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# Restitching the American Quilt: Untangling Marriage from the Nuclear Family

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# *NOTES*

## RESTITCHING THE AMERICAN MARITAL QUILT: UNTANGLING MARRIAGE FROM THE NUCLEAR FAMILY

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### INTRODUCTION

MARRIAGE is a mess. Statutory marriage,[1] common-law marriage,[2] covenant marriage,[3] same-sex civil union,[4] and domestic agreement[5]—each signals a different shade of relationship, with distinct methods of entry and exit, and with disparate rights and

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[1] Statutory marriages are contracted under state statutes and generally involve registration of the parties and some solemnization ceremony. This is the form that commentators generally mean when referring to "traditional marriage."

[2] A common-law marriage is created by consent of the parties and "does not depend for its validity upon any religious or civil ceremony." John B. Crawley, Is the Honeymoon Over for Common-Law Marriage: A Consideration of the Continued Viability of the Common-Law Marriage Doctrine, 29 Cumb. L. Rev. 399, 401 (1998–99). Under this doctrine, courts may recognize long-term relationships as valid marriages. Ariela R. Dubler, Note, Governing Through Contract: Common Law Marriage in the Nineteenth Century, 107 Yale L.J. 1885, 1886 (1998).

[3] Like statutory marriage, covenant marriage is governed by state statutes and is understood to be a lifelong commitment. Covenant marriages, however, require counseling prior to both entry and exit and limits exit to instances of "complete and total breach" by one spouse. La. Rev. Stat. Ann. §§ 9:272–274, 9:307, § 9:272(A) (West 1999).

[4] Vermont recently passed the first statute allowing same-sex couples to contract for state-recognized status affording the rights and obligations of marriage. Vt. Governor Signs Law Allowing Gay Civil Unions, Wash. Post, Apr. 27, 2000, at A9 [hereinafter Vermont Civil Unions]. Legislators have declined to label this relationship a "marriage," though. See id. A number of states and communities allow same-sex couples to register as domestic partners and receive some state and local marriage benefits.

[5] Many states enforce both express and implied nonmarital domestic agreements between cohabitants under traditional contract law. See, e.g., Herma Hill Kay, An



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obligations. The promulgation of the Defense of Marriage Act[6] ("DOMA") further confuses what it is to be married, as a marriage established in one state does not need to be recognized by another state or by the federal government. Inextricably linked with marriage, although frequently held analytically separate, is divorce. One of the two primary forms of exit from marriage today—the other being death—divorce is similarly in disarray. Its frequency, requisite bases, and moral status vary depending on the regime under which one is living and to whom one is talking.

Part of the confusion results from marriage's dual conceptual and legal roles as a contract between two parties and as a status relating individuals and the state. Like many other statuses, individuals contract into marriage and become bound to defined rights and obligations that adhere until the marriage is legally dissolved.[7] Yet the balance between contract and status is shifting. While family law formerly governed marriages, marital responsibilities and property divisions upon divorce can increasingly be fixed by antenuptial contracts[8] and settlement agreements.[9] Such contracting about marriage and divorce is limited, though, by legal prohibitions on couples redefining the content of the specific form of the marital relationship, the terms of divorce, child custody arrangements, and the division of parental responsibilities. Each of these is a limitation on the ability of parties to define the family relationship for themselves.

Marriage serves as a proxy for the nuclear family in contemporary law as courts and legislatures make the economic elements of a marriage available for negotiation, while leaving the disposition of children and assignment of parental obligations nonnegotiable.

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Appraisal of California's No-Fault Divorce Law, 75 Cal. L. Rev. 291, 304 (1987). As a result, "[a] growing body of case law continues to define the rights of cohabitants in their interactions with third parties, their employers, and the state." Id.

[6] 1 U.S.C. § 7 (Supp. V 1999).

[7] Other statuses into which individuals contract include landlord-tenant and employer-employee.

[8] Antenuptial, or prenuptial, contracts specify the rights of one spouse upon death of the other spouse or upon divorce. Couples enter into these agreements in the immediate anticipation of marriage, with an eye to the possibility of a future dissolution.

[9] Settlement agreements are contracts fixing property and support rights, reached in anticipation of divorce. These are negotiated agreements reached in lieu of impending judicial division of assets and responsibilities.

As such, marriage is simultaneously overinclusive and underinclusive since it encompasses married couples with no children and omits from regulation families that exist outside of the current framework of legal marriage. Marriage and family should be conceptually and legally separated, with each governed by a distinct regime rather than by a patchwork of contract and status laws that conflates the two relationships. Given the current child-centered focus of rationales for marital regulation, as expressed in both legislative and academic writings, marriage—a long-term sexual, social, and economic relationship between two adults—is properly within the sphere of contract law, while regulation of families might be an appropriate object of status designation with its concomitant rights and obligations.

Part I of this Note will trace the various threads of American marriage law, particularly the perception that marriage is unraveling today due to an unprecedented divorce crisis. Part II will disentangle the conflicting patterns of contract law and status regimes that variously govern marriage, focusing on the uneven enforcement of antenuptial contracts and the implications of such. Part III will argue that the true focus of regulation is the status of the nuclear family, not of marriage per se. Finally, Part IV will propose a bifurcation of the legal regimes governing marriage and the family, recognizing the ability of individuals to order their private lives without state involvement until third parties—children—are involved. Laws designed to regulate, and arguably protect, families need to be extended to include those families that are formed outside legal marriages and limited to exclude married couples without children.

## I. A PATCHWORKED DOCTRINE: THE MANY STRANDS OF MARRIAGE LAW

Marriage law is currently a patchwork of overlapping doctrines in which marriage itself has no single definition. The forms of marriage range from public marriages implicating the state[10] to private,

[10] Statutory marriages, covenant marriages, and some same-sex civil unions are contracts between two individuals and a state.

often informal, contractual relationships.[11] Each doctrine consists of a specific way of ordering the marital relationship with its own mode of entry and exit and distinct attached rights, although the trend is to treat marriage and the alternative forms of domestic arrangements increasingly uniformly.[12] Marriage is state-regulated: Each state decides the requirements of a valid marriage contract, those people who have contractual ability, the duties and obligations that adhere therein, and the grounds for dissolution.[13] A marriage contracted or a divorce obtained in one U.S. jurisdiction has traditionally been valid in all the others.[14]

Statutory marriage is the form most commonly associated with the idea of marriage. State statutes govern it, and some form of solemnization is generally required. Individuals contract into this relationship, and the state confers legal status.[15] Very little is required to enter into a valid statutory marriage; general qualifications usually involve age and degree of consanguinity, and most states impose a three or five day waiting period.[16] At no point in American history have there been significant barriers to entry into marriage.[17]

Exit from statutory marriage has a more uneven past than entry into it, and higher levels of regulation are associated with divorce. Historically, ability to divorce was tightly restricted;[18] when al-

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[11] Examples of these private contracts include domestic agreements, many same-sex civil unions, and common-law marriages. Another regime regulating marriage is religion; these regulations are, however, outside the scope of this discussion.

[12] Elizabeth S. Scott & Robert E. Scott, Marriage as Relational Contract, 84 Va. L. Rev. 1225, 1333 (1998).

[13] Loughran v. Loughran, 292 U.S. 216, 223 (1933).

[14] See Sherrer v. Sherrer, 334 U.S. 343, 356 (1948); *Loughran*, 292 U.S. at 223. Such interstate recognition of marriages is a product of the federal system of government and is one of the trade-offs necessary for its efficient functioning. The promulgation of DOMA, however, may change interstate marriage recognition. See infra notes 55–60 and accompanying text.

