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# For and Against Marriage: A Revision.

Anita Bernstein

*Brooklyn Law School*, [anita.bernstein@brooklaw.edu](mailto:anita.bernstein@brooklaw.edu)

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# FOR AND AGAINST MARRIAGE: A REVISION

Anita Bernstein\*

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## INTRODUCTION

When anthropologist Henry Sumner Maine issued his famous proclamation that modern legal development evolved “from Status to Contract,”<sup>1</sup> he used juridical categories to make a statement about progress. Voluntary relations now build the law, Maine declared. The alternative to voluntary relations — identity-based legal labels to decree what people may and may not do — must relocate to the dustbin of history. Only a backwater society would keep them.

American legal change in the century-plus since Maine’s death in 1888 gives credence to the claim that status inexorably yields to contract. At one level, newer developments refute the Maine thesis. “Stalkers,” “telemarketers,” “date rapists,” “reciprocal beneficiaries,” “surrogate mothers,” and other noun-phrases have joined the roster of what the law recognizes as shorthand for duties, entitlements, and liability.<sup>2</sup> Labels continue to emerge; rights and obligations attached to them flourish. Meanwhile older status roles like “tenant,” “landlord,” and “employer” have acquired more legal force, rather than less, in the last dozen decades.<sup>3</sup>

Good reasons support the use of status as an instrument for law-making and law enforcement: whether ancient or newly coined, status labels today tell individuals what the law permits and forbids. They pack meanings into a word or two. The phrase “dependent child,” for instance, makes it clear that somebody — at least one person — can be prosecuted for not coming up with food and shelter. Designations like “owner,” “felon,” “attorney of record,” or “residual legatee” are worth fighting over in court. Law would be verbose if not incoherent

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1. HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS* 165 (Ashley Montagu ed., Univ. of Ariz. Press 1986) (1864).

2. See *Cook v. Greyhound Lines, Inc.*, 847 F. Supp. 725, 730 (D. Minn. 1994) (referring to a “‘date’ rapist”); *Doe v. Keane*, 658 F. Supp. 216, 221-22 (W.D. Mich. 1987) (analyzing the status of “surrogate mothers”); *Guth v. Freeland*, 28 P.3d 982, 995 n.6 (Haw. 2001) (referring to “reciprocal beneficiaries”); *R.R. v. M.H.*, 689 N.E.2d 790, 791 (Mass. 1998) (noting “surrogate parent[s]”); *State v. Orsello*, 554 N.W.2d 70, 72 (Minn. 1996) (defining “stalker”); *Charvat v. Dispatch Consumer Serv.*, 769 N.E.2d 829, 830-31 (Ohio 2002) (describing “telemarketer” regulations).

3. Milton C. Regan, Jr., *Postmodern Family Law: Toward a New Model of Status*, in *PROMISES TO KEEP: DECLINE AND RENEWAL OF MARRIAGE IN AMERICA* 157, 167 (David Popenoe et al. eds., 1996).

without the swift, compact punch of a legal label. If status is holding strong in the law, one need not wonder why any label-category is still with us. All statuses might be burgeoning.

"From Status to Contract," however, challenges the existence of state-sponsored marriage. Maine's contention that Status is primitive and Contract modern reminds us that marital status is critically different from other legal statuses that have been thriving. Becoming a "stalker" or a "surrogate mother" fits the Maine progression: it looks like Contract rather than Status. The terms connote episodes or parcels of individual lives, rather than a comprehensive social identity. A person can put on the label and take it off with little formality. By contrast the status of marriage — becoming, or ceasing to be, a wife or a husband — spreads into the far corners of one's life. Marriage is different also from the other key status category of family law — parenthood — in that the relation between parent and child addresses a relatively clear and uncontroverted need. Infants cannot survive without resources from adults. A husband or wife can provide care to a dependent spouse, but care for dependents is not a defining condition of the marital relation,<sup>4</sup> as it is of parenthood. Marriage, in short, is a peculiar status.<sup>5</sup> Most other legal statuses relate directly either to episodes or transactions on the one hand ("agent," "mortgagee," "harasser") or dependency on the other ("parent," "guardian," perhaps "fiduciary").<sup>6</sup>

Law does have a history of recognizing a couple of personal, or comprehensive, statuses that do not fall into these two broad catego-

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4. The common law doctrine of "necessaries" recognizes that a married person may be liable to creditors for some purchases that a spouse makes. This doctrine does not, however, mandate even financial support, let alone spousal caregiving. See D. KELLY WEISBERG & SUSAN F. APPLETON, *MODERN FAMILY LAW* 262 (2d ed. 2002).

5. The marriage literature includes efforts to find a categorical label for this institution. See MARGARET F. BRINIG, *FROM CONTRACT TO COVENANT* 13 (2000) (suggesting "covenant" rather than status); LENORE J. WEITZMAN, *THE MARRIAGE CONTRACT* xix (1981) ("[M]arriage has moved from a status to a status-contract . . . . [M]arital partners have lost the traditional privileges of status and, at the same time, have been deprived of the freedom that the contract provides.").

6. A key exception comes from business law, which offers "corporation" and "partnership" among its statuses rooted in neither dependency nor transactions. See generally Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Private Distinction*, 36 HARV. C.R.-C.L. L. REV. 79, 83 (2001) (noting that business partnerships, corporations, and limited liability companies "are similar to intimate relationships in that they have significant status elements that complement their contractual character"). I discuss the business-law analogy below. See *infra* Part IV.A.3. In conversation, Tony Dillof has suggested to me that the criminal-law concept of conspiracy is a legal status unrelated to dependency; liability for conspiracy, he notes, is so broad that it transcends episodes or transactions. Conversation with Tony Dillof, Associate Professor of Law, Wayne State University School of Law, in Detroit, Mich. (Dec. 4, 2002). Marriage remains anomalous, however, because its status effects impose constraints on individuals, whereas a conspiracy is severable from individual conspirators.

ries of transaction and dependency. Such statuses partake of tautology. They are what they are; they must be because they have been. Legal consequences follow to status-bearers without consent; only a rare person who acquires a comprehensive status understands what it means before the label is bestowed.<sup>7</sup> These labels are hard to shed. Principal examples of this kind of status are race — a legal category still not extinguished — and coverture, the set of disabilities that used to shackle most women. And then there are the categories that come from binary gender, where each person is assigned one (and only one) of two (and only two) legal statuses. The anti-individualistic, choice-denying nature of these comprehensive statuses has clashed with progressive legal development.<sup>8</sup>

It is in the law of marriage that the legal categories of “man” and “woman” retain their power. During the years when the government’s distinguishing a woman from a man accreted disapproval in numerous legal realms — employment, military service, prisons, higher education<sup>9</sup> — a defense-of-marriage movement insisted on this distinction and engraved it into federal and state statutory law. Marriage, in federal law and in most states, must consist of a dimorphous pair, “one man and one woman.”<sup>10</sup>

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7. Such legal labels are not easy even for specialist scholars to spell out. Race, for instance, has no canonical definition in the law. Marriage has been defined as “some sort of relationship between two individuals, of indeterminate duration, involving some kind of sexual conduct, entailing vague mutual property and support obligations, a relationship which may be formed by consent of both parties and dissolved at the will of either.” 1 HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 2.1, at 81 (2d ed. 1987); see also Barbara Stark, *Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law*, 89 CAL. L. REV. 1479, 1482-83 (2001) (noting that marrying means plunging “blindly into legal relationships” that the parties “know little or nothing about”).

8. Consider mental deficiency, once a locus of comprehensive statuses that the law dictated and enforced. See, e.g., *Marvin v. Trout*, 199 U.S. 212, 213 n.1 (1905) (noting duties of “the guardian or trustee of a minor, insane person or idiot”); *Thlocco v. Magnolia Petroleum Co.*, 141 F.2d 934, 938 (5th Cir. 1944) (quoting an Oklahoma statute stating that “[p]ersons of unsound mind within the meaning of this chapter are idiots, lunatics, and imbeciles”); *Lynch v. Rosenthal*, 396 S.W.2d 272, 275 (Mo. Ct. App. 1965) (explaining that “there are three classifications of subnormal mentality, to-wit: moron, low moron, and idiot; [and] plaintiff is a low moron”). Few lament the decline of these legal statuses. See *infra* notes 13-16 and accompanying text.

9. See, e.g., *United States v. Virginia*, 518 U.S. 515, 532-33 (1996) (“Focusing on the differential treatment or denial of opportunity for which relief is sought, the reviewing court must determine whether the proffered justification [for sex discrimination] is ‘exceedingly persuasive.’ The burden of justification is demanding and it rests entirely on the State.”); *Cohen v. Brown Univ.*, 101 F.3d 155, 175-76 (1st Cir. 1996) (rejecting a university’s argument that female students were participating in sports at a lower rate than male students because they lacked interest in athletic opportunities); *Women Prisoners of the Dist. of Columbia Dep’t of Corr. v. D.C.*, 899 F. Supp. 659, 671-72 (D.D.C. 1995) (holding that lesser educational and vocational opportunities for women inmates violate the Equal Protection Clause).

10. Defense of Marriage Act of 1996, 1 U.S.C. § 7, 28 U.S.C. § 1738C (2000); see also *infra* Part II.B.4 (describing the state-level counterparts, or “baby DOMAs”).

Here, then, is the lineup of statuses for human beings in contemporary American law. On one side are the comprehensive labels: race and the successor to coverture, gender.<sup>11</sup> On the other side are noun-phrases tailored to respond either to dependency, or to something resembling free choice in one's encounters. Where does marriage land? In this Article, I argue that marriage imbues individuals with a comprehensive legal status. It is not transactional. Nor is it targeted to address dependency, although it may aid a dependent person incidentally. Like race and coverture, the social category of marriage occupies space in the law, and not only in society. Also like race and coverture, marital status functions to elevate some individuals, and subordinate others, based on their membership in groups that they did not choose to join.<sup>12</sup>

The condition of marriage in American law is noteworthy. Although Maine-like reports of their death might be greatly exaggerated, most comprehensive legal statuses are on their way to oblivion in the United States. Race, once a category that signified either enslavement or the privilege to enslave others, and later a marker of privileges either withheld or bestowed, such as where one could gather in public, or which schools one could attend, now exists almost nowhere in American law beyond "affirmative action," itself on the wane.<sup>13</sup> American law used to speak of lunatics and idiots; the status label now assigned to cover this ground, "disability," sees human variation in briskly functional and specific terms.<sup>14</sup> According to the Supreme

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11. These two statuses do not exhaust the "comprehensive" list — one might add religion, alienage, and sexual orientation as comprehensive categories that have legal effects. These categories are, however, the most fundamental.

12. Married adults generally have made a choice to marry, and stay married; the phrase "single by choice" implies that at least some adults opt not to marry. Nevertheless, the consequences of marital status are not entirely chosen. Recipients of unchosen legal benefits and detriments related to marriage include children, whose entitlements can vary based on the marital status of their parents, *see infra* note 160; jilted partners and single-but-not-by-choice adults, who want to choose marriage but have not been chosen in turn, *see infra* notes 202-210 and accompanying text; and persons coerced into marrying. *See Mountholly v. Andover*, 11 Vt. 226, 227-28 (Vt. 1839) (declaring a marriage void on the ground of coercion); *Brown v. Brown*, 29 S.W.3d 491, 492 (Tenn. Ct. App. 2000) (referring to an earlier marriage of one of the parties that had been annulled on the ground of coercion).

13. *See Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) (upholding race-conscious university admissions with the hope "that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today").

14. American disability law has not achieved full enlightenment. *See* RUTH O'BRIEN, CRIPPLED JUSTICE: THE HISTORY OF MODERN DISABILITY POLICY IN THE WORKPLACE 63-87 (2001) (faulting American disability law for its construct of a "whole man" ideal); Aviam Soifer, *The Disability Term: Dignity, Default, and Negative Capability*, 47 UCLA L. REV. 1279, 1283-84 (2000) (contending that the Supreme Court treats the disabled with disrespect). Nevertheless, progress in disability law has proceeded since the landmark Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796 (2000). As amended in 1974, this statute explicitly rejects "archaic attitudes and laws" in its encouragement of integration into the mainstream. S. REP. NO. 93-1297, at 50 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6400.

Court, the government may not classify homosexually inclined persons as categorically less entitled to benefits that they obtain by democratic means.<sup>15</sup> And “men” and “women” are rapidly exiting most of the law; “persons” take their place. Except in the law of marriage.<sup>16</sup>

Should marriage, then, make an explicit transition from Status to Contract? If it opted to maximize the prerogatives of contract, this change would encourage the law to abandon its recognition of the sexual, gender-dimorphous dyad.<sup>17</sup> All domestic relations between adult individuals would be formed by issue-specific agreements.<sup>18</sup> Family law would survive in order to regulate the care of children, but two would no longer become one in any legal sense. The law would intervene in a couple’s life just as it now uses the law of contracts, torts, crimes, and property to moderate relations between any other adults.

This idea has been floated, but not developed. Of the writers who have made proposals along these lines,<sup>19</sup> Martha Fineman has offered

15. *Romer v. Evans*, 517 U.S. 620, 634-35 (1996). This Article uses “homosexually inclined” or “homosexually oriented,” something of a mouthful, because terser terms (“gay,” “queer,” and the like) have connotations that are too precise to describe this broad category.

16. See generally ANTHONY GIDDENS, *THE TRANSFORMATION OF INTIMACY* 26-28, 111-57 (1992) (arguing that marriage is one of many declining institutions that used to control sexuality and reproduction, and that marriage now approaches a “pure relationship” sustained only by the partners’ individual wishes).

17. Now, how exactly would the state proceed to end legal recognition of this dyad? The race, coverture, and mental-disability precedents provide an array of role models. State statutes, the Emancipation Proclamation, and an accumulation of customary law contributed to abolishing the legal category of “slave.” Courts and legislatures invalidated the *de jure* segregation that followed emancipation. The Married Women’s Property Acts began the elimination of coverture. Desuetude and shifts in public attitudes loosened the hold of statuses like “lunatic” and “idiot.” I return to the mechanics of abolishing state-sponsored marriage below. See *infra* notes 348-360 and accompanying text.

18. The question of what, after abolition, a court should do with a meta-agreement like “We, A and B, consent to be bound together as if we were married, in the pre-abolition sense of the term” complicates the abolition proposal a little. But not too much. One can imagine a body of intimate-contract law evolving on this question, just as corporate law evolved to recognize the open-ended nature of what a corporation may do. See Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279, 1302-13 (2001) (cataloguing the “rise and fall” of *ultra vires*, the doctrine that a corporation’s powers are limited by its charter). Contract law has already pondered the enforceability of paradoxical contracts that waive freedom of contract; at least at this hypothetical level, Americans already live with the possibility of, for example, an agreement to live under eighteenth-century coverture law. Moreover, the subject is familiar: courts today must construe cohabitation contracts, antenuptial contracts, separation agreements, child custody agreements, and other knotty bargains between intimate partners.

19. See, e.g., Dianne Post, *Why Marriage Should Be Abolished*, 18 WOMEN’S RTS. L. REP. 283 (1997) (claiming that marriage is a disaster); Russell Smith, *Marriage: Who Needs It Anyway?*, GLOBE & MAIL (Toronto), May 23, 2003, at R1 (“Maybe marriage is a legal category we no longer need.”); David Boaz, *Privatize Marriage*, SLATE, Apr. 25, 1997, at <http://slate.msn.com/id/2440> (“Make [marriage] a private contract between two individuals.”). Abolish-marriage scholars are mostly female, notwithstanding prevalent suspicions that ‘Marxists’ and their ilk, presumably including men, oppose the traditional family.



the most sustained attack on state-sponsored marriage.<sup>20</sup> An expert in family law, Fineman focuses on what she sees as family law's true domain, the care and nurturing of dependents. Family law could evolve to deny marriage while acknowledging relation-based dependency, she argues.<sup>21</sup> Whereas children come into the world inherently needy and helpless, those who do caregiving work within the family have their dependency — economic vulnerability, conflict between paid and unpaid work, unequal bargaining power vis-à-vis their partners — imposed upon them: "Women are socially and culturally assigned dependency."<sup>22</sup> Thus state-sponsored marriage, to Fineman, is not a cure for the plight of dependent mothers. Marriage *creates* their plight.

If Fineman is right to call dependency the center of, and the reason for, legal regulation of the family, and also right to call women's familial dependency on men a contingent and reparable condition and a problem that marriage makes worse, then the best rationale for state-sponsored marriage is that it lassoes parents to their children: being married to one's fellow parent seems to strengthen the parental tie, particularly for fathers.<sup>23</sup> So long as alternative means of yoking par-

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Friedrich Engels pioneered unsentimental economic analysis of the family, for example, but did not call for the abolition of state-sponsored marriage. See JUNE CARBONE, FROM PARTNERS TO PARENTS: THE SECOND REVOLUTION IN FAMILY LAW 55-57 (2000) (summarizing Engels). Nietzsche wrote, "Modern marriage has lost its meaning — consequently one abolishes it," FREDERICH NIETZSCHE, *Twilight of the Idols*, in THE PORTABLE NIETZSCHE 544 (Walter Kaufmann trans. & ed., 1954), but did not say who abolishes it, how, or when. Lesbian legal scholars have expressed deep skepticism about marriage. See Patricia A. Cain, *Imagine There's No Marriage*, 16 QUINNIPIAC L. REV. 27 (1996); Paula L. Ettelbrick, *Domestic Partnership, Civil Unions, or Marriage: One Size Does Not Fit All*, 64 ALB. L. REV. 905 (2001); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage"*, 79 VA. L. REV. 1535 (1993); see also Jennifer Jaff, *Wedding Bell Blues: The Position of Unmarried People in American Law*, 30 ARIZ. L. REV. 207 (1988) (advocating the elimination of privileges and advantages that derive from state-sponsored marriage).

20. See MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 228 (1995) (contending that "we should abolish marriage as a legal category and with it any privilege based on sexual affiliation"); Nancy D. Polikoff, *Why Lesbians and Gay Men Should Read Martha Fineman*, 8 AM. U. J. GENDER SOC. POL'Y & L. 167, 176 (2000) ("Abolish marriage as a legal category for everyone. Read Martha Fineman.").

21. See generally MARTHA ALBERTSON FINEMAN, THE AUTONOMY MYTH: A THEORY OF DEPENDENCY (2004).

22. Martha Albertson Fineman, Symposium Comments, *Divorce and Feminist Legal Theory*, 82 GEO. L.J. 2521, 2522 (1994).

23. Researchers frequently study never-married and divorced fathers, and find them absent from their children's lives, in comparison to married fathers. Michael E. Lamb, *Placing Children's Interests First: Developmentally Appropriate Parenting Plans*, 10 VA. J. SOC. POL'Y & L. 98, 108 (2002) (noting that divorced fathers are often absent, while "never-married fathers are more than twice as likely as divorced fathers to have no contact with their children"); Barbara Stark, *Guys and Dolls: Remedial Nurturing Skills in Post-Divorce Practice, Feminist Theory, and Family Law Doctrine*, 26 HOFSTRA L. REV. 293, 372 n.394 (1997) (summarizing studies finding that most divorced fathers "neither see nor support their

ents to children are untried as potential substitutes for marriage, and so long as a close relationship with parents contributes to the good of a child, the premise that state-sponsored marriage benefits children will retain some validity.<sup>24</sup> But as a means to tie children to adults, marriage is a crude, antiquated, at-most-second-best instrument. Offspring do not need their progenitors' union to be sanctioned by law for them to reap the benefits of a close link to their parents, now that relatively simple recordkeeping and genetic technology can connect parents with neonates and young children — the most significant set of dependents in any society — and assign legal status to that connection. New legislation accompanying abolition could greatly increase the legal consequences of acquiring the status of parent. Freed from monitoring sexual affiliations, family law could spend its energies looking out for vulnerable people. Abolishing state-sponsored marriage would not ignore, eliminate, or increase dependency: on the contrary, it would force the law to recognize that dependents need care.<sup>25</sup>

Abolishing marriage might not roil the surface of domestic life in practice. Without state-sponsored marriage, many households would likely resemble the married-with-children construct that dominates family life in the United States today.<sup>26</sup> Two people — in most cases a pair that sees itself, and is seen, as gender-dimorphous — would form a durable relation grounded in mutual intimacy and love. They might choose to mark their union with rites and ceremonies. They would typically live together in one household and procreate. Each adult in the pair would feel related to the other; both would feel related to their offspring. Such households would include the legal statuses of “parents” and “children.” But the dyad that came together as an adult

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children in a systematic way”) (internal citation omitted). These findings are of limited value in predicting what father-child ties would look like if marriage were abolished. Although they support a conclusion that a formal, legal connection to a child's mother tends to strengthen a father's relationship with his child, they do not establish that such a connection is the best means of doing so, and do not take into account the costs of that connection.

24. I discuss problems with this premise below. *See infra* Part II.C.1 (noting the frequent confusion of correlation with causation so that, for instance, marriage is associated with beneficial effects in children when parental wealth probably deserves the credit); Part III.C.4 (exploring ways that state-sponsored marriage can be harmful to children). Consider also the well-being that parents and children experience outside of marriage in Europe, where non-marital childbearing and childrearing enjoy considerable support: children in the marriage-focused United States are much more likely than children in western Europe (and also in Australia, Canada, and New Zealand) to live in poverty. M.M. Slaughter, *Fantasies: Single Mothers and Welfare Reform*, 95 COLUM. L. REV. 2156, 2164-65 (1995) (reviewing FINEMAN, *supra* note 20).

25. *See infra* Part III.C.5 (arguing that the existence of marriage conceals caregiving labor).

26. *But see* John T. Noonan, Jr., *The Family and the Supreme Court*, 23 CATH. U. L. REV. 255, 270 (1973) (“Without marriage, created by law, acknowledged by law, privileged by law, the family is a formless biological blob.”).

couple would share no legal bond, no singular identity vis-à-vis third parties or the state.

Could it happen? Although no constituency in the United States has mobilized against state-sponsored marriage,<sup>27</sup> the coverture-influenced fusion of two-into-one grows ever weaker in practice. Most Americans give marriage a try sometime during their lives, but individuals have also been withdrawing from marriage — a phenomenon expressed in a relatively high divorce rate and a rising average age of first marriage.<sup>28</sup> These demographic changes suggest a reduction in the percentage of Americans who register with the state as half of a couple.

Along with these changes, legislatures and courts have been reflecting and fostering a newer individualism in the law of marriage that has undermined the old two-into-one status.<sup>29</sup> Divorce law, liberalized in the last few decades, has made unions easier and cheaper to escape. In less than thirty years state governments swerved from almost unanimously rejecting antenuptial contracts dividing marital property to almost unanimously enforcing them.<sup>30</sup> Even traditionalist reforms that have appeared in recent years (such as the harder-to-exit “covenant marriage” and premarital counseling imposed on applicants for marriage licenses), which are designed to strengthen marriages, focus more on the marrying individual as party to a contract and less on the

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27. The future may bring change. One pro-marriage initiative surveyed young adults and found that forty-five percent of them “agree that the government should not be involved in licensing marriage.” NATIONAL MARRIAGE PROJECT, THE STATE OF OUR UNIONS 2001, at 13 (2001), available at <http://marriage.rutgers.edu/Publications/SOOU/NMPAR2001.pdf> (May 2001).

28. See ANDREW HACKER, MISMATCH: THE GROWING GULF BETWEEN WOMEN AND MEN 7 (2003); Michael A. Fletcher, *For Better or Worse, Marriage Hits a Low*, WASH. POST, July 2, 1999, at A1; see also Jeffrey Zaslow, *Divorce Makes a Comeback*, WALL ST. J., Jan. 14, 2003, at D1 (noting that recent pro-marriage government initiatives seemed to be failing in 2003, as evidenced by a rising divorce rate).

29. One scholar of family law has named this phenomenon “privatization.” Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1444. Commenting on a draft of this Article, law student Damon Karam reflected on a broader theme, manifest in contemporary American life:

We are seeing sporting events billed as ‘Shaq vs. Yao Ming’ or ‘Sammy Sosa vs. Barry Bonds’ and their contracts reflect this shift towards individual focus. In the workplace, it seems as if every person employed by a company has a ‘title,’ from the CEO to the janitor. Whether right or wrong, it is the direction society has taken in virtually all facets, except marriage.

Memorandum from Damon Karam to Anita Bernstein 2-3 (Feb. 27, 2003) (on file with the author).

30. See *Pendleton v. Fireman*, 5 P.3d 839, 845-46 (Cal. 2000) (noting that forty-one jurisdictions enforce such contracts, and relating this new stance to “changes in public policy and the attitude toward marriage”).

oneness of union.<sup>31</sup> A number of state governments in the United States have decided to allow pairs of individuals to sign up for some of the benefits of legal marriage without imposing on these pairs any demand to be gender-dimorphous or have a sexual bond.<sup>32</sup> This innovation understands law-based coupling as a choice that two adults can make, beyond mere compliance with an old imperative to build child-producing households. *Principles of the Law of Family Dissolution*, published by the American Law Institute in 2002 after more than a decade of work, suggests that when longstanding relationships end, the existence of formal law-based unions should count for nothing when courts assign rights and duties to individuals who separate. In other words, according to the Institute, the law for dissolving families should regard marriage as no different from extended cohabitation.<sup>33</sup> American reformers keep an eye outside the United States, where same-sex couples have won full marriage rights, and look forward to a similar American movement away from the gender script.<sup>34</sup> At least in the short term, *Goodridge v. Department of Public Health*,<sup>35</sup> the 2003 decision holding that the state of Massachusetts must provide marriage to same-sex couples, has begotten fragmentation and dissent rather than extended a monolithic condition to cover more people.<sup>36</sup> Marrying — and its important correlatives, repudiating marriage and being foreclosed from it — now yields much less homogeneity. Back in 1861 Henry Maine wrote that, starting “from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in

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31. See *Developments in the Law — The Law of Marriage and Family*, 116 HARV. L. REV. 1996, 2091 (2003) (noting strong contractual underpinnings of covenant marriage).

32. See William C. Duncan, *Whither Marriage in the Law?*, 15 REGENT U. L. REV. 119, 122-24 (2002-2003) (describing “domestic partnership” in California, “reciprocal beneficiaries” in Hawaii, and “civil unions” in Vermont); Joe Crea, *Calif. Law Would Grant Gays Most Rights of Marriage*, S. VOICE, June 13, 2003, at 21 (reporting legislative initiative in California that would extend domestic-partnership law to grant “nearly all the rights of marriage”).

33. AMERICAN LAW INST., *PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION* § 6.05 (2002). But cf. Mark Hansen, *A Family Law Fight*, A.B.A. J., June 2003, at 20, 23 (quoting critics who deem the ALI *Principles* destructive of marriage).

34. See Laura Douglas-Brown, *Belgium Becomes Second Country to Let Gays Marry*, S. VOICE, Feb. 14, 2003, at 11 (noting recognition of same-sex marriage in Belgium and the Netherlands and increased status-protection for same-sex couples elsewhere in Europe, and quoting American activist-lawyer Evan Wolfson: “It’s clear that we are riding a wave here . . . [but] the United States is lagging behind.”); Clifford Krauss, *Now Free to Marry, Canada’s Gays Say, “Do I?”*, N.Y. TIMES, Aug. 31, 2003, § 1, at 1 (reporting gay couples’ reactions to the availability of marriage in Canada).

