

Behind the Law of Marriage (I): From Status/Contract to the Marriage System

Janet Halley[†]

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[†] Royall Professor of Law, Harvard Law School. This Article comes in two parts; “Behind the Law of Marriage, Part II: Travelling Marriage” is forthcoming in UNBOUND: HARVARD JOURNAL OF THE LEGAL LEFT in 2011. I am grateful to Maria Rosaria Marella for publishing much of this Part as *Note sulla Costruzione del Sistema delle Relazioni di Coppia: Un Saggio di Realismo Giuridico*, XXVII-4 REVISTA CRITICA DEL DIRITTO PRIVATO 515 (December 2009). Thanks to my Family Law classes at Harvard Law School, to research assistants Poppy Alexander, Hannah Glover, Jimmy Richardson, Benjamin Levin, and Erika Rickard, and to librarians Melinda Kent, Janet Katz, and Stephen Wiles. Special thanks to Mary Ann Case, Pascale Fournier, Havva Guney, Duncan Kennedy, David Kennedy, Philomila Tsoukala, Maria Rosaria Marella, and Hila Shamir for help with the argument, and to participants in the Up Against Family Law Exceptionalism conference series for myriad contributions. Thanks also to participants in the Harvard Law School Faculty Workshop, to Mary Anne Case for an opportunity to present part of this project at the University of Chicago, and to Richard Helmholtz for generous commentary. Finally, thanks to James Maguire and the Unbound editors for the Flickering Marriage animation. All errors of fact and judgment are mine alone.

I. Introduction

Is marriage status or contract? The two legal forms stand in contemporary legal thought as ideal-typical opposites, the two poles of a gradient or spectrum along which marriage moves. Thus, at least five contemporary family law casebooks pose the question whether marriage is status *or* contract, and then supplant that question by others that render it some mix of both, typically through the question of the enforceability of an antenuptial contract.¹ Thus marriage is status, but with elements of contract. Depending on how many elements of contract we add, marriage moves down the spectrum towards contract. But everyone tacitly agrees that it can never go all the way, because some aspects of marriage are ineradicably different from ordinary contracts. It is status plus some fragmentary elements of contract.

This is our modern way of using a distinction that came into American law in 1852, with the publication of Joel Prentiss Bishop's *Marriage and Divorce*. As I explain in an article entitled "What is Family Law? A Genealogy,"² Bishop declared that marriage was status-*not*-contract and thus solved a number of now-forgotten problems in American law. The status/contract distinction then became a major structural force in the construction of the classical legal order: marriage was status and subject to will of the state, while contract (ideologically, never really) reduced itself to the will of the parties. As I argue, the status/contract distinction came to hold a family/market distinction and to constitute the legal mirror of separate spheres of ideology and supposedly free capital.

The status/contract distinction is still with us today. To be sure, for the classics it was a clear opposition while for us it is a dichotomy for describing fragmentary bits of marriage and a language in which to conduct normative battles over the institution. The idea that marriage has some elements that are status and others that are contract, and that they can be calibrated with respect to each other, carries forward the classical ideology of a family/market distinction, applying it not to marriage as a

¹ WALTER O. WAYRAUCH, SANFORD N. KATZ, AND FRANCES OLSEN, *CASES AND MATERIALS ON FAMILY LAW: LEGAL CONCEPTS AND CHANGING HUMAN RELATIONSHIPS* 89-90 (1994); PETER N. SWISHER, ANTHONY MILLER, AND JANA B. SINGER, *FAMILY LAW: CASES, MATERIALS AND PROBLEMS* 2-3 (1998); HARRY D. KRAUSE, LINDA D. ELROD, MARSHA GARRISON, AND J. THOMAS OLDHAM, *FAMILY LAW: CASES, COMMENTS AND QUESTIONS* 175-177 (5TH ed. 2003); D. KELLY WEISBERG, *MODERN FAMILY LAW: CASES AND MATERIALS* 114-115 (3RD ed. 2006); DOUGLAS E. ABRAMS, NAOMI R. CAHN, CATHERINE J. ROSS, AND DAVID D. MEYER, *CONTEMPORARY FAMILY LAW* 819-820 (2006). *See also*, MILTON C. REGAN, *FAMILY LAW AND THE PURSUIT OF INTIMACY* (1993). Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 Nw. U. L. Rev. 65, 111-20 (1998), provides a deconstruction of the status/contract distinction in marriage law which is similar to the one offered here, but more normatively driven. My goal is not to select the morally right rule but to make the context for that decision clear.

² Janet Halley, *What is Family Law? A Genealogy: Part I*, YALE J. OF L. & THE HUMANITIES (forthcoming 2011) [hereinafter Halley, *Genealogy*].

whole but to its parts. It is typical of our legal consciousness that we have transformed this polar opposition into a spectrum.³

Meanwhile, the fight over same-sex marriage has intensified the idea that marriage is fundamental to the social order, a permanent commitment of the utmost importance, permeated by unshirkable obligation and public normativity. As I show in “What is Family Law? A Genealogy,” these are the very attributes of marriage that classical jurists associated with the term status and with the axiom that marriage was status-*not*-contract. I am going to argue in this Article that the debate over same-sex marriage has intensified and broadened a social commitment to think of marriage as status. I will argue that this trend represents a new conservative consensus, shared by the same-sex-marriage pro’s and the anti’s alike, in that both are committed to the idea that marriage is fundamental, permanent, etc. And I will argue that, as this trend intensifies, it fosters a legal consciousness in which ideas about law from the classical era wake up from their slumber and take on new life. Marriage as status is conservative not only in the sense that it commits legal thought to using the institution to preserve tradition, but also in the sense that it provides an inlet into contemporary legal thought about marriage for classical legal ideas. The very idea that marriage *is* anything—anything at all—is symptomatically classical. This Article attacks that idea, and argues for the revival and updating of a legal realist understanding of the marriage system.

This attack has already been made, sadly without persuading the family law legal intelligentsia of its enduring importance. In 1932 and 1933, Karl Llewellyn published “Beyond the Law of Divorce,” a two-part article that is the direct inspiration for my work here.⁴ This dazzling article was part of Llewellyn’s attack on the social-purpose functionalism⁵ which was then the ascendant form of sociological jurisprudence.⁶ In that school of legal thought, jurists thought themselves obliged to identify the social purposes to which law is dedicated, enlisting sociological knowledge to ascertain any social problem impeding realization of that purpose, and finally to discern which legal rule best solved the problem. For all its sociological orientation, it was a kind of neoformalism, retaining the top-down and conceptualistic characteristics of classical legal thought, and explicitly a mode of “social engineering” along highly mechanical lines. Llewellyn—who looked out over a legal landscape in which the advent of no-fault divorce was visible, just as we today look out over a legal landscape being overhauled by the struggle over same-sex marriage—thought that this conceptualist

³ Duncan Kennedy, *Three Globalizations of Law and Legal Thought: 1850-2000*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL* 63-71 (David Trubek & Alvaro Santos eds. 2006).

⁴ Karl Llewellyn, *Behind the Law of Divorce: I*, 32 COLUM. L. REV. 1281 (1932); Karl Llewellyn, *Behind the Law of Divorce: II*, 33 COLUM. L. REV. 249 (1933).

⁵ For this term and the legal methodology it describes, see Fernanda Nicola, *Family Law Exceptionalism in Comparative Law*, 58 AM. J. COMP. L. 777 (2010).

⁶ Karl Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1235-38 (1931). Llewellyn’s essay is reprinted, with a very useful introduction and bibliography, in *THE CANON OF AMERICAN LEGAL THOUGHT* 134-172 (David Kennedy and William Fisher eds. 2006).

neoformalism was disabling family law as a field from dealing with the vastness and the detail of the immanent changes. He sought to blast the functionalists out of the water by exposing the sheer irrationalist complexity of the interaction between law and society. This Article has similar ambitions, but its target is the neoformalism rising in family law today. Like Llewellyn, I seek to offer a replacement for a theory in which marriage “is” something (status? contract?) and to reconceptualize it *as its effects*.

This Article, like its namesake, comes in two Parts. This Part begins with an account of the same-sex marriage campaign, seeking to show how the advocates and opponents of this reform converge on an image of marriage as status (Section II). I then deconstruct the status/contract distinction, replacing it in the process with the idea of a “marriage system” that is irretrievably ambivalent as between status and contract—so much so that the distinction should be deemed to have collapsed—and that can be adequately described only if we shift from reductive images of what “marriage is” to a broad and complex examination of marriage (and its others) as their effects (Section III). I conclude by tying this recommendation back to the family/market distinction in which the status/contract idea developed its deep roots in American legal thought, and recommend that family law as a field reject the family-law exceptionalism which that distinction introduces into our work, and emphasize—in the family just as much as we would do in the market—the distributive consequences of legal rules (Section IV).

Part II of this Article⁷ exemplifies the benefits of making this turn by showing how gay rights advocates seeking same-sex marriage were misled by their status-bedazzled ideas of marriage and of law into imagining that it would be easy to deliver marriage on a nondiscriminatory basis to their constituency. They ignored marriage as its effects in a key part of our legal system: interjurisdictional conflicts of law and the rules we have for choosing the law that applies.

II. Same-sex Marriage and the Resurgence of Marriage-as-Status

As I show in “What is Family Law? A Genealogy, Part I,”⁸ the idea that marriage was status not contract had specific meanings for its inventors in the middle of the nineteenth century, some of which persist to this day. Marriage as status was fundamental to civilization and to law. It was *ius gentium*, so that it could not be disestablished, and universal. Unlike the relations of husband and wife that it supplanted, marriage as status was an institution, public not private, controlled by the will of the state, not that of the parties. As a result, all the marriages in a given jurisdiction were identical. It was the opposite of contract, which was variable, private, and controlled by the will of the parties not that of the state. The degree to

⁷ Janet Halley, *Behind the Law of Marriage (II): Travelling Marriage*, UNBOUND: HARV. J. OF THE L. LEFT (forthcoming 2011).

⁸ Halley, *Genealogy*, *supra* note 2.

which these ideas about marriage and contract were ideological rather than socially descriptive is marked by the fact that this very distinction was adopted in order to take marriage out of the reach of the Contracts Clause of the U.S. Constitution, which forbade the states to impair contract. Though advocates of marriage as status-not-contract solemnly intoned that it was permanent, even indissoluble, and that the state had more concern for the continuation of particular marriages than the parties themselves, they did so in order to make sure that the rise of divorce would not be impeded by the Contracts Clause.

One of the most important elements of marriage as status was the idea that, though universal and fundamental to all civilization, its specific rules were under the control of the territorial sovereign. National courts could choose their own law in enforcing the rules of marriage and divorce. In the earliest English-language statement of the idea of marriage-as-status-not-contract that I have found, Scottish Lord Robertson asked indignantly,

[I]f a man in this country were to confine his wife in an iron cage, or to beat her with a rod the thickness of the Judge's finger, would it be a justification in any court, to allege, that these were powers, which the law of England conferred on a husband, and that he was entitled to the exercise of them, because his marriage had been celebrated in that country?⁹

No: Scotland was under no obligation to import barbarian English marriage rules just because English subjects who had married in England came to live in Scotland. The law of contract, on the other hand, was or should be internationally uniform: whether by choice of *lex loci contractus*, by the establishment of free-trade zones like Great Britain, by outright imperial domination, or by the ultimate harmonization of the law merchant, contact dissolved interjurisdictional boundaries while marriage cemented them.

In this Section I show how ideas about marriage that originated in American law under the rubric marriage-as-status in the mid-to-late nineteenth century rise of classical legal thought were revived in the same-sex marriage debate, and how both sides *agreed* that marriage should be seen and enforced this way. They disagreed only about choice of law: the anti's were with Lord Robertson, but the pro's have dreamed that same-sex marriage was so fundamental that interstate recognition of particular same-sex marriages was somehow legally mandatory.

⁹ JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC, IN REGARD TO CONTRACTS, RIGHTS, AND REMEDIES, AND ESPECIALLY IN REGARD TO MARRIAGES, DIVORCES, WILLS, SUCCESSIONS AND JUDGMENTS § 111, 102-03 (Boston, Hilliard, Gray, & Co. 1834) [hereinafter STORY, CONFLICT OF LAWS], quoting JAMES FERGUSSON, REPORTS OF SOME RECENT DECISIONS BY THE CONSISTORIAL COURT OF SCOTLAND, IN ACTIONS OF DIVORCE, CONCLUDING FOR DISSOLUTION OF MARRIAGES CELEBRATED UNDER THE ENGLISH LAW Appendix, Note G, at 399 (Edinburgh, Archibald Constable and Company; London, Charles Hunter, Bell-Yard, Temple-Bar 1817).

The strongest and purest marriage-as-status arguments, on the anti-side, came from Joseph Cardinal Ratzinger, now Pope Benedict XVI, writing with others on behalf of the Congregation of the Doctrine of the Faith. A series of fascinating recent letters¹⁰ articulates the specific *heterosexuality* of marriage as a sacred nexus between the human and the divine. Marriage emerges in these letters as a profound image of the divine/human relationship before the fall—indeed, as its initial form—and of the operation of divine love after it. But to reflect this connection and not its opposite, marriage must be exclusive, indissoluble, procreative (or open to procreation); it must organize social life; and state policy must promote it and only it as the preeminent form of dignified human life. For these reasons, Ratzinger argues that Catholics must actively resist any public policy of recognizing purported marriages between homosexuals. And for these reasons, also, he represents marriage as a firmly formal, absolute legal condition, steeply different from its alternatives, with fixed moral attributes that define it and from which individual marriages must not deviate. Status.

Justice Cordy's dissent from *Goodridge v. Department of Public Health*,¹¹ in which a majority of the Massachusetts Supreme Judicial Court held the state could not constitutionally refuse marriage licenses to same-sex couples, gives a more functionalist or instrumental statement of the special place of heterosexual marriage in the social order—but his image, too, emphasizes status.¹² He draws from the “fact

¹⁰ Joseph Cardinal Ratzinger and Angel Amato, S.D.B., from the Offices of the Congregation of the Doctrine of the Faith, “Considerations Regarding Proposals to Give Legal Recognition to Unions between Homosexual Persons,” June 2, 2003; “Letter to the Bishops of the Catholic Church on the Collaboration of Men and Women in the Church and in the World,” May 21, 2004. The letters can be found at http://www.vatican.va/roman_curia/congregations/cfaith/ (last visited January 6, 2011). Thanks to Mary Ann Glendon for help identifying these sources.

¹¹ *Goodridge v. Department of Public Health*, 440 Mass. 309, 363 (2003).

¹² In my view, Justice Cordy's argument was a brilliant stroke of argumentative innovation. Until he advanced it, the only rational justification for excluding same-sex couples from marriage was that the same-sex parentage was not as good as its cross-sex counterpart. There seemed to be no other way to distinguish these couples, given that they often had children, adopted by both partners or born to one and adopted by the other. The idea that marriage regulates not *parentage* but *heterosexual reproduction*, and that we distribute it not as a benefit but as a regulatory yoke, enables Justice Cordy to argue that cross-sex parentage is more socially dangerous than its same-sex counterpart: marriage. Marriage, he argued, could rationally be reserved for cross-sex couples in order to channel their reproduction into its legally regulated space; if denying the stabilizing benefits of the form to the children of same-sex couples seemed to relinquish part of this goal, that was, Cordy said, at least a rationally chosen cost of the decision to use marriage as a signal specifically about where cross-sex sex should take place. When Justice Cordy made it, this argument was *new* and gave the anti-same-sex argument a new claim on rationality. At least on its face it avoids any (implicitly antigay) heterosupremacy: the premise is not that heterosexuals are more adept at parentage and more deserving of the benefits of marriage than homosexuals, but that that heterosexuals are more irresponsible about reproduction than homosexuals and have more need of the marital burdens. It does not derive coherently from the work of Lynn D. Wardle, Maggie Gallagher

that sexual intercourse commonly results in pregnancy and childbirth”¹³ that there is a social need for heterosexual marriage. The purpose of marriage requires its formal fixity: only by insisting that procreation, and thus heterosexual sex, *should* happen only in marriage—only by insisting that marriage is *the* social form for procreation—can societies assign fathers reliably to children and provide a stable, regular form for their reception into society. If marriage as a form is indifferent to these procreative functions (that is, if it is not by rule heterosexual), societies would risk conceding the social-control message that needs to be sent: if you are going to have heterosexual sex, we want you to have it with a spouse. So it was rational for the legislature to refuse marriage to same-sex couples; and that’s all that was constitutionally required.

Underlying this rationality assessment is a vividly *social* image of what marriage achieves for all of us. “[A] society without the institution of marriage, in which heterosexual intercourse, procreation, and child care are largely disconnected, would be chaotic.”¹⁴ Societies *with* heterosexual marriage can make it the preeminent form of social organization: “More macroscopically, construction of a family through marriage also formalizes the bonds between people in an ordered and institutional manner, thereby facilitating a foundation of interconnectedness and interdependency on which more intricate stabilizing social structures might be built.”¹⁵ To be a central stabilizing institution for heterosexual relationships *and society generally*—to “formalize” social “bonds” by replicating marriage-to-marriage and marriage-to-society links—marriage might well rationally impose more limits than the mere rejection of same-sex relationships: Cordy’s vision of marriage plausibly encompasses strong norms against adultery and fornication, divorce, and the multiplication of legally recognized alternatives to marriage. Status.

All of that sounds “conservative,” and it is: religious/natural law conservative in the first case, and Burkean social-order conservative in the second.¹⁶

and other anti’s, who are much more liable to the charge that they derogate homosexuals. See, e.g., Lynn D. Wardle, “Multiply and Replenish”: *Considering Same-Sex Marriage in Light of State Interests in Marital Reproduction*, 24 HARV J. OF LAW & PUBLIC POLICY 771 (2000); Maggie Gallagher, *What is Marriage For? The Public Purposes of Marriage Law*, 62 LA. L. REV. 773 782 (2002). Subsequent courts holding that state constitutions do not require recognition of same-sex marriage are consistently turning to it. See *Morrison v. Sadler*, 821 N.E.2d 15, 23-26 (Ind. App. 2005) (quoting Cordy’s decision); *Standhardt v. Sup. Ct.*, 77 P.3d 451 (Ariz. App. Div. I 2003) (recognizing that the result is “iniquity” for same-sex couples with children and particularly their children, but concluding that the line drawn was rational). For a discussion of this novelty in constitutional argumentation, see Kerry Abrams & Peter Brooks, *Marriage as Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 YALE J. L. & HUM. 1 (2009).

¹³ *Goodridge*, 440 Mass. at 382.

¹⁴ *Id.* at 383.

¹⁵ *Id.*

¹⁶ This difference between Cardinal Ratzinger’s formulation and Justice Cordy’s constitutes an important divide in the increasingly articulate “marriage is heterosexual” position. For Cordy, marriage is an instrument of social policy, a means to the end of orderly reproduction and stable child-rearing. This view has been echoed by more than 100 law professors and other scholars and practitioners in a position paper urging legal academics

But the revolutionaries in this particular engagement also speak of marriage as status. A case in point: Justice Marshall's majority opinion in *Goodridge*. For her, too, marriage is a fundamental building block of society, a vital social institution. Her opinion breaks with the "rights and privileges" representation of marriage that had been typical in pro-same-sex marriage argumentation up to that point, moreover: the marriage to which same-sex couples in Massachusetts have access is not only "rights and privileges" but also "obligations." Thus she insists that marriage is "not a mere contract but a legal status" which the State manages from initiation to conclusion in seriously coercive ways:¹⁷ the obligations will be met. Like Justice Cordy and the Pope, Justice Marshall affirmed a system in which marriage is the *only* state-sanctioned form for adult intimacy: "Individuals who have the choice to marry each other and nevertheless choose not to," she intoned, "may properly be denied the legal benefits of marriage."¹⁸ And more explicitly than Justice Cordy she embraces norms that would justify punishing adultery and fornication and discouraging divorce: repeatedly she describes marriage as "exclusive," once even describing it also as "permanent," despite the lack of any legal commitment in current state law to guaranteeing or requiring that actual marriages exhibit these attributes.¹⁹ Status again.

