The Restatement of Love

REPORTERS
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INTRODUCTION

Custom has long been the authority in matters of love. Men and women have turned almost unthinkingly to tradition and prevailing norms for guidance in the tender passion. These informal social standards have never been organized into a definitive legal code, perhaps because love, the most intimate and idiosyncratic of human emotions, has been presumed unsusceptible to a structure of rules. The Restatement of Love, however, is premised on the view that love, like other aspects of human interaction, can be subjected profitably to legal analysis.

No doubt some will question the departure from legal tradition that the Restatement of Love represents, for while laws pertaining to marriage and divorce are well established, the law's application to a relationship's early stages has until now been unexplored. This lack of codification has created inconsistencies, unnecessary confusion, and pain. In order to remedy this deficiency, the Restatement of Love sets forth the comprehensive legal principles governing the conduct of relationships.

In codifying the underlying principles of love, the Restatement draws on established doctrines from other areas of law. It helps resolve recurring dilemmas (is brunch an appropriate meal for a blind date?) and adjudicate common disputes (is distance a bona fide excuse for a break-up?). Some contend that such matters of love can never be answered with rules of reason, and indeed, the claim has been made that "[t]he heart has its reasons, of which reason knows nothing."1 By distilling a universal, reasoned framework for relations of love, the Restatement will refute this widespread, but mistaken, view.

The Restatement of Love consists of five Chapters. Chapter 1, Meaning of Terms, sets forth the basic definitions of terms employed. Chapter 2, Courtship, surveys the three principal models under which relationships begin: the blind date model, the informal acquaintance model, and the aggravating circumstances model. Chapter 3, Matters Arising During the Relationship, examines four major legal areas in which developed doctrines shed light on the law of relationships: jurisdiction, procedure, property, and torts. Chapter 4, Sex, addresses issues related to the initiation and conduct of sex. Chapter 5, Dissolution, governs the various aspects involved in the act of dissolving a relationship.

CHAPTER ONE
MEANING OF TERMS

This Chapter defines the terms used in this Restatement. Many commentators resist established definitions in the context of love and argue that traditional categories, such as girlfriend or boyfriend, are "crude and unworkable."2 Some contend that such categories are mere constructs, designed to push people toward conventional relationships.3 But law, by its very nature, relies upon a common understanding of the terms that define it.4 This Restatement will employ the following neutral and modern terms in order to encompass the greatest number of possible situations.5

¤ 1.1. Interest

An interest is the object of any human desire.

Comment:

Although this definition mirrors that found in the Restatement of Torts, Second,6readers are cautioned that the term has somewhat different connotations in this field.

¤ 1.2. Party

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

Comment:

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

¤ 1.3. Relationship

A relationship is that status enjoyed by individuals who consider or comport themselves in a manner that indicates an ongoing romantic involvement.

Comment:

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

¤ 1.4. Love

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

Comment:

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

¤ 1.5. Dissolution; breakup

A dissolution or breakup is any act by which a relationship is terminated.

Comment:

Dissolution may be accomplished by either unilateral or bilateral action.

¤ 1.6. Sex

Sex is the act of sexual intercourse.

Comment:

Although some employ this expression to describe all forms of sexual activity including, but not limited to, the act of intercourse, the Restatement restricts use of the term to this single act, unless otherwise indicated.

CHAPTER TWO
COURTSHIP

Chapter Two reviews the three principal models of commencing a relationship: the blind date model, the informal acquaintance model, and the aggravating circumstances model.

In recent history, the blind date model was paramount, and in fact it still remains strong in homogeneous urban and suburban communities.7 A blind date may be arranged or may be initiated by one of the parties; in any event, this model is characterized by a mutual lack of familiarity. While blind dates are often decried as expensive, time-consuming, and futile, the model persists because, each time, parties' hopefulness overcomes the disenchantment brought on by previous disappointments.

Because the blind date model is so prevalent, and because the parties

necessarily bargain at arm's length, certain practices have become standard for blind dates. Blind dates are highly structured, formal transactions.

In contrast to the blind date model, parties to the informal acquaintance model-who consider themselves, at a minimum, to be casual friends or within the same circle of acquaintances-are not bound by standard terms. The informal acquaintance model prevails in school and work settings,8 and its popularity has increased with the growth of coeducation and women in the workplace.

