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Conjugal Liability

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ABSTRACT

Because of a commitment to the concept of individual culpability, holding someone responsible for the wrongdoing of another is a relatively rare occurrence in American jurisprudence. However, this Article reveals a significant, yet largely unacknowledged, source of such liability: conjugal liability. Conjugal liability occurs when one spouse or intimate partner is held legally responsible, either directly or indirectly, for their partner's wrongful acts. Conjugal liability penalizes one intimate partner for the actions of the other in a vast array of legal fields and domains, ranging from tort, criminal law, property and employment law, to creditor's remedies, bankruptcy, and tax law.

Within these domains, conjugal liability is deployed for a variety of laudable purposes, such as the prevention of harm to third parties, the deterrence of drug or other criminal activity, and the expansion of creditor's remedies. However, conjugal liability is a deeply problematic way of achieving these goals. First, in operation, it is profoundly gendered, most often holding wives and girlfriends responsible for the wrongdoing of their male intimate partners. Second, in many instances, conjugal liability is unmoored from traditional notions of culpability, and is arguably a form of guilt by association. Third, conjugal liability flies in the face of the constitutional right to freedom of intimate association. Because of these troubling features, conjugal liability should be recalibrated so as to ensure an actual connection between an intimate partner and an underlying wrong, as opposed to merely a connection between an intimate partner and a wrongdoer.

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INTRODUCTION

Whenever news breaks that a high-profile figure has committed a heinous act of criminal or sexual wrongdoing, a familiar sequence occurs. First, public outrage and indignation converge on the wrongdoer. Then, as more facts regarding the wrongdoing come to light, the wave of outrage and indignation swells, and soon expands to encompass not just the wrongdoer, but also the wrongdoer's spouse. The conversation turns from "How could someone do that?" to "How could someone's spouse let that happen?" Examples abound: Following the Jerry Sandusky child molestation scandal at Penn State University, headlines demanded "How Could Sandusky's Wife Not Know?" and "Does Dottie Sandusky Deserve a Jail Cell of Her Own?"[1] After Bernie Madoff's massive financial fraud was exposed, articles like "Of Course Ruth Madoff Knew"[2] levelled such hostility and scrutiny at his wife that one media outlet wondered aloud "Why Does Ruth Madoff Inspire Such Vitriol?"[3] Likewise, Bill Cosby's wife, Camille Cosby, has been excoriated in traditional and social media for her husband's sexual wrongdoing,[4] as was Hedda Nussbaum nearly forty years earlier, after her husband abused and killed their adopted child.[5]

Spouses of less well-known wrongdoers face similar reactions, too, and often receive public disapprobation and pointed rebukes as a result of their

1. Cheryl Wetzstein, *How Could Sandusky's Wife Not Know?*, WASH. TIMES (June 26, 2012), http://www.washingtontimes.com/news/2012/jun/26/how-can-wives-of-molesters-not-know/?page=all [http://perma.cc/6MHT-8X9D]; *see also* Melinda Henneberger, *Does Dottie Sandusky Deserve a Jail Cell of Her Own?*, WASH. POST (June 26, 2012), https://www.washingtonpost.com/blogs/she-the-people/post/does-dottie-sandusky-deserve-a-jail-cell-of-her-own/2012/06/26/gJQAUmcZ4V_blog.html?utm_term=.60dca7092837 [https://perma.cc/U6R3-VH4Z].
2. Henry Blodget, *Of Course Ruth Madoff Knew*, BUS. INSIDER (Apr. 28, 2009, 8:23 AM), www.businessinsider.com/henry-blodget-of-course-ruth-madoff-knew-2009-4 [https://perma.cc/9QX9-85VG].
3. Sheelah Kolhatkar, *Poor Ruth: Why Does Bernie's Better Half Inspire Such Vitriol?*, N.Y. MAG. (July 2, 2009), nymag.com/news/features/57772 [https://perma.cc/NT7U-STYU] (listing the article's web page title as "Why Does Ruth Madoff Inspire Such Vitriol?"); *see also* Mark Seal, *Ruth's World*, VANITY FAIR (Sept. 2009), http://www.vanityfair.com/style/2009/09/ruth-madoff-profile [https://perma.cc/B8BF-39R7].
4. *See* Stacia L. Brown, *Camille Cosby's Loyalty Confounds a New Generation*, NEW REPUBLIC (Aug. 3, 2015), https://newrepublic.com/article/122440/camille-cosbys-loyalty-confounds-new-generation [http://perma.cc/U775-57ZQ?type=image].
5. Hedda Nussbaum was a battered woman who failed to protect her child from her husband's abuse, and was therefore "widely held to share blame in her daughter's death." CLAUDIA CARD, THE ATROCITY PARADIGM: A THEORY OF EVIL 220 (2002).

partners' actions. Communal anger and indignation is particularly virulent when directed at the spouses of sexual offenders, and the wives and girlfriends of male individuals whose crimes include sex offenses frequently report being harassed, ostracized, and ejected from social circles.[6] Underlying all of this collective castigation lurks the idea that the spouses *must have known something* and "are not, but ought to be, controlling" their partners.[7]

This Article argues that the impulse to blame spouses and intimate partners for each other's wrongdoing is not limited to the court of public opinion. Rather, a plethora of legal doctrines and rules in our courtrooms, laws, policies, and legislation also blame spouses for their partners' wrongful actions. Despite the general rule that "[s]pouses do not . . . share vicarious liability for the acts of one another,"[8] a robust legal regime exists in which spouses and intimate partners are held responsible, both directly and indirectly, for one another's wrongdoing. This form of liability, which I term "conjugal liability,"[9] takes place across a vast array of legal domains, including tort, criminal law, property, employment law, creditor's remedies, bankruptcy, and tax law. Scholars working in these doctrinal areas have sometimes identified specific moments of such liability and offered discrete critiques of them, but this Article argues that these fragments are best understood as pieces of a much larger phenomenon, and as a sum that is

6. Hazel Glenn Beh, *Tort Liability for Intentional Acts of Family Members: Will Your Insurer Stand by You?*, 68 TENN. L. REV. 1, 1 (2000); *see also* HUMAN RIGHTS WATCH, NO EASY ANSWERS: SEX OFFENDER LAWS IN THE US 7 (2007), http://www.hrw.org/sites/default/files/reports/us0907webwcover.pdf [http://perma.cc/VU8Z-LKXA] (noting many instances of wives and girlfriends of registered sex offenders being harassed).

7. *See, e.g.*, Beh, *supra* note 6, at 1, 19.

8. Susan R. Klein, *The Discriminatory Application of Substantive Due Process: A Tale of Two Vehicles*, 1997 U. ILL. L. REV. 453, 453; *see also* Shearer v. Dunn Cty. Farmers Mut. Ins. Co., 159 N.W.2d 89, 93 (Wis. 1968). In *Shearer*, the court refused to impose vicarious liability on an innocent spouse for the insured spouse's wrongful act. *Shearer*, 159 N.W.2d at 93. The court stated: "The marriage relationship should not be used as a basis for such a law. Married people are still individuals and responsible for their own acts. Vicarious liability is not an attribute of marriage." *Id.* For a discussion of *Shearer*, see Willy E. Rice, *Destroyed Community Property, Damaged Persons, and Insurers' Duty to Indemnify Innocent Spouses and Other Co-Insured Fiduciaries: An Attempt to Harmonize Conflicting Federal and State Courts' Declaratory Judgments*, 2 EST. PLAN. & COMMUNITY PROP. L.J. 63, 142 n.622 (2009).

9. "Conjugal" technically means "[r]elating to marriage or the relationship between a married couple." *Conjugal*, OXFORD U. PRESS, https://en.oxforddictionaries.com/definition/conjugal [https://perma.cc/3V2W-PE5N]. I use it here in a broad sense, to encompass not just strictly marital relationships, but marriage-like relationships as well.

more than the whole of its parts. This Article is the first to conceptualize conjugal liability, and to offer a comprehensive account of its descriptive features, its normative underpinnings, and its consequences.

This Article begins with a discussion of conjugal liability's historical antecedents and normative groundwork. Inflicting a legal or extralegal penalty on the family members of wrongdoers is not a new phenomenon, but one with ancient origins. Many cultures, in multiple eras, have used collective punishment against families.[10] Although individual culpability is now a fundamental principle of the American juridical system, conjugal liability persists in part as a vestige of these older collective liability traditions.

Part II provides a taxonomy of conjugal liability and gives a descriptive account of the many ways in which we currently hold spouses legally responsible for the wrongful actions of each other. Transcending the doctrinal silos of legal fields, conjugal liability can be found everywhere from tort law to tax law. To help navigate the breadth of this phenomenon, the taxonomy is organized according to the three functional goals that conjugal liability is most often called upon to serve: the protection of third parties, the deterrence of criminal behavior, and the expansion of creditor's remedies.

Conjugal liability as a means of protecting third parties is found in both tort and employment law. In tort law, a growing trend holds the spouses and romantic partners of intentional tortfeasors liable along with them. In particular, wives and girlfriends are now commonly sued in negligence when their husbands or partners commit intentional torts like child sexual abuse or violent assaults on adult third parties. The safety of third parties has also led to conjugal liability in the employment law context, where domestic violence victims have lost their jobs because their spouses were deemed to be a threat to workplace safety.

Conjugal liability as a means of deterring criminality appears in three general arenas. First, in the substantive criminal law, overly elastic accessory doctrines such as aiding and abetting and conspiracy are routinely used to capture the intimate partners of individuals involved in the drug trade.[11] Common domestic behaviors like answering the telephone in a shared home, renting a house together, or driving one's partner somewhere can

10. Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345, 353–54 (2003).
11. Phyllis Goldfarb, *Counting the Drug War's Female Casualties*, 6 J. GENDER, RACE & JUST. 277, 280 (2002).

make one spouse vulnerable to criminal liability for the other's drug-related activities.[12] Second, property forfeiture actions that arise from criminal wrongdoing also often penalize one spouse for the other's wrongful actions. Such was the case in the infamous decision of *Bennis v. Michigan*,[13] where a wife's car was seized and forfeited after her husband engaged in a sexual act with a prostitute inside the vehicle.[14] Third, eviction policies like the one-strike policy in public housing, and crime-free or nuisance ordinances in private rental housing, operate to evict tenants for the criminal or minor wrongdoing of other household members, including spouses and partners.[15]

Finally, conjugal liability as a means of providing capacious creditor's remedies occurs in three doctrinal areas: debt law, bankruptcy law, and tax law.[16] Within debt law, creditors can use community property rules, family necessaries doctrine, or marital agency principles to create conjugal liability for a spouse's debts. In bankruptcy law, the fiction of marital unity can operate to hold both spouses responsible for one partner's financial liabilities. And, in tax law, conjugal liability renders both spouses liable for the other's tax debts.

Part III sets out the legal, sociological, and constitutional problems with conjugal liability. When viewed in isolation, certain examples of conjugal liability (like joint tax liability, for example) might initially appear justifiable and unworthy of much rancor. However, the logic of spousal liability inherent in these financial doctrines, and the idea of a married couple as a single *economic* unit, has helped to legitimize the conception of a married couple as a single *wrongdoing* unit. And, when understood within the broader universe of conjugal liability, the problems of each iteration, and the systemic impact of conjugal liability as a whole, become more obvious. These problems include conjugal liability's gendered consequences, its affinity to guilt by association, and its constitutional implications.

Conjugal liability is deeply gendered. As the high-profile examples suggest, in practice the most common conjugal liability scenario is one in which a wife is held responsible for her husband's wrongdoing. Interestingly, this reverses the historical gendered allocation of responsibility in marriage, where, under coverture, *husbands* were held legally responsible for the petty crimes or torts of their wives. Coverture, though, also granted

12. *See infra* Part II.B.1.
13. 516 U.S. 442 (1996).
14. *Id.*
15. *See infra* Part II.B.3.
16. *See infra* Part II.C.

husband substantial legal and social control over their wives, a feature that conjugal liability does not share.[17] Instead, conjugal liability penalizes women for the wrongdoings of their male intimate partners while generally disregarding the structural or specific dynamics of marital control, or the lack thereof.

To date, the cases and circumstances in which conjugal liability occurs have almost exclusively involved differently-sexed couples. The post-*Obergefell* era, however, has two important implications for conjugal liability. First, *Obergefell* perpetuates the notion that marriage is a highly incentivized, unmitigatedly positive institution that offers many legal and social benefits to those that enter into it.[18] However, scholars have begun to demonstrate that marriage may also come with a number of detrimental and deprivative effects as well.[19] Through revealing a previously unacknowledged cost of marriage and intimate partnering, conjugal liability contributes to this counternarrative. Second, there is a question of whether conjugal liability will continue in the same gendered way after *Obergefell*, or whether the impact of an increasing number of same-sex couples will call into sharp focus conjugal liability's participation in heteronormative and gendered ordering and thereby serve as a destabilizing force upon it.

Gendered consequences are but one of conjugal liability's faults. Another problem is that conjugal liability is often indistinguishable from guilt by association. Whereas secondary liability is normally based on an individual's relationship to a bad *act*,[20] conjugal liability often appears to be based on an individual's relationship to a bad *actor*. The intimate relationship, rather than participation in wrongdoing, becomes the basis for liability. In these instances, conjugal liability is an impermissible form of guilt by association.[21]

Both the gendered aspect and the guilt by association component could be framed as potential constitutional violations. Conjugal liability's third main problem is also a constitutional one: Conjugal liability arguably

17. For example, husbands enjoyed a right of "domestic chastisement," which included a right to inflict "moderate" physical violence, over their wives. *See* HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY 116 (2000).

18. *See, e.g.*, Justice Kennedy's description of marriage as being of "transcendent importance," and as "essential to our most profound hopes and aspirations." Obergefell v. Hodges, 135 S. Ct. 2584, 2594 (2015).

19. For examples of the ways that marriage can be detrimental, see Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1276 (2014).

20. Vicarious liability is an exception to this principle. However, we accept its legitimacy for mainly policy reasons. *See* Levinson, *supra* note 10, at 426–27.

21. *See infra* Part III.B.2.

infringes on the privacy and liberty interests of the constitutional right to freedom of intimate association. It affects one's ability to continue or maintain the intimate relationships of one's choosing, and, in some cases, may deter one from entering into a relationship at all. For instance, if one is going to be held liable for the future misdeeds of a person with a criminal past or for the large debts of a future mate, one may choose to simply avoid that relationship and its attendant liability. If one does enter into a relationship, the behaviors one partner engages in during the relationship may shift. The eviction policies and forfeiture cases, for example, suggest that to avoid liability, partners should intensely surveil and monitor the actions of each other. Further, some judicial decisions explicitly advise partners that they should terminate certain relationships if they wish to avoid liability.[22]

Through the right to freedom of intimate association, the Constitution recognizes the significance of intimate relational bonds and protects against intrusions on them.[23] Other laws, like spousal testimonial privileges,[24] are also premised on the specialness of the marital bond.[25] Ironically, though, the importance of marital and marital-like bonds is in fact the very reason that conjugal liability exists. Who knows someone better than a spouse or long-term lover? Generally, these are among the closest relationships we can imagine. Our very language reflects a connection between sexual intimacy and knowledge: "knowing" has been a popular euphemism for sexual intercourse since at least the time of the Bible.[26] In many ways, conjugal liability transforms sexual or intimate knowledge into *legally-sufficient* knowledge of wrongdoing, using intimacy as a gross proxy for complicity.[27] Intimacy's relational bond becomes overly freighted, morphing

22. See, for example, *United States v. Sixty Acres in Etowah County*, 727 F. Supp. 1414, 1421 (N.D. Ala.), *vacated*, 736 F. Supp. 1579 (N.D. Ala. 1990), *rev'd*, 930 F.2d 857 (11th Cir. 1991), which is discussed in *infra* Part II.B.2.

23. *See infra* Part III.B.3.

24. Milton C. Regan Jr., *Spousal Privilege and the Meanings of Marriage*, 81 VA. L. REV. 2045 (1995). Like conjugal liability, spousal privilege is also gendered: "[I]n practice it operates largely to prevent wives from testifying against their husbands." *Id.* at 2051.

25. *See* Beh, *supra* note 6, at 15 n.105. The spousal relationship also involves additional legal obligations towards each other, like the duty to rescue one another. *See* DAN MARKEL ET AL, PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES 64–65 (2009).

26. In fact, "'knowing' is a euphemism for the sexual act in many languages" as well. Wendy Doniger, *Are Carnal Ignorance and Carnal Knowledge Cross-Cultural Categories?*, *in* CARNAL KNOWLEDGE 1, 1 (Christina M. Gillis ed., 2000).

27. The conflation of intimacy with complicity ignores the reality that spouses and intimate partners are in fact quite often good at deceiving each other. *See* JILL ELAINE HASDAY,

into a source of legal joint liability, even without any other indicia of independent wrongdoing.

To be sure, it is not just a concern with complicity that motivates conjugal liability. There is also a tendency to believe that being close with a wrongdoer is *itself* a kind of wrong. In other words, even where there is no possibility of complicity, one's choice to be in a relationship with a wrongdoer is itself viewed as wrongful. In many instances where one spouse clearly has no relationship at all to the other's wrongful act, simply being in the intimate relationship becomes its own source of culpability.

This Article argues against turning an intimate relational bond into a basis for liability. It argues that we should challenge the legal and cultural impulse to blame spouses for the wrongful acts of their partner, and reserve our legal and moral disapproval for instances of actual individual participation and culpability. Accordingly, the Article concludes with the remedial prescription that conjugal liability should be recalibrated to align with the usual principles of secondary liability. Liability should be based on a spouse's relationship to an impugned *wrong*, and not based merely on a relationship with an impugned *wrongdoer*.

I. PRECURSORS TO CONJUGAL LIABILITY

This Part describes the historical and philosophical roots of conjugal liability, and how conjugal liability has grown out of a long history of blaming an entire family for the wrongdoing of one member. From primitive tribalism to blood feuds, the history of Western civilization is replete with examples of family units held collectively liable for the wrongdoing of an individual member. One particularly important historical form of family liability is coverture, which held husbands legally liable for the torts and petty crimes of their wives.[28] In fact, in many ways, conjugal liability looks like a modern form of *reverse* coverture, one that reveals a contemporary clash between individual culpability and deeply entrenched notions of marital unity and collective responsibility.

INTIMATE LIES: HOW DOES AND HOW SHOULD THE LAW REGULATE DECEPTION WITHIN OUR CLOSEST RELATIONSHIPS (forthcoming 2018).

28. *See infra* Part I.B.

A. Ancient Iterations of Family Collective Responsibility

The collective responsibility of families for the wrongdoing of one member is of ancient pedigree.[29] However, it is not merely a historical phenomenon. While the idea of collective liability for families "conjures up medieval images of blood feuds among clans in the days before state-enforced behavioral norms," blaming familial units for one member's actions continued long after blood feud systems receded and other kinds of justice systems came to the forefront.[30] These legal systems did not understand wrongdoers in the individualistic terms of contemporary Anglo-American jurisprudence.[31] Instead, they employed an "organic conception of social groups" that attributed responsibility to a group, "a family, clan, tribe, or village," rather than to an individual member.[32] Legal codes using this rubric often prescribed punishments for the innocent relatives of wrongdoers, ranging from monetary fines all the way to death.[33] In fact, even as English common law developed, family collective liability remained. For example, following the Magna Carta, the punishment for treason included not only with the traitor's own "death and forfeiture of all real and personal property," but also, through the "corruption of blood" doctrine, a prohibition on the ability of the traitor's descendants to inherit or transfer land as well.[34]

Collective family liability is also reflected in the historical doctrine of vicarious liability. Originally, vicarious liability applied to male heads-of-households, holding them legally liable for the torts that their wives and servants committed.[35] Because of the historical hierarchical relations in households, and the lack of full legal personhood for those on the lower rungs, holding the master liable for the behavior of these other domestic relations was as easily justifiable as responsibility for harm caused by a master's animals or property.[36] Essentially, the actions of a household member became juridically cognizable only through the prism of the male head of household.

29. Levinson, *supra* note 10, at 411.
30. Klein, *supra* note 8, at 457.
31. Levinson, *supra* note 10, at 35.
32. *Id.*
33. Klein, *supra* note 8, at 457–58.
34. *Id.* at 458.
35. *Id.* at 465.
36. Levinson, *supra* note 10, at 362 n.83 (citing O.W. Holmes, Jr., *Agency*, 4 HARV. L. REV. 345, 348–50 (1891)).