What do the pro's think it means to say that marriage is permanent? Surely they are not with the Pope, who would eliminate divorce. William Eskridge, one of the most articulate and thoughtful U.S. legal academics promoting same-sex marriage, argues that marriage as status (a sacred one, no less) is unbreakable across time *and* space, and *so* we should amend the U.S. Constitution to permit same-sex marriage everywhere; use the Full Faith and Credit clause to ensure that, once married, people could not exploit our interstate system to seek out fora where their marriages could be dissolved; *and* revive fault divorce:

teaching family law to use their authority to promote a "marriage culture"—to promote law reform restricting marriage and adoption to cross-sex couples, stopping the trend to recognizing other adult/adult relationships, making divorce between nonviolent spouses more difficult, and returning marriage to the center of the family system—in order to protect children. Institute for American Values and Institute for Marriage and Public Policy, *Marriage and the Law: A Statement of Principles* (Institute for American Values, 2006) (available at www.americanvalues.org). This is quite different from a view that marriage is an end in itself offered by two of the "new natural lawyers," Robert P. George and Gerard V. Bradley. They sound a lot like Cardinal Ratzinger when they conclude that "the intrinsic intelligible point of the sexual intercourse of spouses is marriage itself, not procreation considered as an end to which their sexual union is the means." Robert P. George and Gerald V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301, 304 (1995) (emphasis deleted).

¹⁷ *Goodridge*, 440 Mass. at 321.

¹⁸ *Id.* at 327.

¹⁹ "[I]t is the *exclusive* and *permanent* commitment of the marriage partners to one another, not the begetting of children, that is the *sine qua non* of civil marriage." *Goodridge*, 440 Mass. at 331 (emphasis added). The majority opinion describes marriage as exclusive at 312, 313, 329, 331, and 343.

[W]e do want to interrogate and ask why has the sanctity of marriage declined, why do we have such a high divorce rate. And those reasons have nothing to do with gay and lesbian couples. They have everything to do with the ease of divorce in today's society. And so indeed my advice would be to work with President Bush to amend the Constitution not to prohibit same-sex marriages but to make it more difficult for people to divorce, people of all orientations, and to make it more difficult for the Full Faith and Credit clause to be used as a way of allowing a husband to leave to go to Nevada and get a quickie divorce that would then be binding on the wife.²⁰

Eskridge appears to propose a deal between antagonists, pro's and anti's, but actually his strategy converges ideas about marriage as status shared by the two camps. Massachusetts same-sex marriages would be recognized everywhere, as a matter of Full Faith and Credit *because* we would *also* federalize minimum standards for divorce. That is, transtemporal unity of marriage (barriers to divorce) supports transspatial unity of marriage (all states recognize Massachusetts same-sex marriages; all states discourage divorce or at least defer to those that do). Status.

As Eskridge indicates, legal scholars have translated the pro and anti positions into a debate about whether Massachusetts same-sex marriages are entitled to recognition in other states. The pro's engaging in this subsidiary and quite expert part of the broader debate also argue for the intensification of marriage as status. For example, my colleague Joseph Singer elaborates Eskridge's argument (without his bizarre endorsement of fault-only divorce).²¹ To Singer, marriage is a status²²—and many legal and moral consequences flow from this. First, as a status, it creates not just rights but also obligations:

But marriage is only partly about rights. It is, more fundamentally, about obligations. After all, marriage is not just an ordinary contract; *it is a status* conferred by state officials who issue a license and conduct a ceremony in which they . . . [declare the couple to be married]. *This status* is a fixed one under state law which the parties cannot escape on their own²³

“The fact that marriage is a status that can be lawfully created in Massachusetts makes the case different from an ordinary civil dispute involving a choice of law question.”²⁴ First, “[a] marriage is a status conferred by the state and evidenced by a public ‘*record*’ that can only be undone by a court *judgment*.”²⁵ As we will see in Part II

²⁰ William Eskridge, on *Talk of the Nation*, Tuesday, March 9, 2004. This is my transcript of the RealAudio tape on npr.org. Thanks to Libby Adler for bringing this interview to my attention.

²¹ Joseph William Singer, *Same Sex Marriage, Full Faith and Credit, and the Evasion of Obligation*, 1 STANJ. OF C.R.&C.L. 1 (2005) [hereinafter Singer, *Evasion*].

²²*Id.* at 4, 5, 34, and passim.

²³ *Id.* at 5; emphasis added.

²⁴ *Id.* at 34. For nonlegal readers: many cases involve parties and relationships plausibly governed by the law of more than one jurisdiction. “Choice of law” is the law governing courts’ decisions, when faced with such cases, about which jurisdiction’s law to apply.

²⁵ *Id.* at 34; emphasis added.

of this Article, the emphasized words operate to tether marriage to the Full Faith and Credit Clause in a way that would, if Singer's arguments were to prevail, require interstate recognition of Massachusetts same-sex marriages. Second, "Marriage is not an ordinary contract; it is a status that confers multiple (perhaps hundreds) of legal consequences—some of them rights but most of them obligations."²⁶ Those obligations turn on marital validity, and allowing them to vary from state to state would, Singer argues, allow spouses to evade,²⁷ escape,²⁸ shirk,²⁹ and skip out on³⁰ these legal obligations. Thus there is a "need in an interstate system to have a single answer to the question of whether one is or is not married"³¹; indeed, "[i]t is necessary for there to be a single law on the question of the status of the parties."³² In sum:

Because marriage creates continuing obligations based on a status that can only be changed through court action and because it is important for individuals to know whether, and to whom, they are married, so that they can fulfill these important continuing obligations, it should be possible for a married couple to remain married if they visit or move to another state.³³

This conclusion is weaker in two ways than Singer's more typical statements, in which he claims that it is *necessary* to know whether one is married and to whom; and it *must* be possible for marriages to travel without variation in their validity or obligations.

Singer argues that, if the state of celebration or the state of co-residence might oblige one or the other spouse, other states must enforce that obligation. His anti-evasion principle is thus a one-way ratchet: it would always intensify marital obligations. And Singer affirms that the resulting canon of *legal* obligations are also *moral* obligations: the state has a coercive role in family law precisely to prevent spouses and parents from failing to do "what they *should* do – what they are *legally obligated* to do."³⁴ The idea that anyone could have a valid defense to a marital obligation melts away here. This conflation of "is" with "ought," of whatever the most obliging state mandates with what married people *should* do, results in a *moral-contract* reading of the marriage. Status.

Inside and outside the context of interstate recognition, Singer pushes marriage in many of the directions we have already associated with efforts to see it as status: state dominion over the form; obligations over liberties; stability and morality as

²⁶ *Id.* at 40.

²⁷ *Id.* at 3, 6, 18, and *passim*.

²⁸ *Id.* at 6, 12, 18, and *passim*.

²⁹ *Id.* at 5; emphasis added.

³⁰ *Id.* at 5; emphasis added.

³¹ *Id.* at 36; see also 41, 42, and 49.

³² *Id.* at 46.

³³ *Id.* at 47.

³⁴ *Id.* at 5; emphasis added.

overwhelming policy objectives; and an insistence on transtemporal and transpatial uniformity of married life.

When it comes to interstate recognition, the anti's have a status-based response: marriage is so fundamental that states must be able to say what it is, and that power has to include the power to refuse recognition to same-sex marriages traveling into the state from elsewhere. Such an idea certainly underlies Cardinal Ratzinger's argument that natural reason mandates that same-sex marriage cannot and does not exist, and that Catholics living in jurisdictions where same-sex marriage might be permitted or recognized have a positive obligation to resist such reforms. Justice Cordy did not address the question of interstate recognition, but if he had, his image of marriage as a status central to the stability and order of intergenerational human life, of marriage as essentially dedicated to the task of ordering human procreation but radiating out from there to regulate social life generally, would certainly justify a refusal to allow same-sex couples married in Massachusetts to move into a state committed to these principles, obtain legal recognition, and confuse its system. And we know where Justice Marshall ended up: in litigation subsequent to *Goodridge*, she agreed with the majority of the SJC justices that same-sex couples residing in states where they could not marry were not entitled to Massachusetts marriage licenses.³⁵ Transpatial unity, yes: but for the anti's, the relevant space is the state. Transpatial unity for them secures the state's territorial dominion and the actual marriage system within it.

To sum up: within the current debate over whether there is, or should be, same-sex marriage, and whether states owe recognition to out-of-state same sex marriages, we can detect a new convergence between pro-gay, rights-maximizing left/liberal projects and conservative projects of various kinds. An ideologically diverse coalition is now arguing hard for seeing and enforcing marriage as a status. There are many components to this new vision of marriage as status. Among them: marriage as the only legitimate form for adult intimacy, as exclusive of other commitments, as unbreakable or nearly so, and as built into the social fabric so firmly that it will always order society even for those who do not participate directly in it by becoming married. Marriage as *the* crucial mode of social and moral being; as *the* crucial site of privileged reproduction; as *the* destination of social resources aimed to support human needs; and as *the* spot where we put the fulcrum for crucial social control projects in intimate life. To think this way is to envision marriage as status.

This paper argues that the descriptive commitments of this vision are often (not always) wildly out of synch with the way in which we *actually* regulate marriage in the U.S. To channel Llewellyn, the promoters of marriage as status are consolidating an enormous ascendancy of Ought over Is. My basic argument throughout is that current imaginings of marriage as status are magic realist; that they ignore and suppress structural ambivalences about marriage-as-status that are everywhere built into our marriage regime. This Article proposes an alternative model of the marriage system, one that is more adequately responsive to these ambivalences. In Part II of this Article, "Behind the Law of Marriage (II): Travelling Marriage," I will show how

³⁵ *Cote-Whitacre v. Department of Public Health*, 844 N.E. 2d 623,652 (2006) (Marshall, C.J., concurring).

the idea of marriage as status has fostered a debate, and a series of reforms, that have systematically blindspotted the distributive consequences of the regime and of its parts, and that this has not been a good thing. My focus will be on the fate of American same-sex marriages as they travel to states that do not recognize that form, but it could have been almost any important policy debate in family law today.

III. A Legal Realist Critique of the Status/Contract Dichotomy

This Section begins by setting a vocabulary for describing the systems for adult/adult intimacy that we have in the fifty states. It then analyzes the possibility, within those systems, that marriage and other forms of legally recognized adult/adult intimacy will actually be statuses—the degree to which we have actually been prepared to make them conform with idea that marriage is status.

There are at least three ways in which marriage and its alternatives acquire or lose the “feel” of a status regime. They can resist or welcome contract in their internal structure. I describe this tension under the heading “*Status or contract?*” But that is not the only axis along which marriage-as-status can be strengthened or weakened. Marriage and its alternatives can be mapped as two-option systems marked by a steep drop-off from marriage to singleness or as pluralistic regimes involving many forms. Here we are asking: “*Two forms or many?*” And the legal and social world can be structured so that each form has highly consolidated and distinct legal consequences that are lived without interruption, or so that these consequences are fragmented, variously contingent, and overlapping among the forms. I discuss this as an ambivalence worrying the question “*Integration or disintegration?*”

In each of these distinctions, the “feel” of status is much stronger where the first description fits, and much weaker when the second one seems right. I am going to argue that each of the forms and all of the systems as they now exist are *ambivalent* about whether to hew to the specifications of marriage as status. I will also argue that the degree to which the forms and the systems have the “feel” of status is at least partly subject to political pressure, and in certain specific ways has become relentlessly ideological.

A. The States, the Forms, the Systems, and the Regime

The states of the U. S. have their “own” tort law, contract law, and family law; when the federal government makes law in these areas, it is imagined to *intervene upon* an original “source of law” allocation of power to the states. This means that, ideationally at least, the states have considerable authority to govern within their territories without much interruption from each other or from the federal government. There are of course massive elements of family law that emerge from the federal government, and (as we will see in Part II) an intricate body of state and federal law about what states must do to honor family law rules and rulings from

other states. But for the moment let us think of marriage as firmly planted inside state family law systems.

Within the fifty states of the United States we have a great diversity of adult-to-adult family law forms. We have *civil marriage* and its great *opposite: singleness*. To be sure singleness has its own subforms—“never married,” “divorced,” and “widow/widower” have historically been highly significant designations, but they are increasingly incidental in contemporary Western systems. We also have a number of alternative forms for the adult/adult sexual, dependent, cohabiting relationship. We have *common law marriage* (CLM), which is (or purports to be) complete legal marriage without the state-based formalities upon initiation. We have *civil union* (CU) as recognized by some of the states, by some local governments, and by some contractual entities like insurers and employers. This form has a number of specific, local names: Civil Union in New Jersey, Domestic Partnership in California, Nevada, Oregon and Washington, PACS (*Pacte Civile de Solidarité*) in France, Registered Partnership in the Netherlands, Denmark, Norway, Sweden, Iceland, Finland, and Belgium and other European jurisdictions.³⁶ We have the form I shall call *Marvin* after the great initial California case establishing the possibility that unmarried, adult, sexually connected cohabitants could incur some of the legal incidents of marriage.³⁷ *Marvin* is sometimes called “cohabitation.” Many states also have a “*putative spouse*” regime which allows retrospective recognition of the marital status even of a bigamous spouse when one or both partners had relied in good faith on the validity of a void marriage.³⁸ Finally, some states have recently added “*covenant marriage*,” which allows a couple, at the time that they marry or even later, to opt out of “no fault” divorce and to stipulate that, if they do divorce, fault rules will apply.³⁹ I will call these different types of legally recognized relationships the “forms.”⁴⁰

All the states of the U.S. have marriage and singleness, but they vary a great deal about which of the other forms they make available to their residents. I call the particular combination of forms in a state its “system.”

Finally, it is only ideationally that marriage and family law generally “originate” in the state systems and have only incidental federal dimensions. I will designate the whole national complex—the way in which the federal dimensions “hold” the state systems—“the regime.”

³⁶ For an excellent summary, see LESLIE JOAN HARRIS, JUNE CARBONE & LEE E. TEITELBAUM, *FAMILY LAW* 200-206 (4th ed. 2010) (hereinafter HARRIS, CARBONE & TEITELBAUM, *FAMILY LAW*).

³⁷ *Marvin v. Marvin*, 557 P.2d 106 (1976).

³⁸ See HARRIS, CARBONE & TEITELBAUM, *FAMILY LAW*, *supra* note 36, at 255-58.

³⁹ See Ariz. Rev. Stat. Ann. §§ 25-901 to 26-906 (1998; amended 1999); Ark. Code Ann. §§ 9-11-801 to -811 (2001); La. Rev. Stat. Ann. §§ 9:307 to 9:309 (1997; amended 2001).

⁴⁰ Note what’s not on the menu: formally speaking at least we don’t have polygamy (Islamic law), temporary marriage (Islamic law), retroactive marriage (Cuba), legally valid marriage of minors (Islamic law), concubinage (France) or (pace Nevada) legal prostitution (Holland, Germany, Canada).

B. *Status or Contract?*

The idea that marriage teeters dangerously between status and contract often implies a highly formal understanding of contract: we are asked to imagine marriage-as-status to be preeminently public and legally controlled—and marriage-as-contract to be a neutral framework for private ordering.⁴¹ This framework derives directly from Sir Henry Sumner Maine’s famous observation that the very essence of modernity involves progress from status to contract:

The movement of the progressive societies has been uniform in one respect. Through all its course it has been distinguished by the gradual dissolution of family dependency and the growth of individual obligation in its place. The Individual is steadily substituted for the Family, as the unit of which civil society takes account. . . . Nor is it difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the Family. It is Contract.⁴²

As Maine concluded:

The word Status may be usefully employed to construct a formula expressing the law of progress thus indicated, which, whatever be its value, seems to be sufficiently ascertained. All the forms of Status taken notice of in the Law of persons were derived from, and to some extent are still coloured by, the powers and privileges anciently residing in the Family. If we then employ Status, agreeably with the usage of the best writers, to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement, we may say that the movement of the progressive societies has hitherto been *from Status to Contract*.⁴⁴

⁴¹ MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* 4 (1993). See also SWISHER ET AL., *FAMILY LAW* 2 (1998) (aspects of marriage that resemble contract rather than status give “marital partners . . . contractual freedom”); ABRAMS ET AL., *CONTEMPORARY FAMILY LAW* 821 (2006) (construing the contractual dimensions of marriage to provide “[p]rivate ordering” and “contractual freedom”). Silbaugh, *supra* note 1, is a very helpful antidote.

⁴² HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS* 168-69 (Frederick Pollock ed., London, John Murray, 1912) (1861).

⁴⁴ *Id.* at 170.

⁴⁶ SANFORD N. KATZ, *FAMILY LAW IN AMERICA* 35 (2003); SWISHER ET AL., *FAMILY LAW* 2 (“marital partners today have considerably more contractual freedom than in the past to determine privately the terms of their relationship, and to decide whether or not their relationship will continue.”); KRAUSE ET AL., *FAMILY LAW* 115 (2003) (following an excerpt from *Maynard v. Hill* with Maine’s famous assessment); ABRAMS ET AL., *CONTEMPORARY FAMILY LAW* 819 (“Since the 1970’s, the conception of marriage has moved unmistakably and dramatically toward contract”). Katz, Swisher, Krause and others draw directly on Maine’s

For many contemporary assessments of family law, Maine is exactly right: the onset of contractual freedom between spouses is seen as necessary for marriage to be free and equal.⁴⁶ But jeremiads mourning the erosion of marriage often score their sharpest points by declaring that it has collapsed *into* contract.⁴⁷

We frequently speak of this tension as involving a temporal narrative—a shift of marriage *from* status *to* contract—understood either as progress or decline. In this section I hope to show that these supposed opposites, these supposed points of origin and destinations, are instead *supplements* in the Derridean sense.⁴⁸ The rules within each of the forms can be torqued towards “status” or towards “contract.”

Very often in discussions of the status/contract distinction in family law, we all behave as though contract involved the sheer autonomous willed choice of the parties to enter into an agreement, entirely private in nature, which is, only incidentally, enforceable upon breach. We all know that this does not capture the complexity of contract. I will mention three additional aspects of contract law which make it impossible to maintain a strict opposition between status and contract for purposes of understanding our family law regime. First, private will is contingent on predictions about what is actually enforceable. There is a deeply public element in private will. Second, contract regimes enforce not only the expressed will of the parties, but their implied will, what it would be reasonable for them to have intended, their reasonable expectations, and so on. There is a whole range of equitable “saves” that infuse contract law with public-law-like commitments to fairness. Courts may require

Ancient Law for their understanding that marriage as status can and should progress to contract within marriage. For an assessment of the ideological significance of Maine’s formulation when it was first coined and received in American legal thought, see Halley, *Genealogy*, *supra* note 2.

⁴⁷ For instance: “When the law declared that it couldn’t judge matrimonial disputes and would henceforth treat spouses who kept their marriage vows the same as those who repudiated them, it put a once-sacramental institution on the legal footing of a gambling debt.” George Jonas, *The Window Was Broken in the 1960’s*, NATIONAL POST (CANADA), February 7, 2005. Or, as Arkansas Governor Mike Huckabee put it when announcing that he and his wife would convert their marriage to a covenant marriage, “There is a crisis in America That crisis is divorce. . . . When it is easier to get out of a marriage than get out of a contract to buy a used car, clearly something is wrong.” Stella Prather, *Ark. Governor, 6,400 Others Take Stand For Covenant Marriages*, BAPTIST PRESS, Feb. 15, 2005, available at <http://www.baptistpress.com/bpnews.asp?ID=20148> (last visited January 6, 2011).

⁴⁸ Jacques Derrida, *That Dangerous Supplement*, in OF GRAMMATOLOGY 141-162 (Gayatri Chakravorty Spivak trans. 1997).

writing or explicitness as basic procedural fairness, test for unconscionability, and require good faith; hold contracts void for force, fraud, or duress; hold them void for the presence of consideration that violates public policy; enforce the doctrines of promissory estoppel, equitable estoppel, unclean hands, etc. These are as much a part of “contract” as the ideas that there must be a meeting of the minds, consideration, performance, breach, etc.⁴⁹ And finally, the long-term, repeat-player contract has come to typify “relational contracts” which, some argue, typify contracts generally: within them, however typical they may be, evolving norms, protection against surprise, and so on add a recognition of the contingency and complexity of contractual life unimagined in the classic model of contract.