The aggravating circumstances model arises when, under the influence of some extraordinary circumstance or condition, parties unexpectedly come together. They may harbor an unacknowledged passion, a passing fancy, or be wholly unacquainted. Because of its unstructured and spontaneous nature, the aggravating circumstances model is acknowledged to be the most unstable and hazardous of the three methods of meeting.

¤ 2.1. The Blind Date Model; Boilerplate Terms

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

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

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

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

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

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

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

Comment:

a. Scope of boilerplate. The boilerplate terms and practices codified in this section have become standard after years of individual experimentation in blind dates. Insofar as the changing role of women in society has called conventional boilerplate into question, the Restatement's language reflects these developments. Parties may generally rely on boilerplate without further inquiry. Though individuals retain the option to contract around these default terms, attempts to depart from boilerplate may be regarded with suspicion.

b. Arranging the blind date. Wednesday has long been considered the proper day to call to arrange a Saturday night blind date. Calling on Tuesday is too eager; Thursday is arrogant; and Friday implies a belief that the invitee is available on demand. The Wednesday night caller acts reasonably, promoting the twin virtues of social efficiency and flexibility. Nine-thirty p.m., after dinner but before bedtime, is the most appropriate time to call an invitee at home. Three-thirty p.m. is preferable for a call to the office, because people generally doze at their desks or take a break at that time.9

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

In recent years, brunch has emerged as an intermediate tier.12 This meal resembles lunch in time and expense, but connotes more familiarity than the workaday lunch. With its overtones of unmade beds, unshowered bodies, and lazy bliss, brunch promotes an atmosphere of intimacy. Combined, these elements warrant greater scrutiny than that necessitated by lunch, although somewhat less than that required for dinner.13

Note, however, a growing trend away from the activity of eating a meal, toward meeting for drinks. Advocates of this alternative praise its flexibility, in that it permits parties to enjoy the atmosphere and convenience of an evening date, without the expense and heavy time commitment necessitated by a meal. The invitor, however, risks appearing unenthusiastic, or worse, cheap.

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

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

f. Screen before the blind date. It is reasonable, indeed advisable, for parties to engage in pre-date screening. Parties generally speak by telephone before the first date, but telephone evidence is often of limited reliability.18 Though parties should refrain from operating in reliance, such discussions do provide ample fodder for a more thorough background check.

Independent investigation of the facts may entail interviews with classmates, work associates, and family members.19 Due diligence often includes an attempt to secure the party's picture. With the advent of facebooks in law offices, investment banks, and other large firms, photographs of most professionals are readily available for immediate faxing.

Jurisdictions are split as to whether due diligence should extend to allow the inclusion of all available information, or whether the hearsay principles of reliability and relevance should govern.20 Some circuits lean toward an importation of the "fresh start" policy of the Bankruptcy Code21 and discourage consideration of past evidence that might unfairly tarnish an otherwise promising candidate. The majority view, however, is consistent with the liberal leanings of the Federal Rules of Evidence.22

¤ 2.2. The Informal Acquaintance Model

In considering whether to enter into a relationship, informal acquaintances should:

(1) avoid any tendency toward willful blindness;

(2) establish a claim of right through possession; and

(3) refrain from stealing corporate opportunities.

Comment:

a. Abusive practices; willful blindness. A common injurious pattern seen

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

Illustration:

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

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

c. Corporate opportunity doctrine; exploitation by friends and acquaintances. Related doctrine on this subject draws from the notion of stealing corporate opportunity.26 In principle, if a person does not or cannot avail himself or herself of a relationship, then others may pursue the opportunity with impunity. In practice, however, such doctrines rarely apply neatly or painlessly. Those aggrieved by another's success, but who lack a legal right to relief, often seek other avenues of redress.27

Illustration:

A and C are roommates. A has had a longstanding crush on X, but has never successfully developed a romantic relationship. C meets X through A, and when C and X begin dating, A accuses C of exploiting corporate opportunity. Legally C is not liable, because A could not use

this opportunity. Yet despite legal rules, informal relations within the household are sure to suffer.

¤ 2.3. Aggravating Circumstances

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

Comment:

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

b. Factors indicating rebound. The most prevalent aggravating circumstance is the rebound. A person on the rebound is almost always unable to evaluate a new relationship with judgment unclouded by the events of the previous relationship. While quick turnaround into a new, successful relationship is possible, a true rebound relationship is one that a party joins merely to be positioned in a relationship.

