issues involving money or property—matters where damages or specific enforcement would appear to be the appropriate remedy for violation of agreements governing the ongoing marriage. Provisions seeking to govern aspects of married life that involve intangible, highly personal matters that, as a practical matter it would not be possible for courts to regulate, include matters pertaining to the day-to-day romantic and/or sexual relationship between the couple and matters pertaining to the quality or the frequency of the performance of daily household tasks such as keeping the house clean, cooking or doing the laundry. Other issues such as the number or timing of children would not be practical (or constitutional) for a court to regulate. Courts might, however, consider enforcing agreements a couple might make to mediate such matters.
the court that would permit spouses to barter their willingness to care for their ill spouses in exchange for money would promote bad social policy.

This view is not unreasonable. Married couples receive many benefits and, arguably, it is not unfair for the state to impose an obligation on spouses to care for an ill spouse. This policy is reflected in the duty of necessaries, which was designed to protect both merchants and the public fisc from having to absorb costs that are rightly the responsibility of the other spouse. It is also not unreasonable for the court in Borelli to believe that marriage should represent a commitment between individuals that is qualitatively different from the relationship between parties in a typical commercial transaction. It is likely that many people would find the kind of "sickbed bargaining"\(^1\) that took place in Borelli to be distasteful. Some might feel that the law should not encourage, or even permit, such bargaining.

There is no easy answer to the moral and/or social policy concerns raised by the kind of contract that was at issue in Borelli. However, it is important for the law to acknowledge the reality that marriage is an institution undergoing fundamental change. Marriage is no longer viewed as idealistically as it once was. With a divorce rate that is much higher than in previous generations,\(^2\) as well as with more and more women entering the workplace,\(^3\) the roles of husbands and wives are changing. One consequence of these changes is an increased desire for private ordering. Many couples may want to structure their marriages in accordance with their own needs, rather than subject to a single model of marriage designed by the state. The courts have recognized the changing nature of marriage through their acceptance of premarital agreements, and it is important that the law move toward acceptance of the other kinds of interspousal contracts that have been discussed here. Procedural and substantive protections should be provided\(^4\) to protect the public interest, but married couples should be permitted a wider range of contractual freedom.

The argument in favor of permitting the kind of contract the spouses sought to enter into in Borelli is also supported by the fact that the very same kind of agreement is upheld by the courts if it is deemed a "reconcilation agreement"--a contract entered into as an inducement for a spouse who has left a marriage to return to the home.\(^5\) In such contracts "promoting reconciliation and the resumption of marital relations,"\(^6\) the fact that one spouse has foregone the

\(^{71}\) 16 Cal. Rptr. 2d at 20.
\(^{72}\) See CENSUS, supra note 11, and accompanying text.
\(^{73}\) See CENSUS, supra note 1, at 373-74.
\(^{74}\) Procedural protections would include the traditional contract law tests that void a contract for reasons such as incapacity, fraud, duress, and undue influence. Substantive tests for the validity of an agreement would include consideration of issues such as fairness and unconscionability, both of which can involve difficult issues of judicial discretion and line-drawing. For a full discussion of these issues, see WEITZMAN, supra note 4, at 345-47, 353-59. See generally Shultz, supra note 4.
\(^{75}\) 16 Cal. Rptr. 2d at 24.
\(^{76}\) Id.
option of separation or divorce is considered legally sufficient consideration. On a practical or a moral level, however, there is little to distinguish this kind of contract from the one in *Borelli*. In each case, however unseemly it may appear, the spouses have struck a deal that allows the marriage to continue. Both contracts should be deemed equally valid.

While the current approach to contracts governing the ongoing marriage restricts the autonomy of both husbands and wives, it has a disparate impact on wives, who continue to provide the lion’s share of domestic work in most marriages.\(^7\) The effect of the current restrictions on interspousal contracts is that, as a practical matter, women are unable to enter into contracts that might better protect their long-term interests should they decide to play the traditional role of homemaker. The current limitations also deny protection to those women who work outside the home but nonetheless make greater career sacrifices than their husbands as they attempt to balance home and career. Finally, holding that the provision of domestic services cannot constitute consideration for a contract between spouses reinforces the devaluation of housework by suggesting that it has no real value. Whenever the law devalues housework, the interests of women are likely to be disproportionately affected. Thus, the fact that domestic services cannot constitute consideration makes it clear that despite its current formal gender neutrality, the duty of support and services is fatally infected with assumptions about gender that work to the disadvantage of women.

A reexamination of the prohibition against contracting for services during marriage is long overdue. In this area, which lies at the intersection of contract law and family law, contract law lags far behind tort law in accommodating the changing realities of marriage and gender roles. In tort law, the long-established doctrine of interspousal immunity, which prevented husbands and wives from suing each other for personal injury, has virtually disappeared.\(^8\) In accepting the realities of modern life, the courts finally recognized that husbands and wives have separate interests with respect to some matters. They rejected outdated arguments that interspousal tort actions undermine marital harmony, hopelessly embroil the courts in the day-to-day adjustments required in marriage, or open floodgates of litigation. The time is ripe for family law to go farther in recognizing the different interests of husbands and wives in contemporary marriages. It is time to remove the duty of support and services as a barrier to interspousal contracts that do not threaten the public interest.

\(^7\) See John P. Robinson & Geoffrey Godbey, *Time for Life: The Surprising Ways Americans Use Their Time* 100, 334 (1996) (stating that employed women spend 25 hours per week on family care, while employed men spend 14.5 hours per week); see also Arlie Hochschild & Ann Mchung, *The Second Shift* VIII-XI, 8-10 (1989).

B. Alimony and Alimony Modification

1. Historical Background

Theoretically, upon divorce, each spouse should be free to make choices with respect to new relationships. The marriage has ended, and in a society in which remarriage is permitted and common, the expectation is that both members of the couple will move on and construct intimate lives with new partners. The next section of this Article asks whether current interpretations of the doctrine of support and services have the effect of unjustifiably constraining choice in this area. While most case law and commentary would suggest that the duty of support is the doctrine most relevant to issues concerning alimony modification, I argue that the duty of services plays an equal, although largely unarticulated role when the modification issue involves remarriage or cohabitation.

An understanding of the historical background of the institution of alimony is important for this discussion. In the United States, alimony was derived from the spousal duty of support as it developed historically in England. Alimony was a remedy developed by the English ecclesiastical courts at a time when there was no such thing as a complete divorce—there was only, in effect, a legal separation. In a legal separation, the husband’s legal duty of spousal support continued. Somehow this practice of awarding support to a woman still married but no longer living with her husband became part of the law in the United States, even though absolute divorce had long been permitted. As a result of its awkward history, the theoretical basis for alimony in this country has always been somewhat unclear, leading some to describe alimony as “a practice without a theory.” In recent years, the institution of alimony has come under attack as legally unsupportable. As a result, a number of scholars

80. Id.
81. Id.
83. See, e.g., Olsen v. Olsen, 557 P.2d 604, 608, 612 (Idaho 1976) (Shepard, J., dissenting), in which the judge stated:

In my opinion, the time has arrived to squarely face the questions and problems of the doctrine of alimony. If society in the past garnered any benefit from this antiquated system of private (versus public) welfare, such is either non-existent in this day and age or at the least is
have been seeking to construct a new theory of alimony based on theories of contract law, tort law, law and economics, and partnership law. However, as of now, there is no commonly accepted legal theory that adequately explains why one spouse should continue to have a legal obligation to support the other after their marriage has been legally terminated.

In looking at the effect of the doctrine of support and services on alimony modification, it is also important to place alimony in the context of its gendered history. At common law, only wives could receive alimony—husbands could not. This rule was derived from the historically gendered division of the duty of support and services. Although today alimony is formally gender-neutral, this history is important in understanding how the rules governing alimony continue to constrain the post-divorce choices of women. It is also important to understand that historically, as well as currently, the vast majority of alimony recipients are ex-wives rather than ex-husbands, meaning that women are disproportionately impacted by the rules governing alimony modification.

When alimony is paid after a divorce, a strange asymmetry results. The paying spouse continues to have a duty of support, but the recipient spouse is relieved of the duty of services. Thus, as a practical matter, while a husband may have an obligation to make financial payments to his former wife, she has far outweighed by the antagonisms, social dislocations, economic burdens and judicial inefficiency which are involved and result from the perpetuation of the doctrine. ... Somehow the legitimate interest of society in preventing divorcees (unable as contrasted to unwilling to work) from being cast upon the relief rolls has been perverted into an instrument to level economic disparities, both real and imagined, between two people in which there exists no legal relationship.