35. 798 N.E.2d 941 (Mass. 2003).

36. Cass R. Sunstein, *Federal Appeal*, NEW REPUBLIC, Dec. 22, 2003, at 21 (noting controversies that accompany the *Goodridge* decision).

which all of these relations arise from the free agreement of individuals.”<sup>37</sup> A century and a half later, his statement has become more true.

The proposal to abolish state-sponsored marriage, then, comes after at least portents, if not out-and-out precedent, elsewhere in American legal change. Additional support for the proposal comes more generally from a focus on the individual as the locus reached, regulated, and tutored by law. What happens to individuals is the measure of law’s ambition and legitimacy. And more than ever, married people are individuals. In contrast to the common law of centuries past, American husbands do not sue in tort for their wives’ injuries. When a wife commits the crime, she, not her husband, does the time. Marriages now contain separate personal property, and permit contracting between the spouses. The persistence of a comprehensive legal status that conjoins individuals into pairs — when in so many respects each person is a solitary creature in the law — calls for evaluation. I undertake that evaluation in this Article.

My account of state-sponsored marriage in the United States begins in Part I with a primer on how federal and state law currently recognize this status. This legal recognition is far from static, and the last decade marked several pertinent changes in the law of marriage. The next Part links this pattern of law reform with a broader marriage movement. From their premise that marriage is both socially desirable and in need of shoring up, activists have encouraged both federal and state lawmakers to focus on marriage policy. These leaders have deployed an influential “case for marriage,” which I study in Part II, examining its arguments and its successes on the legal landscape.

The proposal to abolish state-sponsored marriage puts this “case” in a fresh light. Activists promote marriage on the ground that it offers favorable contrasts to the alternatives to being married: singleness and nonmarital cohabitation. They link marriage with happier individual lives, a sense of the future that makes people willing to invest in their relationships, children who score higher on various indices, sexual contentment, and longer life expectancy, among other “goods.”<sup>38</sup> With all these goods lying there waiting to be claimed, partisans would pursue without hesitation changes in the law that encourage and reward marrying. But welfare disparities between the married and unmarried could be eliminated more effectively. Under abolition, “singleness,” “cohabitation,” and “marriage” would lose their legal status, and indeed some of their meaning.

In this context much of the “case for marriage” evaporates, because to date the “case” has contrasted being married only to being

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37. MAINE, *supra* note 1, at 163.

38. See, e.g., John Witte, Jr., *The Goods and Goals of Marriage*, 76 NOTRE DAME L. REV. 1019, 1019-20 (2001).

divorced and to never marrying; it has never confronted state-sponsored marriage as an option that right-thinking people might reject on the same quasi-utilitarian basis that now commends getting married over not getting married. This lapse is forgivable: researchers like to focus on that which can be counted rather than on a counterfactual hypothesis (especially one they can deem unrealistic).<sup>39</sup> Harder to “imagine there’s no marriage,” as Patricia Cain has proposed.<sup>40</sup> But marriage partisans, having broached a cost-benefit defense of the institution, open the door to imagining just that. The federal government alone — not to mention the dozens of state governments that follow similar policies — spends or declines to collect billions of dollars each year because of its recognition of marriage, as I detail in Part III. If state-sponsored marriage yields net payoffs for society — going beyond married individuals and their children — then these investments should certainly continue. If not, then they become questionable.<sup>41</sup> I begin the bookkeeping.<sup>42</sup>

The detriments of state-sponsored marriage can be laid out in three levels. At a primary level, as mentioned, the government directly forgoes revenue in consequence of its recognition of marriage. At a secondary level, the law’s recognition of marriage mandates or facilitates behaviors that cause social losses. Such losses are more difficult to quantify than the primary detriments, but are linked closely to legal

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39. For instance, some demographers compare the earnings of married men with those of single men, and infer that marriage is good because the former group earns more. See Peter Cappelli et al., *It Pays to Value Family: Work and Family Tradeoffs Reconsidered*, 39 INDUS. REL. 175 (2000); Megan M. Sweeney, *Two Decades of Family Change: The Shifting Economic Foundations of Marriage*, 67 AM. SOC. REV. 132 (2002). The same data would support different normative conclusions, including a proposal to abolish marriage on the ground that it is inequalitarian. Researchers nevertheless prefer the more “realistic” endorsement of marriage as good — a recommendation that both individuals and policymakers can heed.

40. Cain, *supra* note 19, at 27.

41. Cf. Martha Albertson Fineman, *The Inevitability of Dependency and the Politics of Subsidy*, 9 STAN. L. & POL’Y REV. 89, 91 (1998) (“[M]oney need not actually change hands for a subsidy to exist.”).

42. The “bookkeeping” project resembles an endeavor pursued in the media during the spring of 2003: trying to identify the true costs of war in Iraq. Politicians’ pre-war estimates of the necessary appropriations ranged from \$200 billion to \$2 trillion. Jurgen Brauer, *Economist: Achieve War Goal with Ledger Book, Not Laser Bombs*, ATLANTA J.-CONST., Mar. 3, 2003, at A7. “Bookkeeping” arguments are familiar; many writers seek to expand the concept of truthful accounts in policymaking: according to one, economists are inclined to “look at all costs, budgetary and otherwise.” *Id.*; see also Eva Feder Kittay, *A Feminist Public Ethic of Care Meets the New Communitarian Family Policy*, 111 ETHICS 523, 546-57 (2001) (contending that “dependency work” and harm to the environment can be subjected to improved cost-benefit accounting). I have argued that better “bookkeeping” might enhance both tort law and international human rights law. Anita Bernstein, *Conjoining International Human Rights Law with Enterprise Liability for Accidents*, 40 WASHBURN L.J. 382, 403-04 (2001) (characterizing the torts concept of cost internalization as “honest bookkeeping”).

rules and institutions. At a tertiary level, norms and conventions associated with state-sponsored marriage create detriments.

In calling this review “bookkeeping,” I do not say that state-sponsored marriage has an exact price that an auditor can quantify. Instead, the review brings a crucial missing dimension to what advocates have identified as a slam-dunk utilitarian case. Activists have achieved, and seek more, legislation; the value of legislation lies in the balance of improvement over detriment that it can accomplish.<sup>43</sup> To the extent that marriage is a creature of the legislature, it ought to be on the books only if it makes the public better off.

From this base, Part IV, “Revising the ‘Case,’ ” undertakes a preliminary defense of state-sponsored marriage that faces, rather than denies, the extensive social disutility that this legal institution fosters. Once marriage is identified as a source of losses that the “case for marriage” has failed to confront, those who would preserve state-sponsored marriage need arguments beyond the facile and tautological quasi-utilitarianism that now dominates public analysis. Part IV recounts two cogent arguments for marriage. The first one claims that individuals need access to this status in order to flourish; the second claims that men must have access to marriage, both for their own good and the good of society. Without endorsing these arguments, I contrast them favorably to the inadequate “case”; they may not persuade, but they make sense given their own premises, even when compared to a society without marriage.

The query that still needs to be framed, which I broach at the end of the Article, is: Compared to what? As an institution that imposes social control, marriage, though flawed and unjust, is better than its competitors. Ending status-based constraints in the law works well where the area governed does not need regulation: the erosion of race as a legal status offers a strong example of this kind of healthy disappearance. Intimate lives, however, do appear to need some regulation, even when children are not present,<sup>44</sup> and of all potential regulators — the only alternatives are the state and the market — marriage offers the most compelling benefits.

## I. MARRIAGE AS A LEGAL CATEGORY: A SURVEY OF THE LAW AT STAKE

This Part considers the proposal to abolish state-sponsored marriage by looking at its feasibility and consequences, raising two ques-

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43. See generally JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds., Univ. of London Althone Press 1970) (1879) (justifying legislation in terms of producing happiness).

44. I elaborate below. See *infra* text accompanying notes 342-355.

tions. First, would American law permit the abolition of state-sponsored marriage? The answer is yes. Second, what would change? Numerous entitlements and duties mandated in federal and state law would be wiped off the books.

### A. *The Constitutional Law of Marriage*

Reformers have learned that the United States Constitution is neutral on the abolition of state-sponsored marriage. Although the Supreme Court has issued pronouncements on the importance of this institution,<sup>45</sup> nothing in its decisional law requires the states or the federal government to continue recognizing marital status. Decisional law on marriage sets only a handful of constraints. Substantive due process limitations on government power prevent the state from arbitrarily withholding access to marriage from dual-gendered couples. The constitutional guarantee of equal protection prevents the state from conditioning access to marriage on classifications that lack a reason. These two categories provide all the constitutional law of marriage; no other constitutional doctrine gives citizens an entitlement to state recognition of the dyads they choose to form.

#### 1. *Negative Liberties: The Constitutionality of the Abolition Process*

When it ceases to accept that two adults may fuse themselves together in the eyes of the law, the state is abstaining from action, rather than acting. The end of state-sponsored marriage is thus like the end of any other affirmative initiative in public welfare. Because the Supreme Court has long rejected demands for affirmative entitlements cast as constitutional rights — among them health care, government-funded abortion, and education at a state-mandated level of quality<sup>46</sup> — the Court cannot rely on its precedents to recognize a constitutional right to be married in the eyes of the law.

In this negative-liberties perspective, the government may abolish marriage if it does so without derogation of established due process and equal protection rights. Because the nullification of existing marriages would serve to deprive married persons of quasi-property, or

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45. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 383 (1978) (noting that marriage is “of fundamental importance”); *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (stating that marriage is “fundamental to the very existence and survival of the race”).

46. See *Harris v. McCrae*, 448 U.S. 297, 317-18 (1980) (abortion funding); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37-39 (1973) (school financing); *Dandridge v. Williams*, 397 U.S. 471, 483-87 (1970) (welfare funding).

One might argue that state-sponsored marriage is more like the “process” than the “substance” of funded entitlements. Even if this contention is correct, *cf. infra* Part III (arguing that state-sponsored marriage is about money), the core of a procedural right is that it may not be allocated capriciously. The withdrawal of marriage from everyone avoids this pitfall.



impair their contracts, abolition as new legislative policy would pose fewer risks if it took place prospectively, with an effective date set well in the future. Alternatively, state-sponsored marriage could be allowed to elapse through a slow evolution of public withdrawal and distaste, rather than fiat. The abolition of marriage could not be restricted to subgroups, or launched as an experiment that treats subgroups of Americans differently in violation of equal protection law. With negative-liberties safeguards in place, the retreat of marriage from American law would avoid inflicting legally cognizable harm on American citizens.

## 2. *Substantive Due Process*

When the Supreme Court referred to the Due Process Clause in invalidating a Virginia ban on interracial marriage, it noted that “[t]he freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men.”<sup>47</sup> One might read this dictum from *Loving v. Virginia* as assuring Americans some kind of automatic state recognition of their coupling, at their behest. But the *Loving* Court took pains to guarantee no such thing. Immediately after siting the Lovings’ right to marry in the Due Process Clause, the Court went on to add that it would be wrong to withhold marriage from them “on so unsupportable a basis” as racial classification.<sup>48</sup> What *Loving* found unconstitutional, then, was not the foreclosing of marriage per se, but rather the baseless denial of marriage to a couple that had done nothing to deserve this singular deprivation.<sup>49</sup>

As the Supreme Court has seen them, substantive due process rights have never included a right to obtain any governmental benefit or imprimatur, unless a litigant can contend that the government has been distributing this benefit to some recipients. There is no substantive due process right to boons and gifts. According to case law, substantive due process in the context of marriage does not include a right

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

48. *Id.* In other words, a fundamental right to marriage means that the state must have a compelling reason before it may interfere with the law-based coupling it recognizes, not that it must continue bestowing law-based recognition to couples.

49. The Court’s other marriage-as-a-fundamental right cases following *Loving* also indicate that marriage may indeed be withheld for good reason. See *Turner v. Safley*, 482 U.S. 78, 99 (1987) (deeming a Missouri rule prohibiting prison inmates from marrying “not reasonably related to legitimate penological objectives,” but noting that other restrictions on marriage would have been acceptable); *Zablocki v. Redhail*, 434 U.S. 374, 388-90 (1978) (calling Wisconsin’s withholding of marriage from persons in child support arrears poorly tailored to the problem of nonsupport).

to be declared the father of one's biological child,<sup>50</sup> nor a right to know that one's wife is having an abortion,<sup>51</sup> nor a right to impose a paternal surname on one's child.<sup>52</sup> States may bestow and take away marriage-related privileges, moreover, as they see fit.<sup>53</sup>

### 3. *Equal Protection*

The Equal Protection Clause served many litigants well when they pressed their right-to-marry claims in the Supreme Court. *Loving v. Virginia*,<sup>54</sup> *Zablocki v. Redhail*,<sup>55</sup> and *Turner v. Safley*<sup>56</sup> held that an equal protection right, as well as a due process right, was violated when Richard Loving, Mildred Jeter, Roger Redhail, and Leonard Safley were prohibited from marrying. For litigants, the Equal Protection Clause has been integral to marriage as a constitutional right.<sup>57</sup> But it can say nothing against the obliteration of state-sponsored marriages. That maneuver by government would take marriage away from everybody — not just prison inmates, or deadbeat parents, or couples who dare to defy a custom of racial division. Put another way, every equal protection claim needs a government classification, and the abolition of state-sponsored marriage would lead to *fewer* classifications than now exist.

A crucial equal protection decision in the annals of marriage case law, *Eisenstadt v. Baird*,<sup>58</sup> specifically insisted in dicta that the state

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50. Michael H. v. Gerald D., 491 U.S. 110, 114, 129-30 (1989) (plurality opinion) (holding that a man lacked a constitutional right to be declared the father of a child when his paternity was established to 98.07% certainty).

51. *Planned Parenthood v. Casey*, 505 U.S. 833, 887-98 (1992) (striking down various husband-notification requirements).

52. *Neal v. Neal*, 941 S.W.2d 501, 503-04 (Mo. 1997) (en banc) (holding that in the presence of a mother's objections, a father could not unilaterally convey his own surname to his child); see also *Huffman v. Fisher*, 987 S.W.2d 269, 274 (Ark. 1999) (detailing a "best interest" standard for surname imposition when parents disagree).

53. Georgia, for instance, deviates from the majority of states in refusing to guarantee widows and widowers a share of their spouses' estates at death. See Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 47 & n.68 (1994) (discussing Georgia's unusual choice). It also clings to intramarital immunity for tort claims. GA. CODE ANN. § 19-3-8 (2002).

54. 388 U.S. 1, 12 (1967).

55. 434 U.S. 374, 383-91 (1978).

56. 482 U.S. 78, 94-100 (1987).

57. Indeed, one of the Justices wrote that the Clause provides more than enough power to invalidate a Wisconsin denial of marriage to one subset of noncustodial parents: those who do not, or cannot, pay child support. *Zablocki v. Redhail*, 434 U.S. 374, 406 (1978) (Stevens, J., concurring).

58. 405 U.S. 438 (1972).

may not treat married people better than the unmarried.<sup>59</sup> Working with *Griswold v. Connecticut* as a precedent, Justice Brennan reminded his readers that individuals and not couples are what concern the law:

It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and a heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.<sup>60</sup>

### B. *Longstanding Federal Nonconstitutional Law*

In 1996, Representative Henry Hyde sought to find out what Congress had achieved when it approved the Defense of Marriage Act,<sup>61</sup> the first federal statute to proclaim a definition of marriage. Hyde asked the General Accounting Office ("GAO") "to identify federal laws in which benefits, rights, and privileges are contingent on marital status."<sup>62</sup> In response, GAO staffers searched electronic versions of the United States Code looking for pertinent words and word stems, and came up with a count of 1049 federal laws.<sup>63</sup> The major ones are noted here.

#### 1. *Tax*

Federal tax policy recognizes marriage in numerous respects. For example, the joint return, available also for state income taxes, treats married couples as one taxpaying unit.<sup>64</sup> A marriage "penalty" or "bonus" reflects the consequences of marital filing: some couples pay less tax, and others pay more, based on their marital status.<sup>65</sup> Federal law uses marriage as a way to defer tax obligations when an affluent individual dies leaving a widowed spouse, who inherits.<sup>66</sup> Gift tax law takes

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59. *Eisenstadt*, 405 U.S. at 453.

60. *Id.*

61. 1 U.S.C. § 7, 28 U.S.C. § 1738C (2000).

62. U.S. GEN. ACCOUNTING OFFICE, DEFENSE OF MARRIAGE ACT, GEN. ACCOUNTING OFFICE REP. OGC-97-16, at 1 (1997) [hereinafter GAO REPORT OGC-97-16].

63. GAO REPORT OGC-97-16, *supra* note 62, at 2.

64. I.R.C. § 6013(a) (2003).

65. I.R.C. § 6013(a).

66. I.R.C. § 2056.

the marital status of donors and recipients into account when determining tax liabilities.<sup>67</sup> Property transfers between spouses are not subject to gain-loss valuation.<sup>68</sup>

## 2. *Military and Veterans Law*

Military service and marriage come together in veterans' benefits, which "include pensions, indemnity compensation for service-connected deaths, medical care, nursing home care, right to burial in veterans' cemeteries, educational assistance, and housing."<sup>69</sup> Spouses of service personnel share in these statutory entitlements.<sup>70</sup> The GAO has described military spouses' benefits, including employment assistance and commissary privileges, as "unique."<sup>71</sup> Spouses of federal civilian employees can also claim various distributions, such as insurance payments and retirement annuities. Disability payments for work related injuries may increase if a federal employee has a spouse.<sup>72</sup>

## 3. *Immigration*

When aliens receive special residency status due to their employment, their spouses may also receive special status.<sup>73</sup> The "fiancée visa" recognizes a couple's intention to marry.<sup>74</sup> The entitlement to share residency privileges with a spouse opens aliens' marriages to administrative scrutiny. If the federal government believes that a couple married only to provide residency privileges to an alien spouse, it can declare the marriage a sham and deport the alien.<sup>75</sup>

## 4. *Family Medical Leave*

The Family and Medical Leave Act of 1993<sup>76</sup> has been on the books for more than a decade, qualifying as "longstanding" for pur-

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67. I.R.C. § 2501.

68. I.R.C. § 1041.

69. GAO REPORT OGC-97-16, *supra* note 62, at 3.

70. *Id.*

71. *Id.* at 4.

72. *Id.* at 5.

73. 8 U.S.C. § 1153(d) (2000).

74. 8 U.S.C. §§ 1101(a)(15)(K)(i), 1151(b)(2)(A)(i).

75. Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669, 672-73 (1997) (noting the "highly intrusive investigation techniques" that are used to determine the validity of an immigrant's marriage).

76. 29 U.S.C. §§ 2601-2654 (2000).

poses of classification in this Part.<sup>77</sup> Under this statute, all employers with fifty or more employees must extend unpaid leave to workers who wish to care for a parent, child, or spouse.<sup>78</sup> Unrelated adults in need of the employee's care do not trigger the employer's obligation; a spouse is the only adult of the employee's generation who qualifies for this employer-supported benefit.<sup>79</sup>

### 5. *Evidentiary Privileges*

In addition to these statutory recognitions of marriage, federal common law, which holds strong in the law of evidence, also recognizes the marital relation.<sup>80</sup> In evidence law a husband and wife retain some of their common law, coverture-based oneness. Until 1933, a married person was deemed incompetent to testify in favor of his spouse in federal court.<sup>81</sup> This drawback to being married has been replaced by evidentiary rules that make being married a source of power for witnesses and parties to litigation. Two significant marital privileges have endured: the privilege to exclude adverse spousal testimony, and the confidential marital communications privilege. Confidential marital communications are absolutely privileged from disclosure, and either spouse may invoke the privilege.<sup>82</sup>

### C. *Longstanding State-Level Laws*

Defense-of-marriage laws on the books of a majority of states underscore an extensive statutory and common law scheme that bolsters marriage. Not every state gives equal regard to marriage; California, Vermont, and Hawaii, for example, have been leaders in blurring the lines between the statuses of married and unmarried.<sup>83</sup>

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77. Cf. *infra* Part II.B (noting more recent changes in state and federal law that are attributable to the mid-1990s "marriage movement").

78. 29 U.S.C. §§ 2611(2), 2612, 2614.

79. 29 U.S.C. § 2612(a)(1)(C). See generally Nancy J. King, *The Family Medical Leave Act: An Ethical Model for Human Resource Policies and Decisions*, 83 MARQ. L. REV. 321, 355 (1999) (criticizing this stance).

80. See FED. R. EVID. 501 (recognizing common-law evidentiary privileges); see also *infra* Part I.C.6 (examining evidentiary privileges at the state level).

81. *Funk v. United States*, 290 U.S. 371, 380-82 (1933).

82. WEISBERG & APPLETON, *supra* note 4, at 395 (citing *People v. Vermeulen*, 438 N.W.2d 36 (Mich. 1989) (allowing a defendant charged with murdering his second wife to exclude the testimony of his first wife, to whom he had confided his plan to murder the second wife)); see *United States v. Rakes*, 136 F.3d 1, 2-6 (1st Cir. 1998) (ordering confidential marital communications suppressed); *United States v. Porter*, 986 F.2d 1014, 1018 (6th Cir. 1993) (stating prerequisites to assertion of this privilege).

83. See *supra* notes 32-36 and accompanying text.

Nevertheless, all recognize marriage as a legal category with money and privileges at stake.

### 1. *Inheritance and Post-Death Benefits*

When a married person dies holding assets, his or her spouse will almost certainly inherit at least a portion of those assets, unless the surviving spouse waived claims to them in an antenuptial contract — a bargain that by hypothesis gave the now-widowed spouse something in exchange.<sup>84</sup> Many states forbid the disinheritance of spouses, and all of them establish wives and husbands as default beneficiaries when decedents die without a will, a common scenario.<sup>85</sup> Most state laws favor spouses over the decedent's siblings when the decedent has made no will and has no children; the Uniform Probate Code provides that spouses typically inherit a large portion of the estate, even when the intestate decedent had children.<sup>86</sup> Married decedents who die intestate may not have intended to leave money to their wives or husbands, but the state in effect chooses to write a will benefiting these widowed spouses.

In addition to collecting money by inheritance, a surviving spouse will typically enjoy a preference to be appointed the personal representative when the spouse dies intestate.<sup>87</sup> This widow or widower can also claim worker's compensation survivor benefits.<sup>88</sup> It is he or she whom the law usually empowers to decide how to dispose of the decedent's remains, whether to make anatomical gifts from the decedent's body,<sup>89</sup> and whether to bring a wrongful death or survival action.<sup>90</sup>

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84. "Consideration" stands for the notion that all parties to a valid contract give up something and gain something when the contract is formed. To be sure, consideration is frequently absent, or misperceived, in intramarital contracts. See Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 NW. U. L. REV. 65, 79-80 (1998) (noting incoherent judicial treatment of the consideration requirement for marital contracts). Nevertheless, courts typically scrutinize prenuptial agreements for fairness more than contracts between unrelated adults. *Id.* at 74-77.

85. See Waggoner, *supra* note 53, *passim*.

86. UNIF. PROBATE CODE § 2-102(1) (1998); see also Waggoner, *supra* note 53, at 27.

87. UNIF. PROBATE CODE § 5-305(c). Most states also follow a presumption of spousal guardianship when a married person becomes mentally incapacitated, and ignore unmarried partners for this purpose. See David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 456-57 (1996).

88. *Albina Engine & Mach. Works v. O'Leary*, 328 F.2d 877, 878 (9th Cir. 1964) (using state law to determine whether a claimant was a "surviving wife" for purposes of obtaining federal workers' compensation benefits).

89. UNIF. ANATOMICAL GIFT ACT § 3(a) (1987).

90. See Nancy J. Knauer, *The September 11 Attacks and Surviving Same-Sex Partners: Defining Family Through Tragedy*, 75 TEMP. L. REV. 31, 40-41 (2002) (noting that "standing

## 2. *Community Property*

Although only nine states follow the Spanish-derived marital property regime that sees spouses as holding “a present, undivided, one-half interest in all property acquired by the efforts of either spouse during the marriage,”<sup>91</sup> these states include California and Texas, first and third in population, respectively. The minority regime of community property therefore covers twenty-eight percent of Americans.<sup>92</sup> Community property understands marriage as a property-holding unit that overrides the individual predilections and desires of a spouse. Although it excludes some separate property from the marital community, community-property regimes impose a strong legal oneness on the holdings of married individuals.

## 3. *Deferred Community Property*

In the majority of states that follow the common law approach to marital property, and thus do not locate a property-holding community within marriage, community-property influences will manifest themselves upon divorce as well as upon death. For purposes of asset division in divorce, many states presume that “[a]ll property acquired by either spouse after the marriage and before a decree of legal separation is presumed to be marital property.”<sup>93</sup> This rule implicitly accepts the community-property proviso that excludes gifts, inheritances, and other acquisitions unrelated to the title-holding spouse’s efforts. Many states go further, rejecting the proviso and permitting courts to divide any assets that either spouse holds — even assets that would have been separate property in a community-property regime.<sup>94</sup> Such property-division rules, like community property, place tremendous emphasis on the fact of a marriage, recognizing no other type of union as a source of so much compelled sharing between two individuals.

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to sue for wrongful death” is part of the “decision-making authority typically reserved for spouses”).

91. WEISBERG & APPLETON, *supra* note 4, at 255 n.8.

92. The nine community property states, Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin, had 80,692,128 people in 2000, when the nation’s population stood at about 281,000,000. U.S. CENSUS BUREAU, CENSUS 2000, at tbl.2 (2000) available at <http://www.census.gov/population/cen2000/tab02.pdf> (Dec. 28, 2000).

93. UNIF. MARRIAGE AND DIVORCE ACT § 307 (1970).

94. Linda D. Elrod & Robert G. Spector, *A Review of the Year in Family Law: Redefining Families, Reforming Custody Jurisdiction, and Refining Support Issues*, 34 FAM. L.Q. 607, 657 (2001) (noting twenty-one jurisdictions).

#### 4. Consortium

In most of the United States, anyone who injures a married person is deemed also to have injured the spouse of that individual, and state laws allow the spouse to sue the tortfeasor for harm to the marital relationship.<sup>95</sup> Many states extend this entitlement to parents or children of the injured person, but case law around the country typically rejects the consortium claims of same-sex partners, plaintiffs who were merely engaged to the injured person, and other litigants who fall short of being married.<sup>96</sup> Tort law further underscores the importance of marriage by regarding the spouse's claim as derivative; this stance generally forces the spouse to sue in the same action as the direct victim and attributes weaknesses in the direct victim's claim (such as flaws in the *prima facie* case, or contributory negligence) to the spouse.<sup>97</sup>

#### 5. Tenancy by the Entirety

Many states recognize a unique form of shared ownership that only a married couple can enjoy. Tenants by the entirety hold property *per tout et non per my*, in the Norman phrase — “by the whole and not by the share.”<sup>98</sup> This form of concurrent ownership resembles a joint tenancy, except that it adds a fifth unity, the unity of marriage, to the four unities needed to create joint tenancy: unity of time, title, interest, and possession.<sup>99</sup> One writer calls tenancy by the entirety “a particularly difficult form of doublethink: to think about two persons as though they were one.”<sup>100</sup> Many state courts have interpreted the creation of separate legal personhood in the Married Women's Property Acts to require the abolition of tenancy by the entirety.<sup>101</sup> In the states that

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95. DAN B. DOBBS, *THE LAW OF TORTS* 842-43 (2000).