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

CHAPTER THREE
MATTERS ARISING DURING THE RELATIONSHIP

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

¤ 3.1. Jurisdiction

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

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

(2) Grant standing when appropriate; and

(3) Litigate moot disputes sparingly.

Comment:

a. Ripeness doctrine. A couple should not waste its resources by prematurely arguing issues that may resolve themselves. As in other areas of the law, claims should not be adjudicated until they are ripe.28 Circuits are split as to whether discussion about the relationship's status is ripe at all times. Some argue that parties are always entitled to a forum to discuss the other person's intentions about the relationship.29 Others contend that litigiousness in this area is tiresome and counterproductive. The Reporters advise adherence to reasonableness standards when parties raise issues about their relationship.

Illustration:

A and B, who have dated for two years, are beginning their senior year of college. A asks B whether B expects A and B to move to the same city after graduation. B demurs, considering the question premature and a possible source of conflict. A does not pursue the issue, because A recognizes that resolution is not yet necessary. Six months later, in the heat of corporate recruiting season, A must choose between jobs in two different cities. A raises the issue again. B agrees to discuss it, in the knowledge that refusal to do so would be unreasonable.

b. Special case: dealbreakers. Some topics are ripe for review at any time during the course of a relationship. These topics fall under the rubric of "dealbreakers." Dealbreakers are more than sticking points; they are irreconcilable differences. Common dealbreakers include whether a party smokes, does not read books or newspapers, refuses to wear a wedding ring, or insists that the couple adopt the same last name after marriage.

Illustration:

Jewish person, J, and Christian person, C, agree to pursue a relationship despite their religious differences and eventually move in together. When December comes, J refuses to have a Christmas tree in their apartment. J feels that this practice represents a degree of assimilation that J cannot

countenance. C cannot believe that J would expect C to give up this important holiday tradition. If J and C cannot compromise on this issue, they face a dealbreaker.

Such disputes may seem insignificant, but in fact, signal larger, more serious differences. Parties are encouraged to identify dealbreaking issues as early as possible and to exit the relationship as soon as it is clear that a dealbreaker exists.

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

In recent years, the entire doctrine of standing has come under fire.30 Commentators have criticized the requirement that parties show "injury in fact" before they may claim relief. These academics contend that the relevant inquiry instead should be whether the complainant has a source of relief under the disputed legal right. Critics maintain that the discussion of "standing" allows a court to skirt the merits of an underlying claim.

Illustration:

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

d. Mootness. Legal treatments of mootness in matters of love vary according to whether the jurisdiction takes a prudential or declaratory view of relationships. Jurisdictions adhering to the prudential view hold that if an issue no longer poses an immediate tangible problem, it should not be discussed, because unnecessary disputes should always be avoided. In contrast, those that follow the declaratory approach argue that parties should air their views on contentious subjects, even if the issue raised in a particular instance has already been resolved.31 The Reporters support a presumption in favor of the declaratory view-parties generally benefit from

full discussion-but caution that if taken to an extreme, this approach can become a sword, not a shield.

¤ 3.2. Procedure

In the course of a relationship, parties should:

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

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

Comment:

a. Res judicata. This final-decision doctrine establishes that certain disputes, once settled, may not be revisited. Although the principle of res judicata is as deeply embedded in the law of love as it is in the common law generally, it should be applied with some discretion. In some cases a traditional res judicata approach is necessary in order to permit the parties to achieve repose; in other circumstances, res judicata is inappropriate, because some substantive issues must be relitigated and cannot be put to rest by a mere procedural device.

Illustration:

L and R have been discussing for months where to spend their week's vacation. L prefers to sit in the sun; R prefers to ski. After some heated debate, they settle on a vacation in Aspen. Soon after they decide, L notices an advertisement for special low airline fares to Bermuda. Nevertheless, the decision to go skiing has been made, and L cannot reopen the debate merely because of the lower airfare. To upset a one-time, relatively insignificant decision after exhaustive discussion would be unsettling and frustrating for both parties.

b. Discovery; disclosure of evidence. Evidentiary questions pervade relationships. Few parties can transcend the ever-prevalent tension between the values of candid behavior and strategic posturing. Some advocate use of an "open file" system, in which parties reveal without reservation their thoughts and feelings.32 Others prefer a more reticent approach, in which the parties disclose much less.33 The Reporters favor the truth-focused approach. The Restatement recognizes, however, that this course may lead to unfavorable results under certain circumstances. Parties are urged to consult precedent.34

Illustration:

A and B have been in a relationship for some time. A feels that A is in love with B. A must decide whether to disclose freely these feelings, or whether

making such an admission would leave A in a strategically vulnerable position.

