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Restatement of Love

Gretchen Craft Rubin

Jamie G. Heller

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INTRODUCTION

Custom has long been the authority in matters of love. Men and women have turned almost unthinkingly to tradition and prevailing social norms for guidance in the tender passion. Yet the Bar of late has come to acknowledge that the lack of codification in this realm has left a rent in the otherwise seamless web of the law. To address this gap, the Reporters have set forth the Restatement of Love.

No doubt some will question the departure from tradition that the Restatement of Love represents. Although the legal rules pertaining to marriage, divorce, and estates have been well established, the law’s application to a relationship’s early stages has hitherto been largely unexplored. Romantic relationships have been presumed unsusceptible to a structure of rules, perhaps

† J.D., Yale Law School, 1994.
because of the widespread belief that love is the most intimate and idiosyncratic of human emotions. The Restatement of Love, however, is premised on the view that love, like all other aspects of human interaction, can be subjected profitably to legal analysis.

Scope of this Restatement. Currently, matters of the heart are governed by a complicated network of unwritten norms that specify the parties’ rights and obligations. These mores, though subject to extensive discussion in almost every field of human endeavor, ranging from art to literature to the social sciences, have yet to be put to the rigor of legal scrutiny. The Restatement undertakes this task. It codifies the underlying principles of love and, where appropriate, draws on established legal doctrines from other fields. The claim has been made that “[t]he heart has its reasons, of which reason knows nothing.”¹ By distilling a universal, reasoned framework for relations of love, the Restatement will refute this widespread, but mistaken, view.

This Tentative Draft is not exhaustive. It merely begins the process of identifying and cataloging the law of love. Readers should not expect to find all applicable areas of the law treated fully and completely. The Reporters anticipate that the project will culminate in the compilation of a complete and authoritative code.

Organization. This Restatement consists of four Chapters. Chapter 1, Meaning of Terms, sets forth the basic definitions that this Draft employs. Chapter 2, Courtship, surveys the three principal models under which relationships begin: the blind date model, the informal acquaintance model, and the aggravating circumstances model. Chapter 3, The Course of the Relationship, examines four major legal areas in which developed doctrines shed light on the law of relationships: jurisdiction, procedure, property, and torts. Chapter 4, Dissolution, governs the various aspects involved in the act of dissolving a relationship.

CHAPTER ONE
MEANING OF TERMS

This Chapter defines the terms used in this Tentative Draft. Many commentators resist established definitions in the context of love and argue that these “ancient” categories are “crude and unworkable.”² Some contend

2. For leading criticism of “outworn” distinctions, see Rowland v. Christian, 443 P.2d 561, 567 (Cal. 1968):

Whatever may have been the historical justifications for the common law distinctions [among trespasser, licensee, and invitee], it is clear that those distinctions are not justified in the light of our modern society and that the complexity and confusion which has arisen is not due to difficulty in applying the original common law rules . . . but is due to the attempts to apply just rules in our modern society within the ancient terminology.
that such categories are mere constructs, designed to push people toward conventional relationships. But law, by its very nature, relies upon a common understanding of the terms that define it. This Restatement will employ the following neutral and modern terms in order to encompass the greatest number of possible situations.

§ 1.1. Interest
An interest is the object of any human desire.

Comment:
Although this definition mirrors that found in the Restatement of Torts, Second, readers are cautioned that the term has somewhat different connotations in this field.

§ 1.2. Party
A party is any natural person engaged, or potentially engaged, in a relationship.

Comment:
Alternate and colloquial terms to describe the parties within the relationship include, but are not limited to: boyfriend, girlfriend, significant other, partner, lover, sweetheart. Note that "ladyfriend" and "manfriend" are considered vulgar terms that are now in disrepute among all circuits.

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4. See Wesley N. Hohfeld, Some Fundamental Legal Conceptions as Applied in Judicial Reasoning, 23 YALE L.J. 16, 20 (1913) (defining and discussing "the basic conceptions of the law, the legal elements that enter into all types of jural interests" in order to clarify legal reasoning).
5. The Restatement does not discuss parties in gendered terms, nor does it address concerns peculiar to one sex or the other. To be sure, scholars have noted that men and women may have different perspectives on many subjects. See, e.g., CAROL GILLIGAN, IN A DIFFERENT VOICE 1 (1982) (noting "distinction in these [male and female] voices, two ... modes of describing the relationship between other and self"). The Reporters have rejected this model, however, out of a commitment to the vision of ordered law that has shaped the work of the Restatements since the time of Christopher Columbus Langdell. As Grant Gilmore characterized it, the "Langdellian revolution" was founded on the belief, still powerful today, that "there really is such a thing as the one true rule of law, universal and unchanging, always and everywhere the same—a sort of mystical absolute." GRANT GILMORE, THE DEATH OF CONTRACT 97-98 (1974) (footnote omitted).
6. RESTATEMENT (SECOND) OF TORTS § 1 (1965) ("The word 'interest' is used throughout the Restatement of this Subject to denote the object of any human desire").
§ 1.3. Relationship
A relationship is that status enjoyed by individuals who consider or comport themselves in a manner that indicates an ongoing romantic involvement.

Comment:
Alternate and colloquial terms for a relationship include, *inter alia*: going steady, dating, an item, seeing each other, involved.

§ 1.4. Love
Parties in "love" are those parties to a relationship who consider themselves engaged in the highest level of emotional intimacy attainable and who generally presume that such state will continue indefinitely.

Comment:
The English language contains no precise alternate term for "love." This fact is often decried as a constraint on the expression of emotional subtlety. For the purposes of this Restatement, however, one term is sufficient.

§ 1.5. Dissolution; breakup
A dissolution or breakup is any act by which a relationship is terminated.

Comment:
Dissolution may be accomplished by either unilateral or bilateral action.

CHAPTER TWO
COURTSHIP

Chapter Two reviews the three principal models of commencing a relationship: the blind date model, the informal acquaintance model, and the aggravating circumstances model. In recent history, the blind date model was paramount, and in fact it still remains strong in homogeneous urban and suburban communities. Because the model is so prevalent, and because the parties necessarily bargain at arm's length, certain practices have become standard for blind dates. Blind dates are highly structured, formal transactions.