[15] Baehr v. Lewin, 852 P.2d 44, 58 (Haw. 1993) (citing Salisbury v. List, 501 F. Supp. 105, 107 (D. Nev. 1980) and O'Neill v. Dent, 364 F. Supp. 565, 568–69 (E.D.N.Y. 1973)).

[16] Ira Mark Ellman et al., Family Law: Cases, Text, Problems 56–57 (3d ed. 1998).

[17] See, e.g., Elizabeth S. Scott, Rational Decisionmaking About Marriage and Divorce, 76 Va. L. Rev. 9, 15 (1990) ("Even when marriage was presumed to be a lifelong commitment and divorce was rare, the law did little to promote thoughtfulness in decisions to marry.").

[18] Pennsylvania was the first state to enact a divorce statute when it did so in 1785; Delaware was the last, waiting until 1897 to enact one. Until that time, a couple

lowed, it was limited to extreme circumstances as "[u]ntil the 1960's, most states allowed divorce only upon the proof by one party that the other had committed a serious offense against the marriage."[19] These barriers to exit, however, should not be confused with stability in marriage since unhappy couples unable to divorce in nineteenth-century America simply arranged their households as they liked, regardless of the formal legal requisites.[20] Unhappy couples executed their own "divorces," informally "remarried," or simply formed separate households.[21] Where divorce was available, it required a showing of "fault," the exact meaning of which varied by state, but generally involved some combination of adultery, abandonment, and cruelty.[22] Yet the protection afforded marriage by this standard proved illusory: Legal scholars have tracked the uncontested nature of most divorce proceedings and have argued that this is indicative of complicity on the part of

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needed to convince the state legislature to pass a bill that effected the individual divorce. See Lawrence M. Friedman, A History of American Law, *in* Ellman et al., supra note 16, at 187, 188.

[19] Scott, supra note 17, at 15.

[20] See generally Peter W. Bardaglio, Reconstructing the Household: Families, Sex, and the Law in the Nineteenth-Century South (1995) (analyzing the changes in southern household dynamics through the Civil War period); Norma Basch, Relief in the Premises: Divorce as a Woman's Remedy in New York and Indiana, 1815–1870, 8 Law & Hist. Rev. 1 (1990) (tracing the evolution of divorce law and its effect on women's autonomy); Timothy J. Gilfoyle, The Hearts of Nineteenth-Century Men: Bigamy and Working-Class Marriage in New York City, 1800–1890, 19 Prospects 135, 137 (1994) ("As 19th-Century Americans became increasingly mobile and urban, bigamy appears to have been a more viable solution to marital unhappiness."); Hendrik Hartog, Marital Exits and Marital Expectations in Nineteenth Century America, 80 Geo. L.J. 95 (1991) (exploring judicial treatment of marital exit by contractual agreement and by judicial divorce). Moreover, most nineteenth-century marriages ended after about twenty years due to the death of one of the spouses. Kaylah Campos Zelig, Putting Responsibility Back into Marriage: Making a Case for Mandatory Prenuptials, 64 U. Colo. L. Rev. 1223, 1224 (1993). Thus, modern divorce "may merely be a functional substitute for death, made necessary by increasing longevity." Ellman et al., supra note 16, at 219 (citing Lawrence Stone, The Family, Sex and Marriage in England 1500–1800, at 56).

[21] Dubler, supra note 2, at 1896–97.

[22] For example, California's fault grounds were "adultery, extreme cruelty, wilful desertion, wilful neglect, habitual intemperance, conviction of a felony, or incurable insanity." Lynn D. Wardle, No-Fault Divorce and the Divorce Conundrum, 1991 BYU L. Rev. 79, 83 n.10 (1991).

unhappy couples manufacturing adequate fault where none existed.[23]

While the move to no-fault divorce statutes in the 1970s and 1980s[24] is often blamed for a perceived rise in divorce rates,[25] some scholars have argued that cause and effect are confused and that no-fault divorce statutes simply brought the law into conformity with the actual practice of divorce that had previously occurred despite legal constraints.[26] One text reports succinctly that divorce rates "dramatically accelerated upward" in the 1960s and 1970s while most of the shift to no-fault divorce laws occurred in the early 1970s and 1980s, "*after* the largest increases in divorce rates had already occurred."[27] Regardless of cause and effect, every state currently has no-fault divorce statutes, although many maintain the option of fault divorce. No-fault is increasingly criticized, however, and at least eight states have recently considered bills requiring

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[23] See, e.g., Lawrence M. Friedman, A Dead Language: Divorce Law and Practice Before No-Fault, 86 Va. L. Rev. 1497, 1506–07 (2000) (surveying the practices of manufacturing proof of fault and conscious perjuring by witnesses in divorce proceedings throughout the United States in the mid-twentieth century); Gary H. Nichols, Note, Covenant Marriage: Should Tennessee Join the Noble Experiment?, 29 U. Mem. L. Rev. 397, 425 (1999) (concluding that much fault litigation is no more acrimonious than no-fault divorce proceedings).

[24] California passed the first such statute in 1970. Nichols, supra note 23, at 411–12, 418 n.118. South Dakota became the last state to move to no-fault when it enacted its statute in 1985. Theodore F. Haas, The Rationality and Enforceability of Contractual Restrictions on Divorce, 66 N.C. L. Rev. 879, 880 n.9 (1988). Only four states—Mississippi, New York, Ohio, and Tennessee—currently require mutual consent for no-fault divorce while all other states allow a spouse to bring an action unilaterally. Robert M. Gordon, Note, The Limits of Limits on Divorce, 107 Yale L.J. 1435, 1438 & n.22 (1998).

[25] See, e.g., Jeffrey Evans Stake, Mandatory Planning for Divorce, 45 Vand. L. Rev. 397, 398 n.4, 402 (1992) (noting that "[n]ot surprisingly, lowering the price of divorce has increased its frequency" and reporting that the divorce rate in 1988 was about 48%); see also Michelle Dorsey Deis, Case Comment, *Gross v. Gross*: Ohio's First Step Toward Allowing Private Ordering of the Marital Relationship, 47 Ohio St. L.J. 235, 235 n.1 (1986) (highlighting increases in divorce rates from 1965 to 1979). But see Robert S. Lynd & Helen Merrell Lynd, Middletown: A Study in Contemporary American Culture 121 & n.18 (1929) (reporting that divorce rates in one midwestern American city with ordinary divorce laws and attitudes, ranged between 37% and 55% of the marriages contracted between 1918 and 1924).

[26] See Friedman, supra note 23, at 1506–07; Nichols, supra note 23, at 416.

[27] Ellman et al., supra note 16, at 221.

proof of fault in all contested divorces.[28] Some commentators have also called for increased mandatory waiting periods for divorce.[29]

Formal requirements for exit from statutory marriage have shifted in recent decades and continue to shift today. These adjustments arguably mirror changes in popular attitudes from that of marriage as a lifelong commitment to that of marriage as an ongoing agreement open to definition by the individuals involved.

In contrast to the legislative tangle around statutory marriage, state approaches to common-law marriage prove more stable but less widespread.[30] Such marriages are neither solemnized nor available in every state. Entry is by private agreement,[31] requiring only the couple's cohabitation and presentation of themselves as married.[32] The usual context for proving the existence of a common-law marriage is upon dissolution of the relationship or death, although it may also be proven in an independent action for declaratory relief.[33] Currently eleven states and the District of Columbia recognize this form of marriage;[34] because of the full faith

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[28] Nichols, supra note 23, at 441 (citing proposals in Georgia, Idaho, Illinois, Iowa, Maryland, Michigan, Virginia, and Washington).