84. These approaches seek to base alimony on something more than the idea that alimony is simply the duty of support extended beyond marriage. The approaches vary significantly. A law-and-economics-based approach argues that when couples seek to plan rationally as a single economic unit, they will shift career emphasis to the higher earning spouse while the other spouse plays the role of homemaker or performs a disproportionate share of the housework. Under this view, alimony represents compensation for the loss in earning capacity resulting from such behavior. See Ellman, supra note 82, at 45-47. Some scholars have suggested post-divorce models based on an idea of “income sharing”—a model that “represents a conscious effort to achieve equality between spouses who have divided their labor during marriage.” See Jane Rutherford, Duty in Divorce: Shared Income as a Path to Equality, 58 FORDHAM L. REV. 539, 578 (1990).

Others have sought to ground alimony in contract law, arguing that alimony protects a legitimate “expectancy interest” arising out of the marriage contract. See Margaret Brinig & June Carbone, The Reliance Interest in Marriage and Divorce, 62 TUL. L. REV. 855, 894 (1988). I have suggested that economic losses suffered upon divorce should be analogized to strict liability in tort law. Under this view, alimony represents a remedy that compensates a spouse for disproportionate economic losses suffered as a result of the “accident” of divorce in circumstances in which there is good reason to compensate the person who has suffered the loss and good reason to impose the cost of compensation on the other party. See Perry, supra note 82, at 66-67.

A concept of restitution alimony has been applied by some courts to reimburse a spouse for funds expended on the other spouse’s educational training. See, e.g., Mahoney v. Mahoney, 453 A.2d 527, 534-35 (N.J. 1982). Other courts have applied a concept of rehabilitation alimony to provide a divorced spouse with alimony for a limited period during which the spouse is expected to undertake education or training. See, e.g., Pfohl v. Pfohl, 345 So. 2d 371 (Fla. App. 1977). The latter two concepts can be used both to justify awards of alimony, but they can also be used to limit the duration of such awards.

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no duty to cook his meals, clean his house, or have sexual relations with him. It is interesting that this asymmetry between the duty of support and the duty of services in the context of alimony seems to be of no concern, as long as the ex-wife who is receiving alimony is publicly living as a woman alone. However, as I shall illustrate, should the ex-wife choose to remarry or to cohabit with a man, it appears that the duty of services suddenly plays an important (although largely unarticulated) role in the question of whether or not alimony will continue to be paid, and, if so, whether there will be a reduction in the amount provided.

2. Alimony and Remarriage

The general rule is that alimony terminates upon death or remarriage. It is not difficult to understand how the rationale generally given for this rule is inextricably intertwined with assumptions about gender roles in marriage. Thus, the assumption has been that an ex-wife's new husband has assumed a duty of support, and that therefore the hardship suffered by the wife as a result of the divorce has ended. Indeed, the assumption that an ex-wife no longer needs alimony when she remarries has often been treated very much like an irrebuttable presumption. We know this because in most states, alimony is terminated whether the new husband is rich or poor.

The duty of support is relevant to the question of the effect of remarriage on alimony. However, the role of the duty of services is less clear. An

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86. A 1943 law review article suggested the following historical rationale for this asymmetry: The theory of alimony which we persist in to this day is that the wife wants to live with her husband and work as hard as before, but that his conduct makes it so far unsafe for her to do so that her life would be in danger. Since divorce was for the wealthy, and since the rules arose when women had no opportunity for earning as a rule except in purely menial tasks, the courts took the view that the wife was excused from rendering services since it was unsafe for her to do so however much she might want to continue to work for her husband, while his misconduct did not excuse him from continuing his duties to support his helpless wife. The article goes on to critique this rationale: First, in most states, divorce for cruelty or desertion or other convenient reasons does not mean usually that either husband or wife is under serious danger of physical injury if the marriage continues. Thus, to say that the wife ipso facto is absolved from any duties to do anything on her side, although the husband continues to be under a duty to support his wife (in many cases even where the divorce is for the wife's own fault and the decree is awarded to the husband) is to lose all touch with reality and fairness. Note, A Reconsideration of Husband's Duty to Support and Wife's Duty to Render Services, 29 VA. L. REV. 857, 866 (1943).

87. CLARK, supra note 4, at 663-64; GREGORY ET AL., supra note 7. It should be noted that the rules governing different jurisdictions vary widely. The majority of states have statutes providing that alimony terminates upon remarriage. In states without legislation on the issue, most courts have held that remarriage does not automatically terminate alimony, but it creates a prima facie case for termination in the absence of extraordinary circumstances. See, e.g., Keller v. O'Brien, 652 N.E.2d 589, 593 (Mass. 1995). Also, alimony ordered for a specified period (perhaps in lieu of property) or "rehabilitative" alimony are not necessarily terminated upon remarriage KRAUSE, supra note 67, at 158.

88. CLARK, supra note 4, at 663-664.

89. See, e.g., Dunaway v. Dunaway, 560 N.E.2d. 171, 176 (Ohio 1990) (terminating alimony even though the new husband was physically disabled and not capable of providing support).
argument could be made that alimony terminates upon remarriage not only because a new husband has assumed a duty of support, but also because the ex-wife now has a duty to perform services for her new husband. Under this logic, an ex-husband should not have to support a woman who not only has a new man to support her, but is also now cleaning up for and having sex with this new man. Viewed this way, it can be argued that it is not clear whether alimony is terminated upon remarriage because of the duty of support, the duty of services, or both. The significance of the duty of services in alimony modification only becomes clear when we examine what happens when an alimony recipient cohabits rather than remarries.

3. Alimony and Cohabitation

In recent years, as the number of couples who cohabit without marriage has increased, some ex-husbands have sought to terminate alimony on the ground that their ex-wives, although not remarried, were cohabiting with men. Courts and legislatures have taken a variety of approaches when considering whether or how alimony should be affected by that event. In some states, legislation specifically provides that alimony must terminate. In the absence of legislation, courts have taken a variety of positions and offered a variety of rationales. Some courts simply terminate alimony, but a majority apply a "needs" test in which the question is whether or not, in light of the cohabitation, the wife still has a need for her ex-husband's financial support.

Clearly the rationale for terminating alimony upon remarriage—that a new spouse has undertaken a legal duty of support—cannot justify terminating alimony where there is no actual remarriage. It could be argued, however, that termination or modification of alimony where there is cohabitation is justified based on an assumption that either the new partner is supporting the alimony recipient (although he has no legal obligation to do so), or that the alimony recipient is using the ex-spouse's money to support the new partner. Both of these rationales for modifying alimony are still solidly based on the doctrine of

90. See statistics cited supra note 9.
91. See, e.g., N.Y. DOM. REL. L. § 248 (McKinney 1977) (authorizing termination of alimony if the dependent spouse is "habitually living with another man and holding herself out as his wife, although not married to such man"); ILL. COMP. ANN. STAT. § 40/510(b) (West Supp. 1981) (terminating alimony "if the party receiving maintenance cohabits with another person on a resident, continuing, conjugal basis"); see also ALA. CODE § 30-2-55 (Supp. 1982); UTAH CODE ANN. §30-3-5(3) (Supp. 1981). California's statute provides for a rebuttable presumption of decreased need for support if the alimony recipient is cohabiting with a person of the opposite sex. CAL. CIV. CODE § 4801.5(a) (West Supp. 1981).
92. CLARK, supra note 4, at 665-68 (noting that in states where the matter is dealt with by statute it is "impossible to draw from them a single coherent notion of their purpose and application" and noting that cases often reflect the view that the alimony recipient's cohabitation may justify reduction or termination of alimony if it reduces the recipient's financial needs).
support. The focus remains on the issue of money—how much is needed, and how it might be spent. However, a strong argument can be made that the duty of services is as least as important as the duty of support in the decision as to whether alimony will be terminated or reduced when an ex-spouse cohabits.

We know that the duty of services is relevant because the inquiry into whether or not the ex-wife's alimony should be cut off or reduced is usually triggered only when she is cohabiting with a person—presumably a man—with whom there is an assumption she is having sexual relations. The link between the duty of services and the alimony decision becomes more clear if we ask whether an alimony recipient's money would be cut off if she moved back in with her mother or with her elderly parents. In such a case, it may very well be that the ex-wife is receiving support from her parents, or it may be that she is using a part of her ex-husband's money to support them. However, a court would be unlikely to inquire into the matter. An ex-husband's protest that his ex-wife is living with her sister, or even with her best friend would also likely fall on deaf ears. The fact is that the inquiry as to whether an ex-wife still "needs" the alimony is usually only triggered in the event that she begins to live with a member of the opposite sex to whom the court assumes that she is now providing marital-type services. 94 The sexual access that was a part of the duty of services she once owed to her husband is now being provided to another man. An ex-wife cannot keep receiving money from her ex-husband while she is presumably performing household tasks for and engaging in sex with another man, even if she is divorced.