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7. Such communities include, e.g., Jewish Westchester, WASPy Main Line Philadelphia.
In contrast to the blind date model, parties to the informal acquaintance model—who already know each other—are not bound by standard terms. The informal acquaintance model prevails in school and work settings, and its popularity has increased with the growth of coeducation and women in the workplace.

The aggravating circumstances model transcends any particular geographic or contextual identification. It is acknowledged to be the most unstable and hazardous of the three methods of meeting.

§ 2.1. The Blind Date Model; Boilerplate Terms

Parties entering into a relationship through the blind date model are bound by the standard terms of the relevant jurisdiction. Standard terms applicable in all jurisdictions include the following:

(1) For a Saturday night date, the invitor extends an invitation on the immediately preceding Wednesday.

(2) The invitor calls the invitee at 3:30 p.m. or 9:30 p.m, or as near thereto as possible.

(3) In the course of the date, the parties eat a meal together.

(4) The invitor pays for meals and other date activities.

(5) Hopeless projects should be abandoned after three dates.

(6) Invitees and invitors should be screened in advance.

Comment:

a. Scope of boilerplate. The boilerplate terms and practices codified in this section have become standard after years of individual experimentation in blind dates. Parties may generally rely on boilerplate without further inquiry. Though individuals retain the option to contract around these default terms, attempts to depart from boilerplate may be regarded with suspicion. Due to the changing role of women in society, however, some boilerplate provisions are now being called into question.

8. The work-based variant of the informal acquaintance model is high risk. If it goes awry, a party can be left without romance and without a job. Cf. BURTON G. MALKIEL, A RANDOM WALK DOWN WALL STREET 310 (1990) ("Whatever the . . . objectives, the investor who's wise diversifies.").
b. Arranging the blind date. Wednesday has long been considered the proper day to call to arrange a Saturday night blind date. Calling on Tuesday is too eager; Thursday is arrogant; and Friday implies a belief that the invitee is available on demand. The Wednesday night caller acts reasonably, promoting the twin virtues of social efficiency and flexibility. Nine-thirty p.m., after dinner but before bedtime, is the most appropriate time to call an invitee at home. Three-thirty p.m. is preferable for a call to the office, because people generally doze at their desks or take a break at that time.9

c. Date activities; meals strongly recommended. The practice of eating a meal together on a blind date is overwhelmingly favored in all jurisdictions.10 An invitor chooses the date meal according to a multi-tiered structure that parallels equal protection analysis.11 Dinner is the highest tier, signaling the most serious intent, because it entails significant expense, the investment of an evening's leisure time, and increased effort in primping. Just as a court, faced with an equal protection claim, employs strict scrutiny only in the most compelling situations, an invitor extends a dinner invitation only when the invitee is worthy of close scrutiny. Lunch, the lowest tier, is a casual part of the working day and is inherently less costly in time, energy, and expense. A lunch invitee is not subject to heightened scrutiny. If the first date is lunch, the invitor risks the appearance of ambivalence if he or she does not elevate the level of the second date to dinner.

In recent years, brunch has emerged as an intermediate tier.12 This meal resembles lunch in time and expense, but connotes more familiarity than the workaday lunch. With its overtones of unmade beds, unshowered bodies, and lazy bliss, brunch promotes an atmosphere of intimacy. Combined, these

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9. The advent of answering machines and voice mail complicates the traditional bright-line rules governing the most appropriate times to call. The question necessarily arises: If the person is unavailable, is it strategically wise to leave a message? Some of the legal issues raised by the intersection of courtship and technology are reported in Peter H. Lewis, Persistent E-Mail: Electronic Stalking or Innocent Courtship?, N.Y. TIMES, Sept. 16, 1994, at B18. The vast changes wrought by modern technology in this area warrant further examination.

For a related discussion about how actors make strategic decisions when faced with a combination of choices and goals, see ROBERT AXELROD, THE EVOLUTION OF COOPERATION (1984); ERIC RASMUSSEN, GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY (1989).

10. Nonmeal activities, such as sporting events or visits to museums, are not uncommon blind date activities, but they are inherently more risky because the parties' preferences are unknown to one another. Parties are advised to determine their own risk preferences, i.e., whether they prefer a high-risk, high-yield strategy, or whether they are more risk averse. For a discussion of risk/yield strategy, see generally WILLIAM A. KLEIN & JOHN C. COFFEE, JR., BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES 227–35 (1993).


12. Note that breakfast, although formally a meal, is generally discouraged for a date, because it is frequently either wholly personal or taken in a business setting. If people do not have to work over breakfast, they resent a disruption of their morning routine.
elements warrant greater scrutiny than that necessitated by lunch, although somewhat less than that required for dinner.\(^\text{13}\)

d. Invitor pays. Historically, the boilerplate rule has been that the man pays for dates. Most jurisdictions, however, now follow the rule that the invitor pays, regardless of sex. This shift demonstrates the evolution of the common law, which had presumed that the man and the invitor were always one and the same. It is no violation, but a fulfillment of the spirit of the common law, that dictates that the invitor pays.\(^\text{14}\)

e. Three-date rule. Parties often query how many dates it is reasonable to go on in order to assess the possibilities of a relationship. The three-date rule is now standard.\(^\text{15}\) Going on more than three dates, without the promise of a relationship, poses the risk of abusive practices, especially when one party insists on paying.\(^\text{16}\) Even in the absence of bad-faith dealings, however, the three-date rule is a viable period of limitation that allows both parties to a “nonstarter” to proceed with their life business. Any shorter period may pose potential risks as well. A party may foreclose otherwise promising opportunities before discovery is complete.\(^\text{17}\) It is the exceptional, albeit possible, case, where parties know they can settle the matter after the first date.

f. Screen before the blind date. It is reasonable, indeed advisable, for parties to engage in pre-date screening. Parties generally speak by telephone before the first date, but telephone evidence is often of limited reliability.\(^\text{18}\)

\(^{13}\) Just as the contours of brunch are uncertain, as compared with the well-established dates of lunch and dinner, the new tier of intermediate scrutiny has been criticized for its failure to afford clear guidance to actors. See Craig v. Boren, 429 U.S. 190, 220–21 (1976) (“The Court’s [standard of review] apparently comes out of thin air. . . . How is this Court to divine what objectives are important?”) (Rehnquist, J., dissenting).

