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## **Marriage on Our Own Terms**

Teri Baxter

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2017

# Marriage on Our Own Terms

Teri D. Baxter, *University of Tennessee College of Law*



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# MARRIAGE ON OUR OWN TERMS

TERI DOBBINS BAXTER<sup>∞</sup>

## ABSTRACT

States' right to regulate marriage is generally accepted without question. While many have challenged particular restrictions related to who may legally marry, few have questioned whether the state should have any role in regulating the marital relationship. But state regulation of marriage is not limited to a gatekeeping function. Historically, many rights of married couples—particularly married women—were determined by common law or by statute. Yet while the amount and degree of regulation has decreased significantly in the last century, states still play an important role in defining key aspects of the marital relationship.

This article begins a new conversation that considers the future of state marriage regulations, with a focus on laws regulating marital property rights. Despite their potentially life-altering impact, many couples enter into marriage ignorant of the scope, nature, or effect of marital property laws. While states generally allow couples to alter the default rules by entering into a prenuptial (and in some states, postnuptial) agreement, only those who are aware of the state default rules and who have the means to contract around them are able to enter into marriage on their own terms. The article concludes that with respect to property rights, states should continue to provide default rules that govern those rights after marriage, but they should give couples the ability to choose alternate rules that better reflect their intentions without the need to execute a prenuptial agreement. Specifically, states should provide couples with information and options when they apply for a marriage license that allow them to make an informed choice about how property owned by each party before the marriage and property acquired during the marriage will be treated under state law.

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## I. INTRODUCTION

In recent years, marriage has been the subject of significant debate and litigation, primarily focused on whether same-sex couples should be allowed to marry.<sup>1</sup> In the midst of all the controversy surrounding state bans on same-sex marriage, the states' right to regulate marriage was accepted as obvious and correct; as one state court put it, "It is axiomatic that states have absolute jurisdiction over the regulation of the institution of marriage."<sup>2</sup> This belief is so well-entrenched that few questioned it even as the Supreme Court recognized the right to marry as a fundamental right protected by the United States Constitution.<sup>3</sup>

But state regulation of marriage is not limited to a gatekeeping function. Historically, many rights of married couples—particularly married women—were determined by common law or by statute. For instance, a woman's right to own or manage her own property, and a husband's liability for his wife's debts and crimes, were both previously regulated by state law.<sup>4</sup> Yet while the amount and degree of regulation has decreased significantly in the last century—and all of those regulations have been restricted or overruled by case law or statute<sup>5</sup>—states still play an important role in defining key aspects of the marital relationship, including marital property rights.

Despite their potentially life-altering impact, many couples enter into marriage ignorant of the scope, nature, or effect of marital property laws. While states generally allow couples to alter the default rules by entering into a prenuptial (and in some states, postnuptial) agreement, only those who are aware of the state default rules and who have the means to contract around them are able to enter into marriage on their own terms.

Now that the Supreme Court has decided *Obergefell*, it is time to move the conversation beyond who the state can allow or forbid to marry and begin to consider whether state law should continue to regulate marriage at all; if so, we must decide whether and how the role of the state should change. This article begins that conversation by considering the future of state marriage regulations, with a focus on laws regulating marital property rights. The article concludes

1. The recent Supreme Court decision in *Obergefell v. Hodges* resolved the constitutional question in favor of same-sex couples and held that states' refusal to allow or recognize same-sex marriages violates the couples' liberty interests under the Fourteenth Amendment's Due Process and Equal Protection provisions. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599, 2602–03 (2015).

2. *Pinkhasov v. Petocz*, 331 S.W.3d 285, 291 (Ky. Ct. App. 2011); *see also* *Loving v. Virginia*, 388 U.S. 1, 7 (1967) (conceding that "marriage is a social relation subject to the State's police power").

3. *Loving*, 388 U.S. at 12 ("Marriage is one of the 'basic civil rights of man,' fundamental to our very existence and survival."); *Obergefell*, 135 S. Ct. at 2598 ("the [Supreme] Court has long held the right to marry is protected by the Constitution").

4. LENORE J. WEITZMAN, *THE MARRIAGE CONTRACT* 1–2 (1981).

5. *Id.* at 2.

that while states will almost certainly continue to exercise some regulatory authority over marriage, that authority should be greatly limited. With respect to property rights, states should continue to provide default rules that govern those rights after marriage, but they should give couples the ability to choose alternate rules that better reflect their intentions without the need to execute a prenuptial agreement. Specifically, states should provide couples with options when they apply for a marriage license that allow them to choose how property owned by each party before the marriage and property acquired during the marriage will be treated under state law.

Part II discusses the historic role of church and secular authorities in regulating marriage in England and colonial America, and how that role has changed over time. Part III identifies the types of regulations that states have historically imposed, including the prerequisites for marriage, the obligations of each spouse, and the recognition of common law marriages. Part IV traces the history of divorce in England and the United States. The reasons behind the declining role of the state in regulating marriage, as well the enduring role of the state in regulating property rights, are explored in Part V.

Part VI identifies and evaluates four potential models of state marriage regulation going forward: (1) maintaining the *status quo* in which state regulations are decreasing in number but still control crucial aspects of marriage unless the couple takes the initiative to execute a prenuptial agreement; (2) allowing religious entities to regulate marriage, leaving non-religious couples the option of some form of “civil union” or common-law marriage; (3) moving to a contract theory of marriage, with all terms drafted by the couple and with the state’s role limited to contract enforcement; or (4) allowing states to have a minimal regulatory role regarding marriage but empowering couples to choose key terms of the marital relationship, such as property rights.

Part VII concludes that this final option best achieves the goal of providing greater information and autonomy for married couples while not unduly burdening the couples or state courts tasked with enforcing the agreements. Finally, this section discusses marital property rights as an example of a choice that couples should be allowed and enabled to make to define the terms of their own marriages.

## II.

### HISTORIC ROLES OF THE CHURCH AND THE STATE IN REGULATING MARRIAGE

The marital relationship has a public and a private component. While it is often a deeply personal and intimate relationship, the state determines whether the relationship will be legally recognized and reap the government-sponsored benefits of that recognition. This role of the government in defining and regulating marriage has evolved significantly over time. Understanding this history provides necessary context to the discussion of whether the state’s role in



regulating marriage should remain the same, continue to evolve, or disappear entirely.

In one of the earliest United States Supreme Court cases to address the states' role in marriage, Justice Field described marriage as "something more than a mere contract,"<sup>6</sup> explaining that:

The consent of the parties is of course essential to its existence, but when the contract to marry is executed by the marriage, a relation between the parties is created which they cannot change . . . The relation once formed, the law steps in and holds the parties to various obligations and liabilities . . . "When the contracting parties have entered into the married state, they have not so much entered into a contract as into a new relation, the rights, duties, and obligations of which rest not upon their agreement, but upon the general law of the State, statutory or common, which defines and prescribes those rights, duties, and obligations. They are of law, not of contract."<sup>7</sup>

Thus marriage is a quasi-contractual relationship whose terms, rights, and obligations have historically been defined by the state.

Yet marriage has not always been regarded as a civil contract subject to government regulation.<sup>8</sup> As one scholar has explained:

Common law marriage has its origins in the informal forms of marriage common in Europe prior to the Reformation . . . Marriage was regarded as a private affair, a thing between families, rather than a matter in which the state (or whatever formal legal institutions existed at the time) had an interest. Apart from noble or very wealthy families, where a great deal was at stake economically in the union of their children, marriages tended to be entered into with a minimum of formality.<sup>9</sup>

The Church of England eventually became the predominant body to exercise control over the institution of marriage in England, and canon law applied until the mid-eighteenth century.<sup>10</sup> By contrast, in colonial America, secular authorities began regulating marriage long before the Declaration of

6. *Maynard v. Hill*, 125 U.S. 190, 210–11 (1888).

7. *Id.* at 211 (quoting *Adams v. Palmer*, 51 Me. 481, 483 (1863)); see also *United States v. Windsor*, 133 S. Ct. 2675, 2692 (2013) ("The States' interest in defining and regulating the marital relation, subject to constitutional guarantees, stems from the understanding that marriage is more than a routine classification for purposes of certain statutory benefits.").

8. Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 718 (1996).

9. *Id.*

10. Hazel D. Lord, *Husband and Wife: English Marriage Laws from 1750: A Bibliographic Essay*, 11 S. CAL. REV. L. & WOMEN'S STUD. 1, 1 (2001).

Independence or Articles of Confederation freed the colonies from British rule.<sup>11</sup> Yet secular control did not signal freedom from regulations. Regulations still denied couples the right to set the terms, or define the rights and obligations, that would govern their legal union.

*A. From Ecclesiastical to Secular Regulation of Marriage in England*

In medieval times, marriages were fairly informal.<sup>12</sup> The Church<sup>13</sup> required only wedding vows spoken in the present tense (distinguishing marriage from betrothal) freely uttered by two people who were legally allowed to marry.<sup>14</sup> Moreover, by this time marriage was indisputably between one man and one woman.<sup>15</sup> The Church tried to impose formalities that would make it more difficult for couples to marry<sup>16</sup> because the medieval church recognized a binding marriage whenever two people legally capable of marrying freely uttered wedding vows.<sup>17</sup> Such vows were easily (and sometimes inadvisably) made and could not be dissolved, since marriage was a status that continued until death.<sup>18</sup> The concerns of the Church were shared by wealthy families who worried that their children might enter into objectionable marriages without parental approval.<sup>19</sup> In response to those concerns, the Church required marriage vows to be made publicly and to be solemnized by a priest.<sup>20</sup> Additionally, banns<sup>21</sup> had to be published for three consecutive weeks prior to the ceremony.<sup>22</sup>

In spite of the efforts by the Church and wealthy families, many couples ignored the requirements and entered into “clandestine” marriages.<sup>23</sup> Reasons for

11. Bowman, *supra* note 8, at 719 (noting that the Massachusetts Bay Colony was settled by Dissenters from the Church of England who passed laws concerning marriage as early as 1639).

12. See R.B. OUTHWAITE, *CLANDESTINE MARRIAGE IN ENGLAND, 1500-1850* 2 (1995) [hereinafter OUTHWAITE, *CLANDESTINE MARRIAGE*].

13. The English Church (also known as The Church of England) accepted the authority of the Pope in Rome until Henry VIII’s Ecclesiastical Licenses Act of 1533. Lord, *supra* note 10, at 1.

14. Lord, *supra* note 10, at 3. The minimum age for marriage was fourteen for boys and twelve for girls. *Id.* In addition, neither party could be married already or related within prescribed boundaries of consanguinity or affinity. OUTHWAITE, *CLANDESTINE MARRIAGE*, *supra* note 12, at 3.

15. See Lord, *supra* note 10, at 3; William N. Eskridge, Jr., *A History of Same-Sex Marriage*, 79 Va. L. Rev. 1419, 1469 (1993). In contrast to the relatively open and tolerant attitudes expressed during the eleventh and twelfth centuries, Europe after 1200 increasingly persecuted people for any kind of behavior that transgressed established gender lines, including not just same-sex intimacy but also aggressive, independent behavior such as cross dressing by women. *Id.*

16. Lord, *supra* note 10, at 3–4.

17. *Id.* at 3.

18. *Id.*

19. *Id.* at 6.

20. *Id.* at 3.