[29] See, e.g., Anthony T. Kronman, Paternalism and the Law of Contracts, 92 Yale L.J. 763, 795–96 (1983) (describing these waiting periods as ensuring more reasoned actions in exiting marriage and arguing that speed is seldom essential in marital decisions). A number of commentators have agreed that such periods should be extended. See Gary S. Becker, Finding Fault with No-Fault Divorce, Bus. Wk., Dec. 7, 1992, at 22 (proposing limiting unilateral divorce to instances where a several-year waiting period has occurred); Maggie Gallagher, Why Make Divorce Easy?, N.Y. Times, Feb. 20, 1996, at A19 (proposing a five- to seven-year waiting period); William A. Galston, Divorce American Style, 124 Pub. Interest 12, 22 (1996) (proposing a five-year waiting period).

[30] See Annotation, Validity of Common-Law Marriage in American Jurisdictions, 39 A.L.R. 538 (1925), supplemented by 60 A.L.R. 541 (1929), 94 A.L.R. 1000 (1935), 133 A.L.R. 758 (1941).

[31] Ellman et al., supra note 16, at 64.

[32] See Fenton v. Reed, 4 Johns. 52, 54 (N.Y. Sup. Ct. 1809) (per curiam); Crawley, supra note 2, at 405; Dubler, supra note 2, at 1885–86; Annotation, Common-Law Marriage Between Parties Previously Divorced, 82 A.L.R.2d 689 (1962); Annotation, supra note 30, at 538.

[33] Annotation, Judicial Declaration of Validity or Existence of Common-Law Marriage, 92 A.L.R.2d 1102 (1963).

[34] The jurisdictions allowing common-law marriage are Alabama, Colorado, Iowa, Kansas, Montana, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Texas, Utah, and the District of Columbia. Crawley, supra note 2, at 400 n.4; see also Annotation, supra note 30 (listing states recognizing common-law marriages in the first half of the twentieth century). Three states—Georgia, Idaho and Ohio—that

and credit afforded a valid marriage in one state by other states, though, all states recognize the legal legitimacy of a common-law marriage contracted in another jurisdiction.[35] Once a common-law marriage has been contracted and proven, it is part of the same legal regime as statutory marriage. Thus, there is no analogous common-law divorce by mutual agreement.[36] The confusion around the terms of exit from statutory marriage applies to common-law marriages as well.

A third, and arguably novel, form of marriage today is covenant marriage. Covenant marriages are based on a view of marriage as a lifelong commitment; as such, statutes instituting it heighten entry requirements and reinstitute fault divorce as the sole voluntary means of exit. Under the existent statutes, couples may choose a covenant marriage at the time of applying for a marriage license.[37] Louisiana and Arizona have passed such statutes,[38] and Tennessee considered a similar proposal,[39] all in an attempt to combat the perceived high divorce rates.[40] In Louisiana, a couple so electing is required, prior to marriage, to undergo counseling from either a religious or professional marriage counselor concerning the "nature and purposes of marriage and the responsibilities thereto."[41] Only upon "complete and total breach" by one spouse may the other seek divorce.[42] The future spouses commit to "take all reasonable efforts to preserve [their] marriage, including marital counseling"

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until recently allowed common-law marriages retreated from that stance in the 1990s, while Utah revived it. Crawley, supra note 2, at 400 n.4. In general, though, common-law marriage has fallen out of social and legal favor. See Ellman et al., supra note 16, at 65 (remarking on the "general hostility to common-law marriage" in the United States today).

[35] See supra note 14 and accompanying text.

[36] See Crawley, supra note 2, at 405, 410 (describing Alabama specifically); Haas, supra note 24, at 881 n.13 (comparing this lack of common-law divorce in the United States to such regimes in other societies).

[37] See, e.g., La. Rev. Stat. Ann. § 9:272(B) (West 1999); see also Melissa Lawton, Note, The Constitutionality of Covenant Marriage Laws, 66 Fordham L. Rev. 2471, 2472 (1998) (explaining this process); Nichols, supra note 23, at 398 (same).

[38] Ariz. Rev. Stat. Ann. §§ 25-901 to 25-906 (2000); La. Rev. Stat. Ann. §§ 9:272–274, 9:307 (West 1999).

[39] See Nichols, supra note 23, at 399 n.2.

[40] See Margaret F. Brinig, Contracting around No-Fault Divorce, *in* The Fall and Rise of Freedom of Contract 275, 275 (F.H. Buckley ed., 1999); Nichols, supra note 23, at 399.

[41] La. Rev. Stat. Ann. § 9:272(A), § 9:273(A)(2)(a) (1999).

[42] Id. § 9:272(A).

and aver that they have disclosed all potentially adverse information to the other.[43] This option is actually anomalous more in the ability to contract around the no-fault divorce regime than in the ability to contract about the terms of marriage, since it is this former category that is most strictly constrained in ordinary marriage jurisprudence.[44]

In addition to these formal marriages, contractual cohabitation is increasingly recognized legally in the form of domestic agreements and, most recently, same-sex civil unions. While not labeled "marriage," each of these arrangements exists on the border between marriage and purely contractual relations.

Domestic agreements are explicit or implicit contracts concerning nonmarital cohabitation, fixing the property and financial rights of the two parties. Many states allow such agreements as a legally sanctioned alternative to marriage,[45] and they are usually enforced as written, as long as they are not based on sexual services.[46] Such agreements do not afford the parties the status rights of marriage.[47] Exit is also less complex than from the above forms of marriage: These agreements may be terminated as any other contract and are also generally invalidated upon the marriage of the parties to each other.[48]

Unlike domestic agreements, which are widely recognized but generally exist in the purely contractual realm, same-sex civil un-

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[43] Id. § 9:273(A)(1).

[44] See infra Section II.A.

[45] See, e.g., Wilcox v. Trautz, 693 N.E.2d 141, 146 (Mass. 1998) (holding, in an often followed opinion, that "relationship contracts" between unmarried couples are legally enforceable so long as they do not violate public policy); see also Kay, supra note 5, at 304–09 (discussing judicial recognition of the validity of these agreements in California).

[46] Some states require an express contract, others a writing of some sort, while others are willing to find and enforce even implied contracts. See Crawley, supra note 2, at 412–13 & nn.76 & 79 (outlining these approaches); Ellen Kandoian, Cohabitation, Common Law Marriage, and the Possibility of a Shared Moral Life, 75 Geo. L.J. 1829, 1830–31 (1987) (same).

[47] For example, the *Wilcox* court held that parties to a domestic agreement do not receive governmental marriage benefits. *Wilcox*, 693 N.E.2d at 146.