B. Coverture and the Marital Unity Doctrine

A similar dynamic informed coverture. Under coverture, a system of laws which governed Western marriages for hundreds of years, marriage was a merger of husband and wife into one juridical unit, the husband.[37] Through this doctrine of "marital unity," married women lost many attributes of individual legal personhood: they were prohibited from holding property, suing in tort, or entering into binding contracts.[38] But coverture did more than just that—it also had a significant legal impact on husbands. Under the coverture regime, husbands were held legally accountable for the petty crimes and torts of their wives: "[J]ust as the husband held legal control over his wife's property and legacy, he was similarly held liable for her transgressions, including debts and certain crimes."[39] A "presumption of coercion" applied, and held that if a wife committed a wrong in her husband's presence, she was to be presumed to be acting under his control and direction, and, accordingly, he should answer for the wrong.[40] A wife could therefore plead coverture as a legal defense to many torts or small crimes.[41]

The Married Women's Property Acts of the nineteenth century mostly ended this practice of placing liability for a wife's wrongful acts upon her husband.[42] All of the various iterations of this legislation broke coverture's "'unity' of husband and wife," gave each marital member their own individual legal identity, and relieved many of the legal consequences of coverture.[43] But despite this legislation, in the period following the Married Women's Property Acts, a few courts still held that husbands were liable for

37. Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825, 841 (2004).
38. *See id.*
39. Becky M. Nicolaides, *The State's "Sharp Line Between the Sexes": Women, Alcohol, and the Law in the United States, 1850–1980*, 91 ADDICTION 1211, 1214 (1996). As one commentator wrote: "Whatever its origin may have been, it is quite certain that the rule imposing liability on a husband for the actionable misconduct of his wife was most rigorously applied in England from the earliest times . . . ." S. E., *Liability of a Husband for the Torts of His Wife*, 83 U. PA. L. REV. 66, 66 (1934).
40. Benjamin Paul, *The Doctrine of Marital Coercion*, 29 TEMPLE L.Q. 190, 195 (1956).
41. *Id.*; *see also* Cheryl Hanna, *Everything Old Is New Again: A Foreword to the Tenth Anniversary Edition of the* Duke Journal of Gender Law & Policy, 10 DUKE J. GENDER L. & POL'Y, at v (2003).
42. Marie T. Reilly, *In Good Times and in Debt: The Evolution of Marital Agency and the Meaning of Marriage*, 87 NEB. L. REV. 373, 384–85 (2008).
43. Elizabeth R. Carter, *The Illusion of Equality: The Failure of the Community Property Reform to Achieve Management Equality*, 48 IND. L. REV. 853, 861 (2015) (quoting Hack v. Hack, 433 A.2d 859, 861 (Pa. 1981)).

their wives' torts, as a "natural consequence of his marital right and responsibility." California courts, for example, continued to impose this liability until 1913, when an act passed that "expressly made married women liable for their own torts."[44] Texas courts also continued to impose such liability in the post-Married Women's Property Acts era.[45] They held: "Because the husband dominated the marital relationship, 'it would be difficult, if not impossible, for the courts to determine when [a wife] had acted at her own instance, and when she was guided by his dictation.'"[46] Therefore, until a 1921 amendment, Texas courts allowed a wife's tort creditor to recover from her husband's property.[47] But by the mid-twentieth century, virtually all coverture hangovers had fallen out of favor, and for approximately half a century, it was rare to see one spouse held tortiously liable for the actions of the other.

C. Contemporary Tensions

Historical family liability concepts like coverture, corruption of blood, and blood feuds sound like antiquated relics to modern ears. In the contemporary world, "[t]he idea of individual culpability for wrongdoing, especially in the case of criminal behavior, forms the very foundation for the administration of justice in modern Western societies."[48] But, some of these notions of family collective liability still haunt the law, and there is a lingering tension between the ideas of "the unity of the family and the individuality of its members."[49]

It turns out that blaming a family for the wrongdoing of one member is a habit that dies hard, and, despite the emergence of individual culpability as a basic principles of justice, family liability remains a part of our legal and social systems.[50] Part of the tendency to blame families can be explained by the "functional perspective," under which families are "strongly solidary groups that can often exercise low-cost and highly effective control over

44. Reilly, *supra* note 42, at 385 (emphasis omitted).
45. *Id.*
46. *Id.* (quoting McQueen v. Fulgham, 27 Tex. 464, 467 (1864)).
47. *Id.*
48. James Massey et al., *Civil Forfeiture of Property: The Victimization of Women as Innocent Owners and Third Parties*, *in* CRIME CONTROL AND WOMEN: FEMINIST IMPLICATIONS OF CRIMINAL JUSTICE POLICY 15, 15 (Susan L. Miller ed., 1998).
49. Robert B. Chapman, *Coverture and Cooperation: The Firm, the Market, and the Substantive Consolidation of Married Debtors*, 17 BANKR. DEV. J. 105, 219 (2000).
50. Massey et al., *supra* note 48, at 15.

their members."[51] But deeper notions about apples not falling far from trees, and birds of a feather flocking together, are also no doubt at play.

The tension between "the unity of the family and the individuality of its members" is particularly evident in marriage.[52] Although the marital unity doctrine is supposed to be defunct, a married couple is still often imagined as a single marital unit in both law and culture, and the idea of a marital couple as a "single economic unit" informs many legal and policy decisions.[53] Marriage, in short, implies solidarity.[54] The urge to paint both spouses with the same brush, and to attribute one spouse's wrong to the other thus, in many ways, seems like a natural extension of the marital bond. Our impulse to blame a spouse (particularly a wife) for a partner's wrongdoing thus exists at the same time as we profess allegiance to the avoidance of "punishing the innocent, imposing guilt by association, or failing to treat people as individuals."[55] It is here that we find conjugal liability.

II. THE CONJUGAL LIABILITY TAXONOMY

This Part sets out a taxonomy of conjugal liability, organized according to its functional purposes. Conjugal liability is a tool deployed to serve a variety of desirable ends, including the protection of third parties, the deterrence of criminal behaviors, and the expansion of creditor's remedies. In pursuit of these ends, conjugal liability crops up in a vast number of legal domains. Appearing in areas as diverse as tort, employment, criminal, property, tax, and bankruptcy laws, conjugal liability transcends doctrinal boundaries and transverses vast swaths of law, showing remarkable versatility and adaptability in our collective legal consciousness.

51. Levinson, *supra* note 10, at 411–12.
52. Chapman, *supra* note 49, at 219.
53. *Id.* at 106; *see* Hasday, *supra* note 37, at 843.
54. *See* Hanoch Dagan, *The Craft of Property*, 91 CALIF. L. REV. 1517, 1554 (2003).
55. Levinson, *supra* note 10, at 348 (internal quotation marks omitted).

A. Protecting Third Parties

1. Tort

Under the common law, individuals, including spouses, have no general duty to control the conduct of others.[56] As with most rules, though, exceptions exist. First, there is a special relationship exception to this default rule.[57] It applies to relationships in which one party can exercise control over the other, like those of employer-employee, landowner-invitee, and custodian-person in custody.[58] In these relationships, the person who owes a duty to others is understood as holding power over the wrongdoer, such that the wrongdoer "will ordinarily comply with [that person's] wishes, even if they are not legally mandated to do so."[59]

Post-coverture courts have consistently held that marriage lacks this crucial control element and that spouses are therefore not in a special relationship for the purposes of third-party tort liability.[60] Spouses can certainly influence each other, but in the tort context, courts have explicitly held that since "neither spouse has an ability to control the other's conduct,"[61] this influence does not rise to the level of control necessary to anchor a special relationship.[62]

Even though spouses are not in a special relationship for the purposes of third-party tort liability, since the 1990s there has been a "dramatic expansion" in holding one spouse or intimate partner civilly liable for the intentional (and often criminal) acts of the other, most notably in cases involving violent attacks on third parties or child sexual abuse.[63] While

56. *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 37 cmt. a (AM. LAW INST. 2012) (noting that the Restatement (Second) explicitly stated this rule, and the Restatement (Third) has revised it to clarify that this "no-duty rule was conditioned on the actor having played no role in facilitating the third party's conduct").
57. *Id.* § 41, at 64–65.
58. *Id.* §§ 40, 41.
59. Mark Bartholomew, *Contributory Infringers and Good Samaritans*, 3 AKRON INTELL. PROP. J. 1, 9 (2009).
60. Beh, *supra* note 6, at 13.
61. *Id.* at 14.
62. *See, e.g.*, D.W. v. Bliss, 112 P.3d 232 (Kan. 2005); Hackett v. Schmidt, 630 So. 2d 1324 (La. Ct. App. 1993).
63. Beh, *supra* note 6, at 13. Beginning in the 1970s, third-party liability in general became more common. Not surprisingly, many plaintiffs have tried to make other, non-spousal family members of primary wrongdoers part of this trend, but courts generally find "that members of an [intentional tortfeasor's] family do not have a duty either to warn third persons of potential danger posed by the assailant or to control the actions of the assailant in

some courts have resisted this trend,[64] cases like *Pamela L. v. Farmer*[65] and *Doe v. Franklin*[66] have opened previously closed doors of liability, and imposed new responsibilities on spouses for their partners' wrongful actions.[67] The bulk of the liability expansion in these cases has taken place under the auspices of another exception to the general no-duty rule: the affirmative act exception.[68] Under this exception, liability can attach if "the actor's own affirmative act has created or exposed the other to a recognizable high degree of risk of harm through such [third-party] misconduct."[69] The

relation to third persons." Kimberly C. Simmons, Annotation, *Liability of Adult Assailant's Family to Third Party for Physical Assault*, 25 A.L.R.5th 1 (1994). Perhaps because they are understood to have limited chance of success and offer little hope of insurance proceeds, claims against non-familial, non-conjugal cohabitants, like roommates, are quite rare. Spouses, though, are more "attractive target[s]" for third-party liability in part because allegations of their negligence may trigger coverage under homeowner's insurance policies. Hazel Glenn Beh, *The Duty to Warn: Invading the Marital Bedroom and the Therapist's Couch*, 8 J.L. & SOC. WORK 63, 74 n.71 (1998) [hereinafter Beh, *Duty to Warn*]. Coverage issues most often turn on the terms of the exact policy at issue, though at least one court has found that the issue is one of public policy, and coverage should not be permitted because it would allow a non-offending spouse to prioritize the marriage over the safety of third-parties. J.C. *ex rel.* M.C. v. N.B., 762 A.2d 1062, 1066 (N.J. Super. Ct. App. Div. 2000).

64. *See, e.g.*, Wood v. Astleford, 412 N.W.2d 753 (Minn. Ct. App. 1987) (holding that a wife with no knowledge of husband's pedophiliac tendencies had no duty to warn); Faul v. Perlman, 104 So.3d 148 (Miss. Ct. App. 2012) (finding that a babysitter had no duty to protect the plaintiff child from her husband's unforeseeable sexual abuse); Sacci v. Metaxas, 810 A.2d 1119 (N.J. Super Ct. App. Div. 2002) (finding that a wife had no duty to warn regarding her husband's violence); Roe v. Bibby, 763 S.E.2d 645 (S.C. Ct. App. 2014) (declining to hold a wife liable for her husband's sexual abuse of their neighbors' children, though there was a vigorous dissenting opinion).

65. 169 Cal. Rptr. 282 (Ct. App. 1980).

66. 930 S.W.2d 921 (Tex. Ct. App. 1996).

67. *See* Beh, *supra* note 6, at 15–18.

68. RESTATEMENT (SECOND) OF TORTS § 302B, cmt. e (AM. LAW INST. 1965). For further discussion of this exception, see Bruce S. Ledewitz, *Foreseeing is Believing: Community Imposition of Liability for the Acts of "Dangerous" Former Mental Patients*, 45 L. & CONTEMP. PROBS. 67, 86–88 (1982).

69. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 37 cmt. d (AM. LAW INST. 2012) (alteration in original) (quoting RESTATEMENT (SECOND) OF TORTS § 302B, cmt. e). A California court aptly describes the no-duty rule:

> [It] is based on the concept that a person should not be liable for "nonfeasance" in failing to act as a "good Samaritan." It has no application where the defendant, through his or her own action (misfeasance) has made the plaintiff's position worse and has created a foreseeable risk of harm from the third person. In such cases the question of duty is governed by the standards of ordinary care.

Pamela L., 169 Cal. Rptr. at 284.

affirmative act, or misfeasance, is supposedly the key to this exception; it, as opposed to mere nonfeasance, is supposed to ground liability.[70]

In cases of conjugal liability, however, the line between misfeasance and nonfeasance quickly becomes blurred.[71] In many cases involving the liability of wives and girlfriends for their partners' sexual abuse of children, courts hold that acts usually called nonfeasance, like "mere silence and permission," "passively permitting contact between children and the perpetrator," or "merely allowing [their partner] to act," suddenly constitute misfeasance.[72] In other words, although courts have recognized that spouses do not have the ability to control one another under the special relationship framework, failure to control a spouse nevertheless becomes a source of liability under the affirmative act doctrine.[73] As misfeasance slides into nonfeasance, any independent basis for liability disappears, and simply being in an intimate relationship with a wrongdoer, and failing to control them or prevent the wrong, appears to make one vulnerable to liability.

a. Violent Attacks on Third Parties

Two cases help to illustrate the disintegrating border between misfeasance and nonfeasance in the context of violent attacks on third parties. In *Wilkins v. Siplin*,[74] a divorcing wife's attempt to forge a new romantic relationship constituted an act of misfeasance sufficient to ground liability.[75] In *Wilkins*, the California Court of Appeal held that a wife, separated from her husband, had engaged in an affirmative act for the

70. For a discussion of the development and current state of the misfeasance and nonfeasance distinction, see RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 37 cmt. c. The misfeasance/nonfeasance distinction has proved an exceedingly difficult one for both courts and commentators. *See, e.g.*, John M. Adler, *Relying Upon the Reasonableness of Strangers: Some Observations About the Current State of Common Law Affirmative Duties to Aid or Protect Others*, 1991 WIS. L. REV. 867.

71. Beh, *supra* note 6, at 15–18.

72. Beh, *Duty to Warn*, *supra* note 63, at 74. The same holds true for cases involving violent partners or ex-partners who attack others; courts sometimes transform nonfeasance like failing to control into culpable misfeasance. *See id.*

73. Interestingly, one court noted that although a marital relationship does not in and of itself constitute a "special relationship," it "is not irrelevant" to the duty analysis. Hermosillo v. Leadingham, 13 P.3d 79, 83 (N. M. App. Ct. 2000).

74. 13 Cal. Rptr. 2d 634 (Ct. App. 1992) (depublished).

75. *See id.* at 638–39. Although this decision was ordered depublished, it still illustrates one court's attempt to deal with these kinds of facts. For a description of what it means for a case to be depublished, see Philip H. Thompson, *What Depublishing a Decision Means*, LAW360 (Feb. 23, 2011, 3:21 PM), http://www.law360.com/articles/227657/what-depublishing-a-decision-means [http://perma.cc/N5Z4-A6ZS].

purposes of liability when she invited a male coworker to her cabin in Big Bear, informed her husband that she would be using the cabin (without mentioning the male companion), allowed both her vehicle and her coworker's to be visible when parked, and opened the door for her husband when he arrived at the cabin.[76] The estranged husband entered and attacked the coworker, stabbing him seventeen times.[77]

The court found that a jury was "entitled to believe" that the wife had engaged in misfeasance and had "created a foreseeable risk of harm."[78] The court seemed particularly persuaded by the fact that the wife invited the male companion to the cabin even though she was aware that her husband had violent tendencies.[79] Under these circumstances, the court found that she could also be liable.[80]

In *Kargul v. Sandpiper Dunes Ltd. Partnership*,[81] a woman's cohabitation with her romantic partner was characterized as misfeasance.[82] The defendant girlfriend formed an intimate relationship with a man who had previously been incarcerated twice for sexual assault.[83] After he kidnapped and raped a tenant in their building, that victim brought suit against him and his girlfriend, alleging that she had a duty to warn the other tenants that her partner posed a danger to them.[84] The girlfriend brought a motion for summary judgment, which the court denied.[85]

76. *Wilkins*, 13 Cal. Rptr. 2d at 636, 638.
77. *Id.* at 636.
78. *Id.* at 638 (internal quotation marks omitted).
79. *Id.* The coworker produced evidence that the estranged husband had previously attacked men out of jealousy over his wife, and that he had also previously been physically abusive towards her. *Id.* at 636–37.
80. *Id.* at 639. Also, see *Kinsey v. Bray*, 596 N.E.2d 938 (Ind. Ct. App. 1992), where an ex-wife sued her ex-husband after his girlfriend attacked her at his residence. He had invited them both over on the same day, despite knowing that his girlfriend had threatened to beat up his ex-wife if she ever found her at his home. *Id.* at 939. The girlfriend had also been previously violent. *Id.* The court found that the ex-husband was under a duty to control his girlfriend's conduct, since he had control over her in the sense that he could have ordered her to leave. *Id.* at 940. Also, since she had previously made threats in his presence regarding the ex-wife, the violence was foreseeable. *Id.* The court held that "the law will recognize a duty on the part of a possessor of land to protect social invitees against unreasonable risk of physical harm from third persons." *Id.* at 941.
81. 3 Conn. L. Rptr. 154 (Super. Ct. 1991).
82. *See id.* at 160.
83. *Id.* at 155. The defendant's girlfriend was a counsellor who specialized in working with sexual offenders. *Id.* Her romantic partner was incarcerated for a third time during their relationship following a conviction for sexually assaulting the girlfriend's daughter. *Id.*
84. *Id.* at 154.
85. *Id.* at 162.

The court found that tenants owe a duty to each other "not to create an unsafe condition in the premises by an affirmative act."[86] But, through "the act of allowing" her intimate partner to live with her, the girlfriend had engaged in an affirmative act that created the opportunity for the tort to occur and increased the risk of harm to the plaintiff.[87] Essentially, the court interpreted romantic cohabitation as misfeasance sufficient to impose a duty to third parties, rendering this a very robust form of conjugal liability with massively broad applicability.[88]

b. Child Sexual Abuse

When conjugal liability involves one partner's sexual abuse of a child, there are three typical bases for departing from the default no duty rule: knowledge, a special relationship between the non-abusing spouse and the child, and premises liability. Knowledge was the lynchpin of the *J.S. v. R.T.H.*[89] decision, a case from the New Jersey Supreme Court. Here, the court held that a duty to protect against the harms of a third party may be imposed if the defendant knew or had reason to know that the third party was likely to engage in conduct that would "endanger the safety" of another.[90] The issue before the court was "whether a wife who suspects or should suspect her husband of actual or prospective sexual abuse of their neighbors' children has any duty of care to prevent such abuse."[91] The court found that such a wife owes such a duty.