21. “Banns of matrimony” are a form of public notice that a couple intends to marry, which allow objections to be voiced before the wedding. *Banns of Matrimony*, BLACK’S LAW DICTIONARY (10th ed. 2014).

22. Lord, *supra* note 10, at 3–4.

23. *Id.* at 4.

clandestine marriages varied.<sup>24</sup> Some couples could not afford the fees imposed for Church-sanctioned marriages.<sup>25</sup> Laborers, soldiers, and sailors were sometimes unable (or unwilling) to wait or travel to the parish church three successive Sundays for the publication of banns.<sup>26</sup> Children sometimes sought to marry over parental objections.<sup>27</sup> Servants whose masters forbade marriage or who wanted to stay in their employer's good graces while serving out their term would marry in secret.<sup>28</sup> Pregnant women might want a less public wedding.<sup>29</sup> Some wealthy and aristocratic citizens desired marriage by license because the thought of having banns read offended their sensibilities.<sup>30</sup> That list is not exhaustive:

Others seeking privacy might have included widows or widowers marrying too soon after the death of a spouse, couples of disparate age, social status or religion, bigamists, bankrupts and persons with fraudulent intent. Finally, many people who were not willing to meet the clerical requirements for reasons of conscience, among them Roman Catholics, Jews, Quakers, Baptists and other Protestant nonconformists, devised their own marriage rituals.<sup>31</sup>

Although clandestine marriages were prohibited and participants risked fines,<sup>32</sup> such marriages were "unquestionably valid"<sup>33</sup> and gave couples the legal benefits associated with solemnization without the cost or inconvenience of banns or licenses.<sup>34</sup>

Eventually, over half of the residents of London were entering into clandestine marriages at the Fleet prison, which became a popular site for such marriages by people of all classes and backgrounds.<sup>35</sup> In response to the

24. OUTHWAITE, *CLANDESTINE MARRIAGE*, *supra* note 12, at 54.

25. Lord, *supra* note 10, at 4.

26. *Id.* at 5; OUTHWAITE, *CLANDESTINE MARRIAGE*, *supra* note 12, at 61.

27. Lord, *supra* note 10, at 5.

28. OUTHWAITE, *CLANDESTINE MARRIAGE*, *supra* note 12, at 59.

29. *Id.* at 60. While being pregnant at the time of the marriage was not particularly shameful, brides may have wanted to avoid the mockery that came with being married while obviously pregnant, or the risk of punishment for pre-marital sexual relations. *Id.*

30. *Id.* at 62 (noting that upper classes had always married privately and did not wish to have the banns and consent sought from every commoner in the parish).

31. Lord, *supra* note 10, at 5.

32. The couple being married as well as the witnesses were subject to prosecution for violating canon law. R.B. OUTHWAITE, *THE RISE AND FALL OF THE ENGLISH ECCLESIASTICAL COURTS, 1500-1860* 51 (2006) [hereinafter OUTHWAITE, *RISE AND FALL*].

33. MARTIN INGRAM, *CHURCH COURTS, SEX AND MARRIAGE IN ENGLAND, 1570-1640* 134 (1987).

34. *Id.*

35. OUTHWAITE, *CLANDESTINE MARRIAGE*, *supra* note 12, at 62. When St. George's chapel was built in the 1730s, its incumbent, Alexander Keith built up a thriving trade in marriages. *Id.* at 52. His booming business was at least partially responsible for the decline in business at St. George's Hanover Square and invoked the ire (and perhaps jealousy) of its Rector who had Keith

increasing popularity of clandestine marriages, the Church enacted canons of 1597 and 1604 that placed tighter controls on the issuance of licenses and conduct of marriages.<sup>36</sup> Those canons did not eliminate clandestine marriages, but decreased their frequency.<sup>37</sup> Substantial and significant change did not come until 1753, with the passage of *An Act for the Better Preventing of Clandestine Marriages* (the Marriage Act).<sup>38</sup> Under the Marriage Act: (1) with the exception of weddings for Jews or Quakers,<sup>39</sup> only weddings performed in the chapel or a parish church of the Church of England after publication of banns were legally binding;<sup>40</sup> (2) all church marriages were required to be entered in the parish register and signed by the bride and groom; (3) “all marriages which occurred at times or in places defined as illegal by the 1604 canons”<sup>41</sup> were declared invalid; (4) no minors could marry without consent of parents or guardians;<sup>42</sup> and (5) secular courts—not ecclesiastical courts—had the power to enforce the law.<sup>43</sup> The last change was revolutionary, as Hazel Lord explains:

[F]or the first time, the state was actively participating in the regulation of marriages. While the Act itself was later substantially repealed, its passage marked the first encroachment on the jurisdiction of canon law. The Act regarded marriage as a contract like any other, where a secular legislature could regulate and determine under what circumstances it could be declared null and void.<sup>44</sup>

As will be discussed below, the relatively long and unbroken history of ecclesiastic control of marriage in England stands in contrast to the almost immediate secular involvement in regulating marriage in colonial America.

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prosecuted, excommunicated, and imprisoned in the Fleet jail. *Id.* In spite of his imprisonment, Keith continued to conduct marriages in the Fleet. *Id.*

36. INGRAM, *supra* note 33, at 134. In 1553 the canon law commission authorized by Edward the VI proposed the *Reformatio Legum Ecclesiasticarum*, which was an effort to reform marriage and divorce law in England. Judith Areen, *Uncovering the Reformation Roots of American Marriage and Divorce Law*, 26 YALE J.L. & FEMINISM 29, 57 (2014). The *Reformatio Legum* would have made clandestine marriages invalid but most of the reforms (including those requiring marriages to take place in front of the church) failed. *Id.*

37. INGRAM, *supra* note 33, at 134.

38. Lord, *supra* note 10, at 7.

39. *Id.*

40. The marriage ceremony had to follow the language of the Office of Matrimony in the *Book of Common Prayer*. *Id.* Note that this requirement forced Roman Catholics, Protestants, and any others who did not belong to the Church of England to marry using the Anglican rites and in an Anglican church, or to not marry at all. *Id.*

41. LAWRENCE STONE, *THE FAMILY, SEX AND MARRIAGE IN ENGLAND, 1500-1800* 35 (1977).

42. Lord, *supra* note 10, at 7.

43. *Id.* at 8.

44. *Id.* at 8 (citing LAWRENCE STONE, *ROAD TO DIVORCE: ENGLAND 1530-1987* 125 (1990)).

### *B. Marriage in the Colonies*

State regulation of marriage in the United States began in the early days of the colonies. In some settlements, state involvement was a matter of convenience and pragmatism, while in others there was a clear rejection of English canon law. Whatever the reason, the result was civil control of marriage in all regions of the colonies and, eventually, all of the United States.

#### *1. Pilgrims, Puritans, and Reformation Theology Shape Marriage Law in New England*

Canon law was never adopted in Massachusetts. Instead, from the very beginning marriage was regulated by civil statutes of the Colony, Province, and Commonwealth. Moreover, the common law never developed to allow parties to enter into marriage without the presence of an officiating clergyman or magistrate, and the codification of requirements for a valid marriage was interpreted as proof of an intention to abolish common law marriage.<sup>45</sup> Indeed, even ministers who were authorized by law to solemnize marriages between other couples did not have the authority to marry themselves.<sup>46</sup>

The settlers of the first permanent settlement in New England were forty-four Pilgrims who were religious dissenters (also referred to as “Separatists”) from the Church of England.<sup>47</sup> They arrived in Plymouth on November 11, 1620 and had been granted permission to leave England and settle in the area granted to the Virginia Company so that “they could form a bulwark against the expansionist efforts of Catholic Spain.”<sup>48</sup> Less than a year later, the first marriage was recorded between Edward Winslow and Susannah White. Records from that time show that marriage was considered to be a civil matter and was conducted by a magistrate and not ministers.<sup>49</sup> When Mr. Winslow returned to England in 1635 he was questioned by the Archbishop of Canterbury and was eventually imprisoned for seventeen weeks for his admission that he had conducted marriages in his capacity as magistrate.<sup>50</sup> While these colonists vehemently rejected canon law and the influence of the Church of England in the context of marriage, religion still played a pivotal role in their community. The Massachusetts Bay colonists were influenced by the writings of Martin Luther and John Calvin as well as by other Protestant reformers.<sup>51</sup> Civil regulation of marriage was a conscious choice made on grounds of both principle and religious ideology.<sup>52</sup> Rejecting religious control of marriage reflected their

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45. *Commonwealth v. Munson*, 127 Mass. 459, 460–61 (1879).

46. *Id.* at 463.

47. Areen, *supra* note 36, at 61–62.

48. *Id.*

49. *Id.* at 63.

50. *Id.* at 64.

51. *Id.* at 68.

52. *Id.*

commitment to Puritanism and rejection of theocracy.<sup>53</sup> The decision to leave England for the colonies was based in large part on the desire to escape the control of the Anglican Church.<sup>54</sup> Giving religious leaders control in the colonies was viewed as once again submitting to that control.<sup>55</sup> But the Puritans were not seeking escape from religion or religious influence in the community. On the contrary, they believed “[i]t was better to leave marriage to magistrates, particularly [Governor John] Winthrop and the other ‘godly’ magistrates, who would ensure that Puritan values and Scripture shaped New England families.”<sup>56</sup> In other words, the settlers exchanged control by church leaders for control by religious secular leaders.

## 2. *Marriage Outside of New England*

In other colonies, civil regulation of marriage developed more out of necessity than ideology. Even though the Church intended and desired to maintain its influence in the colonies, distance as well as practical realities (not to mention opposition by Protestants) muted and eventually diminished that influence.<sup>57</sup> Thus, long before the colonies came together to form the United States, the power to regulate marriage had shifted from the Church to secular authorities. Even after churches became more established in the United States, states retained control of the regulation of marriage.

For example, in Virginia, high mortality rates, the lack of Anglican bishops in the colonies (which meant that men had to travel overseas to be ordained) and the shortage of clergy generally led to laymen having greater control over church affairs than was the case in England.<sup>58</sup> In particular, laymen performed marriages and county courts took on the task of regulating marriages in the absence of ecclesiastical courts.<sup>59</sup> This arrangement was approved by the king in 1685 when he gave the Church jurisdiction in the colonies but expressly excluded the power to grant marriage licenses.<sup>60</sup>

Informal marriages were common in the southern colonies where formal marriages did not become common until the mid-eighteenth century.<sup>61</sup> As historian Nancy Cott explains, “Marriage frequently followed upon a sexual relationship between [a] man and a woman proving fruitful, rather than

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53. *Id.* “Of all the governments of the Western world at the time, the government of Massachusetts Bay gave clergy the least authority.” *Id.* (citing EDMUND MORGAN, *THE PURITAN DILEMMA: THE STORY OF JOHN WINTHROP* 53, 95–96 (1958)).

54. Areen, *supra* note 36, at 68.

55. *Id.*

56. *Id.* The religious beliefs of the Puritans likely explain why the secular laws regarding who could marry still excluded same-sex marriages.

57. *Id.* at 76.

58. *Id.*

59. *Id.* at 77.

60. *Id.*

61. NANCY F. COTT, *PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION* 31 (2000).

preceding it: pregnancy or childbirth was the signal for a couple to consider themselves married.”<sup>62</sup> Thus, while the authority to regulate marriage resided with secular authorities, the change from church to secular control did not necessarily reflect a cultural shift, and the regulations regarding who could marry and the requirements for marriage did not necessarily change immediately or dramatically.