¤ 3.3. Property

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

Comment:

a. Acquisition of easements. A party who regularly visits a romantic interest may acquire an affirmative easement in certain property. The burdened property may take the form of a shelf, a drawer, part of a closet, or an article of clothing. An easement may be created by any of the established methods, including express grant, necessity, estoppel, implication, or prescription.35 Parties often welcome the creation of easements, because the use of one's property by another is an indication of intimacy. These property rights create a potential for abuse, however. For example, one party may claim an easement that the holder of the servient tenement does not fully recognize or approve.

Illustrations:

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

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

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

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

Illustration:

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

¤ 3.4. Torts

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

Comment:

a. Reasonableness; "eggshell plaintiffs." Reasonableness is an elusive, yet compelling, concept in the law of love. The very idea of love implies that both parties can be themselves, however unreasonable each may be. That is, each party is entitled to be an "eggshell plaintiff," and each must take his plaintiff as he finds him.36 Yet paradoxically, parties invoke objective reasonableness standards when their desires conflict. Despite the formalist view that a relationship is a haven for idiosyncratic behavior, parties cannot escape the notions of reasonableness that pervade society, and will advert to them when disputes arise.

Illustration:

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

b. Duty of care. Because parties to a relationship grow to know each other's idiosyncracies intimately, they are held to a high standard of care toward one another regarding these quirks.37

Illustration:

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

CHAPTER FIVE
SEX

This Chapter addresses the issues that arise when parties contemplate or engage in sex. Sex is a watershed event in any relationship. When two parties desire each other, the unparalleled urge for gratification occupies the foreground, while issues of morality, childbirth, commitment, and death lurk in the background. Although sex itself can yield unmatched pleasures, the clash of these broader concerns can bring on confusion or even anguish.38

This Chapter covers important matters related to the decision to have sex and the initiation of sex, and it sets forth the principles of equity that guide sexual relations.39

¤ 5.1. The Parties' Decision To Have Sex

Sexual intercourse is different from all other forms of sexual encounter, and once executed, cannot be revoked. Before engaging in sexual intercourse, parties should know their goals. Goals will be informed by the parties' status, that is, whether they are:

(1) parties to an established relationship;

(2) friends; or

(3) parties to a "one-night stand."

Comment:

a. Special status of sexual intercourse. Sexual intercourse is different from other sexual acts. Sex, more than any other permutation of sexual activity, invokes powerful social norms and health concerns, and presents the additional possibility of pregnancy.

The contention that sex is different, though facially simplistic, is consistent with the pervasive tendency in legal analysis to elevate certain acts, principles, or punishments to a higher significance.

For example, the written Constitution has long been recognized as the binding law on the Union of the United States--different from and supreme over the general statutes and regulations.40 Similarly, because of the terminal nature of the penalty, death is not imposed before provision of a host of special procedural protections.41 And in the area of wills, a proper signature infuses an otherwise meaningless document with legal significance.42 Therefore the contention that sex is different is consistent with conventional legal reasoning.43

Because sex is different, a party eager to participate in various sexual activities may nevertheless delay the onset of sexual intercourse. If, however, the other party wishes to engage in sexual intercourse, the failure to reach a meeting of the minds may lead to protracted disputes. In this situation, the ready party may attempt to persuade using the well-worn "constructive sex" argument: that is, because the parties have done "everything but," delay of sexual intercourse serves no purpose.44

Illustration:

C is anxious to have sex, and K is hesitant. C contends, "You know we're having sex--what we're doing is sex. What's the difference if we have intercourse?" By resorting to the constructive sex argument, C has attempted to shift the burden to K to explain why sexual intercourse is different. C hopes that if K is unable to articulate why "sex is different," K will capitulate and have sex with C.

The constructive sex argument is seductive, but for the reasons given above, not ultimately persuasive.

b. The progressive nature of sex. Sexual activity progresses as by a one-way ratchet; once parties achieve consummation, they cannot retreat from that point.45 While parties technically can stop engaging in sexual intercourse, parties to a sexual relationship cannot easily return to the status quo ante.46 This one-way-ratchet rule applies to the several variants of sexual relationships. In an established relationship, parties who have had sex but subsequently attempt to desist will find this reverter nearly impossible. Parties who are friends, or who scarcely know one another, will find that sexual intercourse irrevocably alters their dealings. Because the act of sexual intercourse is both significant and irreversible, it is easier both to end a relationship altogether, and to maintain a friendship with a former interest, if sexual intercourse never takes place.