[48] Andrea D. Heinbach & Pierce J. Reed, *Wilcox v. Trautz*: The Recognition of Relationship Contracts in Massachusetts, 43 Boston B.J. 6, 19 (1999). Interestingly, the recognition of marriage-like rights in such non-marital relationships is inconsistent with the more general move away from the permissibility of common-law marriages in the United States. Ellman et al., supra note 16, at 65.

ions are not yet recognized in most jurisdictions. Where they are recognized, however, these unions bring with them the status rights of marriage. The first step in this direction was taken by the Hawaii Supreme Court in *Baehr v. Lewin*.[49] The *Baehr* court held that while there is no fundamental right for same-sex couples to marry,[50] the state statute restricting marriage to opposite-sex couples established a sex-based classification subject to strict scrutiny for the purposes of an equal protection challenge.[51] The court held that the statute amounted to sex discrimination when analyzed under this standard.[52] Following this decision, the Hawaii state legislature amended the state constitution in 1998 to bar recognition of same-sex marriages,[53] and the state supreme court found that "[t]he marriage amendment validated" the statute in question in *Baehr*.[54]

In the wake of the *Baehr* decision, the U.S. Congress passed the controversial Defense of Marriage Act,[55] which limits federal recognition of marriage, with its concomitant rights and responsibilities, to opposite-sex couples.[56] DOMA explicitly permits states to refuse to "give effect to any public act, record, or judicial proceeding of any other State . . . respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State . . . or a right or claim arising from such relationship."[57] This is in direct contradiction to *Loughran v. Loughran*,[58] in which the Supreme Court held that marriages validly contracted in one state are constitutionally required to be given full faith and credit

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[49] 852 P.2d 44 (Haw. 1993).
[50] Id. at 57.
[51] Id. at 67.
[52] Id.
[53] Haw. Const. art. I, § 23.
[54] Baehr v. Miike, 994 P.2d 566 (Haw. 1999). For an overview of these events, see Christopher Graff, Vermont Supreme Court Calls Rights for Gay Couples 'Constitutionally Required,' 221 The Legal Intelligencer 4 (Dec. 21, 1999).
[55] 1 U.S.C. § 7 (Supp. V 1999).
[56] Id.
[57] Id. § 1738C (Supp. V 1999).
[58] 292 U.S. 216 (1933).

in all others.[59] DOMA has yet to be challenged in federal court, although some academics foresee successful future challenges.[60]

More recently, same-sex civil unions have been legally recognized as part of the marriage discussion for the first time in United States history. In *Baker v. Vermont*,[61] the Vermont Supreme Court held that it was a violation of the state constitution[62] to deny same-sex couples the benefits and protections afforded opposite-sex married couples.[63] The plaintiffs in *Baker* were three same-sex couples who had been in committed relationships ranging from four to twenty-five years; two of the couples had children they had raised as a family.[64] The couples had applied for marriage licenses and been rejected, and brought suit challenging the validity of the statute under which they were denied licenses. The trial court held in favor of the defendants, finding that limiting marriage to opposite-sex couples "rationally furthered the State's interest in promoting 'the link between procreation and child rearing.'"[65] Recharacterizing the issue as one of equal treatment, the Vermont Supreme Court held that same-sex couples must be afforded privileges and responsibilities under state law equal to those enjoyed by opposite-sex couples that are married.[66] The holding does not mandate that same-sex couples be allowed to marry; instead, the Court left the exact procedure for effecting the change to the legislature.[67]

The Vermont state senate passed the mandated bill in April 2000,[68] allowing same-sex couples to form civil unions. While not

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[59] Id. at 223.

[60] See, e.g., Scott Ruskay-Kidd, The Defense of Marriage Act and the Overextension of Congressional Authority, 97 Colum. L. Rev. 1435, 1435 (1997) (arguing that DOMA effectively "partially rescinds the Full Faith and Credit Clause").

[61] 744 A.2d 864 (Vt. 1999).

[62] The relevant provision of the Vermont Constitution is the Common Benefits Clause, which provides, in pertinent part, "[t]hat government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community." Vt. Const. ch. I, art. 7.

[63] *Baker*, 744 A.2d at 867.

[64] Id.

[65] Id. at 868.

[66] Id. at 867.

[67] Id.

[68] After the Vermont House and Senate approved the bill, Governor Howard Dean signed it into law on April 26, 2000. See Vermont Civil Unions, supra note 4, at A9.

labeled "marriages," these unions entitle the couples to all the state benefits of marriage.[69] The result is a confused doctrine in which same-sex couples may contract into the marriage status, but may not label it so. "Marriage" is reserved for and conflated with the nuclear family ideal: two opposite-sex adults with their marital children.

In sum, the variety of marriage and marriage-like arrangements today fragment what is often thought to be a homogenous doctrine. As a result, marriage regulation is revealed as a patchwork of disparate regimes that often prove contradictory. Moreover, the perception that there is a divorce crisis, whether based in reality or simply in popular myth, has led to calls for higher standards for divorce and the development of even more marriage regimes. Marriage remains on the seam of status and contract with elements of its governance patterned on each, often with tangled results.

## II. CHOOSING THE STITCH: CONTRACT OR STATUS AS THE RULING MARRIAGE REGIME?

Professor Ellen Kandoian describes marriage as "conceptually problematic" due to its nature as both public and private: It defines both "the relationship between two people and . . . their relationship to the rest of society."[70] The result is a dual legal regime, comprised of a combination of contract and status, and confusion over who should ultimately order the marriage relationship. Under this tangled system of regulation,[71] contract rules govern entry into marriage and, increasingly, the division of property upon exit, while status rules govern the terms of exit and marriage's familial components. In light of this duality, the question becomes how marriage *should* be regulated.

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Opponents of the law, however, made a number of gains in recent statewide elections. See Ross Sneyd, Vermont's Divide: Voters Leave Issue of Gay Unions Unsettled, The Record (Bergen County, N.J.), Nov. 9, 2000, at A22.

[69] *Baker*, 744 A.2d at 867.

[70] Kandoian, supra note 46, at 1829 (footnote omitted).

[71] See, e.g., id. at 1833 (describing a primary legal tension concerning marriage as "the conflict between the status and the contract models of marriage"); Eric Rasmusen & Jeffrey Evans Stake, Lifting the Veil of Ignorance: Personalizing the Marriage Contract, 73 Ind. L.J. 453, 501 (1998) ("Marriage is still a matter of status, and its failure to move to contract is causing much harm.") (footnote omitted); Dubler, supra note 2, at 1907 (terming nineteenth-century marriage a "status contract").

### *A. Marriage as Contract*

As a general trend marital regulation has evolved, albeit incompletely, from status to contract.[72] Simultaneously, attitudes toward and legal regimes regarding antenuptial agreements have changed. While states have long allowed antenuptial agreements fixing the distribution of assets upon the *death* of one spouse, it is only recently that courts have enforced agreements activated upon *divorce* or *separation*.[73] Previously, such agreements were usually invalidated as against public policy because they were thought to undermine marriage and promote divorce.[74]

In the past decade, private ordering of property and financial arrangements prior to marriage has become increasingly acceptable.[75] However, most couples do not draft antenuptial contracts.[76] Professors Eric Rasmusen and Jeffrey Stake identify the most common reasons for not drafting such contracts as: the costs of legal drafting; the failure of most couples to anticipate the possibility of divorce at the time of marriage; a lack of awareness of the behavioral incentives during marriage of the various possible terms; and a distaste for signaling the possibility of failure to others, particularly

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[72] See Dubler, supra note 2, at 1885–90 (tracking the analysis of marriage as contract in the nineteenth century). Professor Eric Posner suggests that instead of a status-contract shift, there has been an "increasing exclusion of the crowd from participation in the regulation of the family." Eric A. Posner, Family Law and Social Norms, *in* The Fall and Rise of Freedom of Contract, supra note 40, at 256, 273 (1999). The practical difference between the two perspectives is unclear. In either model, aspects of marriage that formerly were regulated by family law are increasingly negotiated as contracts.

[73] See, e.g., Deis, supra note 25, at 236. Of course, there is the ever-present caveat that parties need to have full financial disclosure prior to entering into these contracts and must not be subject to coercion. Id.; Robert Roy, Annotation, Modern Status of Views as to Validity of Premarital Agreements Contemplating Divorce or Separation, 53 A.L.R.4th 22, 28–29 (1987).

[74] See Ellman et al., supra note 16, at 799 ("The traditional premarital agreement . . . applied only when the marriage ended by the death of a spouse because premarital agreements 'contemplating' divorce were unenforceable in most states."); Deis, supra note 25, at 236; Roy, supra note 73, at 28–29.