After reviewing the previous case law in which courts had found that wives could be liable when their husbands sexually abused children, the court noted that wives are uniquely positioned to assume a gatekeeper role vis-à-vis their husbands.[92] The court relied on empirical evidence in support of this position, finding that that even though sexual abuse is "extremely

86. *Id.* at 165.
87. *Id.*
88. *See* Eugene Volokh, *Tort Law vs. Privacy*, 114 COLUM. L. REV. 879, 898 (2014).
89. 714 A.2d 924 (N.J. 1998). Conjugal liability claims for violent attacks on third parties are also sometimes pursued under the rubric of negligent entrustment. *Cf.* Mathis v. Am. Fire & Cas. Co., 505 So. 2d 652 (Fla. Dist. Ct. App. 1987) (finding that the husband was not liable for negligent entrustment after his wife shot the plaintiff with a gun that the husband had left in his wife's car); Kingrey v. Hill, 425 S.E.2d 798 (Va. 1993) (overturning a jury verdict that found a wife liable for negligent entrustment after her husband shot the plaintiff).
90. *J.S.*, 714 A.2d at 928 (quoting Clohesy v. Food Circus Supermarkets, Inc., 694 A.2d 1017, 1023 (N.J. 1997)).
91. *Id.* at 926.
92. *Id.* at 930.

difficult to detect or anticipate," wives can foresee it.[93] The cited empirical evidence that formed the basis for this position is that child sexual molesters are predominantly men, who are often married, and that child sexual molestation victims are predominantly girls, who are often abused by family members or family friends.[94] Further, such abuse typically occurs in the home of either the offender or the victim.[95] Based on these demographic factors, the court held that "the wife of a sexual abuser of children is in a unique position to observe firsthand telltale signs of sexual abuse," and, in fact, "[a] wife may well be the *only* person with the kind of knowledge or opportunity to know that a particular person or particular class of persons is being sexually abused or is likely to be abused by her husband."[96]

Because of these factors, the court found that wives should be held to a standard of "particularized foreseeability," meaning that "when a spouse has actual knowledge or special reason to know of the likelihood of his or her spouse engaging in sexually abusive behavior against a particular person or persons, a spouse has a duty of care to take reasonable steps to prevent or warn of the harm."[97] The court found that state legislation which mandated individuals to report suspected child sexual abuse supported such a duty.[98] Noting that the statute "applies to every citizen, including a spouse," and thus represents a public policy position that protecting children from sexual abuse outweighs any concern about marital privacy.[99]

Knowledge also played a role in *Bjerke v. Johnson*,[100] a 2007 decision of the Supreme Court of Minnesota grounded primarily in the special relationship exception. In *Bjerke*, a woman's boyfriend sexually abused a teenager living at their horse farm.[101] The court found that there was a special relationship between the homeowner and the invitee plaintiff, and an issue of fact regarding whether the abuse was foreseeable.[102] The court noted that the defendant girlfriend, along with some other adults, "observed unusual and intimate behavior" between the teenage plaintiff and the

93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* (emphasis added).
97. *Id.* at 934, 935; *see also* Chaney v. Superior Court, 46 Cal. Rptr. 2d 73 (Ct. App. 1995) (finding that spousal liability in a similar circumstance requires actual, not constructive, knowledge).
98. *J.S.*, 714 A.2d at 930–31.
99. *Id.* at 932.
100. 742 N.W.2d 660 (Minn. 2007).
101. *Id.* at 663–64.
102. *Id.* at 667.

defendant's boyfriend.[103] According to the court, these observations could be interpreted as sources of knowledge that an inappropriate relationship was occurring[104] and thus be a sufficient basis for conjugal liability.

Premises liability is another basis for finding that a non-offending spouse owes a duty to third parties. Premises liability was the basis of a wife's potential liability in *Doe v. Faerber*.[105] There, the plaintiff alleged that when he was approximately twelve years of age, the wife's husband, who was a member of the school board and a prominent local lawyer, sexually assaulted him in the marital home.[106] The court found that the plaintiff was a "child social guest in her home," such that the defendant wife had a duty "to exercise reasonable care under the circumstances to protect his safety and well being."[107]

c. No Liability Necessary: Community Property

Sometimes, plaintiffs can impose conjugal liability on spouses even without a finding of civil liability against the non-offending spouse. In community property jurisdictions, laws governing tort judgment recovery can function to deprive non-offending spouses of property despite no alleged wrongdoing or failing of any kind. In these jurisdictions, successful plaintiffs can often access community property assets free from any requirement of misfeasance on the part of the non-offending spouse: Non-offending spouses lose their property interests to tort creditors simply because of their marriages.

In *Clayton v. Wilson*,[108] for example, Mr. Wilson sexually abused a boy whose parents rented a property from him and his wife and whom he paid "to perform yard work around the rental property and other properties owned by the Wilsons."[109] The abuse occurred after the daily work was performed, but prior to payment being made.[110] Payment was made with community assets.[111] After the boy disclosed the abuse, Mr. Wilson was

103. *Id.* For an example of a case where there was no special relationship between the woman and the abused child, see *T.A. v. Allen*, 669 A.2d 360 (Pa. Super. Ct. 1995).
104. *See Bjerke*, 742 N.W.2d at 668–69.
105. 446 F. Supp. 2d 1311 (M.D. Fla. 2006).
106. *Id.* at 1315.
107. *Id.* at 1319, 1320. The plaintiff thus "adequately stated a claim" that could withstand the defendant's motion to dismiss. *Id.* at 1320.
108. 227 P.3d 278 (Wash. 2010).
109. *Id.* at 279.
110. *Id.*
111. *Id.*

arrested.[112] The couple subsequently divorced.[113] The court found that whether the community property should be liable for the judgment against Mr. Wilson for his intentional torts depended on "whether the sexual abuse occurred in the course of managing community business."[114] The court found that the marital community was liable, because the abuse did occur in that context.[115] Mrs. Wilson thus lost her interest in the marital community property because of her husband's wrongful acts.[116]

2. Employment

In the employment context, victims of domestic violence have experienced job termination when their abuser is perceived as presenting a threat to the security of the workplace.[117] In one example, a teacher was fired for the threatening behaviors of her ex-husband.[118] Following a domestic violence incident at home, she warned the Catholic school where she worked (and where her children were enrolled) that her ex-husband might show up there.[119] He did and acted in a "threatening and menacing" manner.[120] He was subsequently arrested and incarcerated, but the school nevertheless terminated her.[121] The school acknowledged that it was not due to any personal fault or blame with regard to the employee, but that in light of the fact that her ex-husband would likely be released from prison

112. *Id.*
113. *Id.* at 280.
114. *Id.*
115. *Id.* at 283. The court also impugned the couple's attempt to transfer their assets to the wife in order to avoid the judgment. *Id.* at 283–84.
116. *Id.* at 283, 285. One court tried to remedy this type of inequity by giving "the tortfeasor's spouse a right to reimbursement against the tortfeasor for any loss to her interest in community property. Her right against the debtor spouse would be secured by an equitable lien enforceable upon termination of the community." Reilly, *supra* note 42, at 402 (citing deElche v. Jacobsen, 622 P.2d 835, 840 (Wash. 1980)).
117. *See* Nicole Buonocore Porter, *Victimizing the Abused?: Is Termination the Solution When Domestic Violence Comes to Work?*, 12 MICH. J. GENDER & L. 275, 288–89 (2006).
118. Neetzan Zimmerman, *Teacher Fired Because Abusive Ex-Husband Posed Threat to Students*, GAWKER (June 13, 2013, 8:56 AM), http://gawker.com/teacher-fired-because-abusive-ex-husband-posed-threat-t-513096922 [https://perma.cc/KM9Y-TW25].
119. Dylan Stableford, *Teacher Fired Over Ex-Husband's 'Threatening and Menancing' Behavior*, YAHOO NEWS: THE LOOKOUT, (June 13, 2003), https://www.yahoo.com/news/blogs/lookout/teacher-fired-domestic-violence-ex-husband-161455153.html?ref=gs [https://perma.cc/6JG2-ZSCK].
120. *Id.*
121. *Id.*

within a few months, the safety of the other students and teachers warranted such an action.[122] The termination letter stated:

> We feel deeply for you and about the situation in which you and your children find yourselves through no fault of your own. Although we understand he is currently incarcerated, we have no way of knowing how long or short a time he will actually serve and we understand from court files that he may be released as early as next fall. In the interest of the safety of the students, faculty and parents at Holy Trinity School, we simply cannot allow you to return to work there or, unfortunately, at any other school in the Diocese.[123]

This termination received significant media attention, and ultimately led to a change in California law in 2013.[124] California joined six other states in providing that it is unlawful to discriminate against an employee on the basis that he or she is a victim of domestic abuse.[125] In many other states, though, there is little to no recourse for victims of domestic violence who suffer employment loss related to that status.[126] Given that "up to two-thirds of employed victims have reported that their abusers harassed them at work," this has serious implications.[127]

122. *See id.* (citing to Letter from Tom Beecher, Dir., Office for Sch., and Bobbie Espinosa, Dir., Office for Human Res., Diocese of San Diego, to Carie Charlesworth (Apr. 11, 2013), http://media.nbcbayarea.com/images/LetterofTermination.jpg [https://perma.cc/8ZGA-FD7C]).

123. *Id.* (quoting Letter from Tom Beecher, *supra* note 122).

124. Bryce Covert, *California Now Seventh State to Bar Employment Discrimination Against Domestic Violence Victims*, THINKPROGRESS (Oct. 15, 2013), http://thinkprogress.org/economy/2013/10/15/2778931/california-domestic-violence-employment-law [https://perma.cc/2ER8-V6JB]; *see also* CAL. LAB. CODE § 230(e) (West Supp. 2017).

125. Covert, *supra* note 124; *see also* LAB. § 230(c), (e). Those six states were Connecticut, Hawaii, Illinois, New York, Oregon, and Rhode Island. Bryce Covert, *In All but Six States, You Can Be Fired for Being a Victim of Domestic Violence*, THINKPROGRESS (June 20, 2013), http://www.nationofchange.org/all-six-states-you-can-be-fired-being-victim-domestic-violence-1371822785 [https://perma.cc/5TVM-J338]. At the federal level, "bills to provide employment protection" in such circumstances "are introduced 'in every session,'" but none have yet passed. *Id.* (quoting Michelle Caiola, an attorney at Legal Momentum).

126. Covert, *supra* note 124; *see also* Logan Howard, *Are Victims of Domestic Violence Protected From Employment Discrimination?*, HOWARD & KOBELAN ATT'YS L. (July 19, 2016), http://www.employmentdiscriminationlawyeraustin.com/domestic-violence-protected-from-employment-discrimination/ [https://perma.cc/AKM9-WPTR] (noting that thirty-two states have a narrow protection for domestic violence victims who need time away from work to assist with the criminal prosecution of their abuser and only sixteen states offer more substantial protection).

127. Sara Svedberg, *Domestic Violence and the Workplace: Mitigating the Risks*, NEXSEN PRUET: INSIGHTS (Mar. 3, 2015), http://www.nexsenpruet.com/insights/employment-law-update-

Although the Catholic school employer in the above case appeared sympathetic to the fact that there was something fundamentally unfair about penalizing an employee for her partner's domestic violence, and likely was legitimately concerned about the possibility of a future violent incident at the school, other terminations involving domestic violence often trace back to "outdated, sex-based stereotypes about survivors."[128] These stereotypes, which include beliefs that domestic violence victims somehow allow themselves to be abused, are unable to act in a reasonable manner in regards to the abuse (for example, by not leaving their partners), are apparent in many contested employment decisions based on conjugal liability.[129]

In fact, employment conjugal liability is not limited to instances where the protection of third parties is at stake. Given the nature of at-will employment, in which termination can occur for virtually any reason,[130] employment cases provide a particularly rich context for considering how conjugal liability functions in a relatively legally unfettered environment. Often, conjugal liability in employment occurs when one spouse's conduct is perceived as immoral or violating conservative sexual mores. For example, in 2001, a police officer received a three day suspension for "'conduct unbecoming an officer' for pornography-related activities."[131] He was not actually personally involved with the impugned pornography; instead, he was suspended because his wife had uploaded pornographic self-portraits onto a website.[132] Although the Florida American Civil Liberties Union believed that the punishment was unjustified, because "[i]t is a fundamental violation to punish someone for something someone else did,"[133] the police department ardently believed that "they had the right to regulate the

domestic-violence-and-the-workplace-mitigating-the-risks [https://perma.cc/KMY4-FY83].

128. JULIE GOLDSCHEID & ROBIN RUNGE, AM. BAR ASS'N, EMPLOYMENT LAW AND DOMESTIC VIOLENCE: A PRACTITIONER'S GUIDE 7 (2009).

129. *Id.* (internal quotation marks omitted).

130. "An at-will employment relationship 'can be terminated for good reason, bad reason, or no reason at all.'" Stewart v. FedEx Express, No. 11222-2013, 2014 WL2881804, at *2 (Pa. Ct. Com. Pl. June 24, 2014) (quoting Nix v. Temple Univ., 596 A.2d 1132, 1135 (Pa. Super. 1991)), *aff'd*, 114 A.3d 424 (Pa. Super. Ct. 2015).

131. William G. Porter II & Michael C. Griffaton, *Between the Devil and the Deep Blue Sea: Monitoring the Electronic Workplace*, 70 DEF. COUNS. J. 65, 71 (2003).

132. *See* Kelly Cramer, *Officer, Wife Ready to Get Under Wraps Again*, SARASOTA HERALD-TRIB., Mar. 15, 2001, at 58 (on file with author).

133. *Id.*

personal conduct of a police officer's family through punishing him."[134] The disciplined officer ultimately chose not to appeal the suspension.[135]

A Florida town manager had a similar experience. City commissioners terminated his employment after his coworkers discovered that "his wife was a porn star."[136] Speaking publicly about the termination, one councilman specifically acknowledged that the manager was fired "because his wife's profession brought an inaccurate image" to the town.[137]

Additionally, one's spouse may have associations that the employer disapproves of. In one case, a city employee was terminated because of her husband's association with a "motorcycle club."[138] The city ultimately paid $50,000 to settle the wife's claim that termination on this basis violated her constitutional right to freedom of association.[139]

Another source of employment-based conjugal liability arises when one spouse may have engaged in criminal activity. In *Panis v. Mission Hills Bank*,[140] which the Tenth Circuit affirmed on appeal, a wife was terminated from her position at a bank after her husband, who worked for another bank, pled guilty to defrauding an elderly customer.[141] The husband's crime received significant media attention, including a front-page article in the Kansas City Star.[142] Although the wife was not mentioned in any of the publicity, the board of the bank where she worked became concerned that her shared last name would cause her husband's alleged crime to be associated with her, and, accordingly, with the bank.[143] They thus

134. Porter & Griffaton, *supra* note 131, at 71.
135. *Id.*
136. *Husband Fired for Wife in Porn*, MIBBA (2009), http://www.mibba.com/Articles/World/2832/Husband-Fired-For-Wife-In-Porn [https://perma.cc/NHC3-NRZ5]; *see also* Todd Wright, *Town Manager Fired for Porn Star Spouse*, NBC MIAMI (July 22, 2009, 4:43 PM), http://www.nbcmiami.com/news/local/Town-Manager-Fired-for-Porn-Star-Spouse.html [https://perma.cc/PBP9-MGKP].
137. *Porn Star's Husband Fired*, S. FLA. GAY NEWS (Jan. 8, 2010, 3:33 PM), http://southfloridagaynews.com/Local/florida-manager-fired-porn-star-wife.html [https://perma.cc/8L8Q-4PK4].
138. *Worker Fired Because of Biker Husband to Get Settlement*, CBS 5 (Feb. 12, 2014. 8:51 AM) [hereinafter *Worker Fired*], http://www.cbs5az.com/story/24574662/worker-fired-because-of-biker-husband-to-get-settlement [http://perma.cc/L3M7-UFVY]; *see also Kingman Suit Settled*, AGING REBEL (Jan. 29, 2014), http://www.agingrebel.com/9759 [https://perma.cc/6ESC-QR6N].
139. *Worker Fired*, *supra* note 138.
140. No. 92-2391-EEO, 1994 WL 185984 (D. Kan. Apr. 5, 1994), *aff'd*, 60 F.3d 1486 (10th Cir.1995).
141. *Id.*
142. *Id.* at *3.
143. *Id.*

terminated her. She brought suit, alleging that her termination amounted to discrimination on the basis of her marital status, in violation of both Title VII of the Civil Rights Act and a similar Kansas statute.[144] The court found that marital status was not a protected category in either case and that even if it were, she was not fired because of her marital status, but because her husband's illegal activity could give rise to a customer concern about the safety of funds.[145] The court found that this was therefore not a wrongful termination.[146]

Whether a spouse can be lawfully terminated for the wrongful actions of their partner was also the main issue in *Singleton v. Cecil*.[147] In *Singleton*, the police department terminated an officer after his wife and daughter, in a recorded phone call, discussed whether it was possible to "set up" the police chief in order to ferret out any potentially corrupt or nefarious activity.[148] In a concurring judgment, one judge noted that there were two possible reasons for the officer's termination, both of which were legally valid.[149] The first possibility was that the department suspected the husband of colluding with his wife, in which case the termination was rational because "it is not unreasonable to suppose that a man or woman knows what his or her spouse is up to."[150] The second possibility was that he was fired "simply because of what his wife did."[151] In the judge's view, this would also still be valid, because "firing Mr. Singleton for his wife's acts rationally serves the legitimate purpose of ensuring that officers conscientiously monitor and police their spouses' actions."[152] Further, the judge found that termination of the husband "in order to punish his wife" or "as a kind of retribution against [her]" was a legally defensible ground.[153]

Another large category of cases occurs when employees are terminated in retaliation for their spouses' workplace complaints or work-related actions. In one case, the female fiancée of an employee who filed a

144. *Id.* at *8–9.
145. *Id.*
146. John B. Phillips, *Husband Fired for Wife's Conduct or Vice Versa*, WORD ON EMP. L. (Oct. 26, 2010), https://web.archive.org/web/20160514105950/http://www.wordonemploymentlaw.com/2010/10/husband-fired-for-wifes-conduct-or-vice-versa [https://perma.cc/5G6P-HKKN].
147. 176 F.3d 419 (8th Cir. 1999).
148. *Id.* at 421.
149. *Id.* at 430 (Arnold, J., concurring).
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*

discrimination claim with the EEOC was fired shortly after the claim was filed.[154] In another, a woman's fiancé was terminated shortly after she brought a sex discrimination suit against their mutual employer.[155] Also, an unidentified worker wrote in to AOL Jobs for advice after her employer terminated her on the grounds that six months earlier her husband had terminated his employment with them without adequate notice.[156] The columnist noted that termination of one employee for the actions of his or her spouse "is more common than you might think," but, for at-will employees, there is little recourse outside of certain limited discrimination claims.[157]

B. Deterring Criminality

Conjugal liability is also often deployed in service of a second goal: deterring criminality. Criminal accessory liability doctrines, property forfeiture rules, and eviction ordinances all use conjugal liability as a means of deterring criminal activity.

1. Criminal Accessory Liability

Conjugal liability affects not only civil liability and employment: Spouses and those in marital-like relationships can also face *criminal* liability based on the wrongful acts of their romantic partners. This form of conjugal liability frequently occurs in the context of the war on drugs.[158] The problem occurs when criminal liability doctrines of conspiracy, accessory liability, and constructive possession are used in hugely expansive ways to hold individuals responsible for the wrongdoing of their intimate

154. EEOC v. Bojangles Rests., Inc., 284 F. Supp. 2d 320, 324–25 (M.D.N.C. 2003); *see also* Alex B. Long, *The Troublemaker's Friend: Retaliation Against Third Parties and the Right of Association in the Workplace*, 59 FLA. L. REV. 931, 933 (2007).

155. Thompson v. N. Am. Stainless, LP, 562 U.S. 170 (2011).

156. Donna Ballman, *Can I Be Fired for Something My Spouse Did?* AOL FIN. (June 24, 2014, 5:00 AM), http://jobs.aol.com/articles/2014/06/24/can-i-be-fired-for-something-my-spouse-did [https://perma.cc/V533-AT2H].

157. *Id.* Additionally, when one spouse is terminated because of her partner's union-organizing activities, she may be entitled to relief. Coastal Sunbelt Produce, Inc., 358 N.L.R.B. 1287 (2012), *aff'd*, 361 N.L.R.B. 85 (2014), *order rescinded by* No. 05-CA-036362, 2014 WL 6879309 (N.L.R.B. Dec. 5, 2014). For additional cases involving employment terminations for the actions of a spouse, see *Adler v. Pataki*, 185 F.3d 35 (2d Cir. 1999), which alleges his discharge in retaliation for lawsuit filed by wife violated his First Amendment rights, and *Sanitation & Recycling Industries v. City of New York*, 107 F.3d 985 (2d Cir. 1997).

158. Goldfarb, *supra* note 11, at 280.

partners.[159] Although accomplices are supposed to be convicted because their "voluntary association with the *offense* [is] blameworthy,"[160] in these criminal conjugal liability cases, the voluntary association with the *offender*, not the offense, appears to be the target of many sanctions.[161]

The legal doctrines of criminal complicity are so elastic that they easily allow for such over-capture. American accomplice law is widely acknowledged to be a doctrinal disaster, "inescapably complex" and "a disgrace" to jurisprudence itself.[162] Whereas other jurisdictions often calibrate their complicity laws to accord with varying amounts of participation in the underlying offense, American versions of complicity law have the uniquely troubling feature of making accomplices "as guilty as" the primary wrongdoers, regardless of how trivial or inconsequential their assistance.[163] This has the result that sometimes, a secondary wrongdoer with little actual involvement in a crime can receive a much harsher punishment than a primary wrongdoer, a scenario that appears frequently in criminal conjugal liability cases.