### III.

#### REGULATION OF MARRIAGE PREREQUISITES, ROLES, AND OBLIGATIONS

Whether the source of the regulation was canon law or secular legislation, some restrictions were consistently imposed. Others were specific to certain regions or depended upon the religious or political concerns of those in power. In addition to rules regarding who could marry, regulations dictated the minimum age for marriage, the requirements for issuance of a license, whether common law marriages would be recognized, who was allowed to officiate or solemnize a marriage, and where the ceremony could take place. Laws also governed the relationship itself, including the duties each spouse owed to the other and the behaviors that could subject one or both parties to prosecution. These regulations placed significant constraints on the rights of the parties to a marriage and limited their ability to define the terms of their relationship.

##### *A. Marriage Prerequisites*

In addition to prescribing the ceremonial and administrative requirements for a valid marriage, both canon and statutory laws have regulated who is legally allowed to wed. Unsurprisingly, both parties must have the legal capacity to wed, which generally equates to the requisite mental capacity to enter into a contract.<sup>63</sup> Near the end of the nineteenth century, states began to adopt more comprehensive legislation regulating who could legally marry. Led by Connecticut, twenty-nine states adopted provisions prohibiting marriage with or between persons who were mentally impaired between 1895 and 1929.<sup>64</sup> Many states required license applicants to obtain an affidavit of good health,<sup>65</sup> and many more required an examination and/or testing for certain venereal diseases.<sup>66</sup> One rationale for the health and disease testing requirements, which

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62. *Id.*

63. Michael L. Perlin & Alison J. Lynch, “All His Sexless Patients”: *Persons with Mental Disabilities and the Competence to Have Sex*, 89 WASH. L. REV. 257, 281 (2014) (“The best accepted standard for mental capacity to marry is whether the individual understands the nature of the marriage contract and the duties and responsibilities it creates.”).

64. Matthew J. Lindsay, *Reproducing a Fit Citizenry: Dependency, Eugenics, and the Law of Marriage in the United States, 1860–1920*, 23 L. & SOC. INQUIRY 541, 542 (1998). Statutes at the time referred to “imbeciles,” “idiots,” “lunatics,” the “feeble-minded,” and those of “unsound mind.” *Id.*

65. *Pre-Marital Tests for Venereal Disease*, 53 HARV. L. REV. 309, 309–10 (1939).

66. *Id.* Some required testing for syphilis only while others required testing for syphilis and

were viewed as a valid exercise of the state's police powers,<sup>67</sup> was the prevention of sexually transmitted diseases.<sup>68</sup> While current statutes do not prohibit the issuance of a license when either party has a venereal disease, some states still require disclosure of any known contagious sexually transmitted diseases.<sup>69</sup>

Some have argued that the reformers of this era sought to restrict the right to marry in order to prevent the transmission of “hereditary deficiencies.”<sup>70</sup> “These social and biological fears, historians contend, fueled the state's expansion of its regulatory purview, drawing the legal inception of marriage out of its refuge in the private domain of the common law of contract and transforming it into a full public status.”<sup>71</sup>

Still others argue that Progressive Era regulations were remarkable not because they sought to regulate marriage (which states had always done), but because of the way in which they regulated *who* could marry.<sup>72</sup> Specifically, some reformers sought to preserve and promote certain classes and races above others and thereby shape the composition of society:

As nuptial reformers, public health advocates, and lawmakers defined what constituted hereditary “fitness,” moreover, their class and ethnic fears explicitly shaped their judgment of precisely who was incapable of parenting an advancing civilization. With its inherent viability as a foundational social institution in doubt, the marriage relation was thus reformulated in legislatures, courts, and public discussion to serve society largely as a strategy of selective breeding—not as the *end* of public policy in and of itself, but as an *instrument* of the state in its governance of the citizenry.<sup>73</sup>

Law regulating marriage thus reflected and entrenched racist and class-based prejudices and discrimination.

Minimum age requirements (with and without parental or judicial consent) have existed for centuries and are still in place in every state.<sup>74</sup> Both parties must

gonorrhoea. *Id.*

67. Lindsay, *supra* note 64, at 542.

68. *Pre-Marital Tests for Venereal Disease*, *supra* note 65, at 310.

69. *See, e.g.*, WASH. REV. CODE § 26.04.210 (2016).

70. Lindsay, *supra* note 64, at 542.

71. *Id.* at 543.

72. *Id.* at 543–44.

73. *Id.* at 544–45 (internal citations omitted).

74. 1 LEG. RTS. CHILD. REV. 2D § 11:3, Westlaw (3d. ed., database updated November 2016). At common law, the minimum age for boys was 14 and the minimum age for girls was 12. Vivian E. Hamilton, *The Age of Marital Capacity: Reconsidering Civil Recognition of Adolescent Marriage*, 92 B.U. L. REV. 1817, 1829 (2012). In most states, the minimum age is 18. *See, e.g.*, CAL. FAM. CODE §§ 301, 302 (West 2015) (allowing minors under 18 to consent to marriage only upon obtaining a court order and parental consent). In others, it is 16 with parental consent (and in some cases, consent of the judge as well) and 15 when a court, after due investigation, gives



be unmarried (either never married, widowed, or legally divorced), and may not be related within specified degrees of kinship.<sup>75</sup> Other common requirements include: obtaining a marriage license;<sup>76</sup> a waiting period between applying for and obtaining the license;<sup>77</sup> proof of the parties' identities;<sup>78</sup> and registration or filing of the license after the ceremony.<sup>79</sup> Historically, states have also restricted or prohibited marriage by same-sex couples, parents who were not current on their child support obligations, and prison inmates.<sup>80</sup> All of these regulations have been struck down as impermissible infringements on the fundamental constitutional right to marry.<sup>81</sup>

### B. Common Law Marriages

States have sometimes recognized marriages that did not comply with statutory requirements. In addition to recognizing marriages solemnized in accordance with state ceremonial and licensing requirements, some states recognize informal or "common law" marriages. Non-ceremonial marriages were formally recognized by the Catholic Church in the Council of Trent in 1563.<sup>82</sup> Such marriages were recognized under English canon law until Lord Hardwicke's Act of 1753.<sup>83</sup> In the United States, some states recognized common law marriages while others did not. States such as Massachusetts declined to follow English canon law from the first years of the colony's existence and set out formal requirements for marriage more than one hundred years before England began to enforce similar formal requirements under Lord Hardwicke's Act.<sup>84</sup> Other colonies that were established before 1753 adopted

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consent on the basis that the marriage is in the best interest of the person. *See, e.g.*, KAN. STAT. ANN. § 23-2505 (2015).

75. Many states previously prohibited marriages between a wide-range of family members. Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1466–67 (1992). More recently, states have narrowed the scope of prohibited marriage to include only close blood relatives and not those related by adoption or marriage. *Id.*

76. *See, e.g.*, ALA. CODE § 30-1-9 (1975); ARIZ. REV. STAT. ANN. § 25-111 (2007); 23 PA. CONS. STAT. § 1301 (2016).

77. *See, e.g.*, 23 PA. CONS. STAT. § 1303.

78. *See, e.g.*, CAL. FAM. CODE § 354 (West 2016).

79. *See, e.g.*, N.H. REV. STAT. ANN. § 5-C:41 (2015).

80. *See* Singer, *supra* note 75, at 1465–66.

81. *See Zablocki v. Redhail*, 434 U.S. 374, 390–91 (1978) (striking down law prohibiting fathers who were behind on child support payments from marrying); *Turner v. Safley*, 482 U.S. 78, 96 (1987) (holding that law restricting right of inmates to marry was impermissible burden on right to marry); *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) (holding that refusal to grant a marriage license to or recognize marriage between people of the same sex violates the Fourteenth Amendment Due Process clause).

82. Jennifer Thomas, *Common Law Marriage*, 22 J. AM. ACAD. MATRIM. LAW. 151, 153–54 (2009).

83. *Id.* at 154; *see also* discussion *supra* Part II.A.

84. *See id.*; Thomas, *supra* note 82, at 154–55.

English common law rules recognizing informal marriages.<sup>85</sup> Those rules prevailed even after the law in England changed.<sup>86</sup>

Generally, a common law marriage has four requirements. First, like all marriages, the parties to a common law marriage must have the capacity to enter into a marriage contract.<sup>87</sup> Second, the parties must have present and mutual agreement to marry (as opposed to an agreement to marry in the future).<sup>88</sup> Third, the parties must live together (cohabit) as husband and wife.<sup>89</sup> Fourth, the couple must hold themselves out to the public as husband and wife.<sup>90</sup> This final requirement is considered the most important factor,<sup>91</sup> and it is the reason there cannot be a “secret” common law marriage.<sup>92</sup> A reputation among family, friends, and the community as husband and wife is necessary to a successful common law marriage claim.<sup>93</sup> As such, “the couple should hold themselves out as married to the public, use the same last name, file joint tax returns and declare their marriage of [sic] documents, such as applications, leases, and birth certificates.”<sup>94</sup>

Many states, particularly western states, recognized common law marriage for pragmatic reasons.<sup>95</sup> Isolation and lack of sufficient access to clergy made it impractical to require licenses or other ceremonial formalities for valid marriages.<sup>96</sup> Increased population growth, movement from rural to urban areas, greater access to clergy, fear of fraudulent claims, and a desire to impress upon couples the seriousness and solemnity of marriage have all contributed to the decrease in the number of states that recognize common law marriages.<sup>97</sup> Also noted was a desire to enforce public policies disfavoring “undesirable” marriages.<sup>98</sup>

85. See Thomas, *supra* note 82, at 155.

86. *Id.*

87. Bowman, *supra* note 8, at 712. Not only must the parties have the requisite mental state, but they must also be of marriageable age and not married to anyone else. See *id.* at 713.

88. *Id.* at 713; Thomas, *supra* note 82, at 159 (referred to as an agreement *per verba de praesenti*).

89. In most states, no particular length of time is specified as necessary to establish cohabitation, and courts must consider the facts of each case to determine whether the cohabitation is sufficient to support a claim of common law marriage. See Thomas, *supra* note 82, at 157–58. New Hampshire requires couples to live together for three years as husband and wife for the marriage to be recognized. N.H. REV. STAT. ANN. § 457:39 (2007).

90. Bowman, *supra* note 8, at 713; Thomas, *supra* note 82, at 158.

91. Bowman, *supra* note 8, at 713.

92. Thomas, *supra* note 82, at 158–59 (“Courts have said that ‘public declaration of marriage is the acid test of common law marriage,’ meaning that to establish a common law marriage, couples cannot have a secret marriage.”) (internal citations omitted).

93. *Id.*

94. *Id.* at 159.

95. See *id.* at 155.

96. See *id.* at 155–56 (noting that “[r]ecognition of common law marriage in western colonies allowed for the passage of property upon death and allowed the children to be legitimized.”).

97. See generally *id.* at 160–62.

98. *Id.* at 162. For example, interracial marriages and marriages involving mentally impaired

Currently, eight states recognize common law marriage—at least for some purposes—by statute,<sup>99</sup> and another three states uphold common law marriages in case law, though they do not provide for it by statute.<sup>100</sup> Finally, six states recognize common law marriages that were entered into before a specific date, ranging from 1958 (in Indiana) to 1997 (in Georgia).<sup>101</sup> Common law marriages not only provide reputational benefits in communities and circumstances in which cohabitation without marriage is stigmatized, it also confers legal benefits that are only available to married couples. If a couple is not married, then they are only entitled to whatever is voluntarily provided or contractually agreed upon.