\(^{14}\) See Oliver W. Holmes, The Common Law 32 (Mark DeWolfe Howe ed., Little, Brown & Co 1963) (1881) (“The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other, which have not yet been absorbed or sloughed off.”).

\(^{15}\) It is unclear whether a similar cut-off point applied with equal rigor in previous times. For example, mothers claim that in “the Fifties,” parties dated more than three times, and dated more than one person at a time, before “going steady.”

\(^{16}\) There are reported cases of “churning” in dating, i.e., of continuous dating where the nonpaying party is simply seeking to tour the New York restaurant circuit. For related doctrine in the securities context, see Armstrong v. McAlpin, 699 F.2d 79, 90 (2d Cir. 1983) (defining churning as “overtrading,” i.e., “excessive rate of turnover in a controlled account for the purpose of increasing the amount of commissions”) (citations omitted).

\(^{17}\) See, e.g., Hickman v. Taylor, 329 U.S. 495, 507 (1947) (“No longer can the time-honored cry of ‘fishing expedition’ serve to preclude a party from inquiring into the facts underlying his opponent’s case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation.”) (footnote omitted).

\(^{18}\) The information is not fully reliable, because a certain amount of “puffing,” by both the daters and intermediaries, is considered acceptable. The standard of reasonableness in puffing is derived from securities law. See Carl W. Schneider, Nits, Grits, and Soft Information in SEC Filings, 121 U. PA. L REV 254, 269 (1972) (“While blatant puffing is not considered proper under the . . . law, investors realize that,
Though parties should refrain from operating in reliance, such discussions do provide ample fodder for a more thorough background check.

Independent investigation of the facts may entail interviews with classmates, work associates, and family members.\footnote{Due diligence often includes an attempt to secure the party’s picture. With the advent of facebooks in law offices, investment banks, and other large firms, photographs of most professionals are readily available for immediate faxing.}

Jurisdictions are split as to whether due diligence should extend to allow the inclusion of all available information, or whether the hearsay principles of reliability and relevance should govern.\footnote{Some circuits lean toward an importation of the “fresh start” policy of the Bankruptcy Code\footnote{\textsection 2.2. The Informal Acquaintance Model}
In considering whether to enter into a relationship, informal acquaintances should:

(1) avoid any tendency toward willful blindness;
(2) establish a claim of right through possession; and
(3) refrain from stealing corporate opportunities.

%within a permissible range, managements may tend to be fairly optimistic, and management opinion can be evaluated in that light.\textsuperscript{19}. For an alternate perspective on puffing, see Carlill v. Carbolic Smoke Ball Co., [1893] 1 Q.B. 256, 261 (C.A. 1892) (distinguishing between “distinct promise” and “a mere puff” in advertising context).}

\footnote{Rule 11 requires that parties engage in a “reasonable inquiry” so that beliefs are “well-grounded in fact.” FED. R. CIV. P. 11. Parties occasionally resort to drastic measures, such as hiring private detectives to conduct background checks. See Dirk Johnson, \textit{Boy Meets Girl, }\textit{`89, Can Be a Detective Story}, N.Y. TIMES, Dec. 10, 1989, at 1. Overzealous investigations, however, may discourage potential partners.

Broker-dealers, intermediaries who set up the parties, must exercise caution in supplying them with background information. See Hanly v. SEC, 415 F.2d 589, 596 (2d Cir. 1969) (holding that broker-dealers must have adequate basis for recommendations made to clients). Parties should be aware that a broker-dealer may not be a disinterested provider of information but may be an advocate for one party. Ideally, however, a broker-dealer acts as what the Model Rules term a “lawyer for the situation,” who serves neither party individually but instead serves both their interests simultaneously. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.2 cmt. (1983) (suggesting role in “seeking to establish or adjust a relationship between clients on an amicable and mutually advantageous basis”); \textit{see also Geoffrey C. Hazard, Jr., Ethics in the Practice of Law 58–68 (1978) (describing Brandeis in role of “lawyer for the situation”). If the date is successful and the pair, later as a couple, spar, it is advisable at that point that the matchmaker interplead. See 28 U.S.C. \textsection 1335 (1988) (“statutory” interpleader); FED. R. CIV. P. 22 (“rule” interpleader).}

\footnote{Parties who wish to conduct relationships armed with abundant information are advised to pursue the informal acquaintance model, which permits greater low-level discovery.}
Comment:

a. Abusive practices; willful blindness. A common injurious pattern seen in the informal acquaintance model is conspicuous flirting toward a friend or acquaintance by a party who lacks any romantic intentions. In such a situation, either or both parties may convince themselves that the other lacks or possesses romantic interest. Such fraudulent behavior encourages reliance and may foreclose the innocent party from pursuing other deals. Willful blindness on the part of the flirt is also inefficient, in that it causes a misallocation of resources. Parties may eventually face sanctions for their willful blindness.23

Illustration:

B is in a relationship with C but spends an inordinate amount of time with D. It is obvious to all that D is pining for B. When asked by others, B insists that B and D are “just good friends,” and acts mystified or outraged at any suggestion to the contrary. B can persist in this belief only by deliberately avoiding discussion with D, because if asked, D would gladly reveal D’s feelings.

b. Pursuit of the object: possession establishes a claim of right. The very informality of the informal acquaintance model gives rise to complications when friends and acquaintances develop overlapping affections. The ancient doctrine governing ownership of ferae naturae applies. The first person to establish a “claim” on an unattached newcomer has superior rights. Yet just as courts wrestle with the question of what action constitutes possession of a wild animal, interested parties may disagree about what constitutes a superior claim on a newcomer. Physical possession, or capture, is widely conceded to be proof of superior rights. More difficult is the claim of the person who has unsuccessfully attempted to establish a relationship, and who therefore feels a strong, though unrequited, attachment.24 Ill will can be particularly strong when one party has long attempted to establish a relationship but has failed, only to see another succeed.25

23. For a more general discussion of willful blindness (also called conscious avoidance), see GLANVILLE WILLIAMS, CRIMINAL LAW, THE GENERAL PART § 57, at 157 (2d ed. 1961) (defining willful blindness as circumstance in which “party has his suspicion aroused but then deliberately omits to make further enquiries, because he wishes to remain in ignorance”).