Although accessory doctrines are facially neutral, in the context of the war on drugs they disproportionally affect women, particularly those who are in familial or romantic relationships with men involved in drug use or trade.[164] Sometimes colloquially referred to as "the girlfriend problem,"[165] this form of conjugal liability has "helped make women the fastest growing population in prison."[166] While some women, of course, are culpably

159. *Id.*

160. Kit Kinports, Rosemund, *Mens Rea, and the Elements of Complicity*, 52 SAN DIEGO L. REV. 133, 136 (2015) (emphasis added).

161. *See id.*

162. *Id.* at 134 (first citing Sanford H. Kadish, *Reckless Complicity*, 87 J. CRIM. L. & CRIMINOLOGY 369, 369 (1997); and then quoting Joshua Dressler, *Reforming Complicity Law: Trivial Assistance as a Lesser Offense?*, 5 OHIO ST. J. CRIM. L. 427, 428 (2008)); *see also* Dressler, *supra*.

163. Michael G. Heyman, *Due Process Limits on Accomplice Liability*, 99 MINN. L. REV. HEADNOTES 131, 131–32 (2015).

164. LENORA LAPIDUS ET AL., CAUGHT IN THE NET: THE IMPACT OF DRUG POLICIES ON WOMEN AND FAMILIES (2005), http://www.aclu.org/images/asset_upload_file393_23513.pdf [https://perma.cc/V9AX-D326].

165. Nemika Levy-Pounds, *Beaten By the System and Down for the Count: Why Poor Women of Color and Their Children Don't Stand a Chance Against U.S. Drug-Sentencing Policy*, 3 U. ST. THOMAS L.J. 462, 472–73 (2006).

166. Patrice Gaines, *The Conspiracy Charge*, BLOGGER: ON THE COUNT (July 24, 2011), onthecountlive.blogspot.com/2011/07/conspiracy-charge.html [https://perma.cc/7WFW-Q7Q3]. Moreover, "black women are incarcerated at a rate of eight times that of white women and represent 30 percent of all females incarcerated under state or federal jurisdiction." *Id.*

involved in the drug trade, either acting individually and for their own benefit or as equal participants in these illegal activities with their partners,[167] for the most part, "women charged with drug crimes are involved, not in wide-scale conspiracies to possess and distribute narcotics, but in intimate relationships with boyfriends or husbands who are active participants in illegal activities."[168] The typical person captured under these forms of conjugal liability is black, poor, and a girlfriend or wife of the primary wrongdoer.[169] And in a cruel irony, the negligible role these women play in drug crimes can end up being part of the reason they may actually face harsher sentence than the primary wrongdoers: the state often threatens female intimate partners with severe criminal sanctions in the hopes that they will then offer up information about their partner's drug activities in exchange for leniency.[170] Unfortunately, if they are not a significant part of the drug activities, these women generally they have little to no knowledge to give, and are thus unable to have valuable information that they could trade for lighter sentencing deals.[171] Their partners, on the other hand, may have a great deal of information to barter, leading to the result that women in intimate relationships with men in the drug trade often end up with longer prison sentences than the primary wrongdoers.[172]

167. Goldfarb, *supra* note 11, at 291. Some spouses may also be willfully ignorant of their partner's activities. For a discussion of the requirements of willful ignorance, see Alexander F. Sarch, *Willful Ignorance, Culpability, and the Criminal Law*, 88 ST. JOHN'S L. REV. 1023 (2014).

168. Haneefah A. Jackson, Note, *When Love Is a Crime: Why the Drug Prosecutions and Punishments of Female Non-Conspirators Cannot Be Justified by Retributive Principles*, 46 HOW. L.J. 517, 531 (2003); *see also* Goldfarb, *supra* note 11, at 281–91 (describing twelve cases in which women were convicted of conspiracy or aiding or abetting crimes based on the wrongs of their intimate partners).

169. Levy-Pounds, *supra* note 165, at 466, 473; *cf.* LAPIDUS ET AL., *supra* note 164, at 35, 66; Goldfarb, *supra* note 11, at 293–94.

170. *See* Marne L. Lenox, Note, *Neutralizing the Gendered Collateral Consequences of the War on Drugs*, 86 N.Y.U. L. REV. 280, 288–89 (2011); *see also* Shimica Gaskins, Note, *"Women of Circumstance" - The Effects of Mandatory Minimum Sentencing on Women Minimally Involved in Drug Crimes*, 41 AM. CRIM. L. REV. 1533, 1533 (2004); *cf.* LAPIDUS ET AL., *supra* note 164, at 41.

171. Lenox, *supra* note 170, at 288–89. Also, even when they might have such knowledge, some women may choose prison over betrayal of their intimate partners. *See* Levy-Pounds, *supra* note 165, at 474.

172. *See* LAPIDUS ET AL., *supra* note 164, at 41; *see also* United States v. Brigham, 977 F.2d 317, 318 (7th Cir. 1992). The *Brigham* court noted the persistent problem of "inverted sentencing," where "the more serious the defendant's crimes, the lower the sentence—because the greater his wrongs, the more information and assistance he has to offer a prosecutor." *Brigham*, 977 F.2d at 318. This practice of "meting out the harshest penalties to those least culpable is troubling," and "accords with no one's theory of appropriate punishments." *Id.* Stephen Schulhofer called it the "cooperation paradox." Stephen J.

Criminal conjugal liability for drug crimes typically falls into one of two categories: It is based either on an act that is common in the context of an intimate relationship or on no real act at all. In the first category, mundane quotidian "commonplace actions, such as taking a message, renting a car for a partner or family member, or purchasing household supplies" are frequently caught under the rubric of accessory doctrines like conspiracy or aiding and abetting, thus exposing an intimate partner to the same potential "harsh penalties" as that of the primary wrongdoer.[173] For instance, one woman was convicted of "constructive possession with the intent to distribute LSD and conspiracy to possess with the intent to distribute LSD" for answering her boyfriend's telephone and riding in the car with him a few times when he distributed drugs.[174] Another was convicted of conspiracy to distribute cocaine for relaying telephone messages and riding in the same vehicle with her boyfriend during drug meets.[175]

In another case, *United States v. Hubbard*,[176] a woman was convicted on conspiracy charges based on evidence that she had "used cocaine, dated [the principal drug dealer], lent him $400, and co-signed a lease with him for the house . . . where they lived together for three months."[177] The appellate court overturned and impugned this conviction, finding that "a conclusion of [her] guilt simply could not have resulted from a reasoned process of inferring from the trial evidence the requisite elements of a conspiracy."[178] In other words, something other than evidence prompted the jury to condemn the female defendant. As with many other instances of conjugal liability, it seems likely that the jury simply used the intimate relationship as a barometer of blameworthiness.

In the second category, where a spouse is convicted without committing a wrongful act, the same slippage between misfeasance and

Schulhofer, *Rethinking the Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 211–13 (1993).

173. LAPIDUS ET AL., *supra* note 164, at 36. For instance, one woman, "[d]espite her minor involvement in her boyfriend's transaction," was convicted of conspiracy and sentenced to thirty-four years in prison for driving him to an encounter in which he sold a methamphetamine manufacturing chemical. Goldfarb, *supra* note 11, at 289–90.

174. Goldfarb, *supra* note 11, at 282 (quoting Philip Oliss, Comment, *Mandatory Minimum Sentencing: Discretion, The Safety Valve and The Sentencing Guidelines*, 63 U. CIN. L. REV. 1851, 1861 (1995)).

175. *Id.* at 287.

176. No. 91-5272, 1993 U.S. App. LEXIS 21850 (4th Cir. Aug. 27, 1993); *see also* Jackson, *supra* note 168, at 531.

177. *Hubbard*, 1993 U.S. App. LEXIS 21850, at *20.

178. *Id.*

nonfeasance that was evident in the civil context reoccurs. Mere "*inaction* in the face of evidence that her mate is involved in drug crimes" can sometimes prompt charges.[179] Specifically, a woman can do nothing beyond sharing a living space with her romantic partner, and this "intimate relationship with a principal male dealer may result in her constructive possession of her boyfriend's drugs."[180] In these instances, her "mere presence in the home" is "circumstantial evidence"[181] of her complicity and "tantamount to membership in a conspiracy."[182] For example, in one case, a woman came home from work to discover federal agents searching her home.[183] They informed her that they had arrested her cohabiting boyfriend for drug trafficking.[184] After they discovered cocaine in a storage compartment in the kitchen, the presence of which she disavowed knowledge of, she was convicted of "possession with intent to distribute cocaine and aiding and abetting her boyfriend's cocaine trafficking" and sentenced to fifteen years imprisonment.[185]

This combination of targeting intimate partners and using otherwise innocuous domestic behaviors or no overt behaviors at all as the basis for criminal liability has led some scholars to observe that criminal conjugal liability makes women "particularly vulnerable to prosecution and incarceration based on their *associations* rather than their conduct."[186] In other words, these wrongs are relational—connected to one's mere status rather than to one's actions. These situations extend the reach of criminal liability to include female intimate partners, even "when they have minimal or no involvement in the drug trade."[187] In fact, "there are thousands of women serving mandatory sentences for drug conspiracy cases who are minimally or not at all involved with the drug offense that they are being

179. Jackson, *supra* note 168, at 531 (emphasis added).
180. *Id.*
181. Gaskins, *supra* note 170, at 1537.
182. Myrna S. Raeder, *Gender Issues in the Federal Sentencing Guidelines and Mandatory Minimum Sentences*, CRIM. JUST., Spring 1993, at 20, 60.
183. Goldfarb, *supra* note 11, at 289.
184. *Id.*
185. *Id.* This raises the problem that unlike the mates of men who engage in white-collar crime, "mates of drug dealers usually live at the scene of criminal activity. Therefore, some women who are poor may be sucked into crime, whereas richer women who associate with white-collar felons do not face sacrificing their relationships in order to remain crime-free." Raeder, *supra* note 182, at 978.
186. LAPIDUS ET AL., *supra* note 164, at 35 (emphasis added).
187. *Executive Summary* for LAPIDUS ET AL., *supra* note 164.

held accountable for."[188] Rather than punishing for individual wrongdoing, criminal conjugal liability punishes women for the simple "act of remaining with a boyfriend or husband engaged in drug activity."[189]

Some judges have expressed discomfort with imposing criminal liability and harsh sentences for conjugal liability based on such a thin thread of connection to the actual wrong. For example, in *United States v. Castaneda*,[190] the Ninth Circuit was troubled by the conviction of a wife for conspiracy to traffic drugs and for vicarious liability for seven counts of possession of a firearm related to a drug offense.[191] The underlying basis for the conviction was that the wife had provided her husband with telephone messages from conspirators who called while he was not home, and on one occasion, in the middle of a social conversation with one of the callers, she informed him that a deal between her husband and another individual had not occurred.[192]

Though her actions certainly indicate knowledge that her husband was involved with drugs, knowledge of another's drug activities is generally not, by itself, a sufficient basis for criminal liability.[193] Nor does a mere relationship with a wrongdoer suffice. As the appellate court concluded: "In the end, the only evidence that connects Leticia to the predicate offenses appears to be her marriage," and a finding of guilt "based solely" on this was a violation of due process.[194] But while Leticia was fortunate enough to have

188. Goldfarb, *supra* note 11, at 290 n.137 (quoting Monica Pratt, the spokesperson for Families Against Mandatory Minimums).

189. LAPIDUS ET AL., *supra* note 164, at 35. Even the metaphor implied in the "war on drugs" is worthy of note: "Without doubt, war has gendered meanings. It is a male-centered and male-identified institution, motivated primarily by fear of the harm other men can do and glorifying qualities that are culturally identified as masculine. Women have always played a role in war, more often given the gender stratification of society as targets and trophies than as commanders or combatants." Goldfarb, *supra* note 11, at 279.

190. 9 F.3d 761 (9th Cir. 1993), *discussed in* Alex Kreit, *Vicarious Criminal Liability and the Constitutional Dimensions of* Pinkerton, 57 AM. U. L. REV. 585, 604 (2008).

191. *See* Kreit, *supra* note 190.

192. *See id.*

193. As explained by the Court:

> Requiring a commitment to act to help bring about the prescribed conduct prevents punishment for knowledge of illegal activity or the "mere [] . . . expression of sympathy with the alleged criminal enterprise, unaccompanied by any significant action in its support or any commitment to undertake such action." In other words, in order to establish personal guilt for another's illegal acts, a defendant must influence or attempt to influence the illegal conduct, not just know about or sympathize with it.

Id. at 609 (alteration in original) (quoting Scales v. United States, 367 U.S. 203, 228 (1961)).

194. *Castenada*, 9 F.3d at 768.

an appellate court recognize the deeply problematic nature of a conviction based solely on an intimate association, many other women continue to be convicted on such a basis.[195]

2. Property Forfeiture

Conjugal liability for criminal wrongs is not limited to criminal convictions. Under forfeiture laws, conjugal liability can deprive an intimate partner of her interest in property shared with a wrongdoing mate.[196] Conjugal liability in the forfeiture context has a particularly pronounced impact on women: "Women involved in relationships with deviant males, typically husbands, are among the most frequent claimants in legal proceedings initiated to recover property" that the government has seized.[197]

In the infamous case of *Bennis v. Michigan*,[198] for instance, Tina Bennis lost her interest in a 1977 Pontiac, purchased primarily with money she had made babysitting, after Mr. Bennis was caught in the front seat receiving fellatio from a prostitute.[199] The Pontiac was forfeited to the State of Michigan as a public nuisance, and five members of the Supreme Court held that the forfeiture was permissible, because "cases authorizing actions of the kind at issue are 'too firmly fixed in the punitive and remedial jurisprudence of the country."[200] As one scholar noted, the end result of this case was the state of Michigan punished Tina "merely for waiting at home while being married to a person who was committing a criminal offense with jointly owned property."[201]

As the *Bennis v. Michigan* case makes clear, forfeiture can impose heavy costs on non-offending third parties.[202] In particular, because spouses and intimate partners frequently use forms of sharing and joint ownership, forfeiture laws have a significant impact on spouses who either have no

195. *See* Goldfarb, *supra* note 11, at 290.
196. Forfeiture, in turn, has been used to support the one-strike policy used to evict tenants in public housing. *See* Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002).
197. Massey et al., *supra* note 48, at 17.
198. 516 U.S. 442 (1996).
199. *Id.*; *see also* Klein, *supra* note 8, at 454.
200. *Bennis*, 516 U.S. at 453.
201. *Id.* at 471.
202. Derrick Wilson, Note, *Drug Asset Forfeiture: In the War on Drugs, Is the Innocent Spouse the Loser?* 30 J. FAM. L. 135, 136–37 (1991). "[F]amilies are often the innocent victims of forfeiture laws." Julie Ayling et al., *Harnessing Resources for Networked Policing*, *in* FIGHTING CRIME TOGETHER: THE CHALLENGES OF POLICING AND SECURITY NETWORKS 60, 69 (Jenny Fleming & Jennifer Wood eds., 2006).

knowledge of the unlawful activity, or who have no means of stopping it.[203] It is not uncommon for forfeiture to involve situations where a spouse simply had no idea that the property was being used for illegal purposes,[204] and perhaps even more disturbingly, property may be forfeited even if the state cannot show that the property actually *was* misused. Property forfeiture can occur even when the person accused of the underlying wrongdoing was acquitted, or even when they were not named as a defendant in the first place.[205]

Fortunately, federal forfeiture laws offer an innocent owner defense for property owners whose vehicles are subject to forfeiture.[206] Unfortunately, the innocent owner defense is uneven in application and often overly onerous.[207] Generally, to make out the defense, the property owner must not have known or consented, nor been willfully blind to the illegal activity.[208] Interpretations of what constitutes knowledge or consent, however, vary widely.[209] In some cases, courts have tried to ease the burden on wives and intimate partners fighting the seizure of property, by interpreting knowledge to mean actual (as opposed to constructive) knowledge, and consent to mean explicit permission.[210] On the other hand, other courts have gone in exactly the opposite direction, imposing significant burdens on spouses by interpreting knowledge to include constructive knowledge, and finding consent unless measures were actively undertaken to prevent the misuse.[211]

203. Wilson, *supra* note 202, at 136.
204. Julie Ayling and Peter Grabosky, *Policing by Command: Enhancing Law Enforcement Capacity Through Coercion*, 28 LAW & POL'Y 420, 432 (2006).
205. Wilson, *supra* note 202, at 137–38.
206. *Id.* at 137–39.
207. *Id.* at 139.
208. *Id.*
209. *Id.* Sometimes it depends on the interest at issue. *Id.*
210. *Id.* at 136–37, 139.
211. *Id.* at 139; *see also* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974). The U.S. Supreme Court held that in the personal property context, property owners seeking to rely on the innocent owner defense must "demonstrate that they have taken all reasonable steps to prevent the use of property for illegal purposes." Wilson, *supra* note 202, at 140. In *United States v. One 1983 Pontiac Grand Prix*, 604 F. Supp 893 (E.D. Mich. 1985), a case involving a husband claiming an innocent owner defense, the court held that taking all reasonable steps included interrogating one's intimate partner regarding their use of joint property. Wilson, *supra* note 202, at 140. The district court "determined that the husband's claim of innocence must fail because 'he failed to determine precisely where his wife was going in Detroit,' [and] 'whether she and [a companion] were driving through or staying overnight.'" *Id.* (original alterations omitted).

Many of these more punitive court decisions echo the victim-blaming sentiments common to domestic violence cases, finding fault with victims who remain in "unsavory domestic situation[s]" and "do not leave."[212] In *United States v. Sixty Acres*,[213] for example, the court rejected an abused wife's innocent spouse claim.[214] She had argued that consent for the purposes of forfeiture must be voluntary, and free from the hallmarks of fraud, duress, or mistake.[215] The court disagreed and held that "'consent' can be implied to a wife, even a wife dominated by an overbearing and abusive husband, if that wife takes no affirmative action whatsoever to stop her husband's criminal activity conducted on her property."[216] The court was "not prepared to state . . . what Mrs. Ellis could have done to avoid being found to have 'consented' to the criminal misuse of her property," but noted, "[a]s pure speculation," that "perhaps she was required to seek a divorce," as "[t]his may be the only way a wife can extricate herself from the predicament Mrs. Ellis found herself in."[217]

Sometimes, mere knowledge that an intimate partner has been involved with drugs in the past can defeat an innocent owner defense. In *United States v. One 1980 Cadillac Eldorado*,[218] police officers arrested the husband for drug crimes and confiscated the car he was driving. Even though the wife and her son had bought the car, and had no knowledge of the crimes at issue, the judge rejected their claims to the vehicle because "they had knowledge of the husband's prior narcotics arrests," and therefore it was "not unreasonable to infer that [the wife] had notice of her husband's involvement in drug trafficking."[219] Under the circumstances, the court found that she had a duty to "try to prevent any illegal use of the car."[220] Her failure to fulfill the duty "prevent[ed] her from asserting her innocence as a defense to forfeiture."[221] The court's opinion also noted that many other courts had similarly held that claimants could not successfully claim an innocent owner defense if they had knowledge of any past drug activities.[222]

212. Massey et al., *supra* note 48, at 23.
213. 727 F. Supp. 1414 (N.D. Ala.), *vacated*, 736 F. Supp. 1579 (N.D. Ala. 1990), *rev'd*, 930 F.2d 857 (11th Cir. 1991).
214. *Id.* at 1421–22.
215. Wilson, *supra* note 202, at 145.
216. *Sixty Acres in Etowah Cty.*, 727 F. Supp. at 1421 (emphasis omitted).
217. *Id.*
218. 603 F. Supp. 853 (E.D.N.Y. 1985).
219. Wilson, *supra* note 202, at 141 (quoting *Cadillac Eldorado*, 603 F. Supp. at 857).
220. *Cadillac Eldorado*, 603 F. Supp. at 857.
221. *Id.*
222. Wilson, *supra* note 202, at 141.