This examination of the impact of the duty of support and services on alimony modification demonstrates how deeply the doctrine of support and services is intertwined with gender hierarchy and male policing of women's sexuality. In the world of alimony, a woman who, at least for public purposes, appears not to be having sex with anyone receives better treatment under the law than a woman who appears to have found a new sexual partner. The underlying view seems to be that if a woman is having sex with a new man, the new man should support her financially—an ex-husband should not have to continue to pay money to his former wife under such circumstances.

The law thus reflects an assumption that women essentially trade sexual services for financial support in their relationships with men. The law also seems to imply or suggest that, even after divorce, a husband retains some kind of a proprietary interest in his ex-wife's body. 95 The structure of the law

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94. Only a few courts have been explicit about this. See, e.g., In re Marriage of Thweatt, 96 Cal. Rptr. 826 (1979) (holding California statute inapplicable in the absence of "evidence of a sexual relationship, a romantic involvement, or even a homemaker-companion relationship" between ex-wife receiving alimony and male boarders who shared expenses with her). But cf. Marriage of Sappington, 478 N.E.2d 376 (1985) (holding that "a relationship can have a conjugal basis even though there is the absence of any sexual relationship").

95. The idea of a husband having a proprietary interest in his wife's body is reflected in the history of the action for loss of consortium,
protects the male ego—a man would be considered a cuckold if he were still sending checks to a woman who is now living with, caring for, and presumably having sex with someone else. Finally, it is very clear that to the extent that the law governing alimony and post-divorce relationships constricts choice, women suffer a disproportionate disadvantage since the vast majority of alimony recipients are women.96

Perhaps the real test of whether gender, gender hierarchy, and the policing of women’s sexuality play a role in alimony modification will be when we can answer the following question: Would the alimony of an ex-wife be reduced or terminated if she began cohabiting in a sexual relationship with another woman? Would a court make the same assumptions about the relationship between sex, financial support, and gender that it seems to make when the ex-spouse begins to cohabit with a member of the opposite sex?97 It seems unlikely that most courts would assume that the new female lover is financially supporting the alimony recipient even though the two women are living together in an intimate relationship, and this would probably be true even if the new female partner was wealthy. Judges probably have more difficulty making the assumption that one woman is financially supporting another woman that she happens to be sharing a household with than making the assumption that a man is financially supporting a woman with whom he shares a household.98 If this is so, it further shows how deeply the doctrine of support and services remains imbedded with assumptions about gender.

which had its origin in the common law view that the wife was more or less a servant or chattel of the husband, and that therefore he was entitled to an independent cause of action if the wife was injured, since the tortfeasor would have damaged the husband’s property rights in the service and society of the wife.

Butcher v. Superior Court of Orange County, 139 Cal. App. 3d 58, 60 (1983). Today, the focus of the action for loss of consortium is not on the loss of household services, but on the damage to the relational qualities of the marriage, including the sexual relationship. See infra text accompanying notes 131-35. I believe, however, that remnants of the historical proprietary interest of a husband in his wife (as well as other practical concerns, such as financial need) are reflected in the fact that the law deems it relevant when an ex-wife is living with another man.

96. This is likely to continue to be the case, although with the entry of more and more women into the workforce, gender roles in marriage are changing. See generally Herma Hill Kay, From the Second Sex to the Joint Venture: An Overview of Women’s Rights and Family Law During the 20th Century, 88 CAL. L. REV. 2017, 2090 (2000).

97. At least one case suggests that the answer is no. See Van Dyck v. Van Dyck, 425 S.E.2d 853 (Ga. 1993) (holding that a statute providing for modification of alimony upon cohabitation with a member of the opposite sex was not applicable to a divorced woman’s relationship with another woman. The court rejected the argument that equal protection required the statute to be applied to either gender). Subsequent to this case, the statute was amended to include relationships with people of either gender. GA. CODE ANN. § 30-1-1 (1993). See also People ex rel. Kenney v. Kenney, 76 Misc. 2d 927, 352 N.Y.S.2d 344 (1974) (also holding that a statute permitting termination of alimony where an ex-wife is cohabiting with a man did not apply to ex-wife’s same-sex relationship); Gajovski v. Gajorski, 577 N.E. 2d 660 (Ohio 1991) (refusal to terminate ex-wife’s alimony based on same sex cohabitation).

98. It should be noted that the courts’ views of the consequences of opposite-sex as opposed to same-sex cohabitation relationships may change as same-sex relationships become more visible and achieve increased legal recognition. The question would still remain, however, as to why subsequent sexual relationships should have any bearing on alimony, regardless of the genders of the parties.
The tangled web between alimony, remarriage and cohabitation will only be unraveled and severed when a theory of alimony is constructed that is completely independent of the marital duty of support. As noted previously, scholars have been working to develop such a theory. Under a rationale in which alimony is reconceived as compensation already earned by a spouse during a marriage and is severed completely from the duty of support that existed during marriage, neither remarriage nor cohabitation by the alimony recipient would have any relevance. After divorce, spouses would be free to choose new relationships without fear of adverse and punitive financial consequences.

C. Sex as Services and Same-Sex Marriage

The discussion of same-sex relationships in the context of alimony modification provides a natural segue to the next issue: the effect of the duty of support and services on the same-sex marriage controversy. Issues of gender are implicated here as well, albeit in a different sense. Whereas the discussion of the effect of remarriage and cohabitation on alimony illustrates how the duty of support and services affirms the dominance of one gender over the other, exploration of that duty in the context of the same-sex marriage controversy provides an example of the way in which the law supports the dominance of different-gender relationships over same-gender relationships. Thus, under the current status of the law, heterosexual relationships are valued and can be legitimized by the institution of marriage, while homosexual relationships are devalued and cannot be legally formalized. The same-sex marriage debate is an intense one. The many arguments that have been advanced on both sides of the issue will not be repeated here—the discussion in this Article will be limited to an exploration of the role of the duty of support and services in supporting a system that prevents people from marrying the person of their choice if that person is of the “wrong” gender.

99. See supra text accompanying note 87.
1. Sex and the Duty of Services

The discussion in Part II of this article established that sex is regarded by the law as one of the "essential" duties of marriage. Thus, refusal to engage in sexual relations can be grounds for divorce in some states, and concealed impotence can be grounds for an annulment. The fact that courts will not enforce a contract between spouses to forego sexual intercourse also reflects the view that sexual relations are viewed by the law as one of the "essentials of marriage."

The persistence of the marital rape exemption in some states is further evidence that sex is considered an essential obligation of marriage. Historically, husbands were permitted the right to exercise "self-help" in the event that their wives refused to have sexual relations with them. A husband could not be prosecuted for taking by force what the law considered to be rightfully his if his wife refused to perform her sexual "duties." The centrality of sex to marriage is reflected in a number of other ways, including the potential legal consequences of adultery and the fact that the elements of the claim for loss of consortium have traditionally included compensation for loss of sexual services.

Historically, there were two reasons why sex was considered to be an "essential of marriage"—procreation and pleasure. The most obvious justification was procreation—there are many cases that make it clear that courts have long viewed procreation as a primary purpose of marriage. However, it is also clear that sexual relations were valued for more than procreation—providing for sexual pleasure within marriage was also clearly an important purpose of the rules promoting sexual relations as integral to marriage. This is evidenced by the fact that although historically impotence was a ground for annulment, sterility was not a ground for annulment or divorce.