Illustration:

G and Q, friends for many years, find themselves having sex one night. Thereafter, though they try to maintain their former friendship, they no longer enjoy their once-easy rapport. Each is now preoccupied by his or her own expectations, and is concerned as well about the other's expectations.

c. Know your goal. One of the most common sources of dissatisfaction pursuant to sexual intercourse is the failure of a party to know his or her goal ab initio.

Most people have fully formulated their own standards and practices in sexual relations. However, at the very moment that the opportunity arises

to put these values to the test, conflicting impulses may emerge. Caught up with the purported spontaneity of sex and nearly irresistible hedonistic urges, a party may feel inclined to disregard previously honed beliefs. The justifications for such abandonment of principle track those for homicide.

i. Necessity.47

"I just needed it."

ii. Diminished capacity48.

"I didn't intend to do it, but, overwhelmed by the moment, I couldn't think straight. Desire clouded my judgment."

iii. Heat of passion49.

"I usually don't have casual sex, but after all, I'm not the kind of person who always has to stick to the rules. Sometimes you have to throw caution to the wind."

As these examples illustrate, parties eager to have sex will not want for justifications. Because of the easy availability of facile justifications, parties should examine with care their motives--i.e., "know their goal"--before engaging in sex.50

Illustration:

N returns home for Thanksgiving weekend and at a party meets T, whom N dated briefly in high school. Although N does not want to establish a new relationship with T, N becomes increasingly interested in a one-night stand as the evening progresses. N decides to have sex with T, but harbors no expectations besides sexual gratification. After their night together, N returns to school. Because N had not wanted the encounter to amount to anything more than a pleasurable interlude, N returned to school free from the burdens of expectation.

Formulating one's sexual goals is similar to structuring a transaction. Just as a single business deal can be arranged as either a sale-leaseback or mortgage financing to achieve different tax consequences, the same physical act may carry different implications depending on how individuals characterize it.51

In some cases, however, parties who think they know their goal proffer a goal which is, in fact, a sham rationalization. Such self-deceit may result in unfortunate consequences.52

Illustration:

Q has only had sex with people whom Q loved. Now, though not in love with anyone, Q wants to have some sexual relief, and R, whom Q has dated a few times, seems suitable. Q decides that, despite Q's established values of viewing sex as "different," sex with R would be appropriate even in the absence of love. After Q and R have sex, Q feels anxious and upset about the casualness of the encounter. Q's ex ante characterization offers little comfort post hoc.

The above illustrations reflect the human proclivity with which law must constantly reckon: the pursuit of a perfect structure to capture all the benefits, and eliminate all the costs, of a course of conduct. Such efforts are doomed to failure.

In the corporate arena, for example, the "limited liability corporation" has recently met with excessive enthusiasm. This new entity purports to combine the limited-liability benefits of a corporation with the tax benefits of a partnership arrangement.53 Surely it is only a matter of time before proponents of the fashionable limited-liability corporation confront the sad truth met by the champions of the sexual revolution: there's no such thing as free love.

The know-your-goal rule has different applications depending on the parties' status.

i. Sex within an established relationship. The most common context for sexual intercourse is between two parties to an established relationship. While sexual intercourse is commonly considered a medium by which the parties advance the relationship, this perception is false; sexual intercourse merely reflects the bona fides of the relationship. Sex cannot remedy or compensate for the weaknesses in a flawed relationship, nor can it be used to circumvent the laborious process of establishing emotional intimacy.54 A fortiori, the introduction of sex into a strong relationship simply reenforces the parties' established emotional attachments.