In the above case, the court relied on negligence concepts to impute culpability: The wife knew of past crimes and therefore had a duty to ensure the vehicle was not misused.[223] In the court's view, the fact that she was unsuccessful in that duty justified the forfeiture. In other words, as a later case phrased it, a wife's knowledge of her husband's past crimes rendered her actual "[i]nnocence, noninvolvement or lack of negligence . . . [was] insufficient."[224] The reality that she had no actual knowledge regarding the current use of the property became irrelevant: once the past-knowledge-equals-current-negligence equation is established, spouses often find their claims defeated.[225]

3. Eviction

Along with property forfeitures and criminal convictions, spouses and those in marital-like relationships may also face evictions as a result of a partners' wrongdoing. For those who live in public housing, the "one-strike policy" operates to evict families when one member engages in drug activity.[226] Similarly, in private market housing, crime-free ordinances and nuisance ordinances provide for eviction when a household member or even, in many instances, just a guest, commits any unlawful act around the tenanted unit (or sometimes even completely off the premises).[227] These ordinances and policies often capture intimate partners, holding them vicariously liable for each other's acts even in the absence of any kind of knowledge, fault, or ability to control the conduct of the other.[228]

a. Public-Housing One-Strike Policy

In public housing, tenants can be evicted for the wrongful acts of their spouses or family members under the "one-strike policy."[229] Over a million families (most of which have female heads of household) are subject to this rule, which "permits the eviction of an entire tenant family when one

223. *Id.*
224. United States v. $16,500 U.S. Currency, No. 89-5546, 1989 WL 107007 (E.D. Pa. Sept. 14, 1989).
225. Wilson, *supra* note 202, at 143.
226. *See infra* notes 229–232 and accompanying text.
227. *See infra* notes 241–253 and accompanying text.
228. For a more thorough analysis of the impact of these eviction laws and policies, see Sarah Swan, *Home Rules*, 64 DUKE L.J. 823 (2015).
229. *Id.* at 826.

member, a guest of the tenant, or another person deemed to be under the tenant's control engages in drug activity or other types of criminal conduct."[230] The policy's severity is staggering: "[A]lthough the tenant herself may have had absolutely nothing to do with the alleged criminal conduct or drug activity, she is nevertheless subject to eviction for the conduct of the person who actually engaged in the prohibited activity."[231] Indeed, a criminal conviction is not even required to trigger the policy: "[A] mere accusation of criminal activity or drug-related activity can suffice to trigger an eviction."[232]

Most often, evictions under the one-strike policy are premised on accusations of drug behaviors, but domestic violence incidents have also been the basis for evictions. Many times, women are evicted following a domestic violence incident in which they are attacked by a husband or boyfriend. In one case, a woman with a one-month-old child was evicted after the baby's father visited and beat her up.[233] In another, a woman's husband, "trying to control her from jail," sent a letter to the building manager describing how he had "fired a gun at her during an argument" in their apartment, in the hopes that she would be evicted for his wrongful act.[234] She was.[235]

The one-strike policy is sometimes softened to allow that a tenant may remain in her residence as long as she agrees to exclude her intimate partner from the premises.[236] A sociologist "studying mobilization among resident organizations in public housing projects in southeastern North Carolina" observed this phenomenon: He saw that on many mornings, "a small

230. Robert Hornstein, *Litigating Around the Long Shadow of* Department of Housing and Urban Development v. Rucker: *The Availability of Abuse of Discretion and Implied Duty of Good Faith Affirmative Defenses in Public Housing Criminal Activity Evictions*, 43 U. TOL. L. REV. 1, 1 (2011).

231. *Id.* at 4.

232. *Id.* The statute provides as follows: "[A] public housing tenant, any member of the tenant's household, or a guest or other person under the tenant's control shall not engage in criminal activity, including drug-related criminal activity, on or near public housing premises, while the tenant is a tenant in public housing, and such criminal activity shall be cause for termination of tenancy." *Id.* at 5.

233. Ann Mullen, *Insult to Injury*, DETROIT METRO TIMES (Apr. 24, 2002), http://www.metrotimes.com/detroit/insult-to-injury/Content?oid=2173586 [http://perma.cc/RC3F-P5AW].

234. *Id.*

235. *Id.*

236. *See* Regina Austin, *"Step on a Crack, Break Your Mother's Back": Poor Moms, Myths of Authority, and Drug-Related Evictions from Public Housing*, 14 YALE J.L. & FEMINISM 273, 276 (2002).

number of African-American men would routinely assemble each morning at a street corner to wait for their girlfriends or wives, who were residents of a nearby housing project, to leave their apartments and cross the street to visit them."[237] The men, "who had been accused, arrested, or convicted of various criminal infractions, were barred from stepping foot on the project," and the women faced eviction if they were to do so.[238] Obviously, continuing an intimate relationship in these circumstances is difficult.[239] Along with the practical inconvenience of being unable to have one's intimate partner in one's home, the looming threat of being punished for the wrongs of one's romantic partner is sure to sow resentment and distrust, thereby turning the home, the usual seat of relational intimacy, into a source of discord and disruption instead.[240]

b. Crime-Free and Nuisance Ordinances in Private Rental Housing

The one-strike policy in the public housing context has now been imported into the private rental housing market via crime-free ordinances. Like the one-strike policy, crime-free ordinances provide for the eviction of an entire tenant family when "a family member, a guest, or any another person deemed to be under the tenant's control engages in drug activity or other types of criminal conduct on—and sometimes even off—the relevant premises."[241]

Crime-free ordinances are based in strict vicarious liability and "hold tenants responsible for actions that they may be only tangentially connected to, by virtue of their familial or social relationship with another person."[242] The idea behind them is that the possibility of eviction will bring "'maximum incentives to tenants to prevent, discover, and remedy' the drug or criminal issues of household members."[243] Underlying this is the idea

237. Christopher Mele & Teresa A. Miller, *Introduction* to CIVIL PENALTIES, SOCIAL CONSEQUENCES 1, 2 (Christopher Mele & Teresa A. Miller eds., 2005).

238. Swan, *supra* note 228, at 856 (quoting Mele, *supra* note 237, at 2). Also, see *King v. Smith*, 392 U.S. 309 (1968), for another example of how law can directly affect intimate relationships.

239. Swan, *supra* note 228, at 856 n.118.

240. *Id.* at 856.

241. *Id.* at 844; *see also* Robert Hornstein, *Teaching Law Students to Comfort the Troubled and Trouble the Comfortable: An Essay on the Place of Poverty Law in the Law School Curriculum*, 35 WM. MITCHELL L. REV. 1057, 1074 (2009).

242. Swan, *supra* note 228, at 846.

243. *Id.* at 847 (quoting Reply Brief for the Department of Housing and Urban Development at 12, Dep't of Hous. & Urban Dev. v. Rucker, 535 U.S. 125 (2002) (No. 00-1770), 2002 WL 104947, at *12).

that, if properly incentivized, tenants can control the actions of their household members, including their intimate partners. But the ability of one intimate partner to control the actions of another is doubtful; indeed, courts in the tort context have specifically indicated that spouses and other intimate partners do not have the ability to control each other's actions.[244]

Like crime-free ordinances, nuisance ordinances are also premised on the idea that intimate partners should be able to control each other, and if they cannot, eviction can follow. These ordinances are often used along with crime-free lease addendums, and many municipalities rely on nuisance ordinances as part of their crime-control efforts.[245] Nuisance ordinances provide for the eviction of tenants when police are asked to assist at the property more than some specified number of times, without regard to whether the tenant herself was a source of the nuisance.[246]

Nuisance ordinances have a particularly significant impact on women who experience domestic violence.[247] In a study of nuisance citations in Milwaukee, Wisconsin, in 2008 and 2009, sociologists Matthew Desmond and Nicol Valdez discovered that domestic violence was the underlying cause of approximately thirty percent of these citations.[248] They also demonstrated that the landlords and police who were involved in issuing the citations and evictions frequently blamed female tenants for the abuse and for failing to control their partner.[249]

For instance, as one landlord wrote regarding an eviction of a tenant who had experienced domestic violence: "The Tenants have been required to vacate their unit or terminate the causes via a 30-day [eviction] notice. It does not matter if they are the cause of the problems or not. It is their responsibility to prevent the problems at all times."[250] And in another example, a landlord wrote informing the police that they were evicting "Sheila M.," who had called 911 for police assistance "numerous" times

244. *See supra* Part I.A.
245. EMILY WERTH, SARGENT SHRIVER NAT'L CTR. ON POVERTY LAW, THE COST OF BEING "CRIME FREE": LEGAL AND PRACTICAL CONSEQUENCES OF CRIME FREE RENTAL HOUSING AND NUISANCE PROPERTY ORDINANCES 3 (2013).
246. Swan, *supra* note 228, at 848.
247. *See, e.g.*, ACLU, SILENCED: HOW NUISANCE ORDINANCES PUNISH CRIME VICTIMS IN NEW YORK 3 (2015), https://www.aclu.org/files/field_document/equ15-report-nuisanceord-rel3.pdf [https://perma.cc/DE29-QRWC].
248. Matthew Desmond & Nicol Valdez, *Unpolicing the Urban Poor: Consequences of Third-Party Policing for Inner-City Women*, 78 AM. SOC. REV. 117, 118 (2013).
249. *See id.* at 134.
250. *Id.* (alteration in original).

during domestic violence incidents.[251] The landlord then noted the following: "*We suggested she obtain a gun and kill him in self-defense, but evidently she hasn't. Therefore, we are evicting her*."[252] Given that domestic violence is itself a "crime of control," this is an especially egregious form of transferred blame.[253]

C. Creditor's Remedies

1. Debt

Although a married person's responsibility for a spousal debt is sometimes simply a matter of straight-forward contract law, at other moments conjugal liability will operate to hold one spouse liable for the debt of the other.[254] In these situations, the insolvency or indebtedness of one spouse becomes "the other spouse's problem simply because the couple is married."[255] Often, regardless of whether the debt was only for the benefit of one spouse, or made even without the other's knowledge, the marriage functions to make the non-debtor spouse liable to a third party creditor for the spouse's breach of contract or other legal wrong.[256]

There are currently three main forms of conjugal liability for debt.[257] First, community property rules can make one spouse liable for the debts and liabilities of the other.[258] Second, the doctrine of necessaries and family expense statutes impose shared liability for debts onto spouses, even in separate property states.[259] And, finally, marital relationships attract special imputed liability and agency rules that transfer liability from one spouse to the other.[260]

251. *Id.* at 135.
252. *Id.* (emphasis added).
253. Rebecca Licavoli Adams, Note, *California Eviction Protections for Victims of Domestic Violence: Additional Protections or Additional Problems?*, 9 HASTINGS RACE & POVERTY L.J. 1, 4 (2012); *accord* John C. Nelson et al., *Domestic Violence in the Adult Years*, 33 J.L. MED. & ETHICS 28, 29 (2005).
254. Reilly, *supra* note 42, at 374.
255. *Id.* at 399.
256. *Id.*
257. *Id.*
258. *Id.* at 400.
259. *Id.* at 399.
260. *Id.* at 403–05.

a. Community Property

The community property system, which approximately 30 percent of Americans live under, has such a profound effect on married people's debts that it has been described as a "creditor collection device."[261] Community property rules greatly expand creditors' access to property and create conjugal liability based solely on the debtors' married status.[262] While community property is often thought of as advancing gender equality norms by recognizing that both partners typically contribute to the economic success of a marriage, community property rules can allocate debts in a manner that is less just.

For instance, if one spouse assumes a debt while married, creditors in community property states can typically seize not just the indebted spouse's property, but any community property that the non-debtor spouse acquired as well.[263] This is a "sheer windfall to creditors:" In community property states, creditors can collect from a significantly larger asset pool when an individual is married than not married.[264] Indeed, in some community property states, creditors can require a spouse to even pay the other's *premarital* debts.[265] Although very few people would be pleased to discover that, for instance, they can have their wages garnished for their spouses' premarital credit card debt, this is precisely the result that occurs in some community property states: "the *premarital* debts of one spouse can be satisfied from the entirety of the community property, including the non-debtor spouse's wages."[266] The debtor spouse's pre-marital actions thus make all community property vulnerable to a creditor's claims, thereby "essentially subsuming the other spouse's legal individuality and dissolving the non-debtor spouse's present and equal interest in community property."[267]

261. Andrea B. Carroll & Christopher K. Odinet, Commentary, *Gay Marriage and the Problem of Property*, 93 WASH. U. L. REV. 847, 855 (2016).
262. *Id.*
263. *Id.*
264. *Id.*
265. *See id.* ("Worse still, in some of these states, even the *premarital* debts of one spouse can be satisfied from the entirety of the community property . . . .").
266. *Id.*; *see* Andrea B. Carroll, *The Superior Position of the Creditor in the Community Property Regime: Has the Community Become a Mere Creditor Collection Device?*, 47 SANTA CLARA L. REV. 1, 4–9 (2007) (first citing CAL. FAM. CODE § 910(a) (West 2004 & Supp 2017); then citing LA. CIV. CODE ANN. art. 2325, 2345 (2009 & Supp 2017); and then citing Action Collection Serv., Inc. v. Seele, 69 P.3d 173 (Idaho Ct. App. 2003)) (describing the creditor-friendly approaches of California, Louisiana, and Idaho).
267. Reilly, *supra* note 42, at 393 (internal quotation marks omitted).

Community property allows a creditor to access the property of someone who may have no connection to the actual debt, only a connection to the debtor.[268] *Lezine v. Security Pacific Financial Services, Inc.*[269] provides a good example of this. In *Lezine*, unbeknownst to his wife, the husband commmited forgery and took out a $240,000 loan which he fraudulently secured with the family home.[270] The wife derived no benefit from the fraudulent loan.[271] The court, however, held that even though it "may appear inequitable in many respects," the creditor could indeed lay claim to the family home.[272]

Some community property states allow creditors to access community property only if the debt benefitted the community or was used for a community purpose.[273] While this sounds like a narrow exception, in practice, procedural rules make it difficult for spouses to save their property interests.[274] First, a spouse's debt is presumed to be a community debt, so a spouse disputing that the debt is communal has the burden of proving that it was not.[275] Further, the standard of proof is high: A clear and convincing standard applies, rather than the usual civil standard of preponderance of the evidence.[276] In addition, a notable substantive hurdle exists as well: "[C]ommunity debt states have defined the concept of community debt so broadly that 'only a slight connection with the community has been required.'"[277] *Benson v. Bush*[278] illustrates this point. There, a husband's assault of a neighbor on his front porch was found to be "in the course of or in connection with the management of the community property," and thus a community debt.[279] Likewise, in *LaFramboise v. Schmidt*,[280] a husband's sexual abuse of a six-year-old child who was being babysat was found to be "done in the course of community business" and therefore constituted a valid

268. Carroll, *supra* note 266, at 3.
269. 925 P.2d 1002 (Cal. 1996), *discussed in* Carroll, *supra* note 266, at 13.
270. *Id.* at 1004.
271. *Id.*
272. *Id.* at 1013.
273. Carroll, *supra* note 266, at 17 (quoting Erik Paul Smith, Comment, *The Uncerntainty of Community Property for the Tortious Liabilities of One of the Spouses: Where the Law Is Uncertain, There Is No Law*, 30 IDAHO L. REV. 799, 808 (1994)).
274. *Id.* at 18.
275. *Id.* at 18–19.
276. *Id.*
277. *Id.* at 19 (quoting deElche v. Jacobsen, 622 P.2d 835, 837 (Wash. 1980)).
278. 477 P.2d 929, 929 (Wash. Ct. App. 1970), *discussed in* Carroll, *supra* note 266, at 19.
279. *Id.*
280. 254 P.2d 485 (Wash. 1980), *discussed in* Carroll, *supra* note 266, at 19.

community debt.[281] Once characterized as community debts, liabilites like these, stemming from abusive and violence acts of husbands, can "result in a proper garnishment of [a] wife's wages, possibly for the remainder of her working life."[282]

Further, the community property regime contains a "stunning" general procedural benefit for creditors.[283] Most community property states "do not require the joinder of the non-debtor spouse for a creditor to enforce a judgment against the community property."[284] In other words, "the entirety of the community property of the spouses, including the non-debtor spouse's one-half interest in that community property, may be seized though the non-debtor spouse is afforded no opportunity to object or to dispute the underlying debt."[285] Remarkably, many states not only do not require joinder, they do not even require *notice* to the non-debtor spouse.[286] In at least one state, for example, "a wife's wages may be garnished for a debt incurred solely by her husband even where she was not a defendant in or given notice of the underlying action on her husband's debt."[287]

b. Doctrine of Necessaries/Family Expenses

The 70 percent of Americans not subject to community property rules are governed by separate property rules.[288] Under separate property rules, marriage has less of an impact on debt liabilities.[289] However, conjugal liability for debts can still be found in the separate property regime, most notably through the doctrine of necessaries. As of 2008, approximately sixty-five percent of all states had the doctrine, rendering it "the most economically significant source of status-based shared liability" for spouses.[290] In its original form, the doctrine provided that husbands were

281. Carroll, *supra* note 266, at 19 (quoting *LaFramboise*, 254 P.2d at 486).
282. *Id.* at 20.
283. *Id.* at 10 n.47.
284. *Id.*
285. *Id.*
286. *Id.*
287. *Id.* In fact, sometimes spouses use potential joint financial responsibility malevolently and acquire debt in order to make the other partner responsible for it. *See* Angela Littwin, *Coerced Debt: The Role of Consumer Credit in Domestic Violence*, 100 CALIF. L. REV. 951, 991 (2012).
288. *See* Carroll & Odinet, *supra* note 261, at 855.
289. *See* Carroll, *supra* note 266, at 4.
290. Reilly, *supra* note 42, at 399; *see also* Roger D. Colton, *Limiting the 'Family Necessaries' Doctrine as a Means of Imposing Third-Party Liability for Utility Bills*, 35 CLEARINGHOUSE REV. 193, 193 (2001) (describing how public utility companies use the necessaries doctrine

liable to third parties for any debts that wives incurred for "necessary goods and services."[291] Necessary goods and services has been interpreted very broadly and has provided creditors with a means of accessing a non-debtor spouse's separate property to cover questionable costs like those paid to a maid, or to an attorney appealing a spouse's drug conviction.[292] Further, the doctrine of necessaries has a particular and continuing impact in the context of medical services and utilities.[293]

Even though the gendered nature of the original doctrine of necessaries presents an obvious equal protection problem, in many jurisdictions it survived unmodified until the mid-1990s.[294] Now, most jurisdictions have transformed it into a gender-neutral family expense statute that imposes liability on both spouses for expenses incurred by one.[295] As the New Jersey Supreme Court noted, however, this fix itself presents a significant problem. The court viewed the extension of liability to both spouses as "equality with a vengeance":

> The rule would result in the immediate exposure of the property of one spouse for a debt incurred by the other spouse. A creditor would receive the same benefits as if both spouses had agreed to joint liability. Neither equity nor reality justified imposing unqualified liability on one spouse for the debts of the other . . . .[296]

Although the New Jersey Supreme Court objected to this form of conjugal liability, other courts have upheld family expense laws on the basis

as a creditor's device on low-income households); Hasday, *supra* note 37, at 838 (noting that thirty-three common law states had the doctrine of necessaries in 2004).

291. Mark S. Brennan, Comment, *The New Doctrine of Necessaries in Virginia*, 19 U. RICH. L. REV. 317, 317 (1985).

292. Carroll, *supra* note 266, at 22.

293. In the medical services context, hospitals often seek "to trap an unwilling spouse into making payment on a debt for which he or she did not contract." Shawn M. Willson, Comment, *Abrogating the Doctrine of Necessaries in Florida: The Future of Spousal Liability for Necessary Expenses After* Connor v. Southwest Florida Regional Medical Center Inc., 24 FLA. ST. U. L. REV. 1031, 1043 (1997). In the utility context, low-income families may unfortunately discover that utility services will often try to claim that "one separated spouse is responsible for the bills of the other spouse under a state's 'family necessaries' doctrine." Colton, *supra* note 290, at 193.

294. In Florida, for instance, "[a]s late as December 1995, a husband remained liable for the necessaries incurred by his wife." Willson, *supra* note 293, at 1032. This doctrine has been "judicially overturned in some jurisdictions," but "family necessaries statutes have survived constitutional challenge in other states." Colton, *supra* note 290, at 193.