96. See, e.g., *Trombley v. Starr-Wood Cardiac Group*, 3 P.3d 916, 922-23 (Alaska 2000) (denying consortium to a plaintiff who was merely engaged, not married, to the direct victim); *Feliciano v. Rosemar Silver Co.*, 514 N.E.2d 1095, 1096 (Mass. 1987) (denying loss-of-consortium claim to a plaintiff who had co-habited with the victim for more than twenty years before the injury); cf. *Coon v. Joseph*, 237 Cal. Rptr. 873, 877-78 (Cal. Ct. App. 1987) (holding that a same-sex partner could not recover as a bystander for negligent infliction of emotional distress).

97. DOBBS, *supra* note 95.

98. JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 323 (4th ed. 1998) (translating “my” as “moieties” rather than “share”).

99. *Id.* at 322-23.

100. John V. Orth, *Tenancy by the Entirety: The Strange Career of the Common-Law Marital Estate*, 1997 BYU L. REV. 35, 40.

101. Steve R. Johnson, *Fog, Fairness, and the Federal Fisc: Tenancy-by-the-Entireties Interests and the Federal Tax Lien*, 60 MO. L. REV. 839, 843 (1995).



have kept it, however, a crucial practical distinction emerges between tenancy by the entirety and joint tenancy: whereas property held in joint tenancy is accessible to one spouse's creditors, property held in tenancy by the entirety often cannot be reached.<sup>102</sup> This version of concurrent ownership gives married individuals a place to keep their property safe from third-party seizure. If not for marriage, they would have no such refuge.

## 6. *Evidentiary Privileges*

In thirteen states, a person can stop his or her spouse from testifying adversely.<sup>103</sup> The broader confidential-communications privilege covers disclosure between husbands and wives in the confidence of the marital relationship.<sup>104</sup> Both the adverse-testimony and the confidential-communications privileges rest on an ancient marital unity, the destruction of which would "destroy the best solace of human existence," according to venerable Supreme Court decisional law.<sup>105</sup>

## II. HOW THE "CASE FOR MARRIAGE" HAS AFFECTED MARRIAGE AS A LEGAL CATEGORY

While the law of marriage described in the last Part rests rather ponderously on an old "tradition," marriage-related doctrine has moved down newer paths. Marriage laws formed in the past assigned privileges, and a few detriments, to married individuals unselfconsciously, without stating much of an agenda. Newer laws promote marriage as a measure of social engineering.<sup>106</sup> This shift toward overt attempts to improve individuals' lives and social welfare invites critical attention: proposals, arguments, new legislation, and social science are available for scrutiny.

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102. These states are Delaware, Florida, Hawaii, Indiana, Maryland, Missouri, Pennsylvania, Rhode Island, Vermont, Virginia, and Wyoming, plus the District of Columbia. See *Sawada v. Endo*, 561 P.2d 1291, 1294-95 (Haw. 1977) (surveying national law).

103. Milton C. Regan, Jr., *Spousal Privilege and the Meanings of Marriage*, 81 VA. L. REV. 2045, 2047-48 (1995).

104. LESLIE J. HARRIS & LEE E. TEITELBAUM, *FAMILY LAW* 144 (2d ed. 2000). One commentator reports that the confidential-communications privilege "is recognized by the District of Columbia and all fifty states, except possibly Connecticut." Pamela A. Haun, *The Marital Privilege in the Twenty-First Century*, 32 U. MEM. L. REV. 137, 159 (2001).

105. *Stein v. Bowman*, 38 U.S. 209, 223 (1839).

106. Katherine Shaw Spaht takes a differing view, arguing that over the last century the law has withdrawn from marriage, and so the contemporary marriage movement amounts to a "counter-revolution." Katherine Shaw Spaht, *Revolution and Counter-Revolution: The Future of Marriage in the Law*, 49 LOY. L. REV. 1, 6, 28 (2003). Professor Spaht dedicates her article "to the courageous and intellectually honest individuals throughout this country who are members of the nascent Marriage Movement." *Id.* at 1.

### A. The "Case for Marriage" Emerges from the Marriage Movement

As an umbrella term, "the marriage movement" covers a variety of organizations with overlapping memberships and common agendas.<sup>107</sup> The movement has extensive ties to religious organizations and political conservatives, groups that have held influence in the American political arena for decades. These sectors galvanized the Republican vote that helped install Richard Nixon and Ronald Reagan into the presidency in past decades. Such successes gave social conservatives robust political power, but until the mid-1990s these activists could point to few legislative successes.

Enter neutral, universalist social science as a base to support law reform. When buttressed by data, family-values activism gained credibility in policymaking.<sup>108</sup> Other stances and arguments can make only a partial case for marriage. Your spiritual orientation, or my geographic community, might applaud our being married, but when making policy arguments these subgroups cannot speak for an entire nation. Moreover, to the extent such teachings amount only to religious dogma, the government may not establish them as policy. Only if marriage is good for us as a society, independent of sectarian faith, should the state promote it.<sup>109</sup> Numbers, not just traditionalist teachings, must support the conclusion that being married rather than unmarried conduces to the welfare of Americans.<sup>110</sup>

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107. Although the movement casts itself as diverse, my own premise is that it unites around family-values conservatism. For support, see Judith Stacey, *Family Values Forever*, NATION, July 9, 2001, at 26. The arguments I make in this section do not require a reader to accept either view.

The movement made an early appearance with *Marriage in America: A Report to the Nation*, published in 1995, which focused on marriage as a source of benefit to children. See The Council on Families in America, *Marriage in America: A Report to the Nation, in PROMISES TO KEEP*, *supra* note 3, at 293-318. In 1997, sociologists David Popenoe and Barbara Dafoe Whitehead formed the National Marriage Project at Rutgers University, a source of research about marriage and family life. This group issues an annual report called *The State of Our Unions*. These activists brought their work to the National Institute of Health, which in 1998 sponsored an inaugural pro-marriage conference.

108. See generally Stacey, *supra* note 107. For a sympathetic exploration of the links between social conservatives and the marriage movement, see W. BRADFORD WILCOX, SACRED VOWS, PUBLIC PURPOSES: RELIGION, THE MARRIAGE MOVEMENT, AND MARRIAGE POLICY (2002), available at <http://pewforum.org/publications/reports/marriage-policy.pdf> (May 2002).

109. See Jonathan Rauch, *For Better or Worse?*, NEW REPUBLIC, May 6, 1996, at 19 ("If we want to know what and whom marriage is for in modern America, we need a sensible secular doctrine.").

110. Brian Bix makes a related plea for clarity on what exactly state recognition of marriage achieves. See Brian H. Bix, *State of the Union: The States' Interest in the Marital Status of Their Citizens*, 55 U. MIAMI L. REV. 1, 7 (2000) (claiming that the state interest in marriage goes beyond "the Utilitarian justification that a state prefers having its citizens' preferences satisfied").

In 2000, sociologist Linda Waite and a journalist co-author, Maggie Gallagher, presented a leading manifesto for the movement.<sup>111</sup> Compact and cards-on-the-table explicit, *The Case for Marriage: Why Married People Are Happier, Healthier, and Better Off Financially* will stand in for the larger body of case-for-marriage literature in this Article.<sup>112</sup> *The Case for Marriage*, lining up married Americans on one side opposite unmarried Americans on the other, deems the former category significantly advantaged. Joined by other writers, Waite and Gallagher demonstrate that married persons enjoy longer life and better health than the unmarried.<sup>113</sup> Married persons also possess more wealth,<sup>114</sup> have sex more often and with more satisfaction,<sup>115</sup> report more happiness,<sup>116</sup> and rear better-adjusted children. Although it does not deny that many individuals suffer detriment in their marriages and would be better off single, the “case” finds no aggregate drawbacks to marriage. As many see the data, there is no significant demographic variable where singles as a group enjoy more well-being than married persons.<sup>117</sup>

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111. LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY* (2000).

112. See also DAVID POPENOE, *LIFE WITHOUT FATHER* (1996) (arguing that children benefit from marriage); MARRIAGE, HEALTH, AND THE PROFESSIONS (John Wall et al. eds., 2002) (arguing that the benefits of marriage suggest implications for various professions); James Q. Wilson, *The Decline of Marriage*, SAN DIEGO UNION TRIB., Feb. 17, 2002, at G1 (advocating that the state shore up marriage). Other works make the argument in passing. See, e.g., WILLIAM A. GALSTON, *LIBERAL PURPOSES* 284-85 (1991) (identifying a state interest in marriage based on the superiority of the two-parent household); Chambers, *supra* note 87, at 490 (declaring that governments “seem justified in favoring a special relationship with someone known as a spouse over other relationships of friendship or kinship”).

113. WAITE & GALLAGHER, *supra* note 111, at 47-64; John Wall & Don S. Browning, *Introduction to MARRIAGE, HEALTH, AND THE PROFESSIONS*, *supra* note 112.

114. WAITE & GALLAGHER, *supra* note 111, at 97-123.

115. Linda J. Waite & Kara Joyner, *Emotional Satisfaction and Physical Pleasure in Sexual Unions: Time Horizon, Sexual Behavior, and Sexual Exclusivity*, 63 J. MARRIAGE & FAM. 247, 253-63 (2001).

116. Ed Diener & Martin E.P. Seligman, *Very Happy People*, 13 PSYCHOL. SCI. 81, 84 (2002).

Nobel laureate Daniel Kahneman has cast doubt on the reliability of self-reports of happiness, however. In an extensive study he found that divorced women deemed their lives less satisfying than did married women. Nevertheless, they were more cheerful than married women over the course of a day. Erica Goode, *A Conversation with Daniel Kahneman: On Profit, Loss and the Mystery of the Mind*, N.Y. TIMES, Nov. 5, 2002, at F1. Journalist Laura Miller interprets this finding as divorced women’s complying with a social imperative to see themselves as miserable, even though they are in fact happier than married women. Laura Miller, *State of the Single Woman*, HAMILTON SPECTATOR, Dec. 28, 2002, at M19, available at [http://archive.salon.com/books/feature/2002/12/12/single/index\\_np.html](http://archive.salon.com/books/feature/2002/12/12/single/index_np.html) (Dec. 12, 2002).

117. But see Elizabeth Cooksey, *Consequences of Young Mothers’ Marital Histories for Children’s Cognitive Development*, 59 J. MARRIAGE & FAM. 245, 245-61 (1997) (suggesting that among low-income African Americans, children from single-parent homes do better in school than counterparts from two-parent homes); Stephanie Coontz & Nancy Folbre, *Marriage, Poverty, and Public Policy: A Discussion Paper from the Council on Contemporary*

Clear policy implications emerge, advocates say. At a minimum, the United States needs more marriages — simply because every marriage, *ceteris paribus*, flips two persons from the disadvantaged into the advantaged category, augmenting national welfare — and it also should encourage individuals to choose marriage over singleness.<sup>118</sup> More is needed, some marriage advocates say. They divide on thorny issues like divorce restrictions and protecting traditional opposite-sex marriage from same-sex initiatives. In reviewing the “case for marriage,” however, I restrict myself to its consensus, the core rather than peripheries: marriage is good; more marriage would be better.

## B. Law Reforms Following the “Case”

### 1. Covenant Marriage

Marriage partisans have worked to create a more solemn, alternative form of state-sponsored marriage in order to remedy an excess they perceive in the divorce rate: couples, they say, tend to flee their marriages too quickly.<sup>119</sup> In this view, the liberalized grounds for divorce that began with California’s no-fault reform left Americans worse off. Codified now in three states and under consideration elsewhere, covenant marriage allows couples to reject no-fault or easy divorce for themselves by signing a declaration of intent when they marry. Their declaration affirms the importance of marriage, and persons who choose covenant marriage accept premarital counseling and agree to forgo some of the easier avenues to dissolution. In Louisiana, where this innovation takes its strongest form, a covenant marriage can be dissolved only for adultery, conviction of a felony with subsequent imprisonment, desertion for at least one year, physical abuse of a spouse or child, or a two-year separation.<sup>120</sup> The Arkansas version is similar. Watering covenant marriage down to very little at the time

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Families’ Fifth Annual Conference (Apr. 26-28, 2002), at <http://www.contemporary-families.org/public/briefing.html> (offering data on how disruptive it is to get a stepparent in a child’s life and describing how, among unstable couples, a first violent episode often occurs soon after a formal commitment). One trivial negative effect of being married, according to the “case,” is that married men and women are more likely to be overweight and not to exercise (even though they are healthier). Linda J. Waite, *The Health Benefits of Marriage, in MARRIAGE, HEALTH, AND THE PROFESSIONS*, *supra* note 112, at 17.

118. See, e.g., COALITION FOR MARRIAGE, FAMILY, AND COUPLES EDUCATION ET AL., *THE MARRIAGE MOVEMENT: A STATEMENT OF PRINCIPLES* (2000), available at <http://www.marriagemovement.org/html/MMStatement.html> (Whether an individual ever personally marries or not, a healthy marriage culture benefits every citizen in the United States . . .”).

119. See Katherine Shaw Spaht, *Louisiana’s Covenant Marriage: Social Analysis and Legal Implications*, 59 LA. L. REV. 63, 66-70 (1998) (discussing, *inter alia*, the work of Maggie Gallagher, David Popenoe, and Barbara Dafoe Whitehead).

120. LA. REV. STAT. ANN. §§ 9:272, 9:307 (2001) (enacted 1997).

of dissolution, Arizona permits these marriages to end by mutual consent.<sup>121</sup>

Critics like to dismiss covenant marriage as trivial, often citing the tiny percentage of marrying couples who choose 'premium' instead of 'regular' when given a choice,<sup>122</sup> but the endeavor extends beyond a handful of couples in Louisiana, Arizona, and Arkansas. Most state legislatures that have rejected covenant-marriage bills have accepted lesser measures with the same purpose of shoring up marriage. One favored statutory provision encourages marital counseling, not only at the divorce decision point but also as part of premarital education.<sup>123</sup>

## 2. *Slowing Divorce*

Going beyond covenant marriage, the marriage movement has pursued other law reforms to make divorces proceed more slowly. Repeals of no-fault divorce have not yet made it into the states' law books, but legislators continually propose, for instance, to amend no-fault divorce by requiring mutual consent (an approach that has prevailed in New York all along, but amounts to a conservative change in many other states) or to lengthen waiting periods in no-fault divorces involving children.<sup>124</sup> Process-oriented reforms have been easier to enact. Several states have in recent years modified their court-ordered divorce mediation programs to introduce marriage-friendly mediation, which encourages couples to reconcile. Traditional mediation, by contrast, strives only for an amicable dissolution.<sup>125</sup>

## 3. *Transfer Payments*

Governments channel funds toward marriage-booster programs. Several state-level initiatives purport to sweeten the deal for those who marry or stay married, offering payments that reward getting married with cash.<sup>126</sup> When President George W. Bush announced in

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121. ARIZ. REV. STAT. ANN. §§ 25-901 to 25-906 (2000).

122. See Stark, *supra* note 7, at 1487 n.29 (noting low participation rate). I borrow the premium-or-regular phrase from a former student, Chandra Jones, who came up with it here in gas-guzzling Atlanta.

123. Marilyn Weber Serafini, *Get Hitched, Stay Hitched*, 34 NAT'L J. 694, 696 (2002).

124. William A. Galston, *Divorce American Style*, PUB. INT., Summer 1996, at 12, 21-24.

125. For the traditional view, see Judith M. Wolf, *Sex, Lies, and Divorce Mediation*, ARIZ. ATT'Y, Nov. 1996, at 25, 34, who notes that "[m]ediation is not designed to bring the marriage back together." But see Alison E. Gerencser, *Family Mediation: Screening for Domestic Abuse*, 23 FLA. ST. U. L. REV. 43, 49 n.37 (1995) (noting that California pioneered "court-connected conciliation services" aimed at reconciliation in 1939).

126. Mark O'Keefe, *Marriage-Is-Better Movement Expands*, GRAND RAPIDS PRESS, July 27, 2001, at A3 (describing costly efforts in several states); see also WILCOX, *supra* note 108 (describing an elaborate \$10 million effort in Oklahoma promoted by marriage-

February 2002 that he intended to appropriate \$300 million for marriage initiatives,<sup>127</sup> a few states already had such programs underway. In West Virginia, for instance, welfare recipients who marry receive an extra hundred dollars per month.<sup>128</sup> Florida and Minnesota reduce marriage license fees for couples who prove they have taken a marriage preparation course.<sup>129</sup>

The Bush proposal was not the first federal marriage-promoting declaration in recent memory to announce marriage-related effects on transfer-payment entitlements. Welfare reform legislation in 1996 heralded marriage as “the foundation of a successful society.”<sup>130</sup> When it inaugurated the Temporary Assistance to Needy Families program, a substitute for traditional federal aid to dependent persons, Aid to Families with Dependent Children (AFDC), Congress announced its desire to “encourage the formation and maintenance of 2-parent families.”<sup>131</sup> Wade Horn, founder of the Fatherhood Initiative,<sup>132</sup> had spent years proposing federal expenditures on the cause before he was named Assistant Secretary for Family Support in the Bush Department of Health and Human Services.<sup>133</sup>

The Bush administration named its family and welfare legislative program “Working Toward Independence,” linking marriage to freedom from dependency on government transfer payments.<sup>134</sup> Instead of addressing needy families as the pre-1996 federal welfare program had provided, “Working Toward Independence” would finance state-level initiatives to foster marriage, and state governments would work with “faith-based organizations.”<sup>135</sup> In the 107th Congress, the House of Representatives passed draft legislation, endorsing “healthy, married,

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enthusiast Governor Frank Keating). For a summary of state marriage-promotion efforts, some of which use financial inducements, see U.S. DEP’T OF HEALTH AND HUMAN SERVS., STATE POLICIES TO PROMOTE MARRIAGE: PRELIMINARY REPORT (2002).

127. Robin Toner & Robert Pear, *Bush Urges Work and Marriage Programs in Welfare Plan*, N.Y. TIMES, Feb. 27, 2002, at A18.

128. O’Keefe, *supra* note 126.

129. See Mary Ellen Klas, *Gov. Bush Hatching Families Initiative*, PALM BEACH POST, Dec. 18, 2002, at 1A (describing government programs); O’Keefe, *supra* note 126.

130. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 101, 110 Stat. 2105, 2110, 2111 (1996).

131. 42 U.S.C. § 601(a) (2000).

132. For more information, see <http://www.fatherhood.org/>.

133. Katha Pollitt, *Forward to the Past*, NATION, July 9, 2001, at 10, 10.

134. Press Release, The White House, President Names Senior Advisor for Welfare Policy, at <http://www.whitehouse.gov/news/releases/2002/02/welfare-reform-announcement-book-all.html> (Feb. 12, 2002) [hereinafter President Names Senior Advisor].

135. *Id.*

2-parent families,” allocating \$120 million for state programs to promote marriage.<sup>136</sup>

#### 4. DOMA and “Baby DOMAs”

How much credit the marriage movement can take for the federal Defense of Marriage Act (“DOMA”)<sup>137</sup> and the state counterpart versions, or “baby DOMAs” now on the books in approximately thirty-seven states, is uncertain.<sup>138</sup> Many consider the federal DOMA, signed into law on September 21, 1996, to be a reaction to *Baehr v. Lewin*, a 1993 case that suggested the state constitution of Hawaii might require the recognition of same-sex marriage.<sup>139</sup> Commentators also link the federal DOMA with *Romer v. Evans*,<sup>140</sup> which struck down an anti-gay-rights initiative as unconstitutional and may have thereby encouraged gay-rights activists to pursue this prize.<sup>141</sup> It is likely that marriage-policy activism and the DOMA phenomenon are not each other’s cause or effect, but rather separate facets of a renascent traditionalism.

Defense-of-marriage efforts and the marriage movement came together in a federal marriage amendment, introduced in the House of Representatives in May 2002.<sup>142</sup> This proposed amendment to the Constitution would prohibit same-sex marriages. In interviews with journalists, sponsors of this legislation spoke in the utilitarian, social-engineering rhetoric characteristic of the marriage movement: eschewing religious references, they invoked “social policy” and a need

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136. H.R. 4737, 107th Cong. (2002).

137. 1 U.S.C. § 7 (1994), 28 U.S.C. § 1738C (2000).

138. The count is unsteady because states continue to consider both enactment and repeal of these defense-of-marriage acts. The number thirty-seven was accurate as of March 2003.

139. 852 P.2d 44, 59-60 (Haw. 1993) (calling Hawaiian equal protection law more “elaborate” in its grants than the Fourteenth Amendment), *superseded by* HAW. CONST. art. 1, § 23 (“The legislature shall have the power to reserve marriage to opposite-sex couples.”).

140. 517 U.S. 620 (1996).

141. See Mark Strasser, *Some Observations About DOMA, Marriages, Civil Unions, and Domestic Partnerships*, 30 CAP. U. L. REV. 363, 365 (2002) (suggesting *Romer* “has important implications for the constitutionality of DOMA”); Veronica C. Abreu, Note, *The Malleable Use of History in Substantive Due Process Jurisprudence: How the “Deeply Rooted” Test Should Not Be a Barrier to Finding the Defense of Marriage Act Unconstitutional Under the Fifth Amendment’s Due Process Clause*, 44 B.C. L. REV. 177 (2002) (calling DOMA a reaction to *Baehr* and *Romer*).

142. H.R.J. Res. 93, 107th Cong. (2002).

to maintain “the union of two genders,” which “has unique and irreplaceable benefits for kids and society.”<sup>143</sup>

### C. *The “Case” in a Skeptical Light: Toward Revision*

The “case for marriage” draws a picture of goods and gains, and its influence continues to change the law. A critical look at it, however, casts these achievements in doubt. Marriage may not deserve the credit for the welfare effects that often accompany being married. Even if marriage did deserve this credit, these gains cannot support retaining, as compared with abolishing, state-sponsored marriage.

#### 1. *Correlation and Causation*

That married people are better off than unmarried people does not demonstrate that marriage makes people better off. As critics of the marriage movement have long charged, correlation is not causation. A selection effect may be at work: perhaps individuals destined for health and wealth want to get married before they achieve success, have little trouble finding suitable partners, and smoothly stay married throughout their lives.<sup>144</sup> Individuals predisposed to illness and poverty, by contrast, may have trouble forming stable and harmonious relationships. It might be truer to say that such unfortunates are not married because they are unhealthy, rather than that they are unhealthy because they are not married.<sup>145</sup>

Marriage partisans have worked diligently to refute this criticism. Waite and Gallagher, for example, report that studies of sick persons find that those who get married live longer than those who do not.<sup>146</sup> Longitudinal studies, looking at the same cohort of people over time, find happiness during the married years of their subjects’ lives and unhappiness during the divorced years.<sup>147</sup> *The Case for Marriage* also identifies particular marital behaviors, like wifely nagging, that it finds

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143. Stephanie Francis Cahill, *Between a Man and a Woman: Federal Marriage Amendment Would Ban Same-Sex Marriages*, ABA J. E-REP., May 24, 2002, at WL 1 No. 20 ABAJEREP 5.

144. See Shankar Vedantam, *Does a Ring Bring Happiness, or Vice Versa?*, WASH. POST, Apr. 21, 2003, at A9 (reporting a fifteen-year study of more than 24,000 persons in Germany that identified a “set point” of happiness at which individuals tend to rest regardless of their marital status, suggesting that marrying does not of itself make people happier).

145. Cf. JESSIE BERNARD, *THE FUTURE OF MARRIAGE* 17 (1982) (quoting Samuel Johnson as declaring marriage to be “the best state for man in general; and every man is a worse man in proportion as he is unfit for the married state”).

146. WAITE & GALLAGHER, *supra* note 111, at 51-52.

147. *Id.* at 59-71. But see Goode, *supra* note 116, at F1 (casting doubt on self-reports of happiness).



salubrious.<sup>148</sup> But such evidence does not refute the selection effect; if credited, it demonstrates only that getting married can convey a few particular benefits.

Meanwhile, other effects cloud the picture, notably the correlation between marriage and wealth.<sup>149</sup> The prosperous marry at a high rate, and tend to stay married; the poor are less likely to marry and more likely to divorce. Low-income women look for economic stability in a partner before marrying him,<sup>150</sup> and for their part, men, Cinderella-rescue myths notwithstanding, apparently prefer wives who earn good wages.<sup>151</sup> Health and wealth are not independent variables: persons with money also have good health insurance, access to wholesome hospitals, shelter from street criminals and dangerous buildings, safe distances from environmental pollution, and the prerogative to decline jobs that would sicken or maim them. The odds are that such persons have spouses too. If marriage can get credit for the welfare that prosperous people enjoy, then high-quality clothes and large houses deserve credit too.<sup>152</sup>

## 2. Reasoning from a Base of Favoritism

Individuals are well-advised to follow a favored path rather than a disfavored one, to the extent that they have a choice. *The Case for Marriage* has duly commended marriage as something to get if you can get it. "Buy them a copy of this book," urge Waite and Gallagher to readers who have relatives or friends in a state of faltering faith, "and highlight the parts on sex, health, wealth, or children, depending on the situation."<sup>153</sup> Notwithstanding this recommendation to strangers about the way they should live, *The Case for Marriage* provokes more questions than it answers.

"[S]ex, health, wealth, children": the law chooses to interfere in all of these realms to shift advantages to married persons. We can note the four realms briefly in turn. When it criminalizes fornication and

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148. WAITE & GALLAGHER, *supra* note 111, at 55.

149. See Coontz & Folbre, *supra* note 117.

150. Kathryn Edin, *Few Good Men: Why Poor Mothers Don't Marry or Remarry*, AM. PROSPECT, Jan. 3, 2000, at 28.

151. Sharon Sassler & Robert Schoen, *The Effect of Attitudes and Economic Activity on Marriage*, 61 J. MARRIAGE & FAM. 147, 148-49 (1999).

152. Ironically, Waite and Gallagher attack marriage critic Jessie Bernard for ignoring the wealth effect. Bernard found single women less depressed than married women; Waite and Gallagher retort that single women are economic elites. WAITE & GALLAGHER, *supra* note 111, at 165. Putting aside the question of whether single women really are economic elites, the same reasoning would undermine many of their own assertions.

153. WAITE & GALLAGHER, *supra* note 111, at 191.

adultery — as it still does in many places<sup>154</sup> — the state expresses disapproval of extramarital sex, a message that might correlatively validate the experience of sex within marriage. Prison wardens typically withhold conjugal visits from unmarried inmates.<sup>155</sup> Residential landlords around the United States are free in most locales to indulge a prejudice against renting to unmarried couples.<sup>156</sup> Little wonder that the married, subsidized by positive law, are at a sexual advantage.