Illustration:

B and C have a good and loving relationship. While B eagerly anticipated sexual intercourse with C, B feared that sex might change things. However, after consummation, their previous feelings and behavior toward each other continued unaffected. Sex simply mirrored B and C's well-established intimacy.

ii. Sex between friends. Platonic friends will, on occasion, engage in sexual intercourse. This situation inevitably presents the parties with a steep challenge to "know their goal." While a party may proffer the pretextual

goal of easy, comfortable sexual intercourse with a familiar friend, in fact, one party or both often harbor a broader, albeit unacknowledged, goal. There are a few reported cases in which friends who have had sex remain friends; however, parties anxious to proceed should not rely on outliers. Few friendships can withstand the transition from friend to sexual partner, and back again.

iii. The "one-night stand." In this model, a party holds no expectations beyond an instant, single encounter. The one-night stand is perceived as the most promising means to costless, casual sex. In many instances, it fulfills that purpose. However, parties may find themselves dissatisfied or despondent, despite the expectation of an easy time.55

Three factors may contribute to disappointment with one-night stands. First, parties who considered the episode an isolated event may feel disconcerted if they subsequently come into contact with each other, for example, at work or in school.56Second, because the first instance of intercourse often fails to provide the heights of pleasure that can be garnered after repeat encounters, only the simple urge for sex is satisfied.57 Third, the better the one-night stand, the more a party wishes the encounter to repeat, and the more disappointed a party becomes when the one-time event remains just that.57

¤ 5.2. Initiation of Sexual Intercourse

(1) Women bear the ultimate burden of securing contraception.

(2) Parties should not rely on appearances when evaluating health risks.

(3) Parties may or may not literally spend the night together, but they should recognize that reasonable minds disagree on this question.

(4) Certain fringe benefits accrue to parties who engage in sex.

Comment:

a. Contraception. In matters of contraception, the woman is traditionally viewed as the least cost avoider, because the costs of pregnancy bear more heavily on her. This substantive difference tracks procedural burden-shifting rules.59 The woman has the burden of proof, because she ultimately must judge the adequacy of the contraception used. However, to demonstrate his good faith, the man has the burden of coming forward to address the issue.60

b. Protection. In matters of protection from disease, parties are cautioned against making assumptions about the sexual history of other parties. Just as derivative financial instruments may be highly volatile even though the

underlying assets are seemingly risk-free government bonds,61 a party may bear the hallmarks of a safe bet when in fact he or she poses a sexual high risk.62

c. Spending the night. After having sex for the first time, two parties must confront the issue of whether literally, physically, to spend the night together. Circuits are sharply split on the advisability of staying over.

Some hold that one party's departure in the middle of the night allows the parties to extend the romantic fantasy--free from stale breath, mussed hair, and other morning realities--and, more importantly, to retain autonomy at a critical juncture. These circuits emphasize that spending the night can be more intimate then sex itself and does not necessarily follow from sex.

Other circuits hold that a significant part of the pleasure--shared breakfast and daylight repetition of the previous evening's activities--would be lost if the parties separated before morning. They contend further that sex creates an expectation of a level of intimacy that warrants at least a full night's stay.

Because reasonable minds disagree so strongly on the issue of spending the night, the Reporters cannot responsibly advocate one position. Rather, the Restatement cautions that a party initially taken aback by another's approach should recognize that both methods enjoy ample support in the caselaw.63

Note that to avoid "spending the night," a party must depart by 5:45 a.m.

Illustration:

D and F have sex for the first time. Long before morning, D awakens to find F dressing to leave. D looks on feeling shocked, disappointed, and rejected. D should take comfort in the fact that F's method, while perplexing to D, is considered objectively reasonable by some circuits.

d. Fringe benefits.64 While circuits differ on the gravity of the emotional commitment that should accompany sex, they universally accept that certain fringe benefits accrue when parties engage in sex. While additional benefits may be granted, the following benefits are guaranteed.

i. Health services.65 When one party is ill, the other party must secure over-the-counter medication (even if provision requires a trip to the drug store) and provide solicitous attention. The healthy party must also discharge any necessary chores until the other's recovery.

ii. Meals and lodging.66 As long as a party stays at another's residence, the party is entitled to meals and lodging free of charge.

Illustration:

L gets up in the middle of the night and finishes P's carton of ice cream. P cannot reasonably seek compensation or replacement.

iii. Relocation benefits.67 Parties must give each other automobile rides to home, work, or school if necessary.

iv. Loans.68 Parties expect reasonable short-term loans at no interest.

v. No-additional-cost services.69 These are benefits that do not impose any substantial inconvenience on the burdened party. They include, e.g., the purchase of items available in a store the party will visit in any event, the return of videos or library books, or the retrieval of dry-cleaning.

Illustration:

J lives next door to a hardware store. H, whose kitchen lightbulb has burned out, asks J to pick up a lightbulb on the way over to H's apartment. J cannot reasonably refuse to perform this minimal service.