24. The classic case of Pierson v. Post, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805), established that “mere pursuit” does not confer possession. In love, however, pursuit may in certain situations grant a temporary right, albeit one that is not clearly defined. This right is subject to a reasonable statute of limitations. The impossibility of constructing a bright-line rule determining the length of the limitations period requires the exercise of discretion by all parties, so that no one is unfairly denied the chance to pursue a relationship for an unreasonably long period of time.

25. Justice Livingston’s dissent in Pierson v. Post rings true when it asks:

But who would . . . pursue the windings of this wily [b]l[orp, if, just as night came on, and his stratagems and strength were nearly exhausted, a saucy intruder, who had not shared in the honours or labours of the chase, were permitted to come in . . . and bear away in triumph the object of pursuit?
c. Corporate opportunity doctrine; exploitation by friends and acquaintances. Related doctrine on this subject draws from the notion of stealing corporate opportunity. In principle, if a person does not or cannot avail himself or herself of a relationship, then others may pursue the opportunity with impunity. In practice, however, such doctrines rarely apply neatly or painlessly. Those aggrieved by another's success, but who lack a legal right to relief, often seek other avenues of redress.

Illustration:

A and C are roommates. A has had a longstanding crush on X, but has never successfully developed a romantic relationship. C meets X through A, and when C and X begin dating, A accuses C of exploiting corporate opportunity. Legally C is not liable, because A could not use this opportunity. Yet despite legal rules, informal relations within the household are sure to suffer.

§ 2.3. Aggravating Circumstances Model

Parties who enter into a relationship under aggravating circumstances must be careful to ensure that it will survive the dissipation of the forces that brought them together. Parties should be alert to undue influences, and proceed with extreme caution into rebound relationships.

Comment:

a. Circumstances conducive to undue influence. It is not uncommon for parties to meet at social gatherings at which the atmosphere is ripe for flirtation and sexual tension. Spontaneous passion may be induced by the consumption of alcohol, or other intoxicants, or by the arousal of intense emotion, such as that present at a wedding, reunion, or office Christmas party. While such a beginning may lead to a successful relationship, parties should be aware of the role played by these undue influences. The so-called "morning after" is not too soon to contemplate the wisdom and authenticity of the previous night's events.

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Id. at 180 (Livingston, J., dissenting).
26. See Guth v. Loft, Inc., 5 A.2d 503, 511 (Del. 1939) ("[I]f there is presented to a corporate officer or director a business opportunity which the corporation is financially able to undertake . . . and, by embracing the opportunity, the self-interest of the officer or director will be brought into conflict with that of his corporation, the law will not permit him to seize the opportunity for himself.").
b. Factors indicating rebound. The most prevalent aggravating circumstance is the rebound. A person on the rebound is almost always unable to evaluate a new relationship with judgment unclouded by the events of the previous relationship. While quick turnaround into a new, successful relationship is possible, a true rebound relationship is one that a party joins merely to be positioned in a relationship.

Rebound relationships occur with great frequency, and parties should look to the following multifactor test to determine whether a relationship is a rebound relationship: (1) amount of time elapsed from preceding relationship; (2) gravity of previous relationship; (3) degree to which party is inclined to be in a relationship “at any price”; and (4) extent to which party rationalizes drawbacks in the new party. If application of these factors to the totality of the circumstances indicates that the relationship is a rebound, parties should employ strict scrutiny to determine the sincerity of their emotions.

CHAPTER THREE
THE COURSE OF THE RELATIONSHIP

This Chapter addresses a myriad of legal questions that commonly arise once a relationship is established. It draws on four major bodies of law: jurisdiction, procedure, property, and torts.

§ 3.1. Jurisdiction

Adjudication of disputes is generally limited to actual cases or controversies. Accordingly, parties should:

(1) Refrain from deciding issues that are not yet ripe for discussion;

(2) Grant standing when appropriate; and

(3) Litigate moot disputes sparingly.

Comment:

a. Ripeness doctrine. A couple should not waste its resources by prematurely arguing issues that may resolve themselves. As in other areas of the law, claims should not be adjudicated until they are ripe.28

28. See, e.g., Abbott Lab. v. Gardner, 387 U.S. 136, 148–49 (1967) (“[T]he basic rationale [of the ripeness doctrine] is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies . . . until [a] decision has been formalized and its effects felt in a concrete way by the challenging parties.”) The concept of ripeness is also helpful
Illustration:

A and B are a couple in the early stages of a relationship. A feels that B avoided and ignored A at a party. In such a situation, A should consider delaying discussion on grounds of ripeness. Over a number of parties, the issue might work itself out and preclude the need for costly explicit confrontation.

Circuits are split as to whether discussion about the relationship’s status is ripe at all times. Some argue that parties are always entitled to a forum to discuss the other person’s intentions about the relationship. Others contend that litigiousness in this area is tiresome and counterproductive. The Reporters advise adherence to reasonableness standards when parties raise issues about their relationship.

b. Special case: dealbreakers. Some topics are ripe for review at any time during the course of a relationship. These topics fall under the rubric of “dealbreakers.” Dealbreakers are more than sticking points; they are irreconcilable differences. Parties are encouraged to identify dealbreaking issues as early as possible and to exit the relationship as soon as it is clear that a dealbreaker exists.

in analyzing appropriate behavior at different stages of a relationship. For example, a relationship may not be “ripe” for certain activities that connote serious intentions, such as meeting parents or spending holidays together.