Next, health. Extending employment-based medical insurance to the spouses of workers, an allocation strategy that the law encourages and fosters,<sup>157</sup> spreads health through marriage: whereas only a little over half of single women have private health insurance, eighty-three percent of married women have it.<sup>158</sup> Every married person has a next-of-kin partner situated to intervene benevolently with the institutional medical care that he or she will receive; the law extends this privilege to spouses, but not to other persons, such as friends.<sup>159</sup>

Wealth-related legal interventions in favor of marriage are especially numerous. As I have mentioned and will detail, the joint income tax return, gift and estate tax exemptions, transfer payments like Social Security, standing to collect wrongful death and survivor and consortium damages in tort litigation, access to health and life insurance, protections in bankruptcy law, and numerous other privileges categorically deliver wealth to married persons. The “children” item

154. See *Oliverson v. W. Valley City*, 875 F. Supp. 1465, 1474-75 (D. Utah 1995) (“[M]ost states have continued to maintain adultery statutes as a part of their criminal law.”); C. Quince Hopkins, *Rank Matters But Should Marriage?: Adultery, Fraternalization, and Honor in the Military*, 9 UCLA WOMEN’S L.J. 177, 178 (1999) (noting that the contemporary U.S. military prosecutes adultery vigorously); Elaine Monaghan, *Georgia Annuls Ancient Law on Sex*, TIMES (London), Jan. 16, 2003, at 17 (counting ten jurisdictions in the United States that still criminalize fornication). *Lawrence v. Texas*, 539 U.S. 558 (2003), which held that states could not criminalize sodomy, might be interpreted to invalidate the crime of fornication, but this development has not yet taken hold.

155. Conjugal visits are scarce even for the married. James Doran, *Voice of Experience for the Executive Facing Jail*, TIMES (London), Dec. 7, 2002, at 58 (quoting veteran inmate who recommends that about-to-be-sentenced American white-collar criminals abandon their hopes of conjugal visits during their incarceration).

156. David Kushner, *Free Exercise, Fair Housing and Marital Status — Alaskan Style*, 12 ALASKA L. REV. 335, 348-56 (1995) (surveying state laws). See generally *Lawrence v. Texas*, 123 S. Ct. 2472, 2496 (2003) (Scalia, J., dissenting) (“[I]n most States what the Court calls ‘discrimination’ against those who engage in homosexual acts is perfectly legal.”).

157. See *infra* Part III.B.1.

158. WAITE & GALLAGHER, *supra* note 111, at 60. A freelance journalist recounted her decision to abandon her ideological stance against marriage in order to obtain health insurance. Sheelah Kolhatkar, *In Sickness and Health (Care): Marrying To Get a ‘Blue Card,’* FORWARD, May 23, 2003, at 1 (“Several days ago I developed a dreadful cough and started feeling feverish. Fearing pneumonia, I rushed home to my boyfriend and said, ‘Let’s get married!’”).

159. Cf. *Baker v. State*, 744 A.2d 864, 883-84 (Vt. 1999); Chambers, *supra* note 87, at 454-55.

does not directly relate to the others on the list. Your relative or friend who has doubts about marriage probably wants more sex, health, and wealth, rather than less, but more children? Or is it fewer? In any event, the law extends benefits to married parents that are unavailable to unmarried ones.<sup>160</sup> If marriage leaves us better off with respect to sex, health, wealth, and children, then, we have laws — which can be changed to take away privileged treatment — to thank for at least some of this largesse. One might speak of the “case for being privileged.”

If the state were to get out of the marriage business, nobody would be favored because nobody would be married in the official, blessed-by-the-state sense that the marriage movement uses the term. To the extent that the benefits of marriage come from something other than positive law, marriage-like living arrangements unsanctioned by the state would continue to leave people better off.<sup>161</sup> More intimacy of any kind might be what does the trick.<sup>162</sup>

Partisans suggest that marriage is unique, however, because by raising the costs of exit it fosters the boons of specialization and comparative advantage. You go conquer the market; I'll hone my childrearing skills; in the end, together we'll have good money and good kids, profiting more as a married couple than we would if we

160. Fathers are especially affected by this stance, as a look at Supreme Court precedents confirms. For example, a man who begets a child out of wedlock and is not declared its father in a formal filiation proceeding cannot be certain that his child will be able to inherit from him if he dies intestate. See *Lalli v. Lalli*, 439 U.S. 259, 264 (1978) (upholding a denial of inheritance rights even though the decedent had acknowledged paternity in a notarized document). In *Lehr v. Robertson*, 463 U.S. 248, 250 (1983), the Court held that a biological father was not entitled to notice and an opportunity to be heard before his child was adopted if he had not assumed any responsibility for the child's care. *Lehr* left open the question of whether a mother could nullify all of the father's due process rights by cutting off his contact with the child. See *id.* at 269-70 (White, J., dissenting); see also *Michael H. v. Gerald D.*, 491 U.S. 110, 119-30 (1989) (plurality opinion) (holding that a man who fathered a child out of wedlock, to whom he reportedly felt a deep connection, could not be declared the child's father, because the California statute that irrebuttably identified a mother's husband as the father was constitutional).

161. Benefits to cohabitants provide an illustration. One advantage to being married in the United States is access to intergenerational wealth transfers: parents of adult children appear more forthcoming with gifts when their children have families of their own. WAITE & GALLAGHER, *supra* note 111, at 117-18. Should legal marriage be abolished, perhaps these generous parental impulses would continue and the paired-off, family-starting adult child would continue to reap this benefit.

162. Interview by Patrick Perry with Dean Ornish, founder, Preventative Medicine Research Institute, in Patrick Perry, *Matters of the Heart*, SAT. EVENING POST, Sept.-Oct. 1998, at 38 (describing a Harvard study that correlated feeling close to one's parents in youth with better health in midlife); see also Steven Stack, *Marriage, Family and Loneliness: A Cross-National Study*, 41 SOC. PERSP. 415, 418 (1998) (finding that married people are less lonely than single people, but noting that their being partnered, rather than married, might be the crucial variable); *id.* at 416 (decrying the tendency to use college students in studies because the “single and childless” state of students occludes the role of marriage and intimate companionship in generating psychological conditions).

were each trying individually to have it all.<sup>163</sup> Such an arrangement gets stronger if the commitment is harder to abandon, but it may not inherently need a license from the state. The experiment of abolishing marriage would demonstrate which gains in health and wealth derive from the legal category of marriage — a creation of the legislature — and which from a long-term dyadic commitment, rooted in contract. At the moment the two types of marital gains — those that derive from legal favoritism, and those that derive from the relationship itself — get tangled together.<sup>164</sup> Policymakers must acknowledge that legal favoritism is an artifice, a construct that new artifices can supersede.

### 3. *Happiness as Policy*

Partisans invoke happiness as a reason to adopt legislative changes in support of marriage. Jeremy Bentham did indeed speak of happiness as the goal of legislation,<sup>165</sup> but few of his successors have hewed to a consistent use of this term or its synonyms as a guide to policy.<sup>166</sup> They will sometimes root legislative choices in the satisfaction of individual preferences, and on other occasions ignore or even obstruct these desires.<sup>167</sup> As legal scholars — a group broad enough to include scholars ranging from historians to game theorists — have demonstrated, the law will proscribe various behaviors that give individuals pleasure or satisfaction: hate crimes, polluting of air and water, predatory pricing, and aggressive panhandling, among many others.<sup>168</sup> It is a truism of the criminal law that antisocial behaviors cause more unhappiness than happiness, but legislative prohibitions remain valid even when they inflict more misery than they prevent or remedy.<sup>169</sup> Happi-

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163. WAITE & GALLAGHER, *supra* note 111, at 25-27. I return briefly to the specialization hypothesis below. *See infra* note 176 and accompanying text.

164. *See* Dorian Solot & Marshall Miller, What The Case for Marriage Doesn't Want You to Know, at <http://www.unmarried.org/case.html>.

165. *See* BENTHAM, *supra* note 43, at 34.

166. *See generally* David Dolinko, *The Perils of Welfare Economics*, 97 NW. U. L. REV. 351, 364-84 (2002) (critiquing "well-being," a concept now used to update Bentham's "happiness," as circular and incoherent).

167. *See* Bix, *supra* note 110, at 7-8.

168. I elaborate in Anita Bernstein, *Reciprocity, Utility, and the Law of Aggression*, 54 VAND. L. REV. 1, 1-18 (2001).

169. Two examples of such legislation are laws proscribing oral and anal sexual acts, struck down only recently as unconstitutional, *see* *Lawrence v. Texas*, 123 S.Ct. 2472 (2003), and laws restricting the sale of liquor on Sunday, *see, e.g.*, CONN. GEN. STAT. § 30-91(d) (2003). For an account of sodomy laws as a source of grief and anxiety, *see* Jeremy Quittner, *Awaiting Judgment Day*, ADVOCATE, Mar. 4, 2003, at 48, 52. The article quotes activist Paula Ettelbrick: sodomy laws "lend support to the stigma and discrimination that lesbians and gay men face — and that allows judges to say you are a criminal and you have no rights." *Id.*; *see also* Randy E. Barnett, *Bad Trip: Drug Prohibition and the Weakness of Public Policy*, 103 YALE L.J. 2593, 2607 (1994) (noting that Indiana and Wyoming once criminalized

ness does not of itself dictate the content of the law, and references to happiness do not conclude an analysis of what the law ought to advocate or compel.

To put the point more concretely, the same social-science-based, utilitarian vantage point that urges individuals to marry has other happiness-related advice to give, but partisans withhold these insights from their list of recommendations. Dorian Solot and Marshall Miller mention two examples: married couples without children claim to be happier than married couples with children, and women with college educations are more likely to divorce than non-college-educated women.<sup>170</sup> The “case for marriage” does not tell Americans to forsake having children, nor discourage women from attending college. Yet an individual motivated to seek happiness by playing the percentages — someone seeking maximum returns on “sex, health [and] wealth,” if not children too, as Waite and Gallagher counsel — would wish to know which choices correlate with which outcomes.<sup>171</sup> No more committed to “happiness” than are most other utilitarian policymakers, these partisans have cherry-picked what they like from the evidence and discarded the rest.

#### 4. *Winners and Losers*

Gaps in welfare between married and unmarried persons may not necessarily commend marriage; they may signal bigotry and injustice. Take for example one of the biggest statistical effects of marriage: “The wage premium married men receive is one of the most well-documented phenomena in social science,” write Waite and Gallagher.<sup>172</sup> Marriage partisans perceive this effect as benign. Married men must be more productive and more likely to show up at work so-

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aiding or encouraging “masturbation or self-pollution”). Perhaps such prohibitions make people happy, especially if one takes seriously the notion of shoring up public morals as a source of happiness. The number of people that such laws make unhappy, however, or the quantity of unhappiness that they cause, is almost certainly greater, even if the law is only occasionally enforced. The principle that legislation retains validity until it is repealed or nullified permits an unhappiness-inducing law to remain in place long after persons made happy by its passage have died or become indifferent to the law; this delay is another source of misfit between legislation and happiness.

170. Dorian Solot & Marshall Miller, *Marriage-Only Forces Don't Help Today's Families*, at <http://www.unmarried.org/marriage-project-sojourner.html>.

171. See WAITE & GALLAGHER, *supra* note 111, at 191.

172. *Id.* at 99.

ber and on time, perhaps spurred by their role as providers.<sup>173</sup> A man who aspires to succeed in his career is in want of a wife.<sup>174</sup>

The same data, however, support darker speculation. Just as labor-market demographers have found that American men are overpaid at work and women are underpaid — in other words, that men's wages reveal a premium unexplained by any variable other than gender<sup>175</sup> — they could similarly conclude that employers overpay married men at the expense of single men. Perhaps wage setters prefer married men because they feel more comfortable with them and harbor unfounded prejudices against single men.<sup>176</sup> Perhaps wage-earning married men take advantage of their wives — Waite and Gallagher describe wives as career counselors and support systems for hard-working husbands<sup>177</sup> — and therefore reap an enlarged share of wages, an unjust enrichment at the wives' expense, for which wives are often uncompensated at divorce. Perhaps single men find their singleness depressing, not of itself but because of societal prejudices against it, and work less productively as a consequence. Perhaps not. The point is that differences in welfare between unmarried and married people can be attributed to malevolent antecedents as easily as to benign ones. Such

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173. *Id.* at 99-104. Married fathers of young children have particularly good attendance records at work. ANN CRITTENDEN, *THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS THE LEAST VALUED* 25 (2001).

174. "It is a truth universally acknowledged, that a single man in possession of a good fortune must be in want of a wife." JANE AUSTEN, *PRIDE AND PREJUDICE* 1 (Adelphi ed., 1930) (1813).

175. See Anita Bernstein, *Engendered by Technologies*, 80 N.C. L. REV. 1, 87 (2001) (summarizing evidence from the Department of Labor and the Council of Economic Advisers). For more scathing commentary, see Richard Goldstein, *The Myth of Progress*, VILLAGE VOICE, Mar. 12, 2003, at 55. Goldstein faults the Bush administration for reducing the federal government's ongoing studies of the wage gap and adds that "[i]f it's tempting to believe women are doing just fine, perhaps that's because so many guys hold to this idea." *Id.*

176. One study finds this hypothesis more plausible than the specialization hypothesis to explain the wage gap between married and single men — because, as it turns out, married and single men spend similar amounts of time on "home production" work. This study also finds the favoritism hypothesis more plausible than the hypothesis of "the selection of more productive men into marriage." Joni Hersch & Leslie S. Stratton, *Household Specialization and the Male Marriage Wage Premium*, 54 INDUS. & LAB. REL. REV. 78, 93 (2000).

Organizational economics identifies a principal-agent problem that causes firms to inflict or suffer harms because their agents, especially managerial employees, pursue agendas in conflict with those of the enterprise. See generally OLIVER WILLIAMSON, *THE MECHANISMS OF GOVERNANCE* 172 (1996) (identifying this problem as fundamental to the study of the firm). As agents, managers have intervened in workers' choices to marry. See ALICE KESSLER-HARRIS, *IN PURSUIT OF EQUALITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA* 47 (2001) (describing a 1914 program at Ford Motor Company that awarded significant extra pay to various workers, most of them married men, and that categorically excluded single men under age twenty-two).

177. WAITE & GALLAGHER, *supra* note 111, at 104-05, 118-20.

differences by themselves do not support a wholesale advocacy of marriage.

### III. TOWARD MORE HONEST BOOKKEEPING: COUNTING THE DETRIMENTS OF STATE-SPONSORED MARRIAGE

As we have seen, the utilitarian “case” invites onlookers to consider the question of whether society is better off with or without state-sponsored marriage. If societal benefits of marriage justify the decision to expand and buttress this institution, as partisans contend, then comparable societal detriments would justify the decision to retreat from marriage and make it weaker. Only a tendentious version of bookkeeping chooses to count the good news, such as increased life expectancy of married persons, and write off the bad news, a portion of which I discuss in this Part. Here my project is not to tally up the aggregate costs and benefits of marriage, which defy computation and reduce to disputes about values. Instead, this Part widens the ledger, adding relevant variables — both monetary and nonmonetary — in order to make the utilitarian inquiry more complete.<sup>178</sup>

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178. Cf. Brauer, *supra* note 42 (“As an economist, I ask that we all consider, even if the administration does not, the total bill to be paid.”).

**A TENTATIVE RANKING OF SOCIETAL DETRIMENTS (OR DISUTILITY)  
ASSOCIATED WITH STATE RECOGNITION OF MARRIAGE**

	<b>VERB PHRASE</b>	<b>DESCRIPTION</b>	<b>EXAMPLES</b>
<b>PRIMARY</b>	State recognition of marriage <i>causes</i> . . .	. . . revenue-related disutilities with respect to public welfare.	<ul style="list-style-type: none"> <li>• Joint income tax return</li> <li>• Gift &amp; estate tax rules</li> <li>• Social Security payment obligations to individuals based on their marital history rather than on need</li> </ul>
<b>SECONDARY</b>	State recognition of marriage <i>facilitates</i> . . .	. . . detrimental effects in the context of an activity that the law regulates.	<ul style="list-style-type: none"> <li>• Health insurance allotted to spouses of workers</li> <li>• Religious institutions receiving state funds permitted to discriminate on the basis of marriage</li> </ul>
<b>TERTIARY</b>	State recognition of marriage <i>encourages</i> or <i>may be linked to</i> . . .	. . . detrimental effects via norms, customs, or other extralegal forces.	<ul style="list-style-type: none"> <li>• Race-based inequities</li> <li>• Social privileging</li> <li>• Adverse effects on children</li> <li>• Women's poverty and near-poverty denied or obscured</li> <li>• Women kept at home, away from the public realm</li> </ul>

**A. Primary Detriments**

The United States government subsidizes marriage through transfer payments and other supports that are not means tested. These payments constitute a reward that taxpayers as a group bestow on a



class of individuals based solely on these persons' being, or having been, married.

My claim that such transfer payments constitute "detriments" compels me to declare my premises.<sup>179</sup> I would mention six. The first is that the need for government spending is ongoing and constant: money spent on transfer payments, or forgone by the decision to create some exception to tax, must be recouped by other means. Budget cuts would eliminate this need for recoupment, but for simplicity's sake I presume fixed expenditures. Second, government capture of revenues is a good thing; taxation, in this view, is not "theft."<sup>180</sup> Third, the government needs a good reason to extend favorable monetary terms to a particular set of individuals. For example, deciding to cease taxing stock-dividend income is proper, according to this view, if the government has a goal it can state convincingly (increasing the pool of capital available for investment, perhaps), but improper if no such goal emerges.<sup>181</sup> Fourth, tax rules affect the quantity of revenue that the state takes in: I deny that the tax code is infinitely manipulable by well-counseled individuals. Fifth, the existence of antecedent legal categories and consequences influences the content of tax legislation. Whereas, in principle, tax law could contain infinite variety and experimentation, preexisting concepts limit the effect of imagination. Sixth, transparency is good and opacity is bad. When these stipulations are granted, marriage becomes a source of direct fiscal detriment, as well as of various benefits, to the American public.<sup>182</sup>

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179. Readers and workshop audiences surprised me by finding this claim more questionable and objectionable than anything else in this Article. (I had assumed that exploring a 'radical' abolition thesis would offend, but apparently it didn't.) The criticisms vary; I note them below as they arise. See *infra* notes 181-182. One notion that these commentators share is that the taxing and spending of revenues is a struggle among interest groups rather than an exercise in applied justice. Because no group has an a priori entitlement to money, it becomes absurd to speak of the "benefits" or "detriments" of any distributional outcome.

180. "Taxation as theft" gets an airing in J.R. Kearl, *Do Entitlements Imply that Taxation is Theft?*, 7 PHIL. & PUB. AFF. 74, 74-81 (1977). Kearl concludes that the answer is no. For arguments that taxation is illegitimate, see Jeffrey Rogers Hummel, Book Review, *Epstein's Takings Doctrine and the Public-Goods Problem*, 65 TEXAS L. REV. 1233, 1242 (1987). Hummel summarizes the view that "natural rights" require "the taxless society." *Id.*; see also ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 169 (1974) ("Taxation of earnings from labor is on a par with forced labor.").

181. My colleague Bill Carney points out correctly that here I neglect interest group theories of public choice. My stance is judgmental: I do not believe that all duly enacted laws are equally sound or wise. Put another way, I mean to distinguish good from bad legislation, recognizing that the latter kind of lawmaking does occur.

182. Some readers of this sentence note that state-sponsored marriage does not itself cause the state to forgo revenue; instead, legislation that recognizes marriage effects this consequence. This criticism is true enough, but I am making a simpler point: "Imagine there's no marriage." See *supra* note 19 and text accompanying note 40 (noting Patricia Cain's article of that title). What then? Among other effects, the state would collect more money in taxes. If state-sponsored marriage were abolished, legislators could revise the tax code. Right now, the subsidy forgoes revenue.

## 1. *Social Security Income*

The federal government disburses Social Security transfer payments on the basis of marriage, and not only on the basis of need.<sup>183</sup> Persons eligible for Social Security income are also eligible for Medicare. Given that financially secure people are more likely to be married than poor people,<sup>184</sup> government policies that allot public funds to individuals on the basis of marriage tend to subsidize the well-off at the expense of the less prosperous. Social Security becomes a primary detriment of state-sponsored marriage, then, because of its regressive effects (and the lack of a rationale to support transfers from poorer to richer persons).

## 2. *Income Tax Revenue Foregone*

A short survey of the federal tax consequences of state-sponsored marriage — omitting comparable effects on state income tax revenues<sup>185</sup> — reveals various negative impacts to the fisc. Income taxation is the kind of tax with the most pronounced marriage-related consequences; estate and gift tax revenues are also reduced by the recognition of taxpayers as married.

In 1948, the United States took the eccentric step of creating a marital joint tax return, recognizing the married couple as a single tax-paying entity at their election.<sup>186</sup> Married couples need not file a joint return, but almost all married individuals who file tax returns choose

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183. 42 U.S.C. § 402 (2000). The entitlement is known formally as the Old Age, Survivors, and Disability Insurance Program. I use “Social Security” because this term is simpler and more familiar, and for my purposes will cause no confusion.

184. See *supra* notes 149-152 and accompanying text.

185. About four-fifths of the states impose income taxes on their residents, generally following the Internal Revenue Code’s definition of marital status. Kristian D. Whitten, *Section Three of the Defense of Marriage Act: Is Marriage Reserved to the States?*, 26 HASTINGS CONST. L.Q. 419, 452 (1999). Domestic partners in California may not file joint income tax returns, so long as the federal government holds to its current definition of marriage. CAL. FAM. CODE § 297.5(g) (West 2004) (“[D]omestic partners shall use the same filing status as is used on their federal income tax returns, or that would have been used had they filed federal income tax returns.”). In Vermont, however, parties to a civil union enjoy the same status with respect to Vermont income tax “as if federal income tax law recognized a civil union in the same manner as Vermont law.” VT. STAT. ANN. tit. 32, § 5812 (2003).

186. Boris I. Bittker, *Federal Income Taxation and the Family*, 27 STAN. L. REV. 1389, 1412-14 (1975); see also Lawrence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 TAX L. REV. 1, 4 & n.15 (2000) (explaining that of the twenty-seven member nations of the Organization for Economic Cooperation and Development, the United States joins only seven other countries in providing for a joint marital return; the other nineteen nations impose income taxes separately on spouses) [hereinafter Zelenak, *Doing Something About Marriage Penalties*]. A 2001 government report in Canada reaffirmed the Canadian choice to tax individuals rather than families. LAW COMM’N OF CANADA, BEYOND CONJUGALITY 38-43 (2001).

to do so because the joint return almost always reduces their tax liabilities.<sup>187</sup> Contemporary justifications of the joint return focus on what Lawrence Zelenak has called "couples neutrality" — the principle that each couple should be treated the same as another couple with the same income.<sup>188</sup> Without artificial intervention from the joint return and without tinkering to combat "the marriage penalty," a couple made up of one high-earning spouse and one spouse earning little or no wage income (for example, a \$120,000 husband married to a \$0 wife) would pay much more in taxes than a couple of two middle-earners with the same total income (each earning \$60,000, say) because of the brackets that characterize progressive taxation.<sup>189</sup>

Couples neutrality is an extraordinary concept, no less for having been taken for granted.<sup>190</sup> Professor Zelenak concisely notes the stakes: "There is no way to design an income tax which (1) is progressive, (2) achieves marriage neutrality (no marriage bonuses or penalties), and (3) achieves couples neutrality."<sup>191</sup> No more than two of the three aspects can exist in any system. Forced to choose, the Internal Revenue Code has clung to the least justified, and least justifiable, of the three desiderata. The principle of progressivity rests on a well-crafted philosophical and political base and enjoys wide support.<sup>192</sup> The principle of what might be called "marriage neutrality" has received extensive endorsement in an array of statutes and judicial decisions.<sup>193</sup> No comparable extrinsic source of support buttresses couples neutrality. No groundswell of enthusiasm for this kind of neutrality supported the invention of the joint return in 1948; couples neutrality was a byproduct rather than a purpose of tax reform.<sup>194</sup>

Negative consequences to the fisc have followed. A continual hue and cry about penalties to married persons notwithstanding, the joint return enriches more taxpayers than it burdens. During 1996, the most

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187. See EDWARD MCCAFFERY, *TAXING WOMEN* 16 (1997).

188. Zelenak, *Doing Something About Marriage Penalties*, *supra* note 186, at 4.

189. MCCAFFERY, *supra* note 187, at 19-20.

190. Bittker, *supra* note 186, at 1438 (arguing that the separate returns proposal is "astonishing" because it violates "equality in taxes between married couples with the same income"); see also SYLVIA ANN HEWLETT & CORNEL WEST, *THE WAR AGAINST PARENTS* 243 (1998) (insisting that "the homemaker penalty" in federal income taxation violates couples neutrality).

191. Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339, 342 (1994) [hereinafter Zelenak, *Marriage and the Income Tax*].

192. See Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 MICH. L. REV. 465, 504-18 (1987) (expounding on philosophical arguments for progressive taxation).

193. See Crea, *supra* note 32; Duncan, *supra* note 32; Jaff, *supra* note 19; *supra* notes 58-60 and accompanying text.

194. Zelenak, *Marriage and the Income Tax*, *supra* note 191, at 359-60.

recent year covered in federal reports, the government lost \$4 billion that it would have collected if married persons were obliged to file separate returns.<sup>195</sup>

### 3. *Gift and Estate Tax Revenue Foregone*

“When a well-heeled spouse transfers property to the other spouse during the marriage,” writes family-law scholar David Chambers, “the transfer is not subject to the federal gift tax that would apply to gifts to others, including the donor’s children.”<sup>196</sup> A spouse can transfer assets to another spouse on divorce without incurring a gift or capital gains tax obligation.<sup>197</sup> “And when a spouse dies,” Chambers continues, “bequests to the other spouse are not taxed under federal estate tax laws.”<sup>198</sup> Intraspousal wealth transfers yield less tax revenue to the government than do comparable transfers between persons who are not married to each other.

### 4. *Offsets*

Against these primary detriments, an honest bookkeeper must count the utility of marriage to the public fisc. Examples abound. Even though the joint return causes the federal government to take in less revenue than it would without one, filing jointly as a married couple can result in greater tax liability than filing separately as a pair of unrelated adults.<sup>199</sup> Gift and estate tax revenue lost to intramarital transfers, though not offset, is frequently recouped in large part when the widow or widower dies.<sup>200</sup> Criteria to receive transfer payments take into account the income of a spouse, in some cases disqualifying an indigent person from making a claim on public funds. Marriage can rescue indigents, especially women, from poverty, and can prevent an individual from becoming a public charge. These quantities are hard to count but certainly exist. One can say, however, that the current state of transfer-payment policy makes marriage more of a detriment than a

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195. CONG. BUDGET OFFICE, FOR BETTER OR FOR WORSE: MARRIAGE AND THE FEDERAL INCOME TAX 1 (June 1997), available at <ftp://ftp.cbo.gov/0xx/doc7/marriage.pdf>.