Scholars have argued persuasively that the refusal to recognize common law marriages has had a negative impact on women—particularly low-income women, women of color, and some immigrants—who are more likely to be financially insecure and left without compensation for domestic services provided during the relationship.<sup>102</sup> Rules of inheritance and default rules for property division upon divorce do not apply.<sup>103</sup> Unmarried couples are also not entitled to benefits such as Social Security and retirement benefits.<sup>104</sup> For all of these reasons, having marital status recognized by the state has significant consequences that extend beyond any effects on social status or stigma.

### C. Legal Identity and Status

While today being married entitles women to various forms of legal and governmental benefits, marriage had distinct disadvantages for women before the middle of the nineteenth century. At common law, marriage was far more than a mere joining of two persons into a formally recognized relationship. For

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persons or alcoholics were previously disfavored or prohibited in some states. *Id.*

99. The eight states are: Colorado, COLO. REV. STAT. § 14-2-109.5 (2015); Iowa, IOWA CODE §§ 252A.3, 595.1A (2016); Kansas, KAN. STAT. ANN. §§ 23-2502, 23-2714 (2015); Montana, MONT. STAT. ANN. § 40-1-403 (2015); New Hampshire, N.H. REV. STAT. ANN. § 457:39 (2007); South Carolina, S.C. CODE ANN. § 20-1-360 (1976); Texas, TEX. FAMILY CODE ANN. § 1.101 (2006); and Utah, UTAH CODE ANN. § 30-1-4.5 (West 2013); see *Common Law Marriage by State*, NAT'L CONF. ST. LEGISLATURES (Aug 4, 2014), <http://www.ncsl.org/research/human-services/common-law-marriage.aspx> [<https://perma.cc/J6SN-ZESC>]. The requirements for and restrictions on common law marriage vary by state.

100. These states are Alabama, Rhode Island, and Oklahoma. See *Common Law Marriage by State*, *supra* note 99.

101. These states are Pennsylvania, Ohio, Indiana, Georgia, Florida, see *Common Law Marriage by State*, *supra* note 99, and Idaho, IDAHO CODE ANN. § 32-201 (2006).

102. See Bowman, *supra* note 8, at 712 (arguing for the retention or reinstatement of common law marriage and concluding that common law marriage better protects the interests of low-income women and women of color than other approaches or policies). See generally Thomas, *supra* note 82, at 163–65 (noting that common law marriages are common among many racial minorities and in large parts of Mexico, and describing the harsh impact on low income couples who believe themselves to be married).

103. See Bowman, *supra* note 8, at 761.

104. *Id.* at 762.

women, marriage resulted in the eradication of her separate legal existence.<sup>105</sup> Under the doctrine of coverture, married women lost the right to own and control their personal and real property.<sup>106</sup>

Under the common law, when a man and woman intermarried, all the property, both real and personal, which he had at the time of marriage remained his separate property and subject to his sole disposition, without the necessity of obtaining her consent, except in so far as the realty was affected by her dower rights. The property owned by the woman before marriage took a different status. The husband had a vested interest therein; its nature depending upon the character of the property and the estate held by the wife. He was entitled to the rents, issues, and profits of her realty, and to an absolute interest in all the personalty in possession, unlimited and unrestricted, together with the right to reduce to possession any choses in action which she might possess.<sup>107</sup>

The only limitation on the husband's right to control his wife's property was his inability to dispose or encumber her separate property by will and deprive her heirs of the property after his death.<sup>108</sup>

Women also lacked the ability to enter into contracts,<sup>109</sup> which severely limited their employment prospects. If a married woman did earn an income, her husband was entitled to receive and dispose of the wages at his discretion.<sup>110</sup> Moreover, because a woman did not own any property herself during coverture, a married woman needed her husband's consent even to dispose of her property in a will.<sup>111</sup> Fortunately, Married Woman's Property Acts have been passed in

105. See WEITZMAN, *supra* note 4, at 1; see also *Lillienkamp v. Rippetoe*, 179 S.W. 628, 628 (Tenn. 1915) ("It was a fundamental principle of the common law that by marriage husband and wife became one."); *Butler v. Wolf Sussman, Inc.*, 46 N.E.2d 243, 245 (Ind. 1943) ("At common law, husband and wife were considered as one person and one spouse could not commit larceny of the goods of the other . . ."); *Henneger v. Lomas*, 44 N.E. 462, 463 (Ind. 1896) ("At common law a valid marriage made the husband and wife one person in law. The legal existence of the woman was suspended, or merged in that of the husband.").

106. *Buchanan v. Lee*, 69 Ind. 117, 120 (1879) ("By the common law, the personal estate and money owned and possessed by a *feme sole* at the time of her marriage, by virtue of her marriage and upon the happening of that event, at once became and were the absolute property of her husband."); see generally COTT, *supra* note 61, at 11–12.

107. *Blackman v. Blackman*, 43 P.2d 1011, 1013–14 (Ariz. 1935); see also Deborah A. Widiss, *Changing the Marriage Equation*, 89 WASH. U. L. REV. 721, 736 (2012) (citing 1 WILLIAM BLACKSTONE, COMMENTARIES \*307-10).

108. *Blackman*, 43 P.2d at 1014.

109. *Craig v. Lane*, 89 P.2d 1008, 1009 (Idaho 1939).

110. *Blackman*, 43 P.2d at 1014 ("Any personal property acquired during coverture by the exertions of either husband or wife, or from the rents, issues, and profits of the estate of either one, was the husband's separate property, and at his absolute disposition, either by grant or by will.").

111. *Adams v. Kellogg*, 1 Kirby 195, 196–97 (Conn. Super. Ct. 1786) ("A *feme covert*, it is said, may make a will of personal estate, with the consent of her husband; but this is only the

every state, beginning in 1839 in Mississippi.<sup>112</sup> The Acts gave women the right to own property, enter into contracts and employment, keep their wages, and to sue and be sued.<sup>113</sup> All states have removed most or all of the disabilities of coverture,<sup>114</sup> but the laws protecting women's right to own property and enter into contracts did not give women full control of their own bodies.

At common law, spouses were immune from liability for torts committed against the other spouse.<sup>115</sup> For instance, a husband could not be guilty of raping his wife.<sup>116</sup> The historic justifications for this exception to rape laws include: (1) the notion that the identity of wives and husbands were merged so that the husband could not be guilty of raping himself;<sup>117</sup> (2) wives were the property of their husbands and therefore husbands could no more be guilty of raping their wives than they could be guilty of stealing from themselves;<sup>118</sup> (3) sexual intercourse was an obligation of marriage and when she married, a woman gave her husband irrevocable consent to exercise his right to sexual intercourse;<sup>119</sup> and (4) it would be easy for women to allege rape and it could be difficult for such allegations to be proved or disproved.<sup>120</sup> Unlike most coverture laws, the spousal rape exemption persisted in many states until the latter part of the twentieth century,<sup>121</sup> although spouses are now generally criminally and civilly liable for abuse inflicted upon the other spouse.<sup>122</sup> The historic spousal exemption is a stark example of state law leaving women worse off and potentially physically vulnerable as a result of marriage.

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husband giving away his own estate in compliance to his wife; or may be in compliance with a marriage settlement; and he may revoke the will before or after her death, at any time, until it be proved.”).

112. WEITZMAN, *supra* note 4, at 2.

113. *Id.*

114. *Id.*

115. Married women could not sue or be sued. *Id.* at 1. Moreover, the “single identity” theory of marriage precluded one spouse from suing the other. Carl Tobias, *Interspousal Tort Immunity in America*, 23 GA. L. REV. 359, 364–65 (1989) (“Unitary legal status prevented one spouse from acquiring a tort cause of action against the other for harm perpetrated. Even if a claim could have been stated, the husband would have been plaintiff as well as defendant in any litigation pursued.”).

116. See WEITZMAN, *supra* note 4, at 2; see, e.g., *People v. De Stefano*, 467 N.Y.S.2d 506, 510–11 (Ct. Ct. 1983) (noting that early New York statutes defined rape as an act committed by a man against a woman who was “not his wife”).

117. *De Stefano*, 467 N.Y.S.2d at 512 (discussing historical justifications for the spousal rape exemption). It should be noted that the single identity theory also subjected husbands to liability for the criminal acts of their wives. WEITZMAN, *supra* note 4, at 2.

118. *De Stefano*, 467 N.Y.S.2d at 512.

119. *Id.*

120. *Id.* at 515.

121. Gregg Strauss, *Why the State Cannot “Abolish Marriage”*: A Partial Defense of Legal Marriage, 90 IND. L.J. 1261, 1311 (2015).

122. *Id.*

### *D. Spousal Obligations and Prohibitions*

The roles of husbands and wives have been prescribed by culture and by law. Under coverture, wives lost their legal identity, and any earnings they received became the property of their husbands.<sup>123</sup> Thus, husbands had complete control of the family finances.<sup>124</sup> This power brought with it corresponding responsibilities.<sup>125</sup> The husband was legally obligated to protect and provide for his wife and their children.<sup>126</sup> The wife's obligations included companionship, domestic duties, childcare, and sexual availability.<sup>127</sup> The wife's obligations were often the result of judicial decisions instead of statutes, and were most often recognized in suits for loss of consortium or alienation of affection.<sup>128</sup>

Other, more specific obligations were historically imposed on one or both spouses. For example, women were often required to take their husbands' last names.<sup>129</sup> The requirement was not necessarily imposed by statute or associated directly with steps necessary for a valid marriage; instead, it was often reflected in voter registration laws<sup>130</sup> or driver's license regulations<sup>131</sup> that required married women to use their husbands' surnames.<sup>132</sup> Additionally, under common law the husband had the right to choose the family's domicile and the wife was obligated to follow her husband.<sup>133</sup> As a consequence, a woman might be legally domiciled in a place she did not choose and in which she did not reside.<sup>134</sup> This could affect her eligibility to obtain benefits such as in-state tuition, or to exercise certain rights such as voting, holding public office, or

123. *Blackman v. Blackman*, 43 P.2d 1011, 1014 (Ariz. 1935); see discussion *supra* Part III.C.

124. WEITZMAN, *supra* note 4, at 28.

125. See COTT, *supra* note 61, at 12.

126. *Id.*

127. WEITZMAN, *supra* note 4, at 60.

128. *Id.*

129. WEITZMAN, *supra* note 4, at 10; see also, e.g., *Roberts v. Grayson*, 173 So. 38, 39 (Ala. 1937) (“[A] married woman’s name consists, in law, of her own Christian name and her husband’s surname.”). *But see* *Kruzel v. Podell*, 226 N.W.2d 458, 463 (Wis. 1975) (concluding that Wisconsin law has never required women to take their husbands’ surname).

130. WEITZMAN, *supra* note 4, at 10. As recently as 1981, the majority of states cancelled a woman’s voter registration when she married and she was required to register under her married name. *Id.*; see also, e.g., *People ex rel. Rago v. Lipsky*, 63 N.E.2d 642, 645 (Ill. App. Ct. 1945) (holding that a woman’s name changes to her husband’s surname as a matter of law upon marriage, and upholding a statute requiring women to register to vote under their married names).