If marriage is status to the extent it is *not contract*, and if contract involves the sheer autonomous willed choice of the parties to enter into an agreement, entirely private in nature, which is, only incidentally, enforceable upon breach, then marriage is status: purely public, purely unwilled, and purely contingent on state recognition for its effectiveness. But American Legal Realist understandings of contract deny that it is a neutral framework for private ordering. Similarly, marriage-as-contract is not the *opposite* of marriage-as-status; these two visions of marriage—perpetually linked to one another as alternatives—are the way we understand our constant, irresolvable ambivalence about individualism and altruism in this domain.⁵⁰ But if marriage is status to the extent that it is *not-contract-as-we-actually-institutionalize-contract*, its status as status is contingent, slippery, hard to maintain: if we want it to be a status, our desire must be an anxious one.

In the rest of this section, I test the strength of this hypothesis to explain the legal character of marriage and the other forms we now have in our marriage system: marriage, *Marvin*, and civil union (CU). I could have done the same for common-law marriage (CLM), putative spouse doctrine, and covenant marriage, but time ran out. The claim is that, however different these forms are, they repeat this core ambivalence with remarkable persistence.

1. Marriage

What would it take to have a legal regime in which marriage was a status (as Maine and his followers understand status) that did not involve contract? You’d have to refuse to the married partners *any say* about their entry into the status and *any say*

⁴⁹ See, e.g., Charles J. Goetz & Robert E. Scott, *Principles of Relational Contracts* 67 VA. L. REV. 1089 (1981); IAN R. MACNEIL, *THE NEW SOCIAL CONTRACT: AN INQUIRY INTO MODERN CONTRACTUAL RELATIONS* (1980). I am grateful to Eyal Diskin, whose SJD dissertation, *Script Exchange: A Study in Contract* (Harvard Law School, 2006), provides a very canny assessment of theories of relational contract.

⁵⁰ For the abiding hunch that legal fields will often manifest related ambivalences about individualism and altruism, form and substance, and rules and standards that are related to each other in some contingent but patterned way, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). Though Kennedy’s paper addresses itself to private law, not family law, I would canonize it if I could as a fundamental paper for analyzing family law.

over its legal consequences. It would be marriage arranged for bride *and* groom; and once they were married, law would decide *everything* about their “legal personal relationship.”⁵¹

There’s no moment in U.S. history when this pattern can be detected. So let’s set aside completely arranged marriage, which seems in the West to have been a characteristic of other legal regimes with other status elements (hereditary prince; aristocratic holder of inalienable land). Even if we regard marriage-as-status to require only arranged-marriage-with-“opt-out”-by-the-proposed-parties, the U.S. got started in the marriage business too late—too deep into the development of bourgeois marriage with its commitment to the parties’ choice of their partners—for this to be a legal idea. Wherever the system insists that those proposing to marry manifest a free, conscious, mutual consent, an element of contract comes in.

You could make the case that, in the past, U.S. marriage was more completely legally determined than it is now. We had marriage as much as Blackstone described it: no divorce except in cases of preexisting incapacity to marry; no power in the spouses to alter the complementary rights and obligations of the husband and wife; thus no ability of the spouses to contract out of the husband’s duty to maintain his wife or his unilateral right to determine domicile, discipline his wife, have sex with her, manage her property, and own all proceeds of her labor; no ability of the spouses to evade the wife’s right to maintenance or her duty to obey, cohabit, and perform domestic services.⁵² But I think these rules reek of status to us because we object so strongly to the *asymmetric* statuses of husband and wife that they inscribe; we imagine that we’ve moved away from this “bad status” and are left feeling complacent that modern marriage is consensual, contractual, free—what we as modern men and women simply *want*.

It’s important to remember, then, that many elements of U.S. marriage today *are* determined by the state: exit through probate or divorce only; required transfers of assets between the parties in probate and divorce (forced share; property division and alimony); mutual duty of support and special rules of property ownership during the marriage; adultery and anti-nepotism rules; testimonial privileges; etc. No person marrying in the U.S. today has any shot at changing the following basics by contracting for something else: marriage is *always* a relationship of two (no polygamy) unrelated (no incest) adults (another status) that not only may but *must be* knowingly entered into, voluntarily, by a legally competent person. It is always *civil* marriage and thus a part of the state; always subject to civil jurisdiction. There are only two ways out of marriage—death and divorce—and the state takes jurisdiction over both; and by force of law, it involves economic interdependence. It is an indefinite relationship (no temporary marriage), it is sexual and sexually exclusive (annulment

⁵¹ BLACK’S LAW DICTIONARY 1542 (9th ed. 2009) (defining status as “a legal personal relationship in which third parties are interested.”).

⁵² 1 WILLIAM BLACKSTONE, COMMENTARIES *421, *421-433. It is an anachronism to call Blackstone’s marriage “status”; as I explain in Halley, *Genealogy*, *supra* note 2, the idea of distinguishing marriage-as-contract from marriage-as-status did not emerge until the 1840’s and did not become established in American legal thought until the middle-to-late nineteenth century.

for failure to intend a sexual relationship), and until recently we've all known it was heterosexual.

That said, the institution is also permeated by contract. All the states pay great respect to the agreements reached by divorcing partners about their property division and alimony arrangement, and, with the exception of the forced or elective share, to a spouse's decision to will property away from the spouse upon death. Most will enforce antenuptial agreements and during-marriage agreements about what will happen upon termination of the marriage through death or divorce, and most recognize the capacity of married couples to contract about other things.

But status "pushes back" hard in a number of ways. The very existence of family court as a place where either spouse can litigate the difference between interspousal agreements and the law of property division and alimony—and the seriousness with which courts substitute divorce decrees for settlement agreements, set aside antenuptial agreements entirely and decide the property arrangements of the divorcing couple according to the Family Code and case-law precedents, and so on—show the continuing, though by now highly fragmented, vitality of marriage as a status. And when a spouse may end up on public assistance, enforcement of property division and alimony "floors" is quite aggressive.

Note, however, that practices often understood to stand for the push-back of status can *also* take the form of contract in its equitable mode. States have various lists of prohibited terms: no promises to divorce, to provide "meretricious" services, to have an abortion, to provide love and affection, and to perform the status obligations of marriage such as personal services.⁵³ Plus, there is a whole range of levels of judicial scrutiny into the equitable enforceability of these contracts, looking variously at the adequacy of disclosure before contract formation, good faith, and conscionability or objective fairness of the terms. None of this is unfamiliar to contract enforcement in courts of general jurisdiction, and indeed many of the doctrines involved are explicitly those of the illegal-terms/equitable side of contract.

It is commonly said that the shift to no-fault divorce eroded the status character of marriage and made the relationship more like contract (efficient breach), and that seems right. If the parties agree to divorce, the state will transparently ratify their decision. But even no-fault has strong status characteristics. First, consider the sheer power of the state to make the exit rules different for everyone, overnight, without "grandfathering in" existing rules for marriages formed on the expectation that those rules "went with" the relationship. A breathtaking example was the introduction of no-fault divorce: this reform changed the terms of all existing marriages overnight,

⁵³ The great casebook example is *Borelli v. Brusseau*, 16 Cal. Rptr. 2d 16 (Cal. Ct. App. 1993), in which the California appellate court refused to enforce an interspousal contract. The wife had promised to provide nursing services to her dying husband, and he had promised to make financial transfers to her. The wife performed, but the husband didn't. The court held that the wife's spousal duty of support could not be subject to contract; it was an absolute consequence of marriage. Family law teachers teach this case to demonstrate the idea of marriage as status. But note that the court held not only that the contract itself was void for public policy (status), but also that it lacked consideration (contract).

and there was no opt-out.⁵⁴ We have here a powerful index of state determination of the legal character of the relationship: status. And inasmuch as no-fault divorce has become unilateral divorce on demand by one of the parties (rather than divorce by mutual consent or only upon a credible showing of irreconcilable differences), both parties in an ongoing marriage live under the condition that the other can *make them single*—can invoke the power of the state to shift their place in a status regime *from* married *to* single, against their will and without paying damages. Inasmuch as singleness is *also* a status,⁵⁵ no-fault remains a status rule.

We are left, then, in a situation in which the rules can make marriage “more like” status or contract, but in which a complete installation of marriage under either rubric seems impossible. Status and contract are, again and again, paradoxically intertwined: the decision to shift in the direction of status is often made *through contract law* in its illegal terms/equitable mode, and increasing (or decreasing) the scope of one spouse’s will to divorce makes the regime more contract-like for that spouse *and* more status-like for his or her partner.

2. *Marvin*

In *Marvin v. Marvin*, the California Supreme Court held that unmarried cohabitants could form enforceable contracts to divide property in the event of a breakup, and indeed were entitled to the “fulfillment of the [ir] reasonable expectations.”⁵⁶ It recognized the full panoply of contract theories:

[E]xpress agreements will be enforced unless they rest on an unlawful meretricious consideration. We add that in the absence of an express agreement, the courts may look to a variety of other remedies in order to protect the parties’ lawful expectations. The courts may inquire into the conduct of the parties to determine whether that conduct demonstrates an implied contract or implied agreement of partnership or joint venture, or some other tacit understanding between the parties. The courts may, when appropriate, employ principles of constructive trust or resulting trust. Finally, a nonmarital partner may recover in quantum meruit for the reasonable value of household services rendered less the reasonable value of support received if he can show that he rendered services with the expectation of monetary reward.⁵⁷

⁵⁴ See *In re Marriage of Walton*, 28 Cal. App. 3rd 108, 113 (Cal. Ct. App. 1972) (wife could not object on Contracts Clause or due process grounds to a no-fault divorce obtained by her husband; she “could have no vested interest in the state’s maintaining in force the grounds for divorce that existed at the tim [sic] of her marriage.”).

⁵⁵ See *infra* p 27. Two forms or many.

⁵⁶ *Marvin v. Marvin*, 557 P.2d 106 (Cal. 1976).

⁵⁷ *Id.* at 122-23 (citations omitted). The court opened the door to still further equitable elaboration in a footnote to the passage just quoted: “Our opinion does not preclude the evolution of additional equitable remedies to protect the expectations of the parties to a nonmarital relationship in cases in which existing remedies prove inadequate[.]” See *id.* at 123 n.25.

Express contract, contract implied from conduct, tacit agreement, constructive and resulting trust, and *in quantum meruit*—there is plenty of room here for judges to require explicit contract-like agreement on one hand, and to infer, to imply, or simply to decide what is reasonable or what is fair on the other.

Not surprisingly, among the fifty states the range of systems is pretty complete: some refuse to recognize any property rights between unmarried cohabitants; others require evidence in writing or an agreement; others regard cohabitation and the mingling of assets and/or division of labor as fully sufficient to give rise to an agreement to submit to equitable doctrines;⁵⁸ and at least three states apply the Family Code provisions that would apply to the divorce of a marriage!⁵⁹ It is important to note, moreover, that only a few sticks of the marriage bundle follow upon a judicial finding that a *Marvin* relationship exists: so far, only claims *between* the cohabitants, only at the time of breakup, and only for property division and/or restitution have come within the reach of *Marvin* as we know it in the U.S.⁶⁰ Clearly it is possible to go further: Canada, for instance, has extended spousal support—a.k.a. alimony—to cohabiting couples.⁶¹

It might be handy to see *Marvin* as a spectrum, with forms that are more and less contract- and status-like.⁶² As we move towards the contract end of the spectrum (agreements written, express, manifested by special conduct) we can say that the autonomy of couples, their capacity to form contracts that used to be illegal (prostitution) or unenforceable (the old rule that contracts between sexually active cohabitants involve meretricious services and are void for public policy and/or lack consideration), has expanded: they can now *Marvin*. And as we move towards the status end of the spectrum, we can say that cohabitating, sexually related, economically commingling adult couples can *be Marvined*: their living arrangements bring with them duties which they can avoid only with the explicit evidentiary consent of their partners, and sometimes not even then. Passive *Marvin* now can be established formally, through rules specifying that if a couple lives together long enough, they will be deemed to be in a legal relationship: this is what we see in the

⁵⁸ See Anna Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1383 (2001).

⁵⁹ See *Connell v. Francisco*, 898 P.2d 831 (Wash. 1995) (elaborating on the power of state courts to do equity between parties to meretricious relationships notwithstanding the complete lack of any evidence of an agreement). The rule was originally announced in *Marriage of Lindsey*, 678 P.2d 328 (Wash. 1984). Note the startling resort of equity to the Code! See also Estin, *supra* note 56, at 1391-95 (for discussions of the borrowing of marital rules for cohabiting couples in Oregon and Nevada).

⁶⁰ Estin provides a very useful survey, concluding that *Marvin* remedies in the U.S. do not extend to forced sharing of one partner's separate earnings or forced compensation for the provision of financial support or household services during the relationship, *supra* note 58, at 1395; and provide none of the public-law-based consequences of marriage. *Id.* at 1402-04.

⁶¹ *M. v. H.*, [1999] 2 S.C.R. 3 (Can.).

⁶² See, e.g., IRA MARK ELLMAN, PAUL M. KURTZ & ELIZABETH S. SCOTT, *FAMILY LAW: CASES, TEXT, PROBLEMS* 963-72 (3rd ed. 1998), for such a treatment.

Netherlands, Catalonia, Canada, Israel and many other regimes;⁶³ it is what the American Law Institute proposes for American family law in its new *Principles of the Law of Family Dissolution*.⁶⁴ But it also arises when agreement or contract is formally required but courts consider the agreement to *cohabit* to trigger duties;⁶⁵ it is implicitly invited in *Marvin*'s embrace of resulting and constructive trust and especially of *in quantum meruit*. But if *Marvin* is a spectrum, it takes a weird Moebius-strip like turn at this point. Passive *Marvin* has *more* of the character of ideal-typical status-not-contract than marriage: unless you live alone, you don't elect it; the world elects it *for you*.

Perhaps it's better to say that the different *Marvin* sub-forms, however strongly they are understood to "be contract," are (like contract generally) permeated by equitable "saves"; that the implied contract systems mediate between contract and status; and

⁶³ The Ontario Family Law Act of 1990, for instance, provides for a duty of support between spouses and defines the spouses involved to include not only marital partners but "either of two persons who are not married to each other and have cohabited, (a) continuously for a period of not less than three years, or (b) in a relationship of some permanence, if they are the natural or adoptive parents of a child." R.S.O., ch. F 3 § 29 (1990). The effect of *M. v. H.*, 2 S.C.R. 3, (1999), is to require that this passive *Marvin* regime includes same-sex as well as cross-sex couples. Relatively robust passive *Marvin* regimes—usually designated cohabitation or "informal cohabitation"—are quite common in Western Europe. See Kees Waaldijk, *More or Less Together: Levels of Legal Consequences of Marriage, Cohabitation and Registered Partnership for Different-sex and Same-sex Partners: A Comparative Study of Nine European Countries* (Institut National d'Etudes Démographiques, Paris, December 2004), for discussion of these forms as they have emerged in Belgium, Denmark, Finland, France, Germany, the Netherlands, Norway and Sweden. For a list of laws regarding same-sex relationships in Europe see International Lesbian and Gay Association of Europe, *Marriage and Partnership Rights for Same-Sex Partners: Country-by-Country*, http://www.ilgaeurope.org/europe/issues/lgbt_families/marriage_and_partnership_rights_for_same_sex_partners_country_by_country. (Last visited on Jan. 29, 2011). For information from non-European nations see International Lesbian, Gay, Bisexual, Trans and Intersex Association, *Lesbian and Gay Rights in the World*, http://old.ilga.org/Statehomophobia/ILGA_map_2010_A2.pdf (Last visited Jan. 29, 2011).

⁶⁴ AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION (2002). For some of the controversies over the ALI PRINCIPLES, see ROBIN FRETWELL WILSON, RECONCEIVING THE FAMILY: CRITIQUE ON THE AMERICAN LAW INSTITUTE'S PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION (2006).

⁶⁵ In Washington state, a judge can declare cohabitants to be in a "meretricious" (*i.e.*, *Marvin*) relationship on the basis of a number of factors—"continuous cohabitation, duration of the relationship, purpose of the relationship, pooling of resources and services for joint projects and intent of the parties." *Chesterfield v. Nash*, 978 P.2d 551 (Wash. Ct. App. 1999). Intent is only a factor; the relationship can be retrospectively decreed even if the court cannot find that the parties intended to be other than single. Indeed, in *Chesterfield*, a woman who successfully claimed a share of her former partner's dental-practice goodwill testified that, during the relationship, she had refused to invest in real estate with her partner unless they married, and no marriage ensued. Her intention to maintain her savings as separate property was no brake on the court's finding that the couple had acted sufficiently like a married couple in other respects to warrant the application of divorce-style property division rules.

that passive *Marvin* virtually annexes the law of marriage. At a certain point cohabitation regimes become indistinguishable from CLM.

We are left, then, in a situation in which the rules in place can make *Marvin* “more like” status or contract—and in which the decision to shift in the direction of status is *always* made *through contract law* in its equitable modes.

3. *Civil Union*

Civil union (CU) as a form emerged when pressures for same-sex marriage met political opposition but were strong enough to move the regime to add a new form—and when the communitarian/paternalist ideologies that support passive *Marvin* were not at work in drafting the new rules. In the U.S., the first really robust CU system in the US—Vermont’s—was a response to the Vermont Supreme Court’s holding in *Baker v. Vermont* that the state constitution’s “privileges and benefits” clause was violated by the refusal to let same-sex couples have all the legal “privileges and benefits” that cross-sex couples could get by marrying.⁶⁶ The legislature was left with a choice about what to do about that, and it chose CU, which it insisted would have “all the same benefits, protections and responsibilities” of Vermont marriage.⁶⁷ Ten years later, the Vermont legislature made marriage accessible to same-sex couples and permitted existing CU’s to convert their relationships to marriages; after that, no new CU’s could be formed under Vermont Law.⁶⁸ But CU remains an important compromise between the same-sex pro’s and anti’s: we now have statutory CU forms in California, Nevada, New Jersey, Oregon, and Washington.⁶⁹ CU is very widespread in western Europe.⁷⁰

CU statutes vary widely in the degree to which they attempt/pretend to deliver “all the benefits of marriage” to participants in the form, in their availability only to couples incapable of civil marriage in the state’s system and in degree of formality required for entry and exit. Along all these axes, legislation that makes CU more marriage-like makes it also more like status; to the extent that the form more closely resembles the incorporation of a business enterprise or the registration of a limited partnership, they produce a CU that more closely resembles contract. Meanwhile, the private CU arrangements—which have become so widespread in employment, in

⁶⁶ *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999). Vermont’s Civil Union statute can be found at VT. STAT. ANN. 15. 23, §1201 *et seq.* (1999).

⁶⁷ VT. STAT. ANN. 15. 23, § 1204(a).

⁶⁸ VT. STAT. ANN. 15. 1, § 8 (2009).

⁶⁹ CAL. FAM. CODE § 297.99 (West 1999) (domestic partnership); NEV. REV. STAT. §122A (2009) (domestic partnership); N.J. STAT. ANN. §§ 37:1-28–37:1-33 (West 2009) (civil union); OR. REV. STAT. §§ 106.300–106.990 (West 2007) (domestic partnership); WASH. REV. CODE ANN. §§ 26.60 (West 2007) (domestic partnership). These CU systems purport to provide the same rights and liabilities to CU partners as to spouses. When a marriage-substitute explicitly provides narrower rights and liabilities, I describe it not as a CU but as a Reciprocal Beneficiaries Relationship or RBR; *see* discussion *infra* note 121.

⁷⁰ *See generally Marriage and Partnership Rights for Same-Sex Partners*, *supra* note 61.

higher education, and in municipalities—are almost purely contractual. Because CU always requires formal registration, it is unlikely ever to trend in the direction of passive, implied, and thus involuntary formation; this makes it more contractual in character than CLM or passive *Marvin*.