196. Chambers, *supra* note 87, at 474.

197. *Id.*

198. *Id.*

199. CONG. BUDGET OFFICE, *supra* note 195, at 1-6.

200. I thank my colleague Jeffrey Pennell for reminding me of this point.

benefit to the public fisc: means-based welfare payments have shrunk,<sup>201</sup> and marriage-inducement payments continue to rise.

### B. *Secondary Detriments*

In contrast to the primary effects of state-sponsored marriage, which relate directly to the public fisc as a matter of statutory law, secondary detriments come from regulated activities in which statutory law takes a strong regulatory interest, but does not expressly decree particular consequences. These secondary effects result indirectly from governmental recognition of marriage. Their price tag includes non-monetary detriments and costs to individuals who do not comply with a marriage-favoring posture in the law, as well as monetary effects.

#### 1. *Private Insurance and Pension Benefits*

State-sponsored marriage establishes a convention for the distribution of private-sector employment benefits, of which health and life insurance are the most significant. To the extent that employers would have chosen not to provide this insurance but feel compelled to follow this convention, spouses receive benefits that they would not receive but for the fact of their state-sponsored marriage. And to the extent that persons covered as spouses rather than employees obtain economic benefit from this coverage, fellow policyholders underwrite this benefit, providing an unexamined and unjustified transfer on the basis of marriage.

The law abets this underwriting of marriage in several ways. Foremost is the Internal Revenue Code position that the furnishing of insurance benefits to employees' spouses does not constitute a taxable transfer of income.<sup>202</sup> Several states have also codified the convention that spouses are entitled to workplace-based health insurance benefits, compelling employers to insure workers' spouses when they insure the workers themselves, if the spouses are uninsured.<sup>203</sup> Insurance law sometimes frowns on permitting any individual to ensure the life of an

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201. On the shrinking of means-based welfare spending, see Ralph Scharnau, *Several Factors Undermine Success of Welfare Reform*, TELEGRAPH HERALD (Dubuque, Iowa), Feb. 3, 2002, at A19.

202. I.R.C. § 105(b) (2000); Cain, *supra* note 19, at 40 n.75; Chambers, *supra* note 87, at 474. By contrast, the furnishing of insurance benefits to domestic partners is taxable to the recipient. See Interview by HRC FamilyNet with Lara Schwartz, Senior Counsel, Human Rights Campaign, HRC Expert Talks About Taxes, Other Financial Issues Facing GLBT Families, [http://www.hrc.org/Content/ContentGroups/News\\_Releases/20031/HRC\\_Expert\\_Talks\\_About\\_Taxes\\_Other\\_Financial\\_Issues\\_Facing\\_GLBT\\_Families.htm](http://www.hrc.org/Content/ContentGroups/News_Releases/20031/HRC_Expert_Talks_About_Taxes_Other_Financial_Issues_Facing_GLBT_Families.htm) (Apr. 8, 2003).

203. Chambers, *supra* note 87, at 484.

unrelated adult, a stance that can wreak havoc in the financial lives of couples who cannot marry.<sup>204</sup> These stances in the law subsidize marriage at the expense of employers and other individuals who participate in insurance pools. In addition to intervening in the distribution of insurance benefits and also decreeing, or at least facilitating, transfers to individuals based on their marital status, the law has often declined to enforce vigorously its rules that prohibit insurers from discriminating on the basis of marriage.<sup>205</sup>

Regarding "qualified" pensions (meaning pensions that are eligible for tax deferral and employer deductions), federal law compels each employer to pay an annuity to the spouse of a participant worker when the participant retires or dies.<sup>206</sup> This annuity is designed to pay "the actuarial equivalent of 50% of the participant's vested benefit, converted to the form of a lifetime annuity."<sup>207</sup> Spouses receive guaranteed pension benefits even when the retirement plan is of the "defined contribution" type, now ascendant over the "defined benefit" type.<sup>208</sup> In the "defined contribution" plan, which includes 401(k) accounts, the participant is often free to withdraw the amount she has accrued, or use it as collateral for a personal loan. Despite this degree of par-

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204. The "insurable interest" requirement, which originated in common law, has been codified in about half the states. Franklin L. Best, Jr., *Defining Insurable Interests in Lives*, 22 TORT & INS. L.J. 104, 105 & n.9 (1986). Under this doctrine, a policy issued to a person lacking an insurable interest in the contingency is an illegal contract that may give rise to tort liability. *Id.* One anecdote on point is provided in E.J. GRAFF, WHAT IS MARRIAGE FOR? 40 (1999). Graff recounts how she and her partner faced a home mortgage lender that required the two women to insure each other's lives; when Graff and her partner tried to comply, they learned that insurers would not recognize an insurable interest between two "unrelated" women. *Id.*

205. Jennifer Jaff writes that as a single woman she was turned down for renter's insurance in Miami because the insurer required policyholders to declare that some responsible person would stay home in the insured residence during the day, notwithstanding a Florida law prohibiting marital-status discrimination. Jaff, *supra* note 19, at 214. Whether Florida regulators did not deem the insurer's policy to be related to marital status (after all, the person trapped inside the house did not have to be a lawful wife) or simply did not care about the company policy is unknown; what is known, beyond Florida, is that insurance law prohibiting discrimination is sparsely enforced. See H. Jane Lehman, *Tests Uncover Rampant Bias in Home Insurance Process*, CHI. TRIB., Oct. 15, 1995, § 16, at 1 (reporting results of undercover testing); Gregory D. Squires, *Let the Sun Shine In on Property Insurance*, NAT'L UNDERWRITER, Sept. 3, 2001, at 25 ("State regulators have simply not regulated in this area.").

206. I.R.C. § 401(a)(11)(A)(ii) (2003). The only exception to this requirement arises when the spouse consents to an alternative type of payment. Jonathan Barry Forman, *Whose Pension is It Anyway? Protecting Spousal Rights in a Privatized Social Security System*, 76 N.C. L. REV. 1653, 1666-67 (1998).

207. David A. Pratt, *Nor Rhyme Nor Reason: Simplifying Defined Contribution Plans*, 49 BUFF. L. REV. 741, 835 (2001).

208. On the rise of "defined contribution" over "defined benefit," see Michael J. Collins, *Reviving Defined Benefit Plans: Analysis and Suggestions for Reform*, 20 VA. TAX REV. 599, 604, 608-09 (2001).

ticipant freedom, the participant's spouse can count on an annuity when the participant dies or retires.<sup>209</sup>

For an unmarried participant, by contrast, the benefits of a qualified pension dwindle. An unmarried participant may designate a beneficiary to receive a post-retirement benefit. If she dies before she retires, however, nobody collects an annuity. Under this scheme, mandated by federal law, employers and unmarried workers underwrite benefits for spouses.<sup>210</sup>

## 2. Religion as a Shield

American law occasionally allows individuals and entities to use religion to achieve immunity from legal liability. Behaviors otherwise prohibited — that is, elsewhere identified as detrimental — become acceptable in a religious context. Because of their partial exemption from antidiscrimination mandates, religious institutions can practice discrimination on the basis of marital status while enjoying the support of law.<sup>211</sup>

Marriage- and religion-related detriments that the law condones include discrimination against employees on the basis of marital status<sup>212</sup> and breaches of religiously based marital contracts. The paradigm contracts of this kind are the Jewish *ketubot* that give a husband the unilateral power to initiate a religious divorce, and permit him to withhold it from his wife.<sup>213</sup> The treatment of religion in American law continues to bolster detriments related to marital status.<sup>214</sup>

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209. See generally Forman, *supra* note 206, at 1669-71.

210. For an account of one unmarried worker's frustration with this state of pension law, see Michelle Conlin, *Unmarried America*, BUS. WK., Oct. 20, 2003, at 106.

211. If state-sponsored marriage were abolished, this opportunity would not go away: religious institutions could discriminate on the basis of nongovernmental marriage. State-sponsored marriage does, however, facilitate this tendency: it makes marital status easy to look up and straightforward to ascribe.

212. See *Little v. Wuehl*, 929 F.2d 944, 945 (9th Cir. 1991) (holding that the religious exemption to Title VII permitted a Catholic school to refuse to renew the contract of a Protestant teacher who remarried in defiance of church teaching). In *Dolter v. Wahlert High School*, 483 F. Supp. 266, 271 (N.D. Iowa 1980), the plaintiff schoolteacher was fired by her Catholic institutional employer when she became pregnant out of wedlock. The court agreed to hear the claim only as one of sex discrimination, not marital-status discrimination. *Id.*

213. See *Aflalo v. Aflalo*, 685 A.2d 523, 525 (N.J. Super. Ct. Ch. Div. 1996) (refusing, on First Amendment grounds, to compel a husband to give his wife a *get*, or Jewish divorce, thereby leaving the wife unable to remarry within her community).

214. The rise of federal faith-based initiatives has diverted money from child-support programs to religious organizations "so they can promote marriage." Siobhan McDonough, *Religious Groups Get Federal Grants to Promote Marriage*, CHI. TRIB., Jan. 3, 2003, § 1, at 20. Recipients of these expenditures see their efforts as benign, but all marriage-promotion efforts inherently contain a detrimental aspect, even if it is nothing worse than the lecturing or hectoring of a captive audience. The religious identity of those who receive funding for faith-based programs hinders scrutiny of what they do with their expenditures — a condition

### 3. Frustrating Worthy Creditors

Marriage, as a shelter of assets, shields deserving and undeserving debtors alike. An observer can speculate infinitely about the worthiness or unworthiness of creditors whose attempts to collect on a debt are frustrated by marriage-based shields like the opportunity to title assets in a spouse's name. Who deserves the asset more, the creditor or the married debtor? One cannot know. One can know, however, that legal shelters protecting individuals based on their marriage, rather than another trait more clearly pertinent to their status as debtors, can hinder the optimal collection and payment of debt.

An example is the use of tenancy by the entirety to obstruct the collection of child support payments. In the name of marriage, a delinquent parent can use tenancy by the entirety to prevent a seizure of property to pay for the support of children from a prior marriage or relationship. One commentator has found the problem nontrivial in practice,<sup>215</sup> notwithstanding the modern decline of tenancy by the entirety and the supposed panoply of remedies available to enforce child support obligations.<sup>216</sup> Commercial creditors can be more or less deserving. Favoring delinquent obligors over their children, who are entitled to support, however, privileges one type of law-based family relation over a different law-based family relation that inherently contains more vulnerability.

### 4. Offsets

The secondary detriments of marriage complement a set of gains, which take form as liberties. Marriage is a site of condoned inequality, but when enforced as government policy, equality comes at the expense of freedom.<sup>217</sup> Freedom of contract and freedom of religion offset (and may justify) some secondary detriments of marriage. Freeing employees to reject insurance coverage for their spouses as well as to

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that turned Congress against faith-based initiatives, compelling President Bush to install them by executive order. *See id.*

215. Robert D. Null, Note, *Tenancy by the Entirety as an Asset Shield: An Unjustified Safe Haven for Delinquent Child Support Obligors*, 29 VAL. U. L. REV. 1057, 1090-93 (1995).

216. On the decline of tenancy by the entirety, see *supra* Part I.C.5. Several authors discuss the range of measures available to deter and punish child support arrears. *See* Jillian Lloyd, *When Do Stiff Penalties for Deadbeat Parents Go Too Far?*, CHRISTIAN SCI. MONITOR, Mar. 25, 1999, at 2 (noting trend toward criminalizing nonpayment of child support); John Wagner, *New Law Allows Crackdown on Child Support*, NEWS & OBSERVER (Raleigh), Dec. 31, 1995, at B1 (describing measures taken in North Carolina, including "most wanted" posters featuring parents in arrears, withheld driver's licenses, and expanded wage garnishing).

217. *See generally* NOZICK, *supra* note 180 (positing that equality and liberty are in perpetual tension).



collect it without tax liability creates options — that is, liberty — for these workers.

Yet along with its complement of secondary gains, the category of secondary detriments gives reason for concern about transparency. Secondary detriments are veiled. Even sophisticated adults seldom know the origins of such everyday truths as the “natural” link between marriage and insurance; even judges become vexed over the question of how much freedom a religious enterprise should enjoy from the rigors of antidiscrimination law.<sup>218</sup> The force of law underwrites these secondary effects, but in an only vaguely estimable quantity. Because they partake of both private-sector prerogatives and law-sponsored encouragement of particular choices, these consequences can escape accountability in a way that fiddling with, say, “the marriage penalty” — a clearly primary maneuver — never achieves. In order to compare offsets against detriments, those who make and observe policy need a sharper sense of how partial regulation makes marriage-favoring outcomes appear spontaneous, or derived from the neutral workings of freedom.

### C. *Tertiary Detriments*

Norms are the best-studied example of quasi-legal sources of regulation that, though neither codified nor judicially decreed, nevertheless predict and partially govern behavior.<sup>219</sup> Marriage-related norms that have detrimental effects fall into the tertiary category because the law neither causes them directly, as is the case with primary detriments, nor facilitates them through partial regulatory involvement, as is the case with secondary detriments. Of the three categories, “tertiary” is the least precise, the most debatable, and the furthest removed from quantifiable financial consequences.

The tertiary detriments of marriage can emerge only after one determines what to compare to what. To those who look at marriage as a legal category, adverse effects emerge with particular clarity when one contrasts heterosexual couplings unrecognized by the state, on the one

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218. See Jane Rutherford, *Equality as the Primary Constitutional Value: The Case for Applying Employment Discrimination Laws to Religion*, 81 CORNELL L. REV. 1049, 1128 (1996).

219. Norms are everywhere. In our context of marriage, for instance, all but two presidents of the United States, James Buchanan and Grover Cleveland, followed a norm that a man must be married at the time of the campaign in order to win this office. Michael Farquhar, *Hail to the Chiefs*, WASH. POST, Feb. 18, 2002, at C16 (noting that Buchanan never married and Cleveland had not yet married when he was elected). Other norms say that the president should not have ever been divorced, nor have married a divorced woman; he is also not supposed to have extramarital sex while in office. Though flouted by Presidents Reagan, Ford, Kennedy, and Clinton respectively (and perhaps by others), these norms retain some force.

hand, with state-sponsored marriage, on the other. State-sponsored marriage has several deleterious consequences when compared with informal pairing. By privileging one type of union over another,<sup>220</sup> it stigmatizes cohabitation as less privileged. It makes a breakup from the sanctioned union more difficult, expensive, and slow. As we have seen elsewhere, distinct benefits undeniably offset these detriments, but the costs nevertheless should not be overlooked in a quasi-utilitarian celebration of marriage.

Cohabitation is not the only alternative to marriage; many adults neither cohabit nor marry. Unpartnered and same-sex-partnered persons also get hurt by tertiary detriments. State sponsorship establishes the gender-dimorphous dyad as the preferred way to arrange one's private life.<sup>221</sup> An uncounted, unaudited, barely questioned, and virtually sacred legal stance in favor of marriage — a subsidy that as we have seen causes billions of dollars to change hands each year — sends a message of privilege that extends beyond money. "It's a [heterosexual] couples' world," the discontented say.<sup>222</sup> Laments from single adults, homosexually or bisexually oriented persons, and husbands or wives who feel social pressure locking them inside miserable marriages are familiar to the point of cliché. *Not fair*, we hear, to deprive the unmarried of marriage-related privileges.<sup>223</sup> Unhappiness about ideological subsidy is, indeed, far more prevalent than unhappiness about any financial perks. Such nonmonetary inequity, though hard to measure and count, is amenable to the quasi-utilitarian reckoning that the "case for marriage" invites. Ideological subsidy is a good investment if society is better off with it: single persons, homosexually and bisexually oriented persons, and persons who resent the pressure favoring marriage may feel that the ideology persecutes them, but the gains of favoring that which is advantageous to the public can outweigh the social losses of their distress. It is wrong, however, to proceed with a pro-marriage legislative agenda as if these losses and detriments did not exist.

Like their cousins of the primary and secondary type, tertiary detriments contain built-in offsets. What you call stigmatization could be to me a principled preference for something good over something bad.

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220. See generally Margaret F. Brinig & Steven L. Nock, *Marry Me, Bill: The Case for Keeping Marriage* (2002) (unpublished manuscript, on file with author) (comparing cohabitation with marriage).

221. See *supra* Part II.C.2 (describing favoritism).

222. For invocations of this phrase, see Lisa Kochanowski, *Group Offers Outlet for Widows, Widowers*, S. BEND TRIB., Mar. 31, 2002, at C1; Kim Ode, *Divorce Might Not Be as Contagious as We Think*, STAR TRIB. (Minneapolis), Sept. 8, 2002, at E4.

223. Miller, *supra* note 116 (recounting whining); see also Jaff, *supra* note 19 (arguing that marital status should be a source of neither benefits nor detriments).

Slowed and burdensome parting for some equals a brake on reckless impulses for others. The point, again, is not to take a measure of marriage, but rather to survey what a reputable measurer would want to count. The following discussion considers a few among many ill effects.

### 1. *The Gender Gap in Gains from Marriage*

Just as bylines identify women as relatively skeptical about marriage and men relatively enthusiastic about it,<sup>224</sup> wives report that they do not enjoy their married lives as much as their husbands do.<sup>225</sup> The “case for marriage” prefers to put the point more positively: both men and women benefit from marriage, but men benefit more. The most dramatic gains of marriage redound to men as individuals, rather than to women: men who marry win significantly higher income, much better health, and longer life,<sup>226</sup> but for women, the gains occasioned by marrying are relatively modest, and the picture more mixed. The improved health that married women enjoy is almost entirely a function of money — specifically, their husbands’ extra income and health insurance.<sup>227</sup> Single women live longer after heart attacks than married women.<sup>228</sup> Many married women in the workforce fare poorly there: divorced women earn more than both married and never-married women,<sup>229</sup> and motherhood, a condition that frequently accompanies women’s marriage, depresses women’s wages and job opportunities.<sup>230</sup> Getting married reduces depression for men but not for women,<sup>231</sup> and the question of whether married women or single women suffer more

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224. For a citation of classic feminist criticisms of marriage, see Martha Chamallas, *Consent, Equality, and the Legal Control of Sexual Conduct*, 61 S. CAL. L. REV. 777, 788 n.49 (1988). See also *supra* note 19 (noting that most authors who criticize or attack marriage are women). Paeans to marriage come more often from men than women, and gay men, including David Chambers, William Eskridge, and Andrew Sullivan, are noted for their eloquent praise of marriage as an institution that should be opened to same-sex couples. Of course, many women are very grateful for, and admiring of, marriage.

225. HACKER, *supra* note 28, at 28 (noting wives’ greater discontent); Karen S. Peterson, *Why Men Drag Their Feet Down the Aisle*, USA TODAY, June 26, 2002, at 8D (“Women often see marriage as a better deal for men than for women, providing a man with steady sex, a caretaker for the kids, a social planner, a domestic servant, and a second — sometimes larger — paycheck.”).

226. Ken Dempsey, *Who Gets the Best Deal from Marriage: Women or Men?*, 38 J. SOC. 91 (2002).

227. WAITE & GALLAGHER, *supra* note 111, at 60.

228. Steve Sternberg, *After Heart Attack, Can Kindness Kill?*, USA TODAY, Nov. 20, 2002, at D10.

229. WAITE & GALLAGHER, *supra* note 111, at 107 n.28.

230. Ann Crittenden estimates she lost a million dollars in wage income because she became a mother. See CRITTENDEN, *supra* note 173, at 87-109.

231. WAITE & GALLAGHER, *supra* note 111, at 70-71.

from depression remains unresolved. Sticking with an unhappy marriage seems to benefit men, but “[w]omen who stay in bad marriages become depressed, exhibit lowered immune functioning and are more likely to abuse alcohol than women who get out.”<sup>232</sup>

Marriage partisans acknowledge the gender gap between men’s and women’s experiences of marriage, but insist that it does not hurt their argument. Yes, they concede, marriage contains two halves.<sup>233</sup> If his were to thrive at the expense of hers, one might worry about the goodness of the institution, they say; but as long as both men and women benefit from marriage, why worry?<sup>234</sup> This stance is at odds with widely held contemporary views of justice that propel the welfare state to ameliorate distributional inequities,<sup>235</sup> and with utilitarianism itself, the normative foundation that advocates have chosen to underlie their secular “case for marriage.” Studies report that game-player parties reject positive-sum bargains when they feel that other participants are taking advantage of them, an embarrassment to hardcore utilitarianism sometimes explained as evincing “a taste for fairness.”<sup>236</sup> Sharply delineated gender differences favoring men over women in any social practice bespeak a problem, not a policy cure-all.

With marriage, the problematic conditions are easy to see, not buried under microeconomic simulations or abstract conceptions of justice. Women gain wealth from marriage because they gain vicarious access to the favored gender’s paycheck. Their health improves because they are married to health insurance: their lower-paying jobs, and their inferior access to employment-based medical insurance, keep

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232. Stephanie Coontz, *Marriage Can’t Be the Only Accepted Commitment*, *NEWSDAY*, May 27, 2001, at B8.

233. Sociologist Jessie Bernard won fame for saying that every marriage contains two marriages, his and hers, and “hers” needs repair. BERNARD, *supra* note 145, at 1.

234. See David Popenoe, *The Top Ten Myths of Marriage*, National Marriage Project, at <http://marriage.rutgers.edu/Publications/pubmyths%20of%20marriage.htm> (Mar. 2002) (claiming that the gains are virtually equal for men and women because women gain significant “financial advantages”) [hereinafter Popenoe, *The Top Ten Myths of Marriage*].

235. See JOHN RAWLS, *A THEORY OF JUSTICE* 278 (1971) (propounding an entitlement to baseline support); see also NORMAN FROLICH & JOE A. OPPENHEIMER, *CHOOSING JUSTICE: AN EXPERIMENTAL APPROACH TO ETHICAL THEORY* 58 (1992) (reporting findings that most people would rather have average utility with a welfare floor than the opportunity to hold great gains without a floor); Maureen B. Cavanaugh, *Democracy, Equality, and Taxes*, 54 ALA. L. REV. 415, 422-28 (2003) (defending redistribution).

236. See Ward Farnsworth, *The Taste for Fairness*, 102 COLUM. L. REV. 1992, 1995 (2002) (quoting LOUIS KAPLOW & STEVEN SHAVELL, *FAIRNESS VERSUS WELFARE* 21 (2002)). For elaboration in the context of marriage, see Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 VA. L. REV. 509, 590 (1998) (citing ERIC RASMUSEN, *GAMES AND INFORMATION: AN INTRODUCTION TO GAME THEORY* 229 (1989), and Alvin E. Roth, *Bargaining Experiments*, in *THE HANDBOOK OF EXPERIMENTAL ECONOMICS* 253, 266-74 (John H. Kagel & Alvin E. Roth eds., 1995)). Wax notes that the decision to divorce a spouse who insists on lopsided bargains may reflect an independent “taste for equity.” *Id.*

them away from the health care resources given more generously to working men. Unlike men, who earn more as married fathers than as childless bachelors, women suffer a loss in wages when they become parents — forcing them to choose, when they have children, between straitened single motherhood and marriage-dependent wifely sacrifice — <sup>237</sup> that is, if they have a choice: some women fail to attain marriage even though they want it, and others get discarded by husbands who no longer want them.<sup>238</sup> Such inequities are not obscure or trivial. By initiating most divorces, despite (probably) knowing that divorce is costly, women manifest a “taste for equity,” which utilitarians admit can outweigh the desire for gain.<sup>239</sup> If many women prefer the hardships of “equity” to the goods of marriage, perhaps these goods are insufficient to support marriage as policy.

## 2. *Tertiary Consequences of Primary Detriments: Social Security and Income Tax*

Social Security subsidizes stay-at-home wives at the expense of working wives. A married woman is entitled to benefits calculated on a basis of half her husband's earnings.<sup>240</sup> Alternatively, if she too participated in the labor market, she receives either the amount credited to her own earnings or the amount credited to the stay-at-home share, whichever is greater. Consequently, if during her years in the workforce she did not outearn the “traditional” allotment, all of her contributions (made in the form of Social Security taxes) go unrepaid. Historians report that these rules were written with the explicit purpose of keeping women home;<sup>241</sup> regardless of their original purpose, they perpetuate the incentive. The tradition of keeping women out

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237. This phrasing omits two sources of gain for mothers: the utility of childrearing (which is available to all mothers), and the benefits of sharing in a husband's income (available to mothers who are married to wage-earning men). These gains are significant, and may help explain why most women become mothers despite the price, but they have already taken up a lot of space in public discussion. Elise Bruhl, *Motherhood and Contract: Always Crashing in the Same Car*, 9 BUFF. WOMEN'S L.J. 191, 191-99 (2000) (noting extravagant rhetorical homage to motherhood). For the sake of balance, I have buried the oft-stated good news in the footnote, and placed the less-stated bad news in the text.

238. See HACKER, *supra* note 28, at 27 (noting that although wives initiate most divorces, this generalization does not hold for older divorcing couples).

239. Wax, *supra* note 236, at 590.

240. 42 U.S.C. § 402(b)(2), (c)(3) (1994).

241. Alice Kessler-Harris, *Designing Women and Old Fools: The Construction of the Social Security Amendments of 1939*, in U.S. HISTORY AS WOMEN'S HISTORY 101 (Linda K. Kerber et al. eds., 1995).

of the labor market is strengthened in a patriarchal view of the provider.<sup>242</sup>

Encouraged to avoid the labor market, women are also encouraged to stay in their marriages until death. When it comes time to receive Social Security payments, widows collect one hundred percent of the benefit that reflects their late husbands' contributions, but women whose marriages ended in divorce collect no more than fifty percent, and then only if they were married to the husband in question for at least ten years.<sup>243</sup> This allotment puts a woman in a bind. If she stays at home the way the Social Security system encourages women to do, she risks losing significant benefits upon divorce (less than half of all marriages that end in divorce make it to ten years). If she stays at work, chances are her Social Security contributions will add up to no additional benefit for her. Meanwhile, much of her economic fate rides on her husband's decision not to divorce her — a decision she cannot control, but can encourage through a pliant, he-comes-first marital attitude (or, perhaps, through assurances that divorce will be costly to him).

Tertiary detriments related to the Social Security treatment of marriage inflict injury on the basis of race as well as gender. First, African-American wives are more likely than white wives to have worked outside the home for money;<sup>244</sup> the subsidy of stay-at-home wives redounds to the benefit of white couples and the detriment of African Americans. Second, African Americans are more likely than Caucasian Americans to be single.<sup>245</sup> Social Security rules that reward marriage, then, reward Caucasian taxpayers at the expense of African-

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242. MCCAFFERY, *supra* note 187, at 193. *But see* Nada Eissa, Book Review, 37 J. ECON. LITERATURE 683, 684-85 (1999) (criticizing McCaffery for ignoring the significant minority of married women who earn more than their husbands).

243. 42 U.S.C. § 402(b) (2000); MCCAFFERY, *supra* note 187, at 97-98.