[75] Haas, supra note 24, at 880 ("Private ordering of marital and postmarital relationships generally has been accepted with respect to certain incidents of those relationships—ownership of property and, to a lesser extent, support.") (footnote omitted); Roy, supra note 73, at 29 (reporting that most courts now only invalidate agreements that prove defective in execution or outcome).

[76] Rasmusen & Stake, supra note 71, at 454.

one's soon-to-be spouse.[77] Despite increasing acceptance, antenuptial contracts are currently the exception, not the rule, particularly since there is no guarantee that they will be judicially enforced. In other words, the costs are high, but the benefits are uncertain.

Despite this uncertainty, antenuptial agreements concerning property distribution upon divorce are increasingly upheld and, as a result, more frequently entered into. In *Buettner v. Buettner*,[78] the Nevada Supreme Court found that, contrary to previous assumptions about the effect of these provisions on marital stability, these agreements may actually be conducive to marital harmony by clarifying the rights of each spouse.[79] Thus the *Buettner* court held a contested property settlement provision valid and enforceable.[80] The current majority rule is to analyze property distribution provisions in antenuptial agreements as ordinary contracts.[81]

Even where property settlements may be fixed ahead of time, alimony, or financial support after the dissolution of the marriage, is not always a permissible object of ex ante bargaining. In *Favrot v. Barnes*,[82] the Louisiana Court of Appeals held that premarital understandings could not alter Louisiana's statutory marital obligations, specifically spousal support payments. The only aspect of the "conjugal association" that the court found mutable was that relating to property.[83] The court held that alimony is a distinct entitlement as a claim against a spouse, not against property, and may only be limited by income, not by contractual arrangement.[84] This approach, however, is increasingly becoming a minority one.

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[77] Id. at 461. See also Stake, supra note 25, at 425–27 (discussing additional reasons for the failure of many couples to draft antenuptial agreements, including social customs or religious beliefs, personal superstition, and the assumption that their relationships will endure).

[78] 505 P.2d 600 (Nev. 1973).

[79] Id. at 603.

[80] Id. at 605; see also Newman v. Newman, 653 P.2d 728, 736 (Colo. 1982) (upholding antenuptial agreement concerning property division).

[81] See, e.g., Laird v. Laird, 597 P.2d 463, 468 (Wyo. 1979) ("Antenuptial contracts are governed by the same rules of construction as are applied to other contracts." (citing In re Luedtke's Estate, 222 N.W.2d 643 (Wis. 2d 1974); In re Estate of Johnson, 452 P.2d 286 (Kan. 1969))).

[82] 332 So. 2d 873 (La. Ct. App. 1976).

[83] Id. at 875.

[84] Id.

Other state alimony regulations have been determined to be default clauses around which parties may bargain under circumstances courts consider to be fair.[85] In *Simeone v. Simeone*,[86] the Pennsylvania Supreme Court located the traditional prejudice against enforcement of these clauses in a paternalistic attitude that assumed women were unable to understand the contracts they signed.[87] Rejecting this view, the *Simeone* court held that such contracts could only be challenged if there was an incomplete or otherwise unfair initial disclosure; absent such circumstances, alimony clauses should be enforced as written.[88] The only evidence of reasonableness that was important, and in fact proved dispositive, was the signing of the agreement by both parties. The court held that once this step was taken, both spouses were entitled to rely on their bargain.[89] While this reliance argument is an extreme example of the treatment of alimony arrangements, many other courts have similarly upheld antenuptial contract provisions about support.[90] In general today, antenuptial agreements about property distribution and, to a lesser extent, alimony payments "will be enforced unless there is a strong reason against enforcement . . . . [This approach] is consistent with a presumption that freedom of contract should be the baseline norm, deviation from which requires justification."[91]

This view of marriage as a contractual relationship, framed by state-supplied default rules, exists in combination with a perceived decline in the moral valence of marriage.[92] The relaxation or abolition of laws concerning fornication, cohabitation, adultery, and

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[85] Cf. Michael J. Trebilcock, Marriage as Signal, *in* The Fall and Rise of Freedom of Contract, supra note 40, at 245, 249 (arguing that a default alimony arrangement is needed "to protect relationship-specific investments").

[86] 581 A.2d 162 (Pa. 1990).

[87] Id. at 166.

[88] Id. at 166–67.

[89] See id. at 166–67.

[90] See, e.g., Burtoff v. Burtoff, 418 A.2d 1085 (D.C. 1980); Edwardson v. Edwardson, 798 S.W.2d 941 (Ky. 1990).

[91] Katherine B. Silbaugh, Marriage Contracts and the Family Economy, 93 Nw. U. L. Rev. 65, 142 (1998).

[92] Of course, there are individuals and organizations who regard marriage as a primarily religious or moral institution. The movement in the law, however, is away from such an assessment, and it is this movement and its justifications that provide the background for this Note. A normative assessment of the purposes of marriage is beyond the scope of this Note.

homosexuality in the past twenty-five years indicates a legal view, at least, of sexual relationships as an inappropriate realm for state regulation.[93] Moreover, scholars locate evidence of a declining stigma attached to divorce with the rise of no-fault divorce,[94] terming it a deliberate societal decision that the morality of individual divorces proves too individual and too "complex for public, impersonal, and adversarial discussion."[95] Instead, there has been a collective decision that "life-long fidelity ought no longer be publicly enforced."[96] Thus, it is no longer clear that an appropriate policy goal in regulating marriage is simply ensuring more marriages or preventing divorces. Instead, in devising regulations it might be more appropriate to uncover where this moral valuation is now focused and devise an integrated legal regime that conforms to these social understandings.

### *B. Marriage as Status*

Interspersed with the free contracting about marital property and finances is a core of rights and responsibilities about which contracting is *not* permitted. Here, marriage is a status, bringing with it a set of rights and obligations that can be altered only by divorce, not by mutual agreement.[97] The marital relationship is therefore analogous to other relationships, such as landlord-tenant and employer-employee, that, while entered into by private agreement, also move the parties into distinct, nonnegotiable statuses. This status model "views marriage as defining and modifying, in an essential way, the identities of the marriage partners .... The terms and conditions of marriage flow from the

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[93] See Carl E. Schneider, Moral Discourse and the Transformation of American Family Law, 83 Mich. L. Rev. 1803, 1817–18 (1985); see also Heinbach & Reed, supra note 48, at 18–19 (discussing the growing acceptability of many once-criticized living arrangements).

[94] See Scott & Scott, supra note 12, at 1240–41 ("Under the no-fault regime, the notion of condemning a moral wrong is as out of place as it would be in a commercial contract.").

[95] Schneider, supra note 93, at 1809; see also Stake, supra note 25, at 401 ("'Married' has now largely become a convenient condition, lasting only until either party perceives a better alternative.").

[96] Schneider, supra note 93, at 1809.

[97] See Posner, supra note 72, at 270.

status, not from private negotiation."[98] On the state level, common examples of nonnegotiable marital rights and obligations include: distinct income tax filing status; public assistance such as health and welfare benefits; default rules concerning community property distribution and control; dower, curtesy and inheritance rights; child custody, child support payments, and enforceable spousal support upon divorce; the right to enter into binding antenuptial agreements; name change rights; spousal and marital communications privileges in legal proceedings; and the right to bring wrongful death, and certain other, legal actions.[99] On the federal level, marriage results in: distinct housing entitlements; federal income tax rates; Medicare, Medicaid, and veterans' benefits; and immigration and citizenship rights.[100] A primary fighting point when new types of legally-recognized relationships are proposed, or when the already existent categories are expanded, is the extent to which such changes will include these status rights and what costs to society will result.[101]

Marriage is also treated as a status in laws concerning children,[102] parenting,[103] and the terms of dissolution.[104] Here, the law is immu-

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[98] Kandoian, supra note 46, at 1833.