101. See supra text accompanying notes 20-21.
102. See Goldfarb, supra note 50.
103. See supra note 21.
104. See supra text accompanying notes 24-25.
105. Until the late 1970's, there existed within many criminal rape laws an implicit exclusion that made it legally impossible for a husband to be guilty of raping his wife. Beginning in the late 1970's, courts began to strike down or at least narrow these exemptions. See, e.g., Warren v. State, 336 S.E. 221 (Ga. 1985); People v. Liberta, 474 N.E.2d 567 (N.Y. 1984). The marital rape exemption was based on a number of rationales, including that the wife was the property of the husband and that the husband and the wife were one legal entity.
106. See infra text accompanying notes 140-142.
107. See infra note 131; see also CLARK, supra note 4, at 396-97.
109. Impotence could be a ground for annulment even if the parties had children in common. See, e.g., T. v. M., 242 A.2d 670 (N.J. Super. Ct. Ch. Div. 1968) (annulling marriage for impotence where the wife became pregnant as a result of the husband ejaculating on the outside of her vagina).
Despite this convincing evidence that the law considered sexual relations between spouses to be extremely important, there is some ambiguity about the question of the extent to which the presence or absence of sex affected the legal status of a marriage. For example, a marriage that follows statutory formalities such as obtaining a marriage license and having a marriage ceremony does not require consummation in order to be valid, Although lack of consummation may be relevant to a later action for annulment. Furthermore, although impotence has long been held to be a ground for annulment, this was only so if the aggrieved spouse did not know about the condition. If the aggrieved spouse was aware of the partner's impotence, a valid marriage could still be contracted. Thus, the law would not have precluded a paralyzed war veteran or an eighty-year-old man from getting married, even if they were impotent. This suggests that the law viewed marriage as having many desirable purposes other than those relevant to sexual relations between the spouses.

2. Sex, the Duty of Services, and Same-Sex Marriage

Although the foregoing discussion raises some questions about the centrality of sex as a legal requirement of marriage, it is clear that any kind of sex contemplated by the law in relationship to marriage was, and still is, required to be heterosexual. Although only a few states have statutes that specifically define "deviant" sexual activity within marriage, the fact that many annulment cases specifically define impotence as the inability to engage in sexual intercourse makes it clear that the law does not contemplate other modes of sexual activity couples may find satisfying and that the law contemplates that the sexual activity taking place within marriage must be between men and women. Although it may not apply to married couples, the Supreme Court's holding in Bowers v. Hardwick makes it clear that states

110. Goldfarb, supra note 50, at 289 (citing CLARK, supra note 4, at 34-39).
111. Goldfarb, supra note 50, at 289.
112. See, e.g., Ksaiboon v. Ksaiboon, 652 S.W.2d 291 (Mo. App. 1983) (granting annulment where husband concealed the fact that he knew he was incapable of engaging in sexual relations with wife).
113. See, e.g., Beck v. Beck, 246 So. 2d 420, 428-29 (Ala. 1971) (noting that inability to have sexual intercourse due to advanced age or physical infirmity did not invalidate an otherwise valid common law marriage).
114. Goldfarb, supra note 50, at 296.
115. A few states permit divorce on fault grounds for "unnatural sex acts." AREEN, supra note 20, at 329.
116. The Uniform Marriage and Divorce Act, for example, provides that physical incapacity results in a voidable marriage whenever a party lacks the physical capacity to consummate the marriage by sexual intercourse and the other party was unaware of this. UNIFORM MARRIAGE AND DIVORCE ACT, 9 U.L.A. § 208(a)(2) (West 1998). See also Rickards v. Rickards, 166 A.2d 425 (Del. 1960) (defining impotence as "inability to copulate"); and T v. M., 242 A.2d 670 (N.J. Super. Ct. Ch. Div. 1968) (holding wife to be impotent despite the fact that she had conceived by husband ejaculating near her vagina, where wife was unable to engage in sexual intercourse).
may impose criminal penalties for sexual acts that do not involve traditional male-female sexual intercourse.

The effect of the current status of the law on the issue of same-sex marriage is obvious. Since sex is an essential, or at least a legally significant component of marriage and the Supreme Court has upheld state laws that render sexual activity between people of the same gender illegal, how can it possibly be legal for same sex couples to marry? Couples cannot marry when the only kind of sex that is recognized within marriage, heterosexual activity, is sex that by definition they cannot perform.

But if the duty of support and services within marriage is now gender neutral, shouldn't this mean that there can no longer be legally mandated roles for men and women to play with respect to any sexual duties that exist within marriage? Gender neutrality with respect to the duty of services strongly supports the argument that there can be no specific roles for men and women with respect to sexual relations within marriage. If this is so, it furthers the argument that the kind of sex in which a couple engages cannot be required to be based on sexual biology, traditional gender roles, or gender stereotypes.

This important point builds on what was made clear in *Griswold v. Connecticut*—that marriage is protected by a realm of sexual privacy. If modes of sexual expression within marriage are not the concern of the government and the duty of services is gender neutral, support is gained for the argument that gender, presumed gender roles in sexual activity, and, therefore, sexual orientation, should be irrelevant to the ability of people to contract a valid marriage. Moreover, the facts that there is some ambiguity in the law as to whether the presence or absence of sex affects the legal status of a marriage,¹¹⁸ that courts have recognized that marriage serves purposes other than procreation,¹¹⁹ and that sex is no longer a prerequisite for procreation also support the idea that sex, and therefore sexual orientation, should be irrelevant.

Other aspects of the duty of services within marriage, such as caring for the home and children and providing physical comfort and emotional support to one's partner, do not give rise to the same level of controversy generated by the matter of sexual relations. Presumably, anyone can do the dishes, cook the food, sweep the floor and be a loyal and supportive companion. Moreover, to the extent that marriage imposes a duty of economic support between spouses so that there is financial recourse to one spouse for the support of the other, same-sex marriage is as consistent with the goal of preserving public funds as heterosexual marriage is.

In sum, a gender-neutral duty of support and services lends support to arguments in favor of same-sex marriage. However, as noted earlier, the objections to same-sex marriage have been based on a variety of arguments.

¹¹⁸. See supra notes 113-16.
¹¹⁹. See supra text accompanying notes 100-14. See infra text accompanying notes 140-42.
Regardless of any changes that might be made to the legal duty of support and services, the same-sex marriage controversy is certain to continue.

III. SHOULD THE DUTY OF SUPPORT AND SERVICES BE ABOLISHED?

In Part Two of this Article, I argued that the doctrine of support and services is not adequate to accommodate modern conceptions of marriage and other intimate relationships. Despite its formal gender-neutrality, the doctrine, as presently construed, unduly restricts married couples from making choices with respect to varying traditional gender-bound spousal roles; it can penalize the post-divorce relationship choices of alimony recipients and it contributes to the prohibition against same-sex marriage in an era in which that restriction seems more and more antiquated. In light of these concerns, a strong argument can be made that the duty of support and services is increasingly inconsistent with evolving notions of privacy, autonomy and equality on the basis of both gender and sexual orientation. The inevitable question is whether the duty should be abolished because of these deficiencies.

A. Should Marriage Itself be Abolished?

It could be argued that rather than eliminate the duty of support and services, the institution of marriage itself should be abolished. Perhaps with the elimination of marriage, a new institution could be developed that would be truly non-sexist and created without the discriminatory baggage so difficult to extricate from the duty of support and services.

It is likely, however, that getting rid of marriage would not be a simple matter. Throughout the years a variety of arguments have been presented against the institution of marriage, including assertions that it has outlived its usefulness, that it inevitably exploits women and perpetuates male supremacy, that it unjustifiably privileges the sexual tie, and that it discriminates against same-sex couples. Despite such arguments in favor of the abolition of marriage, such a step is, quite frankly, unlikely to occur, at least in the foreseeable future. Despite the many criticisms that have been lodged

120. CATHARINE MACKINNON, FEMINISM UNMODIFIED 49, 96-97 (1987).
against it through the years, marriage has managed to remain a highly popular institution, with over two million couples marrying each year. Even if support for marriage were to seriously erode among the public, the chances are probably slim to nil that state courts or legislatures could be convinced to abolish it. The belief continues to be widespread that marriage is beneficial for individuals and society.

Since the institution of marriage is likely to remain viable for the foreseeable future, we might, in the alternative, want to ask what marriage would look like if we eliminated or significantly altered the doctrine of support and services. The final question is whether the duty of support and services could be redefined in ways that would give people more flexibility to structure their intimate relationships so that they might better accommodate their individual preferences without imposing undue burdens on the public interest. The next Section of this Article will examine these possibilities.

B. Abolishing the Duty of Support and Services

Abolishing the duty of support and services could potentially give rise to a number of problems. It could be argued, for example, that eliminating the duty of support and services would remove the legal basis for both alimony and the claim for loss of consortium. Fortunately, there appear to be fairly straightforward ways to address the potential complications with respect to these issues. A more difficult and fundamental question is whether abolishing the duty of support and services would impact the meaning of marriage in a way that would seriously undermine the public interest.

1. Impact on Alimony

It could be argued that because alimony is commonly understood to be derived from the marital duty of support, the institution of alimony would no
longer have a legal basis if that duty were abolished. As discussed earlier, the connection between alimony and the marital duty of support has been challenged, and during the past several years, family law scholars have been working to develop a theory of alimony that is based, not on the marital duty of support, but on other legal theories such as contract law, tort law and partnership law. If an alternative theory of alimony gains acceptance, eliminating or changing the legal duty of support and services would not impact that institution.

