SEX, LIES, AND THE DUTY TO DISCLOSE

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INTRODUCTION

There is enormous risk inherent in the process of negotiating an agreement, as those involved must rely on the belief that they have all the relevant information that they need in order to make a wise deal. Historically, parties to a transaction were expected to fend for themselves in the information gathering process, as was inherent in the old Latin maxim *caveat emptor*, or "let the buyer beware."[1] Nondisclosure in the formation of agreements leads to negative repercussions throughout the law, triggering issues ranging from mistake in contract law, to misrepresentation and fraud in tort law, to unfair dealing in the law of agency, and even to the breach of fiduciary duty.[2] In recent decades, the law has recognized the injustice and inefficiency perpetrated as a result of this approach and has largely abandoned *caveat emptor* and its permissive policies regarding nondisclosure in favor of limited duties to disclose material information.[3] This is true except in the context of agreements made between those involved in romantic or intimate relationships.[4]

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1. *Caveat emptor* is defined as "a doctrine holding that purchasers buy at their own risk." BLACK'S LAW DICTIONARY 236 (8th ed. 2004).

2. *See* Christopher T. Wonnell, *The Structure of a General Theory of Nondisclosure*, 41 CASE W. RES. L. REV. 329, 330 nn.2–6 (1991) (providing illustrations of applicable Restatement provisions).

3. JOHN D. CALAMARI & JOSEPH M. PERILLO, THE LAW OF CONTRACTS § 9.20, at 338 (4th ed. 1998).

4. For the purposes of this Article, "intimates" means two people engaged in an emotionally and physically intimate relationship. Although emotional intimacy can exist between two people without physical intimacy and can lead to trust and vulnerability (and physical intimacy can exist without emotional intimacy), the focus of this Article is the unique closeness and vulnerability typically created by sexual intimacy.

In spite of compelling evidence of vulnerability in the context of negotiations and contract formation between intimates, the law has clung to the anachronistic principles permitting nondisclosure.[5] The reasons for tolerating nondisclosure, or even affirmative misrepresentation, of material information in the context of contract formation between intimates are obscure. To be sure, some agreements made between intimates do not resemble legally enforceable contracts, in that the parties do not intend their promises to be legally binding.[6] Thus, one might envision a different set of norms that would govern those promises.

Yet, courts now hear a growing number of cases involving issues ranging from property allocation in separations of unmarried cohabitants to paternity and child support disputes.[7] These cases demonstrate that, in many instances, at least one party to an agreement with an intimate mistakenly presumes not only that the other person is being truthful, but also that promises between them are binding. Why should the law tolerate nondisclosure in this setting, when the same behavior would be viewed as impermissible between those who bargain at arm's-length?

This inconsistency in the law is increasingly problematic and unjustifiable. This Article aims to resolve the inconsistency in the law's treatment of agreements between intimates, in particular the law's response to evidence of nondisclosure, by subjecting these bargains to the same rules used in evaluating virtually all other agreements. I begin by setting out a brief history of the common law governing disclosure duties between partners to other basic types of agreements, illustrating the expansion of these duties over the past century and explaining their justifications.

The Article then turns to a detailed examination of the types of agreements made between intimates. Part II explores agreements made at the start of an intimate relationship—in particular, examining the legal response to problems of nondisclosure that surface when parties negotiate access to sexual intimacy. Part III discusses agreements made in the context of committed relationships, reviewing contemporary law governing unmarried cohabitants and the tolerance of nondisclosure that results from the law's discomfort with enforcing agreements made between these parties. Part IV discusses agreements made at the end of an intimate relationship, which typically reflect parties' efforts to "settle" any claims they might have. That Part exposes how the law tolerates, and even embraces, a norm of nondisclosure when evaluating these cases.

Having demonstrated that the law continues to permit nondisclosure in agreements between intimates, the subsequent Parts analyze the justifications underlying this policy. Part V applies the two common justifications for expanding the duty to disclose in arm's-length transactions (efficiency and fairness) to agreements made between intimates. In that Part, I conclude that these same justifications of efficiency and fairness argue as forcefully in favor of requiring

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5. For examples of vulnerability in bargaining between intimates, see *infra* notes 241–42, 247–48 and accompanying text. For a discussion of some of the psychological barriers to bargaining between intimates, see *infra* Part V.A.2.

6. *See infra* notes 284–87 and accompanying text (discussing bargains that fail for want of mutual assent).

7. *See infra* notes 121, 175 and accompanying text.

disclosure when the parties are intimates. Part VI considers, and ultimately rejects, alternate justifications for tolerating greater nondisclosure in agreements between intimates than would be permitted in other settings.

This Article concludes that the effect of permitting nondisclosure in agreements between intimates is unjust and harmful, both at the individual and societal level. The law's resistance to imposing consistent rules regarding disclosure in this context seems to be predicated largely upon the fear that lies and nondisclosure are commonplace between intimates and that legal intervention would harm human relationships.[8] Ironically, as I will demonstrate, it is the failure to protect the vulnerable in this setting that serves to harm human relationships.

I. THE NARROWEST FRAMING OF THE DUTY TO DISCLOSE: THE NINETEENTH-CENTURY REIGN OF *CAVEAT EMPTOR*

Commentators reflecting on nineteenth-century U.S. legal history note that the courts of that era were unsympathetic to the claims of vulnerable parties. In his famous text, *The Death of Contract*, Grant Gilmore concluded: "As we look back on the nineteenth century theories, we are struck most of all, I think, by the narrow scope of social duty which they implicitly assumed. No man is his brother's keeper; the race is to the swift; let the devil take the hindmost."[9] One of the best examples of this attitude lies in the relatively narrow scope of disclosure duties between partners to an agreement, specifically in the then-popular doctrine of *caveat emptor*, with its brash *every man for himself* attitude.[10] This Part explores how nineteenth-century courts moved from a firm embrace of the doctrine of *caveat emptor* to a more nuanced rule on disclosure that takes into account the competing doctrines of good faith and efficiency.

A. The Common Law Doctrine of Caveat Emptor

The doctrine of *caveat emptor* dominated much of nineteenth-century U.S. commercial law and dictated that parties dealing in arm's-length transactions had no duty to disclose information that could otherwise be discovered. The classic illustration of this principle is found in the case of *Laidlaw v. Organ*.[11]

This case arose out of a deal struck in the shadow of the end of the War of 1812. News of signing the Treaty of Ghent, and of the war's end, was slow to arrive in New Orleans, where the British fleet blockaded the harbor. The blockade had depressed the prices for tobacco crops. Organ, the plaintiff, learned of the treaty ending the war the night before the news was disclosed to the public. Acting quickly, he purchased a large quantity of tobacco at the depressed price from Laidlaw, who at the time of sale inquired whether there was any news that would affect tobacco prices. Organ remained silent, failing to disclose his knowledge of

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8. *See, e.g.*, *infra* notes 97–98 and accompanying text (discussing the anti-heart balm movement); *infra* notes 286, 301 and accompanying text (discussing the work of Professor Katharine K. Baker).

9. GRANT GILMORE, THE DEATH OF CONTRACT 95 (1974).

10. Wonnell, *supra* note 2, at 338.

11. 15 U.S. (2 Wheat.) 178 (1817).

the treaty. As soon as the news of the treaty spread, tobacco prices rose by 30–50%. Laidlaw refused to tender the tobacco to Organ, who then sued.

The United States Supreme Court ruled in favor of the plaintiff-buyer, rejecting the seller's claim that the buyer's nondisclosure amounted to fraud.[12] Instead, the Court embraced the principle of *caveat emptor*, reasoning that the seller had equal opportunity to discover the treaty on his own or, at the very least, press the buyer harder on whether there was reason to believe the price might rise.[13]

Even at the peak of *caveat emptor*, however, the law limited its scope with numerous exceptions. First, the law of misrepresentation or concealment served to narrow the breadth of *caveat emptor* by forbidding a party from lying or misstating the facts to induce the other party's consent to a bargain, drawing a bright line between misstatement and mere omission. [14] Had Organ replied that there was no reason to believe prices were about to rise instead of simply remaining silent, the deal would have been voidable due to his affirmative misrepresentation of the facts.[15]

Second, even in the context of nondisclosure, the common law rule permitting nondisclosure always made exceptions for situations in which, following the formation of an agreement, supervening law required disclosure, and likewise in which a party's original statement was true and made in good faith, but supervening events rendered it no longer true.[16] For example, if someone makes an accurate report of her sound financial status to a potential business partner but does not report a subsequent financial catastrophe, she is guilty of a misrepresentation, even though the original assertion was true when it was made.[17]

Finally, the common law made an exception for cases in which one party was aware that the other was "operating under a mistake as to a basic assumption on which the negotiations are based . . . ."[18] A long line of cases held that, in such circumstances, the "aware" party had a duty to correct the other's mistaken

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12. Many commentators have noted that, if the record is accurate, the buyer's silence is more than mere nondisclosure; it is intentionally misleading, and therefore a misrepresentation. *See* Anthony T. Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1, 10 n.27 (1978). Randy Barnett offers perhaps the most widely accepted contemporary justification of the holding in favor of the defendant's right of nondisclosure. *See* Randy Barnett, *Rational Bargaining Theory and Contract: Default Rules, Hypothetical Consent, the Duty to Disclose, and Fraud*, 15 HARV. J.L. & PUB. POL'Y 783 (1992). Barnett argues that there was no duty to disclose because the price information was extrinsic and ultimately would have reached the market. *Id.* at 798. Thus, the seller was not entitled to a truthful answer; it was his duty to uncover the value of his own goods. *Id.* at 799.

13. *Laidlaw*, 15 U.S. (2 Wheat.) at 193–94.

14. CALAMARI & PERILLO, *supra* note 3, at 337 (citing W. Page Keeton, *Fraud—Concealment and Non-Disclosure*, 15 TEX. L. REV. 1, 2–6 (1936)).

15. *Id.*

16. *Id.*

17. RESTATEMENT (SECOND) OF CONTRACTS § 161 cmt. c, illus. 1 (1981).

18. CALAMARI & PERILLO, *supra* note 3, at 338 (citing RESTATEMENT (SECOND) OF CONTRACTS § 161(b)).

assumption, even if the "aware" party did not cause it.[19] Initially, the mistaken assumption doctrine, which dates back to the early nineteenth century,[20] was applied to the problem of latent defects, particularly in the sale of property.[21] Taken more broadly, however, this exception could swallow *caveat emptor* altogether. Ultimately, the spirit behind the mistaken assumption exception has driven the broad-scaled reform of *caveat emptor* doctrine.

B. The Expansion of the Affirmative Duty to Disclose

Over the course of the twentieth century, in a variety of contexts, courts and legislatures modified the doctrine of *caveat emptor*, recognizing increasingly broad disclosure duties to limit the harsh consequences of contracts formed on the basis of one party's inaccurate information.[22] This reform occurred in a host of contexts, ranging from the sale of land to commercial transactions.[23] Reform of nineteenth-century contracting mores began when courts embraced a duty of cooperation for parties performing contractual obligations.[24] In the marketplace, a fairly stringent standard of fair dealing replaced the nineteenth-century laissez-faire bargaining norm.[25] As commercial actors discovered that honesty stabilized the marketplace and encouraged transactions, strict adherence to *caveat emptor* fell

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19. *Id.* at 337–38.

20. *See* Nicola W. Palmieri, *Good Faith Disclosures Required During Precontractual Negotiations*, 24 SETON HALL L. REV. 70, 112–13 (1993).

21. CALAMARI & PERILLO, *supra* note 3, at 338 (citing Morton J. Horwitz, *The Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 926 (1974)).

22. For a comprehensive overview of this reform, see Palmieri, *supra* note 20, at 200. *See also* Chiarella v. United States, 445 U.S. 222, 247–48 (1980) (Blackmun, J., dissenting) ("Even at common law . . . there has been a trend away from strict adherence to the harsh maxim caveat emptor and toward a more flexible, less formalistic understanding of the duty to disclose. Steps have been taken toward application of the 'special facts' doctrine in a broader array of contexts where one party's superior knowledge of essential facts renders a transaction without disclosure inherently unfair." (citation omitted)).

23. *See, e.g.*, Cochran v. Keeton, 252 So. 2d 307, 311–12 (Ala. Civ. App. 1970) ("[C]aveat emptor . . . was premised upon the principle that all traders came to the market place on an equal footing. . . . The premise that commercial transactions are between parties with equal bargaining power and resources has long ago fallen by the wayside. The law has responded to the demands for greater protection of the consumer or purchaser, and the placing of greater responsibility upon the manufacturer and seller of personal property, by adoption of manufacturers' strict liability on creation of dangerous instrumentalities and implied warranties of merchantability and fitness of purpose." (citation omitted)); Lingsch v. Savage, 29 Cal. Rptr. 201, 204 (Ct. App. 1963) ("It is now settled in California that where the seller knows of facts materially affecting the value or desirability of the property which are known or accessible only to him and also knows that such facts are not known to, or within the reach of the diligent attention and observation of the buyer, the seller is under a duty to disclose them to the buyer."); Jenkins v. McCormick, 339 P.2d 8, 11 (Kan. 1959) (*caveat emptor* does not apply to shield builder from liability where builder concealed and did not disclose defect).

24. *See* Jane E. Larson, *"Women Understand So Little, They Call My Good Nature 'Deceit'": A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374, 413 (1993); *see also* Palmieri, *supra* note 20, at 112–13.

25. *See generally* Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369, 393 (1980).

into disfavor.[26] In his groundbreaking work, Professor Ian MacNeil documents the growth of new business contracting practices that feature a relational norm and reject harshly adversarial arm's-length dealing.[27] Rather than viewing contracts as discrete agreements, in which both parties attempt to optimize their individual well-being, the relational contract theory notices that many parties doing business have long-term relationships with one another. As such, their contracts might be viewed as part of a series of dealings between partners with an interest in one another's well-being and therefore will aim to protect reliance and expectation interests by honoring goals such as mutuality and reciprocity.[28]

This expansion of the law governing the duty to disclose is reflected in the Uniform Commercial Code and also in the Restatement of Torts.[29] In contract law, courts articulated broader duties of disclosure in both contract formation and performance. For example, Judge Posner discussed the distinction between proper and improper conduct in *Market Street Associates Ltd. Partnership v. Frey*, which involved allegations of bad faith in contract performance:

> [I]t is one thing to say that you can exploit your superior knowledge of the market—for if you cannot, you will not be able to recoup the investment you made in obtaining that knowledge—or that you are not required to spend money bailing out a contract partner who has gotten into trouble. It is another thing to say that you can take deliberate advantage of an oversight by your contract partner concerning his rights under the contract. Such taking advantage is not the exploitation of superior knowledge or the avoidance of unbargained-for expense; it is sharp dealing. Like theft, it has no social product, and also like theft it induces costly defensive expenditures . . . .[30]

Although it is clear that the duty of good faith grows progressively stronger as the parties move from the negotiation of their agreement to the performance of it,[31] it is equally clear that the failure to disclose material information in the process of contract formation may render the contract

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26. *See* Palmieri, *supra* note 20, at 113–14.

27. Larson, *supra* note 24, at 413.

28. For a concise summary of this paradigm shift, see *id.* at 413 (citing MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 48–49 (1992); IAN R. MACNEIL, THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS 71–119 (1980); Ian R. MacNeil, *Relational Contract: What We Do and Do Not Know*, 1985 WIS. L. REV. 483, 523–24 & n.186 (1985)).

29. *See* U.C.C. §§ 1-201, 1-304 (2005). Section 1-201 defines good faith as honesty in fact and the observance of reasonable commercial standards of fair dealing in the trade. Section 1-304 imposes this duty on all contracts under the U.C.C. in their performance or enforcement. *See also* RESTATEMENT (SECOND) OF TORTS § 205 (1977) (imposing a similar duty).

30. 941 F.2d 588, 594 (7th Cir. 1991).

31. *Id.* at 595 ("The formation or negotiation stage is precontractual, and here the duty [of good faith] is minimized. It is greater not only at the performance but also at the enforcement stage, which is also postcontractual.").

voidable.[32] For instance, the *Restatement (Second) of Contracts* notes that one makes a misrepresentation through nondisclosure:

> (b) where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.
>
> (c) where he knows that disclosure of the fact would correct a mistake of the other party as to the contents or effect of a writing, evidencing or embodying an agreement in whole or in part. [or]
>
> (d) where the other person is entitled to know the fact because of a relation of trust and confidence between them.[33]

According to this provision, if the undisclosed information is "material," the ignorant party may later void the contract. Information is material if it reasonably would have affected the party's willingness to enter into the negotiated deal.[34]

Caselaw provides ample evidence of the full reach of the duty to disclose. Indeed, even in what some perceive to be the last stronghold of *caveat emptor*, negotiations of commercial transactions between experienced merchants,[35] courts have all but eviscerated the right to remain silent.[36] Contemporary law governing the sale of goods supplies numerous warranties designed to guard against unfair bargaining and surprise.[37] A prime example of this change is the death of the "battle of the forms" rule. Prior to the adoption of the Uniform Commercial Code, the common law required that written forms setting out the terms of an agreement be identical.[38] As a result, in situations where the written terms of the purchase order and the acknowledgement of sale varied, there was no contract formed by the writings. Instead, the law found a unilateral contract, to be governed by the terms of the last document sent prior to the first act of performance on the contract (typically, the shipment of goods).

The "battle of the forms" rule proved to be unfair in practice because merchants seldom paid attention to the fine print in the many forms governing transactions.[39] In these situations, parties quite naturally could be surprised by the

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32. *See* Palmieri, *supra* note 20, at 139, 160.

33. RESTATEMENT (SECOND) OF CONTRACTS § 161 (1981).

34. *See* CALAMARI & PERILLO, *supra* note 3, at 327.

35. Palmieri, *supra* note 20, at 113 ("Caveat emptor's only legal stronghold remains those areas in which professionals are involved in reaching commercial agreements.").

36. *See id.* at 113–18.

37. *See, e.g.*, U.C.C. §§ 2-207, 2-312 to 2-318 (2005).

38. *See, e.g.*, Minneapolis & St. Louis Ry. v. Columbus Rolling Mill, 119 U.S. 149 (1886).

39. Many scholars have discussed this seemingly puzzling lack of attention by businesspeople to the legal implications of their actions. *See* Stewart Macaulay, *Private Legislation and the Duty to Read—Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051 (1966); Franklin M. Schultz, *The Firm Offer*

actual terms of the contract when a dispute arose.[40] Uniform Commercial Code section 2-207 corrects this problem by requiring contracting parties to make each other expressly aware of any "material change" in contract terms before those terms take effect.[41] This affords even the sophisticated merchant a reprieve, insuring that a contracting partner must affirmatively disclose any truly unusual change to the contract.[42]

The law of torts complements, but does not wholly duplicate, contract law disclosure provisions. The *Restatement (Second) of Torts* defines the tort of misrepresentation as follows:

> One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.[43]

The primary distinction between the tort and contract standards is that, to recover in tort, one must show that the misrepresentation was intentional, whereas in contract law, it is sufficient that the misrepresentation was material.[44] Thus, "conduct that might not rise to the level of fraud may nonetheless violate the duty

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and Credit Cards, 19 VAND. L. REV. 1051 (1966); Franklin M. Schultz, *The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry*, 19 U. CHI. L. REV. 237 (1952); Russell J. Weintraub, *A Survey of Contract Practice and Policy*, 1992 WIS. L. REV. 1, 36, 41 (1992); James J. White, *Contract Law in Modern Commercial Transactions, An Artifact of Twentieth Century Business Life?*, 22 WASHBURN L.J. 1 (1982). Relational contract theorists point to a gap between the law of contracts on the books, and the law in action. This gap is caused, at least in part, by "the fact that businesspeople frequently—even generally—ignore the law of contract, or even do not realize how it might regulate various aspects of their agreements." Larry T. Garvin, *Adequate Assurance of Performance: Of Risk, Duress, and Cognition*, 69 U. COLO. L. REV. 71, 109 (1998).

40. For insight into the policies driving the promulgation of section 2-207, see Bruce A. Americus, *Section 2-207 of the Uniform Commercial Code—New Rules for the "Battle of the Forms,"* 32 U. PITT. L. REV. 209, 212 (1971).

41. U.C.C. § 2-207(2) (2005) ("[A]dditional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless: (a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; or (c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received."). "Whether or not additional or different terms will become part of the agreement depends upon the provisions of subsection (2). If they are such as materially to alter the original bargain, they will not be included unless expressly agreed to by the other party." U.C.C. § 2-207 cmt. 3 (2005).

42. *But see* Katie Hafner, *It May Be Boilerplate, but Read Before You Click*, N.Y. TIMES, Apr. 16, 1998, at G3; *see also* Donnie L. Kidd, Jr. & William H. Daughtrey, Jr., *Adapting Contract Law to Accommodate Electronic Contracts: Overview and Suggestions*, 26 RUTGERS COMPUTER & TECH. L.J. 215 (2000).

