FIFTY WAYS TO LEAVE YOUR LOVER: DOING AWAY WITH SEPARATION REQUIREMENTS FOR DIVORCE

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ABSTRACT

Despite the evolution of no-fault divorces, which were intended to remove certain barriers to divorce and essentially make any divorce filed inevitable, many jurisdictions prescribe a waiting period before eligibility for divorce, during which there must be a demonstrable period of separation. In support of findings of facts and conclusions of law about whether the divorcing couple has established a separation, some jurisdictions will ask whether the couple has lived in the same abode and, if so, will inquire about the divorcing couple's roles and choices vis-à-vis one another—for example, preparing meals for one another or engaging socially with one another. Other jurisdictions will make explicit inquiries into whether a couple has had sex with one another. Probing into families' living arrangements and adults' sexual choices does real and particular harm to marginalized social groups, and doing so defies the liberty and privacy interests of families and couples. In explicating this litany of critiques, this project attempts to avoid the trap that family law scholarship can too easily fall into; namely, criticizing doctrine "on a low level of abstraction" and rushing to a proposed reform. This piece, therefore, offers a taxonomy of the harm that separate and apart requirements cause—paying particular attention to the ways in which these laws are classist, heteronormative, gendered, and racially charged—and illuminates how constitutionally precarious such laws are. The project is ambitious as it attempts to situate and expose the deep-seated problems of separate and apart requirements as reflective of the

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deep-seated flaws in family law jurisprudence generally. The piece offers a comprehensive analysis and investigation of separate and apart requirements, and it serves as an invitation to further conversation and exploration of the themes raised herein.

Based on the author's practice experience as much as her scholarship, the proposal insists that where couples are struggling deep in the heart of the matter about their choices—the good ones and the mistakes—they do not need or desire a judicial officer to ask them to wait or to organize their life a certain way before allowing them to divorce. Nothing and no one is served by insisting on some normative view about what the end of a marriage looks like and requiring some time period for performance of that view. The proposal in this piece joins a growing chorus of practitioners, judges, and scholars talking about administrative divorces. The distinct voice in this piece advocates for administrative divorce as a procedural decoupling of divorce from any underlying or attendant economic and custody issues. The piece motivates this argument based on the premise that allowing families to proceed thusly will enhance the self-determination of families in transition and promote use of the courts when, and only when, the families determine that court involvement in matters of children and economics will improve their stability.

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INTRODUCTION

The problem is all inside your head, she said to me
The answer is easy if you take it logically
I'd like to help you in your struggle to be free
There must be fifty ways to leave your lover[1]

Paul Simon knew full well that there are *50 Ways to Leave Your Lover*, yet many jurisdictions insist on just one. That one way looks something like this: decide you are unhappy, unsafe, or unstable in your marriage. Leave the marital home or somehow excise your spouse from it. Pay for that additional rent or mortgage or count on the fact that your spouse can and will. File some paperwork with the court and wait. Wait a long time. Pay a lawyer. Pay a lawyer a lot of money. While you are waiting and paying you are still married, but you are also not really married. So do not resume living with your spouse, even if there is room in that property for you. If you do find yourself back in the house (but goodness, *please don't*) do not socialize unduly with your spouse. You may not be sure what that looks like, but just please refrain from it. Do not share meals with your spouse. Certainly do not sleep with your spouse. Never. Not if you are living together or if you have moved out. Eventually, go to court. See a judge. Let the judge know that you followed these rules.

This Article takes up those rules, namely jurisdictions' requirements

1. PAUL SIMON, *50 Ways to Leave Your Lover*, *on* STILL CRAZY AFTER ALL THESE YEARS (Columbia Recs. 1975).

that couples live separate and apart and wait out arbitrary waiting periods to be eligible for no-fault divorce. Despite the evolution of no-fault divorces, which were intended to remove certain barriers to divorce and essentially make any divorce filed inevitable, many jurisdictions prescribe a waiting period before eligibility for divorce, during which there must be a demonstrable period of separation.[2] In support of findings of facts and conclusions of law about whether the divorcing couple has established a period of separation, some jurisdictions will ask whether the couple has lived in the same abode and, if so, will inquire about the divorcing couple's roles and choices vis-à-vis one another—for example, preparing meals for one another or engaging socially with one another.[3] Other jurisdictions will make explicit inquiries into whether a couple has had sex with one another. These are questions about families' living arrangements and adults' sexual choices, questions that invade the privacy of families concerning their living arrangements and adults concerning their sexual choices. Moreover, the requirements of separateness and the inquiries they inspire do real and particular harm to certain social groups. This Article critiques these requirements as being classist, heteronormative, gendered, and racially charged and suggests that they defy constitutional protections. The Article ends by proposing a process that protects the dignity of divorcing couples and better provides predictability and stability for families in transition.

The primary argument for separate and apart requirements posits that separateness is a proxy for establishing that the decision to leave one another is mutual and voluntary or at least that one spouse has given the other a very

2. *See* ARK. CODE ANN. §§ 9-12-301, 307, 308, 310 (2022) (requiring spouses in a covenant marriage to separate for one year without reconciliation from the date of decree of separation); D.C. CODE §§ 16-904, 16-905 (2022) (requiring six months of voluntary separation or living separate and apart without cohabitation before filing for divorce); IDAHO CODE §§ 32-601, 610 (2022) (requiring partners to live separate and apart for five years without cohabitation before filing a suit); KY. REV. STAT. ANN. § 403.170 (West 2022) (requiring divorcing spouses to live separate and apart for a waiting period of sixty days); LA. CIV. CODE ANN. arts. 102, 103.1 (2022) (requiring divorcing spouses with no minor children to live separate and apart for 180 days, while divorcing spouses with minor children must live separately for 365 days); MONT. CODE ANN. § 40-4-104 (2022) (requiring partners to live separate and apart for 180 days before filing for a divorce); N.J. STAT. ANN. § 2A:34-2 (West 2022) (requiring couples to live separate and apart for eighteen months); N.Y. DOM. REL. LAW § 170 (McKinney 2022) (requiring a separation period of one year); 23 PA. CONS. STAT. § 3301 (2022) (requiring divorcing spouses to live separate and apart for one year prior to filing for affidavit of divorce); 15 R.I. GEN. LAWS § 15-5-3 (2022) (requiring divorcing spouses to live separate and apart for three years, during which time they cannot have ordinary and usual relations that exist between married persons, including intercourse); S.C. CODE ANN. § 20-3-10 (2021) (requiring a separation period of one year); TENN. CODE. ANN. § 36-4-101 (2022) (requiring a separation period of two years for couples seeking divorce for irreconcilable differences); VA. CODE ANN. § 20-91 (2022) (requiring parents of minor children to separate for one year prior to filing for divorce, while divorcing spouses with no minor children and a written separation agreement must wait only six months before filing).

3. *See infra* Section I.

clear indication that they want out.[4] To the extent that one regards marriage as a contract, a meeting of the minds as to a modification of its terms or its termination makes a certain sense. But the requirements of separateness and the inquiries they inspire are superfluous and odd, given several realities of divorce: first, under no-fault divorce, no one has to prove any particular transgression; and, second, the contestations in divorce are rarely if ever about the divorce itself—rather, disagreements concern custodial, property, and support disputes.

A second argument, more tenuous than the first, to justify these requirements is anchored on the belief that marriage is a primary source of stability and security for children, families, and society. Divorce, the argument goes, is a destructive life event that couples should avoid, delay, or undertake painstakingly slowly.[5] Yet the passage of time and greater visibility of families and couples not hiding their choices and arrangements has debunked the myth that marriage is the only available and functional means of raising children and ordering a civil society. Meanwhile, the time periods and requirements embedded in many separate and apart requirements are deeply destabilizing and burdensome.[6]

Moreover, the requirements for separateness burdens certain social groups in particular. To begin, living—and parenting—separately prior to final orders for support and division of assets is challenging if not impossible for those who are under-resourced or living in poverty; these economic realities impact women in particular. Moreover, the obsession about what is happening behind closed doors and what those intimate and interpersonal choices might tell the public about a couple's desires or capacities is deeply rooted in heteronormative thinking and reasoning that applies rigid binaries to gender, gender performance, sexuality, and family constellations.[7] Many expressions of self, love, and family do not match rigid constructions of how to "do" family.[8] Moreover, inquiries into sex or home life are a particular

4. *See, e.g.*, D.C. CODE §§ 16-904, 16-905 (2022).

5. *See, e.g.*, Nancy D. Polikoff, *Concord with Which Other Families?: Marriage Equality, Family Demographics, and Race*, 164 U. PA. L. REV. ONLINE 99, 103 (2016); Scott Coltrane & Michele Adams, *The Social Construction of the Divorce "Problem": Morality, Child Victims, and the Politics of Gender*, 52 FAM. RELS. 363, 363 (2003); Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2184 (1995).

6. *See, e.g.*, Shankar Vedantam, *Marriage Economy: 'I Couldn't Afford to Get Divorced,'* NPR, (Dec. 20, 2011, 4:29 PM), https://www.npr.org/2011/12/20/144021297/marriage-economy-i-couldnt-afford-to-get-divorced [https://perma.cc/8Q5R-F6ZR].

7. *See* Ramona Faith Oswald, Libby Balter Blume & Stephen R. Marks, *Decentering Heteronormativity: A Model for Family Studies*, *in* SOURCEBOOK OF FAMILY THEORY & RESEARCH 143 (Vern L. Bengston, Alan C. Acock, Katherine R. Allen, Peggye Dilworth-Anderson & David M. Klein eds., 2005).

8. Alexander Nourafshan & Angela Onwuachi-Willig, *From Outsider to Insider and Outsider*

violation to women, members of the LGBTQ+ community, and people of color, as classes of people whose sexuality and home life are too often distorted or weaponized against them.[9] Meanwhile, the requirements appear contrary to constitutional protections.[10] A fulsome accounting of harms—both shared and specific—and a survey of the constitutional concerns reveal that separate and apart requirements defy the very expectations we ought to have for family policies. They do not extend the dignity and respect to couples and families that they deserve, and they do not scaffold the predictability and stability that divorcing couples and families need.

Part I of this Article will explore the context of divorce—who is divorcing and why people leave marriages. This Part also offers a primer as to how the process and requirements for divorce are situated in the history of divorce. Part II will clarify and expand upon the harm done by separate and apart requirements generally and the intrusion they inspire. The Part will begin with an overview of the toll that pursuing divorce takes and how separate and apart requirements compound these burdens. This Part also seeks to situate these harms in the context of the disenfranchisement experienced by those who the law subordinates or fails to anticipate, as well as the particular psychological harm to subordinated communities brought on by invasions of privacy and judgment about lifestyle. To the extent that Part II describes how separate and apart requirements complicate the lived experience of families, Part III introduces the legal doctrine that should challenge the existence of the requirements themselves.

Again: Interest Convergence and the Normalization of LGBT Identity, 42 FLA. ST. U. L. REV. 521, 524 (2015); Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 4 n.10 (1999).

9. *See generally* Hutchinson, *supra* note 8, at 7 (examining "the social problem of systemic violence against oppressed social groups, the anti-racist and legal responses to this violence, and more generalized discussions of heterosexism and gay and lesbian equality within anti-racist discourse and critical race theory" and observing that much of the "oppressive violence" against LGBTQ+ people, specifically LGBTQ+ people of color, involves sexual subordination).

10. As shall be discussed in greater detail herein, the many rights that are important to families are located in the margins of overlay of stated constitutional rights: the penumbra of those rights. Family rights—an inexact and under-theorized jurisprudence—relies on a liberty interest the "exactness" of which is difficult to define, but which "[w]ithout doubt . . . denotes not merely freedom from bodily restraint but also the right of the individual to . . . establish a home and bring up children," Meyer v. Nebraska, 262 U.S. 390, 399 (1923), and an articulation of a privacy right "formed by emanations" from other constitutional guarantees, Griswold v. Connecticut, 381 U.S. 479, 484 (1965); *see infra* notes 170–71 and accompanying text. The articulation and application of these rights has been vital to those in familial and intimate relationships, yet *Dobbs v. Jackson Women's Health Organization* casts a worrisome pall over existing liberty and privacy rights, let alone future extensions of them. *See* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2258 (2022) (stating, at least, that cases such as *Meyer*, *Griswold*, and *Lawrence* have a different and safer articulation of liberty interest than *Roe*, *Casey*, and *Dobbs*).

Part III outlines preliminarily the substantive due process right to be free from the burden of separate and apart requirements and inquiries. Specifically, the Part will illuminate an intersection in the Venn diagram of family law—namely, in the overlay of intimacy cases, right to marry cases, and family rights cases that suggest separate and apart requirements are on shaky constitutional ground. This Part will be in conversation with scholars calling for a right to sexual privacy and a right to unmarry, and it is meant as an invitation to further and future analysis. Preliminary analysis is offered here in this inchoate form to illuminate how clumsily and carelessly we define and defend family as a matter of law. It is not just that separate and apart clauses cause or exacerbate psychic and sociological harm—the risk of this harm exists and persists even where the law appears to be on precarious constitutional footing. In many respects, the Article agrees with Martha Minow's assessment from almost thirty-five years ago that there is "an incoherent jurisprudence about families, [because it is] a jurisprudence tugged and pushed by other concerns."[11]

The final Part of the paper will turn to a consideration of what really matters to families: (1) being afforded dignity and respect; and (2) stability and predictability for ordering finances and property and raising children. Interestingly, these are the public policy concerns cited in support of, but not actually served by, divorce law. Part IV will offer prescriptions that eschew dogmatic and political views of marriage and actually serve familial interests. First, jurisdictions must do away with separate and apart requirements. Second, jurisdictions should bifurcate the adjudication of divorce in a prompt administrative proceeding, allowing for subsequent adjudication or alternative dispute resolution of custodial, property, and support disputes.

This Article attempts to avoid the trap that family law scholarship can too easily fall into criticizing doctrine "on a low level of abstraction" and rushing to a proposed reform.[12] This Article offers a taxonomy of the harm that separate and apart requirements cause, paying particular attention to the unique harm to those whose experience of the law is too often invisible. The Article also illuminates how constitutionally precarious such laws are. The project, then, is both ambitious and insufficient, as it attempts to situate and expose the deep-seated problems of separate and apart requirements as reflective of the deep-seated flaws in family law jurisprudence generally.[13]

11. Martha Minow, *We, the Family: Constitutional Rights and American Families*, 74 J. AM. HIST. 959, 959 (1987).

12. Fran Olsen, *The Politics of Family Law*, 2 MINN. J.L. & INEQ. 1, 3 (1984).

13. "Family law both reflects and helps create an ideology of the family—a structure of images and understandings of family life." Olsen, *supra* note 12, at 3; *see also* Minow, *supra* note 11.

The Article is intended, therefore, to serve as an invitation to further conversation and exploration of the themes raised herein.

I. YOU JUST SLIP OUT THE BACK, JACK: GETTING DIVORCED

People get divorced for all sorts of reasons along a spectrum: from mistaken compatibility to situations that pose health and safety risks to spouses or children. All along this spectrum, there may be elements of neglect of self or partner in the marriage, or unkindness or sorrow or even deceit and scandal, but there is also room for collaboration or planning for a next chapter and a changed future. Whatever the reason, or whatever the conduct of the spouses involved, states now universally recognize the importance of letting people out of unhappy marriages.[14] And about forty to fifty percent of Americans will avail themselves of that option each year.[15] Even where a party can now rely on no-fault grounds for divorce, in many jurisdictions they must establish eligibility under the jurisdiction's separation requirements. A separation requirement refers to the amount of time two spouses must live separately to be eligible for a divorce.[16] Separation requirements range from sixty days to five years.[17] These requirements affect when a party can file and start the clock regarding when the matter will actually be heard or finalized.[18] Moreover, in many cases,

14. Cyn Haueter, *"I Can't Afford to Leave Him" Divorcing a Spouse with Superior Financial Resources*, 31 HASTINGS WOMEN'S L.J. 237, 237 (2020) ("[A]doption of no-fault divorce laws in all fifty states indicates the government-recognized importance of the ability to leave an unhappy marriage.").

15. *Healthy Divorce: How to Make Your Split as Smooth as Possible*, AM. PSYCH. ASS'N (2013), https://www.apa.org/topics/divorce-child-custody/healthy [https://perma.cc/7HUU-NMRV]; John Harrington & Cheyenne Buckingham, *Broken Hearts: A Rundown of the Divorce Capital of Every State*, USA TODAY (Feb. 2, 2018, 7:00 AM), https://www.usatoday.com/story/money/economy/2018/02/02/broken-hearts-rundown-divorce-capital-every-state/1078283001 [https://perma.cc/FY89-XEHX]; *Marriage & Divorce*, AM. PSYCH. ASS'N, https://www.apa.org/topics/divorce-child-custody [https://perma.cc/4TBW-FMFC]. This rate is higher for subsequent marriages.

16. Jennifer S. Tier, *So You're Getting Divorced: What to Expect and How to Proceed*, 42 FAM. ADVOC. 4, 4 (2019).

17. *Id*. In some jurisdictions, one can file for divorce before waiting out the separation period, but the matter will not be calendared for final adjudication until the matter is "ripe." In jurisdictions such as Kentucky, for example, a party can file for divorce prior to separation, but the court will not enter a final divorce decree until the parties have lived separate and apart for sixty days, where "[l]iving apart shall include living under the same roof without sexual cohabitation." KY. REV. STAT. ANN. § 403.170(1) (West 2022).