131. See, e.g., *Forbush v. Wallace*, 341 F. Supp. 217, 223 (M.D. Ala. 1971), *aff’d*, 405 U.S. 970 (1972) (upholding Alabama law requiring women to use their husbands’ surname when obtaining a driver’s license).

132. WEITZMAN, *supra* note 4, at 10–12. Concerns about legitimacy as well as the father’s status as head of the family have been cited as justification for requiring children to have their father’s surname. *Id.* at 13.

133. *Id.* at 14.

134. *Id.* at 15.

registering a car.<sup>135</sup> In addition, a woman could be found liable for abandonment if she refused to relocate to her husband's chosen domicile.

In a 1954 case, one Alabama court observed:

In [Alabama], the husband is still recognized by law as the head of the household. He furnishes the name and fixes the domicile for the wife and family and the obligation of supporting them is imposed upon him. The law likewise imposes upon the wife the duty of following her husband to the matrimonial residence, provided by him in good faith, and her refusal to do so, without lawful excuse, renders her guilty of abandonment.<sup>136</sup>

This rule proved particularly harsh in divorce cases in states with fault-based divorce schemes.<sup>137</sup> The wife's refusal to move could be ruled abandonment that made her "at fault" for purposes of divorce, consequently depriving her of property or alimony to which she would otherwise be entitled.<sup>138</sup> Such gender-based obligations are no longer recognized, and the introduction of no-fault divorce makes each person's decision to live apart from their spouse less likely to have negative consequences in a divorce proceeding.

Of course, as will be discussed in the following section, even after no-fault divorce was introduced, women were often left with little or no alimony with which to support themselves after the marriage ended.<sup>139</sup> In those cases, removing statutory or common law obligations of lifelong support left spouses, especially women homemakers, in dire financial straits after a divorce.<sup>140</sup>

135. *Id.*

136. *Bentley v. State*, 70 So. 2d 430, 432 (Ala. Ct. App. 1954) (internal citations omitted).

137. WEITZMAN, *supra* note 4, at 16.

138. *Id.* Interestingly, many of the marital obligations of each spouse were difficult to enforce in a court of law during the marriage even though they could be used to establish fault in divorce proceedings. See Singer, *supra* note 75, at 1457 n.48 (citing *McGuire v. McGuire*, 59 N.W.2d 336 (Neb. 1953)). In *McGuire*, the Nebraska Supreme Court reversed a district court decision awarding a wife maintenance and support money *during* the marriage. *Id.* at 342. Mrs. McGuire complained that despite having considerable income and assets, her husband refused to provide her with sufficient funds for her to live comfortably. *Id.* at 337–38. For example, he refused to give her any money to buy clothes and the only clothing he had purchased for her in the three to four years prior to trial was a coat that he purchased four years before. *Id.* at 337. In addition, their home had no indoor bathroom, toilet, or bathing facilities. *Id.* The court held that even if the husband's attitude and actions are not commendable, "[a]s long as the home is maintained and the parties are living as husband and wife it may be said that the husband is legally supporting his wife and the purpose of the marriage relation is being carried out." *Id.* at 342.

139. Mary Ziegler, *An Incomplete Revolution: Feminists and the Legacy of Marital-Property Reform*, 19 MICH. J. GENDER & L. 259, 264 (2013) (noting that "[a]limony awards are rare and, when offered, often inadequate.").

140. See *id.* (noting agreement among scholars that changes in divorce laws were "economically devastating for many women and children"); Peter Nash Swisher, *The ALI Principles: A Farewell to Fault—But What Remedy for the Egregious Marital Misconduct of an Abusive Spouse?*, 8 DUKE J. GENDER L. & POL'Y 213, 214 (2001) ("[W]hen no-fault divorce was first introduced in most states, a disturbing number of courts have failed to provide adequate financial protection for many women and children post-divorce . . .").

Allowing couples to decide before marriage how property will be treated in the event of divorce would give each spouse a measure of control over their own financial destiny.

#### IV. DIVORCE

State regulation of marriage does not end when the marriage ends. In fact, the state's greatest impact on the rights of spouses may be felt when one or both spouses seek to dissolve the marriage. First and foremost, the state decides *if* the parties are allowed to divorce. In fact, historically, in England and many early American colonies, married couples had no right to divorce.<sup>141</sup> As societal norms evolved, divorce became more socially acceptable and legally allowed. However, it is still not recognized as a fundamental right and is subject to state regulation. If the state does not find permissible grounds for divorce or if the state-mandated procedures for obtaining a divorce are not followed, then the marriage remains valid as a matter of law and all of the rights and obligations that arise therefrom continue to exist.

##### *A. Evolution of Divorce Law in England*

In spite of efforts to reform English law in the sixteenth century to allow for divorce,<sup>142</sup> divorces were extremely difficult to obtain and were completely unavailable to most citizens until the mid-1800s.<sup>143</sup> Before that time, marriage was controlled by canon law under the jurisdiction of ecclesiastical courts.<sup>144</sup> Since marriage was regarded by the Church of England as a sacrament that was "indissoluble," marriage could not be terminated or dissolved by divorce,<sup>145</sup> but in some circumstances the courts could grant decrees of nullity, which declared that the marriage was void and thus the parties had never been married.<sup>146</sup> The grounds for a decree included: a flaw in the marriage ceremony, lack of consent, lack of capacity to enter into marriage, duress, one or both parties being underage, prior marriage, the parties being related by blood or marriage in a manner that prohibited marriage, and impotence.<sup>147</sup> If the marriage was annulled, the parties were free to remarry, as the first marriage was deemed a

141. See Lord, *supra* note 10, at 12–23 (discussing historical background of divorce in England); Areen, *supra* note 36, at 69–77 (discussing divorce in the early American colonies).

142. See Areen, *supra* note 36, at 53 (noting that Thomas Cranmer's proposed *Reformatio Legum Ecclesiasticarum* would have put civil authorities in charge of marriage and allowed for divorce for adultery, desertion, and ill treatment of the wife).

143. See Lord, *supra* note 10, at 12–23.

144. *Id.* at 12–13.

145. *Id.* at 13.

146. *Id.*

147. *Id.* The broad scope of available grounds made it fairly easy to grant such decrees and "[t]he bishops' courts acquired a reputation for granting decrees of nullity on flimsy grounds . . .". *Id.* at 14.



nullity.<sup>148</sup> However, the decree also had the effect of making all children born during the marriage illegitimate.<sup>149</sup>

Another option for spouses who no longer wished to live together was a decree “*a mensa et thoro* (divorce from board and hearth).”<sup>150</sup> This decree was created to address cases in which one party had committed a serious violation “such as adultery, cruelty, sodomy or heresy” during the marriage.<sup>151</sup> The decree did not dissolve the marriage, but the parties were permitted to live separately (in other words, the wife was released from her obligation to live with her husband and to provide domestic and sexual services) and the husband was often required to pay alimony to support his wife.<sup>152</sup> The parties remained married and had to pledge not to marry again. Importantly, the children of the marriage remained legitimate.<sup>153</sup>

If spouses wished to end the marriage (and not simply live apart) but did not have grounds for an annulment, two other options existed: separation by private deed (also known as a separate maintenance contract) or divorce by private act of Parliament.<sup>154</sup> As a practical matter, both options were only available to the wealthy, and the private deeds were only enforceable by mutual agreement of the parties, not in a court of law. The private deeds were primarily financial contracts that required the husband to pay alimony to his wife; she, in turn, indemnified him against any suits by her future creditors.<sup>155</sup> They also usually allowed women to enter into contracts and other financial matters as though she was a single woman.<sup>156</sup> The agreements might also grant the parties the right to cohabit, have sexual relations with, and even marry other people without risk of criminal prosecution.<sup>157</sup> While these provisions were not enforceable in civil courts, they allowed couples to privately declare an end to their marriage.<sup>158</sup>

For a select few men (and barely *any* women), divorce was available by a “Private Act” of Parliament.<sup>159</sup> “These Private Acts, mostly brought by male members of the aristocracy, were intended primarily to safeguard the inheritance of property and family succession, which was endangered by a wife’s adultery”; adultery was the only recognized ground for divorce.<sup>160</sup> Obtaining a divorce by Private Act was difficult and required multiple court judgments. First, the

148. *Id.* at 13–14.

149. *Id.* at 14.

150. *Id.*

151. *Id.*

152. *Id.* Ecclesiastical courts had no authority to enforce the support orders because they had no authority over the husband’s property. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 14–15.

156. *Id.* at 15.

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* at 15–16.

husband had to get a decree *a mensa et thoro* from the ecclesiastical court, and then he had to sue and win a “criminal conversation” action against the man with whom his wife committed adultery.<sup>161</sup> Only then could the husband present a bill to Parliament for divorce.<sup>162</sup> It has been estimated that only 317 such Parliamentary divorces were ever granted.<sup>163</sup> Despite the clear conflict between canon law and these civil divorces, the Church of England did not oppose the divorces and allowed divorced persons to remarry.<sup>164</sup>

In 1857, the Matrimonial Causes Act created a secular Court for Divorce and Matrimonial Causes, thus removing matrimonial cases from ecclesiastical courts and granting jurisdiction over judicial separations and divorces to civil courts.<sup>165</sup> This made divorce accessible to the middle class for the first time.<sup>166</sup> Both wives and husbands could seek a divorce, but adultery remained the only grounds for divorce and wives had to prove “an additional serious aggravation such as desertion, cruelty, incest, rape, sodomy or bestiality[,]” while husbands only had to prove adultery.<sup>167</sup> The 1923 version of the Act made simple adultery sufficient grounds for husbands and wives, and in 1937, desertion, cruelty, and incurable insanity were added as grounds for divorce.<sup>168</sup> Despite the greater availability of divorce, social stigma kept divorce rates very low well into the twentieth century.<sup>169</sup> In the last half of that century, the law in England evolved to allow divorce on the single ground of “irretrievable breakdown of marriage.”<sup>170</sup>

### *B. Divorce in the United States from the Colonies to the 1960's*

The American colonies were separated from the Church of England by geographic distance and, particularly in the New England colonies, by religious beliefs. The Puritans settled in America to escape religious conflict and persecution by the Church of England.<sup>171</sup> They were heavily influenced by

161. *Id.*

162. *Id.* at 16.

163. *Id.*

164. *Id.*

165. *Id.* at 16–17.

166. *Id.* at 17.

167. *Id.* at 16–17. Despite the higher hurdle for wives, the Act was still revolutionary in that it allowed women to seek a divorce for the first time. *Id.* at 17 n.118 (citing DOROTHY M. STETSON, A WOMAN'S ISSUE: THE POLITICS OF FAMILY LAW REFORM IN ENGLAND 8 (1982); Mary Lyndon Shanley, “One Must Ride Behind”: Married Women's Rights and the Divorce Act of 1857, 25 VICTORIAN STUD. 355 (1982)).

168. Lord, *supra* note 10, at 19.

169. *Id.* at 17 (“By 1900, only .2% of all marriages ended in divorce . . .”). The Court was located in London, which made it inaccessible to a large number of people living elsewhere. *Id.* This may also have affected divorce rates. Those who still could not afford a legal divorce found other ways to terminate a marriage, including one or both spouses moving to a new community. *Id.*

170. *Id.* at 21–22.