43. RESTATEMENT (SECOND) OF TORTS § 525 (1977).

44. *See* RESTATEMENT (SECOND) OF CONTRACTS § 161(a), (d) (1981).

of good faith in dealing with one's contractual partners and thereby give rise to a remedy under contract law."[45]

In addition, *Restatement (Second) of Torts* section 551 echoes the obligation to bargain in good faith by prescribing a duty to disclose the following:

> (a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and (b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and (c) subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so; and (d) the falsity of a representation not made with the expectation that it would be acted upon, if he subsequently learns that the other is about to act in reliance upon it in a transaction with him; and (e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.[46]

Over the course of the twentieth century, the failure to disclose material facts during contract formation increasingly placed parties at risk of violating the growing duty of good faith and fair dealing in contracts.[47] Of course, the definition of good faith is somewhat vague and malleable, and it has evolved according to community standards.[48] Moreover, considerable controversy exists as to whether contract remedies, as opposed to tort remedies, should apply to a breach of the duty of good faith.[49] It is clear, however, that the evolution of this duty has eroded the doctrine of *caveat emptor*, replacing it with legal duties that "discourage dishonesty, and encourage loyalty, fairness and openness, thus fostering trade and commerce, rewarding honesty and candor and condemning deceit of whatever kind."[50]

This is not to say that the movement away from *caveat emptor* has been universal. One notable exception is the duty of a buyer, as opposed to a seller, to disclose information relevant to the object of a particular transaction. For instance, must a buyer disclose that the piece of property he wishes to buy is more valuable than the seller believes it to be? In these cases, courts almost always hold that the buyer need not disclose even material facts relevant to the sale at hand.[51] This is true whether the transaction involves real property or goods.[52]

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45. Mkt. St. Assocs. Ltd. P'ship v. Frey, 941 F.2d 588, 594–95 (7th Cir. 1991) (citing Burton, *supra* note 25, at 372 n.17).

46. RESTATEMENT (SECOND) OF TORTS § 551.

47. *See* Palmieri, *supra* note 20, at 76.

48. *See id.* at 79.

49. *Id.* at 100–07.

50. *Id.* at 106.

51. CALAMARI & PERILLO, *supra* note 3, at 339 n.26.

52. *See id.* at 339.

The absence of a buyer's duty to disclose shows that *caveat emptor* has become the exception rather than the rule. Unlike nineteenth-century cases that embraced *caveat emptor* because courts felt that both parties had equal opportunity to discover all relevant information prior to making a bargain, more recent cases predicate their outcomes on notions of efficiency.[53] Rather than using the doctrine of *caveat emptor* to justify the buyer's right to refrain from disclosure, courts invoke notions of efficiency and the importance of rewarding the buyer's industriousness.[54]

The fact that courts are reluctant to impose a duty to disclose in cases involving buyers with knowledge of material information does not mean that courts are wholly comfortable with the resulting contracts. Indeed, the law of equity typically will not order specific performance of a contract formed in the wake of a buyer's nondisclosure of material information.[55] In the event that the seller refuses to perform once the undisclosed fact emerges, the buyer may seek monetary damages, but specific performance is limited to contracts that are "fair and open, and in regard to which all material matters known to each have been communicated to the other."[56] Thus, one might observe that even the cases that follow *caveat emptor* do so in a defensive manner, revealing that the traditional rule no longer is sufficiently strong to dictate an outcome in a given case. Instead, in assessing enforceability, courts look to external considerations relating to the nature of the undisclosed information and the parties' relationship.[57]

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53. *See infra* notes 54, 59.

54. For an example of an efficiency-based support of a nondisclosure rule, see Nussbaum v. Weeks, 263 Cal. Rptr. 360, 367 (Ct. App. 1989). Weeks, a district water manager, purchased a number of tracts of land knowing the water district would soon allow them to be irrigated, thus increasing the value of the land. *Id.* at 362. He did not disclose this information to Mr. Nussbaum, the seller. *See id.* The court found that while Weeks might be removed from office for abusing his position, there was no duty to disclose to the individual seller. *Id.* at 365. The court stated:

> "If the buyer's duty were extended as broadly as the seller's duty, the rule would result in the ridiculous conclusion that a buyer must disclose to the seller factors that have or will indicate that the seller is selling the property below its true value. Absent affirmative representation, such a rule would eliminate the freedom to negotiate in the marketplace."

Id. at 367 (quoting 1 HARRY D. MILLER & MARVIN B. STARR, CALIFORNIA REAL ESTATE 2D: REAL PROPERTY DIGEST § 1.121, at 414 (2d ed. 1991)).

55. *See, e.g.*, Rothmiller v. Stein, 38 N.E. 718, 721 (N.Y. 1894) (refusing to enforce specific performance because the contract was not fair and open, with all material matters known by each party having been communicated to the other).

56. CALAMARI & PERILLO, *supra* note 3, at 340 (quoting *Rothmiller*, 38 N.E. at 721).

57. *See* Kimberly D. Krawiec & Kathryn Zeiler, *Common Law Disclosure Duties and the Sin of Omission: Testing the Meta-Theories*, Georgetown Law and Economics Research Paper No. 614501; UNC Legal Studies Research Paper No. 04–4 (Nov. 1, 2004) (isolating and evaluating categories of cases in which disclosure has been mandated), *available at* http://ssrn.com/abstract=614501.

C. Policy Justifications for an Expansive Duty to Disclose

Over the course of the twentieth century, courts came to intone two broad-based policy justifications for rejecting *caveat emptor* and promoting disclosure in contract formation. The first of these is efficiency, and the second is a more abstract notion of fairness. The nondisclosure of information, particularly information that is readily known to one party but harder for the other to discover, heightens the risk that the resulting bargain will be based upon faulty information. The resulting bargain not only offends our sense of fair play, but also may lead to market inefficiencies, such as litigation, a more cumbersome negotiation process in the future, or a reluctance to enter into bargains.[58] These costs are most readily avoided by imposing a general duty to disclose material information during the contract-formation process.[59]

1. Arm's-Length Transactions

The embrace of efficiency as an overarching goal of the legal system can be seen in cases applying both statutory and common law, particularly in cases involving the proverbial arm's-length transaction between relative strangers. The law of warranties is a fine example of the promotion of efficiency. The law of implied warranties allocates responsibility for the merchantability of a good to the manufacturer rather than requiring the buyer to negotiate the issue of whether a given product actually will do what it is designed to do.[60] By penalizing nondisclosure, warranty law alters the common law's neutrality regarding the seller's prerogative, inherent in *caveat emptor*, to remain silent.

At common law, most courts today relieve buyers from the duty to investigate where they find that a reasonable investigation would not have yielded useful information. In the sale of new homes, for instance, twentieth-century common law largely abandoned *caveat emptor*, owing to the fact that "[t]here are myriad possibilities of hidden and latent defects in the construction of a home, and most purchasers are not capable by training or experience to detect or recognize them."[61]

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58. *See* Palmieri, *supra* note 20, at 104; *see also* Larson, *supra* note 24, at 413.

59. Indeed, efficiency is the moving force behind the landmark article on the topic of disclosure, Anthony Kronman, *Mistake Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1 (1978). In this piece, Kronman questions the result in *Laidlaw v. Organ* and argues that because "information is the antidote to mistake," the law should provide incentives favoring the rapid disclosure of changed market circumstances. *Id.* at 4, 9–18.

60. U.C.C. §§ 2-313 to 2-318 (2005).

61. Cochran v. Keeton, 252 So. 2d 307, 311 (Ala. Civ. App. 1970) ("Our research indicates the present weight of authority in this country and England is either to evade or restrict the application of caveat emptor to the sale of a new house, either during construction or after completion, by a builder-vendor. The method most prevalent appears to be that of an implied warranty of habitability or fitness for the use for which purchased."); *see also* Stambovsky v. Ackley, 572 N.Y.S.2d 672, 676 (1991) ("Where a condition which has been created by the seller materially impairs the value of the contract and is peculiarly within the knowledge of the seller or unlikely to be discovered by a prudent purchaser exercising due care with respect to the subject transaction, nondisclosure

In addition to efficiency-based justifications, the law of *caveat emptor* has given way to fairness considerations. Parties with unequal access to information risk negotiating substantively unfair deals. Parties that lack information lack an equal footing as they enter into the contracting process. Fairness-based reforms of *caveat emptor* can be seen in a wide range of cases. For instance, consider the line of cases redressing harms incurred by buyers of real property due to the failure to disclose material information.[62] Surely some of the undisclosed information, such as the fact that a house is uninhabitable, might be discovered by an industrious buyer.[63] In spite of the fact that the buyers *could have* discovered the true value of their deal with a bit more effort, considerations of fairness have led courts to permit buyers to avoid these contracts.

A more familiar example arises out of the caselaw governing the doctrine of unconscionability. Consider the well-known case of *Williams v. Walker-Thomas Furniture Co.*,[64] in which the defendant furniture company sold the plaintiff a number of household furnishings on credit. The contract contained a grossly unfair cross-collateralization clause, rendering all of the plaintiff's purchases vulnerable to repossession in the event of a default on any single item.[65] The court found that, although ordinarily buyers assume the risk of being surprised by an unfair term by signing a document they did not read, the poor economic status and education level of the purchaser combined with the deceptive practices of the seller made it unfair to hold the purchaser to the usual standard.[66]

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constitutes a basis for rescission as a matter of equity. Any other outcome places upon the buyer not merely the obligation to exercise care in his purchase but rather to be omniscient with respect to any fact which may affect the bargain. No practical purpose is served by imposing such a burden upon a purchaser. To the contrary, it encourages predatory business practice and offends the principle that equity will suffer no wrong to be without a remedy.").

62. *Stambovsky*, 572 N.Y.S.2d at 676 (citing Rothmiller v. Stein, 143 N.Y. 581, 591–92 (1894)).

63. At common law, no implied warranties of habitability or fitness were recognized for the sale of real property, or for the leasing of new or old housing. The modern trend, however, implies such warranties in both instances. *See* CALAMARI & PERILLO, *supra* note 3, at 339.

64. 350 F.2d 445 (D.C. Cir. 1965). In addition to deals that are undermined by economic impediments to value, there are cases involving the failure to disclose psychological impediments. *Id.*; *see also, e.g.*, *Cochran*, 252 So. 2d at 311–12; *Stambovsky*, 572 N.Y.S.2d at 676.

65. The contract stated that "all payments now and hereafter made by (purchaser) shall be credited pro rata on all outstanding leases, bills and accounts due the Company by (purchaser) at the time each payment is made." *Id.* at 447. The effect of this term was that no individual item was paid off until all the items were paid off together. This meant that if the purchaser defaulted on one item, all the items purchased, even if they were purchased years before and the customer had since paid a sum that would otherwise have paid off all the items but the most recent purchase, Walker-Thomas could repossess them all.

66. *Id.* at 449.

2. Disclosure Duties in Transactions Between Fiduciaries or Confidants

The displacement of *caveat emptor* by fairness-based justifications for a duty to disclose is perhaps most readily observed in the law governing confidential relationships—relationships in which the parties, by definition, operate closer than at arm's-length. The law envisions the classic contract relationship as one in which both parties are presumed to be motivated by self-interest and aware of the need to protect themselves from each other's self-interested behavior.[67] Hence, they bargain at arm's-length, ideally striking a bargain that maximizes their personal welfare.[68]

The law also recognizes that some relationships do not lend themselves to arm's-length dealings. Often there is an imbalance of power between the parties, creating the risk of exploitation for the more vulnerable party. The parties understand that the relationship triggers responsibilities on the part of the more powerful party to act in the best interests of the more vulnerable party. These relationships are termed "fiduciary," and although the term originated in the realm of trusts and agency, over the course of the past one hundred years it has come to apply to a broad range of individuals who hold positions of trust.[69] These include "agents, partners, directors and officers, trustees, executors and administrators, receivers, bailees, . . . guardians, and doctors.[70]

In addition, courts long have adhered to the notion that certain relationships, termed "confidential" relationships, are marked by a higher duty of loyalty between parties because of the closeness of their relationship rather than because one party necessarily is more powerful than the other.[71] In different jurisdictions, "confidential relationships" may include married couples, married and engaged couples, or only those a court finds to have a confidential relationship on a case-by-case basis.[72] Nonetheless, once a court finds that parties to an agreement were fiduciaries or "confidentials," the law governing their relationship shifts dramatically.[73]

The primary consequence of classifying a relationship as "fiduciary" or "confidential" is the limitation of a fiduciary's ability to maximize self-interest when bargaining with one who holds that fiduciary in a position of trust.[74] The law

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67. Tamar Frankel, *Fiduciary Law*, 71 CAL. L. REV. 795, 799 (1983) ("Instead of asserting personal dominance over the other party, each party must persuade the other to exchange. Nevertheless, the parties are in conflict, as each party must protect himself from the other's self-interested behavior.").

68. *Id.* at 800.

69. Michelle Oberman, *Mothers and Doctors' Orders: Unmasking the Doctor's Fiduciary Role in Maternal-Fetal Conflicts*, 94 NW. U. L. REV. 451, 455 n.17 (2000).

70. *Id.* (quoting Frankel, *supra* note 67, at 795).

71. *See* 41 AM. JUR. 2D *Husband and Wife* § 1 (2004) ("The relationship between a husband and wife is the most confidential of all relationships and has been described as a fiduciary relationship."); *see also* Krawiec & Zeiler, *supra* note 57, at 16–19.

72. *See* Krawiec & Zeiler, *supra* note 57, at 18–19.

73. *See generally* Frankel, *supra* note 67, at 809–11.

74. *Id.* at 799 ("In sum, in status relations the Power Bearer dominates the Dependent and the Dependent's freedom is limited in order to ensure the means for his

governing fiduciaries recognizes that the trust inherent in these relationships raises the potential for an abuse of power.[75] As such, fiduciary law limits the capacity for abuse by reducing the fiduciary's discretion, prohibiting suspect transactions, and penalizing fiduciaries who violate the trust of those who rely upon them.[76] Likewise, the law governing confidential relationships works to prevent parties from taking advantage of confidants by exploiting their trust.[77] Summarizing the common law governing confidential relationships, Professor Mark Gergen notes:

> A person doing business with a confidant must disclose material information. More generally, a person who does business with a confidant has the burden of showing the fairness of the transaction. A person may not invoke the statute of frauds or insist upon other legal formalities as a defense when sued by a confidant. An informal understanding between confidants on the sharing of wealth may lay the basis for a restitution claim. Restitution may be required within a confidential relationship for wealth acquired through the relationship even in the absence of an understanding on sharing. In addition, a person may not disclose secrets learned from a confidant.[78]

Read together, the duty to bargain in good faith and the concept of fiduciary duty show that context matters in determining whether a given bargain is fair. In light of this observation, one might expect that the law governing agreements between individuals involved in intimate relationships would be mediated, to a great extent, by the duties to disclose material information. After all, an intimate relationship is by definition much closer than an arm's-length transaction, and as a result, those who bargain within the context of intimate relationships are more susceptible to overreaching and abuse.[79] Therefore, it is

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survival, but the Power Bearer must also limit abuse in the exercise of his power in order to meet his own needs.").

75. *See id.* at 804.

76. *See, e.g., id.* at 807–08; Marc A. Rodwin, *Strains in the Fiduciary Metaphor: Divided Physician Loyalties and Obligations in a Changing Health Care System*, 21 AM. J.L. & MED. 241, 247 (1995).

77. *See* Larson, *supra* note 24, at 409.

78. Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 FORDHAM L. REV. 407, 476–78 (1999) (citations omitted).

79. Indeed, this observation constitutes another justification for increasing the legal duty between intimates. *See, e.g.*, Beverly Balos & Mary Louise Fellows, *Guilty of the Crime of Trust: Nonstranger Rape*, 75 MINN. L. REV. 599 (1991). Balos and Fellows predicate their argument regarding the barriers to prosecuting nonstranger rape upon their observation that there is a confidential, or fiduciary, relationship between sexual intimates:

> [T]he doctrine of confidential relationship, whether reflecting inequality of power or a relationship of trust, represents the law's unwillingness to allow the classical liberal tradition of individuality to be the instrument of unjust treatment of one person by another. Moreover, it goes further and imposes an affirmative duty on one person to act in the interest of another. The law imposes only limited duties between strangers, but requires persons who are connected with each other to act in each other's interest.

Id. at 601–02.

quite surprising to find that the law governing bargains between sexually intimate individuals is ambivalent, at best, in terms of the extent to which it protects parties against nondisclosure or requires that bargains be made in good faith.

II. DECEPTION AND DISCLOSURE IN AGREEMENTS BETWEEN INTIMATES

Individuals who are sexually or romantically intimate negotiate and form agreements in myriad ways.[80] After describing the range of "contracting" behavior between intimates, this Part will review the disclosure problems arising out of these agreements and demonstrate the remarkable persistence of a norm tolerating nondisclosure in resolving disputes between intimates.

Agreements between intimates can be divided into three broad categories. First, there are agreements arising out of the process of negotiating sexual intimacy. Second, there are agreements made within the context of a committed relationship, typically regarding future intentions and the allocation of resources. Finally, there are agreements made upon the dissolution of a relationship that are intended to settle some legal and financial matters between individuals who have decided to separate.

If a couple is legally married, courts tend to look to family law, rather than contract law, to determine the enforceability of these types of promises.[81] Therefore, issues of contract and tort law primarily arise in cases involving the enforceability of promises made between unmarried couples, both heterosexual and homosexual.

In this Article, I focus exclusively on agreements made between unmarried sexually intimate partners. There are two main reasons for this focus. First, these bargains are governed by contract and tort law, which, at least in theory, are the same laws that apply to all other agreements (for example, commercial transactions). Problems pertaining to nondisclosure frequently arise in contracts between unmarried intimates. This is not surprising considering the potential for overreaching and manipulation in the context of an intimate relationship.[82] It is this potential vulnerability that leads to my second reason for electing to focus only on agreements made between unmarried sexually intimate partners. The very absence of the family law system means that these couples bargain without a safety net. Nonetheless, these unmarried couples are often just as

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80. For the working definition of intimacy used in this Article, see *supra* note 4.

81. This is especially true in agreements that do not involve the distribution of property in the event of a divorce. *See* Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65 (1998). Silbaugh argues that courts will usually enforce contracts determining the distribution of property and, less frequently, contracts restricting rights to alimony, but they will not enforce contracts concerning other topics at all. Even when a court will enforce a contract between married parties, it will be subject to a much higher standard than commercial contracts, providing an additional layer of protection denied to intimates who are not married. *Id.* at 74.

82. *See* Larson, *supra* note 24, at 422.

vulnerable as married couples to exploitation, manipulation, and other overreaching in making deals with their partners.[83]

To illustrate the application of principles governing disclosure in this setting, in this Part, I will consider the norms underlying the formation of agreements pertaining to access to sexual intimacy. In Part III, I turn to the topic of agreements made in the context of an ongoing, committed relationship. Finally, in Part IV, I consider the more expressly contractual nature of agreements made upon the dissolution of a relationship, addressing in detail the example of paternity-related settlements. In all three contexts, courts reveal a far greater embrace of the norm of nondisclosure than they do in other contemporary cases, commercial and otherwise.

A. Negotiating Access to Sexual Intimacy: Deception, Disclosure, and the Problem of Sexual Fraud

On occasion, agreements made at the inception of a sexual relationship are explicitly contractual in nature. It is relatively easy to compare the norms pertaining to disclosure and misrepresentation in this context with the norms governing arm's-length transactions. For example, some relationships commence with an explicit bargain of some sort. Such bargains typically are at issue in cases of seduction, in which a suitor's promises are offered in exchange for the "victim's" consent to sexual relations.[84] More commonly, parties enter into sexual relationships while relying upon express or implied promises regarding health status, capacity to conceive, or marital status.[85] Although much has been written about promises made in exchange for or in relation to sexual intimacy, the law governing the duty to disclose material facts in this context is neither well settled nor consistent with principles of contract or tort law in other contexts.[86]

In many ways, sexual bargaining remains subject to a norm of nondisclosure. The controversial case of seduction is an example of this, as it not only tolerates nondisclosure, but also permits express misrepresentations.[87] In the traditional common law case of seduction, the victim's family was permitted to sue for damages against a suitor who made false promises of love and marriage in

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83. *Id.*

84. *Id.* at 379–80. For a rich historical review of the tort of seduction, see generally *id.*

85. Another example of the problem of nondisclosure in couples negotiating intimacy may be seen in a recent Italian case, in which a woman successfully sued her new husband for his failure to tell her that he was impotent before they married. *Sex a Constitutional Right in Italy*, UNITED PRESS INT'L, May 12, 2005.

86. For a discussion of sex's unique place in contract bargaining, see LINDA R. HIRSHMAN & JANE E. LARSON, HARD BARGAINS: THE POLITICS OF SEX 286–94 (1998).