18. In many jurisdictions, the language of the statutes and the pleadings do not line up readily with reality. Take Maryland and the District of Columbia for example. Both statutes have similar language: in Maryland, a "court may decree a divorce on the following grounds . . . 12-month separation, when the parties have lived separate and apart without cohabitation for 12 months without interruption before the filing of the application for divorce," MD. CODE ANN., FAM. Law § 7-103 (West 2022); in the District of Columbia, "[a] divorce from the bonds of marriage may be granted if (1) both parties to the marriage have mutually and voluntarily lived separate and apart without cohabitation for a period of six months next preceding the commencement of the action; [or] (2) both parties to the marriage have lived separate

these waiting periods are not just a matter of running the clock; rather, the period of separation has to have demonstrable features of separation to satisfy the court that the matter is ripe for divorce.

Judges in Pennsylvania, for example, may seek evidence that the spouses began to lead independent lives, may inquire about whether spouses have stopped sharing a bedroom and whether they have had sex, may ask how much time a spouse spent in the marital home, and may question whether the spouses shared meals.[19] In the District of Columbia, as in Pennsylvania, a couple is permitted to remain in the same marital home pending divorce, but the court will make explicit inquiry into whether the couple has had sex with one another and may additionally inquire about whether and when the spouses began to use separate bedrooms and how household finances were managed.[20] In Maryland, couples are not permitted to cohabitate at all, which does not forestall inquiry into the spouses' sexual relationship; rather, Maryland courts will make a direct inquiry regarding sex. Two spouses who have had sex will be deemed to be cohabitating regardless of a reality of separate abodes.[21] The existence of separation periods and the depth of inquiry required in some jurisdictions are vestiges of confounding Victorian principles and the conspiring paternalism of the state when it comes to divorce.

A. CURRENT REQUIREMENTS IN CONVERSATION WITH THE CONFOUNDING HISTORY OF DIVORCE

Historically marriage was a matter of "status and cultural location" as well as economic security (of dependent women) and property rights (of

and apart without cohabitation for a period of one year next preceding the commencement of the action," D.C. CODE § 16-904(a)(1)–(2) (2022). The fiction bound up in the semantics of the statutes is that once someone files for divorce they will be seen by a judge to adjudicate that divorce. But of course, they will not. They must serve the other party, which takes time. The clerk must calendar the matter, which will take time. There will be preliminary hearings, which will take all sorts of time. The time from pleading to divorce can easily be a year, which means that a couple has waited well in excess of the statutory period.

19. 23 PA. CONS. STAT. § 3301(d)(1) (2022); Jim Cairns, *What Does Separate & Apart Mean During an Uncontested Divorce?*, CAIRNS L. OFFS. (Dec. 5, 2016), https://www.mypadivorce lawyer.com/blogs-articles/2016/december/what-does-separate-apart-mean-during-an-uncontes [https://perma.cc/834U-69DA]. *Compare* Frey v. Frey, 2003 PA Super 135, ¶ 13 (concluding that a cohabiting couple had lived separate and apart after consideration of the husband and wife's arrangements and choices during the period of separation, which included examination of dinners out, shared meals in the home, and timetable of sexual intercourse), *with* Britton v. Britton, 582 A.2d 1335, 1337 (Pa. Super. Ct. 1990) (concluding that a three-year separation was invalidated as being a sufficient term of living separate and apart when for three months the couple "shared the same bedroom and resumed sexual relations, shared a joint checking account, and had a social life as husband and wife").

20. D.C. CODE § 16-904(c)(1) (2022); Boyce v. Boyce, 153 F.2d 229 (D.C. Cir. 1946).

21. Bergeris v. Bergeris, 90 A.3d 553 (Md. Ct. Spec. App. 2014).

men).[22] As stated by the Supreme Court in 1888,

> Marriage is something more than a mere contract, though founded upon the agreement of the parties. When once formed, a relation is created between the parties which they cannot change; and the rights and obligations of which depend not upon their agreement, but upon the law, statutory or common. It is an institution of society, regulated and controlled by public authority.[23]

Divorce, then, was about restructuring one's economic life and one's public standing.[24] By extension, divorce was quite public and political. Perhaps the greatest indication of this was the manner of seeking a divorce, namely through a petition to the legislature.[25] Divorce by legislature meant a popularly elected branch of government would decide whether a marriage harmed the spouses *and* the community to such an extent that the harm justified ending the marriage.[26] The move from legislative halls to courtrooms did not really render divorces particularly more available, any more private, or any less political.[27] Separate and apart periods and requirements reflect the longstanding insistence that marriage has an awful

22. RICHARD H. CHUSED, PRIVATE ACTS IN PUBLIC PLACES: A SOCIAL HISTORY OF DIVORCE IN THE FORMATIVE ERA OF AMERICAN FAMILY LAW 5 (1994).

23. Maynard v. Hill, 125 U.S. 190, 191 (1888).

24. CHUSED, *supra* note 22, at 6.

25. Lawrence M. Friedman, *A Dead Language: Divorce Law and Practice Before No-Fault,* 86 VA. L. REV. 1497, 1501 (2000); CHUSED, *supra* note 22, at 8.

26. *See also Maynard*, 125 U.S. at 213 (finding that marriage is a matter of "public ordination" rather than of "private agreement"); SANDRA F. VANBURKLEO, "BELONGING TO THE WORLD": WOMEN'S RIGHTS AND AMERICAN CONSTITUTIONAL CULTURE 69 (2001). Divorce laws then reflected the belief that marriages were social contracts unlike any other known contract. *Id.* at 71 (citing Maryland Acts of 1841) ("[P]arties cannot mutually dissolve it . . . because there is no accepted performance which will end it, . . . because it is not dissolved by a failure of the original consideration, . . . [and] because no suit for damages will lie for the non-fulfillment of its duties . . . .").

27. Maryland offers an apt example of the adoption of "modern" divorce reform. *Historical Background—Divorce Records*, MD. STATE ARCHIVES http://guide.msa.maryland.gov/pages/viewer.aspx?page=divorce-historical-background [https://perma.cc/7S4Y-TA7H] ("The legislature continued its role in divorce proceedings until it passed an act to give the chancery court and the county courts, as courts of equity, jurisdiction in cases of divorce on March 1, 1842 (Acts of 1841, Ch. 262)."); *Reports of Cases in the High Court of Chancery of Maryland 1846–1854*, ARCHIVES OF MD. ONLINE https://msa.maryland.gov/megafile/msa/speccol/sc2900/sc2908/000001/000200/html/am200c--562.html [https://perma.cc/PY7E-CAF4] (featuring excerpts of 1841 Md. Laws 262). Judicial divorce was almost universal by 1900. Friedman, *supra* note 25*,* at 1501. Maryland adopted judicial divorce in 1841, but even here, the Maryland judges shared jurisdiction with the legislature until well after 1850 and exercised very little of the discretion they were granted. CHUSED, *supra* note 22; *see also* VANBURKLEO, *supra* note 26, at 71. Meanwhile, lingering Victorian morals and general concern over a rising divorce rate held back any significant reform to the law beyond moving the matters into court. CHUSED, *supra* note 22, at 159–60. The first major change to divorce law did not occur for seventy years until 1937, when an amendment added a period of separation of five years as grounds for divorce, thereby formally ushering in limited opportunity for consensual divorce. *Id*. at 159; Benjamin Schenker, *A History of Divorce in Maryland*, MD. BAR J., Nov. 2016, 41, 42.

lot to do with the performance of normative roles and obligations, so divorce is only an option if there has been a failure to execute these roles. Proving oneself eligible for divorce inspires the same theater of early divorce law and continues to invite or advance a regime of judicial paternalism.

1. Marriage as Performance of Obligation

Where the legislature might have asked itself if a given marriage violated public policy, the courts addressed divorce as an adversarial process concerning a breached marital contract.[28] The terms of the contract flowed between husband and wife reflecting normative values. The conventional story of marriage in the nineteenth and early twentieth centuries was this: man and woman meet, perhaps based on love, but more likely based on a courtship promoted and controlled by the involved families. Man marries and stays man; woman marries and becomes wife, a person no longer entitled to an independent legal identity.[29] Husband assumes the legally and culturally assigned role of provider and protector for this now vulnerable creature. Wife agrees to obedience and sexual submission in order to birth children and tend to a home.[30]

Even as divorces left legislative halls, the jurisprudence of divorce still reflected a second social contract that flowed between the couple and the state.[31] The state had an interest in reinforcing predictable, regulated (gendered) expectations of support and obligation.[32] The prevailing notion was that this paradigm policed virtue and upstandingness. As sole benefactor to his family, a man would be sober and productive. As keepers of the hearth, women would be too busy or grateful to be performing their manifest destiny as mothers to notice their disenfranchisement.[33] Children would be fed and

28. Friedman, *supra* note 25, at 1501; Davey v. Davey, 96 A.2d 606, 608 (Md. 1953) (finding that a wife "did not make out a sufficient case entitling her to a divorce" and instead declared her to be an insufficient housekeeper and nursemaid because she did not clean up after her husband or have sex with him when he did not bathe for several weeks and soiled his underwear and bedsheets); Mirizio v. Mirizio, 150 N.E. 605, 606 (N.Y. 1926) (finding where wife does not "submit to ordinary marital relations," she cannot accuse her husband of abandonment and compel support from him).

29. Consider the phrase, "I now pronounce you *man* and *wife*" (emphasis added). The phrase contemplates the man's continued existence as a man, whether or not he is married, while the woman's self-alters to that of wife. HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY 101 (2000).

30. Joanna L. Grossman, *Separated Spouses*, 53 STAN. L. REV. 1613, 1613 (2001) (reviewing HARTOG, *supra* note 29).

31. *See also* Maynard v. Hill, 125 U.S. 190, 213 (1888) (suggesting marriage is a matter of "public ordination," rather than of "private agreement"); VANBURKLEO, *supra* note 26, at 71.

32. VANBURKLEO, *supra* note 26, at 71, 79; Fineman, *supra* note 5, at 2187.

33. Claire P. Donohue, *The Unexamined Life: A Framework to Address Judicial Bias in Custody Determinations and Beyond*, 21 GEO. J. GENDER & L. 557, 563–65 (2020).

clothed and sheltered.[34] Conduct such as adultery, desertion, or cruelty—and eventually habitual drunkenness and use of illicit drugs—became acceptable common grounds for divorce as they amounted to an obvious breach in the promises flowing not just from husband to wife, but also between married couple and state.[35]

2. Divorce as Theater

Forced to comply with divorce law's requirements for specific action or omission by a spouse, "one-sided evidentiary hearings[] and feigned testimony became common."[36] Litigants continued to make public performances in courts concerning the appropriateness of their divorcing, just as they had before the legislature.[37] Indeed, litigants would "blithely relate[] prefabricated stories of their spouses' 'extreme cruelty' destroying their marriage."[38] The following situation seems humorous in retrospect, but is in actuality a maddening example of what happens when there is such a gulf between law and society.[39] In New York, couples staged elaborate farces, complete with paid actors, for example, to play a mistress who would substantiate an adultery ground for divorce.[40] Attorneys and judges played

34. Historically, jurisdictions have denied all manner of benefits to children born out of wedlock "based on morals and general welfare because it discourages bringing children [deemed illegitimate] into the world." Levy v. Louisiana, 391 U.S. 68, 70 (1968).

35. Friedman, *supra* note 25, at 1531; *see, e.g.*, MASS. GEN. LAWS ch. 208, § 1 (2022).

36. CHUSED, *supra* note 22, at 160.

37. *Id*.

38. J. Herbie DiFonzo, *No-Fault Marital Dissolution: The Bitter Triumph of Naked Divorce*, 31 SAN DIEGO L. REV. 519, 521 (1994); *see also* Friedman, *supra* note 25, at 1504 (regarding migratory divorce); *id.* at 1505–06, 1511–13 (discussing New York).

39. Friedman, *supra* note 25, at 1504.

40. As early as 1896, the *New York Times* complained:

> Among the more recent creations of knavery is a trade which ought to become as infamous as some other callings which the law visits with its severest penalties. . . . The object of it is to procure divorces by means of fraud and perjury. The husband or wife who wishes to get rid of a disagreeable partner has only to go to some sharper calling himself an attorney, who advertises his readiness to get divorces without publicity, and who at once undertakes to do all the dirty work incidental to the case. If there is no evidence he forges or invents as much as he wants. If the man or woman against whom he is employed is innocent, he finds someone to lay all sorts of crime to their charge.

NELSON MANFRED BLAKE, THE ROAD TO RENO: A HISTORY OF DIVORCE IN THE UNITED STATES 190 (1962).

> In 1934, the *New York Mirror*'s Sunday magazine featured a sensational series entitled "I was the 'Unknown Blonde' in 100 New York Divorces!" A woman calling herself Dorothy Jarvis claimed that she had been a respectable stenographer in a lawyer's office until she lost her job during the depression. Her former employers sent her to a firm of private detectives who employed many girls as professional witnesses in divorce cases. At first Dorothy received from $25 to $100 for each job, but the field became overcrowded and she could get only $10 to $50. With a cooperative husband, the procedure was routine. She would accompany the man to some hotel room and remove a few outer garments. Then a raiding party would break in and surprise the guilty couple. Usually the interlopers were three in number—a private detective, some person who knew the husband (about half the time the wife herself), and a professional process

along.[41] The truly affluent skipped the show and headed to Reno for "quickie" divorces.[42] When New York, one of the last states to allow no-fault divorces finally did so, the two "chief evils the new divorce law was designed to eliminate" were the "collusive or fraud-ridden divorce actions" and "out-of-state divorces based upon spurious residence and baseless claims."[43] If a party failed to keep up the guise of the performance or a judge was not as accommodating of any novelty or stretch in the arguments litigants made, this could forestall the divorce.[44] And of course, any party not willing to concede grounds or agree to the divorce could lock a miserable couple together in perpetuity.[45]

Eventually, the chasm between what relationships actually looked like and what divorce laws and jurisprudence required grew too huge and too public to ignore.[46] The nineteenth century Women's Movement had animated questions about women's roles and capacity that challenged the prevailing notion about family.[47] These reformers raised consciousness regarding women's property rights and a desire to dismantle male domination, "alter[ing] the notion of the husband/father as the legal representative for the family in public and commercial realms."[48] Decades later, in the 1960s, a powerful second wave of feminism supplied further

> server who would later hand the defendant the summons and complaint in the divorce suit. The eventual hearing before the referee would be routine, even to following a mimeographed list of questions."

Id. at 193.

41. Reed v. Littleton, 289 N.Y.S. 798, 800–01 (Sup. Ct. 1936) ("[H]as not my good brother overlooked the fact that a certain amount of naïveté is an essential adjunct to the judicial office? Does not the Supreme Court grind out thousands of divorces annually upon the stereotyped sin of the same big blond attired in the same black silk pajamas? Is not access to the chamber of love quite uniformly obtained by announcing that it is a maid bringing towels or a messenger boy with an urgent telegram?"), *rev'd*, 292 N.Y.S. 363 (App. Div. 1936), *aff'd*, 9 N.E.2d 814 (N.Y. 1937).

42. BLAKE, *supra* note 40; Friedman, *supra* note 25.

43. Palermo v. Palermo, 950 N.Y.S.2d 724, 725 (Sup. Ct. 2011), *aff'd*, 953 N.Y.S.2d 533 (App. Div. 2012).

44. Friedman, *supra* note 25, at 1507 (reciting a case in which a divorce was denied because the parties drew up a property settlement agreement in which the husband agreed "that he will . . . allow the case to go forward as an uncontested case," which was against the public policy of the great state of Ohio).

45. *Id.* at 1509 (describing a six-year-long marriage that went unconsummated and a husband who ultimately left the marital home, but the wife contested and blocked the divorce); *see also Palermo*, 950 N.Y.S.2d at 725 (describing a wife who tried to divorce her husband three times during a ten-year period in which they were not even living together, but the court threw out the case because husband contested).

46. Friedman, *supra* note 25, at 1498, 1504.

47. Minow, *supra* note 1112, at 974.

48. *Id.* That said, one must note that for many reformers, including Stanton herself, the reform was about helping women out of oppressive or dangerous situations, not rejecting family life. *Id.* One can see that in this way, even Stanton was not immune to clinging to a heteronormative family model. *Id.* at 973.

fodder for divorce reform.[49] These twentieth-century feminists were outspoken in naming the privilege and subordination of the varying roles and opportunities available to men and women in marriage and the public realm (for example, the privileged public role of man as employee versus the subordinated private role of woman as caretaker).[50] They mounted resistance to the subordination of private roles and to a woman's default position in them. Emerging notions that women might have myriad ways of deciding whether and how to be wives and mothers lent themselves to reforms that facilitate movement in and out of marriage.[51] This cultural revolution combined with the chorus of litigators, judges, and families who were growing tired of the system-inspired collusion and fraud piloted a transition to no-fault divorces.

The timeline for states adopting no-fault divorce statutes tracked with Supreme Court cases chipping away at laws that carried or reflected assumptions that women would marry, marry young, and remain dependent in their marriages.[52] The first state to adopt no-fault divorce was California in 1969, and the last state was New York in 2010. To this day, only seventeen states have true no-fault statutes whereby the parties cannot raise fault.[53] While the concept of fault eroded or became of second order importance in the divorce law of most states, requisite periods of separation did not, and normative requirements for what constitutes appropriate levels of disconnectedness arose.[54] Parties' abilities to satisfy the court that they have lived separately turns on their abilities to perform as expected.