295. Hasday, *supra* note 37, at 847.

296. Jersey Shore Med. Ctr.-Fitkin Hosp. v. Estate of Baum, 417 A.2d 1003, 1009 (N.J. 1980).

that they honor the shared nature of marriage.[297] One court argued that the doctrine merely acknowledged the "shared wealth, expenses, duties, and rights" that it believed was inherent in marriage, and thus imposed joint and several liability for the debt at issue.[298]

Other courts believe that although principles of partnership can be justifiably imposed when addressing the issues that arise upon the dissolution of marriage, such principles have less relevance for intact marriages.[299] This is because the partnership theory is a one-size-fits-all approach: It acts as though marriage by definition unites two individuals into "one financial entity," when in reality, many couple marry without wholly combining their finances.[300] The Mississippi Supreme Court acknowledged this problem when it was asked to address the doctrine of necessaries.[301] The court refused to uphold it, instead finding that the legislative and judicial branches of government should not be forcing their own view of how marital couples should structure their finances upon others.[302] And, indeed, couples do in fact structure their finances in diverse ways: As many as 42 percent of couples use "a mixture of joint and separate bank accounts" to manage their money.[303] The court ultimately concluded: "Nothing in our jurisprudence obligates one spouse to be liable to a third party for the debts of the other without express consent," and found that "[t]o hold otherwise would violate . . . the Mississippi Constitution" and have the negative affect of allowing one spouse "to control or deplete" the separate estate of the other spouse.[304]

c. Marital Agency and Imputed Liability

For liabilities that cannot be characterized as family necessaries or expenses, agency law can function as another form of conjugal liability.[305]

297. *See* Colton, *supra* note 290, at 200 n.45.
298. Willson, *supra* note 293, at 1041.
299. *Id.* at 1040.
300. *Id.* at 1046–47.
301. *See* Govan v. Med. Credit Servs., Inc., 621 So. 2d 928 (Miss. 1993).
302. Willson, *supra* note 293, at 1051.
303. Carter, *supra* note 43, at 871.
304. *Govan*, 621 So. 2d at 931.
305. Marie T. Reilly, *You and Me Against the World: Marriage and Divorce from Creditors' Perspective*, *in* RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF FAMILY DISSOLUTION 195, 201 (Robin Fretwell Wilson ed., 2006).

"[S]pouses are not presumptively agents for each other,"[306] but if a creditor can successfully show an agency relationship between the spouses, either through actual agency, apparent authority, or agency by estoppel or ratification,[307] the creditor can access the other spouse's property to satisfy its claim.[308] Such an expansion of the available asset pool is particularly important where the debtor is insolvent.[309]

Although the marital relationship is not technically tantamount to an agency relationship,[310] marriage is used as an important analytical piece when there is an agency inquiry involving a married couple. So while proof of marriage is not proof of an intent of shared "ownership, control, and risk of all property interests held by either of them as partners," marriage "certainly matters," and courts will consider the marital financial arrangements and habits when inquiring into a possible agency relationship.[311] When so doing, norms regarding marital behavior and socially valued conjugal conduct will color how courts legally characterize behaviors in determinations of imputed liability and agency.[312] For example, one court found that the fact that a couple co-owned property and shared business profits did not demonstrate a partnership, "because those arrangements are common in marriages."[313] On the other hand, in another case, *Cockerham v. Cockerham*,[314] a court held that similar arrangements did evince an agency relationship. There, a husband was liable for the debt his wife had used to fund her dress company because he had "invested in the business and the couple filed a joint tax return claiming deductions for its losses."[315] In fact, spousal agency cases "reveal no clear line" by which to determine when conjugal liability under agency principles exists or when it does not.[316] Instead, distinguishing "ordinary marital sharing" from the kind of sharing that attracts joint liability under an agency theory depends upon

306. *Id.* at 202. Botticello v. Stefanovicz, 411 A.2d 16, 19 (Conn. 1979) ("Marital status cannot in and of itself prove the agency relationship.").
307. Reilly, *supra* note 42, at 404–05.
308. Reilly, *supra* note 305, at 202.
309. *See id.*
310. Reilly, *supra* note 42, at 406.
311. *Id.* (emphasis omitted).
312. *Id.* at 415.
313. Barmes v. IRS, 116 F. Supp. 2d 1007, 1013 (S.D. Ind. 2007).
314. 527 S.W. 2d 162 (Tex. 1975).
315. *See* Reilly, *supra* note 305, at 201 (citing *Cockerham*, 527 S.W. 2d 162). Some courts also find spousal agency on the grounds that a non-debtor spouse has "simply enjoyed the benefits of the business for which the loan was incurred." *Id.*
316. Reilly, *supra* note 42, at 407.

an unknown and "unspoken norm of socially desirable marital behavior."[317] As with community property principles and the family expense statutes, though, many spouses will find that conjugal liability in the creditor's remedies context operates to make them liable for their partner's debt.

2. Bankruptcy

Conjugal liability also exists in bankruptcy law. Over a million people file for bankruptcy each year, and almost two-thirds of them are married.[318] Their marital status subjects them to unique rule applications and liabilities that their unmarried counterparts do not face. As scholar Robert B. Chapman has cogently argued, judicial treatment of both joint and separate filings use the idea of married couples as a single economic unit to spread liability between them.[319]

Some of these indeterminate and conflicting rules relate to the filing of a joint case.[320] Despite the fact that a joint case involves two separate individuals, "[c]ourts routinely analyze joint cases, both procedurally and substantively, as if they involve only a single debtor."[321] Courts do so not as the result of a carefully reasoned application of theory or facts, but rather as a reflexive and unexamined routine practice.[322] Federal courts have frequently re-employed the old marital unity doctrine to treat two married individuals "as a single economic unit or legal entity," and impose conjugal liability on spouses for the debts of their partners.[323]

Even cases that are not filed jointly, but still involve married individuals, may be treated as though only one economic unit is at issue. Every year, "hundreds of thousands" of separately filing married debtors nevertheless find their cases consolidated with those concerning their spouses' estates.[324] The bankrupt spouse and his or her partner are treated "as one economic person for purposes of income, expenses, assets, and liabilities," rendering the income of the non-debtor spouse subject to the

317. *Id.*
318. Chapman, *supra* note 49, at 133–34.
319. *Id.*
320. Married couples can file joint cases, but "[n]o other relationship gives rise" to this right. *Id.* at 137. "Blood relatives and unmarried, cohabitating couples often file joint petitions, only to be rebuffed by the courts." *Id.*
321. *Id.* at 106.
322. *Id.* at 110.
323. *Id.* at 106.
324. *Id.* at 135.

debtor spouse's liabilities.[325] In the current economic climate and in the bankruptcy context, earning power is typically a consumer debtor's and a spouse's most valuable asset, and bankruptcy courts "routinely treat the income of spouses as jointly earned, owned and available to creditors of each."[326] Under Chapter 7 bankruptcy, a non-debtor spouse's income is sometimes considered in the overall pot, and that spouse's income can be subject to "garnishment as a means of settling [the other spouse's] debt."[327] When courts do this, non-debtor spouses lose their ability to spend their income as they wish and are instead required to financially support their indebted spouse. Any private financial arrangement that a couple may have made in their marriage is overridden, and the non-debtor spouse becomes conjugally liable for the other's insolvency and its underlying breaches of contract or other legal wrongs.[328]

Consolidating marital cases and treating one spouse's income as automatically available to the other directly contradicts the default principle animating the Code that each individual, married or not, has a separate estate, and that "claims and interests must be determined on an individual basis."[329] It also flies in the face of the principle that substantive consolidation is supposed to be an "extraordinary remedy" that should be

325. *Id.* at 106.

326. *Id.*

327. Amy Quan, *Legal Effects When Only One Spouse Files for Bankruptcy*, LEGALMATCH (June 27, 2014, 2:59 PM), http://www.legalmatch.com/law-library/article/legal-effects-when-only-one-spouse-files-for-bankruptcy.html [https://perma.cc/6M8U-JBSA].

328. These include ascertaining:

> [W]hether the debtor has filed a substantially abusive chapter 7 petition; whether student loans are dischargeable because of "undue hardship" or unconscionability; whether credit card debt was incurred fraudulently by the debtor-spouse; whether the debtor has the ability to pay a marital property settlement and whether the harm to the payee of discharging a property settlement outweighs the harm to the debtor of not discharging it; and whether the debtor has committed all of his or her disposable income to a chapter 13 plan and has proposed the plan in good faith.

Chapman, *supra* note 49, at 115–16 (footnotes omitted).

329. *Id.* at 111. It also may conflict with state law. Most jurisdictions follow a whoever-earned-it-owns-it rule. *Id.* at 120. This term was coined by Joan Williams in the mid-1990s. *See* Joan Williams, *Is Coverture Dead? Beyond a New Theory of Alimony*, 82 GEO. L.J. 2227, 2250 (1994) (decsribing the term in the context of ownership allocation in the nineteenth century). Under state bankruptcy claims, the rule functions similarly: "State domestic relations law generally neither vests a spouse with any property rights in the other's separate property nor provides a remedy or process to permit one spouse to access the other spouse's income. Failure to share is remediable only through dissolution of the marriage." Chapman, *supra* note 49, at 120 (footnotes omitted).

applied only "sparingly."[330] Chapman's survey of marital bankruptcy cases reveals that courts virtually always fail to apply the test for substantive consolidation[331] and instead "routinely aggregate" married individual's income and expenses without regard to the usual requirements for consolidatio, nor to the economic tests that usually determine whether or not a single enterprise exists.[332]

The ultimate effect of this consolidation regime, which imposes a particular view about financial obligations within a marriage, is "an unstudied, intuitive, and diverse set of federal requirements for proper domestic behavior by the 'honest but unfortunate' debtor and the debtor's family."[333] This bankruptcy-court-imposed version of family law "applies only to the middle class and working poor individuals who seek relief in bankruptcy,"[334] and involves federal courts imposing a "prevailing characterization of marriage . . . which includes expectations of income sharing as conditions to relief" that is rooted in "constructions of marital unity, privacy, and domesticity that have direct links to the law of coverture."[335] An antiquated "nineteenth century conception of the family" and its attendant conjugal liability is thereby revived in the bankruptcy courts.[336]

3. Taxes

Tax law also contains conjugal liability in relation to its joint marital filings. Married couples have the option of jointly filing tax returns and the vast majority do so: In 2014, for example, approximately 95 percent of married couples filed jointly.[337] Joint filing attracts such a high number of participants because it typically provides for more advantageous tax brackets,

330. Chapman, *supra* note 49, at 160.
331. *Id.* at 118.
332. *Id.* at 219.
333. *Id.* at 119.
334. *Id.*
335. *Id.* at 220.
336. *Id.* at 219.
337. In 2014, the IRS received 2,949,371 returns from married persons filing separately and 53,924,864 from married persons filing jointly. *SOI Tax Stats – Individual Statistical Tables by Filing Status*, IRS, https*://www.irs.gov/uac/soi-tax-stats-individual-statistical-tables-by-filing-status* [https://perma.cc/C63M-YB8J].

allows for some special tax credits, and is administratively convenient, among other benefits.[338]

However, filing jointly comes with a significant downside. When married couples file joint returns, each spouse is jointly and severally liable for any tax deficiency found.[339] One author offers the following demonstration of how this works: imagine a wife who earned $70,000 and had $11,000 already withheld from her wages with a husband who earned $400,000 but had not yet paid any tax. If they file separately, the wife's tax obligation is already satisfied, and she owes nothing. If, however, they file jointly, the wife will become jointly and severally liable for a tax bill of over $100,000.[340]

The usual rule is that an individual who is married, like one who is not, "should be liable for taxes relating to his or her own activities and investments, and not those of any other person."[341] However, joint filing departs from that, on the basis of the marital unity doctrine.[342] The marital unity doctrine creates the fiction that "a married couple is a single economic unit and, thus, a single taxpaying unit."[343] So, the story goes, each spouse is responsible for the unit, and "should be liable for the entire tax relating to a joint return."[344]

The "single economic unit" rhetoric obscures that reality that behind a tax return, there are two individuals who may share finances completely, a little bit, or virtually not at all. In fact, many couples do not combine or share their whole incomes,[345] and although one spouse "may

338. Stephanie Hunter McMahon, *An Empirical Study of Innocent Spouse Relief: Do Courts Implement Congress's Legislative Intent*, 12 FLA. TAX REV. 629, 635 (2012). *But see* EDWARD J. MCCAFFERY, TAXING WOMEN 277–79 (1997). McCaffery argues that joint returns have a deleterious impact on women's participation in wage labor markets, and thus advocates separate filings as a form of gender equity. *Id.*

339. *See* 26 U.S.C. § 6013(d)(3) (2012); Lily Kahng, *Innocent Spouses: A Critique of the New Tax Laws Governing Joint and Several Tax Liability*, 49 VILL. L. REV. 261, 263 (2004).

340. Stephen J. Dunn, *Joint Tax Return Problematic for Innocent Spouse*, FORBES, (Apr. 6, 2011, 2:34 PM), http://www.forbes.com/sites/stephendunn/2011/04/06/joint-tax-return-problematic-for-innocent-spouse/#4bbd06eb66f5 (noting also that there is a benefit of joint filing, though, in the forms of tax savings, which in the example above would be approximately $5000).

341. Kahng, *supra* note 339, at 274.

342. *Id.*

343. *Id.* at 271.

344. *Id.*

345. *Id.* at 282 n.121 (citing Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 105–06 (1993)).

nominally have some control by reason of jointly owned assets," he or she "is not likely to have actual control over amounts earned by the taxpayer."[346]

Any understatement on a joint tax filing boils down to two possibilities: Either the understatement arises from the relief-seeking spouse's activities, or it arises from the activities of the other member of the married couple.[347] If it is the former, the spouse is obviously liable.[348] But, if it the latter, the spouse is also still liable, unless she can satisfy the elements of the innocent spouse defense.

Like the innocent owner defense in forfeiture law, the innocent spouse defense in tax law provides relief from conjugal liability in tax if a spouse can meet certain criteria.[349] The understatement must relate to the other spouse, the innocent spouse must have had neither actual knowledge nor "reason to know" about the understatement, and, in light of all the circumstances, it must be inequitable to make the spouse liable for the deficiency.[350] While this defense provides relief to some spouses, the default position of joint liability remains problematic. In 2005, the National Taxpayer Advocate noted that approximately two-thirds of innocent spouse applicants earned under $30,000 per annum, suggesting that the financial sophistication of relief-seekers may be an issue.[351] Joint liability requires that spouses serve as auditors, a role that is not only technically difficult, but is also "wildly incongruent with the love, intimacy and trust usually associated with the marital relationship."[352]

Even when spouses do not file jointly, non-debtor spouses can still face conjugal liability for the tax debt of a debtor-spouse. First, if the couple owns property in tenancy by the entirety, the property can be subject to a "federal tax lien resulting from the tax liability of one spouse only."[353] In *United States v. Craft*,[354] a husband neglected his federal income tax filings

346. *Id.* at 286.
347. *Id.* at 283.
348. *Id.*
349. *See* 26 U.S.C. § 6015 (2012).
350. *See id.* § 6015(b); Khang, *supra* note 339, at 264–65.
351. 1 TAXPAYER ADVOCATE SERV., IRS, NATIONAL TAXPAYER ADVOCATE'S 2005 ANNUAL REPORT TO CONGRESS §1, at 328 (2005), https://www.irs.gov/pub/tas/section_1.pdf [https://perma.cc/J8V3-QY5K]; *see also* McMahon, *supra* note 338, at 687.
352. Khang, *supra* note 339, at 286.
353. Dagan, *supra* note 54, at 1520. Twenty-one states have this form of ownership. *Id.* at 1524.
354. 535 U.S. 274 (2002).

for seven years, resulting in a tax liability of almost half a million dollars.[355] The Supreme Court held that a lien could attach to the husband's interest in a house held in tenancy by the entirety, a form of ownership rooted in the idea of a married couple as a single economic unit, in which the married couple is understood to hold property as a single entity with neither spouse receiving individual control or rights to alienate it.[356] Justice Scalia noted that allowing such a lien would have distinct consequences for those in traditional, nuclear relationships: It would essentially nullify "(insofar as federal taxes are concerned, at least) a form of property ownership that was of particular benefit to the stay-at-home spouse or mother."[357] Since the stay-at-home spouse "is overwhelmingly likely to be the survivor that obtains title to the unencumbered property," and also "overwhelmingly *unlikely* to be the source of the individual indebtedness against which a tenancy by the entirety protects," she would bear the brunt of the lien.[358]

Second, a homestead right for widowed spouses also serves as a way for non-debtor spouses to be held liable for the tax debts of their spouses. Legal scholar Michael Cook points to the patent unfairness of allowing the IRS to access property in this way. He notes: "No governmental collection action could possibly have a louder ring of unfairness than the threat of losing a home because of the tax liability of another party."[359] But the state has a fairly clear right to do just this: "[W]here the survivor's homestead right is a property right under state law, the IRS can take that property right to satisfy the non-owner/taxpayer's debt to the U.S."[360]

Cook explains how this works with the following illustrative scenario:

> Husband (H) is 50 and wife (W) is 40. They live in a community property state that has a spousal survivorship rights in a homestead. The home they live in is W's separate property that

355. *Id.* See generally Dagan, *supra* note 54, at 1520, for a discussion of *Craft*. Interestingly, one scholar argues that "[o]ne circumstance seemingly analogous to *Craft* is the possible attachment of federal drug-forfeiture laws to property held in tenancy by the entirety." John W. Leardi, Comment, *Reflections on* United States v. Craft*: Justifying a New Federal Common Law of Property?*, 34 SETON HALL. L. REV. 1353, 1355–56 (2004) (discussing how the Eleventh Circuit held that property held in tenancy by the entirety was not subject to forfeiture, but the Third Circuit held that it is).

356. *Craft*, 535 U.S. at 288–89.

357. *Id.* at 289–90 (Scalia, J., dissenting).

358. *Id.* at 290 (emphasis added).

359. Michael L. Cook, *Home Sweet Home: Protecting the Interest of the Non-Liable Spouse From IRS Seizure and Sale*, 109 J. TAX'N 38, 38 (2008).

360. *Id.*; *see also* United States v. Rodgers, 461 U.S. 677 (1983).

> she acquired by inheritance prior to their marriage. The home is valued at $400,000 and is not subject to any debt.
>
> Unknown to both W and H at the time of their marriage, H had potential exposure for penalties for failure to pay payroll taxes. H and W signed a premarital agreement, which among other things acknowledged that the home was W's separate property. The agreement, however, did not provide for a waiver or abandonment of H's survivorship rights.
>
> After the IRS assessed a Section 6672 penalty against H, the Service filed a nominee lien on the home that, in essence, said W is holding title to property rights (the survivorship right) owned by H. Unless W pays the IRS for a release of the lien, the Service will attempt to foreclose, sell the home, and extract from the proceeds an amount equal to H's survivorship rights and apply it to his liability, with any balance going to W.[361]

In the above scenario, the net effect is that the wife loses her home, the home that was her separate property from an inheritance prior to the marriage, and to which both spouses agreed would be her separate property. Here, the tax liability of a debtor spouse, which the non-debtor spouse in no way participated in and in no way benefited from, nevertheless becomes a major burden on the non-debtor spouse.[362]

III. CONJUGAL LIABILITY'S PURPOSES, PROBLEMS, AND POTENTIAL REMEDIES

This Part sets out the laudable goals that conjugal liability is meant to achieve, and the functional reasons why conjugal liability is thought to achieve them. It then describes three major concerns conjugal liability raises, and why these concerns outweigh any potential benefit. The Part concludes with a range of prescriptive suggestions to curb the use of conjugal liability and more carefully calibrate it to conform with general principles of secondary liability.

A. The Case for Conjugal Liability

Conjugal liability is meant to achieve a number of desirable social goals. One such goal is the safety of third parties. The idea behind spousal civil

361. Cook, *supra* note 359, at 39.
362. *See id.*

liability for partners who sexually abuse children or violently assault other adults is that such liability will help keep third parties safe. It could encourage non-offending spouses to monitor, police, and prevent their spouse's wrongful behavior, or take other "reasonable steps" to ward against the wrongdoing. Particularly in the context of child sexual abuse, some courts believe that "when harm to an innocent victim is threatened," the significant societal interest in maintaining marriages "must yield."[363] Courts also argue that imposing a spousal duty in this context is consistent with other imposed duties, like, for example, that found in the premises liability case of *Jobe v. Smith*.[364] In *Jobe v. Smith*, a refrigerator repairman brought suit against a female plaintiff after her ex-boyfriend violently assaulted him at her home.[365] The court held that the plaintiff was a business visitor "entitled to warnings about hidden perils on the premises", and that there was "no reason to say that there is a duty to warn about a freshly waxed and slippery kitchen floor, but not about a homicidal maniac in the back bedroom."[366] From this perspective, the "social utility" of imposing a duty to

363. Beh, *Duty to Warn*, supra note 63, at 64. As Beh notes, "the struggle between the moral obligation to prevent harm, and the law's reluctance to find new legal duties, can sharply divide a court." *Id.* at 73.