87. Larson, *supra* note 24, at 417–18 ("Today, . . . courts rarely consider it unlawful to deceive someone into agreeing to sex. Although force and fraud are equated when it comes to money, the same analysis is not usually extended to sex. It is both a tort and a crime to take money by false pretenses, but in most jurisdictions it is lawful to obtain consent to sex by intentionally deceiving one's partner.").

order to procure her consent to sexual relations.[88] The common law tort of seduction evolved in the late eighteenth century in order to remedy the assorted harms occasioned when a woman relied, to her detriment, upon a promise of marriage offered by her suitor.[89] More precisely, this tort was designed to permit the father of the woman "scorned" by her lover to recover for the harm he had inflicted upon him by damaging his daughter's reputation, and thus, her prospects for marriage.[90]

The tort of seduction sought to provide for a wide range of damages. The losses of virginity and a reputation for chastity often were devastating for a young woman, severely limiting her chances of marrying, or at least making a "good" marriage.[91] Even though, until the early twentieth century, the woman herself could not sue for damages, the tort of seduction allowed her father to procure the resources that she might otherwise have secured only through marriage.[92] This route to compensation was especially important when the woman found herself single and pregnant.[93] Unwed motherhood not only stigmatized the woman and her "bastard" child, but in a time when the law made no provision for child support, it also typically led to a life of impoverishment.[94]

The tort of seduction also remedied the broken heart. This harm was the most intangible, and therefore, the most controversial.[95] The emotional damage suffered by the betrayal of a loved one can be very real and very powerful.[96] Beginning in the early twentieth century, the "anti-heart balm" movement successfully campaigned for the eradication of the tort of seduction.[97] Arguing that the suffering sought to be remedied by this tort was too open to fraud and too difficult to quantify monetarily, a coalition of legislators, supported by feminists and advocates of sexual equality and liberation, brought about the broad-scaled repeal of the tort of seduction.[98]

As a result, an era of *caveat emptor* in intimate relationships began. Suddenly, one who had no intention of marrying could promise marriage in

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88. Lea VanderVelde, *The Legal Ways of Seduction*, 48 STAN. L. REV. 817, 821 (1996).

89. *Id.* at 818–19.

90. *Id.* at 821.

91. Larson, *supra* note 24, at 383–84.

92. VanderVelde, *supra* note 88, at 821, 895.

93. Larson, *supra* note 24, at 383.

94. VanderVelde, *supra* note 88, at 869.

95. Larson, *supra* note 24, at 404–07.

96. *See id.* at 406–07 (discussing Parker v. Bruner, 686 S.W.2d 483 (Mo. Ct. App. 1984), *aff'd* 683 S.W.2d 265 (Mo. 1985) (en banc), in which a woman recovered damages for emotional harms growing out of a series of misrepresentations over the course of a two-year sexual relationship).

97. *Id.* at 393–401.

98. For a full discussion of the genesis of "anti-heart balm" laws, see Nathan P. Feinsinger, *Legislative Attack on "Heart Balm,"* 33 MICH. L. REV. 979 (1935). *See also* Larson, *supra* note 24, at 393–400.

exchange for access to sexual intimacy without fear of legal censure.[99] The post-seduction norm of nondisclosure represents a degree of complacency with regard to bald-faced lying that is almost unparalleled in the common law governing tort and contract.[100] This is surprising given that the law today has adopted many of the features that were thought to be uniquely problematic about remedying seduction.

For instance, the anti-heart balm movement argued that the pain and suffering associated with seduction were too susceptible to fraud and exaggeration.[101] It is true that a plaintiff could fabricate enormous personal suffering after the end of a relationship to obtain her lover's resources out of revenge or simply a desire for pecuniary gain. Indeed, popular culture is replete with terminology that reflects an understanding of humans' capacity for such behavior (for example, "gold diggers").[102] Nonetheless, the fear that some might fabricate emotional injuries surely cannot be confined to the broken-hearted. The same argument may just as readily be raised in all cases of personal injury. The pain and suffering caused by a negligent driver, for instance, might easily be exaggerated and even fabricated. Most jurisdictions nonetheless allow litigants to recover for pain and suffering, some even in the absence of a physical injury, thereby compensating these "victims" for a similar type of emotional harm.[103]

In accomplishing its goal of limiting the risk of exaggerated claims, the anti-heart balm movement simultaneously brought about a remarkable asymmetry in the law governing intimates. As Professor Larson notes:

> The common law protects parties to commercial transactions whose choices are coerced by violent threats, economic extortion, fraud,

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99. For a thorough description of the legal and practical consequences of repealing the tort of seduction, see Larson, *supra* note 24, at 412–14.

100. The law tolerates outright misrepresentation in a limited number of other scenarios, but with far more effort devoted to justifying these cases as exceptions to the rule requiring honesty in fact. *See infra* notes 112–15 and accompanying text (discussing cases in which one party lies about the use of contraception, and as a result, a child is conceived). Courts invoke public policy justifications for forcing child support payments from the party who unwittingly was tricked into parenting a child. *See, e.g.*, Inez M. v. Nathan G., 451 N.Y.S.2d 607, 609 (Fam. Ct. 1982) (compelling father to pay child support despite his claim that he was deceived because accepting his claim "would create a new and inferior category of out-of-wedlock child based upon the circumstances of conceptions . . .").

101. Larson, *supra* note 24, at 395–96.

102. *Id.* at 395.

103. Some jurisdictions restrict recovery for the emotional distress suffered to those who lie within a "zone of danger." *See, e.g.*, Miller v. Chalom, 710 N.Y.S.2d 154, 156 (App. Div. 2000) (discussing the "zone of danger rule"). Other jurisdictions allow recovery for witnesses outside the zone of danger, but only if there is a sufficiently close bond between the witness and the victim. *See, e.g.*, Dillon v. Legg, 441 P.2d 912, 915 (Cal. 1968). For a solid discussion of the law governing these recoveries, see Dale Joseph Gilsinger, Annotation, *Relationship Between Victim and Plaintiff-Witness as Affecting Right to Recover Under State Law for Negligent Infliction of Emotional Distress Due to Witnessing Injury to Another Where Bystander Plaintiff is Not a Member of Victim's Immediate Family*, 98 A.L.R.5th 609 (2005). *See also infra* notes 275–78 and accompanying text (more fully discussing the policies underlying limitations on recovery for emotional distress).

> and even some careless failures by another party to disclose useful facts. When a person consents to sex, however, the law permits a far broader range of coercive practices to distort and manipulate her choices, including all the psychological and emotional tactics of deception. To put it plainly, a man may do things to get a woman's agreement to sex that would be illegal were he to take her money in the same way.[104]

A minority of jurisdictions has attempted to remedy this asymmetry by permitting legal remedies for sexual fraud.[105] For example, the Illinois Breach of Promise Act reflects a compromise position that allows recovery of "actual" damages suffered by the nonbreaching party,[106] but bars all punitive, exemplary, vindictive, or aggravated damages.[107] Even this limited recovery is barred in all but twelve states.[108]

The most persuasive argument against permitting the tort of seduction is that the law should not "force" people into marriage by way of a threatened seduction action, especially when people often make mistakes in personal relationships. Of course, the law would not actually force anyone into marriage. Rather, the party who made a false promise of marriage would have the choice of paying for the harm caused by the promise or going through with the wedding. More importantly, the tort of seduction only penalizes those who agree to marry *in bad faith*.[109] Thus, the real risk of enforcing the tort of seduction is that the trier of fact mistakenly attributes bad faith to one who has an authentic change of heart.

Although this risk is a valid concern, it exists whenever the trier of fact is asked to make a choice between two competing versions of an event. Indeed, the law tolerates this risk of error in other settings where intangible, emotional damages are recoverable. A plaintiff can feign the emotional damage suffered in personal injury or intentional infliction of emotional distress cases just as easily as seduction cases. The tort of seduction may be susceptible to fraud, but there is no reason to believe that it is more susceptible in this regard than other accepted areas of law. Fear of the one false plaintiff has led to the denial of recovery for all the legitimate plaintiffs who have suffered real injuries in reliance upon the promises

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104. Larson, *supra* note 24, at 412 (citations omitted).

105. *Id.* at 401–04.

106. 740 ILL. COMP. STAT. 15/2 (2004).

107. 740 ILL. COMP. STAT. 15/3 (2004).

108. States explicitly barring damages for breach of promise to marry include California, CAL. CIV. CODE § 43.4 (West 2004); Massachusetts, MASS. GEN. LAWS ch. 207, § 47A (2004); New York, N.Y. CIV. RIGHTS LAW § 80-a (McKinney 2004); and Ohio, OHIO REV. CODE ANN. § 2305.29 (West 2004). It is interesting to note that even in states with explicit statutory bans, some jurisdictions allow limited recovery under the theory of unjust enrichment. *See, e.g.*, Jury v. Ridenour, No. 98 CA 100, 1999 Ohio App. LEXIS 3145, at *9–10 (Ct. App. 1999). For an example of a jilted fiancée allowed to recover damages, see Bradley v. Somers, 322 S.E.2d 665, 666–67 (S.C. 1984).

109. Larson, *supra* note 24, at 387 (defining seduction as "means of an intentional deception[that causes] the seduced woman [to] yield[] a valuable interest—her consent—only in reliance on 'deception, enticement, or other artifice.'" (quoting Hutchins v. Day, 153 S.E.2d 132, 134 (N.C. 1967))).

of others. The risks accepted in personal injury law should be no less accepted in this more critical and fragile area of human interactions.

B. Misrepresentations Regarding One's Fertility and Sexual Health Status

In addition to seduction, several cases have litigated misrepresentations regarding one's fertility status. These cases typically arise when one party either fails to disclose, or affirmatively misrepresents, information that bears upon the other party's need to take contraceptive precautions. For instance, a man might falsely assert that he had a vasectomy, or a woman might tell her partner that she is taking the contraceptive pill. Litigation arises when the unwitting partner learns of an ensuing pregnancy.[110] These cases involve such bold examples of manipulation, whether by nondisclosure or by affirmative misrepresentation, that the standard arguments against imposing contract or tort liability simply do not apply.[111] For example, a woman who wants to conceive, despite her partner's reluctance, and therefore lies by telling her partner that she is taking the pill is every bit as deliberate in her intention to mislead as is the seller of a used car who turns back the odometer. There is a long line of cases growing out of instances of nondisclosures and misrepresentations relating to one's fertility status.[112] Typically, these cases assert a breach of promise and claim the right to recover pregnancy- and parenting-related damages and partial or total relief from paying child support.[113] Courts uniformly have rejected these claims, even when the parties went beyond the mere failure to disclose and affirmatively lied by telling

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110. *See, e.g.*, Erwin L.D. v. Myla Jean L., 847 S.W.2d 45, 46 (Ark. Ct. App. 1993); Beard v. Skipper, 451 N.W.2d 614, 614 (Mich. Ct. App. 1990); C.A.M. v. R.A.W., 568 A.2d 556, 556 (N.J. Super. Ct. App. Div. 1990); Wallis v. Smith, 22 P.3d 682, 682–83 (N.M. Ct. App. 2001); L. Pamela P. v. Frank S., 449 N.E.2d 713, 714 (N.Y. 1983).

111. In *Barbara A. v. John G.*, a divorce attorney had an affair with his client. 193 Cal. Rptr. 422, 426 (Ct. App. 1983). She informed him of her psychological and economic reasons not to become pregnant. *Id.* He represented that he was incapable of fathering a child. *Id.* She suffered an ectopic pregnancy. *Id.* at 425. She needed surgery to save her life and was rendered sterile by the operation. *Id.* at 426. She sued, alleging battery and intentional misrepresentation. *Id.* at 425. The court allowed her to go forward on these claims, arguing that California's anti-heart balm statute was meant to prevent so-called "wrongful life" suits or the avoidance of child support, neither of which occurred here. *Id.* at 433. This decision was sharply criticized in the dissent and in subsequent cases. *See, e.g.*, Perry v. Atkinson, 240 Cal. Rptr. 402, 405 (Ct. App. 1987); *Barbara A.*, 193 Cal. Rptr. at 434 (Scott, Acting P.J., dissenting). Both argue that this case clearly falls within the bounds of California's anti-heart balm statute, which states that there is no cause of action for "[s]eduction of a person over the age of consent." CAL CIV. CODE § 43.5(c) (West 2004). Even in the absence of the public policy motivation to support children, these courts would still allow any lie or abuse of trust to go unpunished under a theory of sexual privacy. *Perry*, 240 Cal. Rptr. at 405; *Barbara A.*, 193 Cal. Rptr. at 434 (Scott, Acting P.J., dissenting).

112. Anne M. Payne, Annotation, *Sexual Partner's Tort Liability to Other Partner for Fraudulent Misrepresentation Regarding Sterility or Use of Birth Control Resulting in Pregnancy*, 2 A.L.R.5th 301 (1992) [hereinafter Payne, *Tort Liability*].

113. *See id.*; *see also, e.g.*, Wallis v. Smith, 22 P.3d 682, 683 (N.M. Ct. App. 2001). Wallis alleged "fraud, breach of contract, conversion, and prima facie tort" against the mother of his child to recoup his financial obligations for child support. *Id.*

their partners that they were sterile or using contraception.[114] Courts have justified this outcome based on the perceived best interests of the child—whether it be cast in financial terms or in terms of the emotional harm that would result from permitting parents to claim that they were harmed by the birth of their child.[115]

An alternative outcome, permitting the injured party to sue the other for costs associated with being duped into parenthood, clearly would have negative policy implications. Permitting such claims would create an incentive to avoid child support payments in all cases by fabricating claims that one's partner had lied about the partner's capacity to reproduce. In effect, this would allow an end-run around child support laws by permitting the noncustodial parent to recover child support payments through litigation against the custodial parent. The threat to children that is inherent in this possibility is so insidious, and the mechanism for avoiding it is so elusive, that policy reasons alone must militate against allowing such claims to be brought.

These cases reflect yet another instance in which a norm of nondisclosure between intimates is tolerated, if not embraced, by the law. The one notable exception to caveat emptor in the context of intimate partners involves representations or omissions regarding sexually transmitted diseases. The majority of jurisdictions require individuals who are infected with human immunodeficiency virus (HIV) or another sexually transmitted disease to disclose this information to their partners or face a tort suit for battery.[116] These cases do not distinguish between outright misrepresentations and the failure to disclose this information. In both cases, courts impose a duty to disclose, reasoning that the infected party's silence amounted to an assertion that they were uninfected.[117]

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114. Payne, *Tort Liability*, *supra* note 112.

115. The outcome is similar even in cases in which the duped woman elects to terminate the pregnancy. As there is no child born in such cases, there is no apparent policy reason for limiting the damages she might recover. Nonetheless, in the small number of reported cases, it seems that the woman's recovery will be limited to costs associated with obtaining an abortion. She will not be permitted a broadly framed recovery for pain and suffering, including emotional harm, or even such things as the physical changes caused by the pregnancy or the abortion. *See, e.g.*, Alice D. v. William M., 450 N.Y.S.2d 350 (N.Y. Civ. Ct. 1982) (Woman who conceived after her lover told her he was sterile terminated the pregnancy and sued for damages, recovering the costs of the procedure, taxi fare, lost wages and $150 in pain and suffering); *see also Barbara A.*, 193 Cal. Rptr. at 429 (distinguishing damages for the mother's physical injuries from damages for "wrongful birth" and mental suffering).

116. *See* Gregory G. Sarno, Annotation, *Tort Liability for Infliction of Venereal Disease*, 40 A.L.R.4th 1089 (1985).

117. *See* Ray v. Wisdom, 166 S.W.3d 592, 597 (Mo. Ct. App. 2005) ("One has the legal duty to exercise reasonable care by disclosing a contagious venereal disease before entering into sexual relations with another. In an action for a negligent transmission of a venereal disease, a person is liable *if he knew or should have known* that he was infected with the disease and failed to disclose or warn his sexual partner about this unreasonable risk of harm before engaging in a sexual relationship." (citations omitted) (emphasis in original)); *see also* R.A.P. v. B.J.P., 428 N.W.2d 103, 106 (Minn. Ct. App. 1988) (stating that silence can be a misrepresentation when there is a duty to disclose that one has a venereal disease).

C. Summary

These examples provide striking evidence of the law's tolerance of nondisclosure in the realm of intimate relations. Yet the embrace of this norm between intimates is not limited to agreements involving intimacy. Indeed, equally compelling examples exist in agreements between intimates who are in committed, long-term relationships, as well as agreements relating to the dissolution of an intimate relationship.

III. JUDICIAL RESPONSES TO CONTRACTS MADE BETWEEN UNMARRIED COHABITANTS: WINKING AND SCOLDING

For centuries, courts have struggled with issues relating to promises made, and relied upon, in the context of intimate relationships. In this Part, I will describe the general pattern of judicial resistance to enforcing agreements made between intimates involved in committed relationships. I will then examine the effect that this resistance has on the legal norms regarding truth-telling and disclosure between such couples.

A. Legal Enforcement of Promises Made in the Context of Committed Relationships

Legal analysis of promises made within relationships is difficult because intimate relationships are products of all sorts of contingencies and expectations, promises and reliance. Intimates offer up their physical and emotional labor as part of the role they play in the complex web of trades and trade-offs that mark human relationships. Part of the beauty of family law is that it relieves courts and families from considering the independent merits and legal enforceability of the myriad independent "deals" struck between spouses. For example, although sexual intimacy typically plays a role in marital relationships, there is no need for courts to consider whether the expectation of sexual intimacy constitutes an exchange of support or resources for sex.[118]

This paradigm shifts in the context of unmarried cohabitants, who lack the safety net of family law when seeking legal enforcement of promises or agreements.[119] As unmarried cohabitation has become increasingly common, caselaw in this area has developed rapidly.[120] Although there are many promises

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118. Historically, a wife's obligation to provide sex to her husband was a presumed element of the marriage contract. In exchange, the husband provided a minimum level of material support. *See, e.g.*, Twila L. Perry, *The "Essentials of Marriage": Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1, 3 (2003).

119. Although it clearly is the case that couples can maintain committed relationships without cohabitation, and that they do, within that context, reach agreements of all sorts, I have elected to narrow my focus to unmarried cohabitants. Doing otherwise would pose definitional challenges, which, ultimately, would serve to distract rather than to underscore my point in this section.

120. *See* Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957 967–73 (2000) [hereinafter Dubler, *Wifely Behavior*] (the doctrinal foundations of common law marriage in contract and evidence law date back centuries); *see also* Sharmila Roy Grossman, Comment, *The Illusory Rights of* Marvin v. Marvin *for the*

made between intimates in the course of any given day, let alone over the course of their shared lives, court cases between unmarried cohabitants typically involve reliance upon promises pertaining to a couple's allocation of present and future resources.[121]

The landmark decision involving unmarried cohabitants is *Marvin v. Marvin*.[122] This much-discussed case deals with the affairs of Michelle and Lee Marvin, who lived together for seven years. During that time, Lee Marvin acquired considerable property in his own name. Upon the demise of the relationship, Lee evicted Michelle from the couple's joint home and denied any obligation to support her. According to Michelle, the couple had an oral understanding whereby she would serve as "companion, homemaker, housekeeper and cook" to the defendant, and they would act as husband and wife. In exchange, they would "share equally" in the property they accumulated, and he would support her for the rest of her life.[123] The court accepted her testimony and upheld the legal enforcement of express contracts between unmarried cohabitants. Furthermore, the court suggested that, in future cases involving unmarried cohabitants who lacked express agreements, courts should look to the conduct of parties to determine whether there was an implied agreement to share resources. Finally, it held that courts may also award damages in these cases under the doctrine of quantum meruit.[124]

In most senses, *Marvin* is an enormously progressive decision. It paved the way for a body of caselaw that permits both same- and opposite-sex couples to order their personal affairs through the use of private agreements, rather than relying upon the state's protection via family law.[125] Indeed, for same-sex couples living in states that prohibit them from marrying, private agreements are one of the few ways to provide for present and future allocation of resources.[126]

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number of adults opting to cohabit rather than marry."). Census data from 2003 reports more than 4,600,000 unmarried couples of the opposite sex cohabitating nationwide. U.S. CENSUS BUREAU, POPULATION DIVISION, *Opposite Sex Unmarried Partner Households, by Labor Force Status of Both Partners, and Race and Hispanic Origin/1 of the Householder: 2003*, CURRENT POPULATION SURVEY, 2003 ANNUAL SOCIAL AND ECONOMIC SUPPLEMENT tbl.UC1 (Sept. 15, 2004), *available at* http://www.census.gov/population/socdemo/hh-fam/cps2003/tabUC1-all.pdf.

121. *See, e.g.*, Marvin v. Marvin, 557 P.2d 106, 111 (Cal. 1976).

122. *Id.*

123. *Id.* at 110.

124. *Id.* In essence, this means that the court could simply determine that the defendant was unjustly enriched by virtue of the services rendered by the plaintiff. Thus, the court could ascertain the value of the services rendered, and permit the plaintiff to recover those costs. *See* CALAMARI & PERILLO, *supra* note 3, at 21–22 (regarding quasi-contracts).

125. *See* Ira Mark Ellman, *Unmarried Partners and the Legacy of* Marvin v. Marvin*: "Contract Thinking" was Marvin's Fatal Flaw*, 76 NOTRE DAME L. REV. 1365, 1366 (2001) ("California's choice of a contract remedy was seen as giving options to partners in intimate relationships, options that would allow each couple to ensure that the law took proper account of the way they had chosen to fashion their particular relationship.").

126. *See id.* at 1365–66.