Indeed, hinging alimony on the theory that the spousal duty of support can survive marriage seems to have been fairly useless, as practical matter. As a number of legal scholars have noted, the husband’s continuing duty of support post-marriage involves more myth than reality for most divorced women. The vast majority of women are not awarded alimony at the end of their marriages, and this has long been the case.

2. Impact on the Claim of Loss of Consortium

Another doctrine that could arguably be affected by the elimination of the duty of support and services is the claim for loss of consortium. The cause of action for loss of consortium is a claim for damages for the spouse of a personal injury victim in order to compensate that spouse for injury to both the tangible and intangible qualities of the marriage relationship, including services, companionship and the sexual relationship. It could be argued that if marriage no longer entails a duty of services, the spouse of an injured person should have no right to compensation for this element of loss.

Eliminating the marital duty of services need not undercut the legal basis for the loss of consortium claim, because that claim has an alternative legal basis. The modern claim for loss of consortium does not emphasize the most obvious elements of economic loss: the loss of household services. Today, economic losses suffered by the couple are generally recovered in connection with the action of the spouse who was physically injured. Thus, the action for loss of consortium focuses on the more intangible, companionate aspects of the marriage relationship. This makes the consortium claim very similar to a

126. See supra note 84.
127. Jana B. Singer, Divorce Reform and Gender Justice, 67 N.C. L. REV. 1103, 1106-07 (1989); Perry, supra note 82, at 2503.
128. See generally GREGORY ET AL., supra note 7, at 85-86.
130. Certain elements of damage are deemed recoverable by the injured spouse. Because of concerns about double recovery, many courts require the claim for loss of consortium to be joined with the suit by the injured spouse. CLARK, supra note 4, at 396-97.
131. In the modern action for loss of consortium, in which either spouse can bring the claim, “recovery is largely for such intangible harms as loss of companionship, affection and society.” JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS 181 2000). It has been noted that:
tort lawsuit for negligent infliction of emotional distress, a cause of action which has been undergoing a significant expansion in tort law in recent years. Indeed, some courts have already explicitly identified the claim of loss of consortium as being essentially a claim for emotional distress.

Treating the claim for loss of consortium as a claim for emotional distress is consistent with the growing receptivity of tort law to claims for emotional and relational harms. In recent years, some states have even expanded the claim for loss of consortium beyond spouses, permitting suits where the injury of a child damages the quality of enjoyment of the parent-child relationship. Courts formerly refused to recognize such claims because, among other reasons, they believed that an important element of the consortium claim was the loss of sexual services. The fact that some courts have begun to move beyond this view provides further support for the position that the claim for loss of consortium need not be rooted in the duty of marital services at all.

The claim for loss of consortium is an old one. It was developed at a time when most tort claims for the negligent infliction of emotional harm required a physical impact. However, now that tort law has eliminated that requirement and has become more responsive to claims for emotional distress and relational harms, the specific cause of action for loss of consortium may no longer even be necessary. In any event, should it continue, it certainly need not be based on the marital duty of support and services.

At one time, the gravamen of the claim for loss of consortium was the deprivation of the wife's services conceived to be owing to her husband; the action was similar to that of a master for enticement of his servant. Later the grounds of the consortium action included loss of the society of the wife and impairment of relations with her as a sexual partner, and emphasis shifted away from loss of her services or earning capacity. MARC C. FRANKLING & ROBERT RABIN, TORT LAW AND ALTERNATIVES 297-99 (7th ed. 2001).

132. The expansion of the right to recover for negligent infliction of emotional distress has been controversial and uneven because of skepticism about whether emotional injuries should qualify as "real" injuries, fear of fraudulent claims, proximate cause concerns, and debates about who should be permitted to recover. There are significant jurisdictional differences. DIAMOND ET AL., supra note 131, at 162-63; see also Julie Davis, Direct Actions for Emotional Harm: Is Compromise Possible, 67 WASH. L. REV. 1 (1992). See generally Peter Bell, The Bell Tolls: Toward Full Recovery for Psychic Injury, 36 FLA. L. REV. 333, 399-408 (1984); Richard Pearson, Liability for Negligently Inflicted Psychic Harm: A Response to Professor Bell, 36 FLA. L. REV 413, 423-26 (1984).

133. See, e.g., Romero v. Byers, 117 N.M. 422, 425 (N.M. 1994) ("Loss of consortium is simply the emotional distress suffered by one spouse who loses the normal company of his or her mate when the mate is physically injured due to the tortious conduct of another.").


135. PROSSER & KEATON, THE LAW OF TORTS 359-65 (5th ed., 1984) (discussing the traditional rule in which a physical impact was required); see also DIAMOND ET AL., supra note 131, at 164 (discussing elimination of physical impact requirement).
The "Essentials of Marriage"

C. Impact on the Definition and Meaning of Marriage

A more difficult question is whether elimination of the duty of support and services would fundamentally change the meaning of marriage in ways that would be detrimental to the society and to individuals. At present, marriage is an institution that embodies both legal benefits and legal duties. Some of the important legal benefits of marriage include tax benefits, social security benefits and pensions, the ability to file wrongful death actions, and health and bereavement benefits.136 There are also many intangible benefits associated with being married. In our society, marriage is the form of intimate relationship between a man and women that is accorded the highest level of respect.

How should the fact that marriage entails many legal benefits impact on the question of whether the duty of support and services should be abolished? I have already argued that the duty of support and services as presently construed is at odds with modern values of privacy and equality, reinforces gender hierarchy, and supports discrimination on the basis of sexual orientation. However, I also believe that in light of the many legal benefits marriage confers on spouses, it is both fair and in the public interest for marriage to impose some duties and responsibilities on those who enter into that institution. Why should married people receive all of the legal benefits of marriage without being subject to some significant legal responsibilities? The lingering question is what those duties and responsibilities should entail.

In thinking about that question, an important first step would be to uncouple the duty of support and services and to look at each component separately. Because the duty of services is, for the most part unenforceable, and at the same time stands as a barrier to private ordering, that duty should be abolished. The duty of support should be retained, but restructured in a way that protects the public interest while at the same time, and to the extent possible, permits people to structure their intimate relationships according to their own desires.

1. Eliminating the Duty of Services

What exactly would it mean to eliminate the marital duty of services? First, eliminating this duty would require a clear and unequivocal statement that sex is neither a legal duty nor an essential responsibility of marriage.137 Under

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137. This argument has already been made in connection with the debate over same-sex marriage. See, e.g., Goldfarb, supra note 50, at 300. It has been argued, for example, that: The buried premise of most discussions of marriage, that marriage must involve sex, should be unearthed, and in so far as government is concerned, rejected. If it is not the business of
the current state of the law, courts can become entangled in intimate matters between couples in a variety of contexts, including suits for annulments based on impotence and fault divorces based on adultery, or mental cruelty or constructive desertion based on the withholding of sex. If the spousal duty of sexual relations in marriage was abolished, such causes of action would no longer be available—absent rape, sexual abuse, or other forms of coercion, for the most part the matter of sexual relations between married couples would be outside of the scope of the law.138 In other words, sexual matters between married consenting adults would be regarded by the law largely as a private matter. Eliminating sex as a legal duty of marriage would also mean the preclusion of causes of action such as criminal conversation, or those initiated by a spouse against a third party for emotional harm or damage to the marriage relationship resulting from a sexual affair with the other spouse.

When considering the degree to which the law should step back from regulating sexual matters between spouses, it is important to think, once more, about the two major reasons sex has been considered to be “an essential of marriage” and to explore whether any of these reasons have validity today. Clearly, the procreation rationale for sex being an “essential of marriage” has virtually disappeared. With access to both birth control and abortion, marriage need not always result in children, and indeed, an increasing number of married couples choose not to have them. Certainly, however, the birthrate has not fallen to any level that would justify government actions to encourage procreation. The fact that the link between sex and reproduction has become attenuated is evidenced further by the fact that sex may no longer even be necessary for conception due to new reproductive technologies.

The next question is whether the “pleasure” rationale for sex as a duty of marriage has any contemporary validity. The traditional justification for promoting sexual pleasure within marriage presumably was that it would discourage sexual activity outside of marriage, thereby promoting a more peaceful economic and social order. Although the prohibition against adultery has a strong religious derivation139—the Ten Commandments decree that “Thou shalt not commit adultery”—it reflects practical concerns as well. There was always the possibility that that a sexual relationship outside of marriage might be discovered and/or result in either the husband or the wife conceiving a child.