The 2014 case of *Roe v. Bibby*, 763 S.E.2d 645 (S.C. Ct. App. 2014), *cert. dismissed as improvidently granted*, S.C., Aug. 10, 2016, evidences such a division. In *Bibby*, the majority of the South Carolina appellate court demonstrated extraordinary deference to the importance of maintaining a zone of privacy around spousal relationships. *See id.* The court found that a wife whose husband molested their neighbor's daughters could not be held liable, despite the fact that the husband had been convicted approximately a dozen years earlier for molesting his own daughter. *Id.* at 651. The court found that because the wife "did not have the ability to monitor, supervise, or control" husband there was no special relationship between the spouses, and because they wife was "a lay person untrained in the recidivism of pedophilia," her belief that her husband was "cured" following his "release from treatment" for the past offense rendered the latest molestation unforeseeable. *Id.* at 649, 651. Exemplifying the contentious nature of expanding liability to non-offending spouses, the *Roe v. Bibby* court was not unanimous. *See id.* at 651 (Williams, J., dissenting). A strong dissent found that the special relationship exception and premises liability dictated that a homeowner does have "a duty to warn minor children of potential sexual abuse." *Id.* According to the dissent, the wife's "act of voluntarily inviting minor Appellants into her home while knowing of Husband's prior sexual abuse and continuing sexually deviant propensities" would be "sufficient to impose a duty in this instance," *id.* at 652, and a homeowner should be required "to take reasonable measures to protect children invited into his or her home from potential sexual assault when the homeowner knows or should know of the assailant's propensities." *Id.* at 652–53.

364. 764 P.2d 771 (Ariz. Ct. App. 1988).

365. *Id.* at 771.

366. *Id.*

warn or otherwise protect third parties is judged to be worth any disruption to the marital relationship and any cost to the non-offending defendant.[367]

A similar concern animates terminating the employment of women with violent partners: The terminations are meant to reduce the possibility that the violence will come to the workplace and threaten the safety of other individuals. On this view, while the negative consequence to the female worker is regrettable, reducing the risk that other innocent parties will be collaterally harmed is deemed to be of overriding concern.

Conjugal liability in the form of criminal convictions, property forfeitures, and rental housing evictions is also aimed at a laudable goal: deterring drug activity and other criminality. The turn to spouses as a form of social control is likely connected to the fact that a current dominant trend in crime prevention "focuses on social relations as sources of crime management,"[368] and spouses and intimate partners are perceived as well-positioned for such management. It is thought that by putting negative criminal consequences in play, spouses and those in spouse-like relationships will do their utmost to surveil, monitor, and police their partners' behavior. Further, in the criminal context, the possibility of conviction is thought to incentivize spouses to divulge any information they have about their partners and their wrongdoing, and thereby assist law enforcement in their project of crime-reduction.

In debt, bankruptcy, and tax law, conjugal liability ensures that creditors have access to all possible assets, and that one spouse cannot use the other to shield such assets from legitimate claims to them. Conjugal liability also furthers the neoliberal project of privatizing dependency, and protecting against any potential cost to the state that could instead be transferred to a spouse. On this view, "it makes good sense—and good public policy—to encourage each adult member to assume financial responsibility for the entire family unit, to foster stability and to ensure that no adult becomes a drain on tax payers."[369]

In general, conjugal liability is meant to harness the potential of one spouse to serve as a source of discipline for the other.[370] It targets intimate partners of wrongdoers "because they are in an advantageous position to

367. Beh, *Duty to Warn*, *supra* note 63, at 65.
368. Sharyn L. Roach Anleu, *The Role of Civil Sanctions in Social Control: A Socio-Legal Examination*, *in* CIVIL REMEDIES AND CRIME PREVENTION 21, 21 (Lorraine Mazerolle & Jan Roehl eds., 1998).
369. Klein, *supra* note 8, at 469.
370. Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 27–28 (2012) (describing Michele Foucault's theory that the family is a source of discipline).

identify, monitor, and control responsible individuals, and can be motivated by the threat of sanctions to do so."[371] But targeting spouses and intimate partners threatens core values of equality, privacy, liberty, and association. Although preventing harms to third parties, deterring criminality, and ensuring functioning credit markets are all worthwhile goals, conjugal liability is a deeply problematic means of attempting to accomplish them.

B. The Concerns

Conjugal liability raises three main concerns. First, as many of the examples in the taxonomy demonstrate, conjugal liability has gendered consequences. In operation, it tends to spread liability from men to women, making wives and girlfriends experience a punitive fallout from the wrongful acts of their male intimate partners. Moreover, it often places the very difficult burden of attempting to control a partner onto particularly vulnerable women.[372] Second, conjugal liability is, in some instances, a form of guilt by association. Third, conjugal liability offends the constitutional right to freedom of association, not only because of its gendered and guilt-by-association aspect, but also because it implicates the constitutionally guaranteed privacy and liberty interests in "maintain[ing] certain intimate human relationships."[373] Specifically, conjugal liability dictates when individuals should enter relationships, how they should behave once they are in them, and under what circumstances they should exit. It sets behavioral standards for what good spouses and partners must do and punishes those who fail to meet this bar, thereby rendering an individual's right to enter, maintain, and exit intimate relationships illusory.

1. Gendered Consequences

In operation, conjugal liability is profoundly gendered. It tends to hold wives and women legally responsible for the wrongful acts of their husbands and male intimate partners, rather than the other way around. This gendered pattern appears in part because of the sociological reality that men tend to engage in criminological behaviors more than women (meaning they commit sexual harms, engage in violent acts, and perform drug-trafficking activities more often than women), and in part because of cultural or

371. Levinson, *supra* note 10, at 348.
372. *See supra* Part II.B.
373. Roberts v. U. S. Jaycees, 468 U.S. 609, 617 (1984).

sociological beliefs about appropriate gender roles.[374] Further, although at first glance it may look like a series of facially neutral legal doctrines and practices, in the aggregate, conjugal liability does the normative work of establishing good wifely behavior—namely, that good wives should control their husbands and prevent their wrongdoing—through penalizing women, financially, socially, and psychologically, for the actions of their wrongdoing partners.

There is a long-running cultural tradition of assigning to wives and women the role of "moral compass" for potentially wayward men.[375] For instance, writings from the nineteenth century evidenced the belief that "female virtue buttressed by piety [could] keep the dangerous actions of men in check," and "the influence of the virtuous female is needed to counteract . . . the sexual licentiousness and viciousness of men, a clear threat to the fortunes of social order."[376] Along with the gender stereotypes evident in these writings, legal history contains many examples of blaming women for men's criminality,[377] most notably in regards to the wrongs that men do directly to them.[378] This is most obvious in the context of sexual assault, where "to some extent criminal justice officials (and others) have always considered female victims of sexual assault and rape as responsible for failing to minimize the opportunities for the offense."[379] But legal doctrines like the traditional provocation defense often blamed adulterous women for

374. This phenomenon is known as the "gender crime gap." Jessica Abrahams, *Are Men Natural Born Criminals? The Prison Numbers Don't Lie*, TELEGRAPH (Jan. 13, 2015, 1:00 PM), http://www.telegraph.co.uk/women/womens-life/11342408/Are-men-natural-born-criminals-Prison-numbers-dont-lie.html; *see also* Jessie L. Krienert, *Masculinity and Crime: A Quantitative Exploration of Messerschmidt's Hypothesis*, ELEC. J. SOC. (2003), https://www.sociology.org/content/vol7.2/01_krienert.html [https://perma.cc/6PGS-ZGAC]. According to the Uniform Crime Report in 2000: "The male gender accounted for 73.6 percent of Crime Index arrestees, 82.6 percent of those arrested for violent crimes, and 70.1 percent of property crime arrestees." FBI, CRIME IN THE UNITED STATES 2000: UNIFORM CRIME REPORTS 216 (2001), https://ucr.fbi.gov/crime-in-the-u.s/2000/00sec4.pdf [https://perma.cc/7Q6Q-S665]. Also, see *supra* Part I.A and I.B for statistics on male perpetration of sexual abuse and drug trafficking.

375. Jane E. Rose, *Conduct Books for Women, 1830–1860: A Rationale for Women's Conduct and Domestic Role in America*, *in* NINETEENTH-CENTURY WOMEN LEARN TO WRITE 37, 46, 50 (Catherine Hobbs ed., 1995).

376. *Id.* at 46.

377. For instance, women and girls who engage in prostitution are routinely charged and convicted, while the men who frequent them are only rarely punished. Cynthia Godsoe, *Punishment as Protection*, 52 HOUS. L. REV. 1313, 1317 (2015).

378. Caroline Forell, *Gender Equality, Social Values and Provocation Law in the United States, Canada, and Australia*, 14 AM. U. J. GENDER, SOC. POL'Y & L. 27, 31 (2006) (describing the common law provocation defense being used by "men defending their honor").

379. Anleu, *supra* note 368, at 31.

the violent or homicidal acts of their husbands inflicted on third parties, as well.[380]

Conjugal liability's participation in these traditions of gendered blame is especially troubling, because the women tasked with controlling their spouses are often particularly vulnerable. The conjugal liability forms applied to domestic violence victims, for example, compound the difficulties abused women must overcome to restart their lives if they have left such violence, and add to their misfortune if they have not.[381] Further, criminal conjugal liability and evictions most affect low-income women of color,[382] perpetuating and exacerbating the cycles of incarceration, poverty, and insecurity that already disproportionately burden these populations.[383]

2. Guilt by Association

Penalizing intimate partners for their relational connection to each other, rather than for their own culpable conduct, amounts to guilt by association. When a spouse faces consequences like eviction, employment termination, forfeiture, criminal liability, tortious liability, and financial liability for the wrongful actions of a partner, and not for their own wrongdoing, the "guilt" flows not from personal culpability, but from the intimate relationship. This is the very definition of guilt by association.

One way of understanding guilt by association is as an "umbrella concept" that incorporates two separate forms of penalization.[384] First, it includes "vicarious punishment," under which A is punished for acts that B commits.[385] Second, it encompasses "criminalized association," under which A is punished not for B's conduct, but simply for A's association with B.[386] Both aspects are implicated in conjugal liability: In some instances, one spouse is punished because of the wrongful acts of her partner; in others, one spouse is punished because she has chosen to be in an intimate association with a wrongdoer. This kind of liability, which "permits persons

380. *See* Forell, *supra* note 378, at 31.
381. *See supra* note 129 and accompanying text.
382. *See supra* Part II.B.
383. *See* MATTHEW DESMOND, EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY (2016); Austin, *supra* note 236.
384. Robert M. Chesney, *Civil Liberties and the Terrorism Prevention Paradigm: The Guilt by Association Critique*, 101 MICH. L. REV. 1408, 1434 (2003).
385. *Id.*
386. *Id.*

to be convicted for nothing more than failing to prevent, repudiate, report, or disassociate themselves" from a wrongdoer is deeply troubling.[387]

By any modern measure, guilt by association is "fundamentally unfair,"[388] and "we ordinarily recoil at the notion."[389] The U.S. Constitution acknowledges this through the right to association.[390] Prohibiting guilt by association has been described as "a central feature of the right of association," "the doctrine's bedrock principle," "a central tenet of the right," and its "cornerstone."[391] An insistence on the principle of individual guilt or culpability was particularly important during the McCarthy era, "when thousands of Americans were targeted, investigated, blacklisted, harassed, and driven from public employment or office on charges that they were members of or fellow travelers with the Community Party."[392] The Supreme Court developed jurisprudence that prohibited guilt by association, including the doctrine of specific intent developed in *Scales v. United States*,[393] which held that an individual can only be punished for her membership in a group that engages in legal and illegal behaviors if she specifically intended to further the group's illegal purposes.[394] In essence, the Court held that the right to association included the principle that "individuals should not be sanctioned," criminally or civilly, "for the bad acts of others, but only for their own bad acts."[395]

3. Constitutional Right to Intimate Association

In addition to the potential constitutional implications of the use of guilt by association, and the gendered allocations of responsibility, conjugal liability arguably infringes upon the constitutional right to freedom of association in another way: It infringes upon the right to create and maintain intimate relationships. The constitutional right to intimate

387. Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 496 n.162 (1985).
388. David Cole, *Hanging With the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 SUP. CT. REV. 203, 217.
389. Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 319 (1996).
390. Like "privacy and state sovereign immunity," the right to association is "one of the most potentially capacious and least textually based [Constitutional] rights." Cole, *supra* note 388, at 203; *see* text accompanying *infra* note 398.
391. Cole, *supra* note 388, at 206, 211, 215, 219.
392. *Id.* at 216.
393. 367 U.S. 203 (1961).
394. Cole, *supra* note 388, at 216.
395. *Id.* at 219.

association is not explicitly articulated in the Constitution; rather, it has arisen through an alchemy of various rights and penumbras.[396] Like the right to privacy "which overlaps significantly with associational rights, the Court has relied upon multiple constitutional sources and justifications to ground its protection of the right to associate."[397] The most prominent sources for the right to intimate association are the "due process concepts of the Fourteenth Amendment and the principles of liberty and privacy found in the Bill of Rights," including those expressed in the First Amendment.[398]

Like its somewhat amorphous origins, the exact contours of the intimate association right are undefined. Often, the purpose and parameters of the right vary according to context and the type of association at issue. As a result, while a right exists, it remains "poorly understood and inconsistently recognized."[399]

At the very least, though, it is clear that a right to intimate association protects relationships like "marriage . . . and cohabitation with one's relatives."[400] Marriage, of course, is our most revered intimate association. It is of "transcendent importance;" a sacred institution which has always

396. *See* Kenneth L. Karst, *The Freedom of Intimate Association*, 89 YALE L.J. 624, 624–25 (1980).

397. Rigel C. Oliveri, *Single-Family Zoning, Intimate Association, and the Right to Choose Household Companions*, 67 FLA. L. REV. 1401, 1418 (2015).

398. City of Bremerton v. Widell, 51 P.3d 733, 740 (Wash. 2002). As Nancy Catherine Marcus notes of the seminal *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617 (1984), case: "After initially introducing intimate association in both First and Fourteenth Amendment terms, the Court in Roberts framed its intimate association analysis largely in terms of the freedom of association's Fourteenth Amendment liberty component." Nancy Catherine Marcus, *The Freedom of Intimate Association in the Twenty First Century*, 16 GEO. MASON U. CIV. RTS. L.J. 269, 277 (2006). The decision "has consequently been criticized by some as being unclear about the specific constitutional sources of the intimate association rights it described." *Id.* Marcus, though, posits that the Court "may have deliberately chosen not to limit intimate association to one particular constitutional source, but rather embraced freedom of intimate association's multifaceted nature." *Id.*

In the context of intimate association wrongs, an additional constitutional provision is also arguably relevant. Article III, Section 3 of the Constitution expresses a distaste for punishing family members for the acts of one another through its prohibition on "corruption of blood." *See* U.S. CONST. art. III, § 3. It provides that "no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted." *Id.* "Corruption of blood, which the colonies inherited from English common law, stripped the descendants of anyone convicted of a felony of their right to inherit the felon's estate, any noble title, or any other 'hereditament.'" Henry T. Greely et al., *Family Ties: The Use of DNA Offender Databases to Catch Offenders' Kin*, 34 J.L. MED. & ETHICS 248, 257 (2006). In this clause, then, the idea that one can be responsible for a family member's wrongful actions based on nothing except the familial relation is expressly rejected. Article I, Section 9 also prohibits bills of attainder. *Id.*

399. Oliveri, *supra* note 397, at 1418.

400. Roberts v. U.S. Jaycees, 468 U.S. 609, 619 (1984).

"promised nobility and dignity to all persons, without regard to their station in life" and is "essential to our most profound hopes and aspirations."[401] It is central "to the human condition."[402]

Non-marital intimate relationships generally do not culturally or legally rise to the level of marital ones, but some courts have recognized that they, too, are deserving of a great deal of protection.[403] In particular, relationships that look a lot like marriage can attract Constitutional protection. For example, in *Matusick v. Erie County Water Authority*,[404] the court held that a betrothed couple who cohabited, coparented, and held themselves out as a romantic couple, were in a protected intimate relationship.[405] Further, the court stated that even if the relationship did not ultimately result in marriage, these indicia would nevertheless render the relationship constitutionally protected.[406]

Intimate association rights also extend to all types of individuals. Rights of intimate association are not just for perfect people; wrongdoers, and those in relationships with them, retain this right. Felons and sex offenders have successfully challenged restrictions on their ability to date individuals who have children on the basis that these restrictions violate their rights of intimate association.[407] Similarly, the Court in *Turner v. Safley*[408] held that prisoners' rights of intimate association allow them to marry,[409] and in *Zablocki v. Redhail*,[410] intimate association rights required that men who were behind in child support payments were also nevertheless entitled to marry.[411]

Conjugal liability infringes upon the liberty and privacy interest of the freedom of intimate association.[412] Using particular heteronormative ideas of gender and intimate ordering, conjugal liability structures and shapes the interior of intimate lives, incentivizing certain behaviors and punishing

401. Obergefell v. Hodges, 135 S. Ct. 2584, 2594 (2015).
402. *See id.*
403. *See* Matusick v. Erie Cty. Water Auth., 757 F.3d 31, 58–59 (2d Cir. 2014).
404. 757 F.3d 31.
405. *Id.* at 58–59.
406. *Id.*
407. *See, e.g.*, United States v. Wolf Child, 699 F.3d 1082 (9th Cir. 2012).
408. 482 U.S. 78 (1987).
409. *Id.* at 95.
410. 434 U.S. 374 (1978).
411. *Id.* at 384.
412. It also has a profound impact on the construction of the self, as "the legal assignment of responsibility can prompt an individual to construct the boundaries of the self in certain ways." Regan, *supra* note 24, at 2119.

others. It has a channeling function that encourages "individuals to act in normatively desirable ways" in their intimate relationships, ways that include monitoring and policing the actions of one's partner.[413] Through a process of incentivizing and disincentivizing different behaviors, conjugal liability enforces normative ideals of intimate order that violate the freedom of intimate association.[414] In the tort context, for example, conjugal liability requires spouses to prevent their partners from committing sexual abuses or violent acts, either by warning their family, friends, and neighbors of the risk their spouse or partner presents, or by intensely surveilling their partner's activities. The "social consequences" of such a duty are enormous.[415] Requiring intimate partners of domestic abusers or otherwise violent persons to warn companions or potential lovers that an ex-partner may violently attack them imposes significant costs on those with the duty.[416] First, "[m]any people may find it emotionally humiliating to be seen as a vulnerable target of a powerful prospective attacker, especially when the targeting stems from past crimes, such as domestic abuse (whether or not it involved sexual abuse)."[417] As one example, "a woman who is fleeing an abusive ex-boyfriend . . . might thus feel a grave privacy violation in having to tell people her story, even the parts that are the bare minimum needed to give them an adequate warning."[418] Moreover, it is likely that this kind of warning would be discussed and spread, and be a topic of discussion for others, thus increasing the impact on her privacy.[419] To avoid these negative repercussions, instead of making these sensitive disclosures, some individuals may choose to romantically and socially isolate themselves, cutting off or not pursuing close relationships with others rather than enduring the experience of disclosure. The imposition of a duty to warn thus seems to "necessarily invade[] the constitutionally protected privacy rights of individuals in their sexual practices and in marriage."[420]

Relatedly, a duty to avoid provoking a spouse in case he might violently attack others violates the principle that people should be free to conduct

413. Courtney Megan Cahill, *Regulating at the Margins: Non-Traditional Kinship and the Legal Regulation of Intimate and Family Life*, 54 ARIZ. L. REV. 43, 68 (2012).
414. *Id.* at 68–69.
415. Faulkner v. Lopez, No. HHBCV01511200, 2006 WL 2949070, at *3 (Conn. Super. Ct. Sept. 29, 2006).
416. *Id.*
417. Volokh, *supra* note 88, at 917.
418. *Id.*
419. *Id.* at 916–17.
420. *Id.* at 936.