However, when it comes to the issue of sex in the context of unmarried relationships, *Marvin* fails to resolve the perennial problem courts find in such "meretricious" relationships.[127] Judges find these cases challenging due to the fact that the unmarried parties to a now-disputed agreement were having sex, and therefore there is a risk that some part of their promises may have been made in exchange for sex. As a result, judges spend time struggling with whether enforcing the agreement is somehow tantamount to sanctioning prostitution.[128] The *Marvin* court sidesteps the "meretricious" problem by noting that, although a contract predicated upon the exchange of sexual services would be invalid, "[t]he fact that a man and a woman live together without marriage, and engage in a sexual relationship, does not in itself invalidate agreements between them relating to their earnings, property, or expenses."[129] Moreover, the court noted that even if the agreement rested in part on sexual services, that "illegal" portion of the consideration could be severed, thus permitting enforcement of the remainder of the contract so long as there is independent legal consideration.[130]

Other courts have been less willing than the *Marvin* court to compartmentalize the sexual aspect of the relationship between parties and have instead used the intimate nature of the relationship to justify their reluctance to enforce the parties' agreement. This is explicitly the case in the small number of jurisdictions that refuse to recognize express or implied agreements between unmarried cohabitants as a matter of public policy.[131] In addition, there are many jurisdictions that profess their willingness to enforce express agreements between unmarried cohabitants, and even a willingness to honor implied agreements, but refuse to enforce any agreements that seem to rest, even in part, on sexual intimacy.[132] The de facto result of this limitation is to create a powerful barrier to

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127. *See, e.g.*, *In re* Estate of Steffes, 290 N.W.2d 697, 710 (Wis. 1980) (Coffey, J., dissenting) ("I have examined the circumstances cited and can only reach the conclusion that sexual intimacy, in violation of their marriage vows, was the underlying motivation for Mrs. Brooks' entry into and stay in the home of the deceased.").

128. Wolf v. Fox (*In re* Estate of Fox), 190 N.W. 90, 90 (Wis. 1922) ("Courts are practically unanimous in holding that when a woman voluntarily and knowingly lives in illicit relations with a man she cannot recover on an implied contract for services rendered him during the period of such relationship." (citation omitted)). *But see Steffes*, 290 N.W.2d at 705–06, 708–09 (stating that the previous quotation from *Fox* was dicta and holding that an illicit relationship does not necessarily bar recovery on an implied contract between the parties).

129. *Marvin*, 557 P.2d at 113.

130. *Id.* at 114.

131. *See, e.g.*, Long v. Marino, 441 S.E.2d 475 (Ga. Ct. App. 1994) (finding that an ex-priest had no obligation to support his former nonmarital partner because their contract was founded on immoral consideration); Samples v. Monroe, 358 S.E.2d 273 (Ga. Ct. App. 1987) (holding that plaintiff could not rely on promises made by defendant regarding wages earned during unmarried cohabitation as sex outside of marriage is illegal and contracts based on illegal or immoral acts are void); Ayala v. Fox, 564 N.E.2d 920 (Ill. App. Ct. 1990) (holding that unmarried cohabitants were not entitled to equity in property because unmarried people do not have marriage rights).

132. *See* Katherine C. Gordon, Note, *The Necessity and Enforcement of Cohabitation Agreements: When Strings Will Attach and How to Prevent Them—A State Survey*, 37 BRANDEIS L.J. 245 (1998–1999) (summarizing the wide variations in state law

recovery for many unmarried parties who relied on the promises of their former live-in lover.[133]

It is worth pondering why courts resist awarding even quantum meruit damages to those whose labors provided undeniable benefits to their intimate partners. After all, there are myriad cases in which courts have been willing to grant equitable remedies, whether between strangers or between those who have known one another for years. A full discussion of quantum meruit recovery in this setting is beyond the scope of this Article, but the best justification for the refusal to grant a remedy may be that the services were rendered without any expectation of compensation. One could argue that intimates are more likely to give gifts to one another than are strangers.[134] Therefore, one might reason that, in the absence of an explicit agreement stating otherwise, it is fair to assume that intimates confer valuable services or goods as gifts.

This solution oversimplifies reality, though, in that the essence of any committed intimate relationship, within marriage and without, involves a complex web of promises and obligations.[135] For instance, the work inherent in performing household chores or caring for a sick partner is not simply given, but is offered up as part of an exchange that typically is unspoken.[136] The compensation for such work might involve shared income or emotional support. Far from being gifts, the services provided by partners to one another are a reflection of a couple's private, often tacit, agreement about the terms of engagement. Intimate relationships are a package deal, and they entail all sorts of obligations, spoken and unspoken, typically including, but not necessarily centered on, sexual relations.[137]

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governing the enforcement of property rights for unmarried cohabitants); *see also* Morone v. Morone, 413 N.E.2d 1154, 1157 (N.Y. 1980) (holding that the court would not imply a contract between parties because it was "natural that the services were rendered gratuitously"). Indeed, even in California, *Marvin*'s holding that household labor provides independent consideration sufficient to bind a promise of financial support was narrowed and thrown into some confusion by caselaw involving same-sex partners. Consider the case of *Jones v. Daly*, in which the parties agreed that Daly would provide an allowance to Jones in exchange for Jones's services as "'lover, companion, homemaker, traveling companion, housekeeper and cook to Daly.'" 176 Cal. Rptr. 130, 131 (Ct. App. 1980). In spite of the powerful precedent of the *Marvin* case, the California Court of Appeal upheld a finding that the contract was unenforceable because it was based, in part, upon sexual services. *Id.* at 133. Ultimately, later California cases discredited the *Jones* opinion, noting that the portion of the agreement pertaining to sexual services was severable. *See, e.g.*, Bergen v. Wood, 18 Cal. Rptr. 2d 75, 78 (Ct. App. 1993).

133. *See, e.g.*, *Jones*, 176 Cal. Rptr. 130.

134. *See, e.g.*, *Morone*, 413 N.E.2d at 1157 (holding that the court would not imply a contract between parties because it was "natural that the services were rendered gratuitously").

135. The following sources provide thoughtful discussion and analysis of the contractual nature of intimate relations: HIRSHMAN & LARSON, *supra* note 86, at 3; CAROL PATEMAN, THE SEXUAL CONTRACT (1988); Perry, *supra* note 118.

136. *See* PATEMAN, *supra* note 135 (providing a thoughtful and thought-provoking analysis of the unspoken, yet nonetheless ubiquitous, exchanges that underlie heterosexual relationships).

137. *Id.*

Family law anticipates and guards against the harm that can come to those who rely, to their detriment, upon their spouse's promises. Rather than creating a similar system of protection for committed unmarried couples, caselaw governing these disputes often veers off into discussions about the "illegal" nature of these relationships or the threat such relationships pose to the social fabric.[138] Instead of considering the nature of the agreement and the reasonableness of the parties' expectations and/or reliance, judges seem to lose their focus, and become distracted by the thought of sex in the context of a taboo relationship.[139]

B. The Disclosure Problem in Contracts Made in Long-Term Nonmarital Relationships

Given the reluctance of courts to enforce agreements made between unmarried cohabitants, it is not surprising to find that there is an equally strong reluctance to police the problem of nondisclosure in agreements made by those involved in such relationships. Indeed, the problem of nondisclosure in these agreements might be seen as merely a subset of the greater issue of enforceability. Caselaw reveals that the principal nondisclosure problem in this context involves agreements between unmarried cohabitants regarding property or resources.[140] In these cases, the law's response to evidence of nondisclosure, or in some cases evidence of explicit misrepresentation, depends largely upon its comfort with enforcing the overarching contract. Courts that refuse to recognize even express contracts between unmarried cohabitants impose no duty of disclosure upon parties that reach agreements in this setting.[141] For instance, when evaluating the enforceability of a contract made by unmarried cohabitants, courts may find no duty to disclose material information, even if one party knew that the other was agreeing to the contract under mistaken premises.[142] These cases typically hold

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138. 2 ALEXANDER LINDEY & LOUIS I. PARLEY, LINDEY ON SEPARATION AGREEMENTS AND ANTENUPTIAL CONTRACTS § 100.61, at 100–27 to 100–29 (2d ed. 2003).

139. *See, e.g.*, *In re* Estate of Steffes, 290 N.W.2d 697, 709–13 (1980) (Coffey, J., dissenting).

140. In addition, there are cases involving nondisclosure in agreements relating to future plans for childbearing. In general, these cases are resolved along the same lines as are promises relating to one's intentions at the commencement of a sexual relationship. *See supra* Part III.A. For example, in *Perry v. Atkinson*, the defendant impregnated the plaintiff, his long-time girlfriend. 240 Cal. Rptr. 402, 403 (Ct. App. 1987). The defendant persuaded the plaintiff to have an abortion by assuring her that he would like to have a child with her, but that he wanted to wait. *Id.* He promised that he would have a child with her a year later. *Id.* The girlfriend alleged that the plaintiff misrepresented himself and that he never intended to have a child with her. *Id.* The court rejected her claim, finding that, even if the defendant deliberately misrepresented his intentions, awarding damages in such cases "'would encourage unwarranted governmental intrusion into matters affecting the individual's right to privacy.'" *Id.* at 404 (quoting Stephen K. v. Roni L., 164 Cal. Rptr. 618, 620 (Ct. App. 1980)).

141. *See, e.g.*, *Perry*, 240 Cal. Rptr. at 405 (finding that even if the defendant deliberately misrepresented himself, awarding damages in such a case is against public policy).

142. *See, e.g.*, Long v. Marino, 441 S.E.2d 475 (Ga. Ct. App. 1994) (finding that an ex-priest had no obligation to support his former nonmarital partner because their contract was founded on immoral consideration); Samples v. Monroe, 358 S.E.2d 273, 273–

that because the individuals were unmarried, they were not entitled to rely upon one another as fiduciaries and thus should have bargained with more caution.[143]

On the contrary, in states that enforce express or implied contracts between unmarried couples, the law tends to treat nondisclosure as a species of fraud and misrepresentation. For example, in the Missouri case of *Hudson v. DeLonjay*, an unmarried couple acquired considerable corporate assets during their cohabitation and collaboration.[144] Two years before the lawsuit, Marshall Hudson apparently restructured the parties' joint fifty-percent ownership of their corporation by allocating ninety-nine percent of the corporation's stock to himself.[145] In addition, the couple's business purchased real estate titled solely in Hudson's name.[146] At trial, Hudson argued that state law "prohibits the recovery of damages from a cohabitant based on a meretricious relationship."[147] The court rejected this argument, finding that based on the couple's alleged "express agreement to pool resources and share assets accumulated during their relationship. . . . the trial court properly could have found . . . that the contract was supported by valid consideration."[148]

Related to these cases is a relatively new line of cases involving child custody disputes between unmarried former cohabitants. In such cases, parties claim rights to children whom they parented while in their former relationships, but typically, the parent who is biologically or genetically linked to the child

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74 (Ga. Ct. App. 1987) (holding that plaintiff could not rely on promises made by defendant regarding wages earned during unmarried cohabitation, as sex outside of marriage is illegal and contracts based on illegal or immoral acts are void).

143. *See, e.g.*, Ayala v. Fox, 564 N.E.2d 920 (Ill. App. Ct. 1990) (holding that unmarried cohabitants were not entitled to equity in property because unmarried people do not have marriage rights). *But see, e.g.*, Cochran v. Cochran, 106 Cal. Rptr. 2d 899, 906 (Ct. App. 2001) (holding contracts between unmarried cohabitants enforceable provided that sex is not part of the consideration); Knauer v. Knauer, 470 A.2d 553, 566 (Pa. Super. Ct. 1983) (same). Interestingly, married couples also may be disadvantaged by this rule, in that the courts express a preference for family law resolutions even in the face of express contracts. An example is seen in caselaw governing the spousal interest, upon divorce, in an ex-partner's graduate degree and future earnings. In *Pyeatte v. Pyeatte*, the wife agreed to support the husband through law school, and he would then do the same during her graduate work. 661 P.2d 196, 199 (Ariz. Ct. App. 1982). Shortly after completing law school and before the wife started graduate school, the couple divorced. *Id.* The court found that, although there was an agreement, there was no contract and granted her relief only at equity. *Id.* at 200, 207.

144. 732 S.W.2d 922 (Mo. Ct. App. 1987).

145. *Id.* at 926.

146. *Id.*

147. *Id.* at 924.

148. *Id.* at 927. In a colorful example, *In re Marriage of Selvo*, a man persuaded a woman that they should marry but immediately annulled their marriage so that he would be protected from any future claims of spousal support. 2003 Cal. App. Unpub. LEXIS 2208, at *4–5 (Ct. App. 2003). In spite of his promises that the nullification would have no impact on their obligations to one another (aside from the issue of spousal support), the man used this as the basis for his claim that he was solely entitled to all property acquired during their cohabitation. *Id.* at *5, *10. The court rejected his claim. *Id.* at *27.

asserts sole custody rights.[149] Allegations of nondisclosure or misrepresentation arise when the excluded party claims that there was an express or an implied agreement between the parties regarding childrearing, but that the lover secretly intended to seek sole custody.[150] These cases can generate confusion. Some courts will treat them as conventional custody battles, looking to evaluate the issue of the child's best interests, while others will look to enforce the terms of any express agreement relating to custody.[151] To the extent that courts fail to recognize these agreements as binding, the law effectively gives parties license to not disclose, or even to misrepresent, their intentions.

Just as the law tolerates nondisclosure in agreements between unmarried cohabitants, causing confusion and leaving harms without redress, so too does the law turn away from evidence of lies and omissions in agreements made at the end of intimate relationships. In a sense, these cases are even more surprising, as the underlying facts seldom leave any doubt regarding the parties' intentions to be bound by their agreements.

IV. CONTRACTS MADE UPON THE DISSOLUTION OF A RELATIONSHIP: THE DUTY TO DISCLOSE IN PATERNITY-RELATED SETTLEMENTS

Contracts arising at the dissolution of a relationship tend to be express bargains, devised to settle some legal and financial matters between individuals who have decided to separate.[152] Because these agreements typically are express promises, made in the language of bargain, they are generally free of the mutual assent problems that plague other types of agreements between intimates.[153] These deals often pertain to the settlement of legal claims that one party might have had against the other upon the termination of the relationship, and as such, they reflect the parties' determination to settle their claims outside of court.[154]

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149. *See, e.g.*, K.M. v. E.G., 13 Cal. Rptr. 3d 136 (Ct. App. 2004), *rev'd* 117 P.3d 673 (Cal. 2005).

150. For example, in *K.M. v. E.G.*, the plaintiff tried to bring an equitable estoppel claim against the biological mother asserting that she had encouraged the development of plaintiff's relationship with the children for years. *Id.* at 152.

151. *See, e.g., id.* (in which the lower court held that K.M. lacked rights to her children, despite the fact that she participated in rearing them and was genetically linked to them as the egg donor, because, at the time of insemination, she signed express contracts waiving her parental rights); *see also* Elisa B. v. Superior Court, 13 Cal. Rptr. 3d 494 (Ct. App. 2004), *rev'd* 117 P.3d 660 (Cal. 2005). In contrast, see Rubano v. DiCenzo, 759 A.2d 959 (R.I. 2000), in which the Rhode Island family court was given jurisdiction to determine the child's best interest in allowing visitation with the nonbiological parent.

152. This follows naturally from the alternatives available to parties at the time of a break-up: sue, walk away from the relationship, giving up any unresolved claims, or attempt to negotiate a settlement. *See, e.g., infra* notes 155–221 and accompanying text.

153. *See infra* Part VI.B.1 (discussing the argument that contracts between intimates should not be enforceable because the parties did not intend for there to be legal consequences for their promises, and thus, there is no mutual assent).

154. *See, e.g., infra* notes 155–221.

The nondisclosure problem arises in these cases when one party fails to disclose material information during the course of negotiating the settlement. This problem may arise between married persons who attempt to separate via a private agreement rather than an adjudicated divorce. In one case, a woman concealed a $1,336,000 share in a lottery jackpot from her husband during the divorce process.[155] The court granted the husband all of the lottery winnings in damages.[156] The nondisclosure problem also arises in cases involving "paternity" settlements in which the putative father discovers that he is not the biological father or the woman never delivers a baby because of a miscarriage or, in some cases, because she was never pregnant.[157]

These paternity cases provide an excellent opportunity to study the viability of the norm of nondisclosure in contracts between intimates for two reasons. First, there is a long history of cases on point, providing an ample record of the common law development of this problem. Second, judges and litigants in these cases struggle to articulate justifications for the settled-upon outcome. Indeed, in approaching these cases, judges have often focused on tangential issues such as consideration, public policy, or even blackmail, while missing—or perhaps ducking—the central issue of whether both parties negotiated openly and in good faith.[158]

A. Common Law Governing Paternity Settlements

There is a rich common law history interpreting contracts for out-of-court settlement of paternity claims. Historically, paternity claims brought infamy on the accused in the form of quasi-criminal charges for bastardy—the crime of fathering a child out of wedlock.[159] For hundreds of years, putative fathers of nonmarital children have used private contracting to protect themselves against the stigma of bastardy prosecutions, and more recently, to avoid court orders to pay child support and maintenance.[160]

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155. *In re* Marriage of Rossi, 108 Cal. Rptr. 2d 270, 272 (Ct. App. 2001).

156. *Id.* at 278.

157. *See, e.g.*, Fiege v. Boehm, 123 A.2d 316, 321 (Md. 1956). The court in *Fiege* enforced a contract that forbore a bastardy prosecution even though blood tests determined that the child in question was not genetically related to the father. *Id.*; *see also* Heaps v. Dunham, 95 Ill. 583, 590 (1880) (raising the issue of the duty to disclose when the woman negotiates prior to having confirmed her pregnancy, and later gets her period).

158. *See, e.g.*, Jordan v. Knafel, No. 02 CH 19143 at 9–10 (Cir. Ct. of Cook County, Ill. Jun. 12, 2003).

159. Bastardy proceedings were treated as criminal matters, but they actually were civil in purpose. Most state bastardy laws had, as their purpose, the goal of preventing nonmarital children from becoming wards of the state. However, as the mothers were the distinct beneficiaries of these acts, along with the children, bastardy prosecutions were far more like the enforcement of civil obligations than they were like other criminal prosecutions. *See, e.g.*, *Fiege*, 123 A.2d at 321.

160. *See generally* R.W. Gascoyne, Annotation, *Validity and Construction of Putative Father's Promise to Support or Provide for Illegitimate Child*, 20 A.L.R.3d 500, 512–15 (1968).

There are two basic approaches to these settlements of legal claims. First, the contract may involve the father's explicit promise to pay a lump-sum settlement to the mother in exchange for her promise not to bring bastardy or paternity proceedings against him.[161] Second, the father may make an express promise to provide periodic support for the nonmarital child.[162] Because the common law did not require fathers to support their nonmarital children, the second type of contract was vulnerable to claims of unenforceability on the grounds that it lacked consideration.[163] Nineteenth and early twentieth-century courts often avoided this problem by the doctrine of moral obligation, reasoning that the putative father's moral obligation to support the child, combined with his express promise to do so, constituted sufficient consideration to render the contract enforceable.[164] Modern state laws compelling a father to pay child support furnish sufficient consideration to create an enforceable contract.[165]

The common law has long recognized that the forbearance of legal claims is sufficient consideration to support a contract.[166] Indeed, modern common law goes further than this. By the mid-twentieth century, courts began holding that the forbearance of even an invalid legal claim was sufficient consideration to support a contract, provided that, at the time of contracting, the party surrendering the claim possessed a good-faith belief that the claim was potentially valid.[167] There are two primary justifications underlying this rule. First, forbearance of a legal claim is

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161. For a review of the numerous courts that enforced support agreements to forebear a bastardy prosecution, see *id.* One of the more notable cases on this topic is *Fiege*, 123 A.2d 316. There the court enforced a contract that forbore a bastardy prosecution even though blood tests determined that the child in question was not genetically related to the father. *Id.* at 323.

162. Gascoyne, *supra* note 160, at 510.

163. *See id.* at 519–20.

164. *See, e.g.*, Trayer v. Setzer, 101 N.W. 989 (Neb. 1904); Todd v. Weber, 95 N.Y. 181 (1884). Not all courts accepted the notion that moral obligation constituted sufficient consideration. The following cases rejected this theory, and found for the defendants on the grounds that such contracts lacked consideration: Davis v. Herrington, 13 S.W. 215 (Ark. 1890); Wiggins v. Keizer, 6 Ind. 252 (1855) (reported as 6 Ind. 201 on LEXIS); Mercer v. Mercer, 7 S.W. 401 (Ky. 1888).

165. *Fiege*, 123 A.2d at 320.

> [W]here statutes are in force to compel the father of a bastard to contribute to its support, the courts have invariably held that a contract by the putative father with the mother of his bastard child to provide for the support of the child upon the agreement of the mother to refrain from invoking the bastardy statute against the father, or to abandon proceedings already commenced, is supported by sufficient consideration.

Id. (citing Beach v. Voegtlen, 53 A. 695 (N.J. Sup. Ct. 1902); Thayer v. Thayer, 127 S.E. 553 (N.C. 1925); Jangraw v. Perkins, 60 A. 385 (Vt. 1905)).

166. *See, e.g.*, Brooks v. Haigh, 10 Ad. & E. 323, 113 Eng. Rep. 124 (Ex. 1840) (holding that the surrender to the guarantor of a written guarantee was sufficient consideration to bind the guarantor to his promise to pay, even if the original guarantee was unenforceable owing to the statute of frauds). *See generally* CALAMARI & PERILLO, *supra* note 3, at 180.