[99] See Baehr v. Lewin, 852 P.2d 44, 59 (Haw. 1993) (listing the most important state marital rights in Hawaii).

[100] Heinbach & Reed, supra note 48, at 19.

[101] Professors Elizabeth and Robert Scott point out that "[i]f the state extends privileges and benefits to married couples that are not offered to individuals or cohabiting couples, the value of marriage increases as compared to alternatives, and getting and staying married becomes more attractive." Scott & Scott, supra note 12, at 1332. From this economic standpoint, then, to encourage marriage, the state should restrict the categories to which marital benefits are available. This, however, is not the current direction of marriage law.

[102] See Haas, supra note 24, at 880 n.12 ("An agreement that adversely affects the support rights of the parties' children will not control that matter."); Posner, supra note 72, at 271 (citing abandonment and neglect of children as two primary restrictions on premarital contractual freedom).

[103] See, e.g., In re Marriage of Littlefield, 940 P.2d 1362, 1371–72 (Wash. 1997) (holding that the parenting plan provision of an antenuptial agreement may be considered by a court as long as it was entered into "knowingly and voluntarily," but that it is not binding on a court or the parties to it).

[104] See, e.g., Coggins v. Coggins, 601 So. 2d 109, 109–10 (Ala. Civ. App. 1992) (holding that antenuptial agreements about the terms of divorce are against public policy and thus invalid, despite the general enforceability of antenuptial provisions in Alabama); see also Haas, supra note 24, at 880–81 ("[D]ivorce itself—the change of marital status—has remained a matter of public rather than private ordering.").

table—these are not default rules. This immutability is evidenced by the repeated refusal of courts to uphold contractual terms regarding these issues, usually justified in terms of "the public interest"—protecting children from the perceived psychological and economic injury of divorce.[105] Regardless of whether such harm actually results from divorce,[106] objections to divorce are usually voiced in these terms. In fact, some states have dual legal regimes, in which divorce is easily obtainable if there are no minor children, but otherwise more rigorous standards must be met. For example, many states have summary divorce procedures available for couples without children, through which divorce can be obtained quickly by consent and a filed settlement agreement.[107] The presence of minor children usually precludes a couple from seeking these divorces.[108]

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Moreover, in Schibi v. Schibi, 69 A.2d 831 (Conn. 1949), the Connecticut Supreme Court held that an antenuptial agreement to annul a marriage six weeks after it was contracted was unenforceable. Id. at 834. There were dual grounds for this refusal: First, the court held that the terms of marital dissolution are set by the state and are nonnegotiable. See id. at 833–34. Second, the court held that, as the purpose of the marriage was the legitimizing of the couple's child and an annulment would invalidate this act, enforcement of the agreement would undo what the act of marriage had accomplished. Id. at 833. The court focused on the latter concern in its discussion of the case, although its specific holding rested on the former ground. The effect of the decision was to enforce the nuclear family arrangement, not the contractual bargain.

[105] See, e.g., Scott, supra note 17, at 11 ("Of particular concern are the most vulnerable casualties of the modern marriage, the minor children of divorce. Children typically bear substantial psychological and economic costs for a decision in which they have no role."); Stake, supra note 25, at 408 ("Children may bear a large emotional burden [from divorce]. Though researchers have argued about it, there is substantial evidence that marital breakup causes psychological injury to children.").

[106] See Ellman et al., supra note 16, at 241 (citing studies comparing behavioral problems of children pre- and post-divorce and concluding that "[i]t is not as clear that divorce is bad for children as one might think" and that "[o]ne can assume that children suffer when a marriage breaks down but be less certain that they suffer from *divorce*").

[107] Id. at 205 (discussing summary divorce statutes).

[108] Only Washington and Colorado allow these proceedings for couples with minor children. Id. at 205–06. Moreover, some states have considered altering regular divorce standards if there are minor children involved. For example, Tennessee recently considered repealing part of its divorce statute to prevent divorcing parents from stipulating to fault grounds or irreconcilable differences if children are involved, because in many instances this would effectively result in a return to a no-fault standard. See Nichols, supra note 23, at 441 n.270 (citing § 323, 100th Leg., 1st Reg. Sess. (Tenn. 1997)).

The perceived harm to children from divorce has led some legal scholars to call for even stricter divorce standards for couples with children.[109] Professor Elizabeth Scott argues that a broad-based dual legal regime—one for couples with minor children and one for couples without minor children—might be more appropriate than the current no-fault regime.[110] In a more radical proposal, Professor Mary Ann Glendon advocates that, in marriages that have resulted in children, all property upon divorce should be considered "family property" and distributed to guarantee the financial security of the children and their custodial parent upon divorce.[111] The objective of these proposals is protecting minor children and the traditional nuclear family; these scholars do not analyze marriage itself as something that must be protected.

One clearly problematic aspect of marriage as status is that state law governs marriage, so moving from one state to another changes the terms of marriage and divorce.[112] This issue recently arose in the context of same-sex civil unions and led to the promulgation of DOMA.[113] Within marriages not covered by DOMA, Professors Rasmusen and Stake observe "it only takes one state allowing contracts to put pressures on others. If one state passes the law, and couples see the options as attractive, that state will become a magnet for marriage ceremonies"[114] and divorce proceedings. Thus, outside DOMA's sphere, all it takes is one state changing its approach to which terms are subject to private ordering to effect a national change. The result is a potential race to divorce filing, where the first spouse to file gets to choose the regime under which a contract is evaluated.

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[109] See Scott, supra note 17, at 91 (recommending that parents of minor children be subject to a mandatory two-year separation period prior to divorce). Of course, other scholars argue that divorce restrictions harm children by causing parents to engage in more contentious conduct, causing additional psychological injury to the children. See Gordon, supra note 24, at 1457. Moreover, fault divorces are more expensive to litigate than no-fault ones, leading to additional economic injury to children from divorce. See id. at 1461.

[110] See Scott, supra note 17, at 91.

[111] Kay, supra note 5, at 317–18 (discussing Professor Glendon's proposal).

[112] Rasmusen & Stake, supra note 71, at 500.

[113] 1 U.S.C. § 7 (Supp. V 1999); see supra text accompanying notes 55–57 for DOMA's central provisions.

[114] Rasmusen & Stake, supra note 71, at 500.

In sum, while private ordering of marriage and its dissolution is increasingly allowed with respect to property distribution and spousal support, courts and legislatures have consistently resisted negotiation concerning child support, parenting, and the terms of divorce. The limitations on the ability of parties to contract are frequently justified by reference to the needs of children and the preservation of the family. Where children and the very existence of the family are perceived to be unaffected or only tangentially affected by antenuptial agreements, such agreements are usually upheld.[115] Where children or the existence of the familial relationship are themselves the subjects of a contract, however, courts consistently refuse to uphold any such agreement.[116] In these instances, courts focus on preservation of the nuclear family ideal as long as possible by refusing to uphold contractual provisions dictating the terms of divorce itself and by establishing longer waiting periods and higher levels of proof if a nuclear family is involved. Thus regulation of marriage is revealed as a proxy for regulation of the nuclear family ideal.