The standards before a family court judge are notoriously subjective.

49. *See* NANCY D. POLIKOFF, BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW 32 (2008) (stating that passage of no-fault divorce statutes amounted to "a political consensus to conform law to modern life"); *Divorce and Separation*, 1 WOMEN'S RTS. L. REP. 16, 17 (1972) (citing the National Organization of Women's Model Divorce Reform Bill).

50. *See* CATHERINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 160 (1989) ("[O]ver time, women have been . . . disenfranchised and excluded from public life."); Fran Olsen, *The Politics of Family Law*, 2 MINN. J.L. & INEQ. 1, 19 (1984).

51. *See* Stanton v. Stanton, 421 U.S. 7, 14–15 (1975) (stating that "[n]o longer is the female destined solely for the home and the rearing of the family, and only the male for the marketplace and the world of ideas"); *see also* Donohue, *supra* note 33, at 569–70. For example, law and social reforms around birth control challenged the notion that the family was a necessary institution in ways that built on, but were distinct from, reforms based on securing property rights for women or rhetoric and reform designed to resist subordination to men. Minow, *supra* note 11, at 974.

52. VANBURKLEO, *supra* note 26; *see* Stanton, 421 U.S. at 7. *See generally* Kirchberg v. Feenstra, 450 U.S. 455 (1981); Orr v. Orr, 440 U.S. 268 (1979); Califano v. Westcott, 443 U.S. 76 (1979); Craig v. Boren, 429 U.S. 190 (1976).

53. *Charts 2019: Family Law in the Fifty States, D.C., and Puerto Rico*, 53 FAM. L. Q. 353, 371–79 chart 4 (2020) [hereinafter *Charts 2019*].

54. *See, e.g.*, CHUSED, *supra* note 22, at 159 (discussing Maryland, a state that reluctantly ushered in no-fault divorce); Schenker, *supra* note 27.

The best interest of the child standard in custody matters, for example, asks judges to make determinations concerning a child's welfare and happiness.[55] On the margins—where one parent is unfit or dangerous—this may be an easy call, but, in the vast majority of cases, judges are trying to parse facts about things like parental involvement, a "child's adjustment," and "the wishes" of the parties and the child in order to make predictive determinations about what arrangements will best serve the needs of a child.[56] These determinations inevitably turn on a judge's opinion of the parents—opinions, which are in turn, based on the judge's own observations and values.[57] Parties that do not play the predictable and expected part of mother as nurturer and father as provider can struggle in custody determinations.[58] Similarly, judges' expectations and values about roles and behavior inevitably also come to bear when judges consider the conduct and choices of parties when making findings of fact and conclusions of law about whether or not couples' marriages have in fact broken down irretrievably.[59] Trials and colloquies on these issues, after all, seek to unearth the couples' "inner most beliefs."[60] Perhaps because this task is so impossible and offensive, some jurisdictions pretend to have turned instead to "objective" evidence of separateness to prove the claim that the marriage is over.[61] And yet even here these inquiries can include questions about sex and particularized questions about shared meals, sleeping arrangements, and social engagements when a couple continues to share a residence. Just as with other aspects of family law, couples whose performance is outside of a subjective norm can and will struggle to convince the court that they are eligible for divorce.[62]

One appropriately wonders if any of these inquiries into intimate and

55. *See, e.g.*, MASS. GEN. LAWS ch. 208, § 31 (2022) ("In making an order or judgment relative to the custody of children, the rights of the parents shall, in the absence of misconduct, be held to be equal, and the happiness and welfare of the children shall determine their custody.").

56. D.C. CODE § 16-914(a)(3) (2022).

57. *See* Donohue, *supra* note 33, at 572–73.

58. *See id.* at 573, 580–81.

59. Palermo v. Palermo, 950 N.Y.S.2d 724, 725 (Sup. Ct. 2011), *aff'd*, 953 N.Y.S.2d 533 (App. Div. 2012).

60. *Id.*

61. *Id. But see* Caffyn v. Caffyn, 806 N.E.2d 415, 422 (Mass. 2004) (stating that personal decisions about a marriage or divorce should be "free from overwhelming state control" (citation omitted)).

62. Order for Counseling, Potts v. Potts, No. 21-CI-00358 (Ky. Bullitt Cir. Ct. Fam. Ct. 2021) (denying a divorce to a couple whose family planning and testimony seemed too composed and too collaborative); Theisen v. Theisen, 716 S.E.2d 271, 272–73, 276 (S.C. 2011) (citing that "the night before the hearing in the family court, Husband, Wife, and their children 'all celebrated a very nice Easter dinner as a family at [their] home' " and finding that "living separate and apart must involve more than the cessation of the parties' romantic relationship" and include "something more than a discontinuance of sexual relations," such as "parties must live in separate domiciles").

familial choices are necessary given that parties can plead in plain and simple language that yes, in fact, through "no fault" of either party, there has been an irretrievable breakdown of the marriage.[63] Surely the inquiries are of no consequence when neither party contests the divorce, and even where one spouse contests the divorce, under a no-fault regime, this spouse cannot successfully defend against the divorce itself for long: if one spouse wants out, they will get out.[64] And yet all scenarios—from uncontested divorces to those where someone will impotently contest an inevitable divorce—many courts can and do inquire into the conditions or level of separation before entering an order of divorce.

3. Judicial Paternalism

The early days of judicial divorce and the jurisprudence of fault invited an era of judicial paternalism in which parties aired the failures of their spouse to act in accordance with norms, and the court's orders were a mechanism to replace the failed male head of household.[65] Subsequent divorce reform allowing for no-fault divorce shifted the "regulatory" energy or emphasis away from that of locating blame on one individual and towards the "internal aspects of family life."[66] The need for parties to demonstrate that they have lived separate and apart generally, and the companion assumption that this means something, particularly about the way a couple shares bed and board, tells us that models of judicial paternalism are alive and well.

In twenty-nine states, parties must invite the court to enter their home to determine if they and their soon-to-be-ex-spouse are behaving as if the marriage is truly over.[67] The suggestion, in turn, that evidence of sex acts or contributions to a shared residence is sufficient proof of an intact marriage reflects antiquated and gendered visions of marriage, namely that marriage is nothing more than the exchange of sexual services and housewifery for the support of bed and board.[68] It is also a reminder that marriages have always been a vehicle for the state to police interpersonal relationships and regulate society: "Marriage defines normality. It is the standard against which all other relationships are judged. Societies promote and expect marriage. And

63. MASS. GEN. LAWS ch. 208, § 1A (2022); *Palermo*, 950 N.Y.S.2d at 725.

64. Tier, *supra* note 16; *Palermo*, 950 N.Y.S.2d at 725 (citing Strack v. Strack, 916 N.Y.S.2d 759 (Sup. Ct. 2011)). And indeed, the contestations are rarely, if ever, about the divorce itself; rather, disagreements concern custodial, property, and support disputes. *See* Friedman, *supra* note 25, at 1509.

65. VANBURKLEO, *supra* note 26.

66. Coltrane, *supra* note 5, at 365.

67. *Charts 2019*, *supra* note 53.

68. Friedman, *supra* note 25, at 1508–10 (discussing cases where some "exchange" of services was seen as sufficient grounds to maintain (seemingly miserable) marriages).

governments use marriage to police social groups."[69]

The creation of family courts themselves signal a sense that what the court and judge were doing was intervening into the family, not merely presiding over a breached contract or brokering terms for a party wishing to modify their marital contract.[70] Family courts as originally conceived were meant to "mend, and if possible cure, sick marriages," ending them only "if cure was hopeless."[71] Judges, then, became marriage doctors or conciliators.[72] Still today in many jurisdictions, when one files through no-fault grounds, it triggers not just a separation period and the inquiry into separateness already discussed, but it can also trigger a requirement that the couple undergo mandatory "counseling" sessions.[73] In Pennsylvania, for example the court does not have to order counseling but may do so on information and belief that there is a reasonable prospect of reconciliation.[74] So, if a judge determines that the couple really meant that they wanted to be divorced when they filed for divorce, the judge may decline to order them to counseling. But if the judge decides—what exactly?—that one spouse might still be invested in the marriage and should be able to use state resources to pursue their disinterested spouse, or that either spouse has not thought it through?[75] Then the judge can order the parties into counseling. And counseling to what end? To reconcile?[76] To "play nice"? This is not counseling. This is social engineering.[77] It is well studied that in order for

69. Brian L. Frye & Maybell Romero, *The Right to Unmarry: A Proposal*, 69 CLEV. ST. L. REV. 89, 91 (2020).

70. Friedman, *supra* note 25*,* at 1531.

71. *Id*.

72. *Id*.

73. 23 PA. CONS. STAT. § 3302(b)–(c) (stating the court "shall require up to a maximum of three counseling sessions"); Rich v. Acrivos, 815 A.2d 1106, 1108 (Pa. Super. Ct. 2003).

74. *Rich*, 815 A.2d at 1108 ("The law is clear that the trial court is under no obligation to order marriage counseling if no reasonable prospect of reconciliation exists." (citation omitted)).

75. Palermo v. Palermo, 950 N.Y.S.2d 724, 725 (Sup. Ct. 2011), *aff'd*, 953 N.Y.S.2d 533 (App. Div. 2012) ("In most cases, these other states require the courts to find, as an objective fact, that the marriage is 'irretrievably broken down.' Pennsylvania, for example, permits a divorce upon the grounds of 'irretrievably broken,' but the legislature permits the opposing party to obtain a hearing if they deny that allegation and allege that counseling may repair the marriage." (citation omitted)).

76. *Id.* at 725 (suggesting that there is no standard for evaluating reconciliation).

77. See, for example, *Potts v. Potts*, No. 21-CI-00358 (Ky. Bullitt Cir. Ct. Fam. Ct. 2021) for a shocking case out of Kentucky in 2021 where a court declined to order a couple's divorce and instead ordered them into counseling. In so doing, the court made the following (excerpted) findings of facts:

> [B]oth parties testified to having formed long-term goals for themselves and their child . . . . [T]hese parties have weathered the stresses of being a military family for a long term . . . . The Court . . . observed the emotional responses the parties had toward one another. . . . [T]he parties were respectful and courteous to one another and both held themselves in dignified and mature composure. . . . Frankly, the Court observes these two parties to be two people who have lost the ability to communicate with one another about their emotional relationship and, perhaps, have let their pride become a wall between them.

clinical intervention to be successful, particularly in family counseling, each member must come to the counseling with a sense of autonomy, choice, and insight.[78]

Of final and considerable concern, courts' paternalistic "fact" finding into separateness seeks to ask and answer heteronormative and gendered questions about family composition and choices. The burden of the courts' voyeurism is not something experienced or borne equally across all populations; rather, it is a practice that disproportionately subordinates people of color, women, the poor, and members of the LGBTQ+ community. Meanwhile, the intrusion into divorcing couples' intimate choices and shared living arrangements, and its disparate impact on subordinated populations, is inapposite to family rights doctrine and the evolution of privacy rights in marital and non-marital homes.

II. SHE SAID IT GRIEVES ME TO SEE YOU IN SO MUCH PAIN: BURDEN AND HARM FROM INTRUSION INTO INTIMACY AND FAMILY

While there is some variation across jurisdictions, one can articulate a "typical" process to secure a divorce. One spouse will file a complaint and another will answer, or the two will file a joint complaint; the matter will be marked for a preliminary hearing, at which point the court and the parties chart a path for the divorce, which may include discovery deadlines and a series of court appearances; thereafter follows a final hearing, which may or may not be contested, so this hearing may be an evidentiary hearing or more of a colloquy with the parties; and finally, finally, finally the court will enter an order pronouncing the couple divorced and addressing issues of custody, support, and property. Yet, even within this similar arc of a divorce case, the distinct experience of a given family will be different depending on the predilections of their jurisdiction or the circumstances of the litigants.[79] A

Id. at 1–2. The court then *ordered* a "suggestion" that the couple seek counseling to see if they could resolve their issues—one of which included a party's desire to relocate—"without ending the marriage." *Id.* at 3. The court went on to order that neither party could introduce the child to any "dating interest" or speak to their own child "about such person or relationship or permit any third party to do so." *Id.*; *see also Unusual Ruling: Kentucky Judge Denies a Couple's Divorce*, WLKY (Sept. 4, 2021, 9:01 AM), https://www.wlky.com/article/unusual-ruling-kentucky-judge-denies-a-couples-divorce/37456279 [https://perma.cc/AGC7-B6YS].

78. *See, e.g.*, Laurie Heatherington & Myrna L. Friedlander, *Manifestations and Facilitation of Insight in Couple and Family Therapy*, *in* INSIGHT IN PSYCHOTHERAPY 81, 81–99 (Louis G. Castonguay & Clara E. Hill eds., 2007).

79. In every case, there is the matter of establishing a tracking order that accommodates pretrial issues. The pretrial goalposts may include preliminary hearings regarding temporary orders for custody or support, and cases with property issues follow a track that reflects the likelihood of more involved discovery or protracted litigation regarding designation of property and its equitable distribution.

rudimentary Google search tells us that on average it will take a couple about one year to secure a divorce.[80] In those jurisdictions that require a waiting period before filing for divorce, however, the timeline will be one year plus that waiting period; in Maryland for example, practitioners will set clients' expectations to contemplate a total wait of about two years before the divorce is final.[81] These timelines have elongated substantially during the COVID-19 pandemic and the ensuing crisis of capacity and flexibility in state courts to administer matters remotely.[82]

A. SOCIAL EMOTIONAL AND FINANCIAL COSTS OF THE DIVORCE PROCESS

Scholarship about divorce includes studies tracking divorce rates, attempting to predict why couples divorce, and describing how they fare in the years after divorce. Dwarfing that scholarship are the multitude of articles and studies about how children fare after a divorce. In contrast, there is very little writing and research about the experience—the trajectory and social emotional states—during the *years* that pass when couples are waiting to file for divorce and moving through the courts to secure a divorce. We do know that leaving a marriage is a significant life stress.[83] "For many people, marital separation means substantial financial upheaval, the renegotiation of parenting relationships and co-parenting conflict, changes in friendships and social networks, moving locally or relocating cities, as well as a host of psychological challenges, including re-organizing one's fundamental sense

Additionally, in some jurisdictions, couples must submit to mandatory mediation or take a parenting class prior to any further court-calendared event. How long it takes to divorce depends in large part on how long the adjudication of contentious matters will take, because, typically, the matter of the ending of the marriage is tied up with the resolution of these corollary issues. Even for a divorce in which these matters are not an issue—either because the parties reach private settlement in regard to them or because they were not an issue in the marriage in the first place—a divorce will not be immediate. The length of a divorce is also a function of how busy the court is and the residency requirements of the state. Tier, *supra* note 16.

80. *Id.*; E.A. Gjelten, *How Much Will My Divorce Cost*, NOLO, https://www.nolo.com/legal-encyclopedia/ctp/cost-of-divorce.html [https://perma.cc/8YHH-8ECT]. There is very little difference in the timeline even when a divorce is uncontested. Press Release, Alicia Davis, Principal Ct. Mgmt. Consultant, Nat'l Ctr. for State Cts., Family Courts Need to Adapt to Modern Families, New Study Shows (Oct. 4, 2018), https://www.ncsc.org/newsroom/news-releases/2018/family-courts-need-to-adapt-to-modern-families [https://perma.cc/6Q7B-MYL5].

81. *See, e.g.*, Gary Miles, *The Length of the Divorce Process in Maryland*, HG.ORG L. RES., https://www.hg.org/legal-articles/the-length-of-the-divorce-process-in-maryland-34881 [https://perma.cc/5A9P-BCWN].

82. *See* Samuel V. Schoonmaker IV, *Family Law During COVID-19: Virtual Hearings, Family Court Proceedings, and the Future*, 54 FAM. L. Q., fall 2021, at ix, ix (regarding the impact of COVD-19 on family court operations).

83. David A. Sbarra, *Divorce and Health: Current Trends and Future Directions*, 77 PSYCHOSOMATIC MED. 227, 229 (2015).

of self: *Who am I without my partner?*"[84]

We also know that the divorce process imposes financial strain on families. Divorces are costly.[85] There are filing fees associated with the process.[86] People using an attorney pay for that assistance—sometimes as much as $400 per hour.[87] Divorces may involve consultation with accountants, therapists, or other professionals, none of whom work for free.[88] Divorcing may require refinancing homes and cars to adjust ownership of that property.[89] Couples may face moving costs or additional rents and payments to set up separate homes.[90] The particular time periods and separate and apart requirements of certain jurisdictions are deeply destabilizing and burdensome. The waiting periods and the requirements of separate and apart make the cost of divorce more immediate or pronounced.[91] Protracted divorce proceedings mean lost wages or use of personal leave for multiple court appearances, as well as the risk of job loss for missing work time and the cost of childcare expenditures.[92]

Financial strain and the protracted timeline for divorce map onto a sea of logistical and existential difficulties that are already part of divorce for families.[93] One difficulty surrounds the public airing of private matters. We are socialized—and in fact, the law affirms in many respects—that our marriages are confidential places.[94] Yet, the divorce process invites, even requires, an invasion of this privacy. When the issue of privacy breaches in divorce is discussed publicly or in legal discourse, the discussion usually centers on situations in which one spouse may have crossed an ethical, if not legal, line in accessing information to buttress their claims for a divorce. The

84. *Id*.