244. One study found that 63.2% of African-American wives were working outside the home in 2000, compared to 59.8% of white wives. T. Shawn Taylor, *Time Crunch Clobbers Working Families*, ORLANDO SENTINEL TRIB., Sept. 18, 2002, at G1. The figure for African Americans is probably too low, because African-American women take up informal, off-the-books jobs more than do white women. *See* Alison Stein Wellner, *The Two Worlds of Women*, FORECAST, Oct. 22, 2002, at 1. Earnings from informal employment are generally not subject to Social Security payroll taxes, which means that the worker can take home more of her wage, but also cannot benefit from her own contributions when she retires.

245. Jay D. Teachman et al., *The Changing Demography of America's Families*, 62 J. MARRIAGE & FAM. 1234, 1236-39 (2000) (noting that African Americans are less likely than Caucasians to marry at any point in their lives, to convert a nonmarital union into marriage, and to remarry after divorce); *id.* at 1238 (reporting that in 1990, thirty-five percent of white women aged forty to forty-four had experienced at least one divorce, whereas for African-American women the figure was forty-five percent). The trend is growing stronger: of all black women in their early forties, 58.3% were currently married in 1970, and 40.3% were currently married in 2000. HACKER, *supra* note 28, at 160-61.

American taxpayers.<sup>246</sup> Unsurprisingly, given this racial divide, transfer payments to assist needy children and their caregivers are considered pathological ("welfare as we know it"),<sup>247</sup> while transfer payments for widowed and disabled persons stay respectable, a kind of insurance. To those who say that African Americans can easily cross over to the favored side by marrying, a sizeable literature responds that single African Americans report sound reasons for refusing this option, or are single for reasons other than choice.<sup>248</sup>

Income tax rules also press women to comply with patriarchal traditions. Like many other values that invoke "neutrality," couples neutrality in income tax policy harbors a pointed political agenda. Focusing on a couple rather than an individual as a taxpaying unit, the concept encourages the spouses to live in a particular way qua couple. As scholars have demonstrated, it is impossible for a tax system that respects "couples neutrality" to avoid favoring either an egalitarian or a traditional pattern of wage attribution within each marriage.<sup>249</sup> The

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246. See Conlin, *supra* note 210, at 106 (noting that "one out of every three black male youths will pay for retirement benefits they will never see"). See generally Dorothy A. Brown, *The Abolition of Marriage Movement from a Tax Policy Perspective: Only Certain Women Need Apply* (2002) (unpublished manuscript, on file with author) (pointing out racial consequences of facially neutral federal spending policies).

247. In his 1992 presidential campaign, Bill Clinton pledged to abolish "welfare as we know it." Ross K. Baker, *Nimble Presidents Can Change Views, Still Succeed in Long Run*, USA TODAY, Sept. 18, 2003, at 21A.

248. See Edin, *supra* note 150; see also WILLIAM JULIUS WILSON, *THE TRULY DISADVANTAGED 90-92* (1987) (evaluating African-American women's reasons for rejecting marriage); Linda McClain, *"Irresponsible" Reproduction*, 47 HASTINGS L.J. 339, 393-95 (1996) (summarizing "structural factors" that discourage marriage in both African-American and lower-income communities).

249. One writer uses the alien-planet device to good effect here:

Imagine landing on the planet Ames, discovering that human life inhabits it, and that, like Earth, two things are inevitable: death and taxes. Upon learning that the Amesians have an income tax system, your first impulse is to examine it in the hope of discovering how the Amesians live, how they think, and what they believe. In doing so, you learn the following. The government pays male Amesians to marry females who do not work. When a female Amesian who does work marries, by law her income is cut. In fact, the Amesian government discourages her from working at all after marrying. By contrast, when a male marries, his income is automatically increased. Perhaps most astonishing of all is the phenomenon in which most female Amesians pay their husbands every year for the privilege of being married to them, even when the female earns significantly less than her husband. Each year at tax time, there is, in effect, a massive transfer of wealth from the married women in the population to their husbands. . . .

Later, after returning to Earth, lamenting your misfortune, and pondering the oddities of the Amesian tax code, you still cannot believe that seemingly intelligent beings would devise a tax system with such overt bias against females, one that departed so dramatically from neutral principles. You decide to establish interplanetary communications and to ask the Amesians why they chose a tax system with such an egregious impact on females. You gain access to a government satellite, transmit your inquiry to the Amesians, and a few weeks later, their reply arrives: "We got our tax system from you. It is a copy of your U.S. tax code. We have been watching you Americans for years. As we study your society, we adopt some of your more salient customs."

couples-neutrality concept is not particularly neutral. For instance, it presumes that husbands and wives pool their income — a gross oversimplification of reality at best.<sup>250</sup> Perhaps it is also a coercive intrusion into domestic arrangements; attitudinal surveys report that men favor marital pooling of income more than women do.<sup>251</sup>

### 3. *The Tax on Stepmothers' Resources*

Within marriages that blend preexisting families, stepmotherhood is a tough assignment. Fewer than twenty percent of young adult children in stepfamilies feel close to their stepmothers, an unhappy outcome that one observer attributes to the stepmother role leaving a woman “caught in the middle, expected to be a nurturer of sometimes difficult and suspicious children.”<sup>252</sup> Stepmothers report significant discontent and frustration within their marriages, strains that frequently coexist with financial strife.<sup>253</sup> Informal counterparts to stepmotherhood, though perhaps equally trying, or more so, would be easier than marriage to escape.

### 4. *Detriments to Children*

Paeans to the two-parent family have so filled public discussion<sup>254</sup> that one who undertakes the task of bookkeeping must go to some trouble to count the ways that state-sponsored marriage can hurt children. A two-parent household (containing original parents, that is, rather than a stepparent) unmarred by rifts between the two adults is a fine place to grow up — probably the best possible environment for a child, all else being equal. But the “case for marriage” praises the institution categorically, not just the serene households that comprise a fraction of all marriages. And the category of marriage includes variations that leave children worse off.

Two recurring patterns, neither of them rare, cause children to suffer in marriage. The first pattern is the bitter marriage filled with open

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Amy C. Christian, *The Joint Return Rate Structure: Identifying and Addressing the Gendered Nature of the Tax Law*, 13 J.L. & POL. 241, 241-42 (1997).

250. See Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax Return*, 45 HASTINGS L.J. 63, 106 (1993).

251. PHILIP BLUMSTEIN & PEPPER SCHWARTZ, *AMERICAN COUPLES* 94-103 (1983).

252. Karen S. Peterson, *Kids, Parents Can Make the Best of Divorce*, USA TODAY, Jan. 14, 2002, at 1A.

253. See GLYNNIS WALKER, *SECOND WIFE, SECOND BEST?* 45-56 (1984).

254. See Editorial, *Encourage Marriage*, AUGUSTA CHRON., Feb. 1, 2003, at 4A (summarizing findings that commend the two-parent family as the best environment for a child); *supra* note 123 and accompanying text (noting proposed federal-government endorsement of the two-parent family).



conflict and hostility. Unhappy domesticity can exist without marriage, to be sure. But an official union will cement some families together long after their mutual misery could have ended by a less formal means of separation than state-sponsored divorce. Children fare poorly in these households.<sup>255</sup> Stephanie Coontz and Nancy Folbre report that although children born to teenagers who were married at the time of the birth do better than children born to never-married teen parents, children born to teenage parents who married after the birth do worse, suggesting that marriage can at least accompany, if not cause, the worsening of domestic conditions.<sup>256</sup>

The second variation on marriage that can hurt children, referred to in the preceding subsection,<sup>257</sup> is *remarriage*, the blending of families. Policymakers often manifest a view of marriage as an event written on a clean slate — a transition from unsupported isolation to a nurturing household.<sup>258</sup> But many marriages follow, rather than precede, the formation of a two-generation family. Particularly among low-income populations, the perpetual target of most pro-marriage initiatives, newborn children often live with half siblings from their parents' previous marriages or relationships.<sup>259</sup> State-sponsored marriage often gives birth to a second generation of state-sponsored labels — stepmother, stepfather, stepchild — and, as was mentioned, law-based formality tends to make these new roles harder to dissolve.

After decades of denial, observers now report that adjusting to a new stepfamily is a costly process for a child.<sup>260</sup> Compared with children who live in households headed by their original two parents, chil-

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255. On the effect of unhappy marriages on children, see PAUL R. AMATO & ALAN BOOTH, *A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL* 238 (1997). The authors claim that "a high-conflict marriage that does not end in divorce" and "a low-conflict marriage that does end in divorce" are the two worst family settings for children. *Id.*

256. Coontz & Folbre, *supra* note 117.

257. See *supra* Part III.C.3.

258. See WEITZMAN, *supra* note 5, at 153 (noting an "assumption that every marriage is a first marriage"); Andrew Cherlin, *Remarriage as an Incomplete Institution*, 84 AM. J. SOC. 634 (1978) (arguing that popular denial of the reality of remarriage sows confusion and distress among people living in blended families).

259. E. MAVIS HETHERINGTON & JOHN KELLY, *FOR BETTER OR FOR WORSE: DIVORCE RECONSIDERED* 178-79 (2002); BOB SIMPSON, *CHANGING FAMILIES* (1998); Frank F. Furstenberg, Jr., *The New Extended Family: The Experience of Parents and Children After Remarriage*, in *REMARriage AND STEPPARENTING* 42, 42-61 (Kay Pasley & Marilyn Ihinger-Tallman eds., 1987).

260. See William H. Jeynes, *Effects of Remarriage Following Divorce on the Academic Achievement of Children*, 28 J. YOUTH & ADOLESCENCE 385, 386 (1999) (claiming that for years researchers preferred to believe without evidence "that parental remarriage generally benefited children," probably because remarriage typically generates additional family income or additional caregiving labor, or both).

dren who live in stepfamilies fare worse on various indicators.<sup>261</sup> As was noted, the stepmother-stepchild relationship is particularly difficult,<sup>262</sup> and the harms to children of remarriage increase after re-remarriage.<sup>263</sup> Moreover, remarriages and stepfamily-forming marriages are especially prone to divorce,<sup>264</sup> and so, even if remarriage is a good cure for what ails the members of an about-to-be-blended family, policymakers need to recognize that these pairings often dissolve.

### 5. *Concealing the Work of Caregiving*

Marriage gives legal sanction to a locus of poorly remunerated and poorly measured caregiving work. This work — which can certainly be a source of deep satisfaction — includes housecleaning, a range of attentions for children and elderly relatives, emotional labor to benefit others in the family (particularly husbands), and compelled deference and sacrifice, through which the caregiver is expected to take less, and

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261. See SARA McLANAHAN & GARY SANDEFUR, *GROWING UP WITH A SINGLE PARENT* 19-63 (1994). The generalization holds even when researchers control for family income. *Id.*; see also MELVIN KONNER, *CHILDHOOD* 206 (1991) (finding a heightened risk of abuse in stepfamilies); Gloria Albrecht, All Families, All Forms, *SIGHTINGS*, June 5, 2003, at [http://marty-center.uchicago.edu/sightings/archive\\_2003/0605.shtml](http://marty-center.uchicago.edu/sightings/archive_2003/0605.shtml) (noting estimates that about ninety percent of children living in original two-parent households score in the normal range on adjustment measures, whereas among children in stepfamilies or single-parent homes, about seventy-five to eighty percent score in this range).

262. See Douglas B. Downey, *Understanding Academic Achievement Among Children in Step households: The Role of Parental Resources, Sex of Stepparent, and Sex of Child*, 73 *SOC. FORCES* 875 (1995) (studying stepmothers). Lending a little credence to the wicked-stepmother cartoon stereotype, a study of 24,000 British families reported that stepmothers and other women living with nonbiologically related children spent less money on “healthy foods such as milk, fruit and vegetables” to benefit these children than did biologically related women, and spent more on alcohol and tobacco. Cherry Norton, ‘Wicked Stepmother’ Myth Backed by Study, *INDEPENDENT* (London), Oct. 30, 2000, at 9. For a discussion of the continuing valence of the wicked-stepmother myth, in which stepmothers join “wolves, giants, ogres, and witches” as “representations of evil,” see Anne C. Jones, *Reconstructing the Stepfamily: Old Myths, New Stories*, 48 *SOC. WORK* 228, 229 (2003).

263. “There’s research now that suggests that for children, the sheer number of changes in family structure that they have to go through may be more difficult than living with a single parent,” according to marriage-and-family scholar Andrew Cherlin. “So if we put kids in situations where we’re going to be changing their living arrangements several times, we might put them in more harm than if we just leave them where they are.” See *Analysis: New Federal Welfare Plan to Encourage Marriage* (NPR radio broadcast, Mar. 13, 2002), for an interview by Greg Allen with Andrew Cherlin, Professor, Johns Hopkins University. Consistent with other social-science findings, see *supra* notes 261-262 and accompanying text, Cherlin adds that children in stepfamilies do not do better than single-parent children on the teen pregnancy and high school graduation variables. *Analysis: New Federal Welfare Plan to Encourage Marriage, supra*.

264. HACKER, *supra* note 28, at 51; see also HETHERINGTON & KELLY, *supra* note 259, at 178-79 (summarizing data about strain in stepfamilies); Wade F. Horn, *Stepfamilies Must Work a Little Harder*, *WASH. TIMES*, Mar. 6, 2001, at E1 (quoting one estimate that “two of three stepfamilies break up”).

give more, vis-à-vis others in the household.<sup>265</sup> Women bear this burden disproportionately, in their roles of wives and mothers, but the burden can also afflict husbands and fathers. Nobody knows how much it costs.<sup>266</sup>

Concealing caregiving has several distinct detrimental effects, including legal conundrums: how to divide property and fix support obligations at divorce when the spouse who contributed care and other unpaid investments to the relationship lacks legal title to the assets that must be allocated to one spouse or the other;<sup>267</sup> whether a spouse can hold a property interest in her spouse's professional skill that she helped to cultivate;<sup>268</sup> whether wives may make enforceable contracts with their husbands, agreements that would get them compensated for volunteering to take on caregiving obligations;<sup>269</sup> and how judges can administer the tort remedy of spousal consortium when litigants lack a vocabulary to speak of what it means to lose the benefits of this intimate work.<sup>270</sup>

The mischief of concealing caregiving goes beyond the law. In a social climate that esteems both capitalism and marriage, the gendered (and racialized) dyad of a wage-earning husband married to a wage-dependent wife assigns prestige to the husband. Women often feel irked by their diminished status; some report ambivalence about, and discomfort with, the assigned role of caregiver.<sup>271</sup> African-American families, in which the gendered-dyad normative structure has less

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265. See Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2200 (1995) ("These labors may provide joy, but they are also burdensome and have material costs and consequences that go uncompensated within the private family.").

266. The work of New Zealand economist Marilyn Waring is acclaimed for identifying and measuring this value. See MARILYN WARING, *COUNTING FOR NOTHING: WHAT MEN VALUE AND WHAT WOMEN ARE WORTH* (2d ed. 1999).

267. See AMERICAN LAW INST., *supra* note 33, at § 4.12 (characterizing some property as marital and some separate without regard to title, but making no recommendation on this question).

268. Most courts refuse to recognize such an interest, but some treat earning capacity enhanced by a spouse's labors as a factor in property division. See WEISBERG & APPLETON, *supra* note 4, at 719.

269. *Borelli v. Brousseau*, 16 Cal. Rptr. 2d 16, 19-20 (Cal. Ct. App. 1993) (noting the wife's preexisting duty to render caregiving labor).

270. See, e.g., *Coho Res., Inc. v. McCarthy*, 829 So. 2d 1, 18-23 (Miss. 2002) (noting that consortium damages are difficult to determine); *Macomber v. Dillman*, 505 A.2d 810, 817 (Me. 1986) (Scolnik, J., concurring in part and dissenting in part) (same).

271. See Rebecca J. Erickson, *Reconceptualizing Family Work: The Effect of Emotion Work on Perceptions of Marital Quality*, 55 J. MARRIAGE & FAM. 888, 890-95 (1993) (reporting that wives become resentful when they believe they are doing too great a share of the marriage's emotional work); Katha Pollitt, *Utopia, Limited*, NATION, July 26, 1996, at 9 (paraphrasing Amy Wax to contend that "many women find stay-at-home motherhood lonely and boring and financial dependence on their husbands 'irksome and humiliating'").

force, often do not fit the pattern, and so women are faulted both for working outside the home (critics speak of emasculation of the black man<sup>272</sup>) and for staying home to provide care ("welfare mothers"<sup>273</sup>). Married women of all races, but especially white women, who pursue careers sometimes feel accused of neglect and selfishness towards their children simply because they leave the home, or close the office door, in order to work.<sup>274</sup> Without the sentimental cloaks and aura of natural inevitability that state-sponsored marriage offers, the toil of caregiving would be harder to hide.<sup>275</sup>

## 6. *The Lost "Vocation" of Singleness*

Throughout the past, notably in Christian communities, individuals have been esteemed for their choice to forgo marriage in favor of a conscientious single life.<sup>276</sup> This tradition has not entirely disappeared in the contemporary United States, but its erosion has accompanied the rise of law as central to marriage. When marriage became predominately a law-based institution, alternative versions of marriage once prevalent (ecclesiastical marriage, informal marriage) were displaced. The unmarried condition is now extralegal, if not 'unlawful' or 'outlawed';<sup>277</sup> a decline in singleness as vocation or affirmative choice has accompanied the solidification of state-sponsored marriage. Individuals today remain free to divorce or postpone marriage, but in con-

272. See PATRICIA HILL COLLINS, *BLACK FEMINIST THOUGHT: KNOWLEDGE, CONSCIOUS-NESS, AND THE POLITICS OF EMPOWERMENT* 74 (1990).

273. See Froma Harrop, *Trapped in Rhetoric: Hypocrites Bash 'Welfare Mothers,'* PROVIDENCE J., Apr. 2, 2002, at E9 (arguing that the desire to attack women who receive welfare is itself a "welfare dependency"). See Barbara Ehrenreich, *Chamber of Welfare Reform*, PROGRESSIVE, May 2002, at 14, for a discussion of the conjunction of the two canards about emasculation and welfare. Ehrenreich criticizes antiwelfare reformers as believing that welfare cuckolds black men, "usurping their rightful place as breadwinners," leaving them emasculated and demoralized." *Id.* at 14.

274. See generally Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375 (1996) (analyzing the "selfishness" construct).

275. See generally Amy L. Wax, *Caring Enough: Sex Roles, Work and Taxing Women*, 44 VILL. L. REV. 495, 523 (1999) (evaluating these detriments in economic terms).

276. See ELIZABETH GROSZ, *SEXUAL SUBVERSIONS* 133 (1989) (claiming that chastity or "frigidity," as Freud termed it, meaning "the refusal of a specifically genital and orgasmic sexual pleasure," takes a stance against "the patriarchal requirements of heterosexuality" (emphasis omitted)); THE SINGLE WOMAN: COMMENTS FROM A CHRISTIAN STANDPOINT (Elizabeth Mitting ed., 1966) (considering singleness as a conscientious path for women). For praise of the singleness vocation that includes men as well as women, see AL HSU, *THE SINGLE ISSUE* 35 (1997), and RODNEY CLAPP, *FAMILIES AT THE CROSSROADS* 89-113 (1993). The latter work argues that single people are more whole than married ones. *Id.*

277. These adjectives are offered figuratively, but unmarried persons do complain about stigma. See Miller, *supra* note 116 (chastising single women for believing they are entitled to public validation and support for their lifestyle); *supra* text accompanying notes 221-223.

temporary American culture such decisions look like rejections or abstentions, no longer expressions of a contrary conviction.

Disfavoring unmarried adults and favoring married ones, American law diverts individuals from endeavors that demand protracted isolation, childlessness, sacrifice of sexual gratification, the space to think quietly, or obedience to extrafamilial authority. Few such endeavors enjoy much popularity today, and it is hard for moderns to mourn their decline. The lost vocation of singleness, however, at one time bestowed freedoms and opportunities on a respected minority. The state's privileging of marriage and only marriage has not necessarily endowed Americans with virtues opposite those of isolation and contemplation. As Linda McClain has argued, one key purpose of marriage in liberal democracy might be its power to train young citizens in the negotiations that not only characterize intimate life, but also provide a base from which to explore civic negotiations. In practice, however, marriage as a legal institution has not demonstrated its ability to advance this training.<sup>278</sup> The lost vocation of singleness, then, may not have been offset by gains.<sup>279</sup>

### 7. *Lost Privacy*

Claudia Card claims that marriage strips and exposes:

Central to the idea of marriage, historically, has been intimate access to the persons, belongings, activities, even histories of one another. More important than sexual access, marriage gives spouses physical access to each other's residences and belongings, and it gives access to information about each other, including financial status, that other friends and certainly the neighbors do not ordinarily have.<sup>280</sup>

Other writers also identify a loss of privacy that accompanies marriage.<sup>281</sup> This loss does not mean anything so specific as bathroom doors that get opened without knocking, but rather a sense that the retreats of one's life have been breached.<sup>282</sup> Veiling the marriage itself in law-bound privacy compounds the disquiet, according to Card:

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278. See Linda C. McClain, What Price for Marriage (E)quality in Marriage Promotion? (2003) (unpublished manuscript, on file with author).

279. I thank John Witte for broaching this line of thought.

280. Claudia Card, *Against Marriage and Motherhood*, 11 HYPATIA 1, 13 (1996).

281. Retail magnate Stanley Marcus published an essay noting that "marriage brings with it a loss of privacy to both sides, a quality most of us need, in various degrees." Stanley Marcus, *Separation Can Be Healthy for Marriage*, DALLAS MORNING NEWS, Jan. 5, 1994, at 9A (discussing earlier journalism exploring this theme).

282. See ANITA ALLEN, UNEASY ACCESS: PRIVACY FOR WOMEN IN A FREE SOCIETY 84-85 (1988) (quoting nineteenth-century feminist Charlotte Perkins Gilman as saying that marital privacy comes at the expense of a wife's privacy and that the wife's retreats are "resented," or at least "regretted," by other members of the family).

For all that has been said about the privacy that marriage protects, what astonishes me is how much privacy one gives up in marrying. This mutual access appears to be a central point of marrying. Is it wise to abdicate legally one's privacy to that extent? What interests does it serve? Anyone who in fact cohabits with another may seem to give up similar privacy. Yet, without marriage, it is possible to take one's life back without encountering the law as an obstacle.<sup>283</sup>

When commentators, using a more upbeat rhetoric for the same concept, speak of the "merger" or "oneness" that melts the walls of privacy between spouses,<sup>284</sup> they demonstrate that, like the offsets-versus-detriments juxtaposition considered in connection with primary and secondary detriments,<sup>285</sup> "lost privacy" and "merger" illustrate two sides, the good and the bad, found in marriage. Yet a crucial difference emerges: whereas many primary and secondary detriments can be abandoned and then reacquired, privacy once foregone in marriage is hard to regain. Divorced individuals report a preoccupation with the intimate content of their former marriages;<sup>286</sup> the intimacy echoes after it ceases to be shared and, as Card remarks, the law entrenches continued sharing. Inside violent marriages, privacy builds a locus of physical conflict. The rage that fuels batterers when their wives try to leave, well-documented in domestic violence research,<sup>287</sup> can be seen as a struggle over privacy. When she leaves her home, a battered woman pulls aside the marital curtains; to the batterer whom she abandons, this airing is violent, cold, and disruptive. What the couple shared — financial information, responsibility for both battering and non-battering intimate encounters — does not dissipate but lingers, mocking the idea of marital privacy as a source of gain.

283. Card, *supra* note 280, at 13.

284. See Gerry Hostetler, *He Was Full of the Best Medicine*, CHARLOTTE OBSERVER, Apr. 6, 2002, at 2B (describing, in an obituary, a man's marriage as a "merger"); Kerry Sharp, Letter to the Editor, *Strong Families Key to Prosperity*, EVENING STANDARD (Palmerston North, New Zealand), June 15, 2001, at 4 ("Marriage is essentially about oneness.").

285. See *supra* Parts III.A.4, III.B.4.

286. Here I rely mainly on conversations I have had with divorced persons, but scholarly writings also support the point. See, e.g., Nannette Diacovo, Note and Comment, *California's Anti-Stalking Statute: Deterrent or False Sense of Security?*, 24 SW. U. L. REV. 389, 397 n.64 (1995) (noting that one survey found that "simple obsessionals, such as an ex-husband/wife" amounted to half the stalking caseload of the Los Angeles police); J. Herbie DiFonzo, *Coercive Conciliation: Judge Paul W. Alexander and the Movement for Therapeutic Divorce*, 25 U. TOL. L. REV. 535, 555-56 (1994) (discussing professionals' perceptions of divorcing individuals as obsessive).

287. See NEIL S. JACOBSON & JOHN M. GOTTMAN, WHEN MEN BATTER WOMEN 36-39 (1998) (discussing some batterers' anxiety over abandonment); cf. Victoria Nourse, *Passion's Progress: Modern Law Reform and the Provocation Defense*, 106 YALE L.J. 1331, 1345-47 (1997) (noting that a man who kills his wife or partner can frequently gain a manslaughter rather than a murder charge when he claims as "provocation" the woman's plan or desire to leave).

8. *Removing the Protection of the Law*

Although American law has retreated far from coverture and recognizes individual identity within marriage much more than it did even a few decades ago,<sup>288</sup> marriage still blurs the identity of individuals when they are violators of the law or victims of that violation. In this sense marriage creates a partial void in civil and criminal law enforcement, a space for wrongdoers to get away with what the state would elsewhere remedy, punish, and deter. This detriment can be classified as tertiary because even though law plays a direct role in these exceptions and immunities, many of them are unwritten or informal, a question of norms. Police manuals, for instance, seldom instruct officers to take domestic violence less seriously than violence between strangers.<sup>289</sup>

In the zone of partial lawlessness that marriage establishes, rape becomes marital rape, often treated more leniently than other kinds of rape.<sup>290</sup> A person can lose a jointly owned possession to forfeiture without any due process reclamation rights even when she has done nothing wrong, merely because she is married to a wrongdoer,<sup>291</sup> tortfeasors can, in some states, escape civil responsibility for the harms they do their husbands or wives,<sup>292</sup> spouses can refuse to support de-

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288. In 1981, the Supreme Court invalidated a Louisiana statute, the last such law in the United States, that named the husband the "head and master" of the marital community. See *Kirchberg v. Feenstra*, 450 U.S. 455, 456 (1981). In earlier times, this designation was common. WILLIAM Q. DE FUNIAK & MICHAEL J. VAUGHN, *PRINCIPLES OF COMMUNITY PROPERTY* § 113 (2d ed. 1971). Vestiges of coverture remain in mid-century case law. See *Samuel v. Univ. of Pittsburgh*, 375 F. Supp. 1119, 1130-34 (W.D. Pa. 1974) (striking down a university rule that assigned wives their husbands' domicile to determine their tuition); *Forbush v. Wallace*, 341 F. Supp. 217, 222-23 (M.D. Ala. 1971) (holding that an Alabama law requiring a wife to use her husband's surname was not unconstitutional).