171. See Areen, *supra* note 36, at 62; see generally discussion *supra* Part II.B.

Lutheranism, Calvinism, and other reformers in Europe.<sup>172</sup> While Puritans did not favor divorce, it was allowed when the marriage was found to be unsupportable.<sup>173</sup> The Court of Assistants granted the first divorce in the Massachusetts Bay colony in 1643.<sup>174</sup> At least twenty divorces were granted by the end of the seventeenth century,<sup>175</sup> with adultery and desertion as the most common grounds for divorce.<sup>176</sup> Losing parties could appeal the decision of the Court of Assistants to the General Court, which consisted of “the members of the Court of Assistants plus all the freemen of the colony.”<sup>177</sup> The General Court also had authority to hear divorce petitions that had not already been decided by the Court of Assistants and it granted at least eleven such divorce petitions before 1700.<sup>178</sup>

While divorce was available, petitions were not routinely or easily obtained. The Puritans sought order and domestic tranquility and forbade fornication (sex outside of marriage), dance, and other “riotous merrymaking.”<sup>179</sup> Adultery was a capital offense<sup>180</sup> and spousal abuse was prohibited and punished.<sup>181</sup> Divorce was not encouraged, merely tolerated as “the best way to prevent an innocent spouse in a failed marriage from being forced to remain celibate for life.”<sup>182</sup> The courts sought to keep marriages together whenever possible.<sup>183</sup> Perhaps more importantly, community norms and morals provided pressure for couples to stay married and faithful.<sup>184</sup> “State law set a framework that guided and influenced local communities, but because of its proximity, the community’s ability to approve or chastise its members came first.”<sup>185</sup>

Although divorce was available in the New England colonies, it was not permitted in the other colonies that were still under the control of the Church of

172. *Id.* at 63.

173. *Id.* at 70; RICHARD H. CHUSED, *PRIVATE ACTS IN PUBLIC PLACES: A SOCIAL HISTORY OF DIVORCE IN THE FORMATIVE ERA OF AMERICAN FAMILY LAW* 20 (1994) (noting that in Puritanical society, adultery was a sin and a breach of a civil agreement). “It was better, in such a structure, to ease the establishment of new, functional civic and religious units by permitting divorce than to require the continued existence of unworkable families.” *Id.*

174. *See* Areen, *supra* note 36, at 70.

175. *Id.* at 71.

176. *Id.* After the American Revolution, Massachusetts gave state courts jurisdiction over divorce petitions, but divorce could only be granted for adultery. *Id.* at 82. In 1870 the law changed to allow divorce on the ground of extreme cruelty. *Id.*

177. *Id.* at 72.

178. *Id.* Thus, the total estimated number of divorces granted before 1700 was thirty-one.

179. *Id.* at 69.

180. *Id.* at 69–70. Few adulterers were executed, although many were prosecuted. *Id.* at 71.

181. *Id.* at 73.

182. *Id.* at 70.

183. *Id.* at 72.

184. COTT, *supra* note 61, at 29.

185. *Id.* *See also* Areen, *supra* note 36, at 72 (noting that order was maintained with the help of a culture that encouraged “keeping an eye on one’s neighbors”). Puritan ideals allowed for divorce, but the marital property rights of women during that time were reduced. *See* CHUSED, *supra* note 173, at 20.

England.<sup>186</sup> Consequently, divorce was not available in many colonies until after the Revolutionary War.<sup>187</sup> Even then, divorce was not available equally to men and women.<sup>188</sup> In 1805 Maryland passed its first divorce bill that did not expressly mention adultery as the grounds for divorce.<sup>189</sup> The legislature granted the first divorce petition filed by a woman in 1806 “when Pamela Sampson convinced the legislature that her husband was a deranged drunkard.”<sup>190</sup>

In some southern colonies, race played a pivotal role in the availability of divorce.<sup>191</sup> Some states were reluctant to allow divorce on grounds of adultery for fear that white women would divorce their husbands for having sex with (or raping) their black slaves. However, concerns about white women having sex with black men may have turned the tide in favor of allowing divorce.

Adultery, if sanctioned as a ground for severing family ties, threatened to undermine the long-standing acceptance of sexual encounters between white men and slave women. Permitting women to complain about private liaisons across racial lines would have removed the ability of men to control the form of their public family ties. While such concerns arguably led South Carolina to prevent divorce altogether in order to protect men, the punishment of women breaking racial taboos may have stimulated the passage of the earliest Maryland divorces.<sup>192</sup>

Specifically, husbands could obtain legislative divorces on grounds of adultery after the wives admitted to a sexual relationship with an African American man or gave birth to a biracial child.<sup>193</sup> In Virginia, divorces were first granted in 1803 by legislative act,<sup>194</sup> and the first two petitions were granted to white men whose wives gave birth to biracial children.<sup>195</sup> Over the next half century the legislature granted approximately 150 divorces,<sup>196</sup> until the new Virginia

186. Areen, *supra* note 36, at 74.

187. *See, e.g.*, Areen, *supra* note 36, at 76 (noting that “no divorces were permitted in Virginia until after the American Revolution.”).

188. For instance, while men and women in Maryland filed divorce petitions prior to 1805, only the petitions of men were granted. *See* CHUSED, *supra* note 173, at 22. Women could seek alimony from the courts instead of a divorce. *Id.*

189. *Id.* at 23.

190. *Id.*

191. *See id.* at 22–23 (arguing that “the punishment of women breaking racial taboos may have stimulated the passage of the earliest Maryland divorces” and concerns about race prevented South Carolina from allowing any divorces); *see also* Areen, *supra* note 36, at 82 (opining that “[s]lavery and racism” motivated the Virginia legislature to begin granting divorces).

192. CHUSED, *supra* note 173, at 22–23.

193. *Id.*

194. Areen, *supra* note 36, at 82.

195. *Id.*

196. *Id.* at 83.

constitution prohibited legislative divorce in 1851. By 1853, Virginia lawmakers passed new legislation authorizing courts to grant divorces.<sup>197</sup>

### C. *The Rise of No-Fault Divorce and its Unintended Consequences*

Divorce, like marriage, has seen a transformation in recent decades.<sup>198</sup> As the discussion above illustrates, historically, divorce was not a right, but a remedy that the state could choose to grant on terms that the state alone deemed appropriate.<sup>199</sup> Even if both spouses were unhappy in the marriage, a divorce was not possible unless the parties could prove that one of the state-approved grounds for divorce was met. Indeed, the fault-based model reflected the view that dissolution of a marriage was acceptable only if one party had irredeemably violated the marital relationship such that the innocent party was entitled to be free of the bonds of the marriage.<sup>200</sup> If the wife was innocent, she was also entitled to support.<sup>201</sup> The concept of alimony reflected the view that marriage was permanent and the husband had an irrevocable duty to support his wife.<sup>202</sup>

In the 1960s, a movement began that dramatically transformed divorce law in the United States.<sup>203</sup> Nearly every United States jurisdiction adopted a form of no-fault divorce between 1970 and 1985.<sup>204</sup> The no-fault rules were first adopted

197. *Id.* (citing 1853 Va. Acts 47–48).

198. See generally Lynn D. Wardle, *No-Fault Divorce and the Divorce Conundrum*, 1991 BYU L. REV. 79 (discussing the no-fault divorce “revolution” that began in the 1970’s and its intended and unintended consequences).

199. See Singer, *supra* note 75, at 1470–71.

200. See *id.* at 1470.

201. Under the fault-based divorce regime, the state continued to structure the economic relationship between the husband and wife after divorce. The state would enforce “the husband’s duty to support his wife and the wife’s reciprocal domestic and childrearing obligations.” *Id.* at 1474.

202. *Id.* (noting that the state’s “role in structuring a couple’s post-divorce economic relationship . . . was premised on the state’s interest in enforcing the terms of the traditional marriage contract”); see also Jeffrey Evans Stake, *Mandatory Planning for Divorce*, 45 VAND. L. REV. 397, 401 (1992) (stating that “alimony was founded on the idea that marriage was irrevocable”).

203. “The no-fault divorce revolution surfaced in the United States when a 1966 California Governor’s Commission issued a recommendation that the sole grounds for divorce in that state should be an ‘irretrievable breakdown’ of the marriage or insanity.” Pamela Laufer-Ukeles, *Reconstructing Fault: The Case for Spousal Torts*, 79 U. CIN. L. REV. 207, 218 (2010).

204. Wardle, *supra* note 198, at 79. England adopted a form of no-fault divorce in 1969 as well. See *id.* at 85. The English Divorce Reform Act “provided that divorce could be granted upon one ground only, ‘irretrievable breakdown’” which could be “shown by proof of traditional marital fault, living separate and apart for five years, or living separate and apart with mutual consent for two years.” *Id.* Arkansas was the only state that did not adopt a no-fault divorce rule during those years. *Id.* at 79. However, the current code in Arkansas provides for no-fault divorce, stating that:

When husband and wife have lived separate and apart from each other for eighteen (18) continuous months without cohabitation, the court shall grant an absolute decree of divorce at the suit of either party, whether the separation was the voluntary act of one (1) party or by the mutual consent of both parties or due to the fault of either party or both parties . . .

ARK. CODE ANN. § 9-12-301(b)(5) (2015).

in California, with the intention of reducing divorce rates.<sup>205</sup> No-fault divorce laws were also designed to eliminate the need for the hostility and embarrassment that accompanied the allegations of fault necessary to obtain a divorce.<sup>206</sup> There were also concerns about the cost of proving fault and allegations of perjury and collusion as lawyers and parties tried to prove facts necessary to satisfy narrow grounds for divorce.<sup>207</sup> In some jurisdictions, divorce laws were also amended to remove fault from consideration in determining alimony or division of property.<sup>208</sup>

The original proponents of no-fault divorce envisioned a system in which only those marriages that were “irretrievably broken” would be dissolved, and couples who could not prove that the marriage was broken beyond repair would not be entitled to a divorce.<sup>209</sup> One party could successfully argue that the marriage could be saved to prevent a divorce.<sup>210</sup> Contrary to expectations and intent, the divorce rate increased dramatically in the subsequent years.<sup>211</sup> “Modern divorce law is not only no-fault, it is also unilateral.”<sup>212</sup> Under the no-fault system, a spouse can seek a divorce and their misdeeds during the marriage may not be relevant to whether a divorce will be granted or to how property will be divided.<sup>213</sup>

At first, women’s groups were not significantly involved in the no-fault divorce movement, which initially left women who had not worked outside of the home worse off financially.<sup>214</sup> Women were particularly vulnerable in common law states that determined property rights based on legal title.<sup>215</sup> If the

205. Wardle, *supra* note 198, at 83–84.

206. *Id.* at 92.

207. *Id.* at 92–93.

208. *See id.* at 90–91.

209. “The original no-fault reformers envisioned that fact-finding would be necessary to determine whether the breakdown of the marriage had occurred, and that, absent such a finding, a divorce would not be granted.” Laufer-Okeles, *supra* note 203, at 219.

210. *Id.*

211. *See* Peter Nash Swisher, *Reassessing Fault Factors in No-Fault Divorce*, 31 FAM. L.Q. 269, 271 n.13 (1997) (“According to the U.S. Bureau of the Census, divorces and annulments in America from 1970 through 1980 rose from less than half a million divorces each year to over one million divorces each year . . .”).

212. Laufer-Okeles, *supra* note 203, at 220.

213. *See id.* at 222 (noting that “fault has become much less prominent as a factor in determining alimony and property division in many states, but marital misconduct remains relevant in others.”).