29. This issue also raises important questions concerning the application of the First Amendment. Complex constitutional questions are beyond the scope of this Restatement. The intersection of constitutional history and law, however, and the law of love is ripe for academic exploration. The overlaps extend far beyond the First Amendment.

The Preamble to the Constitution parallels the “we-ness”—i.e., the sense of unity and joinder—of a relationship in its first words: “We the People, in order to form a more perfect union . . . .” U.S. CONST. pmbl. These words could not more perfectly set forth the goals of a relationship. Moreover, the First (freedom of speech, right to petition for redress of grievances), Fourteenth (equal protection), and Nineteenth (suffrage) Amendments have obvious application to relationships.

Theories of constitutional interpretation provide guidance in the law of love. People, like a society, must decide as they mature the standards to which they will adhere over time. Some argue that the standards set down in the earliest years must bind the future, or else these early principles stand for nothing. Others reject this originalist approach to relationships, and argue instead that their early principles should be modified to accommodate the necessarily changing circumstances that come with age. For example, a teenager decides that living together before marriage is immoral; later, as he or she matures, the decision takes on a different aspect. The question for the now-adult becomes: Is cohabitation before marriage immoral, and therefore forbidden, or was the guiding principle (on a more appropriate level of generality) to do the moral thing, which, under changed circumstances, could include “living in sin”? See Michael H. v. Gerald D., 491 U.S. 110, 127–28 n.6 (1989) (“Though the dissent has no basis for the level of generality it would select, we do: We refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”); id. at 136, 139 (Brennan, J., dissenting) (urging consideration of more “generalized interests” and suggesting that “[i]f we had looked to tradition with such specificity in past cases, many a decision would have reached a different result”); see also Bowers v. Hardwick, 478 U.S. 186, 190, 199 (1986).
Illustration:

Jewish person, J, and Christian person, C, agree to pursue a relationship despite their religious differences. Later, they discover that J refuses to have a Christmas tree in the home, and C refuses to give up the tradition. If J and C cannot compromise on this issue, they are faced with a dealbreaker.

As the illustration shows, a dealbreaker may seem insignificant when taken in isolation. But in fact, such issues often symbolize larger differences. Other common dealbreakers include whether a party smokes, does not read books or newspapers, refuses to wear a wedding ring, or insists that the couple adopt the same last name after marriage.

c. **Standing doctrine.** The standing doctrine presents some of the most complicated procedural issues that arise in the law of love. A party who freely enters into a relationship necessarily grants the other party some degree of standing. The scope of standing depends very much on the stage of the relationship, expanding as the relationship develops and increasing dramatically upon engagement. Yet in certain matters, such as one party’s relationship with his or her parents, the other party may never have standing to intervene.

In recent years, the entire doctrine of standing has come under fire. Commentators have criticized the requirement that parties show “injury in fact” before they may claim relief. These academics contend that the relevant inquiry instead should be whether the complainant has a source of relief under the disputed legal right. Critics maintain that the discussion of “standing” allows a court to skirt the merits of an underlying claim.

Illustration:

X and Y are in a long-term relationship. X is unhappy because Y gained fifteen pounds in the last year. When X tactfully tries to express a grievance to Y, Y retorts that X has no business complaining, because X is not materially injured. Of course, Y’s weight may “hurt” X in numerous ways. X might be less attracted to Y, or may worry about Y’s health. X certainly has an injury in fact. Yet under the newly proposed merits-based analysis, X has no claim to relief against Y. This conclusion follows not because X is uninjured, but because regardless of any injury to another, a person’s weight is his or hers to control without interference.

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30. See, e.g., William A. Fletcher, *The Structure of Standing*, 98 YALE L.J. 221, 223 (1988) (arguing that standing “should simply be a question on the merits of plaintiff’s claim”)
d. Mootness. Legal treatments of mootness in matters of love vary according to whether the jurisdiction takes a prudential or declaratory view of relationships. Jurisdictions adhering to the prudential view hold that if an issue no longer poses an immediate tangible problem, it should not be discussed, because unnecessary disputes should always be avoided. In contrast, those that follow the declaratory approach argue that parties should air their views on contentious subjects, even if the issue raised in a particular instance has already been resolved. The Reporters support a presumption in favor of the declaratory view—parties generally benefit from full discussion—but caution that if taken to an extreme, this approach can become a sword, not a shield.

§ 3.2. Procedure
In the course of a relationship, parties should:

(1) Use discretion in adhering to principles of res judicata; and

(2) Pursue and permit discovery within bounds of reasonableness.

Comment:

a. Res judicata. Although the principle of res judicata is as deeply embedded in the law of love as it is in the common law generally, it should be applied with some discretion. In some cases a traditional res judicata approach is necessary in order to permit the parties to achieve repose; in other circumstances, res judicata is inappropriate, because some substantive issues must be relitigated and cannot be put to rest by a mere procedural device.

Illustration:

Q and Z are a two-career couple. Neither can claim res judicata to preclude further discussion of issues such as city of residence or child care. On the other hand, res judicata might justifiably bring repose to decisions such as where Q and Z will spend holidays in any given year.

b. Discovery; disclosure of evidence. Evidentiary questions pervade relationships. Few parties can transcend the ever-prevalent tension between the values of candid behavior and strategic posturing. Some advocate use of an "open file" system, in which parties reveal without reservation their thoughts

31. See PAUL M. BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 205–12 (3d ed. 1988) (discussing reasons why and ways in which courts avoid decisions on merits, and arguments in favor of resolution, especially where recurrence is likely).
and feelings. Others prefer a more reticent approach, in which the parties disclose much less. The Reporters favor the truth-focused approach. The Restatement recognizes, however, that this course may lead to unfavorable results under certain circumstances. Parties are urged to consult precedent.

Illustration:

A and B have been in a relationship for some time. A feels that A is in love with B. A must decide whether to disclose freely these feelings, or whether making such an admission would leave A in a strategically vulnerable position.