"their love lives as they see fit."[421] They should be "free to leave their lovers, and even 'flaunt[]' their new relationships, without a government agency deciding whether such behavior was 'unreasonabl[e]' and imposing legal liability based on such a decision."[422]

Intact relationships are also deeply affected by a duty to warn. "[R]equiring a wife to report on her husband's actions and activities" presents an obvious harm to the marital relationship, and "imposing a duty upon one spouse to inform on the other strikes at the very heart of the obligation of loyalty and would require a spouse to publicly label one's husband or wife as 'unfit' or 'dangerous.'"[423] In *Rozycki v. Peley*,[424] for instance, the majority of the court was persuaded that a duty to warn would have a significant negative impact on the marital relationships and thus "was unwilling to require spouses to choose between either remaining in marriages subject to civil liability or warning a third party and possibly incurring their spouse's ire and disappointment."[425]

Criminal accessory convictions, evictions from public and private housing, and property forfeitures are meant to ensure that good wives and girlfriends also deter their partners from engaging in drugs or other criminal behaviors. As the language surrounding nuisance evictions for domestic violence incidents makes clear, if female intimate partners are unable to control their spouses, they are expected to disassociate themselves from them. In some cases, courts have explicitly indicated that they consider divorce a prudent course of action in the circumstances.[426]

There are numerous reasons, though, why spouses remain in relationships with abusers and wrongdoers. Perhaps they simply take the for-better-or-for-worse part of their vows very seriously and view marriage as a virtually unbreakable bond.[427] They may stay because they want to make the relationship work, "the man is the father of their children, they are reluctant to break up their families, or the relationship has positive

421. Eugene Volokh, *Tort Liability*, VOLOKH CONSPIRACY (Aug. 3, 2009, 5:18 PM), http://volokh.com/posts/1249334335.shtml [https://perma.cc/SK4D-YDVY].
422. *Id.* (alterations in original) (citing RESTATEMENT (SECOND) OF TORTS § 302B Reporter's Notes, at 534 (AM. LAW INST. 1965)).
423. Shaun Mukai, Case Comment, Touchette v. Ganal*: Reaffirming the Judicial Activism of the Hawai'i Supreme Court*, 19 U. HAW. L. REV. 345, 362 (1997).
424. 489 A.2d 1272 (N.J. Super. Ct. Law Div. 1984), *overruled by* J.S. v. R.T.H., 693 A.2d 1191 (N.J. Super. App. Div. 1997).
425. Mukai, *supra* note 423, at 362.
426. *See, e.g.*, United States v. Sixty Acres in Etowah Cty., 727 F. Supp. 1414, 1421 (N.D. Ala.), *vacated*, 736 F. Supp. 1579 (N.D. Ala. 1990), *rev'd*, 930 F.2d 857 (11th Cir. 1991).
427. *See* Goldfarb, *supra* note 11, at 292.

emotional features and they value its healthy attributes."[428] They may stay because leaving is more dangerous, or they are optimistic that things will improve.[429] In any event, judges should not be in the position of making those relational choices for someone, and the admonishments regarding what women should do in particular situations smacks of a paternalism best suited to a bygone era. Dictating which relationships one may stay in, and which relationships one must terminate, offends intimate association rights. Conjugal liability suggests that, as part of an individual's "social citizenship,"[430] spouses should monitor and control their partners, despite their own wishes and despite the incredibly high personal and relational cost that may be involved.

a. Constitutional Argument Hurdles

Although conjugal liability both profoundly affects one's "choices to enter into and maintain certain intimate human relationships"[431] and conflicts with the no-guilt-by-association principle inherent in the right to freedom of association, claims that conjugal liability actually violates the Constitution might not succeed. Three threshold problems initially arise. First, there is the problem of identifying the appropriate approach or level of scrutiny. Second, the requisite state action may not be present. Third, intimate association claims are generally not easy claims to make.[432]

Regarding the first threshold issue of identifying the appropriate level of scrutiny, the law is in a state of uncertainty. It is difficult to say "exactly what constitutional tests apply" to intimate association rights.[433] The best that can be confidently stated is that courts "will apply some form of heightened scrutiny to laws that infringe the freedom of competent adults to make important decisions about family formation."[434] Assuming that some

428. *Id.*
429. *Id.*
430. Nan D. Hunter, *Interpreting Liberty and Equality Through the Lens of Marriage*, 6 CAL. L. REV. CIR. 107, 108 (2015).
431. Roberts v. U.S. Jaycees, 468 U.S. 609, 617 (1984).
432. This may be reflected in the fact that the claimants in *Obergefell* did not actually invoke intimate association as a line of argumentation. *See* Nancy C. Marcus, *Understanding the Equal Liberty and Intimate Association Doctrinal Underpinnings of* Obergefell v. Hodges, A.B.A.: CIVIL RIGHTS (Jan. 13, 2016), http://apps.americanbar.org/litigation/committees/civil/articles/011316-understanding-equal-liberty-intimate-association-doctrinal-underpinnings-obergefell-hodges.html [https://perma.cc/XVP2-R5UZ].
433. *See* MICHAEL C. DORF & TREVOR W. MORRISON, THE OXFORD INTRODUCTIONS TO U.S. LAW: CONSTITUTIONAL LAW 209 (Dennis Patterson ed., 2010).
434. *Id.*

form of heightened scrutiny would apply to arguments that conjugal liability violates the right to intimate association, the state may be able to show that conjugal liability is "substantially related" to "important governmental objectives" in many instances.[435] As outlined earlier, conjugal liability is often directed at achieving important social objectives like protecting children from sexual abuse, protecting third parties from violent acts, deterring drug trafficking and other forms of criminality, promoting public safety, and ensuring the functioning of the credit markets. Many of these could provide the state with the basis for a compelling argument.

The second joint hurdle is that, in some instances, the state action requirement may not be met. In particular, tortious and employment-based conjugal liability may not pass this hurdle. While there is an argument to be made that at least some aspects of tort law can constitute state action, it is a challenging one.[436] In the employment realm, employees with public employers may be able to access federal constitutional protections, but those with private employers may not be able to do so.[437]

The third difficulty is that intimate association claims are generally unsuccessful. "[C]ourts generally seem reluctant to find violations of intimate association, often refraining from extending the scope of the doctrine to new fact situations."[438] Although the *Obergefell* decision gives the sense that the right to intimate association is robust and respected,[439] the reality is that courts often rebuff attempts to assert the right to intimate association.

The specific argument that conjugal liability violates intimate association rights because of its impact on relationships faces an additional hurdle. There seems to be a judicial requirement that such an impact must amount to an actual prohibition on the relationship, rather than a mere

435. Craig v. Boren, 429 U.S. 190, 220 (1976).

436. *See* Ronen Avraham, Is Tort Law Unconstitutional? (Mar. 12, 2013) (unpublished manuscript), https://law.utexas.edu/colloquia/archive/papers-public/2012-2013/05-12-13_avraham_tort_law.pdf [https://perma.cc/EP62-NVZD] (describing when courts will find tort law to be state action for the purposes of constitutional argument).

437. However, there may be an avenue for relief using the possibility of self-executing state constitutions, like California's. *See* John C. Barker, Note, *Constitutional Privacy Rights in the Private Workplace, Under the Federal and California Constitutions*, 19 HASTINGS CONST. L.Q. 1107, 1129 (1992).

438. Elena Goldstein, Note, *Kept Out: Responding to Public Housing No-Trespass Policies*, 38 HARV. C.R.-C.L. L. REV. 215, 232 (2003). Goldstein notes that association claims were unsuccessful *in Roberts v. United States Jaycees*, 468 U.S. 609 (1984); *Parks v. City of Warner Robins*, 43 F.3d 609 (11th Cir. 1995); and, *Coronel v. Hawaii Department of Corrections*, No. 91-16842, 1993 WL 147318 (9th Cir. May 6, 1993). Goldstein, *supra*, at 232 n.117.

439. *See* Obergefell v. Hodges, 135 S. Ct. 2584 (2015).

burden. For instance, in *Department of Housing and Urban Development v. Rucker*,[440] tenants evicted under the one-strike policy argued that the policy violated their First Amendment right to freedom of association.[441] The Court found that their previous decision, *Lyng v. International Union*,[442] was dispositive.[443] In *Lyng*, the court upheld as constitutionally valid legislation which denied food stamps to a household if any member of that household was on a labor strike.[444] The court said that the legislation would not "prevent any group of persons from dining together," and that:

> Even if isolated instances can be found in which a striking individual may have left the other members of the household in order to increase their allotment of food stamps, "in the overwhelming majority of cases [the statute] probably has no effect at all." The statute certainly does not "order" any individuals not to dine together; nor does it in any other way "directly and substantially' interfere with family living arrangements."[445]

Lyng establishes a very circumscribed and anemic understanding of "effect." The Supreme Court jurisprudence suggests that in order to be constitutionally actionable on intimate association grounds, a law must fully deny the possibility of an association, or result in the actual physical sundering of a family. The sex offender residency restriction cases also exemplify this reasoning. The Eighth Circuit, for example, has held that even though restrictions on residency mean that families may be required to choose between relocatating to rural, under-serviced towns where they have no access to social or other forms of support, or living apart from the former offender, "residency restrictions 'do[] not operate *directly* on the family relationship'—and thus do not violate substantive due process—because offenders may live with whomever they choose outside of the restricted areas."[446]

440. 535 U.S. 125 (2002).
441. *Id.*
442. 485 U.S. 360 (1988).
443. *See Rucker*, 535 U.S. at 136 n.6 (citing *Lyng*, 485 U.S. 360).
444. *Lyng*, 485 U.S. at 372–74.
445. *Id.* at 365–66 (alteration in original) (footnote omitted) (citation omitted) (quoting Lyng v. Castillo, 477 U.S. 635 (1986)). The Court also rejected an argument that the legislation itself functioned as a form of collective liability that "impermissibly strikes at the striker through his family." *Id.* at 373.
446. Doe v. Miller, 405 F.3d 700, 710 (8th Cir. 2005) (alteration in original) (emphasis added), *discussed in* Cassie Dallas, Comment, *Not in My Backyard: The Implications of Sex Offender Residency Ordinances in Texas and Beyond*, 41 TEX. TECH L. REV. 1235, 1259 (2009).

Further, an argument that conjugal liability violates the constitutional right to intimate association because it unjustifiably imposes guilt by association faces a separate additional hurdle. The Court's strong resistance to guilt by association during the McCarthy-era has not continued, and since that period, it has displayed increasing "insensitivity" to the principle's significance.[447] This growing "blindness to guilt by association" violations suggests that courts will approach this issue with less concern than was once the case.[448]

Because of these many hurdles, courts may be unlikely to find that conjugal liability offends the Constitution. However, despite failing to achieve judicial recognition as a constitutional wrong, conjugal liability remains deeply problematic.[449] Fortunately, a series of corrective actions at the judicial, legislative, and social level can help remedy some of its most troubling applications.

C. Correctives

Since conjugal liability often plays out in gendered ways, constitutes a form of guilt by association, and arguably violates the constitutional right to freedom of intimate association, we should curb the impulse to blame intimate partners for each other's wrongdoing, and more carefully calibrate conjugal liability so that it only captures actual participation in wrongdoing. Many of the problems with conjugal liability can be at least partially resolved with one of two fixes. First, simply limiting the application of conjugal liability to situations in which an intimate partner has actually participated or contributed in some meaningful way to the underlying wrong would alleviate the concerns in some contexts. In tort, for instance, a more careful calibration would ensure that duties depend on actual misfeasance, as opposed to nonfeasance. And in the criminal context, actual participation, as opposed to the mere performance of innocuous domestic activities that are typical of any intimate relationship, should be the basis of conviction.

447. *See* Cole, *supra* note 388, at 223.

448. *Id.* at 224.

449. Laws that were deemed constitutional, but are unjust, now form a rich anticanon of cases that are widely derided. *See* Jamal Greene, *The Anticanon*, 125 HARV. L. REV. 379 (2011). In other instances, policymakers have acknowledged that the floor the constitution sets is too low. *See* RICHARD A. POSNER, DIVERGENT PATHS: THE ACADEMY AND THE JUDICIARY 94 n.20 (2016) (describing Justice Scalia's idea for a stamp that says "Stupid but Constitutional").

Similarly, in debt, bankruptcy, and other financial matters, some connection to the debt, and not just to the debtor, should be required.

Second, courts should enforce a more vigorous application of the "innocent spouse" defense in tenancy, civil forfeiture, and tax. In the eviction arena, the vicarious liability standard should be raised to include at least an innocent tenant defense, such that tenants with no knowledge of the wrongdoing, nor any ability to control it, should not be subject to eviction.[450] Innocent spouses in civil forfeiture action should be entitled to broader procedural protections, and the defense should be made available to spouses who, despite knowledge of their partner's past wrongdoing, have no knowledge or ability to prevent the present wrongful use. Tax laws should ensure that the "innocent spouse" defense there has broad applicability and perhaps should consider reversing the burden of proof in this regard. Further, Congress should enact new statutory protections for spouses otherwise vulnerable to the homestead taking.[451]

These changes will require action on multiple fronts. Judges, legislatures, and the public should all contribute to a recalibration effort.

1. Judicial Efforts

Courts have already begun to curb the use of conjugal liability in certain circumstances through reliance on public policy arguments. For instance, in the context of employment terminations related to domestic abuse victimization, many courts have held that "a decision to terminate an employee because of their status as a victim of domestic violence" is unlawful, and comes under a public policy exception to the general rule of at-will employment.[452] Similarly, in the tort context, at least one court has found that public policy weighs against the imposition of a tort duty to warn on domestic violence sufferers.[453] In *Faulkner v. Lopez*,[454] two plaintiffs

450. *See* Swan, *supra* note 228, at 898 n.409.

451. Cook, *supra* note 359, at 54.

452. GOLDSCHEID, *supra* note 128, at 11. "However, other courts have found that terminating a domestic violence survivor violates public policy only if the state maintains a specific statutory or constitutional provision or an explicitly expressed policy. This may be an area of increasing litigation as more states issue policy mandates specifically addressing domestic violence." *Id.* (footnote omitted); *see also supra* Part II.A.

453. See *Fiala v. Rains*, 519 N.W.2d 386 (Iowa 1994), where the court held that a woman who had a restraining order against a former boyfriend owed no duty to a male visitor when the ex-boyfriend broke into her home and attacked him, and see *England v. Brianas*, 97 A.3d 255 (N.H. 2014), in which a woman whose ex-boyfriend stabbed her male visitor owed no duty because the act was unforeseeable.

brought an action against a woman whose ex-boyfriend shot them, horrifically injuring both, while they were visiting her at her home. She had obtained a restraining order against her ex-boyfriend six weeks prior to the incident, and, according to the plaintiff's complaint, in the hours before the attack he had telephoned her repeatedly, wanting to see her.[455] Unlike in some other cases, the court did not view the defendant inviting the plaintiffs to her home as an act of misfeasance upon which a duty could be found.[456] Instead, the court listed a litany of concerns with imposing a duty in this type of circumstance, including issues surrounding whether one had to have been the victim of a crime or whether a mere threat would suffice, whether the duty was only to warn or whether one must take affirmative steps to protect against the danger, and who was encompassed within the duty.[457] In light of these concerns, the court found that public policy weighed against imposing a duty on a domestic violence victim to warn others of her abuser's propensity for violence.[458] Courts should continue to engage in cogent analyses that carefully consider the consequences of imposing conjugal liability, and cabin it accordingly.

2. Legislative Efforts

Legislatures also must play a role in limiting conjugal liability. They have already successfully halted its use in some contexts, particularly in situations involving domestic violence. In response to social and legal activism regarding the unfair application of eviction policies, some legislatures have forbidden evictions that are based on domestic abuse incidents.[459] Similarly, a few legislatures have also statutorily prohibited employment terminations based on domestic violence.

Broadening the "innocent tenant" defense in the eviction context and the "innocent spouse" defense in the forfeiture and tax context will also require action from state legislatures and from Congress. Existing statutes will need to clarify the scope of these defenses, to ensure that they will be

454. No. HHBCV01511200, 2006 WL 2949070 (Conn. Super. Ct. Sept. 29, 2006).
455. *Id.*
456. The court was apparently not made aware of the other decisions, like *Jobe v. Smith,* 764 P.2d 771 (Ariz. Ct. App. 1988), imposing just such a duty. *See Faulkner*, 2006 WL 2949070, at *4 ("[The] parties have cited no case in any jurisdiction that has held that a crime victim has a duty to warn her acquaintances or household invitees that her stalker is still obsessed with her.").
457. *Faulkner*, 2006 WL 2949070, at *3.
458. *Id.* at *4.
459. *See* Swan, *supra* note 228, at 888.

judicially interpreted in more expansive ways. New legislation incorporating these more lenient standards may also be required.

3. Social Efforts

The public consciousness must also evolve. Feminist cultural criticism offers much guidance on the social beliefs undergirding conjugal liability and the shifts that we must consciously engage in to challenge its entrenched narrative. As one feminist writer notes, "[e]very time a wife stands by her scandal-mired celebrity husband, we eventually reach a point in the ensuing, endlessly looping discussion where we ask ourselves why she stayed, how much she knew, and whether her refusal to leave him is a reflection of her own shortcomings."[460] Instead of staying focused on the primary wrongdoer, we demand justification from the spouse. Indeed, "for wives, answering for a husband's misdeeds has long been part of the bargain."[461] The social reality is that when "[h]usbands behave poorly; people look to wives for explanations of why. Wives pay prices for goods they never bought; they do time in publicity hell for actions they never took; they receive judgments for crimes they did not commit."[462]

This cultural tendency both reflects and perpetuates gender inequality. Without some basis to believe that wives of wrongdoers have themselves engaged in wrongdoing, reflexively holding them to account for the sins of their partner violates the most basic principles of equality and no-guilt-by-association. Instead of simply participating in such spouse-blaming, we should endeavor to think more critically about the reasons why we do this, stifle our learned impulse to impugn one spouse for the other's behavior, and try to limit conjugal liability not just in its legal form, but in its cultural and social forms as well.

CONCLUSION

When people enter into intimate partnerships or marriage, they expect to share all sorts of things: kids, dreams, homes, vacations, and friends. One

460. Erin Gloria Ryan, *On Camille Cosby and the Problem With Asking, "Why Did She Stay?"*, JEZEBEL (Nov. 20, 2014, 4:00 PM), http://jezebel.com/on-camille-cosby-and-the-problem-with-asking-why-did-s-1661280973 [https://perma.cc/D578-RRLK].

461. Rebecca Traister, *Why Should Wives Have to Answer for Their Husbands' Behavior?*, N.Y. MAG. (Jan. 6, 2016, 1:13 PM), nymag.com/thecut/2016/01/answering-for-their-husbands-sins.html [https://perma.cc/ZWY4-HF4T].

462. *Id.*

thing they may not expect to share, however, is liability for one spouse's independent actions or wrongdoing. But from a spouse's sexual abuse of a child to a partner's bankruptcy, spouses and intimate partners are frequently held to account for each other's wrongdoing. Across a vast swath of legal doctrinal areas, conjugal liability functions to make one spouse or person in a marital-like relationship responsible for the wrongful acts of the other.

In many instances, conjugal liability is used as a means to a laudable end. Much of it is geared towards preventing harms to third parties, deterring criminality and drug abuse, and ensuring healthy credit markets. However, it is not a justifiable means of achieving those goals. First, it is profoundly gendered, and most often functions to hold wives and girlfriends responsible for the wrongful acts of their male intimate partners. Even more troubling, conjugal liability tends to place some of its heaviest burdens on vulnerable female populations, including low-income women of color. Second, in many instances, conjugal liability is tantamount to guilt by association. Third, conjugal liability implicates the constitutionally guaranteed privacy and liberty interests inherent in the right to freedom of intimate association.

Conjugal liability's gendered nature, its violation of the no-guilt-by-association rule, and its impact on entering, exiting, and maintaining intimate relationships can all be translated into cognizable constitutional arguments. However, these arguments are unlikely to result in an actual ruling that conjugal liability violates the Constitution. Given the generally narrow interpretation of the right to intimate association, the state-action problem that arises in some of these scenarios, and the requirement that a law or policy must actually make a relationship next to impossible as opposed to merely difficult, technical arguments that conjugal liability violates intimate association rights may not be successful. Nevertheless, such liability remains deeply problematic. Accordingly, conjugal liability should be curtailed and more carefully calibrated so as to only capture instances where an intimate partner has done something that connects them to the underlying wrongful act, rather than merely to the wrongdoer. Courts, legislatures, and the public more broadly all have a significant role to play in this regard.