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138. This development, of course, would be the end of the marital rape exemption in those states where it still exists. States take a variety of approaches to the marital rape exemption. Some have abolished the exemption entirely. Some allow prosecution of husbands who rape their wives when the couple is living separate and apart. Many states still do not permit prosecution of a husband for the rape of his wife if the couple was living together. GREGORY ET AL., supra note 7, at 216.

139. For a discussion of the religious prohibition against adultery, see generally HELEN FISHER, THE ANATOMY OF LOVE 81-84 (1992).
with someone other than the other spouse--obviously threatening the stability of the marriage, and possibly leading to violence. Today, birth control and abortion have made it less likely that sexual activity outside of marriage will lead to the birth of unplanned and unwanted children. Although the hurt and anger likely to result from the discovery of an extra-marital affair is probably no different today than it was in earlier times, it is likely that, in light of evolving values of autonomy and sexual privacy, many people today would feel that it would be inappropriate for government to seek to ensure that spouses have sex only with each other.

These societal changes, of course, raise the question of whether the elimination of the marital duty of services would also mean that sexual fidelity would no longer be a legal duty of marriage. In some states, adultery remains a ground for divorce and/or can be considered in determining other issues such as the division of economic wealth. Indeed, in some states, adultery is still a crime. It could be argued that attaching legal consequences to adultery acts as a deterrent, furthering the public interest in stable marriages. However, for the reasons just stated, the nexus between legal penalties for adultery and achievement of the social goals presumably furthered by monogamy may not be sufficiently close to justify the required intrusion into private sexual matters. In an era of no-fault divorce in which, spouses, as a practical matter, can divorce each other for virtually any reason, the concept of adultery as a legal wrong between spouses may slowly be losing relevance.

140. Adultery is still a ground for divorce in 29 states. See GREGORY ET AL., supra note 7, at 247. In some states, alimony is barred as a result of a finding of adultery. See, e.g., GA. CODE ANN. § 19-6-1(B) (1999); N.C. GEN. STAT. § 50-16-6 (2002); S.C. CODE ANN. § 20-3-130 (Law. Co-op. 1985). In recent years, courts are less likely to rely on adultery as a factor in custody determinations. See, e.g., Hansen v. Hansen, 562 A.2d 1051, (Vt. 1989); Hanbart v. Hanbart, 501 N.W.2d 776 (S.D. 1993) (holding by the court, in both cases, that adultery is not relevant where it does not impact on the best interests of the children).


142. Professor Homer Clark has observed that: Adultery is a subject of interest to novelists and playwrights, and social scientists have found it to be not uncommon in our society, but in the contemporary law of divorce, it is statistically unimportant. Although it is a ground for divorce in about twenty-eight states today, for a variety of obvious reasons it is relied upon in only a very small proportion of cases.

CLARK, supra note 4, at 498.

Elimination of a legal requirement of sexual fidelity would also be the end of the tort of criminal conversation which is still recognized in some states. See e.g., Fadgen v. Lenker, 365 A.2d 147, 153-55 (1976) (abolishing the tort of criminal conversation, and with the concurring opinion expressing the view that freedom of choice, due process, and the right to privacy protect the right of a spouse to engage in sexual activity with persons other than one's spouse, with no compelling state interest justifying the state in limiting the exercise of that right); see also MILTON C. REGAN, JR., FAMILY LAW AND THE PURSUIT OF INTIMACY 135 (1993) (noting that in many states adultery is no longer a crime and that most states have eliminated spouses' claims against outside parties for alienation of affection).

Not surprisingly, it is difficult to obtain reliable statistics on adultery. In a recent survey, 86% of those interviewed stated that they believed adultery to be morally wrong. In the same survey, 69% said that they knew at least one husband who had had an affair, and 60% said they knew of one wife who had had one. How Do Americans View Adultery?, CNN ALL POLITICS, available at
Care of the home and family, social companionship and emotional support, remain additional aspects of the duty of services within marriage. Abolishing the duty of services would have little effect here because, as discussed earlier, courts have not been willing to enforce these duties due to issues of privacy, judicial competence and the potential administrative burden on the court system.

Finally, there is the question as to whether the marital duty of cohabitation should be abolished. I believe that it should. Cohabitation is a legal duty that poses definitional difficulties, and has very little practical relevance in the modern era. Today, many couples have commuter marriages, live in different cities or are otherwise apart for long periods of time. This reality is a reflection of both the fact that more women are in the workplace as well as new transportation possibilities that enable people to live in one city while working in another.

In light of these developments, the question of what constitutes cohabitation sufficient for a marriage to be viable should more appropriately be a matter for individual couples to negotiate and agree upon. Certainly, retaining a duty of economic support between spouses is not contingent on a cohabitation requirement. And, while it could be argued that the cohabitation requirement discourages adultery with its potentially disastrous consequences, no cause and effect relationship can be clearly demonstrated here; it is obvious that the fact that spouses live together is no bar to married people committing adultery.

Likewise, it could be argued that retaining a duty of services between spouses remains important because that responsibility provides a vehicle through which the law expresses values that society considers to be important in the marital relationship. It would be hard to deny that there is value in society affirming the ideal that married couples should look out for each others' interests, provide emotional support, and seek to create a home for one another that is tranquil and comfortable.

Retaining a marital duty of services which encompasses expectations of emotional support is also consistent with at least certain strands of feminist theory which have encouraged increased recognition by the law of emotional and relational harms, and have argued generally for the expansion of duties of

143. See CLARK, supra note 4, at 500-06 (discussing when refusal of one spouse to cohabit with the other constitutes desertion or abandonment.)

144. This position is what Carl Schneider has referred to as the "channeling function" of family law. Professor Schneider argues that family law creates a system of incentives that "recreates, builds, shapes, sustains and promotes" the family even if the rules themselves are not enforceable. Carl Schneider, The Channeling Function in Family Law, 20 HOFSTRA L. REV. 495 (1992).
care between people. Elminating the duty of services in marriage might be seen as accepting or even promoting less, rather than more, caring between people.

It seems that most of the conduct or actions that comprise the duty of services within marriage are behaviors that one would expect to be present in a relationship in which two people love and are committed to each other. These expectations are probably solidly based in cultural, class, or religious expectations, and undoubtedly many people believe that they are the essential building blocks for a successful marriage. The more difficult question is whether these obligations should be legal, rather than merely social, and this article has offered a number of arguments as to why these obligations should not be legal ones. The reality is that as a practical matter, the only remedy for couples dissatisfied with the companionate aspects of marriage has been divorce. Perhaps it is time for the law to make this explicit by holding that there is no independent duty of services in marriage.

It is important to remember that even if the duty of marital services were eliminated, spouses would still retain important legal obligations to each other. The duty of support would still hold couples responsible for each other's essential physical needs. Spouses would retain an obligation to summon medical care for the other spouse when necessary. General tort duties would continue to impose on spouses, as on others, duties to refrain from conduct that would inflict foreseeable harm on others. Eliminating the duty of services would simply recognize what is already true—that for the most part, the law does not, and really cannot, enforce a duty of services between spouses. The law simply cannot confer upon a marriage those qualities of services, caring, and companionship that the duty of services seeks to guarantee. Spouses who are unhappy with the domestic services provided in the home and the intangible qualities of their relationship have the option of divorce, which unlike the duty of services, is not illusory. The quality of marriages would not suffer by the elimination of the legal duty of services, but eliminating the duty would enable couples to more easily contract with each other in ways that might better protect the interests of married women. Thus, elimination of the duty of services would permit the household services performed by many wives to be

145. These arguments especially have been developed in some areas of feminist tort scholarship. See, e.g., Leslie Bender, A Lawyer's Primer on Feminist Theory and Tort Law, 38 J. LEGAL EDUC. 3 (1988); Leslie Bender, An Overview of Feminist Torts Scholarship, 78 CORNELL L. REV. 575 (1993).

146. See Elizabeth S. Scott, Pluralism, Parental Preference, and Child Custody, 80 CALIF. L. REV. 615, 669 (1992) ("Norms, or 'customary law' regulate family relations more effectively than do formal legal enactments because norms structure conduct into roles and functions that create stable expectations."); Cass R. Sunstein, Social Norms and Social Roles, 96 COLUM. L. REV. 903, 907 (1996) ("Behavior is pervasively a function of norms... [and] norm management is an important strategy for accomplishing the objectives of law.").