§ 3.3. Property

Parties may acquire various property rights in the course of a relationship, including affirmative easements for the use of personal possessions and rights of first refusal.

Comment:

a. Acquisition of easements. A party who regularly visits a romantic interest may acquire an affirmative easement in certain property. The burdened property may take the form of a shelf, a drawer, part of a closet, or an article of clothing. An easement may be created by any of the established methods, including express grant, necessity, estoppel, implication, or prescription. Parties often welcome the creation of easements, because the use of one's property by another is an indication of intimacy. These property rights create a potential for abuse, however. For example, one party may claim an easement that the holder of the servient tenement does not fully recognize or approve.

32. See, e.g., Williams v. Florida, 399 U.S. 78, 82 (1970) (holding that the adversary system "is not yet a poker game in which players enjoy an absolute right always to conceal their cards until played"); United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958) ("Modern instruments of discovery serve...[to] make a trial less a game of blind man's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent."); see also AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE § 11-2.1 (2d ed. Supp. 1986).

33. See, e.g., Williams, 399 U.S. at 111-12 (Black, J., concurring in part and dissenting in part): It is no answer...to suggest that the Fifth Amendment as so interpreted would give the defendant an unfair element of surprise, turning a trial into a "poker game" or "sporting contest," for that tactical advantage...is inherent in the type of trial required by our Bill of Rights...Throughout the process the defendant has a fundamental right to remain silent, in effect challenging the state at every point to: "Prove it!"

34. See discussion infra § 4.4 (reporting of cases).

35. See RESTATEMENT (THIRD) OF PROPERTY §§ 2.11-2.15 (Tentative Draft No. 1, 1989); RESTATEMENT (THIRD) OF PROPERTY § 2.16 (Tentative Draft No. 3, 1993).

Doctrines of easements over light and air prove useful in settling conflicts such as who sits next to the window in an airplane or who has to take the side of the bed near the window, where the morning sun will hit full in the face. For a discussion of easements over light and air, see F.H. LAWSON & BERNARD RUDDEN, THE LAW OF PROPERTY 133-34 (2d ed. 1982).
Illustrations:

i. *Easement by estoppel.* W and P are just starting a relationship. In a burst of romantic generosity, W offers P the use of W's computer to prepare a résumé. Two days later, P begins to write a term paper on W's computer. W is thereby deprived not only of the use of the computer, but also of the room in which P, P's books, and P's papers are now comfortably ensconced. P may argue that the grant was intended to extend to the use of the computer for related projects. W may counter that only a limited easement was granted, and that P has exceeded its scope. W is estopped from denying the existence of an easement, however, because W granted P permission under circumstances in which it was reasonably foreseeable that P might take on larger projects believing that permission would not be revoked.

ii. *Easement by necessity.* J and A have been involved in a relationship for several months. J lives in the city, and A works in the city but lives in the suburbs. A therefore cannot return home in the morning after a night at J's house without being late for work. Under these circumstances, A may acquire an easement by necessity for the use of J's closet to store clothes.

iii. *Prescriptive easement.* C continually uses Q's walkman without Q's permission. The use is known to many of their friends, and Q could have learned of it early on in the relationship through reasonable investigation. After a certain period of time, C has an easement by prescription, and Q cannot regain sole use of the item.

b. *Right of first refusal.* The parties to a relationship owe each other rights of first refusal in almost all leisure activities. Examples include invitations to parties; tickets to the theater, concerts, or sporting events; and vacation plans.

**Illustration:**

V and W are in a new relationship. V has an upcoming break from school and hopes to take a vacation. V must ask W to join V before asking another friend.

§ 3.4. *Torts*

Parties to a relationship are bound by the reasonable person standard, but only within reason. Parties owe each other a high duty of care.
Comment:

a. Reasonableness; “eggshell plaintiffs.” Reasonableness is an elusive, yet compelling, concept in the law of love. The very idea of love implies that both parties can be themselves, however unreasonable each may be. That is, each party is entitled to be an “eggshell plaintiff,” and each must take his plaintiff as he finds him. Yet paradoxically, parties invoke objective reasonableness standards when their desires conflict. Despite the formalist view that a relationship is a haven for idiosyncratic behavior, parties cannot escape the notions of reasonableness that pervade society, and will advert to them when disputes arise.

Illustration:

V and K have confessed their love for each other. V indicates, however, that it is not in V’s nature to speak the words “I love you” often. K has difficulty accepting that this is a mere idiosyncracy. K insists that it is reasonable to expect V to make regular references to V’s emotions for K, just as K does for V.

b. Duty of care. Because parties to a relationship grow to know each other’s idiosyncracies intimately, they are held to a high standard of care toward one another regarding these quirks.

Illustration:

M knows that P hates to be coaxed or bullied out of a bad mood and prefers to sulk. P will reasonably expect M to leave P alone when P is in a funk, even though an outside observer would conclude that P is being unreasonable.

CHAPTER FOUR
DISSOLUTION

The most painful stage in a relationship is dissolution. This Chapter reviews the steps that constitute the dissolution process. It provides guidance
in the decision to break up, the litigation of the breakup, and behavior after the breakup.

§ 4.1. The Decision To Dissolve

Parties should consult precedent in evaluating a relationship's future. In evaluating precedent, however, parties must take care to avoid excessive reliance on outliers.

Comment:

a. Value of precedent. When deciding whether to end a relationship, parties may wish to consult the wealth of precedent generated by the experiences of similarly situated friends. Friends can convey information about their own cases, as well as references to other cases with which they are familiar. When consulting precedent, parties should take into account factors that may distinguish their cases. Differences in religion, ethnicity, race, age, or regional background may lead to very different outcomes in apparently similar cases. Whether the parties are in school or out of school may also have important consequences.

Illustration:

F considers breaking off a relationship with K because F believes K is not ambitious enough. F should consult prior cases concerning diverse topics such as: the benefit or detriment of matched ambition between parties; countervailing benefits of greater emphasis on family; one party's security with the other's greater ambition.

b. Outliers disfavored. In examining precedent, parties are often tempted to continue research until they find an "outlier" case that supports the desired outcome. Such efforts are highly disfavored. The very fact that a party must search for an outlier demonstrates that the desired outcome is contrary to the common experiences of the age.