85. Haueter, *supra* note 14, at 240–45 (detailing the costs of divorce).

86. Vedantam, *supra* note 6. *But see* Boddie v. Connecticut, 401 U.S. 371, 372–73, 382 (1971).

87. Gjelten, *supra* note 80.

88. Geoff Williams, *4 Ways You're Making Your Divorce More Expensive*, U.S. NEWS (June 20, 2022), https://money.usnews.com/money/personal-finance/family-finance/articles/ways-to-avoid-an-expensive-divorce [https://web.archive.org/web/20220908233956/https://money.usnews.com/money/personal-finance/family-finance/articles/ways-to-avoid-an-expensive-divorce].

89. *Id*.

90. *Id*.

91. *Id*.

92. Lynda B. Munro, Johanna S. Katz & Meghan M. Sweeney, *Administrative Divorce Trends and Implications*, 50 FAM. L. Q. 427, 429 (2016).

93. *See* Vedantam, *supra* note 6 ("[U]nhappy marriages and more unhappy couples trapped in marriage—is cause for serious worry."); Palermo v. Palermo, 950 N.Y.S.2d 724, 725 (Sup. Ct. 2011), *aff'd*, 953 N.Y.S.2d 533 (App. Div. 2012).

94. Stephanie Fairyington, *Do You Have a Right to Privacy in Your Marriage?*, TIME (Aug. 8, 2016, 10:58 AM), https://time.com/4419321/privacy-in-marriage [https://perma.cc/CY27-FJHH]; *see also* Commonwealth v. Vigiani, 170 N.E.3d 1135, 1138 (Mass. 2021) (discussing spousal privilege and disqualifications).

invasions I refer to here, in contrast, are invasions solicited by the court and the legal process itself. Even leaving aside the particular inquiries of separate and apart, divorce itself as it is conceptualized and adjudicated asks litigants to discuss a breakdown of a (previously) private domain. It may further require discussion or examination of child rearing and finances. Now layer onto this the particularized inquiry of some separate and apart jurisdictions: last sexual encounters, sleeping arrangements, or the nature of shared meals and social engagements. In almost any other context, sex, money, and child rearing are hallowed grounds. These are issues that one may not have reason or comfort enough to discuss with anyone at all, or only with close friends; and yet now the divorce requires a public airing, all while insisting that the subject matter of the litigation is not to locate or determine any one person's fault. As shall be discussed in more detail below, privacy is an important concept in one's sense of self and sense of control, so the confusing breaches of it take a human toll.[95]

Additionally, families arriving in divorce court are not on happy or easy footing to begin with. They have experienced interpersonal stressors or have had pressures outside the marriage spill over into the marriage, which have triggered the marital conflict.[96] When the divorce process itself introduces new sources of stress and strain—financial, logistical, psychological, and otherwise—it taxes the very families who are already struggling to maintain a sense of collaboration and problem-solving.[97] Where deterioration of the social fabric is absolute, the inability to abide each other, let alone work with one another, presents a particular problem for families with children.[98] The prevailing wisdom is that (absent issues of abuse or parental unfitness) children benefit from access to and care by both parents, and so the presumption at law is one of joint custody. Essentially, divorcing parents will need to "deal" with one another regarding the care of their shared children.[99] Childcare is not the only matter that requires cooperation or compromise during a divorce. Divorcing couples must make decisions about property

95. *See infra* Section II.B.2.

96. Guy Bodenmann, Linda Charov, Thomas N. Bradbury, Anna Bertoni, Raffaella Iafrate, Christina Giuliani, Rainer Banse & Jenny Behling, *The Role of Stress in Divorce: A Three-Nation Retrospective Study*, 24 J. SOC. & PERS. RELATIONSHIPS 707, 724 (2007).

97. *Id*. ("When asked to recall why their marriage ended, participants tended to endorse dyadic skill deficits, lack of commitment, or emotional alienation as primary reasons.").

98. *See* David M. Frost & Allen J. LeBlanc, *Stress in the Lives of Same-Sex Couples: Implications for Relationship Dissolution and Divorce*, *in* LGBTQ DIVORCE AND RELATIONSHIP DISSOLUTION 70, 71 (Abbie E. Goldberg & Adam P. Romero eds., 2018) (discussing the experience of stress within "key social roles (e.g., Mother . . . caretaker), the obligations of such roles, and the social and interpersonal interactions attached to them").

99. *See id*. at 71 (stating that stress moves not only "within individuals' lives," but also "between individuals").

distribution and support or risk the court making the decision for them. Even in situations in which couples are willing and able to communicate and contribute to the joint enterprises of raising children or structuring post-divorce households, navigating these scenarios requires heightened intentionality and care in order to avoid or minimize discord. This work is exhausting. Enter separate and apart requirements—requirements that exacerbate all of the sources of stress and tension described above.

B. BURDENS ARE NOT EVENLY HELD

While any household or divorcing couple risks facing the burdens described above, the risk of exposure to the burdens or the depth of experience of each burden is not evenly borne by each family and couple. This is because not all families are resourced, respected, and accounted for in a way that provides them political and social power. It is worth starting by pointing out the ways in which differently situated families' actual passages through the divorce process will be different; from there, we will move to consideration of the more nuanced aspects of social and political differentiation as it impacts families' relative treatment in, and experience of, the divorce process. To begin then, it is not uncommon for different types of cases to be "tracked" differently, with separate judges for each type of case and distinct tracking orders that reflect the different realities of the pace and nature of the litigation. For families with fewer means, and particularly for those without counsel, pretrial events become the occasion for negotiation and mediation, much of which can be happening before the judge's eyes or with the judge's involvement. Where there are breakdowns or confusion regarding temporary orders, there are no attorneys to turn to for assistance, so the parties will seek the assistance of the court. In contrast, for parties with means, many pretrial court appearances are quite pro forma. The attorneys for the parties submit or discuss the private separation agreements that the divorcing spouses have agreed to in out-of-court negotiations or mediations. Parties produce evidence and ask and answer questions in depositions or interrogatories. Court appearances can be an occasion for announcing what is known, what has been done, and what has been decided.

The effect is to offer people of means the opportunity at least for the vision of divorce that Cady B. Stanton herself had wanted when she advocated for marriage to be considered a private agreement between the parties that could be terminated themselves with only state acknowledgment of the termination.[100] What she argued against is what people of lesser means arguably endure: supervised marital relations by surrogate governmental

100. VANBURKLEO, *supra* note 26.

heads of household.[101] Yet, for certain families, the entire scaffolding for divorce invites judicial involvement and threatens judicial paternalism. All this, in turn, maps on to the public discourse about the divorce "problem."[102] One hears claims that feuding parents should stay together for the sake of the children, that revaluing the idea of marital service and obligation would improve family life, and that marrying and not divorcing would lift women and children out of poverty.[103] Conservative pundits have laid blame for all manner of social problems on the thresholds of "broken homes."[104] "[M]arriage, rather than a shift in public priorities, [is] the solution to poverty, violence, homelessness, illiteracy, crime, and other problems."[105] It is in this context of punitive and judgmental rhetoric and under the eye of judicial paternalism that families are asked to declare their choices about whether they have lived together, how much they have communed with one another if they have lived together, and whether or not they have had sex with one another. There is a risk that subordinated and under-resourced families will have a particularly difficult or strained experience in such a divorce process.[106] This is not only unfair on a systemic level for a society that strives for justice, but it is painful on a personal level for those individuals whose families and needs are ignored, mischaracterized, or marginalized.

The state's intrusion into sexual and familial choices is a story told in race, class, gender, and sexuality, yet the state will declare its laws neutral.[107] The critique herein is twofold: first, to notice the inadequacy or stubbornness of the law, but also to take the time to name the psychic collateral consequences of our subordinating jurisprudence. An example will help here. Let us consider the law of rape. It is well studied that when Black women report rape, their accusations are under-investigated and under-

101. *Id*.

102. *See* Coltrane, *supra* note 5; Patrick Fagan & Robert Rector, *The Effects of Divorce on America*, HERITAGE FOUND. (June 5, 2000), https://www.heritage.org/marriage-and-family/report/the-effects-divorce-america [https://perma.cc/6EKP-C763].

103. *Id*.

104. Polikoff, *supra* note 5, at 100.

105. *Id*.

106. *Id*.

107. Derrick A. Bell, *Who's Afraid of Critical Race Theory?*, 1995 U. ILL. L. REV. 893, 899–900 (1995) (citing STANLEY E. FISH, THERE'S NO SUCH THING AS FREE SPEECH AND IT'S A GOOD THING, TOO 21 (1994)) ("[C]ritical legal studies view of legal precedent [is] not a formal mechanism for determining outcomes in a neutral fashion—as traditional legal scholars maintain—but is rather a ramshackle ad hoc affair whose ill-fitting joints are soldered together by suspect rhetorical gestures, leaps of illogic, and special pleading tricked up as general rules, all in the service of a decidedly partisan agenda that wants to wrap itself in the mantle and majesty of law.").

prosecuted.[108] Yet, in other contexts, the law is swift and careless in its intrusion into Black communities for the purpose of *criminalizing* the behavior of Black bodies.[109] Kimberlé Crenshaw explains how, therefore, a Black woman may be reluctant to call the police even when she has been raped or assaulted due to an unwillingness to subject her private life to the "scrutiny and control of a police force that is frequently hostile" to the Black community. [110] Will her account be heard as an assault as clearly as it would if it had been reported by a white woman? Will her assault and the violation of her sanctity be credited as intolerable as it would if it had been reported by a white woman? This has led, then, to the reality of Black women underreporting violations to their bodies. It has confirmed in the hearts and minds of many in the Black community that the law, for them, is not about protection and safety. There is also lasting psychic harm to Black women, and ongoing risks to their bodily safety.[111]

One can follow a similar path in analyzing separate and apart requirements and inquiries. To begin, requirements and inquiry around separate and apartness are manifestations of not believing—not believing that a family is considering or preparing itself appropriately for divorce; not believing their declarations that a marriage is over. Not being believed takes a psychic toll.[112] Secondly, these laws require probing into private spheres, and often, sexual choices. In this way law is primed—designed?—to alienate, ignore, or suppress classes of *people*, because not everyone's sexual dignity is held in positive regard, and because the law is tethered to heteronormative arrangements for what the private family sphere is "supposed" to look like. Moreover, inquiry in search of "proof" of separation invades a person's sense of privacy. Here, I do not refer to privacy in the constitutional sense (though I will do so in later sections of this Article) but rather in the ways in which individuals understand, hold, and value their privacy.[113] Privacy is an elusive concept: "Privacy is associated with liberty,

108. *See, e.g.*, *Black Women & Sexual Violence,* NAT'L ORG. FOR WOMEN, https://now.org/wp-content/uploads/2018/02/Black-Women-and-Sexual-Violence-6.pdf [https://perma.cc/HE3F-FMW8].

109. *See, e.g.*, *Criminal Justice Fact Sheet,* NAACP, https://naacp.org/resources/criminal-justice-fact-sheet [https://perma.cc/VN6S-RSFS] (discussing the racialized nature of policing and incarceration in the United States).

110. Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1257 (1991).

111. *Id*.

112. It is well studied that the symptoms of post-traumatic stress disorder following sexual assault are correlated with victims' perceptions of whether or not their account was believed. *See, e.g.*, Kaitlin A. Chivers-Wilson, *Sexual Assault and Posttraumatic Stress Disorder: A Review of the Biological, Psychological and Sociological Factors and Treatments*, 9 MCGILL J. MED. 111, 115 (2006).

113. Marijn Sax, *Privacy from an Ethical Perspective*, *in* THE HANDBOOK OF PRIVACY STUDIES: AN INTERDISCIPLINARY INTRODUCTION 143, 143 (Bart van der Sloot & Aviva de Groot eds., 2018)

but it is also associated with privilege (private roads and private sales), with confidentiality (private conversations), with nonconformity and dissent, with shame and embarrassment, with the deviant and the taboo . . . and with subterfuge and concealment."[114] Perhaps as a consequence, people perceive invasions of privacy differently and bear those invasions differently.[115] We are not all situated similarly in terms of the treatment we receive, the ways we are heard, the sense people make of our lives, and our experience of normative expectations.[116] As described above, rhetoric about divorce is already punitive and judgmental.[117] Black, Indigenous, and people of color ("BIPOC"), LGBTQ+, and under-resourced families, meanwhile, are asking for divorces in the context of their own stigmatization, discrimination, and associated psychic pain. They are asking for divorces in the context of specific stigmatization and discrimination about their families and sexuality.[118]

1. Stigma & Discrimination

Discrimination contributes to poor health outcomes and specifically affects mental health when the experience alters "one's perception of self and their surroundings."[119] One's stigmatized social status can create "unique minority stressors" for stigmatized and disadvantaged populations.[120] People of color, specifically, are "stressed by individual, institutional, and cultural encounters with racism."[121] Specific encounters with racism may be aversion, harassment, discrimination, hostility, and

(focusing "on questions such as 'What is the value of privacy?' and 'What privacy norms should be respected by individuals (including ourselves), society, and the state?' ").

114. Louis Menand, *Why Do We Care So Much About Privacy?*, NEW YORKER (June 11, 2018), https://www.newyorker.com/magazine/2018/06/18/why-do-we-care-so-much-about-privacy [https://perma.cc/SXH9-E2RX].

115. *Id*.

116. "Neutral" laws and procedures touch us differently, so the harm they reap lands differently. Emily Joselson & Judy Kaye, *Pro Se Divorce: A Strategy for Empowering Women,* 1 MINN. J.L. & INEQ. 239, 246, 269 n.68 (1983).

117. Fagan, *supra* note 102; *see also* Coltrane, *supra* note 5, at 367 (describing the claim making that portrays "divorce as the cause of 'broken' families"); Polikoff, *supra* note 5, at 100 (writing that broken homes are analyzed as a racist and gendered trope—throughout this rhetoric, "women raising children outside of marriage, a group that is disproportionately populated by women of color," receives the disapproval of conservative pundits who "posit[] marriage, rather than a shift in public priorities, as the solution to poverty, violence, homelessness, illiteracy, crime, and other problems").

118. Fineman, *supra* note 5, at 2192.

119. Tina Chou, Anu Asnaani & Stefan G. Hoffman, *Perception of Racial Discrimination and Psychopathology Across Three U.S. Ethnic Minority Groups*, 18 CULTURAL DIVERSITY & ETHNIC MINORITY PSYCH. 74, 74 (2012).

120. *See* Frost, *supra* note 98, at 72.

121. Robert T. Carter, *Racism and Psychological and Emotional Injury: Recognizing and Assessing Race-Based Traumatic Stress*, 35 COUNSELING PSYCH 13, 14 (2007).

violence.[122] These encounters and experiences can be the source of affirmative trauma or the cumulative experience of them can lead to toxic stress responses.[123] Unsurprisingly, studies suggest that these race-based stressors have an impact on BIPOC's psychological and physical health.[124]

LGBTQ+ people also suffer from individual and institutional discrimination. LGBTQ+ people may suffer from stigmatization by individuals and institutions, which can in turn provoke self-stigma. LGBTQ+ people are specifically subjected to stigmas based on perceptions of illegitimacy: *gay and lesbian individuals do not participate in legitimate relationships*; *transgendered persons do not express their gender in a legitimate way*.[125] Researchers have identified different categories of stigma. "Felt stigma" is the knowledge of society's perception of you.[126] Felt stigma can motivate LGBTQ+ persons to "constrict their range of behavioral options (e.g., by avoiding gender nonconformity or physical contact with same-sex friends) and even to enact sexual stigma against others."[127] Felt stigma may encourage some LGBTQ+ people to conceal their identity or socially isolate.[128] Another manifestation of self-stigma is "internalized sexual stigma . . . . Internalizing sexual stigma involves adapting one's self-concept to be congruent with the stigmatizing responses of society."[129] Finally, stigmas of a different flavor plague women and particularly poor women. Since time immemorial, women looking to leave marriages were cast as lustful and deviant.[130] To this day, poor women, in particular, are subject to commentary about their being imprudent and reckless.[131] Consider, for example, the double standard of marriage as something that is necessary or ideal for mothering. A white celebrity in all her staged glory

122. *Id*.

123. The *Diagnostic and Statistical Manual of Mental Disorders* defines trauma as "actual or threatened death, serious injury, or sexual violence." AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 271 (5th ed. 2013) (hereinafter DSM-V). Toxic stress is defined as the "persistent elevation" of the body's stress response, "which occurs in response to persistent stressors and leads to disrupted physiological development and poor health over time." Eileen M. Condon, Margaret L. Holland, Arietta Slade, Nancy S. Redeker, Linda C. Mayes & Lois S. Sadler, *Associations Between Maternal Experiences of Discrimination and Biomarkers of Toxic Stress in School-Aged Children*, 23 MATERNAL & CHILD HEALTH J. 1147, 1147 (2019).

124. Carter, *supra* note 121.

125. Michele Bograd, *Strengthening Domestic Violence Theories: Intersections of Race, Class, Sexual Orientation, and Gender*, 25 J. MARITAL & FAM. THERAPY 275, 278 (1999).

126. Gregory M. Herek, J. Roy Gillis & Jeanine C. Cogan, *Internalized Stigma Among Sexual Minority Adults: Insights from a Social Psychology Perspective*, 56 J. COUNSELING PSYCH. 32, 33 (2009).

127. *Id*.

128. *Id*.