214. *See* Ziegler, *supra* note 139, at 261. Feminists and anti-feminists were allegedly “preoccupied by the struggle for the ERA” and, therefore, were not paying attention to the divorce reform movement or the effect that it would have on women, especially homemakers. *Id.* at 266. Even in community property states—where community assets are owned equally by both spouses—assets may be divided according to equitable principles, which did not necessarily mean equally. *See, e.g.*, ARIZ. REV. STAT. ANN. § 25-318 (2007) (instructing courts to “divide the community, joint tenancy and other property held in common equitably, though not necessarily in kind, without regard to marital misconduct.”).

215. *See* Ziegler, *supra* note 139, at 270.

husband, who was often the breadwinner, held title solely in his name, he alone had ownership.<sup>216</sup> A wife who was a homemaker might not have a right to any property in a divorce.<sup>217</sup> Groups including the National Organization for Women pushed for divorce reforms, including ones that would recognize the contributions of homemakers and ones that would allow for equal or equitable division of marital property.<sup>218</sup> Currently, “the large majority of jurisdictions, including most community property states, apply a rule of equitable distribution that requires equitable division of property at divorce. Equitable division does not mean ‘equal’ division, and, as its label implies, it focuses on the objectives of ownership rights and fairness.”<sup>219</sup>

But the rise of no-fault divorce did not signal the end of fault-based divorce.<sup>220</sup> Most jurisdictions retain both fault and no-fault divorce options.<sup>221</sup> Choosing fault-based divorce may lead to a faster resolution of the case,<sup>222</sup> give an innocent spouse leverage in negotiating a settlement agreement, and may have an indirect effect on custody.<sup>223</sup> Fault may also be considered in determining alimony or support,<sup>224</sup> but innocent spouses are not automatically entitled to support, and may be left financially insecure even if they have been true to their vows and do not want a divorce.<sup>225</sup>

Even though divorce is much easier to obtain now than it was in the past, couples must still address complex issues when dissolving a marriage. Among the most contentious is the division of property. If the parties have entered into an enforceable prenuptial or postnuptial agreement, the issues may be more easily resolved on the terms set by the parties themselves. In the absence of such

216. *See id.*

217. *See id.*

218. *Id.* at 266.

219. Craig W. Dallon, *The Likely Impact of the ALI Principles of the Law of Family Dissolution on Property Division*, 2001 *BYU L. REV.* 891, 895. While equitable distribution provides far more protection for a stay-at-home spouse, it is subjective and, therefore, unpredictable. *See id.*; *see also* Margaret Ryznar, *All's Fair in Love and War: But What About in Divorce? The Fairness of Property Division in American and English Big Money Divorce Cases*, 86 *N.D. L. REV.* 115, 119 (2010).

220. *See* Laufer-Okeles, *supra* note 203, at 220.

221. *See id.*

222. *See id.* at 221.

223. Wrongdoing by one spouse may be relevant to morality and character issues relating to custody. *Id.*

224. “[I]n cases in which marital fault has negatively affected the economic status of the parties it may be considered in the calculation of alimony. By way of example, if a spouse gambles away all savings and retirement funds, and the assets are inadequate to allow the other spouse to recoup her share, an appropriate savings and retirement component may be included in the alimony award.” *Mani v. Mani*, 869 A.2d 904, 916 (N.J. 2005); *see also, e.g.,* *Lauro v. Lauro*, 847 So. 2d 843, 850 (Miss. 2003) (noting that while “fault is a proper consideration for awarding periodic alimony[,]” alimony may not be used as a punishment); *Rogers v. Rogers*, 475 S.E.2d 457, 464 (W. Va. 1996) (noting that West Virginia law specifically authorizes the consideration of fault in determining a maintenance/alimony).

225. *See* Stake, *supra* note 202, at 401.

contractual arrangements, those issues will be decided by the courts (the state) in ways that allow the court considerable discretion.<sup>226</sup> Moreover, even when spouses negotiate and agree to terms, those terms must be approved by the court before they are enforceable.<sup>227</sup>

## V.

### THE DECLINE OF REGULATION

#### *A. The Diminished Role of the State*

Marriage has evolved from a highly regulated institution rooted in religious doctrine, then controlled by state legislatures, to a relationship that is defined largely by the couple themselves.

Over the past twenty-five years, the law has loosened its control over the legal and economic incidents of marriage in three related ways. First, the state-imposed marriage contract is a far less comprehensive or precise instrument than it was a generation or two ago. In particular, the reciprocal rights and obligations of spouses are both less well-defined and less extensive than they were in previous generations. Second, individual couples today have considerably more freedom than in the past to vary by private agreement what little remains of the state-imposed marriage contract. Third, the law increasingly treats marriage partners as individuals, rather than as a single merged unit, for purposes of doctrinal analysis.<sup>228</sup>

All of these changes reflect changes in society at large and, in particular, the changing role and rights of women, and the increased protection and recognition of the rights of same-sex couples.

Of particular significance is the ability of parties to use contracts to govern their relationship during the marriage and in the event of divorce.<sup>229</sup> The requirements for enforceability of both pre- and postnuptial agreements vary by state.<sup>230</sup> Historically, prenuptial agreements that attempted to define or limit economic obligations in the event of divorce were void as against public

226. See Dallon, *supra* note 219, at 895.

227. See, e.g., *Lourie v. Lourie*, 2016 VT 57, ¶ 12 (holding that the family court was obligated to consider whether the settlement agreement voluntarily entered into by the parties “was fair and equitable pursuant to the relevant statutory factors at the time of the final hearing, such that it could be incorporated into the final divorce order”); *Cvitanovich-Dubie v. Dubie*, 231 P.3d 983, 988 (Haw. Ct. App. 2010), *aff’d*, 254 P.3d 439 (Haw. 2011) (“Property settlement agreements between husband and wife made in contemplation of divorce or judicial separation are favored by the courts and will be strictly enforced if fair and equitable and not against public policy.”).

228. See Singer, *supra* note 75, at 1458.

229. See *id.* at 1474–75.

230. See *id.*



policy.<sup>231</sup> Some believed that such contracts encouraged divorce and undermined the policy of treating marriage as permanent.<sup>232</sup> Others believed that the duty of husbands to support their wives was “an essential incident of marriage” that should not be limited by contract.<sup>233</sup> However, as divorce became more easily obtained and as state regulation of marriage decreased, prenuptial agreements gained acceptance in every jurisdiction,<sup>234</sup> although they are often subject to some restrictions.<sup>235</sup>

Postnuptial agreements are enforceable in many but not all jurisdictions,<sup>236</sup> and are more closely regulated than prenuptial agreements in a number of states.<sup>237</sup> While the opponents of postnuptial agreements point to the inability of spouses to contract at arm’s length and a desire to protect more vulnerable spouses from being taken advantage of, bans on postnuptial agreements leave spouses with no means of altering their marital agreements to meet changed circumstances short of divorce and remarriage. However, this limitation on spouses’ ability to redefine the terms of their relationship after marriage is often less important than the practical limitations on couples who want to define the terms of their marriage from its inception.

231. *Id.* at 1475.

232. *Id.*

233. *Id.*

234. J. Thomas Oldham, *With All My Worldly Goods I Thee Endow, or Maybe Not: A Reevaluation of the Uniform Premarital Agreement Act After Three Decades*, 19 DUKE J. GENDER L. & POL’Y 83, 83 (2011) (“During the past four decades, all U.S. states have accepted the general idea that spouses may make an enforceable agreement specifying the economic consequences of divorce.”).

235. *Id.* at 83–84. For example, some states require full disclosure of financial information or that each party has access to counsel. *See, e.g.*, CONN. GEN. STAT. ANN. § 46b-36g (West 2009) (requiring “fair and reasonable disclosure of the amount, character and value of property, financial obligations and income of the other party” and a “reasonable opportunity to consult with independent counsel” before a prenuptial agreement will be enforced); *see also* Sean Hannon Williams, *Postnuptial Agreements*, 2007 WIS. L. REV. 827, 838–39 (2007) (comparing various states’ requirements for enforceable prenuptial and postnuptial agreements).

236. Williams, *supra* note 235, at 838. Ohio prohibits all postnuptial agreements. *Id.*; *see also* OHIO REV. CODE ANN. § 3103.06 (West 2011) (“A husband and wife cannot, by any contract with each other, alter their legal relations, except that they may agree to an immediate separation and make provisions for the support of either of them and their children during the separation.”).

237. Williams, *supra* note 235, at 838 (identifying sixteen states that impose greater restrictions on postnuptial agreements as compared to prenuptial agreements). For example, in Minnesota, each party to a postnuptial agreement must be represented by counsel in order to be enforceable, but the parties only need the opportunity to access to independent counsel for a prenuptial agreement. *Id.* at 838–39. In Tennessee and Arkansas, the courts have held that a promise to remain married is not consideration sufficient to support a postnuptial agreement unless the marriage is under significant strain or a spouse abandons a specific, existing career. *Id.* at 839.

## B. Current Regulations (What is Left)?

### 1. Who Can Marry

State laws still regulate who can marry. Specifically, most states still require couples to obtain a license (unless common law marriages are recognized), and impose minimum age requirements, restrictions based on affinity by blood or marriage, requirements intended to ensure mental capacity, and requirements that neither party be legally married to anyone else.<sup>238</sup>

### 2. Divorce

State law currently regulates if and under what conditions a couple can end their marriage.<sup>239</sup> While the no-fault system currently in place in all states gives individuals much more control over the fate of their marriage, divorce is still not considered a fundamental right. Consequently, while couples (and even just one half of the couple, acting independently) are generally able to get a divorce, they still must adhere to whatever jurisdictional and procedural barriers the relevant state has in place.<sup>240</sup> Inability to overcome the hurdles will result (at least temporarily) in remaining married against the will of one or both spouses. Additionally, division of property and alimony obligations upon divorce will follow the default rules of the state in the absence of an enforceable pre- or postnuptial agreement to the contrary.

### 3. Property Rights

State law also determines property and inheritance rights in the absence of an enforceable prenuptial or marital agreement. These laws can have a tremendous impact on entire families in the event of divorce or the death of a spouse. With respect to property rights, most states follow the common law as modified by statute, while the remaining states are community property jurisdictions.<sup>241</sup> The rules in common law jurisdictions have their roots in English common law.<sup>242</sup> As discussed above, under the common law, not only

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238. See, e.g., Strauss, *supra* note 121, at 1267 (“The state uses registration to ensure that fiancés are competent to accept marital obligations (of sufficient age, able to consent); to impose limits on who may marry (two persons who are unmarried, not close relatives, and of the opposite sex); and to keep track of who is entitled to marriage’s benefits and burdens.”).

239. See discussion *supra* Part III.

240. See, e.g., *Sosna v. Iowa*, 419 U.S. 393, 410 (1975) (holding that state law requiring proof of one year of residency in state before a divorce petition could be filed did not violate the United States Constitution).

241. See Andrea B. Carroll, *Incentivizing Divorce*, 30 CARDOZO L. REV. 1925, 1928 n.24 (2009); SPERO, ASSET PROTECTION: LEGAL PLANNING, STRATEGIES AND FORMS ¶ 4.02, Westlaw (2016).