Illustration:

D begins to date L but feels unenthusiastic. D continues to date L for months, hoping that passion will spark. Throughout this period, D consults with friends, seeking precedent to legitimate D's hope that the relationship can gain momentum. D grasps for an outlier to

38. Cf. Planned Parenthood v. Casey, 112 S. Ct. 2791, 2808 (1992) ("The obligation to follow precedent begins with practical necessity . . . . With Cardozo, we recognize that no judicial system could do society's work if it eyed each issue afresh in every case that raised it.").

39. One unresolved question in this body of law is whether school is the "real world" for purposes of identifying a viable relationship.
support this behavior. Instead, D should recognize the well-established principle: "When it's not there, it's not there."

c. **Special circumstance: long-distance relationships.** An entire line of cases is dedicated to the special problems of long-distance relationships. No party should end a long-distance relationship without consulting this well-developed body of doctrine, which considers heavily litigated issues such as: frequency of communication and expenses arising therefrom; the ability to see other people; whether the relationship would benefit or suffer if the parties were together; and whether one party should sacrifice interests in order for the couple to live near each other.40

§ 4.2. **Motions for Dissolution**

Once a party has decided that a breakup is warranted, that party should promptly move for dissolution. In initiating dissolution proceedings, the movant should assert grounds honestly. Extreme tactics such as constructive eviction are highly disfavored.

**Comment:**

a. **Grounds commonly invoked.** It is common for the moving party to justify the proposed dissolution on several grounds, both procedural and substantive.41 Often, moving parties take refuge in procedural grounds, and elevate form over substance to avoid a painful confrontation on the merits. Procedural grounds may include: timing,42 distance,43 statute of frauds,44

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40. Even principles that seem embedded in the foundations of our society conflict on the effects of long distance on a relationship. Compare "Absence makes the heart grow fonder" with "Out of sight, out of mind" and "Familiarity breeds contempt."

41. Parties may also dispute whether the relationship rises to the level of requiring a formal dissolution to end it. One party may claim that interactions were just "for fun" or that the parties were "just dating," and that therefore, the harm is not great enough to warrant the full panoply of procedural protections. See Kenneth Mann, Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law, 101 YALE L.J. 1795, 1812 (1992) ("Thus, the different procedural rules in the paradigmatic forms of criminal and civil law reflect distinct attitudes toward the severity of sanctions and due process."). (citation omitted).

42. E.g., "Things are moving too fast"; "You're terrific, but I'm not ready to make a commitment", or "I wish we could have met ten years from now."

43. E.g., "It's just too hard to carry on the relationship when we aren't together." See supra § 4 1

44. E.g., "We never agreed that we wouldn't see other people"; "We never talked about the long term"; "I didn't know that you were moving to this city just to be with me." This defense is disfavored, because it frustrates the reasonable expectations of the opposing party. In the law of love, the statute of frauds' requirement that agreements be explicit is inapplicable, because a meeting of the minds need not be formally communicated. For a critique of lawyers' use of the defense, see William H. Simon, Ethical Discretion in Lawyering, 101 HARV. L. REV. 1083, 1123-25 (1988) (arguing that lawyer should not plead statute of frauds when doing so would frustrate opposing party's substantively meritorious claim)
Illustration:

Y wants to break up with Z. Y claims the ground of timing, saying, “I’m just not ready for a serious relationship,” to avoid acknowledging that Y is simply not interested in pursuing this relationship.

b. Constructive eviction. Constructive eviction is a common tactic employed by moving parties who wish to dissolve a relationship, but who lack the wherewithal to articulate any ground at all, even pretextual. Rather than confront the anguish of breaking up, the disaffected party engages in conduct so unbearable that the opposing party finds the relationship uninhabitable. Such behavior often involves picking fights, refusing to return phone calls, breaking plans regularly, and conspicuously avoiding public appearances as a couple. The opposing party feels forced by the moving party’s behavior to initiate the breakup. This is a form of fraud by the moving party and is highly disfavored.

Constructive eviction includes a subclass of cases that undergo “reversal.” Such cases follow the pattern of classic constructive eviction, but just when the evictee is ready to resort to breaking off the relationship, the evictor reverses position and decides that now he or she wants to stay in and work it out. The evictee may, at this point, feel tempted to stay in the relationship. Generally, however, reversal is merely a temporary change of heart that occurs when a previously abusive party faces the prospect of a loss. Evictees should be wary of the sincerity of such sudden reversals in attitude.

§ 4.3. Defenses Available to Opposing Party

Regardless of the grounds invoked by the moving party, an opposing party is always entitled to plead the merits of his or her case. Parties may also seek notice to cure defects, or in extreme cases, attempt a leveraged buyout of the moving party’s affections.

Comment:

a. Rights of opposing party. When the moving party offers procedural grounds for a breakup, the opposing party often holds out the hope that an appropriate defense will circumvent dissolution. An opposing party often will argue that the substantive merits of the case outweigh any procedural concerns the moving party may have. Such defenses, however, are invariably unavailing.

45. Many jurisdictions hold that a claim that the moving party is too busy to conduct a relationship is per se unreasonable. Claims of other, more pressing priorities beg the question of what that party’s priorities are.
A moving party intent on dissolving a relationship will ultimately prevail, no matter how forcefully the opposing party states the case. Nevertheless, exercise of defenses by an opposing party is not futile. Explanation by the moving party is the minimum relief to which the opposing party is entitled.

Illustration:

T moves to break up with K, on the grounds that their long-distance relationship is too difficult to maintain. In defense, K offers to move to T's city to remedy the situation. Faced with the prospect of K's move, T drops the pretext of long distance, and reaches the merits: T tells K that T is no longer in love. No defense on K's part will dissuade T.

b. Coming to the nuisance. When a movant provides a substantive reason for the breakup, the opposing party often raises “coming to the nuisance” as a defense. That is, the party asserts that the moving party was aware of the problematic condition upon entering into the relationship.