129. *See id.* (emphasis omitted); *see also* Frost, *supra* note 98.

130. Donohue, *supra* note 33, at 564.

131. *Id.* at 579–86 (discussing "branding" of mothers).

and living in an environment buttressed by endless support and resources can tell a story of her personal redemption and strength in her decision to be a single mother. The object of a "welfare mom," however, is scrutinized as having subjected herself, her children, and society at large to her irresponsible decision to mother alone.[132] Moreover, numerous studies have confirmed that the accumulation of stress present in a life of poverty has adverse health and mental health outcomes.[133]

Withstanding the domination and control of racist, gendered, or heteronormative systems interferes with one's esteem and mood states.[134] It also frustrates one's locus of control.[135] In psychology, a locus of control refers to one's perception that they control what happens to them and around them.[136] Someone with a strong internal locus of control can believe and actualize that they are the masters of their own destiny.[137] Individuals with external loci of control are left with the feeling that the world happens to them and that they are powerless to chart or change their path.[138] The requirements of divorce risk adding to accumulative stress, stigmatization, and a loss of control already experienced by vulnerable families. Additionally, any judgment or rejection during a divorce proceeding about not getting the separation "right" follows a litany of experiences and systems that tell them BIPOC, LGBTQ+, and under-resourced families are not getting family "right."[139]

2. Getting Family and Sex "Right"

Consider, specifically, the requirement for inquiry into a couple's decision to cohabitate during a period of separation. As previously discussed, anyone might be annoyed or embarrassed by offering a virtual stranger in open court an account of your bed and board choices, but these requirements and inquiries present particular insult to subordinated populations. Separate and apart inquiries specifically are an intrusion into the inner workings and

132. SUSAN J. DOUGLAS & MEREDITH W. MICHAELS, THE MOMMY MYTH: THE IDEALIZATION OF MOTHERHOOD AND HOW IT HAS UNDERMINED WOMEN 88 (2004).

133. *See, e.g.*, Robert M. Sapolsky, *Sick of Poverty*, 293 SCI. AM. 92, 94 (2005).

134. Chou, *supra* note 119.

135. *Id*.

136. Richard B. Joelson, *Locus of Control*, PSYCH. TODAY (Aug. 2, 2017), https://www.psychologytoday.com/us/blog/moments-matter/201708/locus-control [https://perma.cc/RU5Q-JYBK].

137. *Id*.

138. *Id.* Clinicians understand a total inability to identify or shift to an internal locus of control as maladaptive. A culturally competent clinician, however, would recognize that the lack of control felt by members of subordinated groups is not illogical or pathological. *See generally* D. J. Ida, *Cultural Competency and Recovery Within Diverse Populations*, 31 PSYCHIATRIC REHAB. J. 49 (2007).

139. Fineman, *supra* note 5, at 2192–93.

decision-making in a private realm. For subordinated populations in particular, this private realm is a last bastion of dignity. The experience of the intrusion into a private sphere can be particularly painful and acute for those who weather subordination in the public sphere.[140]

As Crenshaw so astutely surmised,

> There is . . . a more generalized community ethic against public intervention, the product of a desire to create a private world free from the diverse assaults on the public lives of racially subordinated people. The home is not simply a man's castle in the patriarchal sense, but may also function as a safe haven from the indignities of life in a racist society.[141]

Racism's chronic external, public assaults on dignity create resistance to, or sensitivity about, inquiry and critique of private family decisions that are nuanced and, therefore, more susceptible to racist misinterpretations and biased reasoning.[142] People of color are not alone in distrusting inquiries into private realms or experiencing heightened discomfort during such inquiries. The LGBTQ+ community has borne bias in many spheres of life.[143] For too many members of the LGBTQ+ community, rejection and judgment started in their homes and families.[144] The rejection of LGBTQ+ children in homes and in school can turn violent.[145] Judgment and hostility in the workplace or public spaces is common too.[146] Far too often, LGBTQ+ families are cast as deviant, illegitimate, or confusing to children.[147] The home spaces and families designed by some members of the LGBTQ+ community are an expression of what is required to build the family or keep it safe from heteronormative hostility.[148] Family design can also reflect a conscious decision to reject gendered norms for a family's financial and social

140. Crenshaw, *supra* note 110, at 1257.

141. *Id*.

142. *Id.*; Donohue, *supra* note 33, at 564.

143. Michael Friedman, *The Psychological Impact of LGBT Discrimination*, PSYCH. TODAY (Feb. 11, 2014), https://www.psychologytoday.com/us/blog/brick-brick/201402/the-psychological-impact-lgbt-discrimination [https://perma.cc/C9FG-BBY9].

144. *Id*.

145. *Id*.

146. *Id*.

147. Lloyd R. Cohen, *Rhetoric, the Unnatural Family, and Women's Work*, 81 VA. L. REV. 2275, 2278 n.6 (1995) (using quotes around the word "families" to subordinate and other LBGTQ family constellations and around the word "professional" to minimize the contributions of those whose writing about family suggests that the presence of a cis male father is not necessary for children).

148. Maria Federica Moscati, *Understanding LGBTQ Unions and Divorces: Essays Provide Valuable Insight into How Today's Families Travel Through Transitions*, 25 DISP. RESOL. MAG. 30 (2019) (book review); Suzanne A. Kim & Edward Stein, *Gender in the Context of Same-Sex Divorce and Relationship Dissolution*, 56 FAM CT. REV. 384, 388 (2018).

arrangements.[149] These families may feature partners and children connected in diverse ways.[150] Historic lack of protection—or affirmative criminalization—for the family ordering of LGBTQ+ families leave many LGBTQ+ families with legacies of perceived vulnerability, a perception that can be particularly acute during divorce.[151] Preliminary research regarding same-sex couples, for example, suggests that these couples feel a "heightened social scrutiny at the time of a relationship's end."[152] LGBTQ+ families are not alone in structuring families that do not fit a rigid heteronormative paradigm—male head of household, female companion, children. Under-resourced communities, foreign-born families, and Black families are all more likely than white affluent families to live in multigenerational homes.[153] There are racial and ethnic disparities in marriage matters as well.[154] Lastly, there are growing disparities by class concerning modalities for child rearing.[155] When families operate outside of the norm, they raise the hackles of our system of supervision: a class-based system of white, heteronormative supervision.[156]

149. *See generally, e.g.*, LGBTQ DIVORCE AND RELATIONSHIP DISSOLUTION: PSYCHOLOGICAL AND LEGAL PERSPECTIVES AND IMPLICATIONS FOR PRACTICE (Abbie E. Goldberg & Adam P. Romero eds., 2018) (offering a series of essays that explicate the diverse ways children, parents, and partners are connected in ways beyond those anticipated by heteronormative ideals).

150. *Id.*; Fineman, *supra* note 5, at 2190–91.

151. Moscati, *supra* note 148.

152. Kim, *supra* note 148, at 391.

153. Moore v. City of East Cleveland, 431 U.S. 494, 509 (1977) (Brennan, J., concurring) (discussing this trend in Black families); D'vera Cohn & Jeffrey S. Passel, *A Record 64 Million Americans Live in Multigenerational Households,* PEW RSCH. CTR. (Apr. 5, 2018), https://www.pewresearch.org/fact-tank/2018/04/05/a-record-64-million-americans-live-in-multigenerational-households/ [https://perma.cc/9326-P4EA] (illustrating the trend in Asian and Hispanic households).

154. *See generally* R. Kelly Raley, Megan M. Sweeney & Danielle Wondra, *The Growing Racial and Ethnic Divide in U.S. Marriage Patterns*, 25 FUTURE CHILD. 89 (2015).

155. Claire Cain Miller, *Class Differences in Child-Rearing Are on the Rise*, N.Y. TIMES (Dec. 17, 2015), https://www.nytimes.com/2015/12/18/upshot/rich-children-and-poor-ones-are-raised-very-differently.html [https://perma.cc/2QAV-CRXJ].

156. *See* DOROTHY ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE, at ix (2002) (arguing that racial inequities in the child welfare system cause "serious group-based harms by reinforcing disparaging stereotypes about Black family unfitness and need for white supervision, by destroying a sense of family autonomy and self-determination among many Black Americans, and by weakening Blacks' collective ability to overcome institutionalized discrimination"); *see also* Smith v. Org. of Foster Fams. for Equal. & Reform, 431 U.S. 816, 833 (1977) (comparing the critique that "foster care has been condemned as a class-based intrusion into the family life of the poor" with the courts' perceptions that "the poor resort to foster care more often than other citizens"). Yet, even here the Court acknowledges the roles discrimination and coercion play in the role of the child welfare system in poor families: "discrimination doubtless reflects in part the greater likelihood of disruption of poverty-stricken families." *Id.* at 834. And "[t]he extent to which supposedly 'voluntary' placements are in fact voluntary has been questioned on other grounds as well." *Id.*; *see also* Fineman, *supra* note 5, at 2189, 2192 ("Intimate groups that do not conform to [normative family models] historically have been labeled 'deviant' and subjected to explicit state regulation and control justified by their nonconformity.").

Finally, consider where the inquiry into the private family sphere includes specific inquiry about sex. Domination and control of sex and sexuality is an old tool in the arsenal of oppression. Consider, for example, that there was a time when the law did not acknowledge marital rape as a crime. This was because sex was an "essential obligation of marriage," and sex between married people was "private."[157] Bound up in the protection of male entitlement to sex and freedom from scrutiny regarding how they pursued it was systemic acceptance of the domination of women. Eventually, the mantle of marriage could not disguise the violence of rape and the public came to see the law's willful ignorance of the violence as tantamount to support.[158] The change in law, in turn, better reflected and resisted the dominance and control inherent in rape and acknowledged that dominance and control is no less dangerous and damaging in the context of a marriage. Legacies of domination and control explain why women, BIPOC, and LGBTQ+ persons face the most abuses of their sexual privacy and are vulnerable to critique of their sexual choices in public spheres.[159]

Anti-racist scholars have also demonstrated the "sexualized nature of racial oppression."[160] Since the time of slavery, when Black women were reduced "to a sexual object, an object to be raped, bred or abused," and onward, Black women's sexuality has been co-opted and weaponized against them.[161] Meanwhile, the hyper-sexualization of Black men is "one of the most prevalent stereotypes in white America's racial mythology."[162] Indeed, in family court proceedings and the child welfare context, one still sees that the sexual stereotypes of Black men and women result in the "devaluation" of mothers and the stereotype of the absent father.[163] The scrutiny of Black parents generally, and their sexuality specifically, is ingrained into our definition of the worthy and unworthy poor.[164]

157. Twila L. Perry, *The "Essentials of Marriage": Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1, 30, 38 (2003).

158. Danielle Keats Citron, *Sexual Privacy*, 128 YALE L.J. 1870, 1877 (2019). On a similar theme, before dissemination of one's nude images online without one's consent was dubbed "nonconsensual pornography" and made punishable, there was a perception that the availability of one's nude images was the product of one's risky behavior and the unsavory choices of a vexed ex-lover. Legal reform did not begin until law makers began to understand that nonconsensual pornography is exploitation and control of the female body. Claire P. Donohue, *A Feminist Framing of Non-Consensual Pornography*, 17 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 247, 251–53 (2017). *But see* Citron, *supra*, at 1878–79.

159. Citron, *supra* note 158, at 1875.

160. Hutchinson, *supra* note 8, at 7.

161. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1437 (1991).

162. Earle V. Bryant, *The Sexualization of Racism in Richard Wright's "The Man Who Killed a Shadow,"* 16 AFR. AM. REV. 119, 119 (1982).

163. Roberts, *supra* note 161.

164. *See, e.g.*, Khiara M. Bridges, *Poor Women and the Protective State*, 63 HASTINGS L.J. 1619,

LGBTQ+ communities, meanwhile, have experienced state-sponsored hostility regarding private, consensual sexual expression for centuries. Consider "sodomy laws" for example, which "do not merely express societal disapproval; they go much further by creating a criminal class."[165] Sodomy laws provide a particularly clear example that the law is often clumsy and mean in its desire and attempts to define, understand, and regulate relationships.[166] Separate and apart laws are no exception to this general rule. Laws and procedures that require probing into family constellations and sexual choices are not neutral or kind—not by design and not in effect. Meanwhile, how we define and dignify intimacy between people and to whom we extend corollary rights to privacy and liberty matters. It has significant implications for equality.[167] When we hone in on considerations of liberty and privacy interests, what also becomes clear with separate and apart laws, beyond the fact that they are bastions of bias and unkindness, is that they are not obviously even permissible.

III. SHE SAID IT'S REALLY NOT MY HABIT TO INTRUDE: INTIMACY, MARRIAGE, AND FAMILY

The legal grounds for doing away with separate and apart requirements and their invasive inquiries are hiding in the shadows where many rights important to families and those in relationship do. Our Constitution does not articulate positive rights, rights securing access to a given thing—education or housing or health care, for example.[168] The quintessential articulation of rights in the U.S. Constitution—the Bill of Rights—articulates a series of negative rights, or limits on the government. The Ninth Amendment does, however, remind us that the enumeration of certain rights "shall not be construed to deny or disparage others retained by the people."[169] And so,

1621–22 (2012). Under the New York State Prenatal Care Assistance Program ("PCAP"), women seeking prenatal care must submit to a psychological and nutritional assessment.

> It is an understatement to describe the psychosocial assessment as intrusive. Even without a "risk factor," the woman must submit to a series of intimate questions designed to discover relevant information; with a "risk factor," the series of questions grows longer and more intimate. It deserves underscoring that women in New York are led into these conversations only when they are poor, pregnant, and seeking state-assisted prenatal care. Wealthier women with private insurance can avoid enduring such conversations.

Id. at 1620–21.

165. Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103, 110 (2000).

166. Citron, *supra* note 158, at 1929.

167. *Id.* at 1875.

168. U.S. CONST. amends. I–X; *see also* Linda R. Monk, *Rights . . . Have We Gone Too Far?*, PBS (Feb. 12, 2013), https://www.pbs.org/tpt/constitution-usa-peter-sagal/rights/#.YXGfnBrMI2w [https://perma.cc/E3W4-L6EL].

169. U.S. CONST. amend. IX.

against a scaffolding of governmental restraint and in combination with an explicit invitation to recognize rights of the people, we see a liberty interest the "exactness" of which is difficult to define, but which "[w]ithout doubt . . . denotes not merely freedom from bodily restraint but also the right of the individual to . . . establish a home and bring up children"[170] and an articulation of a privacy right "formed by emanations" from other constitutional guarantees.[171] The articulation and application of these rights has been vital to those in families and relationships.[172] These rights as discussed in the context of intimacy cases, right to marry cases, and family rights cases suggest that separate and apart requirements are on shaky constitutional ground.

A. PRIVACY: INTIMACY

In 1965, the Supreme Court asked itself if our society could tolerate the police searching the "sacred precincts" of a marital bedroom for evidence of use of contraceptives. It answered its own question, declaring that "[t]he very idea is repulsive."[173] The Court's language in *Griswold v. Connecticut*, describing the image of a police officer in the bedroom in order to regulate the intimacy of two adults, was not hyperbolic rhetoric. Rather, the description was reminiscent of the actual encounter that Mr. and Mrs. Loving had with police in their bedroom in 1958 and foreshadowing of state action to come.[174] In 1988, an officer entered Michael Hardwick's home with a (moot and invalid) warrant for his arrest on another matter, and, upon seeing him in his bedroom having sex, arrested him. Then, in 1998, police entered John Lawrence's home on a report of a "weapons disturbance," saw John Lawrence and Tyron Garner having sex, and arrested them.[175] All might have

170. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

171. Griswold v. Connecticut, 381 U.S. 479, 484 (1965); *see also* Laurence H. Tribe, Lawrence v. Texas*: The "Fundamental Right" That Dare Not Speak Its Name*, 117 HARV. L. REV. 1893, 1938 (2004).

172. Tribe, *supra* note 171, at 1932 ("[T]he way constitutional law has long treated rights in general, including those that find their home snugly in the Bill of Rights, has not been as flattened-out collections of private acts, or even as specific groups of private actions, that are identified as protected from government prohibition or undue restriction. They have been treated as the reflections, in the lives of individuals and groups, of constitutional principles with a more complex architecture, centrally concerned with the ways we have determined that government must not dictate the kinds of people we may become or the kinds of relationships we may form.").

173. *Griswold*, 381 U.S. at 485–86.

174. Marisa Peñaloza, *'Illicit Cohabitation': Listen to 6 Stunning Moments From Loving v. Virginia*, NPR (June 12, 2017, 5:00 AM), https://www.npr.org/2017/06/12/532123349/illicit-cohabitation-listen-to-6-stunning-moments-from-loving-v-virginia [https://perma.cc/VAN2-5XS4] (describing the Caroline County Sheriff entering the bedroom of Mildred and Perry Loving and "shining a light in their face in the privacy of their bedroom").