167. CALAMARI & PERILLO, *supra* note 3, at 180 & n.5.

consideration because it represents one party's agreement to refrain from acting upon a legal right.[168] Therefore, it constitutes a legal detriment. The party who bargains for this detriment benefits by avoiding the costs of litigation, which can impact that party's money, reputation, time, and emotional health. A defending party must often endure these costs regardless of whether the claim ultimately prevails.[169] Indeed, even successful defendants must pay the costs of defending litigation.[170] As such, even the release of a legal claim that ultimately proves invalid may constitute valuable consideration.[171] The second justification for enforcing these contracts is public policy favoring out-of-court settlements.[172]

B. Paternity Settlements and the Problem of Nondisclosure

The problem of nondisclosure can be raised by the subset of paternity-settlement cases in which a putative father promises money to a pregnant woman in exchange for her waiver of legal claims, only to learn some time later either that the woman was not (or was no longer) pregnant, or that he was not the child's father.[173] In these cases, the man generally challenges the contract on grounds of

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168. *See Fiege*, 123 A.2d at 321 ("In the early part of the Nineteenth Century, an advance was made from the criterion of the early authorities when it was held that forbearance to prosecute a suit which had already been instituted was sufficient consideration, without inquiring whether the suit would have been successful or not." (citing Longridge v. Dorville, 5 B. & Ald. 117, 106 Eng. Rep. 1136 (K.B. 1821))).

169. *See* John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 AM. U. L. REV. 1567, 1569 (1993). Rule 54(d)(1) of the Federal Rules of Civil Procedure states: "Except when express provision therefor is made either in a statute of the United States or in these rules, costs other than attorneys' fees shall be allowed as of course to the prevailing party unless the court otherwise directs . . . ." FED. R. CIV. P. 54(d)(1). The U.S. Code limits this rule to costs numerated in 28 U.S.C. § 1920, which excludes attorneys' fees—typically the largest expense in litigation. 28 U.S.C. § 1920 (2000). For an interesting discussion of the policies that shape cost awards, see John M. Blumers, Note, *A Practice in Search of a Policy: Considerations of Relative Financial Standing in Cost Awards Under Federal Rule of Civil Procedure 54(d)(1)*, 75 B.U. L. REV. 1541(1995).

170. Vargo, *supra* note 169, at 1569.

171. *Fiege*, 123 A.2d at 323.

172. *See* Stanspec Corp. v. Jelco, Inc. 464 F.2d 1184, 1187 (10th Cir. 1972); Cent. Kan. Credit Union v. Mut. Guar. Corp., 886 F. Supp. 1529, 1536 (D. Kan. 1995); Messer v. Wash. Nat'l Ins. Co., 11 N.W.2d 727, 731–32 (Iowa 1943); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 74, cmt. a (1981) (discussing public policy).

173. *See, e.g.*, Heaps v. Dunham, 95 Ill. 583 (1880); Thompson v. Nelson, 28 Ind. 431 (1867); Pflaum v. McClintock, 18 A. 734 (Pa. 1889); T.J. Oliver, Annotation, *Avoidance of Lump-Sum Settlement or Release of Bastardy Claim on Grounds of Fraud, Mistake, or Duress*, 84 A.L.R.2d 593, 595 (1962) ("It appears that in accordance with the principles applicable to settlements and releases in general, a lump-sum settlement or release of a bastardy claim may be avoided on the grounds for fraud, duress, or mistake." (footnote omitted)). The issue of the duty to disclose also is raised in cases in which the woman negotiates prior to having confirmed her pregnancy and later gets her period. *Heaps*, 95 Ill. at 590. Theoretically, it might also be relevant in cases in which the settlement is negotiated very early in the pregnancy, and the woman later either miscarries or has an abortion.

fraudulent misrepresentation or mutual mistake.[174] Many of these cases have been filed in recent decades, as blood-typing and DNA technology can now provide a putative father with irrefutable evidence of nonpaternity.[175] Perhaps the most comprehensive opinion on this issue is found in *Fiege v. Boehm*, a 1956 Maryland decision.[176] That case involved a suit by Hilda Louise Boehm against Louis Gail Fiege for breach of his promise to support a child that he purportedly fathered.[177] Although he denied having had sexual relations with Ms. Boehm, Fiege promised to pay her birth-related expenses and provide ten dollars per week for child support until the child reached the age of twenty-one in exchange for Boehm's promise not to bring a bastardy claim against him.[178] Fiege made various payments for two years following the child's birth, after which newly available blood-typing technology established that he could not have fathered the child.[179]

Without the support payments, Boehm ultimately relinquished her three-year-old child for adoption.[180] After losing her bastardy case, Boehm sued Fiege on the underlying contract, claiming that she had refrained from bringing bastardy charges in exchange for and reliance upon Fiege's promises of support.[181] In response, Fiege contended that the contract was unenforceable because the bastardy claim was invalid and thus could not constitute adequate consideration.[182]

The *Fiege* court's analysis began with British law, noting that early common law distinguished between "good" and "bad" claims, and held that a promise to refrain from bringing a bad claim was not sufficient consideration.[183] Later cases, encouraging the settlement of claims, altered the doctrine to render legally enforceable a promise to forbear further legal action on a suit that already had been instituted, regardless of whether the suit ultimately would have been successful.[184] By the mid-nineteenth century, it was clear in both England and the United States that forbearance on even a doubtful claim would constitute consideration, provided the parties thought there was a bona fide legal claim between them at the time of contracting.[185] In light of these findings, the *Fiege* court held that a promise not to prosecute an invalid claim may constitute

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174. *See, e.g.*, *Heaps*, 95 Ill. 583 (claiming fraud); *Thompson*, 28 Ind. 431 (same).

175. Such testing has become so established that courts tend to show little sympathy to putative fathers who failed to avail themselves of it prior to acknowledging paternity and beginning to pay child support. *See, e.g.*, *In re* Paternity of Cheryl, 746 N.E.2d 488 (Mass. 2001) (denying relief to a father who paid child support for several years before challenging the paternity judgment).

176. 123 A.2d 316 (Md. 1956).

177. *Id.* at 318.

178. *Id.* at 318–19.

179. *Id.* at 319–20.

180. *Id.* at 319.

181. *Id.*

182. *Id.* at 320.

183. *Id.* at 321.

184. *Id.* (citing Longridge v. Dorville 5 B. & Ald. 117, 106 Eng. Rep. 1136 (K.B. 1821)).

185. *Id.* (citing Hartle v. Stahl, 27 Md. 157, 172 (1867); RESTATEMENT (FIRST) OF CONTRACTS § 76(b) (1932)).

consideration provided there is both a subjective belief shared by the parties in the potential validity of the claim, and that belief is objectively reasonable.[186]

This holding makes it plain that "[i]t is immaterial whether defendant was the father of the child or not."[187] Likewise, the court rejected the assertion that these cases reflect a form of extortion or duress, in that a man may feel compelled to enter into the contract because he fears harm to his reputation.[188] On the contrary, the *Fiege* court reasoned that:

> The fact that a man accused of bastardy is forced to enter into a contract to pay for the support of his bastard child from fear of exposure and the shame that might be cast upon him as a result . . . does not lessen the merit of the contract, but greatly increases it.[189]

In support of this claim, the court cited several cases involving "paternity" settlements in which the woman never delivers a baby, either due to a miscarriage or because she never was pregnant.[190] In these cases, the woman nonetheless is permitted to recover on promises to pay a lump-sum settlement, simply because, at the time they reached the settlement, both parties shared a good-faith belief that the woman was pregnant and that their deal would avoid her seeking judicial recourse against the man.[191] In all of these cases, the men had other choices when they agreed to, or even proposed, these out-of-court settlements. To the extent that they were skeptical about the baby's paternity, they could have challenged the mother's assertion by pressing her to promise that she had had no other sexual partners during the relevant timeframe. If the mother made such a claim, and then was later shown to have lied, their contract clearly would be voidable due to her misrepresentation.[192]

In addition, the man simply could have waited for her to bring suit and required her to prove, in court, her charges that he was the father of her child.[193] A third alternative emerged once paternity testing became available. Blood-group

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186. *Id.*

187. *Id.* at 323.

188. *See id.* at 322.

189. *Id.* (citing Hays v. McFarlan, 32 Ga. 699 (1861); Hook v. Pratt, 78 N.Y. 371 (1879)).

190. *Id.* at 361–62 (citing Heaps v. Dunham, 95 Ill. 583, 590 (1880); Thompson v. Nelson, 28 Ind. 431 (1867); Pflaum v. McClintock, 18 A. 724 (Pa. 1889)).

191. *See, e.g.*, *Heaps*, 95 Ill. at 590 ("[T]here is great doubt from the evidence whether [Dunham] was pregnant, yet so far as the charge of bastardy is concerned, as complainant voluntarily settled and gave his notes in settlement of the prosecution which had been commenced against him, he must be concluded by that settlement."); *see also Thompson*, 28 Ind. 431; *Pflaum*, 18 A. 724.

192. "If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient." RESTATEMENT (SECOND) OF CONTRACTS § 164(1) (1981).

193. This sort of claim necessarily would be raised in the context of a bastardy prosecution. William E. Nelson, The 2002 Kormendy Lecture: Authority and the Rule of Law in Early Virginia, *in* 29 OHIO N.U. L. REV. 305 (2003), at 325–27 (describing the weaknesses of such laws in early colonial America).

testing to possibly exclude paternity began in the 1940s, and modern DNA testing can now establish paternity to a very high degree of certainty.[194] Men accused of fathering a child can insist on a paternity test prior to agreeing to pay any money in support of the child. Thus, this line of decisions reasons that the men freely entered into these bargains, motivated perhaps by the desire to avoid stigma or shame and also by a sense of moral obligation to the mother.[195] Regardless, the mother's agreement not to pursue legal action is sufficient consideration to uphold these bargains.[196]

This line of cases also enshrines a norm of nondisclosure. After all, the men in these cases relied, to their detriment, on the women's assertions that the men had impregnated them.[197] Had the women disclosed that they had other lovers during the relevant timeframe, these men might have altered their bargains dramatically. Thus, the law endorses the traditional norm of nondisclosure by failing to require disclosure of this material information.

C. Contemporary Discomfort with "Nonpaternity" Paternity Settlements: Alternatives to Enforcement

Even though these contracts regarding the surrender of invalid legal claims are supported under the traditional contract law doctrine of consideration, as any professor who has taught *Fiege v. Boehm* in a first-year Contracts course will agree, these cases are nonetheless controversial.[198] This discomfort exists even in commercial cases.[199] Hindsight typically reveals these deals to be unfavorable to

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194. *See generally* DANIEL L. HARTL, A PRIMER OF POPULATION GENETICS (3d ed. 2000); ALEXANDER S. WIENER, BLOOD GROUPS AND TRANSFUSION 7–34 (3d ed. 1943); Alf Ross, *The Value of Blood Tests as Evidence in Paternity Cases*, 71 HARV. L. REV. 466 (1958); E. Donald Shapiro, Stewart Reifler & Claudia L. Psome, *The DNA Paternity Test: Legislating the Future Paternity Action*, 7 J.L. & HEALTH 1 (1992–1993); Jule B. Greene, Comment, *"Blood Will Tell!,"* 1 MERCER L. REV. 266 (1950); Lewis R. Williams, Jr., Comment, *Evidence—The Use of Blood Grouping Tests in Disputed Parentage Proceedings—A Scientific Basis for Discussion*, 50 MICH. L. REV. 582 (1952); John A. Yantis, Comment, *Blood Test Exclusions as Decisive Evidence of Nonpaternity*, 24 ROCKY MT. L. REV. 237 (1952).

195. *See supra* notes 160, 164 and accompanying text.

196. *See* Gascoyne, *supra* note 160, at 510 ("At the present time, when statutes by which a putative father may be compelled to aid in the support and maintenance of his bastard child are generally in force, the courts have less difficulty in finding a legal consideration for contracts of this character, for unquestionably the impending likelihood of being compelled, by legal proceedings, to make provision for the support of an illegitimate child furnishes a sufficient consideration for a voluntary contract to provide for the child, and thus escape prosecution, which is usually one of the objects of the agreement.").

197. *See, e.g.*, Fiege v. Boehm, 123 A.2d 316 (Md. 1956).

198. The case appears in at least two popular first-year Contracts casebooks: JOHN D. CALAMARI, JOSEPH M. PERILLO & HELEN HADJIYANNAKIS BENDER, CASES AND PROBLEMS ON CONTRACTS 206 (4th ed. 2000); EDWARD J. MURPHY, RICHARD E. SPEIDEL & IAN AYRES, STUDIES IN CONTRACT LAW 75 (6th ed. 2003).

199. *See, e.g.*, Aviation Contractor Employees v. United States, 945 F.2d 1568 (Fed. Cir. 1991); Wickman v. Kane, 766 A.2d 241 (Md. Ct. Spec. App. 2001). Although the modern view is that "the surrender of an invalid claim serves as consideration if the

the party who has paid a settlement rather than risking a lawsuit that is later exposed as baseless.[200] It seems the party who relinquished the legal claim procured the deal unfairly, perhaps by threatening the other party with litigation.[201] In addition, often the relinquishing party knew that the legal claim was invalid.[202] These concerns are enhanced in the context of paternity-related settlements, where the nature of the charges is inflammatory, and the woman is in a much better position to assess the potential validity of her claim of paternity than the man.

Thus, students recoil against Boehm's recovery as an unfair victory. Perhaps another reason for their discomfort stems in part from the fact that the women involved in these contracts are unmarried and "promiscuous," in that they had more than one sexual partner at more or less the same time. This is not to suggest that law students are particularly prudish in their sexual sensibilities, but rather that, perhaps due to the stultifying effects of the first-year law school experience, or perhaps due to the tendency of law students to find and follow rules, they tend to judge harshly those who are not playing by the rules of monogamy that ostensibly govern sexual relationships.[203] When I teach this case, I attempt to explore whether students' frustration with the outcome stems from their objection to Boehm's sexual behavior or her contracting behavior. I ask whether Hilda Boehm still would have been able to recover on the contract if she had had several lovers during the month she conceived, or even several dozen lovers. The class does not like my answer, which is, so long as she possessed a good-faith belief that the man with whom she entered into the settlement was in fact the father of her child, the contract is valid.

I follow this line of inquiry by asking whether, assuming that she had two lovers in the month during which she conceived, she could have entered into two separate contracts settling prospective paternity claims, one with each lover. This question directly addresses the possibility that she was not acting in good faith. If she entered into the two contracts without disclosing to either man that she had an equally compelling belief that another man could be the father, each contract might be invalid because she did not possess an objectively reasonable, good-faith belief that the particular man was responsible for her pregnancy.[204] These contracts

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claimant has asserted it in good faith and a reasonable person could believe that the claim is well founded," this view is not unanimous. *See* CALAMARI & PERILLO, *supra* note 3, at 186.

200. *See, e.g.*, *Fiege*, 123 A.2d at 319 (finding the defendant contractually obligated to pay child support for a child that was later determined not to be biologically related to him).

201. *See, e.g.*, Heaps v. Dunham, 95 Ill. 583, 586 (1880) (noting that Heaps was told by Dunham that "unless a settlement was made he would be prosecuted for rape and seduction, in addition to the charge of bastardy then pending").

202. *E.g.*, *id.* at 590 (finding that "there is great doubt from the evidence whether [Dunham] was pregnant").

203. Of course, there is a remarkable gap between monogamy on the books and monogamy in practice! Elizabeth F. Emens, *Monogamy's Law: Compulsory Monogamy and Polyamorous Existence*, 29 N.Y.U. REV. L. & SOC. CHANGE 277, 284 (2004) (providing a fascinating discussion of the legal enforcement of monogamy-related norms).

204. Recall that the *Fiege* case turned on the fact that the judge found that Hilda Boehm held a good-faith belief that Louis Fiege had impregnated her, in spite of the fact that she had had more than one lover during the relevant timeframe. Thus, evidence of

would be on a firmer footing if she had told each of the men that she had a good-faith belief that there was a fifty-percent chance that he was the father of her child.

Seen from this perspective, what remains disconcerting about the contract between Fiege and Boehm is the suspicion that Hilda Boehm was less than candid with Louis Fiege when she asserted her belief that he had impregnated her. Students are not alone in finding the "nonpaternity" paternity settlement cases problematic. Consider the outcome in a more recent rendition of this fact pattern: a case involving the famous basketball player, Michael Jordan, and a woman with whom he had an extramarital sexual relationship, Karla Knafel.[205]

In the winter of 1989, Michael Jordan, then a newly married professional basketball player on the verge of worldwide stardom, pursued an intimate relationship with Karla Knafel, an aspiring singer and model.[206] Like Jordan, Knafel was intimately involved with another at the time of their affair.[207] After a series of unprotected sexual encounters, Knafel became pregnant.[208] According to Knafel, when she informed Jordan that she was pregnant, he asked her if she was sure that he was the father.[209] She replied that she believed that he was, and Jordan offered to pay her $5 million when he retired from professional basketball in exchange for her refraining from "going public" about their relationship or suing him for paternity.[210] Knafel accepted his offer and neither publicized her story nor pursued a paternity action against Jordan.[211]

When Knafel's baby was born, in July 1991, genetic tests revealed that Jordan was not the child's father.[212] Nonetheless, he subsequently reaffirmed his deal with Knafel.[213] In the winter of 2001, when Jordan's retirement became

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nonmonogamy need not, standing alone, preclude one from forming a good-faith belief as to paternity.

205. Jordan v. Knafel, 823 N.E.2d 1113 (Ill. App. Ct. 2005).

206. *Id.* at 1116.

207. Amended Verified Answer and Counterclaims of Karla Knafel at 8, Jordan v. Knafel, No. 02 CH 19143 (Cir. Ct. of Cook County, Ill. Feb. 7, 2003) ("Early in Karla's and Jordan's relationship, she had told him that she was dating and sleeping with another man.").

208. *Jordan*, 823 N.E.2d at 1116.

209. Amended Verfied Answer and Counterclaims of Karla Knafel, *Jordan, supra* note 207, at 9 ("Jordan asked her if she was sure, and she replied that she believed the baby was his. Although Jordan knew about Karla's relationship with the other man, he did not challenge her belief.").

210. *Jordan*, 823 N.E.2d at 1117.

211. *Id.*

212. Jordan v. Knafel, No. 02 CH 19143, at 5 n.2 (Cir. Ct. of Cook County, Ill. June 12, 2003).

213. *Id.* It is worth noting that this may have been strategically wise, given what he gained from her silence. First, her silence enabled him to maintain his image as a wholesome family man, which surely helped secure his lucrative advertising contracts with companies like Nike and Gatorade. In 1991, in addition to his $2.5 million annual salary from the Chicago Bulls, Michael Jordan earned between $6 million–$8 million per year endorsing products for companies such as Nike, Chevrolet, Coca-Cola, McDonald's, and Wheaties. Chuck Stogel, *The 100 Most Powerful People In Sports; CHAIN REACTION; Impact of CBS' Spending Spree Makes Tisch Most Potent*, THE SPORTING NEWS, Jan. 7,

imminent, Knafel's attorneys contacted Jordan with regard to his debt to her.[214] Jordan responded by suing Knafel for extortion.[215] Knafel's attorneys responded with a counterclaim for breach of contract.[216] Trial judge Richard Seibel dismissed the case, finding that the deal between them was an unenforceable effort on her part to secure "hush money."[217] The contract was held void as against public policy.[218]

Judge Seibel's opinion echoes the sensibilities of my first-year students that there is something unseemly about seeking judicial enforcement of a contract predicated upon the relinquishment of an invalid legal claim. The legal foundation for the opinion, however, is far from solid. Rather than directly addressing the process of contract formation and the concern that Knafel was not sufficiently forthcoming about her other partner when negotiating the paternity settlement with Jordan, he viewed the bargain as an illegal effort on Knafel's part to procure money from Jordan.[219] In situating their bargain within the context of blackmail, Judge Seibel found that Jordan and Knafel's out-of-court settlement was "extortionate" and thus void against public policy.[220] This approach yielded the desired effect of avoiding enforcement of a deal the court found distasteful.[221] Nonetheless, it is legally untenable and useless in charting the boundaries of other intimate relationship contracts.[222]

1991, at S-2. At the end of the 1990s, Jordan's peak celebrity years, his annual endorsements earned him $16 million from Nike alone. *See* DAN WETZEL & DON YAEGER, SOLE INFLUENCE: BASKETBALL, CORPORATE GREED, AND THE CORRUPTION OF AMERICA'S YOUTH 5 (2000), *excerpt available at* http://www.powerbasketball.com/soleinfluence.html.

214. Amended Verified Answer and Counterclaims of Karla Knafel, *Jordan*, *supra* note 207, at 12.

215. *Jordan*, 823 N.E.2d at 1116.

216. *Id.* at 1115.

217. Jordan v. Knafel, No. 02 CH 19143 at 9–10 (Cir. Ct. of Cook County, Ill. Jun. 12, 2003).

218. *Jordan*, 823 N.E.2d at 1115.