The question of whether CU is more like marriage or a business association—more like status or more like contract—has been rendered irretrievably ideological. Let's say you believe that the leading principle is nondiscrimination as between cross-sex and same-sex couples. At least two state supreme courts—in *Baker v. Vermont* and *Lewis v. Harris*—have ruled that CU is the perfect legal equivalent of marriage and can deliver that equality.⁷¹ To them, “marriage” marks only a semantic or symbolic difference. But if you think that that equality requires the adoption of same-sex marriage, you see the provision of CU only as the relegation of gay couples to second-class citizenship. Justice Marshall held, in litigation subsequent to *Goodridge*, that a proposed CU statute which “forbids same-sex couples entry into civil marriages . . . continues to relegate same-sex couples to a different status.”⁷² If you oppose the same-sex equality project on grounds that marriage is by nature a relationship between a man and a woman, you might like CU because it is not like marriage, or oppose it because it is.

In the next section we will examine CU forms more closely for the ways in which they are grafted into the marriage systems in which they appear. For now, I hope it suffices to say that CU is *represented* as status and as contract, entirely successfully in the minds of those who wish to be convinced, but inconclusively, if you are at all capable of finding a critical vantage point from which to watch this debate.

C. Formality or informality? (And, by Implication, Consent/Ascription, Prospectivity/Retroactivity, Hard/Soft Control and Essence/Accidents)

The legal and social orders can intensify the status orientation of each of the forms examined in Part I.A—marriage, *Marvin*, and CU—not only by differentiating it from contract but also by intensifying the formality (and the ascriptiveness, retroactivity, hardness of control, and essentialness) of entry rules, exit rules, and requirements for actual performance of the relationships housed in the form. In order to probe these dimensions of the system, however, I will turn to CLM as my example.

The rules say that CLM is real, valid marriage, entered into without the formalities required by statute. Courts hold people to be married at common law on the basis of some combination of capacity, intent or agreement to be married, and holding out as married.⁷³ As I explain in a forthcoming paper, CLM is persistently

⁷¹ *Lewis v. Harris*, 908 A.2d 198 (N.J. 2006) (holding that “under the equal protection guarantee of [the New Jersey equal protection clause], committed same-sex couples must be afforded on equal terms the same rights and benefits enjoyed by married opposite-sex couples”); *Baker*, 744 A.2d 864. Both cases held that CU satisfied the demands of constitutional equality.

⁷² Opinions of the Justices to the Senate, 802 N.E.2d 565, 569 (Mass. 2004).

⁷³ For a quick introduction, see HARRIS, *supra* note 36, at 247-52.

and relentlessly controversial.⁷⁴ Here, I offer a brief summary of the ambivalences that beset legal minds when faced with the decision whether to waive formalities and enforce a marriage without them.

Perfect formality is probably, practically speaking, unattainable, but it would ideally involve: perfect enforcement of highly ritualized, publicized, and recorded initiation prescriptions; absolutely reliable recognition of the relationships so initiated as legitimate and absolute nonrecognition of imposter relationships; thoroughgoing enforcement of the rights and obligations that the forms require of the parties, third parties, and the state; and crisp, consistently enforced exit rules that no one can evade. The rule of law is the law of rules:⁷⁵ formality would require a preference for rules over standards and for explicit state involvement in their enforcement over outcomes negotiated in the nonstate space.

The marriage system in the U.S. has consistently been ambivalent about how hard to try for formality. The chief engines driving this ambivalence, it seems to me, are the desire for formal entry practices and the countervailing desire for thoroughgoing enforcement of rights and obligations where the entry performances are somehow defective. If we refuse recognition to marriage-like relationships that were initiated informally—and that could be anything from the officiant being from the wrong county to the complete omission of all ceremonial rites and registration requirements—we block enforcement of rights and obligations that people may have intended to, or should, undertake. This deficit sets up the desire for more informality in the enforcement of entry requirements, which in turn creates more ambiguity about who enjoys the rights and owes the duties that flow from legal recognition.

But there is also state-based and interest-based desire for formality so that enforcement of rights and duties can be foreclosed. Some of these motives are entirely consistent with the marriage-as-status agenda: for fornication, adultery, bigamy and polygamy to be meaningfully illegal, for instance, we need formal entry rules that we can enforce with some rigor. But other motives aren't: in a system like ours, with no legal concubinage, formality can widen the space for erotic and/or cohabiting relations that do not involve duties. A libertarian could love formality.

Once this spiral is in place, it generates three related ambivalences in the system, each of which marks the relationships in the system as “statutes” with greater/lesser decisiveness, though without moving the form in the direction of “contract.” The first of these is consent/ascription. In American law, it was never OK for a parent to force a child's (or the state to force anyone's) marriage: some degree of consent was always required, and entry-rule formality seems at first blush to protect it. But children who want to marry notwithstanding parental disapproval may well do so—often in ways that evade some of the entry-rule formalities. The resulting informally-initiated relationships will be *very hard to distinguish* from meretricious ones. Which ones should we enforce as marriages? Especially because some of the men and some of the women *in them* will seek *non-enforcement* of the during-marriage rules and/or the exit rules, we are now running a consent-based regime that is willing to *ascribe*

⁷⁴ Janet Halley, *The Mystery of Common Law Marriage* (on file with the author).

⁷⁵ Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

marriage not only to people who assert but also to people who deny that they are married. Consent has led inexorably to ascription, its opposite.

Once we have a system in which entry-rule formalities exist but can be pretermitted, moreover, we have committed ourselves to establishing marriage prospectively by the correct performance of those formalities *and* retrospectively by judicial recognition of marriage despite their nonperformance. This dimension of the system is amazingly paradoxical. Status aspirations embodied as rigid entry requirements can *also* be met by capacious retrospective recognition rules: both tend to make the state the source of the rules and impose the status with rigor, hold people to their obligations, and punish fornicators by deeming them to be married. But retroactivity can introduce informality that contradicts this status-affirming tendency: even if the retroactive rules are rigid, their application will encounter factual ambiguities confounding the aspiration for clarity; and if they are not kept rigid and rule-like, the door is open to highly informal entry standards. The potential for retrospective legitimation of unions that one or both partners never intended to be marriage increases with every status-intensifying turn of the recognition screw. Moreover, prospective and retrospective decisions even about the very same alleged marriage can *come out differently*. Temporal inconsistency is now an important part of the regime. Marital status—which the system we are imagining is trying to make extremely certain—may not be determined until after the supposed spouses are *dead*.

Many of these contradictory contingencies appear in the very case that has become canonical for proponents of marriage as status. In 1888, the U.S. Supreme Court decided *Maynard v. Hill*, holding that marriage was status-not-contract in the following purple passage:

[W]hile marriage is often termed by text writers and in decisions of courts as a civil contract, generally to indicate that it must be founded upon the agreement of the parties, and does not require any religious ceremony for its solemnization, it is something more than a mere contract. The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relationship between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its public character the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.⁷⁶

When the Supreme Court held that marriage was “something more than marriage,” that “something more” was *status*. But holding that marriage was status-not-contract allowed the Court to ratify David Maynard’s divorce from his wife Lydia, obtained *ex parte*, without her fault, and without even notice to her, from an Oregon Territorial Legislature which at that time was composed of his personal cronies. Lydia was then living in Ohio, waiting for David to fulfill his promise to send for her to rejoin him in Seattle. Even after the Supreme Court decided *Maynard v. Hill*, Ohio was under no positive legal obligation to recognize the Oregon divorce,

⁷⁶ *Maynard v. Hill*, 125 U.S. 190, 210-11 (1888).

leaving Lydia in an ambiguous state of being divorced in Oregon and married though (perhaps) free to choose Oregon law and remarry in Ohio. The entire matter did not even reach this degree of legal clarity until after David's death, when her dower rights in land in Seattle that he had owned during the marriage came up for determination. The constitutional question in *Maynard v. Hill* was whether marriage was contract for purposes of the U.S. Constitution's Contracts Clause, barring the states from impairing the obligation of contract.⁷⁷ The Court held that marriage was not contract; it was status; it was fundamental, public, and the very foundation of family and society; it created a relationship which the parties could not alter—and *therefore* David's divorce from Lydia was valid. Marriage as status made it acutely more contract-like—a paradox which, by now, should not strike us as surprising.

Unless the regime is constructed to put some entity effectively at the highest degree of imperative control—if it is legally plural in any way—the legal status of a single marriage is not a steady beam shining in all directions across space and through time: instead, it *flickers*. In a federal system like ours, legal pluralism affecting marriage is acute. And this brings me to two additional polarities that have paradoxical effects on the capacity of the system to deliver on its status aspirations: hard/soft control and marital essence/incident.

Hard/soft control first. Legal systems differ a great deal in the degree to which various legal rules and legal ideas are operative. If actors in social life carry out the intentions of the legal order consistently, the result will be a highly operative legal system; if they ignore it or flout it, the result will be an intermittently operative legal system. *The existence of most marriages is never adjudicated.* If the marriage entry rules are operative not only because of state enforcement (hard control) but because of popular cooperation (soft control), the system will be better able to maintain the specialness of the marital status. But if popular cooperation is an important element in the operativity of the system, informality will find its way in, and will also muddle the specialness of the marital status. If everybody in George and Susan's world thinks that they are married and if they die and their estates are wound out without litigation in which their marital status could be challenged, it might not matter that they started out as fornicators, adulterers and/or bigamists knowingly cohabiting in flagrant violation of important marital capacity and/or entry rules. On the other hand, it might matter a great deal: the persistent possibility of such a misprision might undermine popular confidence in popular status ascriptions. People might start *thinking* that their neighbors are married instead of *knowing* it. The result would be a less status-operative regime, and that without any shift in the direction of contract.

And finally, a legal-pluralistic system can generate inconsistent outcomes even in the hard-control mode. One way that a marriage regime can legitimate this status-undermining impulse is to distinguish between outcomes that are merely incidental and those that go to the essence of the relation. We can have rules saying, for instance, that a man and woman were absolutely certainly married (essence), but that,

⁷⁷ The Contracts Clause stipulates that "No state shall . . . pass any . . . law . . . impairing the Obligation of Contracts." U.S. CONST. art I, § 10, cl. 1.

because they did not enter the relationship in compliance with all the entry rules, we won't enforce the rights of the surviving spouse to a portion of the property owned by the other (incidents).⁷⁸ Their children are legitimate (essence), but they can't assert dower or curtesy rights (incidents). (English marriage law did precisely this while conflicts between English and canon law were a major source of concern in the English marriage system.)⁷⁹ Or we could have rules requiring stronger proof of marriage when litigation touches the core like adultery, fornication, and criminal conversation (essence) than we do when mere property rights are involved (incidents).⁸⁰ We can—and do—say that the Full Faith and Credit Clause requires state courts to recognize out-of-state divorces that could not have been obtained under state law (essence) but allow them to ignore concomitant out-of-state alimony and property division orders (incidents).⁸¹ We can even rank-order legal attributes inside the essence. For example, we can—and do—have rules ranking defects in the formation of a marriage: where really severe defects are present, we call the marriage void and say so in highly formal terms, annulling it as a way of insisting that it never existed; but where less severe but real defects show up, we call it voidable and consider it valid unless one of the parties seeks not a divorce but annulment, which, again, formally purports to deem the marriage never to have existed! (This schema has been the basic apparatus of marital validity *vel non* in Anglo-American law for centuries.) The essence/incidents distinction allows the regime to paper over inconsistent or potentially inconsistent outcomes, maintaining a surface commitment to marriage as status while accommodating the practical necessity that the regime can *actually*, in all legal reality, deliver only *marriage as its effects*.

⁷⁸ Joseph Story devoted separate chapters to the choice of law rules applicable to the question of marital validity and those applicable to “incidents to” marriage. The former was subject to the law of the place of celebration; the latter was, at the time Story wrote, almost completely uncertain. STORY, CONFLICT OF LAWS, *supra* note 9, at 119. For Story, the “incidents” included “the personal capacity and power of the husband and wife, or the right of each in regard to property, personal or real, acquired, or held by them during coverture.” *Id.* Because many recent Defense of Marriage Acts deny recognition to the “incidents of marriage” between same-sex couples legally married out of state, new fervor is being poured into the essence/incidents distinction. See, e.g., Lynn D. Wardle, *What is Marriage*, 6 WHITTIER J. CHILD & FAM. ADVOC. 53 (2006); Mark Strasser, *State Marriage Amendments and Overreaching: On Plain Meaning, Good Public Policy, and Constitutional Limitations*, 25 L. & INEQ. 59 (2007).

⁷⁹ Sir Frederick Pollock & Frederic William Maitland, 2 *The History of English Law* 375-75(2d ed.1898).

⁸⁰ JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE, AND EVIDENCE IN MATRIMONIAL SUITS 253-56 (1st ed., Boston, Little, Brown 1852)].

⁸¹ Our contemporary “doctrine of divisible divorce,” under which courts of one spouse’s domicile must recognize a divorce granted to the other spouse by a sister state’s court, but need not heed the latter’s alimony or property division orders, track this distinction between essence and incident, though in the language of *in personam* and *in rem* jurisdiction. *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957); *Simons v. Miami Beach First National Bnak*, 381 U.S. 81 (1965).

D. *Two Forms or Many?*

Clearly “status or contract?” is not the only way our family law regime articulates and enforces marriage (and its alternatives) as status. As we have just seen, marriage can become more (and, paradoxically, less) status-like by becoming more (and, paradoxically, less) formal and informal, consent-based and ascriptive, prospective and retroactive, and subject to hard and soft control. There are at least two additional diacritics that produce this effect: “Two forms or many?” and “Integrated or disintegrated?” It has taken me a long time—fifteen years of teaching family law—to figure this out, so spectacular is the status/contract distinction and so deep the dusk into which it throws these other diacritics of status. In this Section, I explore the explanatory possibilities of the idea that a family law *system*—not just its individual forms—can intensify the degree to which we perceive marriage as status.

1. *Singleness*

In one of the great status-maniacal Supreme Court decisions of all time, Justice Frankfurter posited that “. . . divorce, like marriage, creates a new status”⁸² What would that status be? *Singleness*.

Is singleness a status correlative to marriage?

In colonial American law, singleness was a social problem and the law dealt with it quite severely. In 1669, Plymouth Colony adopted the following legislation:

Whereas great Inconvenience hath arisen by single p[er]sons in this Collonie being for themselves and not betakeing themselves to live in well Gou’ned families It is enacted by the Court that henceforth no single p[er]son be suffered to live of himself or in any family but such as the Celectmen of the Towne shall approve of; and if any p[er]son or p[er]sons shall refuse or neglect to attend such order as shalbe giuen them by the Celectmen; That such p[er]son or p[er]sons shalbe summoned to the Court to be proceeded with as the matter shall require.⁸³

At about the same time the Massachusetts legislature decreed that single people be listed, presumably so that they could be allocated to “well Governed families.” As Steinfeld reports, in 1668 Massachusetts towns were required:

⁸² *Williams v. North Carolina*, 325 U.S. 226, 230, 65 S.Ct. 1092, 1095 (1945). Part II of this Article explains the claim that Justice Frankfurter’s opinion in this case, known in choice of law shorthand as *Williams II*, veers towards status in ways that reproduce the cascade of contradictions that attend the interjurisdictional or transpatial recognition of marriage.

⁸³ RECORDS OF THE COLONY OF NEW PLYMOUTH IN NEW ENGLAND, LAWS, 1623 – 1682, 223 (David Pulsifer ed., William White 1861). Thanks to ROBERT J. STEINFELD, *THE INVENTION OF FREE LABOR: THE EMPLOYMENT RELATION IN ENGLISH AND AMERICAN LAW AND CULTURE, 1350-1870*, 58 (1991), for bringing this item to my attention. Steinfeld dates the statute to 1699, and given the dates attributed to statutes listed before and after this one, that seems right.

To take a list of the names of those young persons within the bonds of your Town, and all adjacent Farms through out of all Town bounds, who live from under Family Government, viz. as Children, Apprentices, hired Servants, or Journey men ought to do, and usually did in our Native Country, being subject to their commands and discipline.⁸⁴

In this legal order, singleness was a strictly recognized and regulated form of personhood in a decidedly unfree legal order, one in which hierarchically ordered households constituted small governments and which aspired to assure that the status relationships of husband and wife, parent and child, and master and servant gave every individual a highly determinate place in the legal and social order.

Even in colonial Massachusetts, however, singleness was not what we would now call a status. Single persons were sheer outliers, and the aim of the statutes I've just quoted was to bring single persons *into* what would later be called a status relationship. If we anachronistically designate Blackstone's "private *oeconomical relations*"⁸⁵ statuses, as classical jurists of the mid-to-late nineteenth century eventually did, singleness just doesn't fit in:

husband : wife
 ::
 parent: child
 ::
 master : servant
 ::
 married : single

The first three status pairs are *relations* between *persons*, parts of the "law of persons" dating back to Blackstone and beyond.⁸⁶ Singleness never emerged in that tradition as a body of law that created a "legal personal relationship"⁸⁷ of one type of person to another. Husbands and wives, parents and children, masters and servants existed as such because of the rights and duties they owe each other: no such legal personal relationship has ever existed between married people and single ones.

This was true, it seems, even in the nineteenth century, when the statuses of husband and wife were so much more robust than they are today. Ariela Dubler has written two fascinating papers on the anomalous situation of single women in 19th century U.S. law, but neither paper reveals any specific positive law *about* women's singleness. Indeed, Dubler argues that the most singleness-specific legal elements she could find—heartbalm actions, CLM and dower—provided legal remedies to a single

⁸⁴ Quoted in STEINFELD, INVENTION OF FREE LABOR, *supra* note 81, at 58. I have been unable to verify this quotation from Steinfeld's sources.

⁸⁵ BLACKSTONE, *supra* note 52.

⁸⁶ *Id.* For a discussion of the evolution of the law of persons into the nineteenth century, see DUNCAN KENNEDY, THE RISE AND FALL OF CLASSICAL LEGAL THOUGHT 186-212 (Beard Books 2006) (1975); Halley, *Genealogy*, *supra* note 2.

⁸⁷ BLACK'S LAW DICTIONARY, *supra* note 51.

woman which she could tap into only by representing herself as a “thwarted wife,” a wife indeed, or a widow. Women’s social singleness was subjected, Dubler concludes, to a *legal* “Disappearing Act.”⁸⁸ And her long paper on single women, titled “In the Shadow of Marriage,” focuses on dower and widows. Dower was entirely the law of husband and wife, the law of marriage; dower was a widow’s right only because she *had been* married.⁸⁹ In Dubler’s work, at least so far, women’s singleness is a *social*, not a *legal*, phenomenon.⁹⁰

My own survey of contemporary U.S. positive law relating to the family discloses only two places where single people are subject to distinct legal treatment—and both of them turn on another status as well. Nonmarital *fathers* who attempt to secure or avoid relationships with their biochildren have a lot of their own distinct law, both constitutional and statutory,⁹¹ and since 2002 our welfare regime has had an elaborate policy and equally elaborate regulatory schemes targeted *against* singleness among *the poor*. In US welfare policy and increasingly in the states, singleness is held to be detrimental to the poor; they should marry; to give effect to this policy, welfare law subjects single welfare recipients, male and female, parents and childless to distinct legal treatment.⁹² To be sure, the positive law giving special legal treatment to

⁸⁸ Ariela R. Dubler, *Exceptions to the General Rule: Unmarried Women and the Constitution of the Family*, 4 THEORETICAL INQUIRIES IN L. 797, 801, 805-10 (2003) [hereinafter Dubler, *Unmarried Women*].

⁸⁹ Ariela R. Dubler, *In the Shadow of Marriage: Single Women and the Legal Construction of the Family and the State*, 112 YALE L.J. 1641 (2003).

⁹⁰ Indeed, in *Unmarried Women*, Dubler based her argument that single women gained social visibility as a class in the 20th Century entirely on the basis of social-historical, not legal, materials. Dubler, *Unmarried Women*, *supra* n. 88 at 801, 811-16.

⁹¹ See, e.g., *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208 (1972); *Lehr v. Robertson*, 463 U.S. 248, 103 S.Ct. 2985 (1983); *Adoption of Michael H.*, 10 Cal.4th 1043, 43 Cal.Rptr.2d 445 (Cal. 1995), setting out some distinct constitutional rules, all of them disadvantageous to fathers seeking to establish their parental status and to assert parental rights. For the differential treatment of marital and nonmarital fathers in the statutory regimes challenged in *Lehr* and *Adoption of Michael H.*, see N.Y. D.R.L. § 111-a (NY DOM REL § 111-a) (2010) and Cal. Fam. Code § 7611 (2005). For the differential treatment of the children born abroad to nonmarital fathers and mothers when those children seek naturalization as US citizens—disadvantageous to the children of nonmarital fathers—see *Nguyen v. I.N.S.*, 533 U.S. 53, 121 S.Ct. 2053 (2001).