175. Adam Liptak, *John Lawrence, Plaintiff in Gay Rights Case, Dies at 68*, N.Y. TIMES (Dec. 23, 2011), https://www.nytimes.com/2011/12/24/us/john-lawrence-plaintiff-in-lawrence-v-texas-

been lost for Lawrence as it was in *Bowers v. Hardwick* had the Court not recognized that the issue before it concerned "the most private human conduct, sexual behavior, and in the most private of place, the home."[176] In so doing, the Court finally agreed that the question provoked by a law regulating sex between consenting adults was not a question of what an individual was doing in the privacy of his own bedroom, but rather what was the state doing there.[177] *Griswold*, *Lawrence v. Texas*, and their progeny tell us that the bedroom becomes a proxy for "the exercise of . . . personal rights."[178] These cases also confirm that these rights exist within, but also extend beyond, *marital* relationships.[179]

Danielle Keats Citron argues more specifically that it is "time to conceptualize sexual privacy clearly and to commit to protecting it explicitly."[180] Citron's advocacy concerns civil and criminal liability for those who attack and assault the sexual dignity of individuals through any range of behaviors, including nonconsensual pornography, coerced sex, nonconsensual capture of nude images, and so forth, but her analysis affirms concepts important for the issue at hand. Citron defines sexual privacy as "the behaviors, expectations, and choices that manage access to and information about the human body, sex, sexuality, gender, and intimate activities."[181] She argues that sexual privacy combines principles of equality, intimacy, and sexual agency and that recognition of such a right and protection under it allows people to "author [their] intimate lives and be seen as whole human beings rather than as just . . . intimate parts or innermost sexual fantasies."[182] Protecting the self-disclosure and vulnerability inherent in sex upholds principles of dignity and equality. While the concept of sexual privacy is developed and litigated, cover for the literal and figurative "bedroom" at issue in separate and apart inquiries is undeniably located in

dies-at-68.html [https://perma.cc/KRR4-A9DJ].

176. Lawrence v. Texas, 539 U.S. 558, 567 (2003).

177. Having lost the *Bowers* case and subsequently authoring an amicus brief for Lambda Legal in *Lawrence*, constitutional scholar Laurence Tribe successfully insisted on this frame. *See* Tribe, *supra* note 171 (offering his reflections on *Lawrence*). *Compare Lawrence*, 539 U.S. at 564–79 (holding that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct was unconstitutional as applied to adult males who had engaged in consensual act of sodomy in privacy of home), *with* Bowers v. Hardwick, 478 U.S. 186, 190–96 (1986) (holding that "[t]he Constitution does not confer a fundamental right upon homosexuals to engage in sodomy").

178. *Lawrence*, 539 U.S. at 565 (citing Eisenstadt v. Baird, 405 U.S. 438, 454 (1972)).

179. *Id.* ("In *Eisenstadt v. Baird,* the Court invalidated a law prohibiting the distribution of contraceptives to unmarried persons. The case was decided under the Equal Protection Clause; but with respect to unmarried persons, the Court went on to state the fundamental proposition that the law impaired the exercise of their personal rights." (citation omitted)).

180. Citron, *supra* note 158, at 1877.

181. *Id.* at 1870.

182. *Id*. at 1875.

the penumbra of privacy interests.[183] The privacy rights here clearly establish that the state is not, when it comes to consenting adults, permitted to intrude on who is having sex[184] and to what end.[185]

One cannot help but notice how these principles of privacy around sexual intimacy erode completely in the context of separate and apart requirements. Indeed, in the context of divorce, at least, the needle has moved since the early and deeply influential articulations of why privacy matters. Samuel Warren and Louis Brandeis, in their seminal contributions to the conversation of privacy, repeatedly emphasized protection of "thoughts, sentiments, and emotions," not just the body and property.[186] They made their impassioned case for privacy following publicity and specifically photography of a wedding at which the many Boston elite were present. To their thinking, by photographing the wedding and making those pictures available for public view, the press was laying bare "the sacred precincts of private and domestic life."[187] If photographing marital joy was so compelling to early proponents of privacy, how can seemingly superfluous inquiry at the time of a divorce not seem problematic? Consider, for example, in *Bergeris v. Bergeris*, from the year 2012—not 1812—in which we see a court probing the interactions of a couple to determine whether and what type of phone sex they had.[188] The probing occurred despite Maryland ostensibly being a no-fault jurisdiction. The probing occurred despite the procedural posture of the case, in which Ms. Jeanine Bergeris sought and received a protective order against Mr. Bergeris, and both parties had—at varying times in the history of the case—sought limited or absolute divorces from one another.[189] And, in which, the scrutiny of "sexually explicit telecommunications" forestalled the divorce of this couple, despite their having been locked in litigation for two years during

183. Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

184. Lawrence v. Texas, 539 U.S. 558, 585 (2003) (O'Connor, J., concurring); Eisenstaedt v. Schweitzer, 159 N.Y.S.2d 296 (App. Div. 1957).

185. *Griswold*, 381 U.S. at 479.

186. Sax, *supra* note 113, at 149*;* Samuel D. Warren & Louis D. Brandeis, *Right to Privacy*, 4 HARV. L. REV. 193, 198 (1890).

187. Warren, *supra* note 186, at 195; *see also* Sax, *supra* note 113, at 147–48 (describing the provoking event).

188. Bergeris v. Bergeris, 90 A.3d 553 (Md. Ct. Spec. App. 2014).

189. Brief for Appellant at 1, *Bergeris*, 90 A.3d 553 (No. 0405) (laying out the procedural posture of the case). A consequence of requiring separation periods, particularly those as long as the ones required in Maryland, is that, in order to access the assistance of the court for orders of support or distribution, parties will seek orders of separation or limited divorces to "tide themselves over." *See id.* In *Bergeris*, for example, there were no less than five filings that finally resulted in access to a final hearing approximately two years after filing on the matter of divorce. *See id.*

which time one or both of them was seeking one.[190]

Privacy for sexual intimacy is not the only substantive right important to families hanging out in the shadow of liberty interests.[191] One can see declaration after declaration that "[t]here . . . exist[s] a 'private realm of family life which the state cannot enter.' "[192] As stated in *Carey v. Population Services International*, "[w]hile the outer limits of [the right of personal privacy] have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions 'relating to marriage, procreation, contraception, family relationships, and child rearing and education.' "[193] Accordingly, the Court has admonished laws that abridge the freedom of personal choice in matters of family life.[194] The family realm, as a site for making choices for and about one's family, has been afforded both substantive and procedural protection.[195]

B. FAMILY RIGHTS

Families' privacy and liberty interests can link in important ways to their survival.[196] This liberty interest has translated into the law affording families' choices dignity, respect, and a wide berth.[197] Family survival has, in turn, always included the notion of change or restructuring.[198] Any

190. *But see Bergeris*, 90 A.3d at 554. For reasons not at all clear to the author, Ms. Bergeris does suddenly seek a motion to dismiss the divorce, despite she herself being among the first parties to seek one.

191. *Griswold*, 381 U.S. at 479.

192. Smith v. Org. of Foster Fams. for Equal. & Reform, 431 U.S. 816, 842 (1977) (citing Prince v. Massachusetts, 321 U.S. 158, 166 (1944)); s*ee also* Moore v. City of East Cleveland, 431 U.S. 494, 504–06 (1977).

193. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 684–85 (1977) (citations omitted).

194. Loving v. Virginia, 388 U.S. 1, 12 (1967); Skinner v. Oklahoma, 316 U.S. 535, 541–42 (1942); Eisenstadt v. Baird, 405 U.S. 438, 453–54, 460, 463–65 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Pierce v. Society of Sisters, 268 U.S. 510, 535 (1925); Meyer v. Nebraska, 262 U.S. 390, 399 (1923); *see also* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639–40 (1974); *Smith*, 431 U.S. at 842 (citing *Prince*, 321 U.S. at 166); *Moore*, 431 U.S. at 494.

195. *Smith*, 431 U.S. at 842 nn.46–47.

196. Consider that in *Smith*, foster parents argued that certain procedural protections best secured their survival as a family unit, while biological parents surely experience foster care and the attendant hearings and proceedings as "class-based intrusion" into their family. *See* Smith, 431 U.S. at 833, 839. In *Moore*, the chosen constellation of the Moore family was linked to the needs of minor children and the family's choices regarding their resources. *See Moore*, 431 U.S. at 508.

197. *Smith*, 431 U.S. at 842.

198. Consider the narratives behind seminal family rights cases: for example, *Smith*, *id.* at 816, which involves the hopes and dreams of foster families entrusted with the care of a child for an entire year as compared to the vital interest of that child's biological family; or *Moore*, 431 U.S. at 494, a case flowing from the death of a child and a grandparent's decision to care for her grandchild with the help and companionship of her grown son and his child; or *Meyer*, 262 U.S. at 390, which is a case stemming

suggestion that families journeying through a divorce are no longer families or will no longer be families once the divorce is finalized is intellectually dishonest and demeaning. To begin, any argument that the end of a marriage means the end of a family does not track with common sense or with the Court's recognition of many non-nuclear or bi-modal families.[199] Moreover, statutes adjacent to divorce, namely support, child custody, and property distribution statutes, confirm that divorced families will still be tied to one another through continued coordination, support, or cooperation, even while each spouse will be entitled to independence from the marriage. Property distribution statutes, for example, do not just consider spouses' past contributions to marital property and past acquisitions of assets and income to design equitable distributions, but also consider spouses' future opportunities for acquisition of assets and income, and forward-looking needs in terms of providing care for any children.[200] Custody statutes will ask about the living arrangement and structure of care to which children are already accustomed while also asking questions about a parent's willingness and capacity to shape new and presumptively shared custody arrangements going forward.[201] Alimony statutes call out spouses' past contributions to the achievements of the other or running of the household, while also enumerating forward-looking considerations of spouses' abilities to find employment or achieve financial independence. In this way, the jurisprudence around care of children, support, and division of property reflects the complex reality of divorced families: while the pathways for two divorcing individuals is diverging, there is a history that binds them and a tomorrow that involves them both.

Prior to any restructuring contemplated above, there is a limbo period during which spouses are contemplating divorce or are in the process of negotiating or litigating a divorce. What couples *are* in this stage is *still married*. And what the couple *is doing* at this stage is *making choices*. These choices might include choices about how to spend money, how to organize their affairs, and how to care for children and prepare them for their new reality. Couples' status as (still) married and the choices they are confronting provoke liberty interests. Direct and easy application of family rights

from the experience of family members who migrated from their native land and attempted to carve out a life for their family and education for their child that speaks to both their native identity and their identity as Americans. These are all stories of families in transition or periods of adjustment.

199. Stanley v. Illinois, 405 U.S. 645, 651 (1972) (stating that the Constitution has not "refused to recognize those family relationships unlegitimized by a marriage ceremony"); *Smith*, 431 U.S. at 843 (stating that "biological relationships are not [the] exclusive determination of the existence of a family"). Indeed, "[t]he legal status of families has never been regarded as controlling." *Id.* at 845 n.53.

200. *See, e.g.*, N.C. GEN. STAT. § 50-20 (2022); MASS. GEN. LAWS ch. 208, § 34 (2022).

201. D.C. CODE § 16-914 (2022).

doctrine should forestall court inquiry into the private realm of their family dealings.[202] Parents of a child, for example, may make decisions to continue to share physical space and even a degree of intimacy as part of a larger vision of how to provide the best care for a child during a time of emotional and financial upheaval.[203] This ability to decide how to raise one's child is a clearly constitutionally protected interest.[204] Families' interest in childrearing, their interest in protecting their family, and their interest in creating social and legal order were considerations Justice Kennedy named as buttressed to the right to marry. He wrote: "marriage is inherent in the concept of individual autonomy"; marriage is an "intimate association," a "union unlike any other in its importance to the committed individuals"; "the right to marry . . . safeguards children and families"; and finally, "marriage is a keystone of the Nation's social order."[205] Taken together, these four principles put flesh on the bones of the interests bound up in marriage.

C. RIGHT TO MARRY

In *Obergefell*, the Court had relatively recent occasion to write its latest love letter to the institution, agreeing with sentiments from Courts before it that marriage is the "relation . . . most important" in life,[206] and that freedom to marry is a "vital personal right[] essential to . . . happiness."[207] And yet, our nation has a shameful history of denying access to marriage for all sorts of reasons. Until appallingly recently, many states had anti-miscegenation laws on their books. When, in 1968, *Loving v. Virginia* declared such laws unconstitutional, *fifteen* states in addition to Virginia had similar laws.[208]

202. Consider an example from New York. The New York Bar was wrangling with the efficacy and legality of litigating an element in its divorce statutes, namely the "possibility of reconciliation." N.Y. DOM. REL. LAW § 170 (McKinney 2022). A Monroe County Court declared that allowing a right to a jury trial on the issue of reconciliation would "invad[e], in an incalculable manner, the inner privacy of married couples." Palermo v. Palermo, 950 N.Y.S.2d 724, 725 (Sup. Ct. 2011), *aff'd*, 953 N.Y.S.2d 533 (App. Div. 2012).

203. Paul R. Amato, Jennifer B. Kane & Spencer James, *Reconsidering the "Good Divorce,"* 60 FAM. RELS. 511, 514 (2011) ("According to stress theory, a large number of changes concentrated within a short time can have adverse effects on the mental and physical health of adults and children."); Leonard I. Pearlin, Scott Schieman, Elena M. Fazio & Stephen C. Meersman, *Stress, Health, and the Life Course: Some Conceptual Perspectives*, 46 J. HEALTH & SOC. BEHAV. 205, 207–08, 213–14 (2005) (discussing the impact of stress and social status on health inequities over the life course of a family, which in turn invites consideration of families' efforts to mitigate financial burdens and minimize stress during a life course interruption).

204. *See generally* Prince v. Massachusetts, 321 U.S. 158 (1944); Meyer v. Nebraska, 262 U.S. 390 (1923); Smith v. Org. of Foster Fams. for Equal. & Reform, 431 U.S. 816 (1977).

205. Obergefell v. Hodges, 576 U.S. 644, 665–67, 669 (2015).

206. Maynard v. Hill, 125 U.S. 190, 211 (1888).

207. Loving v. Virginia, 388 U.S. 1, 12 (1967).

208. Frye, *supra* note 69, at 93 n.14 (citing DAVID GOODMAN CROLY & GEORGE WAKEMAN,

And there was not a clear, unencumbered pathway for same-sex couples to marry until 2015.[209]

Loving, *Obergefell*, and their progeny clarify and confirm that the state may not "significantly interfere" with decisions to enter a marriage, but it is well understood that states can and do regulate marriage, both in terms of one's entrance into it and exit from it.[210] With few remaining constraints, however,[211] you can decide to be married and you can—relatively immediately—be married.[212] In contrast, there is no prohibition against interference regarding the decision to divorce. The only restrictions on states are that they cannot deny access and opportunity to be *heard* to end the marriage and they must extend full faith and credit once a jurisdiction has pronounced a divorce.[213] Thus, states police both the gateway to marriage and the gateway to divorce, but they are neither the same gate nor do they swing with equal ease or open to equal breadths.[214]

Those arguing for a "right to unmarry" take issue with the fact that the process to divorce is so encumbered, as compared to the process to marry.

> The government promotes marriage by making it fast and easy, at least if it's your first marriage. In states like Nevada, you can even get married on the spot. By contrast, divorce is slow and burdensome. It can take many months and inevitably requires many filings. Unlike marriage, which is essentially a ministerial act, divorce typically requires legal representation, multiple filings, court appearances, and considerable expense. You can get married on a lark, but getting divorced is always a bear.[215]

They argue—quite convincingly—that all four *Obergefell* principles regarding marriage apply to a right to a prompt divorce. In its argument that the fundamental right to marry "must apply with equal force to same-sex couples," the majority opinion relied upon four principles: (1) individual

MISCEGENATION: THE THEORY OF THE BLENDING OF THE RACES, APPLIED TO THE AMERICAN WHITE MAN AND NEGRO (1863) (explaining that "[t]he term 'miscegenation,' which means 'racial mixing' via sexual relations, marriage, or procreation, was coined by New York World reporters David Goodman Croly and George Wakeman in an 1863 pamphlet intended to discredit abolitionism")); *see also* Sidney Kaplan, *The Miscegenation Issue in the Election of 1864,* 34 J. NEGRO HIST. 274, 284–86 (1949).

209. *Obergefell*, 576 U.S. at 681.

210. *See* Carey v. Population Servs. Int'l, 431 U.S. 678, 684–85 (1977); Boddie v. Connecticut, 401 U.S. 371, 389 (1971) (Black, J., dissenting); *Maynard*, 125 U.S. at 191.

211. *See, e.g.*, MASS. GEN. LAWS ch. 207, § 1–17 (2022) (listing grounds for prohibited marriages, including void marriages from "nonage or insanity," marriage to minors, polygamy, and marriage to relatives).

212. Zablocki v. Redhail, 434 U.S. 374, 386–87 (1978); Frye, *supra* note 69.

213. *Boddie*, 401 U.S. at 377.

214. Frye, *supra* note 69.

215. *Id.* at 102 (citation omitted).

autonomy; (2) intimate association; (3) the promotion of familial relationships; and (4) social order.[216] In articulating these principles, the *Obergefell* Court declared that marriage "draws meaning from related rights of childrearing, procreation, and education" and that choices about marriage "shape an individual's destiny."[217] Proponents of the right to unmarry suggest that "[i]f it offends autonomy and dignity" to prohibit a given marriage, then surely it "offends autonomy and dignity" to bind someone to a marriage they no longer wish to be part of, particularly where that bind constricts their ability to marry another.[218]

One can see that protecting the "choices" and "destiny" of those in a marriage means nothing—and in fact sets us back hundreds of years—if we then limit the acceptable choices to only those that reflect a willingness to stay bound to a marriage no matter the consequences to safety, psychology, or finances. But a stronger, or additional, argument might thread the needle a little differently. One can argue that the principles in *Obergefell* apply directly to a divorcing couple because, during a divorce proceeding, a couple *is* married. The operation of laws confirms this simple truth: until parties are actually divorced, they are married. They cannot, for example, remarry in the interim without risking the subsequent marriage being deemed polygamous.[219] Property acquired before a divorce is final can be deemed marital property, and property disposed of before the divorce can be seen as a party dissipating assets.[220] Couples engaged in divorce proceedings should, therefore, be entitled to privacy in any intimate association they choose to maintain and deference to their sound discretion concerning child rearing and creation of stability and predictability, because doing so will indeed serve to preserve social and legal order.[221]

These constitutional mandates taken in combination with one another are suggestive of a substantive due process right to be able to maintain privacy and demand state deference to familial decision-making during a divorce. These protected rights of family liberty and privacy should foreclose parties from having to submit to a hearing about their choices to engage in sex, share meals, or occupy similar space.[222] There may also be equal

216. *Id.* at 97 (quoting Obergefell v. Hodges, 576 U.S. 644, 665–70 (2015)).