219. Jordan v. Knafel, No. 02 CH 19143 at 9–10 (Cir. Ct. of Cook County, Ill. Jun. 12, 2003).

220. *Id.*

221. *See id.*

222. It would seem that the Illinois appellate court agrees with this assessment, as, in February 2005, it overturned the decision and remanded the case for trial. *Jordan*, 823 N.E.2d 1113. The facts underlying the Jordan-Knafel agreement reveal that it could not have amounted to extortion because the agreement was not the result of a threat by Knafel, but, rather, was proposed by Jordan. For more on the significance of threats in establishing extortion or blackmail, see George P. Fletcher, *Blackmail: The Paradigmatic Crime*, 141 U. PA. L. REV. 1617, 1621–23 (1993). Nor did the resulting deal, in particular Knafel's promise to refrain from publicizing the affair, violate public policy. She had a legal right to sell her story, just as Jordan surely had a legal right to attempt to buy her story from her. The resulting agreement therefore was little more than a garden-variety out-of-court settlement. Nor was the agreement flawed due to mutual mistake. In this case, both parties either were aware, or reasonably should have been aware, of the risk of a mistake of fact. More importantly, the famous case of *Sherwood v. Walker*, 33 N.W. 919 (Mich. 1887), in which rescission of a contract was permitted on the grounds that neither the seller nor the buyer of a "barren" cow even suspected that it could be fertile, is essentially dead law. *See* Lenawee

Ironically, both the Knafel-Jordan and the Feige-Boehm deals could have been resolved much more persuasively had the judge applied the basic rules that govern the duty to disclose in other contractual contexts. For instance, nondisclosure by a party to a contract for the sale of goods would trigger concerns regarding bad faith and perhaps even a breach of warranty.[223] Under the common law of torts and contracts, Knafel's nondisclosure might have qualified as a material misrepresentation, permitting Jordan to rescind the agreement or seek damages.[224] It is this resistance to imposing a duty to disclose in contracts between intimates that I will explore in the following Part.

V. EFFICIENCY, FAIRNESS, AND THE DUTY TO DISCLOSE BETWEEN INTIMATES

The irony of the judicial resolutions of the Knafel-Jordan and Fiege-Boehm deals is that neither court applied the basic rules of contract formation that would govern in almost all nonintimate settings. Specifically, the parties seemingly were exempted from the common law duty to disclose information in cases in which one party is aware that the other is operating under a "mistake . . . as to a basic assumption" on which the negotiations are based.[225]

Recall that the law's abandonment of *caveat emptor* and embrace of a broader norm favoring disclosure were driven by a conviction that considerations of both efficiency and fairness demand that, to the extent possible, parties negotiating agreements should do so on equal footing.[226] When one party conceals material information, there is an imbalance in the power between the parties that can undermine the fairness of the resulting contract. The seeming retention of *caveat emptor* when the parties are intimates, rather than strangers, suggests that the law has a different calculus of the underlying risks in such cases.[227] However, the justifications that support a broader duty of disclosure in arm's-length contracts apply with equal, if not greater, force in the context of agreements between intimates.

County Bd. of Health v. Messerly, 331 N.W.2d 203, 209 (Mich. 1982) (confining Sherwood to its facts). In another case, *Wood v. Boynton*, the court refused to rescind the sale of a "pretty stone," which turned out to be a valuable diamond, holding that both parties took the risk that the stone might be more or less valuable than the contract price. 25 N.W. 42, 44 (Wis. 1885). What is critical to the outcome of the Jordan case is that both parties knew that paternity had not been verified, and could not be until after the child's birth. Thus, in keeping with contemporary law governing mutual mistake, rescission will not be permitted.

223. *See, e.g.*, U.C.C. §§ 1-201, 1-304, 2-312 to 2-318 (2005).

224. *See* RESTATEMENT (SECOND) OF CONTRACTS § 161 (1981); RESTATEMENT (SECOND) OF TORTS § 551 (1977).

225. *See* RESTATEMENT (SECOND) CONTRACTS § 161(b); *see also* RESTATEMENT (SECOND) OF TORTS § 551(e).

226. *See supra* notes 58–59 and accompanying text.

227. Indeed, in some cases the law goes farther than merely permitting nondisclosure, enforcing promises predicated upon affirmative misrepresentations. *See supra* note 98 and accompanying text (regarding the abolition of the tort of seduction).

A. Barriers to Gathering Material Information Between Intimates

One might argue that the difference between the commercial setting and the intimate setting is that the material information in commercial cases may be difficult or expensive for the ignorant party, typically the buyer, to unearth. Indeed, this calculus is the basis for the contemporary theories explaining the viability of *Laidlaw v. Organ* and the justification for requiring sellers, but not buyers, to disclose material information pertaining to the value of a specific commodity or property.[228]

Expanding upon this reasoning, one might argue that, as with sellers, any information that is "material" to intimates is readily accessible to both parties by communicating. Thus, the law should not require disclosure of material information by either party, but instead, should encourage the parties to proceed cautiously, taking care to protect themselves from exploitation due to their own ignorance. A closer examination of the actual context in which intimates negotiate agreements shows this supposition is unfounded. Instead, there are marked barriers, both practical and psychological, to eliciting information that is vital to the integrity of the contract.

1. Practical Barriers to Eliciting Material Information Between Intimates

The practical barriers to gathering material information in bargaining between intimates are most easily understood by considering the role of truth in the process of negotiating access to sexual intimacy. For instance, how might a person ascertain the truth about a partner's assertions regarding contraception? It would not be practical for laypeople to investigate whether their partners are taking the pill or had surgery to prevent conception. Laws protecting patient confidentiality prohibit doctors from responding to inquiries about contraception and fertility from a patient's partner.[229] In contrast, in other contexts, such as the

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228. For instance, Professor Kronman's theory about the viability of buyer nondisclosure is predicated upon the difference between "deliberately" acquired information and that which is "casually acquired." One might be said to have a property right in the former, having invested resources in order to obtain such information. Thus, a rule mandating disclosure of information obtained by a deliberate search might be viewed as depriving the person who invested resources of her "property." Kronman, *supra* note 12, at 15. His solution was to endorse a norm of nondisclosure only in those cases in which it was reasonable to assume that the information at issue was acquired deliberately, through an investment of resources, as opposed to "casually." *Id.* at 18; *see also supra* note 7 (explaining Professor Barnett's alternative theory for justifying nondisclosure in exceptional cases).

229. There are various legal theories that safeguard the confidentiality of medical information. These include common law rights stemming from tort law, fiduciary duty, and breach of contract. For an excellent summary of the law governing the confidentiality of medical information, see 1 BARRY R. FURROW ET AL., HEALTH LAW §§ 4-32 to 4-33, at 150–55 (2d ed. 2000). *See also* Humphers v. First Interstate Bank of Or., 696 P.2d 527, 533–36 (Or. 1985) (brief discussion of relevant caselaw). In addition, federal and state statutes protect the confidentiality of this information. *See, e.g.*, Health Insurance Portability and Accountability Act (HIPAA) of 1996, Pub. L. No. 104–191, 110 Stat. 1936 (1996); FLA. STAT. ANN. § 395.3025 (West 2005); 740 ILL. COMP. STAT. 110/15 (2004).

purchase of property, one might seek information from the seller's neighbors or acquaintances. In this case, former sexual partners, even if they are known, are not necessarily a reliable source of information about a new partner (who is, of course, their ex-partner).

The only realistic option is to have a candid discussion with one's partner and hope for full disclosure. As the following Subpart will explain, there are enormous psychological barriers to conducting such a conversation, let alone to ascertaining whether a partner is telling the truth.

2. Psychological Barriers to Eliciting Material Information Between Intimates

Let us consider the psychological context of negotiations between intimates by returning to the context of the contract negotiation between Fiege and Boehm. When Hilda Boehm told Louis Fiege that she was pregnant with his child, there were many questions he could have asked her that would have triggered her duty to disclose that she had another lover. There is no reason to doubt that he would have found this information material to his willingness to promise to support the child. Two questions arise: why didn't he ask the right questions, and why didn't he know, or even suspect, that she was lying?

As to the first question, intimate relationships are generally distinct from other human experiences, such as buying a car. Although it may be unwise, common sense dictates that individuals tend to be far more trusting of their lovers than they are of used car dealers. Recent studies bear out this proposition.[230]

Perhaps the best evidence of this comes from studies involving high-risk sexual activity and the failure of those who know about the risks of unprotected sexual contact to take precautions against the transmission of HIV and other sexually transmitted diseases.[231] Numerous investigators have explored the problem of HIV transmission among young people, and their findings yield interesting insights into interpersonal communication in the context of sexual relationships.[232] First, studies demonstrate that risk perception is not a purely objective evaluation, but rather, it can be influenced by the context in which the subject gauges his risk.[233] When that context involves a sexual relationship, studies indicate that, despite accurate knowledge about the risks of unprotected sex, "the construct of trust within [the] sexual relationship[] is an issue that frequently overrides the threat of HIV infection . . . ."[234]

This tendency to trust, or to underestimate risk, may be compounded by a phenomenon known as psychological maintenance, whereby "people inaccurately

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230. *See* Lisbeth G. Lane & Linda L.L. Viney, *Toward Better Prevention: Constructions of Trust in the Sexual Relationships of Young Women*, 32 J. APPLIED SOC. PSYCHOL. 700, 709–11, 714 (2002); *see also* Trace S. Kershaw et al., *Misperceived Risk Among Female Adolescents: Social and Psychological Factors Associated with Sexual Risk Accuracy*, 22 HEALTH PSYCHOL. 523 (2003).

231. *See* Kershaw et al., *supra* note 230, at 523.

232. *Id.* at 524.

233. *Id.*

234. Lane & Viney, *supra* note 230, at 700 (citing studies).

perceive their risk because acknowledging self-destructive behavior damages psychological well-being (for example causes anxiety and threatens self-esteem)."[235] In essence, psychological maintenance theory posits that it can be distressing for an individual to acknowledge the extent of risk she faces in a sexual relationship.[236] As a result, individuals may be inclined to grossly underestimate their risks, thus preserving "romance" and "ideals of exclusivity."[237]

In light of these findings, one can surmise that it would have been decidedly uncomfortable for Louis Fiege to ask Hilda Boehm whether she had other lovers. In the context of a casual sexual relationship in the 1950s, asking Boehm about other lovers might have insulted her by suggesting that she was promiscuous.[238] Moreover, Fiege may not have wanted to know whether Boehm had other lovers before him. Even when pursuing a relatively casual connection, intimacy involves making oneself vulnerable to another, allowing the other to come closer than arm's-length. One places one's ego on the line, risking ridicule and rejection, in the hopes of some greater gratification.

Perhaps the agreement between Fiege and Boehm should be treated differently because it occurred at the end of the relationship rather than during it. One might suppose that there would be less psychological inhibition and a greater inclination to protect one's own interests in an "exit" agreement. Interestingly, psychological research does not bear this out. Instead, particularly in the context of divorcing women, it seems that there are numerous psychological and contextual inhibitions that undermine the ability to negotiate at arm's-length.[239] Professor Penelope Bryan has written extensively on the problems of coercion and exploitation in divorce settlements, illustrating the manner in which naïve trust and the traditional roles played by each spouse during the marriage contribute to the tendency for wives to accept a poor settlement.[240]

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235. Kershaw et al., *supra* note 230, at 524.

236. *Id.*

237. Lane & Viney, *supra* note 230, at 700 (citing R.F. Galligan & D.J. Terry, *Romantic Ideals, Fear of Negative Implications, and the Practice of Safe Sex*, 23 J. APPLIED SOC. PSYCHOL. 1685 (1993)). I do not mean to suggest by this that either Louis Fiege or Michael Jordan were starry-eyed romantics in the context of the sexual relationships that gave rise to their respective paternity settlements. Nonetheless, the fact that Michael Jordan refused to use a condom when engaging in extramarital relations is indicative of an extraordinary level of risk-denial. Not only was he courting the risks of pregnancy, fathering an out-of-wedlock child, and destroying his public image, but also, given that this was 1991, he could not have been unaware that he was risking acquiring HIV and other STDs. In 1991, approximately one million people were infected with HIV nationwide, and the Centers for Disease Control had been tracking the disease for ten years. David Johnson, Timeline: AIDS Epidemic, http://www.infoplease.com/spot/aidstimeline1.html (last visited Oct. 21, 2005).

238. *See, e.g.*, RICHARD A. POSNER, SEX AND REASON 248–50 (1992) (noting American disapproval of promiscuity).

239. *See* Penelope Eileen Bryan, *The Coercion of Women in Divorce Settlement Negotiations*, 74 DENV. U. L. REV. 931, 932 (1997) [hereinafter Bryan, *Coercion*].

240. *See* Bryan, *Coercion*, *supra* note 239 at 932; *see also* Penelope Eileen Bryan, *Women's Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 BUFF. L. REV. 1153 (1999) [hereinafter Bryan, *Women's*].

Although there are many contractual contexts that might require uncomfortable questions, it is the emotional connection between the parties that distinguishes agreements between intimates from ordinary cases involving hard bargaining. When an individual buys a used car, there is no mistaking that a transaction is taking place. The key to maximizing one's self-interest is keeping focused on the transaction at hand.[241] As a result, one operates at arm's-length, specifically aiming to avoid the vulnerability that can come with an emotional attachment to a contracting partner.[242] Indeed, a good salesperson might attempt to extract a more favorable deal by confusing the buyer into believing that they are "friends." Common sense dictates that the goal of maximizing self-interest is more difficult to pursue when one cares deeply about the person with whom one is negotiating, even if the negotiation takes place at the end of a complex relationship. Thus, there is vulnerability inherent in almost any effort to negotiate a contract with a sexual intimate.

Indeed, this inhibition may have been a factor even in the contract negotiation process between Jordan and Knafel. Although their relationship seems to have been a discreet affair, it is conceivable that Jordan felt uncomfortable pressing Knafel about the details of her sexual relationships with others. According to Knafel, he asked only if she was sure that the pregnancy was his, and he did not request paternity testing.[243] It may be that Jordan failed to inquire about Knafel's other lovers because that information simply did not matter to him. Once it became clear that she was willing to go public about their relationship, he may have decided to do whatever he could to stop her.[244]

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241. This point is perhaps most clearly illustrated through a consideration of the distinctions between classical contract formation theory and relational theory. For a succinct overview of the manner in which relationships to one's contracting partner may alter the contracting process, see Jay M. Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283 (1990).

> [I]n relational contracts other common contract norms, such as maintaining the integrity of one's role within the relation and harmonizing the relation with the surrounding social matrix, are more important because of the more extensive characteristics of relational exchanges. . . . In addition, the [relational contract] framework brings to light certain features of many exchanges that neoclassical law undervalues or ignores because of its emphasis on relatively discrete, value-maximizing agreements. Values other than wealth maximization figure importantly in exchanges, . . . because the non-economic, non-market aspects of relations pervade market transactions. Sometimes relations are not mutually favorable to all parties because they arise out of social situations of inequality, so the values may include elements of coercion and dependence, contrary to the neoclassical assumption of rough equality. In other situations, values such as trust, cooperation, reciprocity, and role integrity are essential to the relationship.

Id. at 1302.

242. *See id.*

243. Amended Verified Answer and Counterclaims of Karla Knafel, *Jordan*, *supra* note 207, at 9.

244. Jordan's clean public image was vital to his lucrative endorsement business. Contracts for product endorsements typically contain morals clauses, in which "the

In addition, Jordan's failure to inquire about paternity may also have been evidence of the power of "psychological maintenance." Recall that studies suggest that the stronger one's self-image and self-confidence, the more powerful the individual's drive toward psychological maintenance, and hence, toward risk denial.[245] Either way, because Jordan asked only whether Knafel was certain about paternity, her good-faith response that she was sure, having checked with her physician about the likely timing of conception, likely was enough to protect her from liability for misrepresentation.[246]

Perhaps the more important question, then, is why Louis Fiege did not suspect, let alone know, that Hilda Boehm was keeping a secret from him. One explanation is that Fiege, like all of us, was overly sanguine about his ability to know when he was being lied to. Empirical evidence indicates that people are not very accurate in judging when someone is lying, including professionals whose jobs require them to make credibility judgments.[247] A second explanation may lie in the social construction of trust in close relationships. Relationships are predicated upon a "willingness to trust," so the more "Hobbesian" expectations that one might harbor about people in general are cast aside when it comes to an intimate.[248] Even though they were negotiating the terms of their separation, Fiege might have believed that he could trust Boehm to be fully honest because they were still in the relationship.

Considered from this perspective, the psychological barriers to gathering material information in negotiating agreements with intimates are at least as formidable as are any economic barriers in the nonintimate setting. Indeed, considering the likelihood that we are unaware of our misplaced tendency to assume we can detect lies, coupled with our resistance to pressing our partners for full disclosure because so doing risks harm to our relationships and, perhaps even

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company reserves the right to cancel the contract in the event the athlete does something to tarnish his or her image and, consequently, the image of the company or its products." Steve Carlin, *Forget What (Kobe's) Commercial Says, Image is Everything*, FORT WORTH BUS. PRESS, Sept. 3, 2003, *available at* http://www.legalpr.com/9-3-03stevecarlindavismunck.html.

245. *See, e.g.*, Kershaw et al., *supra* note 230, at 523; Carla Willig, *The Limitations of Trust in Intimate Relationships: Constructions of Trust and Sexual Risk Taking*, 36 BRIT. J. SOC. PSYCHOL. 211, 220 (1997).

246. *See* E. ALLEN FARNSWORTH, CONTRACTS § 4.12, 258 (2d ed. 1990) ("In addition to scienter, there must be intent to mislead.").

247. *See, e.g.*, Bella M. DePaulo, Julie I. Stone & G. Daniel Lassiter, *Deceiving and Detecting Deceit*, *in* THE SELF AND SOCIAL LIFE 323 (Barry R. Schlenker ed., 1985) (demonstrating individuals' tendency to overestimate truthfulness in attempting to distinguish truth from lies); Paul Ekman & Maureen O'Sullivan, *Who Can Catch a Liar?*, 46 AM. PSYCHOLOGIST 913 (1991) (examining the ability to detect lies).

248. Willig, *supra* note 245, at 218 (in intimate relationships, trust maintains the relationship as well as functions as a guarantee for safety from HIV); *see also* Steven A. McCornack & Malcolm R. Parks, *Deception Detection and Relationship Development: The Other Side of Trust*, 9 COMM. Y.B. 377, 388 (1985) (people in intimate relationships are more likely to presume their partner is truthful).

worse, to our egos, intimate relationships seem to render individuals particularly vulnerable to deception.[249]

B. Testing the Conventional Disclosure Justifications in Agreements Between Intimates

If one agrees that the emotional proximity between intimates inhibits the ability to obtain full disclosure of material information, then one must acknowledge that such inhibition likely affects the contracting parties' access to material information. Because the justification for retaining the rule permitting nondisclosure rests on the assumption that both parties have ready access to material information, evidence regarding the obstacles to obtaining such information suggests that we must reconsider the viability of this distinction.[250] There are psychological obstacles to obtaining full disclosure between intimates that are equivalent to the economic obstacles in an arm's-length transaction.[251] The rule that there is no duty to disclose material information in negotiations between intimates suggests that intimates are *better* able than those in arm's-length transactions to protect themselves from exploitation. In fact, the opposite is true. Instead, intimates are primed for deception in the relationship setting.[252] They incorrectly believe they are able to detect lies, and they avoid asking too many questions for fear of destabilizing the "trust" in the relationship[253] or their own mental health.[254] Romantic partners fail to negotiate defensively, and, as a result, they often form agreements based upon false assumptions.

Yet the question remains whether the law should intervene to protect intimates who fail to protect themselves. In answering that question, one can focus either on the process by which a contract is negotiated, or on its substance. A focus on process might lead one to conclude that the law should not intervene because the barriers to obtaining full disclosure in negotiations between intimates tend to be emotional and intangible, rather than structural, as in the case of, say, insider trading.[255] Individuals are not *unable* to negotiate defensively with an intimate, but

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249. *See* Lane & Viney, *supra* note 230, at 701 ("[W]hile unprotected sex might be seen as a token of trust, and a choice in favor of enhancing the relationship, assessment of partner risk can be inaccurate, thus placing [] women at risk of HIV." (citing A.C. Morrill et al., *Safer Sex: Social and Psychological Predictors of Behavioral Maintenance and Change Among Heterosexual Women*, 64 J. CONSULTING & CLINICAL PSYCHOL. 819 (1996))).

250. *See supra* Part I.C.1 (discussing policy justifications for an expansive duty to disclose in arm's-length transactions).

251. *Black's Law Dictionary* defines "arm's-length" as "[o]f or relating to dealings between two parties who are not related or not on close terms and who are presumed to have roughly equal bargaining power; not involving a confidential relationship <an arm's-length transaction does not create fiduciary duties between the parties>." BLACK'S LAW DICTIONARY 103 (7th ed. 1999).

252. *See* Lane & Viney, *supra* note 230, at 701. *See generally* Kershaw et al., *supra* note 230, at 524.

253. *See* Lane & Viney, *supra* note 230, at 701.

254. *See* Kershaw et al., *supra* note 230, at 524.

255. For a definition of structural inequality, see KIM LANE SCHEPPELE, LEGAL SECRETS: EQUALITY AND EFFICIENCY IN THE COMMON LAW 120–21 (1988). *See also* Victor

rather, psychological factors predispose them to being uncomfortable, and therefore they are *unwilling* to do so.[256]

However, the broader law governing the duty to disclose is not limited to remedying structural knowledge barriers.[257] Courts routinely impose a duty to disclose upon sellers where the material information might have been readily discovered by a more industrious or simply more inquisitive buyer.[258] The most important and relevant of these contexts involves contracts made between parties who are involved in a fiduciary or a confidential relationship.[259] Regardless of the definitional distinctions that govern these relationships, it is clear that, "as a general matter, courts impose a heavier disclosure obligation in cases where the relation between the parties could be considered fiduciary or confidential, such as, for example, a familial or marital relationship, than they do when the parties share a merely arms-length relationship."[260]

To date, courts have not extended the doctrine of confidential relationships to include those who are sexually intimate but neither married nor engaged. The central justifications for failing to do so mirror the general arguments made against extending rights to unmarried cohabitants.[261] In other words, there are those who might argue that the rights and privileges of marriage must be reserved to those whose relationships are legally sanctioned. The doctrine of "confidential relationships" dates from an era in which the only legal sexual relationships took place within the confines of marriage.[262] Today, as is amply demonstrated by the plethora of cases involving unmarried cohabitants and issues such as "gay divorce," there is no plausible basis for such an assumption.[263]

A more plausible justification, then, is that the law requiring a higher duty of care in dealing with "confidants" is a special privilege, which should not be extended to those who engage in sexual intimacy outside the confines of marriage. But such a position situates judges as moral arbiters, forcing them to ignore the underlying merits of the claims brought to them by parties who relied,

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Brudney, *Insiders, Outsiders and Informational Advantages Under the Federal Securities Laws*, 93 HARV. L. REV. 322 (1979).