⁹² The Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193 (Aug. 22, 1996), 110 Stat. 2105 (1996), replaced welfare as we knew it with a system providing block grants to states complying with general policies and specific rules set out in the new federal scheme. Block grants are codified in 42 USCA Ch. 7. Marriage promotion for the poor is central to PRWORA, and this policy has produced myriad large and small discriminations between married and unmarried mothers, married and unmarried fathers, and children being raised in marital and nonmarital households.

The very first finding of the statute is that “Marriage is the foundation of a successful society.” Sec. 101(1). The third: “Promotion of responsible fatherhood and motherhood is integral to successful childrearing and the well-being of children.” Sec. 101(3). Responsible fatherhood and motherhood are *married* fatherhood and motherhood: the statute targets “the

marriages and the people in them has immense distributive consequences for single people. But that's disparate impact, not disparate treatment, to borrow a concept from discrimination law.

American law today contains almost no "law of being single." Certainly an infinity of legal consequences follow upon the condition of being single. But, except in the case of single fathers and single poor welfare recipients, they aren't codified or made "positive" in our regime; rather they are the effect of a million determinations—and those often made silently—that the rules of marriage don't apply.

Singleness today is completely unlike singleness in colonial Massachusetts, so much so that representing singleness as a status today should be understood to be an ideological project aiming to make *marriage* more status-like by making its social consequences more trenchant, uniform, and consistent. They're reciprocally tied to one another: if we make marriage immensely consequential (legally, socially, morally, pictorially), we will also make singleness as its opposite immensely consequential too. Treating singleness as a status would run this causal process in reverse. If the project works, it would indeed be "a truth universally acknowledged, that a single man in possession of a good fortune, must be in want of a wife";⁹³ myriad other universal truths about singleness would follow as well. Being single would be like being a celibate priest: a big deal. But if we let marriage become a diffuse aspect of only some people's lives, then it would not have the social-ordering power to make singleness very different from itself. Marriage and singleness would then often blur together. Being married *or* single under these circumstances would become more like (not like, but *more* like) being a toll-payer on the turnpike: an activity or social classification that people engage in only intermittently, only to merge almost imperceptibly into other activities or social classifications.

Note, then, that—unless we generate an entirely new set of positive rules for single people or disestablish legal marriage altogether—singleness will be a "status" only by virtue of strong social controls. In the regime as we currently run it, however, marriage is a *legal* status and singleness, if it is a status at all, is a *merely social* one, implicit in marriage perhaps but entirely derivative from it.

negative consequences of an out-of-wedlock birth on the mother the child, the family and the society[.]” Sec. 101(8). The second primary goal of the block grant system is to “end the dependence of needy parents on government benefits by promoting job preparation, work, and marriage.” Sec. 103 (codified in 42 USCA § 601). The specific provisions putting these policies into effect are summarized in Anna Marie Smith, *The Politicization of Marriage in Contemporary American Public Policy: The Defense of Marriage Act and the Personal Responsibility Act*, 5:3 CITIZENSHIP STUDIES 303, 312-15 (2001). For descriptions of the state programs adopted in the wake of PRWORA, see Theodora Ooms, Stacey Bouchet and Mary Parke, BEYOND MARRIAGE LICENSES: EFFORTS IN STATES TO STRENGTHEN MARRIAGE AND TWO-PARENT FAMILIES, A STATE-BY-STATE SURVEY (Center for Law and Social Policy [CLASP], 2004) available at http://www.clasp.org/admin/site/publications_archive/files/0158.pdf and Anna Marie Smith, *The Sexual Regulation Dimension of Contemporary Welfare Law: A Fifty-State Overview*, 8 MICH. J. OF GENDER & L. 121, 138-209 (2002).

⁹³ JANE AUSTEN, *PRIDE AND PREJUDICE* 1 (Mark Schorer ed., 1956).

Clearly we need a new vocabulary for understanding how marriage and singleness are related. I propose that we are looking for a way of describing marriage as part of a *system* for ordering many aspects of social life.

2. “System”

Here’s what I propose: the more acute the consequences of the married/single distinction, the more the *system* in which that distinction counts will feel like a *status* system. Status can be an attribute of the system, not just of the particular forms within it.⁹⁴

And this brings immediately to light a simple fact: the modern (and the historical) family law regime involves more forms than marriage and singleness. There are also CLM, *Marvin*, putative spouse doctrine, and, more recently, CU, covenant marriage and some other novelties. We need a vocabulary for rating the degree to which states functioning as marriage systems differ in their relative disposition of the forms they do admit.

And here’s my second suggestion: the forms exist in each state in an array, a system, that can take one of two basic shapes, *steep-drop-off* or *form-pluralism*. A steep-drop-off system is one that insists on one or more highly privileged forms for legally meaningful adult-to-adult relations, with a steep drop off from those forms to singleness. Think colonial Massachusetts. The ideal type has *only* marriage and singleness, but you could have a steep drop off from marriage + CU to singleness. The critical feature of a steep drop-off is that it *matters a lot* whether one is in one of the forms or not. An ideal-typical form-pluralistic system, on the other hand, has a number of different-but-comparable forms, some of them overlapping with respect to their entry requirements, exit rules, and legal consequences. The multiplicity of forms and their mutual duplications are managed so as to weaken the differences between them, and between the forms and singleness.

I used to think of form-pluralism as presenting people with a *menu of options*: they can have salads, entrees, and desserts; some of the entrees are sweet and some of the salads can make up a whole meal, and people get to pick what they want from the array. But so many of the forms in form-pluralistic systems have an ascriptive character: CLM, passive *Marvin*, and strong putative-spouse doctrine rules exemplify this tendency. These systems are less emphatic about choice, more regulatory, more *governmental* in the Foucaultian sense than a real menu of options.⁹⁵ Status returns, but

⁹⁴ I don’t mean to repeat here Lee E. Teitelbaum’s effort to understand *the family* as a system. Lee E. Teitelbaum, *The Family as a System: A Preliminary Sketch*, 1996 UTAH L. REV. 537 (1996).

⁹⁵ MICHEL FOUCAULT, SECURITY, TERRITORY, POPULATION (LECTURES AT THE COLLEGE DE FRANCE) (Michel Senellart et al. eds., Graham Burchell trans., Palgrave Macmillan 2007); MICHEL FOUCAULT, *Governmentality* (Rosi Braidotti trans., Colin Gordon

in a new, diffuse, biopoweristic form; the system is immanently inclusive, softly mandatory. If the system includes CLM, putative spouse doctrine and/or passive Marvin, it is not a menu-of-option system; it is form-pluralistic.

A steep drop-off alone makes marriage *and singleness* more status-like, quite independently to the degree to which, for instance, mutual-consent divorce is permissible or marital antenuptial contracts will be enforced. Form-pluralism can be more or less statusy depending on the degree to which the system respects exit. Form-pluralistic systems seem more contractual and less status-like even though none of the particular options necessarily leaves one much power to contract within it and even though some or all of them can be ascriptive; yet ascriptive form-pluralism represents a return to status. So it seems that the “status-feel” of a marriage system can be intensified vertically, as it were, by excluding the capacity to contract within any of the forms; and horizontally, by intensifying the rigidity of the system and the legal gravity of moves from one form to another and by blocking egress from the system generally.

The states of the United States all have civil marriage and singleness, but they diverge a great deal in the degree to which they “add on” any of the other forms I’ve named. “Demise of marriage” and “families we choose” debates make the decisions about which way to go—steep-drop-off or form-pluralism—intensely controversial. So, predictably, systems that add new forms, seeking to increase the range of available options, also reflect the politics of status-reinforcing push-back. The push-back comes in two forms: via constraints on contract *within* any form and via the steep drop-off *between* forms.

3. Steep-Drop-off Systems

Massachusetts is notorious for recognizing fully legal same-sex marriage. The results are often described as being *pluralistic*. Perhaps, with respect to sexual orientation, particularly hetero- and homo-, and its power to order the social world. But the marriage *system* in Massachusetts is not *menu-of-options* pluralistic: rather, it exemplifies the steep drop off. Here is how.

In Massachusetts we have marriage (now formally sex-indifferent) and singleness, *and that’s it*. Massachusetts courts and legislatures have persistently refused to admit CLM or *Marvin* into the state’s system. The Massachusetts Supreme Judicial Court’s decision recognizing same-sex marriage, *Goodridge v. Department of Health*, insisted that any of these add-ons would extend the benefits of marriage to those who had not shouldered its full responsibilities—and the Court was adamant against that.⁹⁶ It

rev.), in *THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY* 87–104 (Graham Burchell et al. eds., University of Chicago Press, 1991).

⁹⁶ “Individuals who have the choice to marry each other and nevertheless choose not to may properly be denied the legal benefits of marriage.” *Goodridge*, 440 Mass. at 327, 798 N.E.2d at 958. The majority cited a line of cases holding that *Marvin* and loss of consortium are not cognizable outside actual marriage in Massachusetts: *Wilcox v. Trautz*, 427 Mass. 326, 330, 693 N.E. 2d 141 (Mass. 1998); *Collins v. Guggenheim*, 631 N.E.2d 1016 (Mass 1994);

ratified earlier caselaw holding that civil unions recognized by employers did not create “dependents” entitled to state-regulated employment-based health insurance.⁹⁷ (Many large employers in the state got the message and promptly canceled CU programs they had set up to extend benefits to homosexual couples, their rationale being that their gay employees could now marry.⁹⁸) The *Goodridge* majority quoted with approval a passage from *Feliciano v. Rosemar Silver Co.*, a 1987 SJC case refusing to extend loss of consortium actions to nonmarital cohabitants because the plaintiff had opted out of marriage. As the *Feliciano* court reasoned:

“Marriage is not merely a contract between the parties. It is the foundation of the family. It is a social institution of the highest importance. The Commonwealth has a deep interest that its integrity is not jeopardized.” . . . Our recognition of a right of recovery for the loss of a spouse’s consortium . . . promotes that value. *Conversely, that value would be subverted by our recognition of a right to recover for loss of consortium by a person who has not accepted the correlative responsibilities of marriage.* This we are unwilling to do.⁹⁹In Massachusetts, all of marriage’s attributes are piled up inside marriage, and evacuated from the rest of the regime. In such a system marriage and singleness retain a strong flavor of status, not because of anything directly implicating contract but because of the steep drop-off.

It is interesting to watch this steep-drop-off system struggle to maintain itself as such. Many of the pendulum dynamics that emerge because of our ambivalence about individualism and altruism, rules and standards, form and substance, seem to be implicated.¹⁰⁰ Let’s start with *Sullivan v. Rooney*, decided in 1989.¹⁰¹ There, faced with a cohabitant breakup with a property-division outcome that would have been manifestly inequitable if the couple had been married, the SJC could not bear the unfairness produced by the steep drop-off; it held, instead, that the weaker party could get a court to impose a constructive trust on her partner’s assets if she could show that the outcome otherwise was substantively unjust and that she had reasonably relied to her detriment on her partner’s promises to share the couple’s major asset, in this case a home. Five years later, in *Collins v. Guggenheim*,¹⁰² faced with facts very similar to those in *Sullivan v. Rooney*, the court reversed the legal rule without even attempting to distinguish the facts. There would be no imposition of a constructive trust without a

Feliciano v. Rosemar Silver Co., 514 N.E.2d 1095 (Mass.1987). *Goodridge*, 440 Mass. at 327, 798 N.E.2d at 958.

⁹⁷ See *Goodridge*, 440 Mass. at 323-24, 798 N.E.2d at 955-56, citing *Connors v. Boston*, 430 Mass. 31, 43, 714 N.E.2d 335 (1999).

⁹⁸ Cheryl Wetzstein, *Massachusetts firms drop domestic-partner benefits*, THE WASHINGTON TIMES, Dec. 9, 2004, <http://washingtontimes.com/national/20041209-122557-6540r.htm>.

⁹⁹ *Feliciano*, 514 N.E.2d at 1096 (Mass. 1987) (quoting *French v. McAnarney*, 195 N.E. 714 (1935); citations omitted; emphasis added) (quoted in part and in approval, *Goodridge*, 440 Mass. at 323).

¹⁰⁰ Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARVARD L. REV. 1685 (1976).

¹⁰¹ *Sullivan v. Rooney*, 533 N.E.2d 1372 (Mass. 1989).

¹⁰² *Collins v. Guggenheim*, 631 N.E.2d 1016 (Mass.1994).

showing of a formal fiduciary relationship or fraud; substantive unfairness and detrimental reliance would not be not enough. The pure steep drop-off was back.¹⁰³ But four years further on, in *Wilcox v. Trautz* the SJC declared itself to be driven to recognize *express* contract for unmarried cohabitants precisely *because* other relief was barred: “This may be especially important in a jurisdiction like Massachusetts where we do not recognize common law marriage, do not extend to unmarried couples the rights possessed by married couples who divorce, and reject equitable remedies that might have the effect of dividing property between unmarried parties.”¹⁰⁴ The court

¹⁰³ Technically, *Sullivan v. Rooney* and *Collins v. Guggenheim* can be distinguished so as to reconcile their holdings. In *Sullivan* the (male) defendant had repeatedly promised to convey title to the house (533 N.E.2d at 1373-74); whereas in *Collins* the (female) defendant had made no such promise with respect to the farm (comprising not only real estate but also farm equipment and an informal business partnership) (631 N.E.2d at 1017). In *Sullivan* the SJC concluded from the findings of fact below that that the male partner had assumed a fiduciary duty which was vindicated by the constructive trust (533 N.E.2d at 1374); in *Collins* the trial court had found that no such duty existed (631 N.E.2d at 1017). But the SJC in *Collins* did not bother to distinguish *Sullivan*; there is no holding that cohabitants can form a fiduciary relationship by express but not implied agreement. It would have been very easy, on the facts of *Collins*, to find an implied agreement (everything about the couple’s management of the farm suggested a partnership (*id.* at 1016) and unjust enrichment (the “boyfriend” made equal contributions to payment of the debt on the farm, and a larger contribution to investment in equipment (*id.* at 1016-17); when the relationship ended he remained legally indebted on the mortgages (*id.* at 1017 n.1) and the female partner ended up as the legal owner not only of the real-property improvements financed by the debt but also in possession of all the farm equipment purchased by his monetary contributions) (*id.*). That it was easy for the court to approve an implied agreement and to see unjust enrichment in *Sullivan* and impossible to do so in *Collins* almost certainly turns on nonlegal factors, but it’s impossible to tell from the opinions which ones mattered. Eventually, the SJC was to remit cohabitants to contract. *Wilcox v. Trautz*, decided four years after *Collins*, held that cohabitants’ express agreements are subject to the “usual rules of contract”: no equitable remedies, and thus no fiduciary relationship, can arise. *Wilcox v. Trautz*, 427 Mass. 326, 330, 693 N.E. 2d 141, 146 (Mass. 1998). Technical legal rightness does not seem to be in charge here; rather, *Sullivan* and *Collins* manifest the SJC’s ambivalence about the place of fairness in property division between unmarried cohabitants, while *Wilcox v. Trautz* shows us a court willing to tie itself to the mast of the steep-drop off.

Note that Massachusetts courts have not yet fully faced the challenge to the steep-drop-off introduced by CU from other states: should they recognize these unions pursuant to *Goodridge*’s holding that refusing same-sex marriage was a constitutional violation; or should they refuse recognition in order to maintain the line established in *Collins*, *Wilcox*, and related cases? An unpublished opinion of the Superior Court recognized a Vermont CU in order to dissolve it, using its equitable powers and noting that, if it didn’t act, the two men might be unable ever to dissolve their CU and might for that reason be permanently incapable of forming another CU or marrying. *Salucco v. Alldredge*, 2004 W.L. 864459 (Mass. Super. 2004). The nondiscrimination stance of *Goodridge* was deployed as warrant for this move. The court went on to enforce an express separation agreement between the two men. Query whether it would enforce an oral agreement or an equitable remedy? Probably not; the steep drop-off is a strong feature of Massachusetts precedent.

¹⁰⁴ *Wilcox v. Trautz*, 693 N.E.2d at 145.

reasoned that the couple's sexual relationship was not part of the exchange, so their contract was not one for sexual services, and so it could be enforced.¹⁰⁵ And it held that "the usual rules of contract," not the law of antenuptial and during-marriage agreements, applied: the trial court could not consider any challenge to the fairness of the agreement.¹⁰⁶ Finally, the SJC explicitly rejected anything in *Marvin* over and above express contract.¹⁰⁷ *Marvin-as-contract* assimilated cohabiting couples to arm's-length bargainers in the marketplace so as to extend *some* remedies while saving the steep drop-off from marriage to singleness.

4. *The Legal Vocabulary for Adding Forms*

Very often the controversialness of a form will be fought out not in terms of the new form's own advantages or disadvantages, but in the language of the *system*: is the system committed to one form or can it have many? Is it committed to the steep drop-off or can it blur its forms? Ways of answering those questions may already be embedded in the legal vocabulary generated by past decisions to add or to refuse to add new forms.

It's a matter of conjecture, of course, but I think one reason the Massachusetts SJC was able to muster a majority vote for constitutionally-required same-sex marriage was its pre-existing commitment to one form and a very steep drop-off to singleness. The Court had boxed itself in. *Collins v. Guggenheim* and *Wilcox v. Trautz* tracked that commitment back to the very first moments of Massachusetts law, when the legislature took jurisdiction of marriage from the common law and required formal marriage.¹⁰⁸ In the line of cases the SJC recited are dozens refusing to accord the effects of marriage to people who had relied in utter good faith on the belief that their formality-defective marriages were valid: no matter how horrible the roadkill, the SJC almost always held to its rule.¹⁰⁹ But in *Collins v. Guggenheim* and *Wilcox v. Trautz*, the Court could tell the plaintiffs that they could (and should) have married: it was obviously impossible to say that to the plaintiffs in *Goodridge*. Nor was the contractual remedy provided to the parties in *Wilcox v. Trautz* a meaningful response to their pleas: the complaint in *Goodridge* amply displayed the inadequacy of express contract to mimic the "cornucopia of benefits"¹¹⁰ and equally copious obligations of marriage. It was an excruciating fairness problem. The court would have had to flout an

¹⁰⁵ *Wilcox v. Trautz*, 693 N.E.2d at 144-45, quoting *Margolies v. Hopkins*, 401 Mass. 88, 92, 514 N.E.2d 1079, 1081-82 (1987).

¹⁰⁶ *Wilcox v. Trautz*, 693 N.E.2d at 146.

¹⁰⁷ *Wilcox v. Trautz*, 693 N.E.2d at 146 n. 3.

¹⁰⁸ "We have never recognized common law marriage," *Collins v. Guggenheim*, 631 N.E.2d at 1017; "We have never recognized common law marriage in this commonwealth," *Wilcox v. Trautz*, 693 N.E.2d at 146; see also *Wilcox v. Trautz*, 693 N.E.2d at 145. See *Commonwealth v. Munson*, 127 Mass. 459 (1879), for a recitation of the early statutes.

¹⁰⁹ See *Munson*, 127 Mass. at 459, again, for an example of the rigor with which the Court enforced this rule.

¹¹⁰ *Goodridge*, 440 Mass. at 336.

immensely long line of cases stipulating that Massachusetts' system maintains only one form with a steep drop-off, rooted in claims about its aboriginal law, if it wanted to deliver some fairness to the plaintiffs by requiring CU. The only other way out was same-sex marriage.

Compare Vermont. Even though Vermont has always required formal marriage, its courts have never deduced from that a commitment to the steep drop-off. The non-common-law-marriage precedents are simply never cited as reasons to reject putative spouse doctrine or *Marvin*: instead, Vermont omitted these forms silently.¹¹¹ The door was open for the addition of a new form—and as we will see, the legislature was quite inventive, adding not only CU but an entirely new form for illness- and disability-related dependency. To be sure, as we'll also see, the steep drop-off pushed back to make both of these forms as much like marriage as possible. But this was in response to a political force; neither Vermont's system nor the legal argument structure articulating it interposes the barrier to “many forms” that Massachusetts courts had constructed for themselves.