217. *Id.* at 97–98 (quoting *Obergefell*, 576 U.S. at 666, 667).

218. *Id.* at 99.

219. *See, e.g.*, MASS. GEN. LAWS ch. 207, § 4 (2022).

220. *Compare* CAL. FAM. CODE § 771(a) (West 2022) (stating that property acquired after legal separation is separate property), *with* ARK. CODE ANN. § 9-12-315(b)(3) (2022) (stating that property acquired after separation but before divorce is marital property).

221. *Obergefell*, 576 U.S. at 646–47.

222. *Id.* at 665–66 ("This abiding connection between marriage and liberty is why *Loving* invalidated interracial marriage bans under the Due Process Clause. Like choices concerning

protection challenges embedded in the pronounced burdens that separate and apart laws place on to particular social groups.[223] But, what both the typology of harms and the analysis of the rights and interests show more generally is that separate and apart requirements are baffling and problematic. They are a "solution" in search of an actual problem, which meanwhile ignores the legitimate needs of families in transition. Perhaps this should surprise no one because family law jurisprudence and the associated rights and obligations so rarely reflect the needs and interests of families and the individuals that make up those families; rather, they are a reflection of prevailing political forces and wills.[224] Divorce, in particular, is "a lightning rod for deep-seated political anxieties that revolve[] around the positive and negative implications of freedom."[225] And we have a long and particularly brutal history of disregarding or distorting the familial rights and interest of subordinated groups.[226]

IV. MAKE A NEW PLAN, STAN

If we are to design laws and procedures that protect families, it is worth pausing to name, even in the most general sense, what matters to families. What appears to matter—sociologically, psychologically, and historically speaking—is (1) stability and predictability for raising their children and ordering finances and property; and (2) being afforded dignity and respect.[227] Separate and apart requirements, and the invasive inquiries that some requirements provoke, defy these interests. They deny some families a path to the clean, expeditious exit that they need, despite it being "socially and morally undesirable to compel a couple whose marriage is dead to remain subject to its bonds."[228] For other families, it forces social arrangements that

contraception, family relationships, procreation, and childrearing, all of which are protected by the Constitution, decisions concerning marriage are among the most intimate that an individual can make. Indeed, the Court has noted it would be contradictory 'to recognize a right of privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.' " (citation omitted)).

223. *But see* Washington v. Davis, 426 U.S. 229, 239 (1976).

224. Minow, *supra* note 11.

225. Coltrane, *supra* note 5, at 364 (citation omitted).

226. Consider the reality of treating enslaved people and their children and spouses as divisible property, the separation of migrant children from their parents at U.S. borders, or the ruinous child welfare practices that resulted in Black children being four times as likely to be in foster care as compared to white children despite being only fifteen percent of the total population of children, thus altering the landscape of Black families and communities. Dorothy E. Roberts, *The Racial Geography of Child Welfare: Toward a New Research Paradigm*, 87 CHILD WELFARE 125, 127 (2008).

227. Boddie v. Connecticut, 401 U.S. 371, 389 (1971) (Black, J., dissenting) ("The States provide for the stability of their social order, for the good morals of all their citizens, and for the needs of children from broken homes."); Coltrane, *supra* note 5, at 363.

228. Gleason v. Gleason, 26 N.Y.2d 28, 39 (1970).

feel premature, unnatural, or disadvantageous to a family's plan for transition. In contrast, the proposal herein better protects and reflects a commitment to stability and predictability and dignity and respect. Preliminarily, divorce law must be rid of separate and apart requirements. From there, one could more easily contemplate divorce as an administrative and civil—not judicial—matter, just as marriage is a civil and administrative matter. Divorce could then be bifurcated from subsequent adjudication of custodial, property, and support disputes where the circumstances and needs of a family require adjudication of those matters.

A. STABILITY AND PREDICTABILITY

In a manner relatively consistent since the Victorian era, divorce has been cast as the cause of many social ills—sex-crazed men and women, unrestricted by a commitment to have sex only in order to have children and then raise children together; vagabond children left by the aforementioned parents; impoverished women-led households.[229] Today, conservative pundits insist that decline in marriage is the cause of children struggling in school, financial strife, and even crime and violence.[230] Rather than unearth the complicated social realities and psychology that contributes to struggling marriages or undertake public policy reform to address social ills, it is far easier to posit marriage as "the solution to poverty, violence, homelessness, illiteracy, crime, and other problems."[231]

Yet, far from causing all social ills, divorce actually provides important social and financial recalibrations for many families.[232] As way of example,

229. POLIKOFF, *supra* note 49, at 13–14; Coltrane, *supra* note 5, at 364.

230. Polikoff, *supra* note 5. Indeed, the specific rhetoric of married parents being the optimal prototype for child-rearing helped propel the argument for same-sex marriage, despite the statistics that relatively few same-sex couples are raising children; specifically, 16–18% of same-sex couples are raising children compared to 69% of heterosexual couples. *Id.* at 99; *see also* Bill Browning, *Anthony Kennedy Says He 'Struggled' with Marriage Equality Ruling*, LGBTQ NATION (Nov. 29, 2018), https://www.lgbtqnation.com/2018/11/anthony-kennedy-says-struggled-marriage-equality-ruling [https://perma.cc/9G6W-7HJC] ("As we thought about this and I thought about it more and more, it just seemed to me, you know, wrong under the Constitution to say that over 100,000 adopted children of gay parents couldn't have their parents married. I just thought that this was wrong.").

> Initially, opposition to same-sex marriage was part of the conservative canon. But over time, some conservatives revised their position to encompass support for same-sex marriage precisely because it was *marriage*. To capture or solidify this support, LGBT advocates often either adopted or acquiesced in positions preferring childrearing by married parents—as long as same-sex couples could marry.

Polikoff, *supra* note 5, at 100 (citation omitted).

231. Polikoff, *supra* note 5, at 100; *see also* Coltrane, *supra* note 5, at 363.

232. Palermo v. Palermo, 950 N.Y.S.2d 724, 725 (Sup. Ct. 2011), *aff'd*, 953 N.Y.S.2d 533 (App. Div. 2012) ("[D]ead marriages . . . should be terminated for the mutual protection and well being of the parties and, in most instances, their children." (citation omitted)); Misty L. Heggeness, *When Laws Make Divorce Easier, Research Shows Women Benefit, Outcomes Improve*, U.S. CENSUS BUREAU (Dec. 18,

let us begin with an honest look at the ubiquitous claim of many pro-marriage and antidivorce activists: what about the children?!? Divorce obviously affects children, and studies have rather consistently concluded that the event of a divorce will produce measurable anxiety and depression for many children.[233] What early studies failed to ask, however, was how long or pronounced that suffering would be; and moreover, how evidence of anxiety, depression, or clinical antisocial behavior was linked to the quality of family life prior to divorce.[234] More nuanced studies reveal that children in marriages marked by high dysfunction suffer, so their antisocial behavior *decreases* when parents dissolve unhappy marriages.[235] Other studies suggest a positive relationship between divorce and measures of increased resilience across time.[236] Paying attention to the experiences and outcomes for high-conflict families is particularly important when one considers the reality that divorce is also a means of escape from affirmatively abusive environments. Approximately, twenty-five percent of divorces are initiated in response to domestic violence.[237] There is also an inverse correlation between divorce rates and domestic violence rates: "In the first five years after the adoption of no-fault divorce, divorce rates did indeed rise, but the domestic violence rates fell by about 20 to 30 percent, and wives' suicide rate fell by 8 to 13 percent."[238]

Even in situations that do not overtly threaten one's personhood, divorce can increase predictability and stability because it opens the door to structuring parenting and finances.[239] It is no secret that divorce can create economic hardship and that this hardship disproportionately affects female headed households, but it is not true that financial independence and competence would have been assured if the marriage had remained intact.[240] Similarly, it is true that custodial disputes can be contentious and painful, but

2019), https://www.census.gov/library/stories/2019/12/the-upside-of-divorce.html [https://perma.cc/5AF4-BTJZ].

233. Amato, *supra* note 203.

234. *Id.*; Lisa Strohschein, *Parental Divorce and Child Mental Health Trajectories*, 67 J. MARRIAGE & FAM. 1286, 1286–87 (2005).

235. Strohschein, *supra* note 234; Amato, *supra* note 203.

236. *Risk and Resilience in Children Coping with Parental Divorce*, DARTMOUTH UNDERGRADUATE J. SCI. (May 30, 2010), https://sites.dartmouth.edu/dujs/2010/05/30/risk-and-resilience-in-children-coping-with-parental-divorce [https://perma.cc/V8TV-RLS9].

237. Mary Pat Brygger, *Domestic Violence: The Dark Side of Divorce*, 13 FAM. ADVOC. 48, 48–51 (1990).

238. Vedantam, *supra* note 6.

239. E. MAVIS HETHERINGTON & JOHN KELLY, FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED 48–49, 97 (2002).

240. *Id*.

it is not true that marriages produce equal and adequate parenting.[241] Oftentimes, divorce recognizes the truth that some people reach more authentic or sustainable parenting and financial arrangements when they are apart. And indeed, it is only through divorce and not within an intact marriage that parties have a legal right to equitable distribution of property, claims for support, and claims of custody that are severable from that of the child's other parent.[242] It is only in the context of divorce and not marriage that parties can seek intervention of the court to help them act on these rights.

Whether the assistance of the court or an internal reckoning gets them there, divorces can and do change people's choices regarding their parenting and decisions to work or pursue training. After studying nearly fourteen hundred families, Mavis Hetherington describes custodial parents learning to round out their skills as parents; for example, a parent may learn more about discipline and control or strive for greater kindness and softness when the parent cannot offload some aspect of parenting on the other parent and must develop the skills themselves.[243] She also writes about a group she calls "divorce activated fathers"[244] who "begin to do all the things they were too busy to do before divorce or had relegated to their wives," for example, soccer games and school plays.[245] Other individuals studied reported that divorce ignited an opportunity or a motivation to go back to school, find work, or switch jobs. For many of these divorcees, these changes in their roles and ways they conceived of themselves in their families led to self-discovery and empowerment.[246]

B. DIGNITY AND RESPECT

Perhaps precisely, because divorce is a pathway to refiguring one's social, financial, and custodial relationships, leaving a marriage can be an important expression of agency and self-determination. Self-Determination Theory looks to human experience to understand what motivates people and

241. *Id.* at 7, 9.

242. *Cf.* McGuire v. McGuire, 59 N.W.2d 336, 342 (Neb. 1953) ("The living standards of a family are a matter of concern to the household, and not for the courts to determine, even though the husband's attitude toward his wife, according to his wealth and circumstances, leaves little to be said in his behalf. As long as the home is maintained and the parties are living as husband and wife it may be said that the husband is legally supporting his wife and the purpose of the marriage relation is being carried out.").

243. HETHERINGTON, *supra* note 239, at 115–18.

244. *For Better or for Worse: Divorce Reconsidered* takes up divorce in an entirely heteronormative frame. HETHERINGTON, *supra* note 239. For consideration of a more diverse set of families, one might also consult the scholarship of authors cited in *LGBTQ Divorce and Relationship Dissolution*. Frost, *supra* note 98.

245. HETHERINGTON, *supra* note 239, at 121.

246. *Id*.

posits that the ultimate goal for any intervention is inspiring a person's optimal functioning. The theory suggests that three basic psychological needs are associated with increases in wellbeing: autonomy, competence, and relatedness. Autonomy refers to the need to have an independence of being; competence is defined as the desire to "master one's environment"; and relatedness refers to the desire for meaningful social interactions. Scholars have described marriage as an "expressive resource" and that commitment to marriage is an expression of association and personhood. [247] David Cruz argues that that ability to hold oneself out in a relationship recognized by civil law, and not just social reality, is an expressive resource.[248] He made this case in 2001 to argue for same-sex marriage, but the notion easily applies to divorce as well. A decision to divorce and an appeal to have that divorce recognized by law is an expression of needs and choices about the continuation of a union with another person and the associated intermingling of finances, property, child rearing, and habitation. Limiting an individual's expression inside marriage to only those decisions and behaviors that commit to the marriage constrains one's self-determination. Divorce can be a valid expression of one's autonomy, decision-making, and desire for a different manner or source of relatedness. Divorce allows people the opportunity to resituate themselves in new relationships or outside of any relationship at all. Additionally, in ways unavailable to them in an intact marriage, those seeking divorce are able to pursue orders for equitable reallocation of property or for support that may alter financial and power dynamics with their spouses in important ways.[249]

It is not just the ability to divorce that matters for one's self-determination; freedom from public scrutiny regarding the mode and manner of separation *while* divorcing has implications for one's self-determination and mental health as well. Much of divorce reform acknowledges that judges have no business probing into families' personal issues, because their doing so is beside the point if the couple themselves declared their marriage "dead"

247. David B. Cruz, "*Just Don't Call It Marriage": The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 933 (2001) (presenting marriage as a First Amendment issue pre-*Obergefell*); Frye, *supra* note 69.

248. *Id.* ("Marital commitment is expressed not simply by ceremonies, rings, and gifts. It is also expressed by the act of undertaking and continuing to live under the responsibilities of civil marriage, and by letting it be known that one is living as a part of a civil marriage. One's statements of marital commitment gain additional credibility from the civil status. A proposition of (civil) marriage is an invitation to a partner to join a publicly valued institution, not simply to maintain a relationship in the realm of the private.")

249. *Compare* McGuire v. McGuire, 59 N.W.2d 336, 342 (Neb. 1953) ("The living standards of a family are a matter of concern to the household, and not for the courts to determine . . . ."), *with* NEB. REV. STAT. § 42-365 (2022) ("When dissolution of a marriage is decreed, the court may order payment of such alimony by one party to the other and division of property as may be reasonable . . . .").

and because such probing produces "gut-wrenching pain" and injures families.[250] Moreover, such probing is also fated to skew toward normative bias or whimsy, which in turn tend to ignore, silence, or diminish voices of those who fall outside the dominant narrative.[251] Nothing defeats a sense of autonomy and competence like being told "you might have meant x, y, or z by your words and actions, but we find your interpretation of your own words and actions less valuable than our own interpretation of your words and actions." Moreover, certain requirements of separation ask families to distort or hide their truth by either rearranging themselves or avoiding certain disclosures, or they incentivize families to misrepresent themselves. Truth-telling, meanwhile, promotes social emotional health. Research suggests that truth-telling strengthens the connection between our prefrontal cortex—our "adult" brain—and our limbic brain—our "child" brain. Truth-telling is literally good for our brains.[252]

What if, instead of substituting our judgment about what the end of a marriage looks like or incentivizing distortion to satisfy our judgment, we simply said "okay" when a party said, "I wish to no longer be bound by marriage to this person?" What if our process reflected the reality that when couples are struggling deep in the heart of the matter about their choices—the good ones and the mistakes—they do not need or desire a judicial officer to ask them to wait or organize their life a certain way before deciding to divorce or while undertaking the divorce? What if we could avoid forcing "efficacious resolution of economic issues and custody" to take a back seat to the timeline of divorce by decoupling these issues from the right or opportunity to divorce? We would then be free to conceptualize alternative dispute resolution alternatives that can improve outcomes for the thorny issues of custody and economic issues.[253]

C. PROMPT ADMINISTRATIVE DIVORCE

This Article proposes that divorces should be administratively and promptly issued upon the filing of a request by an aggrieved party to a marriage; such that, thereafter, issues of support, equitable distribution, and custody can drive the manner and mode of adjudication or alternative dispute resolution. First, one must note that this proposal flips the script on divorce, suggesting that a pronouncement of a divorce can be disaggregated from and

250. Palermo v. Palermo, 950 N.Y.S.2d 724, 725 (Sup. Ct. 2011), *aff'd*, 953 N.Y.S.2d 533 (App. Div. 2012) (citation omitted).

251. Donohue, *supra* note 33. at 575.

252. Terry Gross, *In 'Dopamine Nation,' Overabundance Keeps Us Craving More*, NPR (Aug. 25, 2021), https://www.npr.org/transcripts/1030930259 [https://perma.cc/2L2J-M6HU].

253. *Palermo*, 950 N.Y.S.2d at 725.

precede final resolution of matters of property, custody, and support. Currently, in all states, a divorce starts when a party files a complaint and serves it on the other; after which time the parties enter a "kind of purgatory," a "*pendente lite* stage."[254] During this time, the court holds hearings or the parties submit agreements regarding temporary decisions on parenting, support, and use or access to certain marital property (such as homes or cars) while the case is pending. After (in some cases) protracted discovery or (in all cases) protracted waits due to court congestion, matters are calendared and heard in final hearings, or negotiated final agreements receive judicial blessing. The meat of these final hearings and agreements are the minutia and nuance of the same issues that were handled initially and temporarily, namely custody, support, and property.