289. *Fajardo v. County of Los Angeles*, 179 F.3d 698, 699-701 (9th Cir. 1999) (challenging informal classification of domestic violence 911 calls as less important). The relation between marriage and domestic violence is murky. Married women report less domestic violence than unmarried women, but they may simply be underreporting it. See Popenoe, *The Top Ten Myths of Marriage*, *supra* note 234, at ¶ 7. Women are especially likely to be battered in the setting of unmarried cohabitation, a fact that might commend marriage. *Id.* Alternatively, the existence of state-sponsored marriage might encourage a batterer to view the woman he lives with as subordinate to him.

290. See 2 MODEL PENAL CODE AND COMMENTARIES § 213.1, at 345 cmt.8 (rev. ed. 1980) (urging that the law of rape not "thrust the prospect of criminal sanctions into the ongoing process of adjustment in the marital relationship").

291. *Bennis v. Michigan*, 516 U.S. 442, 447-49 (1996). *Bennis* leaves open the question of what rights an innocent co-owner would have if he or she were not married to the wrongdoer. *Id.* It would be reasonable to suppose, however, that married people are particularly likely to own forfeitable property jointly.

292. GA. CODE ANN. § 19-3-8 (1999) (retaining immunity unless marriage has broken down); *Lucero v. Valdez*, 884 P.2d 199, 201-05 (Ariz. Ct. App. 1994) (noting that Utah has not fully abrogated immunity); *Williams v. Williams*, 439 N.E.2d 1055, 1056-58 (Ill. App. Ct. 1982); *Cloud v. State Farm Mut. Automobile Ins. Co.*, 440 So. 2d 961, 962 n.1 (La. Ct. App. 1983); *Bonkowsky v. Bonkowsky*, 431 N.E.2d 998, 998-99 (Ohio 1982).

pendent spouses with a decent minimum of comfort in relation to what they can afford, even though divorce would make these obligations enforceable.<sup>293</sup> Parents who if divorced would be ordered to pay college tuition for their children can deny any such obligation and get away with it.<sup>294</sup> From this lawless center, norms resembling the slogan of Might Makes Right govern private lives. Justice can become merely “the interest of the stronger”<sup>295</sup> inside marriage, while elsewhere the rule of law hampers the same kind of abuse.

#### IV. REVISING THE “CASE”

This Part seeks to build a narrow argument. It begins by sketching what any case for marriage can and cannot achieve. Next it considers two existing defenses of marriage, both less comprehensive than the failed utilitarian case. Unpersuaded by the reasoning of these two arguments, I nevertheless praise them for their cogency and parsimony. Continuing in the direction of ever-more-parsimonious rationales to support this institution, I conclude that although a thick or robust defense of state-sponsored marriage cannot be sustained, a thinner one emerges.

##### A. *What State-Sponsored Marriage Can Do*

“State interference is an evil,” wrote Oliver Wendell Holmes, “where it cannot be shown to be a good.”<sup>296</sup> Although American law at times applies coercion to individuals without an accompanying rationale about welfare, such instances are exceptions within a larger scheme rooted in public reason and ought to be challenged. Law constrains, but it should not do so without a good reason, one that is intelligible to interested and disinterested persons alike.<sup>297</sup> This starting point about a good rationale, more conservative than the “harm principle” associated with John Stuart Mill and also more informative than such catch-phrases as “substantive due process” and “fundamental rights,” helps to explain why it might be a good idea for the state to sponsor marriage: marriage could increase welfare.

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293. *McGuire v. McGuire*, 59 N.W.2d 336, 342 (Neb. 1953).

294. See Bix, *supra* note 110, at 12 & n.55.

295. PLATO, *THE REPUBLIC* 35-36 (Richard W. Sterling & William C. Scott trans., W.W. Norton & Co. 1985) (attributing this concept to Thrasymachus).

296. OLIVER WENDELL HOLMES, *THE COMMON LAW* 77 (Mark DeWolfe Howe ed., Harv. Univ. Press 1963) (1881).

297. I elaborate in Anita Bernstein, *The Representational Dialectic (With Illustrations from Obscenity, Forfeiture, and Accident Law)*, 87 CAL. L. REV. 305, 364-68 (1999).



Wrongheaded considerations about welfare, however, continue to clutter public discourse. We have already considered in detail the sinking "case for marriage," which asserts that individuals should choose marriage because of the institution's supposed payoffs. Although the data commend marrying rather than remaining unmarried (at least for most people), marriage partisans have not contemplated seriously a world without state-sponsored marriage. Their arguments in favor of marriage thus apply only, and at most, to the question of whether an individual should marry in a society where marriage exists and bestows benefits upon those who choose to wed; they do not refute the claim that marriage should be abolished.

### 1. *The Public-Reason Constraint*

Whereas the case-for-marriage argument fails because it is incomplete, other arguments fail because they are too particular. A public-reason justification for retaining marriage must lie within reach of all citizens to discover and debate as human beings, rather than as members of a subgroup.<sup>298</sup> Accordingly, religious rationales for continuing marriage do not shed light on what the state should do. Even if we put aside First Amendment obstacles to these rationales, no single religion unites all Americans in the sense that they are united by shared reason.<sup>299</sup> Family-values traditionalism and conservative references to the past — "it must be this way because it has always been this way" — fall short on the same ground of too much particularity.<sup>300</sup> We are not all social conservatives. Not everybody embraces "family values."

If marriage is to survive as one of a dwindling number of comprehensive statuses that the law continues to respect, then it must pay attention to the dignity and autonomy of the individual, a concern that militates against status in general. Every status is inherently illiberal, but even illiberal categories or tendencies in the American legal system must recognize that the individual is fundamental. Getting married, then, must result in keeping some freedoms alive even if it must also extinguish others. Exit is the most fundamental of these freedoms:

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298. See Rauch, *supra* note 109, *passim* (insisting on a clear and "secular" civic understanding of marriage).

299. One might mention again that religious rites would be unaffected by the abolition of state-sponsored marriage.

300. Some disagree. *Lawrence v. Texas*, 123 S. Ct. 2472, 2495 (2003) (Scalia, J., dissenting) (concluding that if longstanding tradition supports "morals legislation," such support should suffice to protect it from being overturned); L. Lynn Hogue, *State Common-Law Choice-of-Law Doctrine and Same-Sex "Marriage": How Will Courts Enforce the Public Policy Exception?*, 32 CREIGHTON L. REV. 29, 36 (1998) ("I persist in believing that a well-grounded distaste for particular conduct that is viewed as morally objectionable by a majority within a democratic society . . . is not a product of unreasoned fear . . . but rather of proper moral reservation.").

individuals not otherwise disabled must have the prerogative to go from unmarried to married and from married to unmarried. Beyond the prerogative of exit, a liberal version of marriage must tread cautiously on the expressed preferences and life plans of individuals.

## 2. *Gender Equity: A Conservative Approach*

Many people committed to liberality take a stance against the subordination of women in marriage and in favor of making marriage available to same-sex couples. I share these inclinations but do not press them strongly in a case for marriage that aspires to be thin. Like religious understandings of marriage and family-values beliefs, a commitment to diminishing the force of gender in marriage — that is, a stance against constraints on women's freedom and the current opposite-sex criterion of access to the status — is still something of a particularistic stance. To many, the principles against subordination of women in marriage and in favor of access to marriage for same-sex couples are just as self-evident and as easy and as amenable to public reason, as the stance against old miscegenation laws that prohibited individuals of different races from marrying each other.<sup>301</sup> This perspective has not yet gained recognition in the law.<sup>302</sup>

It is possible, however, to advocate liberality with respect to gender in conservative terms — as an inclination, rather than a source of yes-no rules. Because the constraint of public reason prohibits the state from coercing individuals unless there is a good reason to do so, the state should not craft its law of marriage to force individuals into a gender script — for instance, decreeing that a man may marry only a woman and a woman may marry only a man, or that a husband rather than a wife has the prerogative to choose the couple's place of residence — unless there is a good reason to impose this script on persons who will find it coercive. This position, unlike the stronger stance that views the law of marriage as illegitimate until it comes to comply with gender equity, has won influence in American law. While gender equity remains contested in public discussion in a way that race equity does not, it enjoys wide support and continues to make gains in public discourse. Accordingly, the stance I advocate here emphasizes procedure rather than substance: The law of marriage should respect and bear in mind the claims that feminists and same-sex activists have made regarding marriage, without necessarily acceding to all of them.

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301. Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 235-36 (1994) (advancing miscegenation analogy).

302. *But see* *Lawrence v. Texas*, 123 S. Ct. 2472, 2483-84 (2003) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting) (invoking miscegenation analogy)).

### 3. *The Business Analogy*

Recent scholarly initiatives explore the connection between the law of marriage and the only other field in contemporary American law that continues to emphasize status as a full-throttle complement to contract: the law of business.<sup>303</sup> As Martha Ertman has elaborated, partnerships, corporations, and limited liability companies provide examples of status-based constraints on freedom that override contracts and other instances of individual choice, just as marriage does, but rely on “functionalist reasoning” rather than the “moral judgment” and “purportedly natural differences” so central to family law.<sup>304</sup> In a world in which apolitical objectivity has been deemed unattainable, business law comes closer than any other subject to giving marriage law an ideal of neutrality to emulate.

Persons who engage in entrepreneurial commercial activity find that ideology does not fetter their behavior much. Businesses typically pursue profit, but they need not do so.<sup>305</sup> Business law relies on the construct of markets, a tendency that some deem ideological; but market rhetoric can be kept separate from the gender script that attributes oppressive conditions to nature or divine design, and helps to build a contrary ideal of nonintervention, which in turn can augment freedom for individuals.<sup>306</sup> Professor Ertman invokes the numerous parallels between the law of marriage and the law of close corporations to argue that corporate law provides a model for a morally neutral revision of state-sponsored marriage.<sup>307</sup> Professor Case builds a related analogy between the law of corporate bankruptcy and the law of divorce, arguing that both commend a “fresh start” and a focus on putting assets

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303. Professors Mary Anne Case and Paul Mahoney formed a project called “The Role of the State in Marriage and Corporations,” following what Case describes as a quarter century that saw the ascendancy of the contractual theory of the corporation. In this project scholars frame analogies between business and marriage. See Mary Anne Case, *What Stake Do Heterosexual Women Have in the Same-Sex Marriage/Domestic Partnership/Civil Union Debates?* 29 (2003) (unpublished manuscript, on file with author); WEITZMAN, *supra* note 5, at 240 (noting similarities between “marriage partnerships and business partnerships”); Ertman, *supra* note 6; Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissolution Under No-Fault*, 60 U. CHI. L. REV. 67, 119-38 (1993) (propounding a partnership analogy); Margaret Sokolov, *Marriage Contracts for Support and Services: Constitutionality Begins at Home*, 49 N.Y.U. L. REV. 1161, 1188 (1974) (predicting that the business contracts and the marriage contracts of the future will resemble each other more closely); see also Alicia Brokars Kelly, *The Marital Partnership Pretense and Career Assets: The Ascendancy of Self over the Marital Community*, 81 B.U. L. REV. 59, 62-63, 72 (2001) (faulting current divorce law for its infidelity to the quasi-business partnership ideal).

304. Ertman, *supra* note 6, at 83.

305. See *id.* at 90 n.59 (noting the legal recognition of nonprofit businesses).

306. *Id.* at 90.

307. *Id.* at 112-23.

to productive use, and noting that both have turned away from pinning stigma on failed entities.<sup>308</sup> At least in principle, the law of marriage, emulating the law of business, could address the rights and interests of the individuals whom marriage affects, rather than rest on gender and other socially scripted constraints on individuals' choices.

### B. *Two Cogent Arguments in Favor of State-Sponsored Marriage*

Scholars take state-sponsored marriage for granted. Almost none have set out to defend it against an abolitionist proposition. In the large body of writings that applaud "the family," an institution considered vulnerable to feminism and individualism as well as macroeconomic phenomena such as the decline of wage labor, however, one does find copious cheering for marriage. Among these cheers, two arguments warrant particular attention.

#### 1. *Belonging and Shelter in a Postmodern World*

Bruce Hafen speaks of "belonging" as a necessary condition for human fulfillment.<sup>309</sup> Although the idea of belonging to, or possessing, another person can connote enslavement or objectification, Hafen argues, "the bonds of kinship and marriage are valuable ties that bind."<sup>310</sup> Hafen worries that liberal individualism has brought about a current "age of the waning of belonging," and defends marriage as integral to the struggle against loneliness.<sup>311</sup>

Family law scholar Milton C. Regan, Jr. has crafted a more detailed argument for the ongoing vitality of status-based family law within a liberal and feminist jurisprudence.<sup>312</sup> Professor Regan aspires to a defense of status-based family law that, contrary to a longstanding tradition in the field, does not rest on children's vulnerability and dependence: he aspires to explain all of family law including its childless aspects. As he must, Regan begins by acknowledging that status in family law is associated with oppression, especially oppression of women: "the Victorians gave status a bad name."<sup>313</sup> Paradoxically, however, the constraint of status is necessary to generate the empowered self that individualism upholds.

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308. Case, *supra* note 303, at 34.

309. Bruce Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 BYU L. REV. 1, 31-42.

310. *Id.* at 31-34.

311. *Id.* at 32.

312. MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* (1993); Regan, *supra* note 3.

313. Regan, *supra* note 3, at 165.

Without status, Regan explains, a person bobbles from episode to episode without continuity of identity. The autonomous individual so prized in modernism and contractarian political thought is not a daughter, a husband, or somebody's child, hemmed in by the duties and commitments that these identities impose. These people are free. A transaction eagerly embraced today might become dull or distasteful tomorrow — the individual might feel less like a son then, or more like a mother. To Regan this figure does not embody "the Enlightenment dream of individual emancipation"<sup>314</sup> but rather is lonely and pitiful, worse off than he would have been without the ties of status. Buffeted by "the winds of each passing experience," unprotected from whatever stimuli come his way, this person cannot maintain the sense of being "a purposive agent."<sup>315</sup> And when one loses status, one loses identity and intimacy. Identity diminishes because only status can remind us that our past will shape and frame our present and future. Intimate commitment becomes harder to achieve because intimacy is dependent on identity. Without a self to unite last year's promises with tomorrow's array of options, there is no reason to feel bound or even affected by an episode in the past that linked one person with another.<sup>316</sup> So hampered in their pursuit of intimacy and identity, individuals suffer.

In order to assuage these harsh effects, individuals need the support of marriage. The fragmenting effects of postmodern life notwithstanding, most people seek a primary relationship as a base of romantic and sexual intimacy. The quest can lead to great pain: Regan notes the vulnerability that derives from looking for, and also from having found, a partner. Just as economic vulnerability justifies regulation to override freedom of contract, at least in the post-*Lochner* era, the emotional vulnerability that always accompanies the romantic dyad means that law should sponsor a status of marriage Regan argues, in order to affirm responsibilities that derive from dependence and mutual vulnerability.<sup>317</sup>

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314. *Id.* at 162.

315. *See id.* at 164.

316. *Id.* at 170.

317. *Id.* at 168. In an effort to move marriage from status to contract, one might consider the possibility of enhancing marital stability within a body of marital "contract" law encompassing harsh penalties for breach. Such a doctrine could adopt some principles of current contract law, for example by allowing parties to collect for divorce-related economic loss or to pre-set difficult-to-calculate liquidated damages, much as prenuptial agreements currently allow. Marital "contract" law might build on these traditional principles, also allowing parties to collect, for example, damages for emotional trauma. The additional stability, however, could come at a substantial cost: it might undermine our no-fault divorce system, force persons unable to pay damages to stay in decaying marriages, and result in unconstitutional discrimination against the poor, who would face limitations on their fundamental right to divorce.

Could marriage, for Regan, exist without state sponsorship? Regan says little about the legal consequences of marital status in a harmonious or otherwise ongoing marriage. Regarding divorce, however, Regan finds doctrinal applications,<sup>318</sup> suggesting to readers that his conception of status has state-sponsored marriage in mind, rather than an informal status relation like the boyfriend-girlfriend dyad in contemporary society or a pair united only by contract in the hypothetical future world, after state-sponsored marriage is abolished. At a minimum Regan appears to insist on retaining the legal category of “family,” where individuals are constrained at least by social norms, if not legal rules, from doing whatever they please. He notes with disapproval the academic perception that “the family” is just one variant on “the close relationship situation.”<sup>319</sup>

This vagueness on what “family” means mars an otherwise elegant argument and suggests that Regan’s thesis does not complete the task of defending the existence of state-sponsored marriage. If all we need is any status label, however inconsequential to the law, in order to find refuge from postmodern clangor, then “partner” and “lover” would serve as well as “husband” and “wife.” If, alternatively, Regan intends for marriage to be a status with significant law-based constraints, then he needs to explain how to balance individualism against respect for status in one’s everyday life — that is to say, as a participant in one’s own marriage — and family law. Regan purports to endorse two contrary values. He commends sensitivity to “the solitary and the social dimension of our being” but also urges “an equilibrium in which both status and contract play a role.”<sup>320</sup> At this high level of generality, all answers to tough questions become possible, and the defense of state-sponsored marriage crumbles.

## 2. *The Savage Hypothesis*

From an array of disciplines and perspectives — feminism notably excluded — some scholars applaud marriage for its effects in socializing men: half the human race, they say, has brutish inclinations that society must moderate. In 1986, before the fathers’ and marriage movements got underway, George Gilder offered a book-length expo-

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318. See *id.* at 171-74 (contending that parties to a divorce should have the option of bringing fault into the adjudication); *id.* at 174-78 (arguing against “the clean break” approach to property division, favoring instead an effort to leave husband and wife with an equal standard of living, particularly if the marriage was long). The former suggestion is critiqued in Ira Mark Ellman & Sharon Lohr, *Marriage as Contract, Opportunistic Violence, and Other Bad Arguments for Fault Divorce*, 1997 U. ILL. L. REV. 719, 724-37.

319. Regan, *supra* note 3, at 162.

320. *Id.* at 174.

sition of this argument.<sup>321</sup> *Men and Marriage* begins with a claim that civilization is what human beings achieve when the long-term timetable and sense of futurity inherent in female sexuality overpower male sexual impulses:

In creating civilization, women transform male lust into love; channel male wanderlust into jobs, homes, and families; link men to specific children; rear children into citizens; change hunters into fathers; divert male will to power into a drive to create. Women conceive the future that men tend to flee; they feed the children that men ignore.<sup>322</sup>

As Gilder sees the sexes, women enjoy a unique serenity because of the capacities they find in their bodies. They are capable of diverse sexual acts and experiences, whereas men have only two meager ones, erection and ejaculation: "Nothing about the male body dictates any specific pattern beyond a repetitive release of sexual tension."<sup>323</sup> Whether she bears children or not, each woman knows that she can "perform the only act that gives sex an unquestionable meaning, an incarnate result."<sup>324</sup> Contrast her tragic fellow human being:

For men the desire for sex is not simply a quest for pleasure. It is an indispensable test of identity. And in itself it is always ultimately temporary and inadequate. Unless his maleness is confirmed by his culture, he must enact it repeatedly, and perhaps destructively for himself or his society. . . . A man without a woman has a deep inner sense of dispensability, perhaps evolved during the millennia of service in the front lines of tribal defense. He is sexually optional.<sup>325</sup>

The consequences to society are clear. Impulsive, trapped in the present, more cut off physically from nurturing and consequently from caring about human beings — cut off even from valuing his own life — this person is not only uncivilized but an active menace to civilized

321. GEORGE GILDER, *MEN AND MARRIAGE* (1986).

322. *Id.* at 5.

323. *Id.* at 8-9.

324. *Id.* at 9.

325. *Id.* at 11, 15; see also DAVID T. COURTWRIGHT, *VIOLENT LAND: SINGLE MEN AND SOCIAL DISORDER FROM THE FRONTIER TO THE INNER CITY* (1996); David Popenoe, *Life Without Father*, in *LOST FATHERS: THE POLITICS OF FATHERHOOD IN AMERICA* 33, 36 (Cynthia R. Daniels ed., 1998) ("Left culturally unregulated, men's sexual behavior can be promiscuous, their paternity casual, their commitment to families weak.") [hereinafter Popenoe, *Life Without Father*]. The prevalence of longterm gay male dyads might refute this rather stereotypical depiction. Writers debate whether homosexually inclined men desire or embrace marriage-like monogamous relationships. Compare George W. Dent, Jr., *The Defense of Traditional Marriage*, 15 J.L. & POL. 581, 642-43 (1999) (quoting WILLIAM N. ESKRIDGE, *THE CASE FOR SAME-SEX MARRIAGE* 83 (1996) (commenting that gay men eschew "quasi-marriages")), with Letitia Anne Peplau, *Lesbian and Gay Relationships*, in *HOMOSEXUALITY* 177, 179-81 (John C. Gonsiorek & James D. Weinrich eds., 1991) (finding a similar desire among opposite-sex and same-sex couples, including men and women, for a long, enduring relationship, and noting the endurance of very long-lived pairings among gay men and women).

people. Young single men, writes David Popenoe, "make up the majority of deviants, delinquents, criminals, killers, drug users, vice lords, and miscreants of every kind."<sup>326</sup> Compared to married men, single men drink almost twice as much; they are also more likely to have drinking problems, to drink and drive, and to get into fights.<sup>327</sup> Although they constitute about thirteen percent of the population over age fourteen, they commit nearly ninety percent of major and violent crimes.<sup>328</sup> "Groups of sociologists venturing into urban streets after their seminars on violence in America do not rush to their taxis fearing attack by marauding bands of feminists, covens of single women, or angry packs of welfare mothers," writes Gilder. "[O]ne need have little fear of any group that so much as contains women — or, if the truth be known, of any group that contains men who are married to women."<sup>329</sup> Another writer claims that men, who "constitute the majority, and the most productive portion, of the workforce" would have less incentive to work hard if marriage were abolished — and none whatsoever, if Martha Fineman were to succeed in having government pay women to care for their children at the same rate that marriage now compensates them.<sup>330</sup> In this perspective, marriage rescues not only a man, who would be lonely and worth little otherwise, but the society around him.

Other writings have advanced the thesis that this bleakness is replicated in a second generation: they associate being deprived of a father in one's home with deviant or antisocial behavior. The sons of absconded scoundrels are the chief offenders, but writers worry also about daughters, more vulnerable to teen pregnancy and out-of-wedlock childbearing when their parents are separated or divorced.<sup>331</sup> A correlation between fatherlessness and troubled children is widely accepted.<sup>332</sup> In sum, here in the savage hypothesis men must marry

326. Popenoe, *Life Without Father*, *supra* note 325, at 43.

327. Waite, *supra* note 117, at 15-16.

328. GILDER, *supra* note 321, at 65; *see also* Scott J. South & Steven F. Messner, *Crime and Demography: Multiple Linkages, Reciprocal Relations*, 26 ANN. REV. SOC. 83, 86 (2000) (reviewing evidence that marriage seems to reduce a man's propensity for crime). Married men are, however, well-represented in the ranks of white-collar criminals. Edward Helmore, *Want to Survive in the Slammer? Then Feign Paranoia. Don't Stare. And Take Pyjamas*, OBSERVER, Jul. 6, 1997, at 17 (reporting on the enterprise of "con consultants" who give tips to clients, most of whom are "white, middle-aged, married men involved in white-collar crime," about how to get through their prison sentences, and claiming that this business is "a winner" because of increases in white-collar crime).

329. GILDER, *supra* note 321, at 64-65.

330. Lloyd R. Cohen, *Rhetoric, The Unnatural Family, and Women's Work*, 81 VA. L. REV. 2275, 2289 (1995).

331. *See* Popenoe, *Life Without Father*, *supra* note 325, at 41-43.



and stay married — because if they don't, they will take us all down with them.<sup>333</sup>

### C. *Toward a Third Way: Marriage Reenvisioned*

At this point we have aired the principal arguments for state-sponsored marriage, classifying them as either not cogent or cogent. Much of the utilitarian “case for marriage” — marriage is good because it makes people healthy, wealthy, and happy — reduces to tautology.<sup>334</sup> Moreover, it collapses when its unstated beliefs, chief among them the notion that state-sponsored marriage can never be eliminated, fail to support its weight. The utilitarian “case for marriage” is not cogent.

The last two arguments, however, follow a sturdy inner logic. Having ably contended that an individual needs some kind of status role in order to achieve intimacy and identity, Milton Regan is able to portray marriage as tending to ease the existential sadness that comes from relating to other persons only through one's bargains and episodic encounters.<sup>335</sup> The savage hypothesis is cogent too. If one posits that men are inherently different from women, and that the ways in which they differ from women conduce to social instability and havoc, then the highly gendered institution of marriage becomes a way to cabin men, reducing the social harm they would otherwise cause. One need not agree with either argument in order to agree that both make sense on their own terms, in a way that the utilitarian “case for marriage” does not.

Mere cogency, however, cannot justify engraving an argument into public policy. Premises must be questioned, and then rejected if they prove wrong. The conclusion of wrongness can derive from varied commitments. For example, it would be wrong not to lower the speed

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332. But see Judith Stacey, *Dada-ism in the 1990s: Getting Past Baby Talk About Fatherlessness*, in *LOST FATHERS*, *supra* note 325, at 51, 64 (noting that social science has not settled on a definition of “fatherlessness” and so cannot identify what it causes, if anything). As will be familiar by now, other variables, especially money, are also significant: losing a father means losing some of the income he would otherwise have contributed, and poverty is also correlated with antisocial behavior. Wade C. Mackey & Nancy S. Coney, *The Enigma of Father Presence in Relationship to Sons' Violence and Daughters' Mating Strategies: Empiricism in Search of a Theory*, 8 J. MEN'S STUD. 349 (2000) (citing sources).

333. It is odd that such high-pitched apocalyptic phobia, casting the masculine nature as antithetical to civilization, comes almost exclusively from conservative men. As feminist scholar Drucilla Cornell has remarked, few women, “even in their worst fantasies and fears,” hold so bleak and negative a view of what men offer the world. Drucilla Cornell, *Fatherhood and Its Discontents: Men, Patriarchy, and Freedom*, in *LOST FATHERS*, *supra* note 325, at 183, 183. This discourse also eliminates nonheterosexual men from its consideration.

334. See *supra* Part II.C.

335. See *supra* notes 313-318 and accompanying text.

limit on a highway just before a sharp curve, because principles related to automobile braking and deceleration make unreduced, pre-curve speeds dangerous. Such principles appear to be, and I would say really are, prepolitical and nonideological.

While the "belonging" argument of Hafen and Regan contains no *a priori* affronts of this kind, the savage hypothesis is at best indeterminate as a matter of descriptive fact, the reality that lawmakers need to consider in such contexts as setting highway speed limits. One might say that descriptive fact, however politically incorrect or inconvenient, must always outweigh even the best-intentioned attempts to revise the truth. Perhaps. Yet the question of how inherently different men and women are from each other — before politics, before ideology, before even their birth as persons — cannot be measured in a setting so permeated with socially installed and enforced gender roles as the contemporary United States. Adequate laboratory conditions for such a study are not present; we do not have the data needed to support a hypothesis that men inherently demand extra measures of socialization. The farrago of proclamations from journalists and some social scientists that male and female human beings are fundamentally more different than alike — based on leaps of faith, tiny samples, tendentious inferences from ambiguous data, ideological readings of what anthropologists report, and the disregard of contrary evidence — proves only that strong versions of gender dimorphism have a big following in both the media and the academy,<sup>336</sup> not that conjectures about that dimorphism are true or false. And so, forced to proceed without guidance from social science, policymakers must rely on American political and jurisprudential commitments.