## III. UNRAVELING THE DOCTRINE: MARRIAGE AS NUCLEAR FAMILY PROXY

Viewed as a whole, laws regulating marriage and divorce are confusing and contradictory. While much of marriage law is contract law, with couples allowed to negotiate the economic terms of their marriages, courts and legislatures consistently prevent couples from fixing the non-economic aspects of their marriages. Such limitations on couples' contractual freedom are invariably linked to state manipulation and preservation of the nuclear family.[117]

Court decisions, proposed legislation, and academic scholarship evidence that the true focus of marriage regulation is the creation and perpetuation of the nuclear family. The Supreme Court, in

[115] See supra notes 75, 81–84 and accompanying text.

[116] See supra notes 97–108 and accompanying text.

[117] As used in this Note, the term "nuclear family" refers to the family form, often termed the "traditional family," (although there is no evidence that there is anything traditional about it) of two opposite-sex parents with their marital offspring. This is not an ideal family form in any objective sense, just the form that contemporary legislation, jurisprudence, and academic literature seek to produce and maintain.

*Skinner v. Oklahoma*,[118] located the fundamental right to marry in the right of procreation, not in marriage per se,[119] failing to recognize that the two concepts are, at best, imperfectly overlapping. Moreover, a strong point of contention in the drafting of Vermont's same-sex civil union bill was a proposed amendment declaring that one of the central purposes of marriage is procreation.[120] In effect, arguments such as this sanction the production of the nuclear family through the medium of marriage. While the Vermont legislature did not ultimately adopt this amendment or the perspective embodied in it, those opposed to allowing same-sex couples to marry articulated their objections by focusing on the inability of same-sex couples to procreate and to conform to the nuclear family model.[121] Social and legal commentators, in analyzing the state of the law and proposing changes, focus most strongly on the effect of various regulations on the nuclear family, and it is here that moral valence is most clearly associated with questions of marriage and divorce. For example, Professor Carl Schneider observes that the belief that parents are obliged to support their children through their minority is one of the few "moral" judgments concerning marriage and divorce that is still judicially enforced.[122] This is a clear focus on the meaning of family, and the responsibility of family members to one another, not on marriage itself. Moreover, Professor Schneider and others have argued that the "most stable, healthy, safe, and happy environments for adults and children is the traditional nuclear family."[123] In fashioning restrictions on the freedom to contract about the terms and outcome

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[118] 316 U.S. 535, 541 (1942).

[119] Id. See also Baehr v. Lewin, 852 P.2d 44, 55–56 (Haw. 1993) (using the *Skinner* Court's logic as the basis for holding that the denial of marriage licenses to same-sex couples does not violate substantive due process by divesting them of a fundamental right to marry).

[120] See Vermont Senate OKs Measure on Gay Unions, The Desert News (Salt Lake City, Utah), Apr. 19, 2000, at A2.

[121] See id.

[122] Schneider, supra note 93, at 1812.

[123] Nichols, supra note 23, at 433 & n.210 (citing Carl E. Schneider, The Law and the Stability of Marriage: The Family as a Social Institution, *in* Promises to Keep 187, 188 (David Popenoe et al. eds., 1996)). See also Ronald L. Simons & Assocs., Understanding Differences Between Divorced and Intact Families 217 (1996) (suggesting policies designed to encourage families to stay together as one approach to promoting healthier children).

of divorce, wherever the focus is on children and not on the relationship between the parties to the marriage, the real object of regulation is the nuclear family.

As a proxy for the nuclear family, marriage is simultaneously overinclusive and underinclusive. Couples without children are included in the regime, while unmarried couples with children are excluded. Both of these situations are problematic.

In its overinclusive aspect, regulating the family through regulation of marriage subjects married couples without children to unnecessary costs. Since the regulatory efforts are articulated in terms of marriage, these couples are prevented from freely contracting the terms of divorce. They remain in a status regime despite the absence of the factor—children—that is the primary legal rationale for their placement there. This results in inefficient antenuptial contracts concerning divorce, or no such contracts at all, even though it is at the outset of a marriage that parties can most rationally and most collaboratively set out the terms they desire in the event of dissolution. Moreover, couples are prevented from signaling their intentions in the marriage. By refusing to uphold contractual provisions defining breaches and their consequences, potential spouses are prevented from signaling their commitment to and expectations from the relationship.[124] This greatly reduces a couple's incentives to negotiate their own marital terms, because there are no legally enforceable consequences for breach of their commitments, nor any legal recourse if a partner should so breach.[125]

Recognition of the legal failure to allow couples to enter into binding contracts concerning marriage has led some commentators to argue that antenuptial agreements should be mandatory,[126] while

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[124] See Scott & Scott, supra note 12, at 1329–30.

[125] Professors Margaret Brinig and Steven Crafton make an analogous argument about the effect of no-fault divorce laws. They argue that the rise of the no-fault regime has caused spouses to invest less in marriage and children than they otherwise would have by making it clear that marital promises are legally unenforceable. Margaret F. Brinig & Steven M. Crafton, Marriage and Opportunism, 23 J. Legal Stud. 869, 892–94 (1994).

[126] See, e.g., Stake, supra note 25, at 429–30 (suggesting standardized form antenuptial agreements and a legal regime requiring their completion prior to the issuance of a marriage license); Zelig, supra note 20, at 1230–31 (arguing that couples should be required to register a marriage contract with the state prior to a marriage

others have devised complicated schemes for different divorce standards depending on whether minor children are involved.[127] This bifurcated divorce scheme, however, is only necessary when marriage is overinclusively used as a proxy for the nuclear family.

In its underinclusive aspect, regulation of the family through marriage reaches too few families. The U.S. Census Bureau reported that in 1994 there were approximately 3,661,000 unmarried couples cohabiting; of these, 1,270,000 had children under fifteen years old.[128] If legislators are concerned about protecting children and better ensuring that they grow up in a two-parent household, then regulations concerning the right of exit from a relationship should properly include these 1,270,000 families, as well as those who formally enter into marriage. Thus, analyzing marriage as an underinclusive proxy for the family reveals that regulation of marriage and regulation of family need to be separated to accomplish the commonly articulated goal of reducing the externalities of the breakdown of families on children and society.

Once it becomes clear that the goal of marriage and divorce laws is to regulate the nuclear family, not marriage itself, much of the current confusion in existing law can be eliminated. While scholars have suggested that one set of rules is inappropriate to accomplish this ideal,[129] their solution repeatedly has been to devise alternative schemes for regulating marriage, rather than developing means for disentangling the doctrinal threads of marriage and family.

## IV. RESTITCHING THE QUILT: FORMULATING A COHERENT LEGAL APPROACH TO MARRIAGE AND FAMILY

The arguments for limiting contractual freedom regarding the terms of divorce and the disposition of children prove tenuous at best if the protected status at the focus of such limitations is the

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ceremony or, for common-law marriage, prior to presenting themselves to the community as married).

[127] See Scott, supra note 17, at 90 ("[T]he legal rules will distinguish parents from other divorcing spouses."); see also Nichols, supra note 23, at 419 ("When a family has a minor child, the no-fault statute may work differently; for example, there may be a longer waiting period before the couple can be divorced.").

[128] Bureau of the Census, Current Population Reports, Series P20-484, Marital Status and Living Arrangements: March 1994.