256. *See* Feinman, *supra* note 241, at 1302.

257. The theory that the law requires disclosure of material facts in cases of unequal access to information is most powerfully articulated by Kim Lane Scheppele. *See* SCHEPPELE, *supra* note 255, at 120–24.

258. *See, e.g.*, Cochran v. Keeton, 252 So. 2d 307, 311 (Ala. Civ. App. 1970).

259. *See* Krawiec & Zeiler, *supra* note 57, at 4, 16, 19, 59, 60.

260. *Id.* at 19.

261. *Cf.* Jonathon D. Hurley, Note, *Loss of Consortium Claims by Unmarried Cohabitants in the Shadow of* Goodridge*: Has the Massachusetts SJC Misapprehended the Relational Interest in Consortium as a Property Interest?*, 39 NEW ENG. L. REV. 163, 194–95 (2004).

262. Rachel F. Moran, *How Second-Wave Feminism Forgot the Single Woman*, 33 HOFSTRA L. REV. 223, 235–36 (2004) (discussing the limited rights of unmarried women historically, and providing a rich discussion of the historical tendency of the law to accord protection to women in the context of marriage).

263. *See, e.g.*, Whorton v. Dillingham, 248 Cal. Rptr. 405 (Ct. App. 1988); Doe v. Burkland, 808 A.2d 1090 (R.I. 2002); *see also supra* note 120 and accompanying text.

understandably and to their detriment, upon the promises of their lovers. This was the dilemma faced by the *Marvin* court, and, as noted above, the overwhelming majority of courts now reject the highly moralistic position that courts should not enforce any agreements made by unmarried cohabitants on the grounds that such relationships violate public policy.[264]

A final justification for resisting the expansion of "confidential relationship" protection to unmarried couples might be definitional in nature. That is, without the marriage requirement, it is not clear which couples would qualify as "confidants." Should the fact that a couple had sex create a legal duty to act in each other's best interests? Could this obligation be triggered by a single sexual encounter?

In spite of the definitional uncertainty, it seems self-evident that marriage is a poor proxy for identifying relationships in which one finds a level of trust that renders one vulnerable to deception. Surely, one might readily imagine cases in which an estranged married couple would have far less justification for relying upon each other's representations than would a romantically inclined unmarried, noncohabiting couple. If the law is to be consistent in its mission to protect those who are vulnerable to deception, then it must provide at least a cursory factual inquiry into the nature of the emotional connection between the parties.

Regardless of how the law classifies confidential relationships, a heightened duty of disclosure between intimates might be justified on both procedural and substantive grounds. For instance, although it is true that family members could negotiate contracts with great vigor, undertaking rigorous investigations and interrogations of one another, such an investigative process might be more costly than it would be in a nonintimate relationship. First, some information that is material to an agreement, such as medical information, might be unobtainable at any price. In addition, as noted above, intimate partners tend to be unsuspecting and therefore are more easily misled or put off-guard.[265] Moreover, the corrosive effects of such an inquisition on the relationship place external costs on the contracting process—costs that are less salient when bargaining with those with whom one has neither a prior relationship nor the expectation of any future relationship.

Thus, efficiency also should be considered in setting a duty to disclose in contract negotiations between intimates. For instance, although it is true that Michael Jordan *could have* asked Karla Knafel if she had additional sexual partners, it would have been far more efficient to simply require her to disclose that material information when negotiating a paternity settlement.

Perhaps the best justification for imposing a heightened duty to disclose on partners in all confidential relationships is the substantial fairness of the

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264. *See supra* note 129 and accompanying text; *see also* Della Zoppa v. Della Zoppa, 103 Cal. Rptr. 2d 901, 907 (Ct. App. 2001) (a contract "is not totally invalid merely because the parties may have contemplated creating or continuing a sexual relationship"); Salzman v. Bachrach, 996 P.2d 1263, 1268–69 (Colo. 2000) ("[C]ohabitation and sexual relations alone do not suspend contract and equity principles.").

265. *See supra* notes 234–36, 246–47 and accompanying text.

situation. All confidential relationships are predicated upon trust, not just those relationships recognized as "confidential" by the law. Thus, those engaged in intimacy are vulnerable to exploitation from a self-interested partner. As such, standard contract formation principles that encourage parties to maximize their own self-interest fail when applied to intimates who are emotionally entangled.[266] Courts achieve the goal of substantive fairness in contract formation by imposing a heightened duty of disclosure upon those who would be tempted to take advantage of their partner's trust.[267]

The problem with imposing a duty to disclose material information in contracting between intimates is not that such a duty would be unfair or unjust, but rather, that requiring truth-telling between intimates might be unworkable. The standard justifications of efficiency and fairness that have brought about the expansion of a duty to disclose in other contexts apply with equal force when considering agreements between intimates. The question that remains, then, is whether there are other justifications for retaining a norm of nondisclosure between intimates, when it has been rejected as outmoded in virtually all other contexts.

VI. ALTERNATIVE JUSTIFICATIONS FOR RETAINING A NORM OF NONDISCLOSURE BETWEEN INTIMATES

There are perhaps two alternative justifications for permitting intimates to form binding agreements without requiring that they make good-faith disclosures regarding material issues. The first is the ease of adjudication that comes with retaining a bright-line rule. The second is that intimate relationships should be sui generis and separate from the law. Thus, any agreements made between those who are romantically involved exist in the proverbial shadow of the law and should not be bound by prevailing legal norms or mores. In this Part, I will discuss, and ultimately reject, both of these justifications.

A. Strict Liability has Good Policy Consequences

One plausible argument in favor of applying a norm of nondisclosure when evaluating agreements formed between intimates is that, even if it does not comport with the general rules governing contracts and torts, it generates beneficial policy consequences. By refusing to use the force of law to require disclosure, the law generates a sort of strict liability in the context of bargaining with an intimate. For instance, if the law required disclosure, then in almost every case involving an unmarried father's objection to child support obligations the man could claim that his partner led him to believe that she was taking oral contraceptives and therefore breached her duty to disclose that she was not using contraception. As a result, he might claim that he was duped into fathering a child

266. *See generally* Feinman, *supra* note 241, at 1285, 1299 (discussing the distinctions between relational and neoclassical contract theory).

267. Palmieri, *supra* note 20, at 127 ("When a confidential or fiduciary relationship exists between the parties, the party who owes the confidential or fiduciary duty has an obligation to divulge or disclose during negotiations all material facts concerning the transaction within his knowledge." (footnote omitted)).

and that he should not have to support it.[268] Alternatively, he might seek damages against his former partner for breach of promise or perhaps for misrepresentation.

But for these policy reasons involving offspring, the argument for a duty to disclose in these cases is strong. There is no disputing the materiality of representations regarding one's capacity to conceive, particularly when relied upon by a partner who does not wish to become a parent. Therefore, it would seem that the reasons for not obligating parties to disclose such information are driven not by law, but rather, by policy considerations.

In the vast majority of cases, the resulting litigation would be bad for the child. A long and costly legal battle would impede the process of obtaining necessary child support. Any financial recovery for the father would, by definition, reduce the amount of monetary support available to the child. In addition, many courts have argued that children are harmed by litigation in which a father argues that the child was unwanted and that he was tricked into paternity.[269]

Ascertaining the truth is yet another problem in such cases. It will be difficult, after the fact, to determine the veracity of the man's claim that the woman implied that she was using contraception.[270] The problem of proof is so great that the claim of a failure to disclose could be raised in defense against virtually all claims to child support by unmarried women. Thus, although it is certain that the "strict liability" approach traps some men who are honest in their claims of having been tricked into paternity, it protects against a seemingly inevitable and profoundly negative policy outcome inherent in the alternate policy.

The only just reason we do not hold parties to the duty to disclose is that there are overriding policy reasons that dictate a different remedy. In the vast majority of agreements formed between intimates, the policy reasons militating against liability for nondisclosure are far less evident than they are in other contexts. Consider, for example, the range of agreements discussed in this Article: promises to marry, promises pertaining to disease status, promises regarding allocation of resources, and separation agreements. Permitting parties to form these

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268. The father could also bring a claim against the mother for intentional infliction of emotional distress, as Dr. Richard Phillips recently did against his former lover, Dr. Sharon Irons. *See Court: Man Can Sue for Distress Over Surprise Pregnancy, but Sperm Were Hers to Keep*, ASSOCIATED PRESS, Feb. 25, 2005; Karen Mellen, *Deceptive Conception Alleged by Dad's Suit; Plaintiff Says Woman Saved His Semen*, CHI. TRIB., Feb. 25, 2005, (Metro), at 1. Phillips claimed that Irons secretly kept semen after they had oral sex and used it to get pregnant. He learned about the child nearly two years later, when Irons filed a paternity lawsuit. DNA tests confirmed Phillips was the father and he was ordered to pay child support. Phillips claims that Irons betrayed and deceived him by using his semen to get pregnant, and that she lied to him about her marital status when they began their relationship (telling him she was divorced, when she was only separated from her husband). The trial court dismissed his claim, but the appellate court reinstated it.

269. *See, e.g.*, Beard v. Skipper, 451 N.W.2d 614, 615 (Mich. Ct. App. 1990). For an overview of this general policy, see Payne, *Tort Liability*, *supra* note 112; Anne M. Payne, Annotation, *Parent's Child Support Liability as Affected by Other Parent's Fraudulent Misrepresentation Regarding Sterility or Use of Birth Control, or Refusal to Abort Pregnancy*, 2 A.L.R.5th 337 (1992) [hereinafter Payne, *Child Support Liability*].

270. After all, typically, there are no witnesses to intimate sexual encounters.

agreements without fear of liability for nondisclosure, or even misrepresentation, is not necessarily a wise policy decision. Nondisclosure in separation agreements or agreements regarding the allocation of resources may unfairly deprive a trusting partner of much-needed support or property. [271]

In the absence of compelling policy reasons, such as harm to a child, the advantages gained by permitting nondisclosure between intimates are readily offset by the harms occasioned. [272] Between intimates, as between strangers, there should be a duty to disclose material information in forming agreements, and courts should impose liability upon those who fail to do so.

B. Bargaining in the Shadow of the Law

The second justification offered in favor of permitting nondisclosure, if not outright misrepresentation, in agreements made between intimates is that the law should not interfere with intimate relationships. This argument takes on varying forms, depending upon whether one seeks to establish contract liability or tort liability.[273] Regardless of the legal form that the argument assumes, the core spirit reflects the notion that the law should recognize a zone of sexual privacy within which individuals are free to act without the fear or inhibitions that would follow from legal consequences.

Discussions about liability arising out of agreements made between intimates are closely connected to questions about the nature of damages that might be sustained in the intimate setting. Prior to discussing liability, then, it is important to identify and set aside the issue of damages. Part of what makes agreements between intimates controversial is that the damage sustained in the event of breach often is emotional in nature.[274] As such, these agreements trigger the legal system's ongoing concerns about the problems with awarding damages for emotional distress. As Douglas Whaley notes, "The law of emotional distress

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271. *See, e.g.*, Whorton v. Dillingham, 248 Cal. Rptr. 405 (Ct. App. 1988); Blake v. Stradford, 725 N.Y.S.2d 189, 192–93 (Dist. Ct. 2001) (holding that petitioner could evict his ex-domestic partner because the property rights bestowed in legal marriage do not apply to cohabitants); DeSanto v. Barnsley, 476 A.2d 952, 955 (Pa. Super. Ct. 1984) (same-sex domestic partners "acquire no automatic claims to property from cohabitation" (quoting Knauer v. Knauer, 470 A.2d 553, 564 (Pa. Super. Ct. 1983))); Doe v. Burkland, 808 A.2d 1090, 1095 (R.I. 2002).

272. The law already recognizes the negative consequences of permitting nondisclosure (let alone misrepresentation) by those who would expose their partners to sexually transmitted diseases. *See supra* notes 116–17 and accompanying text; *infra* note 302. Mandating disclosure in these cases generates positive policy consequences—diminishing the spread of sexually transmitted diseases by penalizing those who fail to disclose the threat they pose to others. *See supra* note 115 and accompanying text; *infra* note 303.

273. This Subpart discusses this claim as it relates to breach of contract claims. *See also* Larson, *supra* note 24, at 439–42 (discussing tort liability growing out of similar fact patterns).

274. *See, e.g.*, *supra* notes 91–96 and accompanying text (discussing the harms generated by seduction).

damages is in a state of flux in tort cases, and in a state of chaos in contract ones."[275]

Concerns pertaining to emotional damages are overblown and inapplicable, particularly in the context of contract claims. In the context of tort law, courts fear that permitting recovery for emotional distress might trigger an endless set of claims by plaintiffs far removed from the relevant injury, yet nonetheless "harmed" by it.[276] In contrast, contract law governs only those who assent to being governed.[277] The focus in remedying a breach of contract is on making the nonbreaching party whole by protecting expectation, reliance, or at the very least, restitution interests.[278] Consistent with the common law anxiety regarding emotional damages, the *Restatement (Second) of Contracts* expresses hesitation on the topic of such remedies:

> Loss Due to Emotional Disturbance: Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract of the breach is of such a kind that serious emotional disturbance was a particularly likely result.[279]

Upon reflection, there is little logic behind the limitation on emotional damages. As Douglas Whaley forcefully argues:

> [T]he breaching party to a contract intentionally assumed must bear the full burden of the harm caused, and there should be no exception for emotional distress damages. . . . Where the facts are compelling, when the defendant's breach is outrageous, if the emotional harm is so likely that in effect we can take judicial notice of it, then our sense of justice demands a recovery. We are not redressing a fiction; in these cases the harm is real and must be paid for by whomever caused it.[280]

Setting aside for the moment any concerns regarding the emotional nature of the harm done when intimates break promises to each other, I turn now to the question of whether promises made within the "zone of privacy" should be legally binding.

1. Mutual Assent

Perhaps the most persuasive argument against imposing a duty to disclose in deals between intimates arises when one subjects these agreements to scrutiny under the laws governing contracts. A standard prerequisite to contract formation is the requirement of mutual assent: both parties to a contract must have

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275. Douglas J. Whaley, *Paying for the Agony: The Recovery of Emotional Distress Damages in Contract Actions*, 26 SUFFOLK U. L. REV. 935, 947 (1992).

276. *Id.* at 948.

277. This is reflected in the law of mutual assent, which requires an objective manifestation of assent for the formation of enforceable contract. *See generally* JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS 26–28 (5th ed. 2003).

278. RESTATEMENT (SECOND) OF CONTRACTS § 344 (1981).

279. *Id.* at § 353.

280. Whaley, *supra* note 275, at 948–49.

objectively manifested the intention to create a binding legal obligation.[281] In essence, those invoking this maxim argue that there is no mutual assent in promises whispered across the pillow—partners simply do not intend their private promises to be legally binding.[282] The problem with this argument is that it proves too much. It may be true that some promises made between intimate partners are characterized by intense, yet ephemeral emotionality, devoid of any lasting significance, let alone of an intention to be bound. It also may be true that, when the negotiations involve the goal of furthering intimacy (for example, "If you stay with me, I promise I'll love you forever"), the parties to such "bargains" understand that these are just words, or at least that the law will not intervene to enforce such promises. Yet there is no reason to believe that these "fatal flaws" characterize all contracts between intimates. Nor does it necessarily follow that the presence of heightened emotions precludes one from forming the intention to enter into a binding promise.

The critical distinction between legally enforceable contracts and promises lacking legal force lies *neither* in the extent to which the parties are intimately involved *nor* in the nature of the contract's object.[283] Instead, the law of mutual assent is quite explicit in providing that it is the mindset of the parties at the moment of making a promise that dictates enforceability.[284] The objective theory of contract places the focus on the mindset of the party to whom the offer is made. If offerees are reasonable in understanding their partners' promises to carry legal weight, then they should be permitted to recover damages for breach.[285]

This distinction should help alleviate the concerns of those who maintain that attaching liability to promises made between intimates would occasion disaster, or at least the demise of sexual relations.[286] For example, contract liability

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281. PERILLO, *supra* note 277, at 26.

282. *See* Dan Subotnik, *"Sue Me, Sue Me, What Can You Do Me? I Love You": A Disquisition on Law, Sex, and Talk*, 47 FLA. L. REV. 311, 401 (1995) (arguing that a tort of sexual fraud is ill-conceived due to the prevalence of dishonesty in intimate relationships).

283. Of course, this is not true for contracts that have an illegal purpose, such as contracts to exchange money for sex. PERILLO, *supra* note 277, at 843.

284. *Id.* at 29–30. Ordinarily, mutual assent is established by the process of offer and acceptance. *Id.* at 26.

285. *Id.* at 26–30. If an objective, reasonable person would not have believed the offer was serious, then no offer was made and there is not manifestation of intent to enter into a contract. *See, e.g.*, Leonard v. PepsiCo, 88 F. Supp. 2d 116 (S.D.N.Y. 1999) (a reasonable person would not have believed Pepsi was giving away military fighter jets as part of its promotion).

286. Such hyperbolic objections tend to be raised whenever suggestions are made for reforming the rules surrounding sexual relationships in order to limit the harm done to vulnerable parties. Consider, for instance, the hue and cry raised by efforts to combat date rape on campus. *See* Katharine K. Baker, *Sex, Rape, and Shame*, 79 B.U. L. REV. 663, 688 (1999) ("People like Professor Gilbert reject reform proposals [like the Antioch College Sexual Offense Policy] that require affirmative assent because he says they reduce romantic interaction to 'cool-headed contractual sex.'"); *see also* Subotnik, *supra* note 282, at 401 ("[If we recognize sex fraud, o]ne thing will almost surely be lost: that sensuous striptease in which we slowly and deliriously reveal our indissolubly entangled real and imagined selves to our partners—and then hope for the best."); *id.* at 409 ("[S]exual players need

would not attach when a partner procures consensual sexual relations by saying, "I'll have sex with you if you promise that you love me." Not only does this exchange involve sex as consideration (thereby rendering it illegal), but also, it raises a mutual assent problem in that no recovery can be had unless it was reasonable to think the promisor intended legal consequences.[287] On the other hand, a jury might find that a party was reasonable in assuming that a cohabiting partner's promise to share living expenses was legally binding.

There are many agreements made between intimates in which one party's consent is induced by the other party's silence, or even misrepresentation, of a material fact. The only question the law of contracts need ask is whether the injured party was reasonable in assuming that the breaching party intended to make a legally binding promise. In the event that the parties manifested mutual assent, there is no legitimate reason for refraining from imposing the standard rules of contract law, including the duty to disclose. Far from creating problems for the courts, or for couples, this rule clarifies matters by bringing these contracts into the fold of mainstream common law, which has long since abandoned the doctrine of *caveat emptor* and embraced a broad duty to disclose.[288] The result is greater efficiency in contract formation and performance in that the availability, *ex ante*, of all material information enables couples to negotiate an agreement that best benefits their mutual and individual needs.

2. The Zone of Sexual Privacy: Can and Should the Duty to Disclose Be Cabined?

A central theme in arguments against requiring disclosure between intimates is that lying, or at least exaggerating, is fundamental to the nature of intimate relationships.[289] This argument is related to the "no mutual assent" argument in that it evolves from a fundamental claim that the law does not belong in the proverbial bedroom.[290] But it extends beyond this, in that it posits that seduction and other human "mating rituals" are sui generis and cannot be likened to bargaining in other contexts. Therefore, the argument goes, the rules simply should not apply, and instead, there should be a zone of privacy surrounding the sexual realm, into which the law cannot penetrate.[291]

This position might be justified on several grounds. One might contend, as do some commentators, that lies, or affirmative misrepresentations, permeate human sexual interactions and are so prevalent as to be harmless.[292] The "lies" told

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space from one another, and . . . if they do not get it, they and all around them should watch out for falling pillars[.]").

287. *See* PERILLO, *supra* note 277, at 26–31 (discussing the objective theory of contract).

288. *See supra* notes 22–26 and accompanying text.

289. Subotnik, *supra* note 282, at 406.

290. *Id.* at 349–63.

291. *Id.* at 388–93.

292. *See, e.g.*, *id.* at 361 (citing JEAN BAUDRILLARD, SEDUCTION 42 (Arthur Kroker & Marilouise Kroker eds., Brian Singer trans., 1990)).