Whether true or false or something in between, the savage hypothesis affronts several distinct precepts of American law and law-making. Its claim that legal rules and institutions should regard men as brutes dishonors the Equal Protection Clause of the U.S. Constitution, which limits the effect that government can give to gender-based stereotypes.<sup>337</sup> Its sweeping denigration of millions of people offends procedural justice.<sup>338</sup> If engraved into legal doctrine and public policy it would, or should, hurt the "hearts and minds" of men and boys so insulted.<sup>339</sup> Its dismissal of the passage of time and the accretion of cul-

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336. See Bernstein, *supra* note 175, at 36-40 (citations omitted).

337. Some late twentieth-century Supreme Court case law can be read in this light. See, e.g., *United States v. Virginia*, 518 U.S. 515, 550 (1996) (striking down sex segregation as practiced in a state military academy); *Romer v. Evans*, 517 U.S. 620, 634-36 (1996) (invalidating a state law that took an antagonistic stance toward homosexually inclined persons).

338. See E. ALLAN LIND & TOM R. TYLER, *THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE* (1988) (arguing that an inclination toward procedural justice, extending beyond the legal system, is rooted in human psychology).

339. See *Brown v. Bd. of Educ.*, 347 U.S. 483, 494 (1954).

ture — evolutionary psychology sees human nature as fixed in the savanna of the Stone Age — expresses a posture hostile to negotiation and political compromise, one that the Supreme Court has held to invalidate numerous laws.<sup>340</sup> Its portrait of the male human being as destructive, sociopathic, and an enemy of order is at odds with such foundational documents as the Declaration of Independence and the Bill of Rights, which recognize the citizen's capacity for thought, speech, religious belief, association and assembly, giving and receiving counsel, and civic participation.

Although American lawmakers and policymakers are thus precluded from using the savage hypothesis as a condemnation, or even a reductive summary, of male humanity, they can share some of the values that happen to animate *Men and Marriage* and other expressions of the hypothesis — those beliefs that do not affront equal protection, procedural justice, and civic governance. Classifying men as savages is categorically wrong. A concern for civil society and sociopolitical stability, however, is laudable.

From these two cogent arguments favoring state-sponsored marriage, then, we can see the outlines of a newer case for marriage, one that escapes both the vagueness of Regan's indeterminate endorsement of status on the one hand, and the gender shackles of the savage hypothesis on the other. The cogent arguments take a crucial step forward in defending marriage. Although marriage has let many people down, made them worse off, and caused harm to society, its ideals and practices offer genuine goods.<sup>341</sup> In benefiting individuals it can benefit third parties and the larger society as well.

Marriage holds the potential of giving individuals more of a past and a future than they would otherwise have. When they marry, especially if they are relatively young at the time, couples convincingly report a feeling of connection to their ancestors, progenitor couples who entered unions of their own, while looking ahead.<sup>342</sup> Past and future are partner concepts, not opposites. As Robert Nisbet and other scholars of progressivism have detailed, a sense of the past makes a

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340. *Reynolds v. Sims*, 377 U.S. 533, 386-87 (1964) (invalidating a vote-dilution scheme); *Baker v. Carr*, 369 U.S. 186, 237 (1962) (holding that vote-dilution cases are justiciable in federal court); *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938) (identifying the need for judges to look out for "discrete and insular minorities" as political actors). The rise of voting-rights jurisprudence rests on a premise that human beings are injured when they are deprived of meaningful political participation. See Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEXAS L. REV. 1705, 1709-33 (1993) (conceptualizing the right to vote in broad categories: participation, aggregation, and governance).

341. See Witte, *supra* note 38 (noting "goods" of marriage).

342. Sarah Blustein, *Counterproposal*, LILITH, Spring 2000, at 17, available at <http://www.poppolitics.com/articles/2000-06-19-counterproposal.shtml>.

sense of the future possible and coherent.<sup>343</sup> Neither human beings nor societies can flourish without a prevailing belief that the future holds some meanings and consequences for them.<sup>344</sup> As a form of enforced commitment, state-sponsored marriage facilitates investment — that is, the sacrifice of short-term gain for the prospect of returns in the long term — just as other state-sponsored enforced commitments, like procedural rules and the protection of property holdings, facilitate economic investment.

To opponents of marriage, these values will sound ominous: a critic can hear the clink and rattle of chains. This critic might start by saying that even if marrying does give individuals a sense of connection to the past, other avenues toward this connection might work better. Perhaps marriage has obstructed their development. Moreover, Regan's elegant admonition that individual human fulfillment cannot emerge without the status roles that build a sense of self and permit intimate connection to another person notwithstanding, this idealized version of marriage — as shelter, continuity, investment base, buffer against impulses and seductive opportunities — overlooks much oppression inherent in the institution. The legal category of marriage has begotten a generation of pernicious newer categories: marital rape (and the Model Penal Code's "spousal exemption" to rape), family immunity from tort liability, tax rules that encourage husbands to make money and avoid their families while discouraging wives from earning wages, "bastardy" and "legitimacy" to describe the status of children, defense-of-marriage state laws that do nothing except denigrate same-sex unions, and numerous other hurtful concepts.<sup>345</sup> I deny none of these harmful effects of state-sponsored marriage, and indeed have gone to some trouble to catalogue and recite them. But this re-accounting finds gain as well as loss: the "case" for state-sponsored marriage neglects a crucial point.

The point may be seen as the political and communal counterpart to Regan's postmodernist psychology, which focuses on marriage as a source of gain for individuals. To the extent he is persuasive, Regan redeems marriage from the perspective of a solitary person who seeks identity and intimacy, but does not link this individual's opportunity with a societal interest in marriage. In order to demonstrate a distinct societal interest in marriage one must show that letting human beings achieve identity and intimacy makes for a gain to the collective, such

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343. ROBERT A. NISBET, *HISTORY OF THE IDEA OF PROGRESS* (1980); MADSEN PIRIE, *TRIAL AND ERROR AND THE IDEA OF PROGRESS* (1978).

344. Here Gilder and Regan explicitly agree. See also Steven L. Nock, *Time and Gender in Marriage*, 86 VA. L. REV. 1971, 1974-75 (2000) ("[M]arriage is experienced mainly in the future and in the past.").

345. See generally Card, *supra* note 280.

as better citizens or greater economic prosperity.<sup>346</sup> It may be the case that because statuses always require societal recognition, Regan has necessarily made a political and social point as well as a psychological one. But the argument in favor of a status (a social construct) needs to show how societies gain when that status is in place.<sup>347</sup>

If marriage and comparable statuses were to disappear, the individual would flutter from transaction to transaction, contract to contract, and encounter to encounter, Regan says, bouncing like images on MTV.<sup>348</sup> What happens to society, to the body politic, as this person bounces? It too might be unmoored from a base of deep tradition and continuity. But unlike the individual, who in Regan's exposition dissolves and becomes lost, a society can hold itself together without state-sponsored marriage. Marriage as a law-based status arrived relatively recently in human existence.<sup>349</sup> Humanity can live without it.

We arrive at the relevant question for legal policy: what would American society be like if the state were to withdraw from recognizing marriage, a status now derived from the romantic dyad? How would humanity live without it in the United States? Not by failing to cohere, like Regan's lost individual. Instead, some new source of power and governance would move into the space that marriage now holds. There are only two contenders for this role in governing private lives.<sup>350</sup> One is the state, regulating individuals directly rather than

346. See *infra* note 370 (noting arguments that the marriage movement has failed to make).

347. In her classic critique of state-sponsored marriage, Lenore Weitzman takes pains to detail this kind of analysis. See WEITZMAN, *supra* note 5, at 246-54 (concluding a chapter titled "The Case for Intimate Contracts" with a survey of the "social policy issues" that her proposal implicates).

348. Regan, *supra* note 3, at 163.

349. Boaz, *supra* note 3 (noting the relatively recent date, 1754, on which the Earl of Hardwick's Act gave the (secular) government authority over marriage). I thank Joan Mahoney for emphasizing this point.

350. Marriage scholar Steven Nock elaborates on where this power can lie, finding five possible locations:

As a sociologist, I see norms as the primary source of social order and conformity. Norms, that is, are the building blocks of social institutions. My perspective begins by viewing any society as a *cluster of integrated social institutions*. While there may be many such institutions in any one society, all societies have at least five. There is always an organized system of securing and distributing goods and services, or an economy. There is always some organized method for transmitting knowledge from one generation to the next, or an educational institution. There is always an organized pattern of protection and formal social control, or a state. There is always an organized system of dealing with the ultimately unknowable, or a religion. And there is always a patterned system to distribute the obligations for dependent individuals (children and the elderly), or a family.

Nock, *supra* note 344, at 1972. Educational systems are not contenders for power over intimate lives, and the First Amendment disqualifies religion from overt governance within American law (although it would undoubtedly gain power if state-sponsored marriage were abolished). The three other institutions remain available to govern family life.

through its current indirect practice of making a status out of a pairing. The other is the market. As they do under contemporary liberal regimes around the world with respect to economics, the two would likely share power in a postmarriage legal regime. Moving toward the terrain that state-sponsored marriage now occupies, they would each gain the opportunity to grow stronger.

A liberal policymaker who is willing to consider abolishing state-sponsored marriage has good reason to proceed with caution before ceding new prerogatives to either the state or the market. To many who have contemplated the abolition of state-sponsored marriage, new state-sponsored initiatives — either well-framed default rules to be used when disputes arise within a relationship, or an array of official legal options that couples could choose when approaching state registries — would necessarily follow this particular law reform.<sup>351</sup> Even if the state were to hold firm to its abolitionist agenda and refuse to recognize coupledness except in terms of what individuals choose to do, the result of abolition would be not one big new void in the legal realm, but a proliferation of new, smaller state-sponsored rules, covering the terrain that the old marriage regime once regulated more obliquely. The substantive content of these new state-sponsored controls would not necessarily move private life in a progressive or benevolent direction.

And if the state were to pull away from regulating the romantic dyad altogether, allowing contracts and transactions to control this kind of union, then social effects would follow. Although the abolitionist stance consistently disclaims any agenda to abolish the couple in any extralegal sense — two may merge into one in their own minds, say abolitionists, even as they remain two in the eyes of the law — reformers know from experience that when American law stops recognizing a particular status, that status goes into decline in day-to-day life, not just in legal form.<sup>352</sup> As the concept of an *e pluribus unum* couple gets weaker in relation to the state's abandonment of marital status, intimate conjunction would move toward an exchange undertaken in the hope of individual gain, like the purchase and sale of goods in a market. We have seen that Regan thinks each player in this game is a loser, at least in relation to the alternative available through state-sponsored marriage. The societal perspective on this abolitionist picture is less bleak, but concerns emerge.

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351. For stimulating my thoughts on this subject, I thank Peter Siegelman, William Eskridge, and Michael Broyde, each of whom separately volunteered his belief that any abolition of state-sponsored marriage would install a range of new default settings, rather than true elimination.

352. See *supra* Part III.C (discussing the relation between a legal category like marriage and its "tertiary" effects, most of which are norms).

There is no reason to suppose that the human craving for paired connection would disappear with the abolition of state-sponsored marriage, and so abolition would throw most people into an uncharted competition for intimacy. The marital bond that now holds opposite-sex couples together (and by example encourages same-sex couples to think of themselves as conjoined) would loosen; pairing-off might grow more provisional, requiring more effort to keep up. These struggles would take time away from other pursuits. It seems plausible to speculate that individuals who can never obtain respite from competing for intimacy would have less to offer (including, for example, political engagement, the building of economic wealth, the care of children, or expanding the frontiers of human knowledge and accomplishment) than those not competing in this market. To the extent that individuals abjure the competitive market for romantic love and choose isolation instead, civic realms could benefit from the energies of full-time participants. But one might question the goodness of social settings and institutions in which solitary, intimacy-barren volunteers living in dissent from a common pursuit hold the reins. Moreover, markets are notoriously severe, tending to reward powerful persons at the expense of weaker ones. Wealth (in men) and reproductive-age youth (in women) are cold commodities now; they might be pursued and bought and sold and liquidated even more harshly in a world in which men and women could not take refuge in status.

If these concerns about direct state regulation and a triumphant market are valid — and their validity cannot be known, absent an abolitionist experiment — then state-sponsored marriage becomes a political force that, for all its numberless flaws, offers protections and benefits. Located at a kind of midpoint between the intrusions of direct regulation at one end and the laissez-faire prerogatives of the market at the other, state-sponsored marriage presents a unique blend of freedom and control. And just as the experience of getting married connects couples with their past and their future, marriage as a social institution manifests both continuity and change. Memories and archetypes of marriage occupy human consciousness: when same-sex marriage activists criticize *Baker v. State*, the Vermont decision that used a common-benefits clause of the state constitution to extend the legal privileges of marriage to same-sex couples,<sup>353</sup> they mean to say, among other things, that one of the “common benefits” withheld under

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353. See, e.g., David B. Cruz, “Just Don’t Call It Marriage”: *The First Amendment and Marriage as an Expressive Resource*, 74 S. CAL. L. REV. 925, 1020 (2001) (contending that Vermont’s civil unions violate the First Amendment because they withhold expression from citizens); Michael Mello, *For Today, I’m Gay: The Unfinished Battle for Same-Sex Marriage in Vermont*, 25 VT. L. REV. 149, 156 (2000) (claiming that “political reality” stopped the Vermont legislature from enacting same-sex marriage and that “‘political reality’ is a polite term for homophobia”).

Vermont law is a connection to symbols and traditions derived from marriage in the past. State-sponsored marriage feels different from the state-sponsored granting of marital entitlements:<sup>354</sup> the force of marriage lies in the fact that it combines legal privileges and duties with an extralegal, socially understood set of conventions.<sup>355</sup>

Political philosophy and legal theory recognize the force of extralegal authority on individuals' lives. Although the words "norms" and "community" and "social meaning" and "anarchist philosophy" push separate buttons and engage (or affront) different advocates, these terms unite around their attention to intermediate institutions — buffers between law and no-law — that structure human relations. Jurisprudes of all schools acknowledge the existence of intermediate institutions as central to law in a complex society; there can be neither law nor society without them. For the moment at least, marriage is a crucial intermediate institution.

Readers thus far unconvinced that marriage is worth retaining might now consider the procedural obstacles to abolition. Even if marriage as 'third way,' to reuse a hoary phrase, were discounted, and the market or direct state regulation preferred as a source of social control, the costs of abolishing state-sponsored marriage would be heavy, in several senses. No groundswell of popular feeling supports this change, and so marriage could be abolished only after considerable investment — either in fending off resistance or the slower-paced strategy of nurturing existing sentiments or tendencies against marriage.<sup>356</sup> This cost belongs on the ledger alongside our tripartite schema of the disutilities of marriage.<sup>357</sup>

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354. For this reason Mary Anne Case argues that women inclined to choose a male rather than a female partner have a stake in debates over civil unions and domestic partnership. They might abjure marriage because of its oppressive traditions, but also want the "common benefits" of a state-sponsored pairing. Case, *supra* note 303. Case's stance complements that of the same-sex marriage activists who oppose the Vermont compromise: both she and they identify the symbolic community that links marriage to the past, but Case repudiates that link, whereas the activists pursue it. Although these stances may appear opposed, one may readily agree with both of them. The connection of marriage to past traditions is a source of social progress both for same-sex couples, who enrich the meaning of marriage, and for heterosexual dissenters like Case, who testify to the danger of oppression while not obstructing others from access to marriage.

355. Same-sex marriage may be necessary to build public recognition of lesbians and gay men as partners in long-term relationships, not just as individuals. Christine Pierce, *Gay Marriage*, J. SOC. PHIL., Fall 1995, at 5, 14 (1995). Without access to marriage, writes Pierce, same-sex couples look abnormal, not like "couples, partners, family, and kin." *Id.* at 13.

356. See generally D.H. HODGSON, CONSEQUENCES OF UTILITARIANISM 110 (1967) (arguing that the study of any reform proposal must take into account the conditions that the reform proposes to change because, without this increment, one cannot know the price of transition). I thank philosopher Ben Zipursky for helping me think of the much-stretched "utilitarianism" as including the social costs of tampering with settled, relied-upon marriage law.

357. See *supra* Part III.



The transition between state recognition of marriage and no state recognition of marriage yields numerous complications. Other legal statuses, as was noted, have disappeared or dwindled in a variety of patterns: the accretion of state-level reforms, judicial activism, presidential decree, public disapproval and desuetude.<sup>358</sup> While most legal statuses that have disappeared made their exit slowly, the abolition of slavery provides an example of status elimination that the government imposed on unwilling, bellicose Americans.

Advocates for the elimination of state-sponsored marriage can thus consider the frontal-assault pattern that characterized the Civil War and its aftermath, in addition to other precedents that got rid of statuses in ambiguous retreats. The most dramatic mechanism would be for Congress to declare every marriage null and void in the United States.<sup>359</sup> Congress may not have the power to pass such a law,<sup>360</sup> even if anyone would ever take such a violent prospect seriously as a plan of action. As an alternative, imagine years of investigation followed by enactment of a federal statute patterned on the Defense of Marriage Act: pick a day in the future and circle it on the calendar as the last date on which couples could enter into a marriage that the law would recognize. Would thousands rush to the altar? How could more than fifty jurisdictions, all of them with their own laws of marriage, coordinate the timing of abolition?

The abolish-marriage literature is inclined to pass over problems of form and procedure, which include the division between federal and state regulatory authority to control marriage, the role of the judiciary in managing the abolition of state-sponsored marriage, the possibility of executive-branch nonacquiescence, and the validity of legal judgments or entitlements that might arise based on a mistaken belief that parties were married in a way that the law recognizes. One must advert briefly to these difficulties here, however, to raise just a suggestion of how cumbersome it would be for the government to get out of

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358. See *supra* note 17.

359. The postwar government of Italy took this step with respect to titles of nobility, by popular vote. Sophie Arie, *Exiled Royals Dip a Toe in Italy*, GUARDIAN (London), Mar. 15, 2003, at 15.

360. See *supra* Part I.A (noting constitutional limitations). One might also note that the Tenth Amendment, see *New York v. United States*, 505 U.S. 144, 187-88 (1992) (invalidating congressional legislation that infringed upon state sovereignty), and Article I limitations on congressional power, see JOHN T. NOONAN, JR., *NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES* 4 (2002) (noting that the Supreme Court has held, in several unrelated areas of law, that Congress cannot pass laws impinging on state sovereignty), and the narrowing view of the Commerce Clause that the Supreme Court took in *United States v. Morrison*, 529 U.S. 598, 607-19 (2000), may prohibit Congress from invalidating all existing and future marriages. For an overview of these evolving limits on congressional power, see Jesse H. Choper, *Taming Congress's Power Under the Commerce Clause: What Does the Near Future Portend?*, 55 ARK. L. REV. 731 (2003).

the marriage business. Moreover, even if we assume an orderly shift from the current world into this future one, a large cohort would live in the in-between years, with some people entitled to call themselves "married" or needing to get "divorced" in order to "remarry," and others disabled altogether from the status. Strife and frustration within families, and among unrelated persons, would accompany the transition.

If, by contrast, state-sponsored marriage were to remain an option while also receiving some of the critical attention that I have cast on it here, society would more likely maximize its gains. The benefits of marriage, whatever they really are, would continue. The detriments would be better understood, perhaps becoming more amenable to strategic minimization at the individual level (for example, couples could anticipate future difficulties with antenuptial contracting) and law reform at the aggregate (we could rewrite Social Security rules, for instance). With marriage no longer fulsomely and tautologically praised as the source of everything good but rather treated as a mixed blessing, individuals would enter into this relation more soberly, and society would regain some of the losses now written off under tendentious bookkeeping. Kept alive and thus open to future gain, marriage could evolve into something better.

### CONCLUSION

In 1997, when activists were beginning to achieve their first legislative successes in promoting marriage, one dissenting activist added a dash of rhetoric to the public mix:

An enterprise has a fifty percent failure rate. The female participants are injured sixty-three percent of the time. Children in the system are physically and sexually abused from thirty to eighty percent of the time. If this were a business, its doors would soon be closed. If it were a workplace, OSHA would shut it down. If it were a school, the principal would be arrested. Instead politicians extol it, courts ruminate over its value to society, and business, religious, and cultural leaders pander to its mystique.<sup>361</sup>

The passage is noteworthy not for its dubious statistics — the "failure rate" of marriage is hard to measure; the thirty-to-eighty range is so wide as to be meaningless; and the percentage of women "injured" by marriage is probably not precisely sixty-three — but as a specimen of the fervent discourse that altered American law at a particular time, and has not yet finished its work.

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361. Post, *supra* note 19, at 283. Post cites the *Statistical Abstract of the United States: 1995*, Post, *supra* note 19, at 283 nn.1-3 (citing U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1995, at 346 tbl.87 (115th ed. 1995)), which, in my opinion, does not support her claims.

With the exception of specialists in family law and policy, few commentators dwelled much on state-sponsored marriage until the late 1990s, when the discussion grew too noisy to ignore. Federal welfare reform enacted in 1996 attacked as pathological those families made up of low-income, unmarried mothers and their children.<sup>362</sup> The federal Defense of Marriage Act and its isomorphs in the states ventured for the first time into legal definitions of marriage. These proclamations underscored marriage as Status, an institution that rests on fixed and immutable ascribed characteristics.<sup>363</sup> "Covenant marriage" and related reforms began to make divorce harder to get.<sup>364</sup> "Fatherhood initiatives" and other small-scale programs, first supported by federal grant money out of Temporary Assistance to Needy Families (the program that replaced Aid to Families with Dependent Children) and then by new appropriations, meddled overtly in private lives.<sup>365</sup> Antidivorce state-government spending flourished in bastions of marital breakdown like Oklahoma and Arkansas.<sup>366</sup> For their part, gay activists took up same-sex marriage to the exclusion of older causes, such as funding for the AIDS crisis and the expression of radical social critique.<sup>367</sup> A well-funded movement soldiered in behalf of marriage, using surveys and other quasi-scientific means; one book, *The Case for Marriage*, has told readers that if they get with the program they will be healthy, wealthy, and wise.

In short, observers of contemporary American law and policy reform have now been provoked. The more activists "pander to its mystique,"<sup>368</sup> the more state-sponsored marriage invites a citizen to consider a challenge: Why marriage?<sup>369</sup> Who needs it? Not children and their parents, with whom the state can deal separately. Not believers in the sanctity of marital union: such persons remain free to perform rituals celebrating the pair bond. Why shouldn't American law abandon the status of marriage — just as it has abandoned other notorious comprehensive personal statuses related to race, gender, and mental

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362. See *supra* Part II.B.3.

363. See *supra* text accompanying note 10.

364. See *supra* Part II.B.1.

365. See *supra* Part II.B. 3.

366. Zaslow, *supra* note 28 (recounting the failure of these expenditures).

367. See Martha M. Ertman, *Reconstructing Marriage: An InterSEXional Approach*, 75 DENV. U. L. REV. 1215, 1247-48 (1998) (noting "[q]ueer [t]heory [q]ualms [a]bout [s]ame-[s]ex [m]arriage" and identifying political issues that the same-sex marriage endeavor can bury or overshadow). For an argument that activism on behalf of same-sex marriage is compatible with more radical agendas, see Barbara J. Cox, *The Lesbian Wife: Same-Sex Marriage as an Expression of Radical and Plural Democracy*, 33 CAL. W. L. REV. 155 (1997).

368. Post, *supra* note 19, at 283.

369. Martha Albertson Fineman, *Why Marriage?*, 9 VA. J. SOC. POL'Y & L. 239 (2001).

condition — and allow the ordinary law of torts, property, crimes, and (especially) contracts to govern relations between adults?

The answer cannot be found in the familiar “case for marriage.” The marriage movement has installed marriage promotion as state and federal policy, and may have led some couples or individuals toward the license-and-ceremony route rather than a more casual affiliation like cohabitation. But it has failed to justify the existence of state-sponsored marriage. Taking as fixed and unquestioned the gross favoritism that the government lavishes on marriage (in its current opposite-sex, antipolygamous, officially sanctioned form), activists cite the prosperity of married persons to justify this law-based favoritism and argue for its extension. The project is propaganda, not reason or social science. It is specious to applaud marriage as better than its absence on the ground that married people are happier or healthier or richer or more fecund than unmarried people; these disparities in welfare may derive from arbitrary laws that could be rewritten or repealed. And even if marriage makes an individual better off, the societal stake in marriage requires a separate rationale, and on this point marriage-movement partisans have not gone beyond vague platitudes.<sup>370</sup> To entrust the entire case for marriage to the marriage movement risks missing better points, a deeper case.

Accordingly, this Article has put state-sponsored marriage to a straightforward jurisprudential test. Referring to the writings of Jeremy Bentham and Oliver Wendell Holmes on government power, I have begun with the premise that any artifact of the law deserves to be abolished if it does not promote human well-being. This starting point fits the case for marriage into a study resembling cost-benefit analysis. While the benefits and detriments of marriage cannot be measured precisely, some counting is possible. After identifying the detriments of state-sponsored marriage, which this Article has laid out in three levels — “primary,” through which the state forgoes or loses revenue that it would otherwise have; “secondary,” through which the state contributes to a buildup of social losses; and “tertiary,” through which norms and social meanings leave people worse off — one may consider its benefits.

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370. See, e.g., *supra* note 112 (quoting a marriage-movement website); President Names Senior Advisor, *supra* note 134. In fairness to the marriage movement, its spokespersons may believe that this separate rationale is not necessary: if marriage is good for individuals, then in the aggregate it is good for society, because society consists of individuals. See generally Josie Huang, *Census: Maine Eighth in the U.S. in Percentage of Divorced Residents*, PORTLAND PRESS HERALD, June 15, 2002, at 1A (quoting David Popenoe in order to connect divorce with poverty and juvenile crime). Nevertheless, the omission is crucial. Individuals must choose between marrying or not marrying, to the extent they have a choice. They cannot abolish marriage. Societies and systems, however, have the power to abandon recognition of marriage as a legal status.

Satisfactory arguments, it turns out, support state-sponsored marriage as a comprehensive, capital-S personal Status, the legal artifice that Henry Maine pronounced dead or dying in 1861. At an individual level, marriage gives persons something valuable, enhancing the gains they achieve when they venture toward intimacy with another person. At a communal level, the space where law reform works, marriage is a valuable locus of political and social power, a counterweight: without marriage, the force that would expand to control citizens' private lives is either the state or capital, an unrelenting press of the market. No blithe, freeing, choice-affirming alternative to this extraordinary institution is available. Yet honest bookkeeping demands vigilance in aid of repair. The endeavor to mend marriage — that is, to fulfill its promises for the benefit of individuals and society, and to ameliorate its lingering ills and injustices — begins with recognition of the good that it achieves.