¤ 5.3. Maxims of Equity

The maxims of equity trace their history back to the very roots of the common law, and they distill into a few simple yet profound phrases the fundamentals of a principled system of justice.70 "Equity" denotes the spirit of fairness, justice, and the proper regulation of intercourse between people.71 These general rules of conduct transcend all particular areas of law and apply with equal force to the law governing sex.72

Maxim: Equity regards substance rather than form.

Application: The putative indicators of sexual prowess, such as big ears, big hands, and sophisticated techniques, are unreliable as well as inconsistent. It is the substance of a sexual encounter, including the degree of effort one makes to satisfy a partner, rather than any predetermined forms, that determines the likelihood of ultimate, mutual satisfaction.

Maxim: Equity presumes no right to be without a remedy.

Application: When engaging in sexual intercourse, each party should disclose his or her needs and desires to the other party when necessary. The practice of certain acts may dramatically increase the probability of mutual satisfactory resolution, but parties cannot be expected to employ all available measures without some guidance.

Maxim: Equality is equity.

Application: One party should not be expected consistently to assume the "laboring oar" in sexual initiation and energy. Sexual relations benefit when both parties play a role in facilitation.

Maxim: Equity delights to do justice, and that not by halves.

Application: Once a party initiates sexual activity, that party must, in good faith, undertake all reasonable efforts to allow the other party to reach satisfaction.

Maxim: Equity regards that as done which ought to be done.

Application: The withholding of sexual intercourse as a tactic of argument (the so-called Lysistrata strategy) is highly disfavored. Parties are counselled not to use sexual intercourse as a weapon, particularly where the issue at bar is unrelated to the act.

Maxim: Equity favors the vigilant, not those who sleep on their rights.

Application: Although no party should feel obliged to have sex against a strong disinclination, the presumption lies in favor of sexual intercourse for parties in a sexual relationship. The reason is two-fold: first, parties who regularly engage in sex generally benefit from having more sex rather than less, and second, sexual rejection--even from a familiar and well-loved partner--is distressing and may be destructive if recurrent.

Maxim: Equity bears all things, believes all things, hopes all things, endures all things.

Application: Because of the vulnerability that necessarily accompanies sexual relations, parties should afford one another tolerance, understanding and empathy.

Maxim: He who seeks equity must do equity.

Application: A party must strive to satisfy a sexual partner as well as to seek satisfaction for himself or herself.

Maxim: Equity will not aid a wrongdoer.

Application: An unfeeling party who criticizes the other party for failure to become sexually excited will not enjoy improved sexual relations. The critic only exacerbates the situation by making the other party feel inadequate or self-conscious.

Maxim: Equity follows the law.

Application: As set forth in this Restatement.

CHAPTER FOUR
DISSOLUTION

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

¤ 4.1. The Decision To Dissolve

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

Comment:

a. Value of precedent. When deciding whether to end a relationship, parties may wish to consult the wealth of precedent generated by the experiences of similarly situated friends.73 Friends can convey information about their own cases, as well as references to other cases with which they are familiar. When consulting precedent, parties should take into account factors that may distinguish their cases. Differences in religion, ethnicity, race, age, or regional background may lead to very different outcomes in apparently similar cases. Whether the parties are in school or out of school may also have important consequences.74

Illustration:

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

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

Illustration:

D begins to date L but feels unenthusiastic. D continues to date L for months, hoping that passion will spark. Throughout this period, D consults with friends, seeking precedent to legitimate D's hope that the relationship can gain momentum. D grasps for an outlier to support this behavior. Instead, D should recognize the well-established principle: "When it's not there, it's not there."

c. Special circumstance: long-distance relationships. An entire line of cases is dedicated to the special problems of long-distance relationships. No party should end a long-distance relationship without consulting this well-developed body of doctrine, which considers heavily litigated issues such as: frequency of communication and expenses arising therefrom; the ability to see other people; whether the relationship would benefit or suffer if the parties were together; and whether one party should sacrifice interests in order for the couple to live near each other.75

¤ 4.2. Motions for Dissolution

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

Comment:

a. Grounds commonly invoked. It is common for the moving party to justify the proposed dissolution on several grounds, both procedural and substantive.76 Often, moving parties take refuge in procedural, rather than emotional, grounds, and elevate form over substance to avoid a painful confrontation on the merits. Procedural grounds may include: timing,77 distance,78 statute of frauds,79 and outside pressures.80

Illustration:

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

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

Constructive eviction includes a subclass of cases that undergo "reversal." Such cases follow the pattern of classic constructive eviction, but just when the evictee is ready to resort to breaking off the relationship, the evictor reverses position and decides that now he or she wants to stay in and work it out. The evictee may, at this point, feel tempted to stay in the

relationship. Generally, however, reversal is merely a temporary change of heart that occurs when a previously abusive party faces the prospect of a loss. Evictees should be wary of the sincerity of such sudden reversals in attitude.