> In sum, our examination of sexual relationships has revealed that lying is a pervasive, and perhaps even desirable, element whose origin lies in the

in the context of sexual relationships are not truly lies, they reason, because we all understand that romantic human interactions are full of half-truths.[293] After all, poses Subotnik, "Who among us has not also, like our love-crazed heroes, misrepresented himself in love?"[294] He points to Camille Paglia for support "that everything in romance is lying and delusion and that judgment goes out the window in sexual matters."[295] Professor Jane Larson notes Judge Richard Posner's comments "on the 'exquisite difficulty' of litigating the distinction between an initially false statement of one's sexual or romantic feelings and a later change in those feelings."[296] She also notes Camille Paglia's assertion that "[t]he element of free will in sex and emotion is slight. As poets know, falling in love is irrational."[297]

The problem with this assertion is that it seems to be unfounded. Indeed, if we all understood the baseline in intimate relationships to be one of falsehoods, rather than truths, then it would seem that we would cease to believe the false claims made by our intimate partners, and their lies and omissions would cease to mislead us. Instead, human experience tells us that they work time and again, much to the detriment of the party who is misled.[298] The core meaning of the assertion that "everything in romance is lying and delusion,"[299] then, is the claim that one ought to be permitted to lie without fear of legal consequence. My response is that this is true only insofar as no reasonable person would have understood the promise (or in this case, the lie) as one that anticipated legal consequences.

> never-ending conflict between the need of *Homo Liber* to decide for himself or herself what to do and say, and that of *Homo Ludens*, to play with others.

Id. at 362.

293. *Id.* at 349–63.

294. *Id.* at 314.

295. *Id.*; *see also id.* at 402–03 ("[T]he immense obstacles in the way of establishing a sex fraud regime [include]: our deep need to trump up our accomplishments; our need for privacy; the interplay in our mental lives between fact and fancy; [and] the difficulties of interpreting language, particularly in high-tension contexts . . . ." (citations omitted)).

296. Larson, *supra* note 24, at 451.

297. *Id.* at 452.

298. For a somewhat sensationalistic take on this problem, see DORY HOLLANDER, 101 LIES MEN TELL WOMEN: AND WHY WOMEN BELIEVE THEM (1995). For a grim depiction of the effectiveness of "pick up lines" on younger women and girls, see Michelle Oberman, *Turning Girls Into Women: Re-Evaluating Modern Statutory Rape Law*, 85 J. CRIM L. & CRIMINOLOGY 15, 54–68 (1994). In 1993, a group of teenage boys calling themselves the Spur Posse developed a "game" in which members scored points for each sexual conquest. *Id.* at 53–54. With one exception, the alleged victims had consented to sexual intercourse. *Id.* at 54. The boys reported they gained girls' consent through flattery. *Id.* This illustrates the collective findings of numerous studies of teenage girls' psycho-social development: that many factors combine to make teenage girls particularly vulnerable to flattery. *Id.* at 55–68.

299. Subotnik, *supra* note 282, at 314 (quoting Shulamith Gold, *Don Juan in Court*, CHI. TRIB., Jan. 5, 1993, at N1 (quoting Camille Paglia)).

A related claim offered in support of the zone of privacy is that the imposition of a duty to disclose would dramatically rewrite interaction between intimates, opening the proverbial floodgates of litigation and casting a dismal pall over all intimate relationships.[300] Katharine Baker has written of the severe criticism of the Antioch College Sexual Offense Policy, which requires the verbal consent of one's partner before moving to higher levels of sexual intimacy:

> Antioch's policy was widely mocked by a variety of influential media sources. *Time Magazine* called it "extreme." George Will worried that "hormonal heat [would] be chilled by Antioch's grim seasoning of sex with semicolons." . . . [A]nd *Newsweek*, in a cover story article, complained that the Antioch Policy "seem[s] to stultify relationships between men and women on the cusp of adulthood."[301]

Of course, over the last several decades, courts have created limited duties of disclosure between intimates, apparently without occasioning the demise of human sexual interaction. For instance, there is ample caselaw permitting recovery in tort for the failure to disclose the fact that one has a sexually transmitted disease.[302]

Perhaps the most compelling argument in favor of a zone of sexual privacy is that there is a powerful trend in contemporary law that militates against government intervention into or regulation of sexual activity. This may be observed in the outcome of *Lawrence v. Texas*, in which the U.S. Supreme Court held that a Texas statute making it a crime for two people of the same sex to engage in certain intimate sexual conduct violated the Due Process Clause.[303]

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300. *See* Subotnik, *supra* note 282, at 392–93.

301. Baker, *supra* note 286, at 687 (footnotes omitted).

302. *See, e.g.*, Berner v. Caldwell, 543 So. 2d 686, 689 (Ala. 1989) (creating a cause of action for the tortious transmission of genital herpes under Alabama law), *overruled on other grounds*, *Ex parte* Gen. Motors Corp., 769 So. 2d 903, 909 (Ala. 1999); Maharam v. Maharam, 510 N.Y.S.2d 104, 107 (App. Div. 1986) (finding it a misdemeanor in New York to have sex with another knowing that you have a sexually transmittable disease); Crowell v. Crowell, 105 S.E. 206, 214 (N.C. 1920) (holding that a wife may sue her husband for transmitting a venereal disease to her); Mussivand v. David, 544 N.E.2d 265, 270 (Ohio 1989) (finding that "a person who knows, or should know, that he or she is infected with a venereal disease has the duty to abstain from sexual conduct or, at the minimum, to warn those persons with whom he or she expects to have sexual relations of his or her condition"); Panther v. McKnight, 256 P. 916, 917–18 (Okla. 1926) ("[A]ny person who shall, after becoming an infected person[,] marry any other person or expose any other person by the act of cohabitation or sexual intercourse to such venereal disease, shall be guilty of a felony, and upon conviction shall be punished by confinement in the penitentiary for not less than one nor more than five years."); De Vall v. Strunk, 96 S.W.2d 245, 246–47 (Tex. Civ. App. 1936) (finding right of action for woman induced to sleep with man who gave her crab lice).

303. Lawrence v. Texas, 539 U.S. 558 (2003).

> The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.

Additional evidence of this trend is seen in the lack of enforcement of adultery and fornication laws.[304]

All of this reflects a change in the moral fabric of our culture. Indeed, this shift might be witnessed in the two paternity cases contrasted in this Article. At the time of *Fiege v. Boehm*, there was little doubt that Louis Fiege made a valid contract when he promised to support Hilda Boehm's child.[305] Had he not agreed to do so, he would have faced a quasi-criminal prosecution for bastardy, and his reputation, as well as Ms. Boehm's, would have been greatly impaired.[306] By contrast, Judge Seibel's willingness to view Knafel's accusation as an effort at blackmail presupposes an ability to sympathize with Michael Jordan, rather than condemning him for having had an extramarital affair.[307] Unwed motherhood is an accepted reality in contemporary society.[308] Likewise, infidelity is not simply commonplace in contemporary society; it has lost much of its moral stigma.[309] As such, Seibel's concern about what he termed a "hush money" deal was not, as it might have been in the 1950s, whether Jordan had offered money in exchange for

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Id. at 578.

304. *See, e.g.*, Benjamin J. Cooper, *Loose Not the Floodgates*, 10 CARDOZO WOMEN'S L.J. 311, 313 (2004); Martha M. Ertman, *Contractual Pergatory for Sexual Marginorities: Not Heaven, but Not Hell Either*, 73 DENV. U. L. REV. 1107, 1128 (1996); Sanford H. Kadish, *Fifty Years of Criminal Law: An Opinionated Review*, 87 CAL. L. REV. 943, 970 (1999).

305. This owes both to the fact that the common law was settled regarding the surrender of invalid claims as consideration, and also to the fact that Fiege willingly assumed the risk of nonpaternity when he entered into the contract with Boehm. *See* PERILLO, *supra* note 277, at 186–88, 365 n.27.

306. For a discussion of the prosecution of bastardy, and the social and legal consequences of conviction, see JENNY TEICHMAN, ILLEGITIMACY: AN EXAMINATION OF BASTARDY (1982).

307. *See* Jordan v. Knafel, No. 02 CH 19143 at 9 (Cir. Ct. of Cook County, Ill. Jun. 12, 2003).

308. In 2003, the most recent year for which statistics are available at the time of publication, 34.6% of all births in the United States were to unmarried women. Nat'l Ctr. for Health Statistics, Ctrs. for Disease Control and Prevention, Fastats: Out-of-Wedlock Births, http://www.cdc.gov/nchs/fastats/unmarry.htm (last visited Nov. 4, 2005). Given these numbers, it is easy to understand why society in general, and the law in particular, has tempered its former severity toward nonmarital births. Consider, for example, the Uniform Parentage Act, the prefatory note to which states that the purpose of the Act is to provide "substantive legal equality for all children regardless of the marital status of their parents." UNIFORM PARENTAGE ACT prefatory n. (2002); *see also* IRWIN GARFINKEL & SARA S. MCLANAHAN, SINGLE MOTHERS AND THEIR CHILDREN: A NEW AMERICAN DILEMMA 116 (John L. Palmer & Isabel V. Sawhill eds., 1986).

309. Consider the long-dormant laws against fornication, which once served to police against extramarital sex. *See generally* 2 AM. JUR. 2D *Adultery and Fornication* § 1 (1994). For a provocative discussion of contemporary efforts to revive long-forgotten laws banning fornication, see Robert Misner, *Minimalism, Desuetude, and Fornication*, 35 WILLAMETTE L. REV. 1 (1999).

preserving his reputation.[310] Instead, Seibel saw only the possibility that Jordan had been blackmailed into paying Knafel.[311]

The prevailing nonjudgmental, amoral attitude seems, at first blush, to blend quite nicely with a *caveat emptor* approach to intimate relationships. The question, then, is whether there is any harm done by designating sexual relationships as a "duty-free zone." In answering this question, one might note harms that occur both at the collective and at the individual level.

At the collective level, there is a risk of harm that is inherent in invoking a context based argument against liability. The common law has a long and troubling history when it comes to exempting certain "spheres" from the force of the law.[312] The entire notion of the private sphere, as has been carefully explicated by Professor Catherine MacKinnon and others, served for centuries to leave women vulnerable to oppression without any legal redress.[313] This manifested, for instance, in the form of domestic violence, wherein the law's refusal to intrude upon a man's private domain left women and children almost entirely dependant upon the mercy of their "masters."[314]

The separation of the private from the public also had the effect of exempting women from much of the realm of civil law. Until the past century, the law permitted women only limited legal rights, denying them access to education, limiting their access to the workplace, and preventing them from holding property in their own names.[315] Thus, their route to security lay in their ability to rely upon promises made to them in the context of family.[316] As such, the failure of the

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310. *See* Lawrence Friedman, *Name Robbers: Privacy, Blackmail, and Assorted Matters in Legal History*, 30 HOFSTRA L. REV. 1093, 1095 (2002).

311. Jordan v. Knafel, No. 02 CH 19143 at 9 (Cir. Ct. of Cook County, Ill. Jun. 12, 2003).

312. *See* CATHARINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 168–69 (1989) (arguing that a private boundary for a woman is a false notion because the private sphere is constructed to perpetuate abuse against women).

313. Catharine A. MacKinnon, *Privacy v. Equality; Beyond Roe v. Wade*, *in* FEMINISM UNMODIFIED 93, 100–02 (1987). *See generally* Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

314. This is perhaps most vividly evoked by the notorious "rule of thumb," which permitted husbands to beat their wives at will, so long as the stick used was no wider than a man's thumb. *See, e.g.*, State v. Oliver, 70 N.C. 60 (1874); State v. Rhodes, 61 N.C. (Phil.) 453, 459 (1868).

315. *See* MARY BECKER ET AL., FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY, CASES AND MATERIALS 1–14 (2d ed. 2001).

316. Ariela Dubler's work on the law's treatment of marriage provides ample support for this notion. *See* Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641 (2003) [hereinafter Dubler, *Shadow of Marriage*]. For a fascinating account of the negative impact that reliance on oral promises had on women, see Hila Keren, *Textual Harassment: A New Historicist Reappraisal of the Parol Evidence Rule With Gender in Mind*, 13 AM. U. J. GENDER, SOC. POL'Y & L. 251 (2005).

common law to extend the force of law to promises made and relied upon in the context of the family surely had a negative impact upon women.[317]

Over the course of the twentieth century, the law of promissory estoppel emerged as a useful tool for redressing this legal shortcoming, offering protection to those who relied, to their detriment, upon the promises of others.[318] Nonetheless, the common law still looks with suspicion upon many promises made, and relied upon, in the context of the family.[319]

This is not to say that women are more vulnerable than men to deception in forming agreements with their intimate partners. Indeed, as discussed throughout this Article, it seems that deception is equally well practiced by both genders.[320] Instead, the problem with refusing enforcement of promises made between those who are intimately involved is that in so doing, the law denies the possibility of remedying actual harms suffered by those who are vulnerable.[321] The nature and genesis of the vulnerability inherent in romantic relationships renders it naïve to suggest that people's awareness of the "zone of privacy" will make them more cautious when making agreements with intimates.[322] Indeed, a posture of complete refusal to police these promises recalls the harsh words of criticism offered against the strict nineteenth-century rules governing consideration,

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317. It is no coincidence that many of the landmark consideration cases find women holding the short end of the proverbial stick. *See, e.g.*, Norton v. Hoyt, 278 F. Supp. 2d 214 (D.R.I. 2003) (holding that where plaintiff and defendant had been lovers for twenty-three years and then broke up, defendant's promise to give former lover $100,000 and set up a trust that would take care of her for life is unenforceable); Kirksey v. Kirksey, 8 Ala. 131 (1845); Filippi v. Filippi, 818 A.2d 608 (R.I. 2003) (holding that decedent's promise to daughter that the family restaurant would be hers if she came back to manage the business was unenforceable because it was unclear and ambiguous). In *Brakenbury v. Hodgkin*, an elderly mother promised to give her daughter the family farm if the daughter moved home and cared for her. 102 A. 106, 107 (Me. 1917). The daughter agreed, moved home, and cared for her mother. *Id.* Shortly thereafter, the relationship between them deteriorated, and the mother evicted the daughter and deeded the property to her son. *Id.* The court found the daughter possessed an equitable interest in the property. *Id.* at 108; *see also* John Wightman, *Intimate Relationships, Relational Contract Theory, and the Reach of Contract*, 8 FEMINIST LEGAL STUD. 93 (2000).

318. For a relatively early example of this, see Ricketts v. Scothorn, 77 N.W. 365 (Neb. 1898).

319. *See supra* Part III.A, regarding the debate about reliance damages between unmarried cohabitants upon the dissolution of household or relationship. The contemporary reluctance to award damages in breach of promise to marry cases also illustrates this reluctance. *See* Neil G. Williams, *What To Do When There's No "I Do": A Model For Awarding Damages Under Promissory Estoppel*, 70 WASH. L. REV. 1019 (1995) (discussing the rejection of such claims by many jurisdictions, in spite of the fact that promissory estoppel is applicable).

320. Subotnik, *supra* note 282, at 378–80.

321. *See, e.g.*, *supra* notes 99–108 and accompanying text (discussing the harms left unremedied after the abolition of seduction); *supra* notes 140, 150–51 and accompanying text (discussing the harms left unremedied by permitting nondisclosure in the context of nonmarital cohabitation).

322. *See supra* note 249 (regarding the psychological barriers to gather material information in the context of intimate relationships).

promoting a rule of law that looks "with stone-eyed indifference" upon the actual suffering of others.[323]

At the individual level, the risk inherent in creating a "duty-free" zone between intimates involves the denial of compensation for harms suffered. Surely, the harm to one whose partner persuades her to have an abortion by falsely promising to have a child with her next year is at least as great as the harm suffered by the unwitting purchaser of a damaged used car![324] As noted above, it is the legal system's anxiety about remedying emotional harms, rather than a principled distinction about the nature of bargain and reliance, that drives our reluctance to acknowledge these damages.[325]

A deeper level of individual harm emerges when one considers the broad range of consequences following from the refusal to enforce private agreements between intimates. Witness the *Jordan* decision, in which Judge Seibel held unenforceable the promise made by Jordan to pay money in exchange for Knafel's promise not to publicize their affair.[326] Prospectively speaking, this rule would create the potential for harm not merely to the party who relies upon such a promise (here, Knafel). It also could harm, and perhaps more profoundly, the party whose sexual privacy might best be protected by forming a binding contract. After all, if Judge Seibel's opinion that the contract was void against public policy was widely accepted, then it would bring about the perhaps unintended consequence of preventing those in circumstances like Jordan's from making legally enforceable agreements to protect their privacy.

This result seems to place sexual privacy in the realm of other legally taboo contracts: those involving sales of human organs, babies, sex, and slaves. Viewed from this angle, the outcome in *Jordan* must be absurd, as it cannot possibly be the case that there is widespread societal consensus that the attempt to pay money to preserve one's sexual privacy is akin to the attempt to buy a child or a kidney and therefore should be banned.[327]

In spite of these risks, there is a core truth in the "zone of privacy" argument in that it would be ludicrous to impose contract liability in cases in which the parties could not reasonably have anticipated, let alone intended, that their words or actions amounted to binding commitments. The solution to this problem lies in carefully applying the rules of contract and tort law to these agreements. If the promisee reasonably understood the promisor to have intended to make a legally binding promise, then the promise should be legally enforceable under the law of contracts.[328] If the promisor intentionally misled the promisee,

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323. AMY HILSMAN KASTELY ET AL., CONTRACTING LAW 275–76 (2d ed. 2000) (quoting GRANT GILMORE, THE DEATH OF CONTRACT (1974)).

324. *See* Perry v. Atkinson, 240 Cal. Rptr. 402, 405 (Ct. App. 1987); M.N. v. D.S., 616 N.W.2d 284, 287 (Minn. Ct. App. 2000).

325. *See supra* notes 274–79 and accompanying text.

326. Jordan v. Knafel, No. 02 CH 19143 at 9–10 (Cir. Ct. of Cook County, Ill. Jun. 12, 2003).

327. I am indebted to Professor Katharine Baker for having helped me to surface and elucidate the issue of market inalienability of sexual privacy.

328. PERILLO, *supra* note 277, at 27.

whether through silence or misrepresentation regarding material information, the promisee should have an action in tort for such misrepresentation.[329] In some cases, a plaintiff may have a choice of law, as it is conceivable that claims may lie both in tort and contract.[330] In many cases between intimates, particularly those infused with a sense of violating social norms of morality, the law of tort may provide a better remedy than that of contract. As Professor Larson explains in her endorsement of the tort of sexual fraud:

> From a contractarian perspective, a person incurs liability only for those obligations that she has voluntarily accepted. By contrast, tort law imposes a set of background legal duties grounded in social morality or custom, regardless of a person's purposive choice. There is a mistaken tendency to conceive of any liability that arises from the act of promising as necessarily arising in contract. But where the claim is tortious misrepresentation, the false promise instead constitutes only the mode of inflicting injury.[331]

In some cases, where neither the intention to form a legally binding agreement, nor the intention to mislead can be proven, there may be no remedy at law for the harms suffered.

CONCLUSION

This Article has argued that the law governing agreements between intimates is anachronistic in its refusal to impose a duty of disclosure with regard to material information. The status quo, wherein *caveat emptor* lives on in this most vulnerable of settings, is far from a harmless embrace of the reality that humans lie to those whom they love. On the contrary, the law as it stands seems not only to accept, but even to embrace the assumption that one may, with impunity, "always hurt the one you love."[332]

Ultimately, permitting nondisclosure, and even misrepresentation, in agreements between intimates places the risk of harm, and therefore the legal burden, on the party without the knowledge of the information in question. In practice, this burden has toxic consequences, both in law and in policy. The burden of securing disclosure of any risk-related information (which, in most agreements between intimates will not be needed, as there will be nothing to disclose) falls to the party without knowledge. As a result, "interrogation" becomes the norm, or at

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329. RESTATEMENT (SECOND) OF TORTS § 525 (1977) ("One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.").

330. This is not controversial, of course, and it may be particularly useful for the plaintiff's lawyer to have a choice of law in attempting to secure a recovery for intangible damages. For a rich, if somewhat dated, discussion of the relative merits and implications of tort versus contract in considering such damages, see Sullivan v. O'Connor, 296 N.E.2d 183 (Mass. 1973).

331. Larson, *supra* note 24, at 417.

332. THE MILLS BROTHERS, *You Always Hurt the One You Love*, *on* PAPER DOLL (ASV/Living Era 2004).

least the prudent course of action, in negotiations between intimates. Surely, compulsory interrogation, which the law considers too inefficient and burdensome between those bargaining at arm's-length in commercial and other settings, is even more burdensome in intimate settings. Indeed, it is more than burdensome; it is corrosive. Moreover, as we have seen, there are profound psychological barriers that impede the gathering of information.

The refusal to impose conventional legal limits on the ability to lie and mislead one's intimate partner is predicated upon false assumptions and baseless fears. There is no reason to expect that those involved in intimate relationships are better than nonintimates at discerning misinformation or nondisclosure when negotiating deals. Moreover, there is little reason to anticipate catastrophic consequences for either the law or romance were the law to impose now-standard duties of disclosure in the context of bargains between intimates. Any risks of creating murky legal rules or a "chilling" effect due to legal uncertainty are easily remedied by imposing long-standing rules regarding mutual assent.

The demise of *caveat emptor* in the law has enhanced the fairness and the efficiency with which we structure our dealings. In the end, these same goals are as worthy between intimates as they are between strangers, and the law's willingness to impose a duty to disclose will enhance, rather than harm, the quality of our intimate relationships.

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