[129] See, e.g., Stake, supra note 25, at 414 ("[T]he proposed reforms suffer from the prevailing presumption that we can structure one law to fit all marriages.").

family, rather than marriage. Professor Anthony Kronman describes many limits on contractual freedom as either protection of the interests of third parties or paternalism. He defines paternalism as the imposition of legal rules "that prohibit[] an action [because] it would be contrary to the actor's own welfare."[130] Through the lens of the warranty of habitability in landlord-tenant law, Professor Kronman argues that paternalism is justified when there are a sufficient number of fraudulent bargains that would otherwise be judicially enforced.[131] Such situations exist where fraudulent bargains would be enforced more often, and their fraudulence would be less easily proven, than in bargaining situations in general. Then, paternalism achieves an effective result and is socially desirable.[132] Moreover, paternalism may be justified when used to achieve distributive justice: to overcome the effects of clearly and abnormally unequal bargaining power by shifting control from the more powerful party to the less powerful and refusing to let the parties bargain around this distribution.[133] Many instances of paternalism, however, cannot be justified on either efficiency or redistributive grounds.[134]

In the marital context, the distinction between contractual limits to protect third parties and paternalistic limits that unjustifiably restrict freedom of choice differentiates the legal rules devised to protect the nuclear family from those that limit the ability of the parties to a marriage to negotiate their own contract. Rules designed to protect the nuclear family focus on protecting children—third parties to any contract negotiated between the parents. The presence of children may create circumstances warranting governmental interference in a right to contract. Such interference in the absence of children, however, is paternalism—an effort to define for the contracting parties what their best interests are. Without sufficient rationale, such paternalistic intervention is simply unwarranted.

Removing concerns about possible harm to children resulting from divorce and recognizing that the focus of legislation is the

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[130] Kronman, supra note 29, at 763.
[131] Id. at 768.
[132] Id.
[133] Id. at 770–72.
[134] Id. at 774–75.

family relationship itself, the argument for limiting contractual freedom in marriage is premised on the assumption that women and men have unequal bargaining power.[135] Under this view, freedom to bargain about the terms of the marriage and its dissolution tends to disfavor women and is likely to produce inequitable bargains. Therefore, it is better to deem these contracts void ex ante rather than create a bad result ex post. This perspective bears a striking similarity to the historical justification for the limitations placed on women's abilities to contract: Women are less powerful than men and need societal protection in the form of voiding the bargains they strike.[136]

This perspective ignores both economic and social realities. Contrary to this pessimistic view, ex ante bargaining might actually produce *better* outcomes for women than ex post negotiations. First, parties bargaining ex ante are more likely to devise terms that deal with role specialization and asymmetric investment in a mutually beneficial way.[137] An unhappy potential spouse always has the powerful bargaining position of the freedom to walk away prior to any social or economic investment in the marriage. Second, even if a woman's bargaining power is less than that of her potential husband, the disparity is generally smaller going into the marriage than it is coming out of it, after she may have spent the duration of the marriage removed from the workforce.[138] Third, judicial bar-

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[135] See, e.g., Scott & Scott, supra note 12, at 1243 ("Feminists . . . argu[e] that women are socially and psychologically disabled in negotiating the marriage contract in ways that will systematically result in their getting a smaller share of the benefits of marriage.").

[136] See Simeone v. Simeone, 581 A.2d 162, 165 (Pa. 1990) (criticizing this approach). The Pennsylvania Supreme Court found that such assumptions are inappropriate and deleterious today. Id.

[137] Scott & Scott, supra note 12, at 1247 (employing a hypothetical bargaining heuristic to predict the outcome of antenuptial negotiations in the shadow of default, rather than mandatory, divorce laws).

[138] See generally Lenore J. Weitzman, The Divorce Revolution: The Unexpected Social and Economic Consequences for Women and Children in America 184–214 (1985) (describing older homemakers in marriages of long duration as one group explicitly exempted from self-sufficiency standards under California alimony law); Ira Mark Ellman, The Theory of Alimony, 77 Cal. L. Rev. 1, 43–44 (1989) ("The traditional wife . . . makes substantial investments early in expectation of a deferred return [and] . . . depletes her capital assets while making those investments."); Zelig, supra note 20, at 1237 & n.68 ("[T]he woman's position is better at [a marriage's]

gains struck after the demise of the marriage have generally proven inadequate to maintain either the pre-divorce financial condition of women or their financial position relative to their ex-husbands.[139] In fact, Professor Thomas Oldham argues "a major cause of the current financial problems of divorced women is that they made major life decisions in prior decades without considering the possibility of divorce."[140] Finally, the social consequences of disallowing ex ante negotiating can be high, because such a rule perpetuates a view of women as incompetent to enter into contracts on their own behalf.

Instead of limiting contractual freedom in marriage, the more appropriate solution might be a purely contractual regime. If the status aspects of marriage law are removed upon recognition of their actual role as proxy for nuclear family law, what remains is two adults voluntarily structuring the terms of their relationship. The social functions of marriage can still be adequately performed through non-legal religious ceremonies and recognition that marital contracts are the legal framework of any marriage. Entry into marriage would thus have higher ex ante negotiation costs than currently, but this in itself is not necessarily undesirable. Instead, it places marital negotiation costs where they more appropriately belong, on the couples entering into a relationship, rather than on society in the form of court costs.

In this understanding, the appropriate moment for state intervention becomes the birth or adoption of a child within a relationship that approximates a nuclear family. The focus of any regulation predicated on concern for children and the formation and maintenance of a nuclear family should be this family form itself, not marriage as its proxy. The traditional status-based limitations on marriage and divorce should shift, instead, to become limitations on the dissolution of nuclear family relationships, regardless of the marital status of the parents.

The problem with such a scheme is defining the appropriate unit of regulation. "Family" is a slippery term, and marriage has un-

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inception than at dissolution, when her career sacrifices and child rearing have typically left her in an economically dependent state.").

[139] See Zelig, supra note 20, at 1237 & n.69.

[140] J. Thomas Oldham, Premarital Contracts Are Now Enforceable, Unless . . . , 21 Hous. L. Rev. 757, 785 (1984).

doubtedly served as its proxy because there is a clear legal moment at which the state may intervene—the moment of marriage—and there are clearly identifiable individuals covered by the law—the couple. Yet clarity alone does not make one law better than other alternatives, and the clarity chosen thus far leaves millions of children outside the protection of the law and unnecessarily includes too many childless couples within its constraints. Moreover, the current legal regime has worn thin and has only poorly and incompletely been patched with the recent laws that stretch to define marriage, resulting in a confused and uncertain approach toward divorce.

Disentangling these legal regimes produces higher marriage entry costs, but lower and clearer exit costs. This financial restructuring might encourage fewer marriages and, absent children, more divorces. Exiting from a family, however, would have clear and high costs. As marriage and divorce are themselves often perceived as morally neutral,[141] this outcome could actually be desirable: Couples would have the incentive to enter carefully into marriage, have the ability to leave with known consequences, and be better able to assess the decision to have children with full awareness of the economic and lifestyle consequences of that decision.

## CONCLUSION

Modern marriage law is unnecessarily complicated. Its forms and contours are rearranged regularly as legislatures and courts try to make sense of the overlapping and thinly-worn doctrines regulating state-recognized relationships. Through an analysis of the dual regimes of contract and status approaches to marriage, it becomes apparent that the forms and existence of families are the true objects of regulation. Marriage is used as a convenient proxy for families, but such use is inappropriate due to its overinclusiveness, ineffective due to its underinclusiveness, and unnecessarily confusing due to its inexact fit. Moreover, after recognizing that it is the composition and protection of families—in particular, *nuclear* families—that is the true focus of marriage regulation, many restrictions on contractual freedom in marriage are revealed as pa-

[141] See supra notes 93–96 and accompanying text.

ternalistic. Since such restrictions are neither efficient nor redistributive, they should be lifted. The appropriate focus of contractual restrictions and object of the attachment of status rules proves to be the family: Any restrictions need to be tailored to this subject, rather than clumsily operating through the patchworked proxy of marriage.