The argumentative repertoire is more contradictory in states which once had CLM and have repealed it. (Most states fall in this category; Massachusetts and Vermont are outliers.) In them, the caselaw is permeated by highly articulated doctrinal struggles over what that CLM repeal implies for the addition of other forms, whether putative spouse doctrine, *Marvin*, or CU. When faced with a decision about whether to add new forms to these systems, legal minds ask whether the earlier repeal of CLM indicates a public policy of preserving a steep-drop-off marriage-and-singleness-only system, *or* creates the social need to extend fairness to the weaker party who would have been protected by CLM if it hadn't been repealed.¹¹² And how to do

¹¹¹ Cases holding that Vermont never recognized CLM include *Morril v. Palmer*, 68 Vt. 1, 33 A. 829 (Vt. 1895) and *Stahl v. Stahl*, 136 Vt. 90, 385 A.2d 1091 (Vt. 1978). Unlike Massachusetts, however, Vermont courts do not seem to have derived from this line of cases a legal commitment to one form or to the steep drop-off: the caselaw and statute books simply lack any provision for putative spouse doctrine or *Marvin*. They are left out by omission, not commission.

¹¹² *Marvin* itself noted that its holding did not revive CLM: rather, foreclosed from marriage remedies by CLM repeal, Michelle Marvin was entitled to “the same rights to enforce contracts and to assert her equitable interest in property as any other unmarried person.” (at 122 n.24). But CLM repeal has also been invoked as a plentiful source of reasons to *refuse* to add *Marvin*. In the oft-anthologized case *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979), the Illinois Supreme Court concluded that recognition of a contract between cohabitants would effectively reinstate CLM (*id.* at 1208), would therefore amount to judicial usurpation of the legislature's monopoly over this decision (*id.* at 1209), would trump the legislature's decision that CLM depleted the social authority and “sanctity” of marriage (*id.* at 1211, quoting *In re Soeder's Estate*, 220 N.E.2d 547, 561 (Oh. App. 1966)), and would flout the strong legislative and judicial trend to criticize CLM as “a fruitful source of perjury and fraud” and of “imposition on the estates of suppositious heirs” (*id.* at 1211, quoting *Baker v. Mitchell*, Penn. Threshermen & Farmers' Mut. Casualty, 143 Pa. Super. 50, 17 A.2d 738, 741 (Pa. Super. 1941), *Sorensen v. Sorensen*, 100 N.W. 930, 932 (Neb. 1904), and *Soeder's Estate*). It is also possible to recognize *Marvin* but limit its effects, and to justify this “splitting the difference” strategy by invoking CLM repeal. This seems to be the rule in California: in

the latter? Re-recognition of CLM is off the table, so it's *Marvin* or RP, the former from courts, the latter from legislatures. If either of those add-ons are made, there is now clear precedent for introducing a new form, but without delegitimizing the CLM-repeal cases. If you're operating in such a system, you can still argue from those cases that the system remains steep-drop-off—but your claim has been weakened by the addition of the new form. These systems are systematically unstable—more so, so far anyway, than Massachusetts; though, once again, they repeatedly make their distinctions in terms of one-form-or-many.

This discussion could be extended to notice that, nested¹¹³ in the confrontations already described, are related ones: standards or rules, judges or legislatures, law-follows-society or society-follows-law, to name the most salient.¹¹⁴

Friedman v. Friedman, 20 Cal. App. 4th 876, 888 (Cal. App. 1. Dist. 1993), a Court of Appeal enforcing *Marvin v. Marvin* itself reversed a trial court's alimony award on the ground that the "net effect" of such an order was "to resurrect common law marriages in California. That institution was abolished by the legislature in 1895" And when the Washington Supreme Court held that "meretricious relationships" should be subject to *some but not all* of the property division rules applied in divorce, it justified its holding as a way to acknowledge the intent of the parties by not "creating a common law marriage." *Connell v. Francisco*, 898 P.2d 831, 835-36 (Wa. 1995).

Some courts have held that CLM repeal has no preclusive effect on municipal power to establish CU systems; they argue for this view on the grounds that CU is so much weaker than marriage. *See Slattery v. City of New York*, 266 A.D.2d 24, 697 N.Y.S.2d 603 (N.Y.A.D. 1 Dept. 1999) (holding that a state constitutional ban on CLM did not render a city incapable of requiring employers to extend employment benefits to parties in registered CUs because the CU system did not duplicate marriage); *Lowe v. Broward County*, 766 So.2d 1199 (Fla. D.Ct. of App. 2000) (repeal of CLM did not render city incapable of establishing an CU registry because the rights granted to registered CUs did not "rise to the level of a traditional marital relationship"). These decisions imply that a robust CU system at the state level might collide with the ban on CLM, but of course the very difference in name could be held to constitute a sufficient difference to permit the shift to a menu-of-options.

¹¹³ For the deferral of unresolved political conflict to subsequent, "nested" stages of doctrinal elaboration, *see* Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYR. L. REV. 75 (1991), *reprinted in* 3 COLLECTED COURSES OF THE ACADEMY OF EUROPEAN LAW, Book 2, 357-60 (Kluwer Academic Publishers, Netherlands, 1994).

¹¹⁴ The pendulum swing from standards to rules can be exemplified by the *Marvin* court's sublime indifference to the uncertainty that was produced by its adoption of so many standard-based equitable remedies (*Marvin*, 557 P.2d at 122) (standards), bitterly denounced by the *Marvin* dissent as a derogation of the rule of law (*Marvin*, 557 P.2d at 123-4) (rules), and decried in *Hewitt* for the social disorder that would result, *Hewitt*, 394 N.E.2d at 1209 (rules). Judge versus legislature: *Marvin* adopted equitable remedies acting explicitly as a court unrestrained by a silent legislature and responsible to overrule its own precedents if they were unfair, *Marvin*, 557 P.2d at 116-23 (priority of judges); the *Hewitt* court, by contrast, repeatedly emphasized its duty to defer to the legislature, *Hewitt*, 394 N.E.2d at 1208, 1209, 1210-11; *see* also the dissent in *Marvin*, 557 P.2d at 124 (priority of legislatures). Law-follows-society versus society-follows-law: the *Marvin* majority noted that "the mores of the society have indeed changed so radically in regard to cohabitation that we cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many,"

There are limits to what is possible in any given system as long as the players remain committed to using the established vocabulary. And if they do move in the direction of a plurality of forms, the possibility of re-infusing it with status never goes away.

5. *Pluralistic Systems*

Early in the same-sex marriage fracas it was assumed that expanding “family diversity” meant providing people with the “freedom to choose from a variety of family forms. . . .”¹¹⁵ It seemed obvious that reforming the system so that it provided a plurality of forms and choice among them was inherently progressive.

But the event has diverged from these expectations. As we have added forms to the marriage/singleness dyad—as we have pluralized our marriage systems—we have seen changes in the status/contract character of particular forms and of the system as a whole. Political resistance to these reforms typically emerges as push-back seeking to enhance the status character of the forms and to restore the steep-drop-off design of the system as a whole.

This push-back has been very pervasive and very effective. Status-push-back inside form pluralism has been very successful in depleting it of contractual features, peppering it with new steep drop-offs, and making sure any new forms are basically the marriage bundle with a few sticks added or removed.

Let’s examine a technically simple menu-of-options reform achieved by status-hungry social conservatives—a reform in which contract and status are both inextricably intensified. When Louisiana, Arkansas and Arizona added a second form of marriage, covenant marriage, they pluralized their systems.¹¹⁶ Covenant marriage ends only with death or *fault*-based divorce (or a super-long period of separation); vanilla marriage ends with death or no-fault divorce; and then there’s singleness. These systems preserve a steep drop-off from marriage to singleness; but at least for cross-sex couples this *return to fault* (a status intensification, to be sure) results in a system that is arguably *more contractual than what they had before*. Marrying couples may choose to be bound by very stringent, state-imposed exit rules—a more status-like marriage—but proponents rightly insisted that their capacity to contract at the *beginning* of marriage had expanded.¹¹⁷ And this choice mutes somewhat the steep-

Marvin, 557 P.2d at 122 (law-follows-society); but the *Hewitt* court took the opposite tack, emphasizing the social stability provided by a strong, legally invariant, one-form steep drop-off, *Hewitt*, 394 N.E.2d at 1209, 1211 (society-follows law).

¹¹⁵ Katharine T. Bartlett, *Saving the Family from the Reformers*, 31 U.C. DAVIS L. REV. 809, 817 (1998).

¹¹⁶ LA. REV. STAT. ANN. §§ 9:272-275.1 to 9:307-309 (2008); ARK. CODE. ANN. §§ 9-11-801 to 9-11-808 (2010); ARIZ. REV. STAT. §§ 25-901 to 25-906 (2010).

¹¹⁷ Joel A. Nichols, *Louisiana’s Covenant Marriage Law: A First Step Toward a More Robust Pluralism in Marriage and Divorce Law?*, 47 EMORY L. J. 929, 958-60, 988-94 (comment) (1998); Elizabeth S. Scott and Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225

drop-off character of marital status: instead, menu-of-options plurality; choice *among* statuses!

Similarly, recent reforms to include CU reveal the resilience of status in the marriage system. Let's first compare Vermont and the Netherlands. Both of these jurisdictions offer marriage, CU, and singleness; take your pick. Sounds like contract. But the political situation in which this reform was adopted restored as much status as pro's and anti's could devise.

The story of Vermont is characteristic. Its initial shift towards a menu of options significantly eroded the steep-drop-off character of the Vermont system—but the steep drop-off pushed back. The most striking way in which it did so was to restrict Vermont CU to same-sex couples.¹¹⁸ This implicitly allocated marriage to cross-sex couples and CU to same-sex ones so that the system goes like this: if you don't want to be single you have two choices, CU or marriage, *but* CU is available *only* if you propose to form a same-sex union and marriage is available *only* if you propose a male/female one. (To be sure, now that Vermont has adopted same-sex marriage and is phasing out its CU form, it has reverted to one-form-with-a-steep-drop-off.)

An alternative, which we see in the Netherlands, and which may reflect weaker “marriage is heterosexual” politics or weaker steep-drop-off politics, involves a much less status-like plurality of forms: *everyone* can pick between CU and singleness.¹¹⁹ Stop there, and this system seems both more contractual and more progressive: people have more options, and everybody shares them. But status pushes back once again: in the Netherlands the drop-off from marriage and CU is not steep at all, because cohabitants will be *Marvined* no matter what.¹²⁰

For all their differences, these outcomes caution us that menu-of-options/form pluralistic systems are not necessarily more contractual *or* more “progressive.” Most CU's are restricted to same-sex couples or couples that cannot marry, thus strictly limiting the choices people can make: if you are in a cross-sex relationship you have no access to CU and if you are in a same-sex one you can't marry. And if, as we see in the Netherlands, legal relatedness is inescapable for cohabitants whether they are married, CU'd or single, whether their relationship is cross- or same-sex, the menu-of-options spreads status across every part of the system except singleness that lives alone. When we first encountered passive *Marvin* in Part III.B.2 we were struck by the odd mixture of progressive and social-control aims it satisfies: where passive *Marvin* rules are very strong, we can say that cohabiting couples are either married or *Marvined*: only by living apart can they stay single. This suggested to us then a severely narrowed space for contract between cohabitants: status. The point now is to extend that counterintuitive observation to the *system*: when we *add a steep drop-off* from marriage and *Marvin* on one hand to singleness on the other, we channel choice,

(1998). Scott and Scott aver that the “principal impact of the [Louisiana covenant marriage] statute is to give couples more options than were previously available to structure their marital relationship according to their mutual values and goals.” *Id.* at 1227.

¹¹⁸ VT. STAT. ANN. 15 § 1202(2).

¹¹⁹ For a summary, see Waaldijk, *supra* note 63.

¹²⁰ *Id.*, at 142-43.

intensify status, and achieve another progressive reform that has the effect of consolidating the system's social-control capacities.

Many CU's also intensified status *within* the new form. Again, let's look at the simplest available example first. At the same time that the Vermont legislature adopted its CU system, it also installed a new form—the “Reciprocal Beneficiaries” relationship (RBR)—providing specific and limited rights for caretakers of the ill or disabled. The statute accords to registered participants in an RBR a restricted list of the “benefits and protections. . . and responsibilities that are granted to spouses”: health care and death participation rights plus coverage by the Vermont abuse prevention statute.¹²¹ You would expect such a reform to provide protection for caretakers generally. But no: Vermont veered back into the marriage paradigm, reinstating the status character of the new form and its place in the system in a number of ways. First, RBR is open only to pairs of people (the marriage paradigm: antipolygamy rule) already related by blood or adoption (the family paradigm: existing familial dependencies only). It thus precludes couples who can marry or form a CU (the steep drop-off).¹²² Nor can either party be in a marriage, a CU, or an RBR, with anyone else.¹²³ I will call this a *monoformy rule*, so clearly is it modeled on the requirement of marital monogamy. Plus here's something astonishing: both parties are subject to the arbitrary, noticeless, and automatic termination of the relationship through a new device I'll describe as a *form-hierarchy voidness rule*: if either party marries or forms a CU, the RBR automatically dissolves!¹²⁴ In sum: a highly functional relationship having nothing to do with cohabitation, sex, or economic dependence is invented here (menu-of-options/form pluralism); but it is fitted very tightly with status-confirming access and exit rules (the marriage paradigm, the steep drop-off, and the hierarchy of forms).¹²⁵

¹²¹ 15 V.S.A. § 1301 (1999).

¹²² 15 V.S.A. § 1303 (3) (1999).

¹²³ 15 V.S.A. § 1303 (2) (1999).

¹²⁴ 15 V.S.A. § 1305 (c) (1999). It's not too much to say that form-hierarchy voidness rules manifest a *new* commitment to status. They permeate CU, and thus the systems into which CU is introduced; but neither putative spouse doctrine nor *Marvin* manifest any concern that it might be a problem for a single person to participate at the same time in either of those forms and marriage. Indeed (and thanks to Mary Anne Case for pointing this out to me), Lee Marvin was *married* to Betty Marvin when Michelle Triola (who styled herself Michelle Marvin in her complaint) sued him to enforce his alleged promise of lifelong support. *See* Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381, 1381 (2001). And as we have seen, putative spouse doctrine specifically anticipates and embraces quasi-bigamous outcomes. Inasmuch as CLM and formal marriage were thought to be metaphysically identical, they were subject to the same rules against bigamy: that is to say, they were shared the same form-hierarchy voidness rule, though the doctrinal means for enforcing it were virtually nil. Current CU reforms, when they endow a nonmarital form with form-hierarchy voidness rules, thus present us with a complete novelty.

¹²⁵ Specifically restricted marriage substitutes similar to Vermont's RBR have appeared in at least four additional states: Colo. Rev. Stat. §§ 15-22-104 to 15-22-112 (designated beneficiaries, offering a form contract allowing two people to elect property and financial

A very similar thing happened in France.¹²⁶ The original PaCS (*Pacte Civile de Solidarité*) proposal, presented by Senator Mélenchon in 1990, would have been open to any two persons regardless of their sexes or of the nature of their relationship.¹²⁷ The next legislative proposal narrowed access one tick: ascending and descending relatives could not enter into the relation with one another.¹²⁸ Later still came legislative proposals that required the pair to be *a couple*. The actual legislation promulgated in 1999 limits access to the PaCS to unrelated adults who are not married or bound by any other PaCS, who have a common legal residence (but not

rights and obligations from a determinate list as designated beneficiaries; married persons and persons already in a designated beneficiary relationship ineligible, § 15-22-104(1)(a)(III, IV)); HAW. REV. STAT. §§ 527C-1 to 527C-7 (reciprocal beneficiaries: “The purpose of this chapter is to extend certain rights and benefits that are presently available only to married couples to couples composed of two individuals who are legally prohibited from marrying under state law” § 527C-1; neither party can be married or a party to another RBR, § 527C-4(2)); MD. CODE ANN. HEALTH-GEN. § 6-101 (2008) (domestic partnership; hospital visitation and medical emergencies); Md. Code Ann. Tax-Gen.. § 7-203 (2009) (property exempt from inheritance tax); MD. CODE ANN. TAX-PROP. § 7-203 (exemption from property tax); MD. CODE ANN. TAX-PROP. § 12-101 (2008) (recordation tax); MD. CODE ANN. TAX-PROP. § 12-108 (2008) (recordation tax exemptions); MD. CODE ANN. TAX-PROP. § 12-101 (2008) (recordation tax); MD. CODE ANN. TAX-PROP. § 13-403 (2008) (county transfer tax); WIS. STAT. ANN. §§ 770-001 to 770.18 (establishing a domestic partnership regime recognized under various statutes, e.g., wills, evidentiary privileges; § 770-001 specifies that “The legislature further finds that the legal status of domestic partnership established in this chapter is not substantially similar to that of marriage.”).

California and New Jersey have further innovated by allowing cross-sex couples to form CU’s if one or both of the partners is age 62 or older. CAL. FAM CODE § 297(5)(B) (“one or both”); N.J. STAT. ANN. § 26:8A-4(b)(5) (New Jersey’s repealed Registered Partnership Act; “both”). These new forms aim to assist heterosexual couples who would be disadvantaged by deeming rules in federal old-age insurance schemes. The idea seems to be that the federal DOMA would not apply to them, and partners to these CU’s could gain access to federal benefits without exposing spousal income to deeming or spend-down. The California and New Jersey monofromy rules apply; this is a direct marriage substitute, adding to the menu of options for couples with access to marriage.

¹²⁶ The remainder of this paragraph, and the notes to it, are taken almost verbatim from my article, Janet Halley, *Recognition, Rights, Regulation, Normalization: Rhetorics of Justification in the Same-Sex Marriage Debate*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 97-111 (Robert Wintemute & Mads Adenæs eds., Hart Publishing, 2001).

¹²⁷ See Daniel Borrillo, *The ‘Pacte Civile de Solidarité’ in France: Midway Between Marriage and Cohabitation*, in LEGAL RECOGNITION OF SAME-SEX PARTNERSHIPS: A STUDY OF NATIONAL, EUROPEAN AND INTERNATIONAL LAW 478 (Robert Wintemute and Mads Adenæs, eds., Hart Publishing, 2001). I am indebted to Daniel Borrillo for his careful legislative history of the PaCS.

¹²⁸ *Id.*, at n. 12 and accompanying text.

necessarily a single domicile) and who intend by their registry of a PaCS to formalize the economic interdependence of their “*vie commune*.”¹²⁹

This process of limiting access to the PaCS to relationships that resemble marriage culminated, within days of passage of the legislation, in a decision of the *Conseil constitutionnel* which construed the new law to require *sexual* attachment as an essential element of the PaCS relation.¹³⁰ Indicating that “*la vie commune*” anticipated by the PaCS legislation did not extend to a mere commonality of interests or mere cohabitation of two people, the *Conseil* held that the PaCS is available only to those who intend to lead “*un vie de couple*.” And it derived this rule from the legislation’s incest bar and form-hierarchy monofomy rule.

What happened in the RBR and the PACS has happened, endemically, in CU. Here’s how the political struggle has gone, again and again. Systems that add a new form could permit or require people to engage in several forms at once. If the content of the forms varied a lot, two entirely new possibilities would enter into the marriage system. If people could enter into more than one form, then menu-of-options plurality would resemble that on offer in the market, where players can elect between the corporate form, partnership, limited partnership, long-term contract, and so on, and can form relationships in which these forms overlap quite a bit. We are used to this in the law of business forms, where we quite happily foster the many potentially conflicting obligations set up by the intersection of different corporate forms in a loose or tight nexus of contracts. The same thing could happen in family law: we could encourage people to marry *and* to form a CU with their aging parents *and* to add on a specialized CU (promising intergenerational devotion but not financial support) to formalize their commitment to help, say, a beloved student.¹³¹

Or (or and) we could *require* them do to this, by making some or all of the forms ascriptive. To marriage we could add CLM; to active *Marvin* we could add the passive counterpart; to RBR or PaCS or CU we could add judicial imposition of each form along the lines of putative spouse doctrine, passive *Marvin*, or CLM. The result would resemble our tort system, in which people can contract for special duties of care, but in which they can also be required to shoulder the consequences of more generic ones unexpectedly, even accidentally, and retrospectively; and in which the idea that one has many intersecting relationships and duties surprises no one.