¤ 4.3. Defenses Available to Opposing Party

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

Comment:

a. Rights of opposing party. When the moving party offers procedural grounds for a breakup, the opposing party often holds out the hope that an appropriate defense will circumvent dissolution. An opposing party often will argue that the substantive merits of the case outweigh any procedural concerns the moving party may have. Such defenses, however, are invariably unavailing. A moving party intent on dissolving a relationship will ultimately prevail, no matter how forcefully the opposing party states the case. Nevertheless, exercise of defenses by an opposing party is not futile.81Explanation by the moving party is the minimum relief to which the opposing party is entitled.82

Illustration:

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

b. Coming to the nuisance. When a movant provides a substantive reason for the breakup, the opposing party often raises "coming to the nuisance" as a defense. That is, the party asserts that the moving party was aware of the problematic condition upon entering into the relationship.83

Illustration:

G moves for a breakup on grounds that H lacks a sophisticated sensibility to complement G's own cosmopolitan air. G points to H's Gap-based wardrobe and preference for early dinners as evidence of their incompatibility. H counters that G was on notice that H had grown up in the suburbs and was not interested in adopting an urban style, and G had proceeded notwithstanding.

c. Notice to cure. A moving party may put forward a meritorious reason for the breakup, upon which the opposing party may demand notice to cure, to say, in effect, "Give me a chance, and I'll change my ways." Because either party may terminate a relationship at will,84 however, notice-to-cure is a privilege, not a right. A moving party who grants notice to cure is advised to take steps to protect his or her position during the cure period.85 A moving party who grants notice to cure should allow a meaningful cure period. Short turnaround ultimatums are discouraged for the same reasons that the "Saturday Night Special" has been banned in securities trading. Exploding cure periods are considered coercive because they force parties to work under the pressure of an arbitrary deadline without the benefit of full information.86

Illustrations:

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

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

d. Leveraged buyout/compromise. In the realm of love, the leveraged buyout is a last-ditch defensive tactic. An opposing party who wants to maintain a relationship can offer to deplete his or her resources (financial, emotional, or otherwise) as an inducement for the other party to remain. Use of this tactic poses severe risks to both parties, however. If a relationship is too highly leveraged, it can become dangerously unstable in the long term.87

Illustration:

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

¤ 4.4. Adhering to the Dissolution Decision

Once parties have terminated a relationship, they must maintain their

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

Comment:

a. Mandatory adherence. The decision to dissolve a relationship can cause revolutionary change in the course of people's lives. Constitutional theory lends guidance at this difficult time. When parties bicker or engage in low-level disputes, they participate in "normal politics." The breakup decision, however, rises to the higher level of a "constitutional moment."88 The parties see more clearly at this time than at any previous moment, and when they break up, they commit themselves to a new way of life. A breakup is comparable to a constitutional amendment, which can only be changed through the procedurally rigorous amendment process. Once all defenses have been aired, and the litigation is resolved, parties should adhere to the dissolution judgment, no matter how difficult it may be.

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

Illustration:

B, who perennially wears L's sweatshirt, generally can keep it.89

c. Reporting of cases. Parties contribute to the development of the common law of love by orally reporting their cases. They do so by telling their stories to friends and acquaintances, even as the stories are unfolding.90 The Reporters anticipate that this informal reporting method will ultimately be replaced by an official, centralized reporter system.91

d. Maintaining fiduciary duties. The parties' fiduciary duties to each other persist after dissolution. In particular, the duty of confidentiality to former parties endures long after a relationship ends. This duty is designed to protect parties to a former relationship. Note that fulfillment of the duty enhances one's reputational value in a new relationship.92

Illustration:

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

Call for Comment:

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

The Reporters invite comment on the foregoing material. Given the gravity of the project, timely evaluation and modification are imperative. In the words of one of our predecessors, Herbert Wechsler, "Nowhere in the entire legal field is more at stake for the community or for the individual."93 Address comments to the American Law Institute members' consultative group on the "Restatement of Love."

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