The embedded notion is that a party cannot be divorced until matters of custody, support, and property are squared away. But why? It is a social and legal myth that parties cannot negotiate and contract regarding support and property or negotiate and mediate about parenting children outside of the bonds of marriage. As a matter of law, it is actually possible, for example, to grant a divorce and table or calendar matters of custody for a final hearing. Socially, we know full well that many children are raised in households by unmarried parents or are raised in and by two separate households.[255] Moreover, even in the current regime, the litigation of custody, support, and property issues often persists and survives after the dissolution of marriage via motions to modify or motions to compel.[256]

In addition to disaggregating the divorce itself from resolution of corollary matters, this proposal conflates or includes the concept of shortening waiting periods with freedom from requirements during that waiting period. Any proposal to promptly issue divorces and do away with separate and apart requirements can find comfort in the fact that plenty of states do not have them, and the world appears to have kept on spinning. States such as Alaska, Nevada, New Hampshire, Wyoming, South Dakota, and Idaho have short waiting periods for divorce.[257] These same states do

254. Munro, *supra* note 92, at 429.

255. Naomi Cahn & Kim Kamin, *Adapt Old Strategies to Fit New Family Arrangements*, 47 EST. PLAN. 30, 30 (2020); *see also* Timothy Grall, *Custodial Mothers and Fathers and Their Child Support: 2017*, U.S. CENSUS BUREAU (2020), https://www.census.gov/content/dam/Census/library/publications/2020/demo/p60-269.pdf [https://perma.cc/RK6T-UZZQ].

256. *See, e.g.*, Budrawich v. Budrawich, 240 A.3d 688, 705 (Conn. App. Ct. 2020) (concerning a motion to modify order of alimony); Downing v. Perry, 123 A.3d 474, 477–78 (D.C. 2015) (concerning a motion to modify custody).

257. Erin Danly, *Top 7 Places to Get a Quickie Divorce*, AVVO STORIES (July 27, 2015), https://stories.avvo.com/relationships/divorce/top-7-places-to-get-a-quickie-divorce.html [https://perma.cc/2X9V-A7LJ].

not have involved requirements for demonstrating separation in order to qualify for the divorce.[258] When one cross-checks "quickie" divorce states against other states, one is struck by the fact that nothing is striking. To begin, aside from Nevada, which has a distinct explanation for being an anomaly,[259] divorce rates in these other low-bar states are on par with other states, and even Nevada is not alone in being a high divorce rate state.[260] But, then again, separation periods and normative standards for periods of separation are about creating predictability for children and economic and psychological security for families. So then, surely the citizens of Alaska, Nevada, New Hampshire, Wyoming, South Dakota, and Idaho must be floundering in a state of civic and familial chaos. But no. No, they are not: measures of social services consumption, child welfare statistics, school performance data, and so forth are all unremarkable compared to other states with more stringent divorce requirements.[261]

The question then becomes what, if anything, should the requirements be for the administrative pleadings and requests for divorce. Here again, we see examples of jurisdictions offering opportunities for "summary dissolution," "streamlined dissolution," or "simplified dissolution" to offer parties efficient, less public, and more cost-effective dissolution of their marriage.[262] These processes still require judicial approval, but they do not contemplate a trial and instead invite parties to craft their own agreements. States allowing these dissolutions may impose limits on assets, requests for spousal support, or length of marriage, or they may be limited to cases in which there are no children. France has taken this approach one step further and allowed matters that can be handled summarily to move forward without

258. ALASKA STAT. § 25.24.010 (2022); IDAHO CODE § 32-601 (2022); NEV. REV. STAT. §§ 125.010, 125.020 (2021); N.H. REV. STAT. ANN. § 458:7-a (2022); WYO. STAT. ANN. § 20-2-104 (2022); S.D. CODIFIED LAWS § 25-4-2 (2022).

259. In 1931, Reno, Nevada became known as the "Divorce Capital of the World" when lawmakers reduced the residency requirement for divorces from three months to six weeks. The loosened divorce laws drew a steady flow of "divorce tourists," which strengthened the local economy through lodging and entertainment. *See* Sofia Grant, *How Reno Became 'the Divorce Capital of the World'—and Why That Reputation Faded*, TIME (Feb. 13, 2020, 7:36 PM), https://time.com/5783893/reno-divorce-history [https://perma.cc/ER2W-4NTE].

260. *Divorce Rate by State 2022*, WORLD POPULATION REV., https://worldpopulationreview.com/state-rankings/divorce-rate-by-state [https://perma.cc/AY7X-DR68].

261. *Data by State*, CHILD.'S BUREAU, https://cwoutcomes.acf.hhs.gov/cwodatasite/byState [https://perma.cc/ACW5-BQCS]; *State Profiles*, NATION'S REP. CARD, https://www.nationsreportcard.gov/profiles/stateprofile?chort=1&sub=MAT&sj=&sfj=NP&st=MN&year=2019R3 [https://perma.cc/SB7E-7C5C]; *SNAP Data Tables*, USDA, https://www.fns.usda.gov/pd/supplemental-nutrition-assistance-program-snap [https://perma.cc/Y45S-WKGQ]; *State-by-State Child Support Data*, NAT'L CONF. OF ST. LEGISLATURES (June 25, 2019), https://www.ncsl.org/research/human-services/state-data-on-child-support-collections.aspx [https://perma.cc/AC7B-R7MX].

262. Munro, *supra* note 92, at 428.

judicial involvement at all.[263] The same is true in Australia, where uncontested divorces with no children can be obtained by administrative procedure through the mail.[264] Denmark similarly allows for an administrative procedure in uncontested cases.[265]

An expeditious administrative process supports the goals of creating a system that respects the families utilizing it, as well as the goal of creating predictability and security for families. To begin, an administrative process that separates requests to divorce from requests for the court's assistance with property, support, and custody better reflects several important realities beleaguering the family courts and harming the families who are forced to engage with the courts. Family courts are overcrowded and inefficient.[266] Family courts also deal with vast numbers of pro se litigants.[267] As compared to represented parties, pro se litigants are more likely to have substantive or procedural missteps such as missed deadlines or deficient filings. As a family court judge and two practitioners put it,

> This perfect storm created by a void of knowledge of procedural, substantive, and evidentiary law on the part of individuals stuck in a system to deal with unhappy, very personal, and, at times, highly conflicted matters results in an unnecessary overuse of judicial resources and a growth of the backlog in the court's docket.[268]

Under this new proposal, certain divorce scenarios would come off the court docket all together, clearing room for those matters that require more time and attention. Other matters could come before the court, not automatically upon the filing of a divorce, but rather when the families' own needs and energies direct them to file. Some parties may feel they need court intervention to understand, negotiate, and contract around their property interests, support needs, or child custody issues; some parties may not.[269]

263. Margaret Ryznar & Angélique Devaux, *Voilà! Taking the Judge out of Divorce*, 42 SEATTLE U. L. REV. 161, 168 (2018).

264. Sharon Shakargy, *The Outlawed Family: How Relevant Is the Law in Family Litigation?*, 47 MITCHELL HAMLINE L. REV. 568, 578 (2021).

265. *Id*.

266. Munro, *supra* note 92, at 427.

267. *Id*.

268. *Id.* at 431.

269. There are a myriad of avenues for mediating and negotiating settlements: negotiation between parties with or without attorneys, mediation or conciliation with a third-party neutral, or collaborative divorce processes. *See Probate and Family Court Approved Alternative Dispute Resolution (ADR) Programs*, MASS.GOV, https://www.mass.gov/info-details/probate-and-family-court-approved-alternative-dispute-resolution-adr-programs [https://perma.cc/S92R-79D9]; *Collaborative Divorce and Family* Law, MASS. COLLABORATIVE L. COUNCIL, https://massclc.org/collaborativedivorce [https://perma.cc/9ZKU-WKCU]. Further, in some jurisdictions, one can choose to use state child support services rather than file privately in the context of a traditional divorce. *See, e.g.*, *Opening a Child Support*

Some parties may choose to merge and incorporate settlement agreements into court orders, while other parties may not.[270]

Courts and legislatures recognize that the more process a law requires or inspires, the greater the delay and that the greater the delay, the greater the agony.[271] Social science literature—and if we are honest with ourselves, our own lived experiences—buttress this conclusion. People do not like to wait; and waiting for uncertain time periods, for an uncertain outcome, is the worst kind of waiting.[272] People become agitated and irrational under these conditions; "[w]aiting in ignorance creates a feeling of powerlessness, which frequently results in visible irritation and rudeness."[273] The psychology of waiting is often studied in connection with customers waiting in line, so one must consider how these same psychological tendencies toward frustration and anger will be amplified when the matter at hand—a divorce—is more socially emotionally fraught than a trip to a customer service center. Consider, for example, patients asked to wait for medical procedures due to COVID-19 protocols and barriers. Here, patients showed marked symptoms of mental distress as they waited to undergo their procedures.[274] To add insult to injury, the psychic toll did not just cause suffering in the patient, but it

Case, D.C. CHILD SUPPORT SERVS. DIV., https://cssd.dc.gov/service/opening-child-support-case [https://perma.cc/Q7BU-YK4N].

270. Parties who have reached a settlement agreement on matters corollary to divorce, for example custody and property, will ask the court to recognize that agreement at the time of decreeing the divorce. *See To Merge or Not to Merge: A Look at "Incorporated and Merged" vs. "Incorporated but Not Merged" Language in a Divorce Decree*, FAM. L. GUYS: BLOG, https://familylawguys.com/merge-not-merge-look-incorporated-merged-vs-incorporated-not-merged-language-divorce-decree [https://perma.cc/PK2X-WDPN]. If they ask that their agreement be incorporated into the divorce, then essentially, the private settlement is incorporated by reference in the divorce decree but exists as a private contract enforceable through standard civil breach of contract channels. *Id.* If the parties merge and incorporate the settlement into the divorce decree, then it becomes part of the decree, thus ceasing to exist as a private contract and existing as a court order instead. Enforceability, then, is via motions to compel or motions for contempt. *Id*.

271. For a discussion of legislative history which highlights the logistical and mental loads caused by delay, *see* Palermo v. Palermo, 950 N.Y.S.2d 724, 725 (Sup. Ct. 2011), *aff'd*, 953 N.Y.S.2d 533 (App. Div. 2012).

272. Garrett Bomba & Michael Burke, *Psychology Behind How Waiting Affects Patients*, EXPERITY, https://www.experityhealth.com/ebooks/psychology-behind-how-waiting-affects-patients [https://perma.cc/RR6T-Z7X2]; DAVID H. MAISTER, THE PSYCHOLOGY OF WAITING LINES 6 (1985), https://davidmaister.com/wp-content/themes/davidmaister/pdf/PsycholgyofWaitingLines751.pdf [https://perma.cc/83WH-RYYK].

273. Maister, *supra* note 272; *see also* Bomba, *supra* note 272.

274. Anna R. Gagliardi, Cindy Y.Y. Yip, Jonathan Irish, Frances C. Wright, Barry Rubin, Heather Ross, Robin Green, Susan Abbey, Mary Pat McAndrews & Donna E. Stewart, *The Psychological Burden of Waiting for Procedures and Patient-Centered Strategies that Could Support the Mental Health of Wait-Listed Patients and Caregivers During the COVID-19 Pandemic: A Scoping Review*, 24 HEALTH EXPECTATIONS 978 (2021).

also adversely impacted patients' trust in the health care system.[275] As it turns out, such findings do and have translated onto the legal system generally and family courts specifically. Delay upon delay with uncertainty about the divorce risks exacerbating the social-emotional stress a family is under and threatens to diminish litigants' ability to work together and confidence in the legal system.[276]

Simplifying and truncating the line between wanting a divorce, filing for a divorce, and getting a divorce has advantages for almost every type of couple who the family court sees. The law lacks teeth on the issue of divorce itself; so much of divorce law is actually about regulating or apportioning property and money among family members to support the individuals and bimodal family constellations arising out of breakdowns in the married, nuclear family.[277] Some couples struggle financially to create separate households or face contentious divorces. Without the benefit of advocacy and assistance, separation periods are rarely productive and simply impede the couples' full opportunity to use the resources of the court and the force of the law to plan and prepare for a new future. A prompt administrative divorce clears the way for these couples to immediately seek final resolution for the matters that will help them prepare financially and logistically for their next chapter. In contrast, some resourced and represented couples are able to negotiate agreements about property, support, and child support. These couples do not need active involvement of the court to broker agreements, but they need the court's prompt attention to finalize them. For these resourced couples, the murkiness created by periods of separation prior to divorce can create confusion around what holdings or debts are marital property.[278] Clearly delineating the moment of divorce from the period of negotiation and possible adjudication regarding property and support interests clarifies which choices and conduct were "marital" and which were not.[279] Still other couples have "simple" cases where they own little to no property and have no children. Despite shifts in divorce law leaving the courts with little to no authority over the matter of divorce itself, these couples must queue up, adding to the clogged docket, missing work for

275. *Id*.

276. *See* Press Release, Alicia Davis, *supra* note 80.

277. Shakargy, *supra* note 264, at 570.

278. *Compare* CAL. FAM. CODE § 771 (West 2022) (regarding property acquired after legal separation as separate), *with* N.Y. DOM. REL. LAW § 236(B)(1)(c) (McKinney 2022) (regarding date of executed separation agreement or commencement of action for divorce as dispositive).

279. *See, e.g.*, Fitzwater v. Fitzwater, 151 S.W.3d 135, 136 (Mo. Ct. App. 2004) (detailing a case in which a husband and wife disagreed about the designation of property and propriety of a certain expenditure of the husband vis-á-vis the date of their separation and commencement of the trial for divorce).

interim court appearances, and waiting—sometimes years—for a pronouncement of what they themselves have known all along: their marriage is over.[280] The current divorce system not only creates all these inefficiencies and delays, thus forestalling family problem-solving, but it also decentralizes the problem-solving.

Court filings automatically trigger the involvement of bureaucratic authority, which can be demoralizing or unnecessary for many families. Administrative trends reflect a jurisprudential reality that divorces seem less like a "legal matter in need of adjudication and more a private matter subject to administrative regulation."[281] Administrative divorce trends, meanwhile, also mirror the parallel practice of alternative dispute resolution ("ADR") trends. Many states, even those without summary dissolutions on the books, allow families to use ADR such as mediation to settle their disputes before seeking judicial approval. Such practices promote parties' self-determination over personal matters and their everyday lives.[282] One argument is that court processes and the role of judges are often about rewarding and punishing or incentivizing and barring. These frames contemplate one winner and one loser. The frames are not comfortable or appropriate for people trying to share property equitably or contemplate some sort of partnership to raise children.[283] Others point out that the process of re-conceptualizing family relationships in a new family system is slow, iterative, deeply personal, and ideally collaborative. The divorce process is not currently designed with the space to negotiate, grieve, try, fail, and try again. A system that reduces dockets and narrows issues before the tribunal might better foster opportunity to design systems and processes more respectful of, and responsive to, families' needs.

CONCLUSION

The origin story of separate and apart requirements is a legacy of the bizarre and lasting stalemate between what people were doing inside unhappy or unhealthy marriages and the technical lawful authority to divorce.[284] Surely now we can begin to narrow that divide between law and society, because after all, the train has left the proverbial station.

280. Shakargy, *supra* note 264, at 577–78 (stating that shifts in the law that do not, ultimately, give the court much authority at all over the "substance" of the divorce itself: "divorce is always attainable;" and "not only is divorce more flexible, but it is also governed chiefly by the wishes of the parties").

281. *Id.* at 576, 579.

282. Ryznar, *supra* note 263, at 175–76.

283. Shakargy, *supra* note 264, at 576, 589.

284. Friedman, *supra* note 25*,* at 1525–26.

> About half of all Americans over the age of 18 are married, but an increasing number of them have been married before. Over the past ten years, the number of cohabiting adults over the age of 50 has increased dramatically, from 2.3 to 4 million. More than one-quarter of married men in their seventies report having had an intimate relationship with someone other than their spouse. The grey divorce rate—the divorce rate for those age 50 and older—doubled from 1990–2015, although it remains significantly lower than the rate for those under 50. Almost a third of Americans (30%) have a step- or a half-sibling. . . . As many as 5% of Americans are polyamorous, having serious intimate relationships with more than one person at the same time. Approximately 40% of children are born to unmarried mothers, but more than a third of those mothers are cohabiting at the time they give birth.[285]

"[S]tatistics have normative as well as empirical implications."[286] One can see these implications playing out on our TV screens, in our neighborhoods, our schools, our work, and our social spaces. Families increasingly "do" family all sorts of ways—ways that suggest that family is a beautifully nuanced thing. Bound up in this, is the reality that marriage must also be a beautifully complicated thing—or at least something that is about more than sex and meals. It is illogical to hover the magnifying glass on these issues when a party seeks to end their marriage. Moreover, this piece suggests it is acutely painful and harmful to certain populations and constitutionally precarious to do so. A simple conclusion flows from all of this: these requirements do not make sense. They require performance and permission that is neither necessary in life nor should be acceptable in law.

285. Cahn, *supra* note 255, at 30 (citation omitted).

286. Fineman, *supra* note 5, at 2189.