¹²⁹ Code civil [C. civ.] art. 515 (Fr). Loi no. 99-944 du 15 novembre, 1999, modifiée par la Loi 2007-308 du 03 mars, 2007, art. 13° [Law 99-944 of Nov. 15, 1999, modified by Law 2007-308 of March 3, 2007, art. 13°] JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [JORF] [OFFICIAL GAZETTE OF FRANCE], Mar. 7, 2007.

¹³⁰ Conseil constitutionnel [CC] [Constitutional Court] decision No. 99-419DC, Nov. 09, 1999, J.O. p. 16962 (Fr.).

¹³¹ This is not the alternative advocated by Martha M. Ertman, who has proposed instead that we should supplement the marriage system with contract relations. See, Martha M. Ertman, *Commercializing Marriage: A Proposal for Valuing Women’s Work through Premarital Security Agreements*, 77 TEX. L. REV. 17 (1998); Martha M. Ertman, *Reconstructing Marriage: An InterSEXional Approach*, 75 DENV. U. L. REV. 1215 (1998); Martha M. Ertman, *Contract Sports*, 48 CLEV. ST. L. REV. 31 (2000); Martha M. Ertman, *Marriage as a Trade: Bridging the Private/Public Distinction*, 36 HARV. C.R.-C.L. L. REV. 79 (2001).

We don't see that, somehow. Again and again, systems offering CU stipulate that one can't be both a spouse and a party to a civil union, and that entry into the "stronger" form terminates any existing engagement in the weaker one. Wherever this happens, and it seems so far to be almost everywhere, the menu-of-options reform represented by the addition of CU transposes status characteristics of marriage into the new form: antipolygamy becomes a requirement that the CU house only two adults;¹³² anti-incest rules are carried forward;¹³³ monogamy becomes monoformy;¹³⁴ and sometimes form-hierarchy voidness rules translating the antipolygamy and antibigamy voidness rules of marriage into the menu-of-options system aggressively enforce monoformy.¹³⁵

For all that *Marvin* and CU, when added to a system, endow it with a plurality of forms, the existing systems retain extremely strong status elements. Just as contract and status are doubly invaginated in marriage and CLM, they are doubly invaginated in one-form and pluralistic *systems*. Pluralistic systems have retained status by intensifying the status characteristics of each form and, across the system, by retaining as much of the steep drop-off as legislative ingenuity has been able to devise.

IV. Marriage as Its Effects

The degree to which marriage is integrated is a third dimension of its status as a status in our family law regime. Again, the opposite of status is not contract. The more integrated marriage is, the more it feels like status; the more disintegrated, the

¹³² HAW. REV. STAT. § 572C-5(a) (2010); CAL. FAM. CODE § 297(a) (2004); N.J. STAT. ANN. § 34:1(2)(a) (2010). These CU's provide that a marriage or CU entered into by anyone already married, in an existing civil union, or in an existing registered partnership is void. The New Jersey rule just cited displaces the equivalent rule in New Jersey's former CU regime, which provided that the formation of a marriage dissolves both parties' existing CU, if any. *See* N.J. STAT. ANN. § 8A-10.b (2007).

¹³³ HAW. REV. STAT. Title 31, Section 572C-1(1) (2010) ; Vt. Stat. Ann. Tit. 15, § 1203 (2010); Cal. Family Code § 297(b)(3) (2004); N.J.R.S.37:1-1 (2010).

¹³⁴ For legislation providing that parties to other forms cannot enter into a CU, see VT. STAT. ANN. tit. 15, § 1202(1) (2010) (parties to an existing CU or marriage cannot form a new CU); CAL. FAM. CODE § 297(b) (2) (2004) (same); N.J. STAT. ANN. § 2A:34-1(2)(a) (2010) (same); N.J. STAT. ANN. § 26:8A-4(b)(9) (2007) (waiting period after termination of a New Jersey CU before a party to it can form a new CU).

¹³⁵ These rules state a hierarchy of forms and then stipulate that if anyone enters into a second form, the weaker of the two automatically dissolves. HAW. REV. STAT. §572C-7(c) (2010) (taking out a Hawaii marriage license automatically dissolves an applicant's CU); HAW. REV. STAT. § 572C-7(d) (2010) (any marriage of a party to an CU automatically dissolves the CU); N.J. STAT. ANN. §26:8A-10(b) (2007) (New Jersey's repealed Registered Partnership Act; providing that the marriage of cross-sex over-62-year-old heterosexual registered partners to each other automatically dissolves their registered partnership). For a discussion of this novelty, see n. 124, *supra*.

more it beggars description. I will argue in this Section, however, that a legal realist understanding of marriage as we now have it requires that we take this disintegration seriously and seek ways to describe it.

As we have seen, both the pro's and the anti's in the same-sex marriage debate love to think of marriage as a status, and that involves them not only in minimizing contract and in seeking to enhance the steep drop-off, but in representing and—where they get the chance—regulating marriage as profoundly integrated. This impulse animates Justice Marshall's exaggeration of the exclusivity and permanence of Massachusetts marriage and William Eskridge's willingness to trade in no-fault for transpatial same-sex-marriage; it brings the Pope and Eskridge together in their representation of marriage as a sacred relationship, and it brings the Pope and Justice Cordy together in their representation of it as the very fabric of society; it underpins Joseph Singer's representation of marriage as a set of obligations that have no corresponding rights, that do not imply their own Hohfeldian limits, and that unite positive law with morality. Perhaps the high water mark of integration is Justice Cordy's vision, in which the relationships *between* marriages become the web for weaving a fully integrated and stabilized "social": in such a world, all marriages would be marriage all the time and everywhere, and all social life would be linked in some tight way to the marriages and to marriage.

But these are all, to some extent, jeremiads. Singer, Eskridge, Cordy, and the Pope are all bemoaning a world in which marriage is *not* in fact very integrated. It is a world in which adultery and fornication statutes are largely in desuetude—and in which most young people have had legally protected sex outside marriage, if only while they were single; in which uncontested divorce is both "quick" and "easy"—and often undertaken; in which legal marriage is a civil relationship; in which many of our most important relationships—the parent/child relation and employment to name two—do not take marriage as their practical core or even as the image in which they are made; in which a doctrine of family privacy ensures that individual marriages, unless they divorce or incur third-party obligations, almost never encounter the moment of legally enforced obligation while both spouses are living; and in which, at death and divorce—times when law does coercively impose obligations on spouses—we have very little consensus—whether as spouses, as bystanders, or as a "public"—about what those obligations ought to be.

The law of marriage is ripe for the theoretical reframing that Thomas C. Grey provided for the law of property when he addressed the disintegration of that legal domain.¹³⁶ Grey argued that, while we once imagined property—the law of property and property itself—to be integrated, we now manage and experience both of them as disintegrated.¹³⁷ We are all familiar with the idea that property regimes moved from status to contract as they shifted from a feudal identification of persons with their situation in a world constituted by legally reified property, to imagining and enforcing property as the exclusive dominion of the individual (free) owner over a reified thing,

¹³⁶ See generally Thomas C. Grey, *The Disintegration of Property*, in PROPERTY: NOMOS XXII 69-86 (J. Roland Pennock & John W. Chapman eds., 1980).

¹³⁷ See *id.*

to imagining and enforcing “property” as an almost infinitely fragmented and evanesced series of relationships of persons to one another with respect to things (and plenty of “intangibles” as well).¹³⁸ (Note that Grey was not arguing that property, having disintegrated in this way, became a less important social, distributive phenomenon.) Corresponding to this disintegration of property in the world is a disintegration of property as a legal category. Property is a bundle of rights; rights can be broken out further into Hohfeld’s jural relations. The heterogeneity of the contemporary property course—from the Rule against Perpetuities to landlord/tenant law, from the ancient tenancies in land to “the new property”—makes the course hard to teach. Students want it to be integrated by subject matter, method, source of law, but it can’t be.

I am suggesting that, when we engage in futile efforts to calibrate the degree to which marriage is status or contract, we ignore the handy tools offered to us by the legal realists for describing marriage as disintegrated—as its effects. Could we say that the consolidated formality of feudal and early-capitalist/liberal property resembles the idea of marriage as a status *as opposed to* its instrumental, pragmatic, modern fragmentation as a series of complex, intersecting relationships and disparate consequences?¹³⁹ And what if, in the ideology of marriage, integrated marriage *still lives on*, doing important work in the culture and in the law, such that, if marriage is *also* disintegrated, we encounter our third chronic ambivalence about marriage as status?

Integrated property was an effect of classical legal thinking about law in general and about property in particular; its disintegration is characteristic of contemporary legal thought. I propose that a similar updating of legal theory provides a key out of the status/contract maze and will let us imagine marriage instead as its effects. Here is a quick summary of the theoretical stakes:

1. Whereas in classical legal thought, a legal entity like contract, property, or marriage was imagined to have the same form in positive law and in society, legal realism makes a distinction between law on the books and law in action and is willing to see the many slippages between the two.¹⁴⁰

¹³⁸ See, e.g., *id.*

¹³⁹ This question may imply another: whether family law “is” a part of private law or of public law. It has always been possible to say that family law is local law such that, if there is federal family law, constitutional or statutory, it intervenes upon an original endowment of power in this domain in the states. In this construction, family law is private law. But there has always been federal family law and federal family policy, see Libby Adler, *Federalism and Family*, 8 COLUM. J. OF L. AND GENDER 197 (1999), and indeed, the family and its law have always been public in the broadest sense, in that they help constitute the nation. See NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* (2000). The rise of constitutional rights between family members in the US further cements the public-law character of large swathes of family law. Thus, whereas in Europe family law is taught as part of the private law curriculum, in the U.S. we do not classify it on the private/public-law distinction at all. To us, it crosses the line between the two domains too often to be classified either way.

¹⁴⁰ See, e.g., Llewellyn, *supra* note 6.

2. In classical legal thought, law was imagined to be destined to systematicity, so that, not only ideally but eventually and actually, it would become a perfectly logical and orderly structure, complete and gapless. Reasoning from first principles, downwards to particular cases and by analogy across them, law would emerge through the operation of deduction. This common law would inevitably “work itself pure.” The legal realists objected that judges persistently abused deduction and exploited analogy, that social policies (not logic) drove legal decisions, and that the law would never become an orderly abstract edifice but was instead an artifact dedicated to human ends. In realist work that I most admire (exemplified by Llewellyn’s *Behind the Law of Marriage*, the namesake of this Article) the social policies being pursued were often inchoate, conflicting, and phantasmatic, and the law was understood to be rife with gaps, conflicts and ambiguities.

3. Whereas in classical legal thought, law was imagined to exist independently of its consequences, the legal realists were consequentialists: for them, law was its effects. Oliver Wendall Holmes defined law as “the prediction of the incidence of the public force through the instrumentality of the courts.” “If you want to know the law and nothing else,” Holmes argued, “you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.”¹⁴¹ Law was not only what the judge would actually do; it was what a resolutely self-interested user of the legal order would anticipate happening if he sought to maximize his own gains, perhaps by exploiting gaps in enforcement and the spread between his own gains and any eventual legal sanction that might or might not be imposed on him. Holmes’ Bad Man is not necessarily an outlaw: he wants to avoid a legal sanction, and thus to avoid breaking the law as it will actually be enforced, but short of that, he also wants to act as self-interestedly as he can. He reads the law not for its aspirational reach but for its limits; not for its moral claims, but for its implicit permissions. This is what makes him Bad. The Bad Man thus divides the world into the Law and the range of permitted action that he can indulge in *beyond* the law—and if we would see the law *that way*, Holmes argues, we would see *what the law is*.¹⁴²

Revising and complicating Holmes’s formula, Llewellyn exploded the judge into “the lawmen,” opening the analysis to *all* the entities that give law its force, and added three key layers of ideology to Holmes’ art of prediction:

What will in this paper . . . be meant by “law” is . . . in the first instance and especially all that the lawmen *do*, as such. And in the second instance, what one may reasonably anticipate that they will do. And in the third instance, the rules laid down for their doing. Fourthly, the ideology about their doing prevalent among them (following

¹⁴¹ Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1896-97). Holmes’s essay is reprinted, with a very useful introduction and bibliography, in THE CANON OF AMERICAN LEGAL THOUGHT 21-43 (David Kennedy and William Fisher III eds., 2006).

¹⁴² The last three sentences appear in Janet Halley, *Does Law Have an Outside?*, OSGOOD HALL L. SCH. COMP. RES. IN L. & POL. EC. RES. PAPER SERIES 7(1) (2010).

precedent, *e.g.*). Lastly, the ideology of other folk about the law comes into the discussion.¹⁴³

Law is not only the multiple and often contradictory things that legally authorized agents actually do; it is what the users of the legal order anticipate that they will do, even if that anticipation is not fulfilled in the event. Llewellyn makes an important shift here: law is made not only by legally authorized agents but by *everyone* who alters his or her conduct or even his or her ideas to reflect predictions about how legally authorized agents will behave. And the ideology *about* law *is* law, equally so when it is held by the lawmen and by the users of the legal order. The ways in which we alter not only our conduct but our thought to take into account our predictions of the activities of the entire legal order—that is what Llewellyn thought law is.

4. American classical legal thought understood the zone of human life that fell outside of the direct command of the law to be *free*. Holmes's Bad Man may have inhabited this zone; Llewellyn's "other folk" don't. Robert Hale's legal realist critique of *laissez faire* amounted to a demonstration that the supposedly "free" contract of the laborer and his employer was pervasively coerced for both parties by a property regime that denied the laborer food if he did not work and denied the employer labor power if he did not pay a wage.¹⁴⁴ Hale enables us to speak of the constitutive role of the background rules as they create *bargaining endowments* for the laborer and the employer.

In one of the most important contributions to U.S. family law scholarship, Lewis Kornhauser and Robert Mnookin linked legal realist assumptions about law with bargaining theory, to argue that divorcing spouses derive their differential power in divorce negotiation indirectly, from the property, child custody, and child support rules that would govern if they went to court.¹⁴⁵ Regrettably from my perspective, Mnookin and Kornhauser describe the resulting negotiations as "private ordering" and thus reinstate an element of classical legal thought that Hale worked hard to abandon and which I've done my part to scotch in the "Status or Contract?" Section of this paper. For my purposes here—which include driving as sharp a wedge as possible between classical legal intuitions and legal realist ones—I'm going to return Mnookin and Kornhauser's formulation to its point of origin in Hale's "coercion" idea. I'm going to posit for legal realism the following intuitions about the law of marriage:

- a. the idea that spouses can have merged or adverse interests;
- b. the idea that the rules of marriage create bargaining endowments for them, strengthening the hand of one often at the expense of the other; and that

¹⁴³ Llewellyn, *Behind the Law of Divorce: I*, *supra* note 4, at 1297.

¹⁴⁴ Robert Hale, *Coercion and Distribution in a Supposedly Noncoercive State*, 38 POL. SCI. Q. 470 (1923). Hale's essay is reprinted, with a very useful introduction and bibliography, in THE CANON OF AMERICAN LEGAL THOUGHT, *supra* note 141, at 85-110.

¹⁴⁵ Lewis Kornhauser and Robert Mnookin, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

when spouses have adverse interests, they deal with each other in the shadow of these rules;

- c. the idea that this “bargaining in the shadow of the law”—or at least, of what the spouses *think* the law to be—does not emerge suddenly in divorce negotiations but rather permeates marriage and may even be important in conditioning their interactions on their first date; and
- d. the idea that “law in action” includes the actual outcomes of these deals. In what follows, I’ll draw on these legal realist intuitions about what law is and how it can be described in an effort to make disintegrated marriage analytically intelligible.

A. *The Grid*

What is marriage? Imagine a grid, a three dimensional spreadsheet.

On one axis, put all the consequences that the lawmen will enforce when they determine that someone is married. For a handy list of marital incidents, we can turn to the Massachusetts Supreme Judicial Court’s decision in *Goodridge*, where we find the following legal attributes of marriage which same-sex couples unable to marry could not otherwise enjoy/suffer:¹⁴⁶

- Joint filing of state income tax;
- Tenancy by the entirety;
- Spouses’ and children’s homestead claim;
- Rights to inherit from an intestate spouse;
- Rights to the elective share of the estate of a spouse who dies with a will granting less than the legal minimum bequest;
- Entitlement to wages owed to a deceased employee spouse;
- Eligibility to continue certain businesses [for instance, the dental office] of a deceased spouse;
- Right to share the medical policy of one’s spouse;
- Thirty-nine week continuation of health care coverage for the spouse of an insured who is laid off or dies;
- Preferential options under the state pension system;
- Preferential benefits in the state’s medical insurance □ program, MassHealth; Spousal benefits and preferences in veterans’ benefits programs;
- Financial protections for spouses of certain state employees (fire fighters, police officers, and prosecutors, among others) killed in the performance of duty;
- The equitable division of property upon divorce;
- Right to separate support on separation without divorce;
- Standing to claim for wrongful death and loss of consortium, as well as to claim

¹⁴⁶ See *Goodridge*, 440 Mass. at 323-35.

- funeral and burial expenses and punitive damages in tort actions involving spousal injury or death;
- Presumption of legitimacy and parentage of children born to the wife;
- Testimonial privileges—including a prohibition against spouses’ testifying against each other about private conversations, in criminal and civil cases;
- Qualification for bereavement or medical leave to care for individuals related by blood or marriage;
- Automatic “family member” preference to make medical decisions for an incompetent or disabled spouse who does not have a contrary health-care proxy;
- Application of the rules of child custody, visitation, support and removal out-of-state as part of divorce proceedings;
- Priority rights to be the administrator of the estate of a deceased spouse who dies intestate, with a right to veto the appointment of any other person proposed to take this role;
- Right to burial in the lot or tomb owned by the deceased spouse.

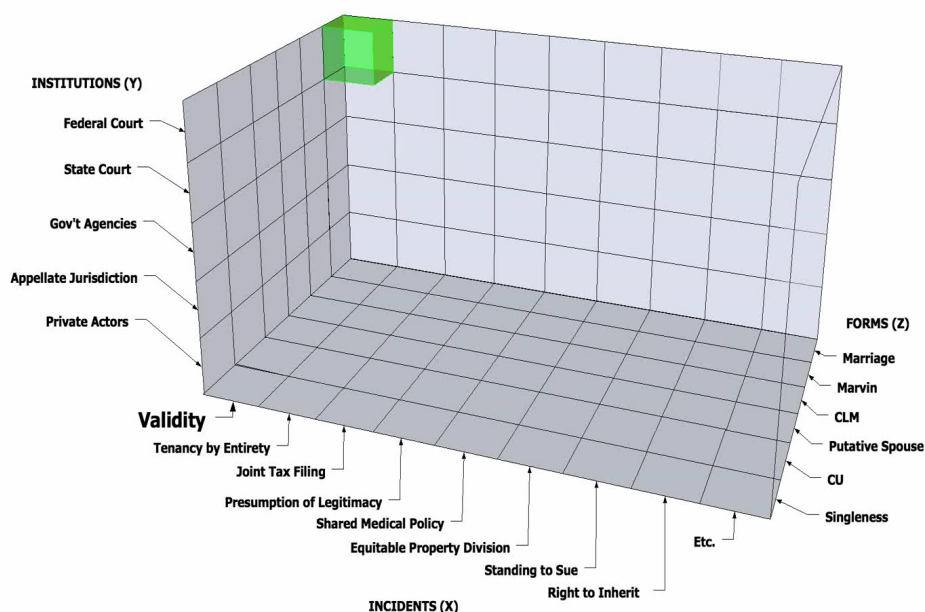
On the second axis, put the plurality of forms: singleness, *Marvin*, CLM, putative spouse doctrine, and CU. How many of the attributes of marriage do they convey? Do they provide for new rules?