147. Eliminating the duty of services would also mean the end to any and all causes of action based on "fraud in the essentials" of marriage to the extent that the matters at issue concerned aspects of the marriage such as sexual relations.
recharacterized, or perhaps correctly characterized, as contributions to the economic structure of the marriage. This would help to provide the basis for household services to be considered valuable consideration adequate to support a contract.

2. Clarifying the Duty of Support

For reasons discussed earlier, the duty of support between spouses should be retained. Retention of this duty furthers the important goal of protecting the public fisc. In addition, as argued earlier, it is fair to impose legal responsibilities on those who are reaping so many legal and social benefits from marriage.

The question then becomes how to define a duty of support that is tailored to modern realities. Certainly there is a continuing need for spouses to be liable for each other’s necessities. Therefore, the duty of support should continue to include an obligation to see that food, shelter and clothing are provided for one’s spouse. It is also clearly appropriate to maintain an obligation to summon health care for one’s spouse when that is necessary.

One way to look at the duty of support might be to think of it as having both a public and a private component. The public component is reflected by the rule that one spouse should be called upon to meet the economic needs of the other before there is resort to public funds. Thus, imposing a duty of support serves to prevent one spouse from becoming a public charge as long as the other spouse has resources that can be accessed.

The other component of the duty of support and services is more private—this component concerns the expectation that during the marriage, the spouses will share the marital wealth. Of course, the court in McGuire\(^{148}\) held that the courts will not intervene to determine how the resources held by a family are divided or spent within an intact marriage, and this continues to be the general rule. This raises the question, however, of whether the law should be structured in a way that guarantees that both spouses in an intact marriage have equal access to the assets of the marriage. Such a rule could empower wives in marriages where, like Mrs. McGuire, they are unhappy about the allocation and spending of economic resources, but do not desire to end the marriage. The problem, as recognized by the court in the McGuire case, is the difficulty of devising and implementing a rule that gives power to both spouses without destabilizing the marriage or imposing undue burdens on the judicial system. Perhaps there is something to be learned from systems currently in effect in some community property states where elaborate rules have been developed to govern management and control of the couples’ community property.\(^{149}\)

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148. 59 N.W.2d 336 (1953).
149. AREEN, supra note 20, at 329-32.
rules are designed to balance the dual goals of facilitating commercial transactions and protecting the financial interests of each spouse.

Defining exactly what the duty of support should entail in the intact marriage, beyond what is necessary to protect the public interest, is not a simple matter. Although people have many expectations of marriage, once again, most of these expectations ultimately must be treated as moral, cultural and religious obligations rather than legal ones. This means that while there certainly should have been a legal obligation on the part of the wife in *Borelli* to secure physical nursing care for her husband as part of her duty of support, that duty should not include a legal duty to physically perform the services herself, unless she could not afford to pay a third party to do it. Moreover, while it certainly is desirable for Mrs. Borelli to be emotionally supportive of her husband during his illness, defining emotional support as a legal obligation seems problematic. If one spouse is unhappy with the emotional support that is being provided by the other, the remedy should be marriage counseling, or in extreme cases, divorce. As a practical matter, these are the only remedies available anyway, as courts will not and cannot order specific performance of a duty to be a gentle, caring and supportive spouse.

As a practical matter, a gender-neutral duty of economic support should serve us well as we move toward a society with increased gender equality. As more and more women enter the workplace and hold down jobs involving substantial responsibility and which provide increasing financial rewards, it will be more and more true that both women and men will have the means to satisfy the duty of support in cases in which that duty must be enforced.  

IV. THE EFFECT OF REDEFINING THE DUTY OF SUPPORT AND SERVICES ON ALTERNATIVE STRUCTURES FOR INTIMATE RELATIONSHIPS

At present, there are several alternatives to formal marriage. These alternatives, which may or may not be available depending on the jurisdiction, include domestic partnerships, cohabitation with or without a contract, and the

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150. Although I believe in the importance of retaining the duty of support as between spouses, I also believe that many of the financial obligations that are currently placed on spouses should, in fact, be governmental obligations. As a society, we expect too much from families. Adequate levels of medical care, child care, and educations are all necessary in order for people to have a minimal level of dignified existence and these should be guaranteed not by spouses or parents, but ultimately by the government. In this society we rely too heavily on families to provide for the necessities of life. Many families simply cannot meet this burden, and ultimately the public pays the price in terms of the costs of illness, unemployment, crime, and other reflections of social dislocation.

The fact that I advocate maintaining the duty of economic support between spouses in no way detracts from my belief that the government should play a much larger role in guaranteeing the social welfare of its citizens. Professor Martha Fineman has been working on the development of a theory designed to reinvigorate the idea that the government should do more to assist families with the financial issues that result from the inevitable dependencies of childhood and old age. See, e.g., Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13 (2000).
new structure of the civil union available in Vermont. There is also the longstanding institution of common law marriage, still recognized in fourteen states. This Article has examined how the marital duty of support and services affects ongoing marriages as well as how it restricts the ability of people to enter into post-divorce relationships and to marry the person of their choice. This final section will briefly speculate as to the possible consequences for relationships other than formal marriage if the duty of services in marriage was eliminated and the duty of support retained but redefined to allow more private ordering of the ongoing marriage than is presently permitted.

A. Domestic Partnerships

Currently, some cities permit same-sex and/or heterosexual couples to enter into domestic partnership arrangements in lieu of marriage. Domestic partnership arrangements generally provide for at least some of the benefits of marriage, such as bereavement leave and health insurance. Because of the ban on same-sex marriage, the domestic partnership structure, where available, may be the only way for same-sex couples to gain some legal protections and benefits for their relationships.

Under the current typical structure of domestic partnerships, it appears that couples who enter into such arrangements receive more legal benefits than they incur legal obligations. For example, although nearly all of the ordinances now in effect require that the partners declare that they are responsible for each other’s welfare, they do not impose a specific legal duty of support upon the partners equivalent to the legal duties imposed upon spouses in a marriage. It would seem reasonable that in the case of domestic partnerships, as is true in the case of marriage, there should be some symmetry between the legal benefits and the legal obligations incurred by those who enter into that arrangement. Altering the duty of support and services within marriage would provide an occasion for reexamination of the balance of benefits and obligations in the

151. GREGORY ET AL., supra note 7, at 37.


153. See, e.g., Bowman & Cornish, supra note 152, at 1188-94 ( "Nearly all of the ordinances contain requirements that the partners declare that they are responsible for each other's welfare. Los Angeles uses the terms ‘share the common necessities of life.’ Seattle requires that the partners be ‘jointly responsible for basic living expenses.'")
domestic partnership context as well, particularly to determine what type of economic support obligation would be appropriate for that context.

B. Civil Unions

In 2001 the State of Vermont became the first state to offer what it has termed a "civil union" structure as an alternative to marriage. The civil union structure, which is available only to same-sex couples, provides exactly the same legal duties and benefits as marriage. Thus, parties to a civil union have duties of support and services, and they receive tax benefits, inheritance rights, family leave, victims' compensation, and all the other benefits married couples receive. Like a marriage, the civil union must be terminated by a legal process. It would seem that elimination of the duty of services in marriage and a clearer definition of the duty of support would not give rise to the need to make any specific changes to the structure of the civil union—its structure would continue to mirror the legal structure of formal, legal, heterosexual marriage, whatever that structure turns out to be. Over time, the family law issues that will inevitably be litigated between partners to civil unions will provide an interesting study as to how the duty of support and services functions in a context in which there can be no reliance on even unconscious assumptions about gender.

C. Cohabitation

Since 1976 when Marvin v. Marvin was decided in California, many states have permitted unmarried couples to enter into contracts governing the disposition of property in the event that their relationship should end. This means, in essence, that cohabitating couples can now make the same kinds of agreements planning for the division of their property that married individuals have the right to make. Because cohabitating couples are by definition not married, and therefore not subject to the legal duty of support and services, they, in fact, have more freedom to make certain kinds of agreements than married couples do. For example, the kind of agreement invalidated in Borelli would be perfectly valid between an unmarried couple because there are no

154. A distinction might be drawn here between same-sex and heterosexual couples. Because same-sex couples do not have the option of marriage, the argument is weaker that domestic partnership arrangements unfairly provide legal benefits without imposing corresponding legal obligations. If same-sex marriage were permitted, the law could impose all of the legal benefits as well as all of the legal obligations of marriage on all couples who desire state recognition of their relationships.