Illustration:

G moves for a breakup on grounds of religious difference. H attempts to estop the breakup on the grounds that G and H had both been on notice of these terms, and had proceeded notwithstanding.

c. Notice to cure. A moving party may put forward a meritorious reason for the breakup, upon which the opposing party may demand notice to cure, to say, in effect, “Give me a chance, and I'll change my ways.” Because either party may terminate a relationship at will, however, notice-to-cure is a privilege, not a right. A moving party who grants notice to cure is advised to take steps to protect his or her position during the cure period.

A moving party who grants notice to cure should allow a meaningful cure period. Short turnaround ultimatums are discouraged for the same reasons that the “Saturday Night Special” has been banned in securities trading.
cure periods are considered coercive because they force parties to work under the pressure of an arbitrary deadline without the benefit of full information.31

Illustrations:

i. Protecting moving party's position. N wants to break up because Q pays inadequate attention to N. Q promises to change, and therefore N gives notice to cure in lieu of immediate dissolution. If Q does not cure, and the problem continues, N must, at that point, break up. Q loses any incentive to cure once it is clear that N will not hold Q to Q's word.

ii. Meaningful cure period. C and D have been dating for a year. Although they have never discussed commitment, C tells D that unless they are engaged within two weeks, C will terminate the relationship. D is thereby deprived of the time necessary to contemplate such an important decision. C is advised to allow more time before the expiration of the cure period.

d. Leveraged buyout/compromise. In the realm of love, the leveraged buyout is a last-ditch defensive tactic. An opposing party who wants to maintain a relationship can offer to deplete his or her resources (financial, emotional, or otherwise) as an inducement for the other party to remain. Use of this tactic poses severe risks to both parties, however. If a relationship is too highly leveraged, it can become dangerously unstable in the long term.52

Illustration:

M, who wants to become engaged, offers to move wherever is most convenient for O, even if the move defies M's previously established preferences of being near family or working in a certain city. Even if O accepts this deal and satisfies M's short-term wishes, M is later likely to feel overextended and frustrated by the receipt of inadequate consideration.

51. The Williams Act, enacted in 1968, did away with Saturday Night Specials as part of an attempt to protect shareholders of corporations targeted in takeover bids. The Act created a minimum time period in which shareholders could evaluate offers before deciding whether to accept. See Robert A. Prentice, The Role of States in Tender Offers: An Analysis of CTS, 1988 COLUM. BUS. L. REV. 1, 43 n.241 (“Before enactment of the Williams Act's minimum hold-open period, a bidder could 'blitzkrieg' a target's shareholders by giving them only a short period of time to decide whether to tender.”).

52. For evidence of strained relations created by instability accompanying leveraged buyouts, see Metropolitan Life Ins. Co. v. RJR Nabisco, 716 F. Supp. 1526 (S.D.N.Y. 1989), vacated and remanded, 906 F.2d 8084 (2d Cir. 1990).
§ 4.4. Adhering to the Dissolution Decision

Once parties have terminated a relationship, they must maintain their commitment to the breakup decision. Parties have an obligation to report their case, and to maintain all fiduciary duties formed in the course of the relationship.

Comment:

a. Mandatory adherence. The decision to dissolve a relationship can cause revolutionary change in the course of people's lives. Constitutional theory lends guidance at this difficult time. When parties bicker or engage in low-level disputes, they participate in "normal politics." The breakup decision, however, rises to the higher level of a "constitutional moment." The parties see more clearly at this time than at any previous moment, and when they break up, they commit themselves to a new way of life. A breakup is comparable to a constitutional amendment, which can only be changed through the procedurally rigorous amendment process. Once all defenses have been aired, and the litigation is resolved, parties should adhere to the dissolution judgment, no matter how difficult it may be.

b. Division of property; adverse possession. While community property principles generally apply—i.e., parties take out those possessions that they took in—adverse possession also plays an important role in distribution of property after a breakup.

Illustration:

B, who perennially wears L's sweatshirt, generally can keep it.

c. Reporting of cases. Parties contribute to the development of the common law of love by orally reporting their cases. They do so by telling their stories to friends and acquaintances, even as the stories are unfolding. The Reporters anticipate that this informal reporting method will ultimately be replaced by an official, centralized reporter system.

53. Bruce Ackerman theorizes that revolutionary constitutional change occurs during times of "higher lawmaking" as distinguished from day-to-day politics. BRUCE A. ACKERMAN, WE THE PEOPLE 6 (1991)

54. Unless it is a prize college sweatshirt, or other unique good, in which case adverse possession does not apply.


56. The efficient market hypothesis buttresses the rationale for reporting of cases. Promulgation of information benefits not just the community, by providing useful precedent, but the parties themselves, by allowing the market to adjust to the information that parties are available for dating.

Without accurate information, the workings of the marketplace are distorted, resulting in "fraud on the market." For example, one party may pretend not to be in a relationship, thereby attracting the attention of interested parties, when the party is actually unavailable. The dangers of fraud on the market are set
d. Maintaining fiduciary duties. The parties’ fiduciary duties to each other persist after dissolution. In particular, the duty of confidentiality to former parties endures long after a relationship ends. This duty is designed to protect parties to a former relationship. Note that fulfillment of the duty enhances one’s reputational value in a new relationship.57

Illustration:

Two coworkers, B and C, are dating. C confides in B about a problem with a superior. Later, after B and C break up, C quits in the midst of an office scandal. B is now dating D, also a coworker. B’s fiduciary duty to C prevents B from disclosing the privileged information to D.

Call for Comment:

The Reporters invite comment on the foregoing material. Given the gravity of the project, timely evaluation and modification are imperative. In the words of one of our predecessors, Herbert Wechsler, “Nowhere in the entire legal field is more at stake for the community or for the individual.”58 Address comments to the American Law Institute members’ consultative group on the “Restatement of Love.”

GRETCHEN CRAFT RUBIN
JAMIE G. HELLER
Reporters

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57. Legal ethics rules recognize the importance of maintenance of past confidences. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9(b) (1983).