And on a third axis, list the range of institutions that have legal power to bestow, impose, and deny legal force to each incident of marriage. Sometimes that power can only be exercised after someone has decided whether someone is indeed married; if that is a different entity than the one enforcing the incident, add that entity too. Display the jurisdictional variables: does more than one state have jurisdiction to decide the question? If so, what law will that state choose for adjudicating it: its own law or the law of some other state? Is there a federal system overarching and permeating the states that has jurisdiction? Does it have any relevant law or choice of law rule? Following Llewellyn, we need to take into account not only judges but all the lawmen: governmental agencies and private entities like employers and insurers often allocate the effects of marriage and thus have to decide who is married, so they need to be listed on the second axis. And finally, how much finality does each of these fora attach to its decisions within its own horizontal and vertical authority structure, and how much deference does it get from other decisionmakers? Legal decisions can come out differently over time because of appeals within a system; multiple adjudications of the same question often escape foreclosure through finality doctrines like collateral estoppel and *res judicata*. And as we’ve seen in *Maynard v. Hill*, marriage can sometimes be attributed not only prospectively but retrospectively; it’s possible *to have been married or single*, and not to find out until after you’re dead! Somehow, build those variables into the second axis.

The point of this exercise is to face an amazing fact: the question whether two people are married or not, and the question whether they will enjoy/suffer any particular attribute or incident of marriage, can be decided differently for different incidents—in different fora within a state, in multiple states, in federal systems, by

bureaucrats, by private employers, by institutions of higher education, always with various choice of law practices potentially changing the law that's actually applied. Anticipation and retrospection pervade the system.

FLICKERING MARRIAGE



Here are just two sides of this grid, elaborated only for eleven of the roughly forty-one obligations/benefits listed in *Goodridge* and only for forum. I make no attempt at a complete list of the possible fora.

Joint filing of state income tax: Massachusetts Board of Assessors, federal IRS; criminal prosecution for tax fraud by state or federal prosecutors; private entities to which individuals disclose their income tax returns, for instance academic institutions' financial aid offices.

*Tenancy by the entirety and spouses' and children's homestead claims:*¹⁴⁷ bankruptcy court; courts of general jurisdiction adjudicating property claims from trespass to eminent domain, tort claims from guest statutes to nuisance; probate court in disputes raised by heirs; local government officials deciding real estate tax liability and rights to notice of zoning waivers; private entities including mortgagors and insurers (casualty and liability).

¹⁴⁷ Summarized as "a form of ownership that provides certain protections against creditors and allows for the automatic descent of property to the surviving spouse without probate." *Id.* at 323.

Rights to inherit from intestate spouse; elective share; dower: courts of general jurisdiction if the spouse seeks a declaration there; probate court if heirs contest; bankruptcy court if creditors seek to coerce the beneficiary of the claim to take advantage of it.

Entitlement to wages owed to a deceased employee: same as inheritance rights immediately above, but add any dispute processes inside the employment relationship and/or union which a claimant must exhaust before turning to litigation.

Eligibility to continue certain businesses [for instance, a dental office] of a deceased spouse: same as rights to inherit, but add courts of general jurisdiction hearing claims by the partners of the deceased; landlords managing rental contracts; professional licensing bodies; courts of general jurisdiction hearing claims made by consumers or patients.

Right to share the medical policy of one's spouse: insurers; HMO's; medical facilities providing services; dispute resolution process specified by the insurance policy.

Thirty-nine week continuation of health coverage for the spouse of a person who is laid off or dies: employers, unions, insurers, doctors certifying disability.

Preferential options under the state pension system: the state pension system itself; courts of general jurisdiction hearing claims under the system; federal and state courts enforcing ERISA.

Preferential benefits in MassHealth, the state's medical program: MassHealth and all cooperating physicians; any medical provider in the world which has provided goods or services which may or may not be covered. The listed benefits include a right to bar the placement of a lien on long-term care patient's former home if the spouse still lives there, so add all the fora that can end up adjudicating rights to real estate invoked by all the parties that might have competing claims to the property or to mortgages, attachments and liens on the deed.

The fora listed above could decide the question whether Amy is married or not *differently*. If the Massachusetts system included a plurality of forms, they could also decide that Amy is CLMarried, *Marvinizing/Marvinized*, or a putative spouse . . . also differently. Even if the only decisionmakers were courts, the system involves so many diverse parties with so many diverse claims that *res judicata* and collateral estoppel will not bar a subsequent court from redeciding that question . . . again possibly differently. The range of possible conflicts in outcome with respect to the questions "Is Amy married? To George?" (let alone the possible remedial consequences) is vast.

So . . . imagine yourself, securely married, sitting at the kitchen table. I propose that you could, and sometimes that you do, think of your marriage as legally real only to the extent that these possible contingencies can be expected to produce the decision that you are married. Even if you are more credulous and imagine that you are married in essence, it would be a highly realist thing for a law professor trying to understand the situations of millions of people like you to determine that you are married only when, in the far-flung cells of the grid, relevant decisionmakers can be predicted to say that you are married. Over time and space, across jurisdictions, and depending on whether the question even comes up for a legal decisionmaker—your marriage *flickers*; and sitting at the kitchen table, if you think about it at all, the intensity with which it flickers generates your sense of what you can expect of your spouse, how hard you can bargain with him or her, what risks you are running when

you let a fight erupt or decide to get pregnant or to move to (or even take a vacation in) another state.

Imagine further that you know you are married because you know that every single decisionmaker in the system will decide that you are. Will you enjoy/suffer any particular incident of marriage? Are the obligations of marriage any more secure from the contingencies of the grid than the fact of marriage? I think not.

The grid answers the question: is it more *realistic* to see marriage as integrated or disintegrated? Status concepts and status practices would consolidate marriage. Status ideology works hard to give us a “marriage culture” in which marriage and singleness do not flicker and in which they thoroughly pervade the social field. But, seen through a legal realist lens, the regime we have is highly disintegrated.

B. Modes of Integration and Disintegration

Seeing marriage as its effects can seem quite counterintuitive, difficult to master. In this subsection I consider three dimensions along which particular marriages can (need not, but can) flicker: time and space, in gaps between law in the books and law in action, and through the intensification or loosening of legal operativity.

1. Time and Space

CLM doctrine and, less powerfully, putative spouse doctrine can produce holdings that people who think they are single are actually married and vice versa. They can do so in probate, and therefore after the person whose marriage or singleness is in question has died. These doctrines thus also change, in retrospect, the legal identity of many spouses. They can make marriages that were valid up till their application into bigamous, and thus invalid, unions.

A similar thing can happen even in tightly organized vertical court systems with a right of appeal, strong *stare decisis* practices, and effective *res judicata* and collateral estoppel rule of law practices. Within such a system, a case going up for appeal and down again on remand can produce more than one ruling on whether two people are married and what follows remedially from that decision. Very often, the doctrines and rules being applied can make it seem “right” to the judge to say two people are married and “right” to another judge to say they are not. You need a skyhook—or classical legal thought—to avoid the sense that marriage and not-marriage exist in some suspense between prospect and retrospect, even in strong rule of law systems.

All of these complex effects are multiplied when multiple jurisdictions can be invoked.¹⁴⁸ Imagine that an Egyptian man living in Egypt is legally married to two women. Egyptian law allows him to have four wives; the practice is disfavored, but it exists. If he comes to the U.S. with his wives, and the legal status of the second wife

¹⁴⁸ I characterize these multiple jurisdictions as spatial because that is what they so predominantly are in the U.S. But they need not be: in a personal law system like Egypt’s, India’s, or Nigeria’s, for instance, different bodies of marriage law apply depending on the parties’ religious affiliation, not on their geographical location.

comes up for adjudication, what might happen? A state prosecutor might decide to prosecute him for bigamy.¹⁴⁹ But at the same time a merchant who had sold necessities to the second wife could sue the husband under the doctrine of necessities: the criminal prosecution would not preclude relitigation of the question of marriage *vel non*. Could the wife maintain a divorce action against the husband? Note that the wife, and perhaps the husband, have contradictory strategic interests in the validity of the marriage: if she wants to avoid the suit by the merchant, she has an interest in claiming the invalidity of her marriage; if she wants to obtain a divorce under American property division rules, she has an interest in asserting its validity. And we could break the marriage up into its incidents, saying (as one California court has done)¹⁵⁰ that inheritance by both wives is legally appropriate, but maintaining the proviso that, if the husband had attempted polygamous cohabitation in the state, the court would have declared *the same marriage* void. Though our Egyptian husband really does have two wives if they all stay in Egypt, if they—or even if only he—come to the U.S., his marriage to the second wife flickers, over time and space.

Part II of this paper examines in depth the rules that apply when a marriage is performed in a state which considers it valid, and the couple, one spouse, or an incident of the marriage travels to another state where the marriage could not have been performed. It is enough for now to note that this problem is almost identical to the problems faced by our polygamous Egyptian husband and his second wife, and that—up till now anyway—we’ve accepted a highly disintegrated way of giving such a marriage legal effect.

What is the opposite of temporally and spatially variable marriage? What would marriage, integrated on these dimensions, look like? I think you have to imagine something like a married couple living its entire lifespan in a medieval European citystate, or colonial Massachusetts, or some similarly closed legal system. Everyone would notice the marriage at its inception; everything about the couples’ life would be adjusted to recognize the centrality of the marriage to the spouses’ status as persons; none of the legal incidents of the marriage would leave town or come in from outside; the legal system and the culture, agreeing as they would as to the fact of marriage and its legal consequences, would give smooth, uncontroversial enforcement to all the incidents of marriage; and no outside legal entities (like a church or an empire) would have any legal purchase on the consequences of the marriage. If you lived in such a system, *all* the consequences of marriage would befall you 24/7. Part of the reason the story of Martin Guerre is so poignant is that it shows how space (Martin’s departure and the possibility that he has returned) and time (his aging, everyone’s forgetting, making it plausible to assert doubt as to his identity) could pierce even this idyll of marital integration.¹⁵¹ To the extent that proponents of marriage as status

¹⁴⁹ See *People v. Ezeonu*, 588 N.Y.S.2d 116 (N.Y. Sup. Ct. 1992), upholding the conviction of a Nigerian immigrant for statutory rape of his 13-year-old second wife. The marriage was valid in Nigeria.

¹⁵⁰ *In re Dalip Singh Bir’s Estate*, 188 P.2d 499 (Cal. App. 1948).

¹⁵¹ See generally JANET LEWIS, *THE WIFE OF MARTIN GUERRE* (Swallow Press, 1967) (1941); and NATHALIE ZEMON DAVIS, *THE RETURN OF MARTIN GUERRE* (1983).

seek integration in space and across time (not status as not-contract and not status as the steep drop-off), it seeks this consolidation. We are often encouraged to think of the contingencies of disintegration as chaos, a symptom of social disorder, the demise of marriage, civilization under threat from a hedonistically motivated metastasis of family forms. But it can also be a way of spreading state power to impose marital obligations wherever marriage-like relationships emerge. Consider here that Louisiana not only pioneered covenant marriage; it also has one of the most vigorous putative marriage regimes going. In Louisiana, it is entirely possible for a woman to be covenant-married to a man who proceeds to form a vanilla marriage with a second woman, fails to divorce either of them by either method, and dies. The little-known putative spouse doctrine ensures that the wives are in for a surprise: they will be forced to share his assets with each other.¹⁵² The strong presumption of monogamy is defeated in the very state that introduced a partial return to fault divorce! And a web of marital property relationships is calmly recognized and managed by one of the most “conservative” jurisdictions in the U.S.

2. *Law in the Books/Law in Action*

Let's say you are a woman married to a man who is your second cousin, and that such marriages are deemed void by virtue of an unambiguous statute in the state of celebration. He is out of state filing divorce papers against you right this minute. Or look in the crystal ball: your children know that you married your cousin in a jurisdiction prohibiting such unions, and after your death they will challenge the validity of your marriage, hoping that the proportion of your estate falling to them will be larger. Or imagine that your husband is in the intensive care unit in a state that recognizes cousin marriages, racking up huge hospital bills that you can't afford to pay: if the hospital sues you under the doctrine of necessities, will you try to invalidate your own marriage, invoking a choice of law rule selecting the *lex loci celebrationis* in order to avoid responsibility for his immense medical bills?

Imagine that you are a Mexican day laborer working in Los Angeles without documentation. You are married to a woman living in Mexico; absolutely no paper record of this marriage exists, however. You regularly send a large portion of your earnings to her, and she spends the money on her own needs and the needs of several children (some born to you both, some born to her without your help, and some your affines from your two extended families). You move in with another woman and cohabit with her: you eventually have a private “wedding” (unofficial) and as a result she believes you are married to each other. You support each other and hold yourselves out as married; you are investing together in a small condominium. Children are born into your household; both you and the mother of these children assume you are their father. Eventually you become a naturalized citizen of the U.S. and stop sending money to your first wife.

Are you married? And if so, to whom?

¹⁵² In re Succession of Jones, 08-1088 (La. App. 3 Cir. March 4, 2009); 6 So.3d 331.

One answer—the formalist one—would test “the facts” against “the rules” and produce the “right answer.” Depending on lots of factors, this answer might be pretty solid, something like “what most judges faced with your case would say under most conditions.” But it might not come out that way in action. You might run aground legally in a number of places: your marital status could be adjudicated or determined administratively under a number of different scenarios (during your life if you are prosecuted for immigration fraud; after your death if your second wife seeks to inherit or, even if she doesn't or is determined to be a mere putative spouse, by your kids challenging your marriage as incestuous and void, and so on). Moreover, if you *knew* you were running any of these risks, their very possibility would be part of your understanding of your marital status.

And you might go through your whole life, practically speaking, divorced without knowing it, never effectively married without knowing it, married to a bigamist, or married to two women, or married to one woman and cohabiting without any legal consequences with another.

Here's how that might unfold. Susan and George are legally married. They drift apart, though; one of them moves out to an apartment, and then to a different city (let's say, in the same state). They forget each other. They both then fall in love again, with Jorge and Esmeralda respectively, and marry them. Technically these second marriages are bigamous. The basic rule in our system is that the second marriage is void, that it does not exist. But let's say that no one ever has occasion to get a legal ruling to that effect, that Susan and George die, and Jorge and Esmeralda die, and all their children, if any, die, and all their estates are resolved in probate, on everyone's assumption that Susan is legally married to Jorge and George to Esmeralda. Susan and George were married on the books, but in action they weren't. With respect to the very question whether they were married or not, their marriage is double, not single—disintegrated, not integrated.

Classical legal thought would ask us to see these second marriages as legal nullities and to cognize the first spouses as married to each other throughout their lives. In each of my examples, it would “integrate” the first marriage. Legal realism can, and does, disintegrate the first marriages in an existential sense: they both did and did not exist. Working with the grid, we can see Susan's marriage to Jorge as a real marriage, enjoying real legal enforcement, despite its lack of formal validity.

In Part III.D.2 above, I noted the strong preference of emerging menu-of-options systems to reproduce the idea of monogamy, restricting people to participation in only one form at a time, with only one person at a time—the new monofomy rules. Putting menu-of-options systems on the grid indicates that, *in action*, they tolerate a great deal of actual or potential polyfomy. In the real world people living in menu-of-options regimes can enjoy/suffer participating in more than one form at the same time. Imagine this: one party to a cross-sex married couple in New Jersey moves out and cohabits with someone else. It happens all the time, for instance, pending divorce of the first relationship. Will this second association be *Marvined*? What if the cohabitants register their relationship as a CU with an employer or locality? This couple would have to fudge a little to do this: CU programs typically require the partners to aver that they shoulder mutual support duties that are much heavier than

those imposed on marital spouses, much less *Marvinizers*. But they could draw down lots of employment insurance before the employee partner quit her job. What if they split up? If the low-earning partner doesn't seek *Marvin* remedies (relying perhaps on the CU documents to equitably estop the high-earner-partner from invoking a claim that they had contracted out of *Marvin*), they would have lived a substantial part of their relationship *both* as non-*Marvin*ing singles *and* as CU's and would revert to perfect singleness only if and when the relationship breaks up and the CU is dissolved.

Thus, the second dimension of the grid asks us to ponder how *competing* claims of a married spouse, a common law married spouse, a party to a CU, a *Marvin* cohabitant and a putative spouse would be adjudicated in the state—if there is one—that recognizes all these forms. In our marriage system, we permit forms that would surprise no one in the business context but that seem quite off sides in family law because of its strong overlay of status thinking.

3. *Operativity*

Here, let's imagine that a cosmopolitan couple, Lori and Amr, marry but decide not to live together, not to have sex with each other, not to mind if each of them sleeps with other people, not to share any aspect of their finances. Their relationship might still be the most important intimacy in their lives.

This marriage deviates quite significantly from marriage as status because the legal rules just don't seem to affect Lori and Amr. In our system, a doctrine of marital privacy enables people to render the rules inoperative for long periods of time. As long as the doctrine of marital privacy holds, that is, as long as neither of them dies and no third party finds a way to intervene legally, no one can sue Lori and Amr to force them to conform to the assumption that marriage is a sexually monogamous, cohabiting relationship involving significant financial dependency. I'll spell out the coercions they could not avoid in a moment. Let's suppose that none of them arise. The doctrine of family privacy makes these legal expectations *less operative* in the case of this particular marriage.

The rules could become more operative, however. Third parties *can* intervene. As we have seen, the doctrine of necessities allows claimants who have provided "necessary" goods or services to a married person to sue his or her spouse for compensation. A merchant or hospital could sue Lori or Amr and make them act married.¹⁵³ A college financial aid program or a social-welfare system like Medicaid or TANF can deem Lori and Amr to be mutually supporting and impute income earned by one to the other. If that happened, their relationship to the state or to the school they are attending would be altered by fact of their marriage whether they liked it or not. And there are always death and divorce: once married, Lori and Amr are highly unlikely to exit the relationship without considerable state interference in their cosmopolitan plans.

¹⁵³ See *Jersey Shore Med. Ctr.—Fitkin Hosp. v. Baum's Estate*, 84 N.J. 137 (N.J. 1980).

I don't think it is helpful to say that Lori and Amr have traveled partway from status to contract. They have made an agreement, to be sure, but it's not a contract. Looking at their relationship as a temporally, spatially variable legal form, multiplied along the first and third dimensions of the grid, allows us to see their cosmopolitan practice as an intrinsic part of their marriage that can and might well be punctuated by legal interruptions enforcing the rules of marriage. Even when living their cosmopolitan lives, their bargaining positions vis à vis each other are altered by their marriage and the possibility of these interruptions. The precise contours of these enforcements and nonenforcements constitute their marriage. Their marriage is its effects.

V. Thinking Marriage Otherwise: Why Do It?

This Article argues that the status/contract distinction is not a two-dimensional spectrum along which marriage moves. Rather, it is an intensely contradictory ideology *about* marriage and about every other element in the marriage system: singleness, *Marvin*, CLM, putative spouse doctrine, and CU.

The most important ideological consequence of our commitment to the status/contract distinction is the retention of the very idea that marriage or any other element of the system delivers status: a normatively compelling, fundamental legal personhood saturated with public normativity. This Article argues that a shift in attention to the marriage system, and to seeing marriage legally-really as its effects, can startle that ideological phantom and threaten it with evaporation. Nothing will ever make it really go away, but we can stretch our imaginations—and in this Article I offer the marriage system and the grid as ways to do that—in the effort to weaken it.

But why would we want to weaken the phantom of status? The proponents of status in the same-sex marriage campaign—both of the right and of the left—collude in misdescribing this important institution. They propound ideas not only about marriage but about law: there, they are neoclassicals, neoformalists. They would take our eye off of the immense distributive effects of marriage and its alternatives. But the real normative issue is not whether marriage is or should be status or contract, but whether marriage and its alternatives distribute in ways that we think are just. Addressing that question requires that we attend first to description: *how do marriage and its alternatives distribute?* Part I of this Article argues that they distribute across the system in ways that can be made visible only with something like the marriage system and a shift in attention from marriage as essence to marriage as its effects. Part II will extrapolate that argument to address the problem of interstate recognition of same-sex marriage. I will be presenting a textbook case of the distortions produced by the idea that marriage is status. I will argue there that actual constituencies of the same-sex marriage movement have been concretely injured—distributively disadvantaged—by their own advocates' enchantment with the phantom.