156. Section 1204 of the Vermont civil union statute states: "Parties to a civil union shall have all the same benefits, protections and responsibilities under law... as are granted to spouses in a marriage." VT. STAT. ANN. tit. 15, § 1204 (2001).

pre-existing legal duties. Thus, a cohabitating couple could legally enter into an agreement for one partner to be paid for domestic work. Moreover, if the duty of support and services within marriage was altered to reflect the suggestions in this Article, the law with respect to cohabitation would not be affected in any formal way.

Still, because cohabitation relationships sometimes function as de facto marriages, changes in the legal structure of marriage would likely inspire a reexamination of the current legal structure of cohabitation to determine whether that structure is fair to the parties and consistent with the public interest.

Cohabitating couples are not married, and their contracts are not substitutes for marriage. Cohabitation contracts may govern the very limited issue of the distribution of property, but they generally do not provide for ongoing financial support after a relationship ends. Most cohabitation cases that are litigated are argued on the theory of an alleged oral contract. If that contract claim for property division fails, the partner on the losing side of the litigation may have fulfilled what amounts to a duty of services during the cohabitation only to be left with neither property nor post-relationship financial support in the end.

This possibility raises the more general question as to whether a duty of economic support should be imposed on long-term relationships that function essentially as marriage equivalents, but where there is neither a marriage nor a contract. The public interest can be implicated in long-term cohabitations in which one partner ends up playing a role during the relationship that might leave him or her economically vulnerable should the relationship end, leaving the public to provide financial support while the other partner retains the accrued economic wealth. As the number of cohabitating couples increases, so does the number of cases in which this outcome is a distinct possibility. Common law marriage, which gives rise to an actual legal marriage, is an alternative that may provide more protection in some cases, but only in those states where such marriages are recognized, and only in cases in which the elements of the alleged common law marriage can be proved.

Cohabitation relationships raise an additional concern with respect to the marital duty of support and services. Although cohabitation relationships presumably give rise to neither the legal duties nor the legal benefits of marriage, there have been a number of cases in which surviving partners in a cohabitation relationship have sought to bring claims for legal benefits on the theory that they were "de facto spouses." For example, there are several cases

in which courts have permitted cohabitants to bring claims for loss of consortium.\footnote{159} Although there certainly are public policy reasons for permitting recovery in some cases, the asymmetry between legal benefits and legal responsibilities in such cases is somewhat troubling.\footnote{160} A cohabitant might receive a substantial financial recovery even though he or she was not subject to any legal obligations of services or economic support during the relationship. Such controversies raise the question of the extent to which unmarried couples should receive some of the same benefits that married couples receive. This, in turn, should prompt the question of whether there needs to be a balance of legal benefits and legal duties in the context of cohabitation more generally.

\section*{D. Common Law Marriage}

In those jurisdictions in which they are recognized, common law marriages constitute valid, legal marriages.\footnote{161} Theoretically, because they are considered to be legal marriages, it would seem logical to conclude that spouses in common law marriages would have the same legal duties of marriage as any other spouses.\footnote{162} If this is the case, any changes in the legal duties between spouses in formal marriages would result in corresponding changes in those


160. One interesting and troubling development with respect to the marital rape exemption is that while an increasing number of states are eliminating the exemption, others have been extending the exemption to cohabiting couples. ELLMAN ET AL., supra note 37, at 176. See Note, To Have and to Hold: The Marital Rape Exemption and the Fourteenth Amendment, 99 HARV. L. REV. 1255 (1986). Connecticut, for example, provides an affirmative defense where “the defendant and the alleged victim, were, at the time of the alleged offense, living together by mutual consent in a relationship of cohabitation, regardless of the legal status of their relationship.” CONN. GEN. STAT. ANN. §§ 53(a)-67(b) (West 1994). Although the marital rape exemption was derived from a number of common law perspectives on the relationship and duties of husbands and wives, to the extent that it is based on the duty of services, there is no logic in applying it to cohabiting couples, since no duty of services exists in that context.

161. Common law marriages are currently valid in eleven states and the District of Columbia. AREEN, supra note 20, at 93.

162. The question of whether common law marriages impose the same duties on spouses as traditional ceremonial marriages is an interesting one. In general, common law marriages require four elements to be present: capacity, agreement, cohabitation, and the couple holding themselves out to the public as being married. Cynthia Grant Bowman, A Feminist Proposal to Bring Back Common Law Marriage, 75 OR. L. REV. 709, 712-73 (1996). With respect to cohabitation, no specific period of time is required in order for a common law marriage to be established. To meet the “holding out” requirement, the couple must have the reputation of being married “among family, friends and neighbors.” Id. at 713.

With respect to a ceremonial marriage, while cohabitation appears to be a duty of marriage, the legal marriage comes into being at the time of the license and ceremony. It is also interesting that the “holding out” suggests that the parties appear, at least to some extent, to be performing at least some of the duties and/or expectations of married couples; however, it makes no reference to the duties of support and services. Still, many claims arising from common law marriages are the kind of claims that grow directly out of the duties of support and services in the ceremonial marriage context. These include claims for alimony, survivor's benefits, loss of consortium and wrongful death.
duties in common law marriages. As a practical matter, however, issues involving the duties of support and services in the ongoing marriage do not often arise in the context of the common law marriage. This is because most people only seek to establish common-law marriages after they are already over, often as the result of the death or desertion of one spouse. By this point in time, the duty of services is obviously moot, and the duty of support may be relevant only in the form of alimony, government benefits or a cause of action for wrongful death to recover for pecuniary losses.

In light of increasing rates of cohabitation, arguments have been made for the revival of common-law marriage as an alternative to cohabitation contracts. It has been argued that cohabitation contracts often do not adequately protect the interests of de facto spouses. In Marvin v. Marvin, for example, although the female plaintiff obtained the legal right to assert claims against her partner based on express and implied contracts and equity, on remand she ended up receiving nothing. The court found that she had failed to prove the existence of an express or implied contract and that there was no justification for an equitable award.

Moreover, cohabitation contracts cannot confer on the contracting parties the right to receive government benefits or to bring claims for matters such as wrongful death or loss of consortium, whereas common law marriages may provide such remedies. Should common law marriage be revived on any widespread basis, there will be a need to examine more closely whether, and if so, how, the duty of support and services associated with traditional marriage would apply to that institution.

163. Most common law marriage claims are brought by women after the marriage has terminated by death or desertion. Id. at 754-64. A few common law marriage claims have been brought by men. These claims typically involve the following contexts: men seeking to bar court testimony by their alleged common law wives, men seeking to assert common law marriage as a defense to statutory rape, claims brought by male lodgers seeking to inherit as husbands, and claims brought by cohabitants seeking workers compensation benefits. Id.

However, the vast majority of common law marriage claims have been brought by women seeking divorce remedies, social security or other government benefits upon their husbands' deaths, or by women involved in will contests or other inheritance issues or who seek to assert claims based on wrongful death or insurance. Id. It should be noted, however, that claims based on common law marriage can also arise during a marriage, as in claims for worker's compensation benefits or for loss of consortium. Id.


166. Bowman, supra note 162, at 774.
CONCLUSION

The idea that there are certain "essentials of marriage" has been overdue for reexamination. For the last several decades, the law has been shifting from a system characterized predominately by state regulation of marriage and other intimate relationships to one in which more and more limits have been imposed on state control of personal life choices. This article has argued that one of the most important state-imposed "essentials of marriage," the duty of support and services, has become increasingly problematic in an era in which ideals of gender equality, privacy, autonomy, and non-discrimination have become ever more important. Today, people expect and want to have more freedom in defining the structure of their intimate relationships without state interference.

This Article has argued that the duty of support and services should be redefined to recognize the difference between legal obligations legitimately imposed on married couples to protect the public interest, and those social expectations about marriage that, as a practical matter, the law cannot enforce. With respect to the latter, which relate, for the most part, to the intangible aspects of a marital relationship, divorce would seem to be the appropriate remedy for those people who are unhappy. Thus, the law should retain a duty of economic support between spouses, but eliminate the duty of services, a badly outdated doctrine which, because of its inability to discard its historical baggage, does much more harm than good.

The redefinition of the duties of marriage proposed in this Article would give married couples more opportunities to structure their marriages in accordance with their own preferences, without imposing an undue burden on the public interest. It would also remove a significant barrier for divorced women who wish to move on with their lives and seek fulfillment in new relationships. Finally, this redefinition of the duty of support and services would move society further toward treating, with equal respect, the desire of consenting adults to formalize relationships with the life partners of their choice. According respect to the relationships people choose to make most important in their lives would serve the public interest by promoting a society of contented, law-abiding, and productive citizens.