242. Kenneth W. Kingma, *Property Division at Divorce or Death for Married Couples Migrating Between Common Law and Community Property State*, 35 AM. C. TR. & EST. COUNS. 74, 75 (2009).

could husbands own separate property after marriage, but they also acquired all of their wives' property upon marriage. The husband had the right to manage and control the wife's property, but wives had no right to their husbands' property.<sup>243</sup> Married Woman's Property statutes were enacted in every state to allow married women to own and manage property.<sup>244</sup> Thus, common law states now allow both husbands and wives to maintain separate property.

The rules for separate property in common law states vary somewhat by jurisdiction, but generally separate property includes property acquired before marriage.<sup>245</sup> Separate property and the earnings of a spouse cannot be used to satisfy the other spouse's debts.<sup>246</sup> State rules regarding appreciation of separate property resulting from the efforts of one spouse are inconsistent, with some treating the increase in value as separate property and others treating it as marital property.<sup>247</sup> Marital property in common law states includes most property acquired during the marriage.<sup>248</sup> Exceptions to this general rule include gifts, property that is inherited, and property designated as separate property by agreement of the spouses.<sup>249</sup>

Nine states follow the community property model.<sup>250</sup> The rules in community property states are completely the product of statute and vary by jurisdiction. In general, each spouse owns an equal (one-half) interest in all property acquired during the marriage.<sup>251</sup> As in common law states, property acquired before the marriage is generally separate property after the marriage.<sup>252</sup> However, "[i]n most community property states, income from separate property is community property," although some treat it as separate property.<sup>253</sup> Separate property may become community property if separate property is commingled with other property.<sup>254</sup> One of the most significant consequences of community

243. SPERO, *supra* note 241, ¶ 4.02[1].

244. WEITZMAN, *supra* note 4, at 2.

245. *See, e.g.*, VA. CODE ANN. § 20-107.3 (West 2016) ("Separate property is (i) all property, real and personal, acquired by either party before the marriage . . ."); TENN. CODE ANN. § 36-4-121 (West 2014) ("Separate property' means . . . [a]ll real and personal property owned by a spouse before marriage . . .").

246. SPERO, *supra* note 241, ¶ 4.02[3].

247. *Id.* ¶ 4.02[2]. For example, in Illinois, appreciation of separate property is still separate property "regardless of whether it resulted from the efforts of the spouse or otherwise, and income therefrom." *Id.* In Florida, the appreciation of separate property "resulting from the efforts of either spouse or from the expenditure of marital funds" are marital property. *Id.* However, income from separate property is generally separate property. *Id.*

248. *Id.*

249. *Id.*

250. Edward F. Koren, ESTATE, TAX AND PERSONAL FINANCE PLANNING § 10:8, Westlaw (database updated September 2016). Those states are: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin. *Id.* § 10:8 n.1.

251. *Id.* § 10:8.

252. *Id.*

253. *Id.*

254. *Id.* Community property may lose its community status if it is commingled with other property, but this is less common. *Id.* Tracing of funds can be done to reassert rights over separate

property systems is that upon the death of one spouse, the other spouse owns only one-half of all community property. The other half is part of the deceased spouse's estate and will be disposed of according to the intestacy laws of the state or the decedent's will.<sup>255</sup> In divorce proceedings, courts in the majority of states (including common law and some community property states) apply some form of equitable distribution principle to divide property.<sup>256</sup>

Whether a couple resides in a common law or community property state, unless they have sufficient understanding of the law to know the rules that apply in their state, or have the resources to hire a lawyer to explain it to them *and* prepare a prenuptial agreement if they are dissatisfied with the default rules, their lives can be impacted in ways they never expected or desired. For example, a husband living in a common law property state may know that his wife owned a home before they married, and together they might decide to purchase a new house and rent out her former home. She might spend her earnings fixing up the house and paying for its maintenance and taxes while his income is used to pay the expenses and taxes on their jointly-owned home.

They might both believe that he has an equal interest in her home, or at least in the appreciation of the home after their marriage, and they may intend for him to have such an interest, although they never bothered to draft or execute an agreement to that effect. If they divorce, he could be left with no interest in her home, which will likely be treated as her separate property. However, she would have an interest in the home they purchased while married. Moreover, if she has children from a prior relationship and she dies intestate before her husband, the children will likely get a half-interest in their joint property even if the couple intended for it to help fund their retirement.

Problems can also arise if a married couple moves from a community property jurisdiction to a common law jurisdiction or vice versa.<sup>257</sup> The default

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property or a right to reimbursement for community funds utilized to benefit separate property, but this requires adequate records. *Id.* When separate funds are used to benefit community property, those funds are considered a gift to the community and there is no right to reimbursement. *Id.*

255. *Id.*

256. See Ryznar, *supra* note 219, at 119 (noting that the majority of states employ equitable principles for dividing assets in divorce proceedings). This is true even in some community property states. See WASH. REV. CODE ANN. § 26.09.080 (West 2005) ("In a proceeding for dissolution of the marriage or domestic partnership . . . the court shall, without regard to misconduct, make such disposition of the property and the liabilities of the parties, either community or separate, as shall appear just and equitable after considering all relevant factors."); *In re Marriage of Duncan*, 108 Cal. Rptr. 2d 833, 838 (Cal. Ct. App. 2001) ("Family Code section 2552, subdivision (b) gives the trial court considerable discretion to divide community property in order to assure an equitable settlement is reached.").

257. See Kingma, *supra* note 242, at 75–76 ("When married couples plan to migrate from a common law jurisdiction to a community property jurisdiction or vice versa, or they plan to migrate between common law jurisdictions or community property jurisdictions, they should engage in estate planning at the time of migration . . . because property rights and tax consequences are affected by the characterization of property as separate, community or marital property.").

rules in the state of origin might have suited their wants and needs, but the rules in the destination state may not. Unless they realize the change in law that accompanied their change in residence, they might be stuck with governing laws that are inconsistent with their intentions. Worse, they might have moved to a state that will not allow them to enter into a postnuptial agreement to ensure that their property is treated in accordance with their wishes.<sup>258</sup>

## VI.

### THE FUTURE OF MARRIAGE

The institution of marriage has changed as the roles of men and women in society have changed. Although many scholars and activists, including feminists and gay rights advocates, have argued for the complete abandonment of the institution of marriage,<sup>259</sup> given the institution's deep roots in American history and culture, it is likely to persevere. Indeed, the fight for marriage equality and the fierce opposition thereto are evidence that many people still view marriage as a highly desirable institution with continuing relevance in American society. Yet, while the institution of marriage survives, the reasons why couples choose to marry have evolved dramatically.

No longer do concerns about the transfer of property or legitimacy of heirs dominate the list of reasons for couples to marry. Bonds of affection, a desire to raise a family together, and access to certain government benefits are more common motivators.<sup>260</sup> Moreover, women are no longer merely property to be transferred from the care of their parents to their husbands. Couples are marrying later and are more equal in terms of education, skills, work experience, and assets. Roles in the relationship are likely to be shaped by these facts as well as by community norms and family upbringing.

While each couple is shaped by their individual beliefs and experiences, and they arguably should have greater control over the terms of their relationship, it may not be feasible to completely exclude the state from involvement in the marital relationship. For example, even if marriage were to become a completely contractual relationship, the state would still have a role in contract enforcement, particularly in the context of divorce or the distribution of assets upon the death

258. *See, e.g.*, OHIO REV. CODE ANN. § 3103.06 (West 2011) (“A husband and wife cannot, by any contract with each other, alter their legal relations, except that they may agree to an immediate separation and make provisions for the support of either of them and their children during the separation.”).

259. *See, e.g.*, Elizabeth S. Scott, *A World Without Marriage*, 41 *FAM. L.Q.* 537, 539 (2007) (considering “whether it would be desirable—or not—to abolish legal marriage altogether and replace it with a new legal status (call it a civil union), open to all individuals who want to register their commitments to an intimate partner”).

260. *See* Strauss, *supra* note 121, at 1268 (“First, the state conditions monetary benefits (and some burdens) on marital status . . . Other laws . . . provid[e] for sick leave, emergency decision-making powers, or immigration benefits . . . Last, the law provides special protection for the widowed, through pension benefits, precedence in intestacy, and the right to bring wrongful-death claims.”).

of one spouse. Moreover, states still have an interest ensuring that children are provided for and that property rights are easily and unambiguously determinable. Thus, the real issues for the immediate future of marriage are not whether the state will have any involvement, but instead: (1) the degree to which states will be allowed to regulate marriage, and (2) whether state default rules will presumptively apply to certain issues, or if parties will be required, encouraged, or enabled to choose the terms themselves. This section will consider whether states should maintain the *status quo* and apply state default rules unless the parties enter into enforceable prenuptial or postnuptial agreements, treat marriage as a religious matter and limit the state's involvement to a record-keeping function, view marriage as a purely contractual relationship, or allow all couples to choose the terms that will govern their marriage without the need to enter into a separate marital contract.

### A. Maintaining the Status Quo

Today, the roles of each person in an intimate relationship can vary widely from one couple to the next, and each couple has the ability to define the terms of their relationship *until they marry*. Once married, the state sets the terms unless the couple takes steps to draft and execute an enforceable prenuptial contract. If this system is maintained, states will continue to regulate who can marry (consistent with rights guaranteed by the United States Constitution and state constitutions), requirements for legal marriage, grounds for divorce, and financial and property rights upon divorce or death of a spouse.

There are many reasons why the current system is likely to persist in spite of critiques. Most judges and legislators start with the assumption that states should make the rules applicable to all married couples residing in the state. But this basic assumption has come under attack in light of the Supreme Court's decision in *Obergefell v. Hodges*. Opponents of same-sex marriage have increasingly advocated limiting or ending the state's involvement in marriage and thereby eliminating the need for state employees who oppose same-sex marriage to "participate in" or signal approval of such marriages.<sup>261</sup>

These conservative voices join feminists and gay rights advocates, who have questioned the state's role in marriage and the value of marriage itself for decades. In particular, "[s]ome queer theorists are critical of the efforts by the gay rights movement to 'mainstream' gay sexuality by, for example, seeking admission into the institution of marriage."<sup>262</sup> Other critics have complained that

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261. See Greg Horton, *Oklahoma Bill Would Give Clergy Power over Marriage Licenses*, HUFFINGTON POST (Mar 12, 2015), [http://www.huffingtonpost.com/2015/03/12/oklahoma-gay-marriage\\_n\\_6858424.html](http://www.huffingtonpost.com/2015/03/12/oklahoma-gay-marriage_n_6858424.html) [<https://perma.cc/J9F4-DA87>] (discussing legislation proposed by State Representative Todd Russ designed to protect court clerks "caught between the federal and state governments").

262. Carlos A. Ball, *Privacy, Property, and Public Sex*, 18 COLUM. J. GENDER & L. 1, 8 (2008) (citing MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX POLITICS AND THE ETHICS OF QUEER LIFE* 41–80 (2000)).

the current system privileges married couples by bestowing benefits on married people that are not available to non-married couples.<sup>263</sup> In 1993, lesbian feminist scholar Nancy D. Polikoff explained her objection to marriage as follows: “I believe that the desire to marry in the lesbian and gay community is an attempt to mimic the worst of mainstream society, an effort to fit into an inherently problematic institution that betrays the promise of both lesbian and gay liberation and radical feminism.”<sup>264</sup>

Current regulations also privilege those with the knowledge and financial resources to hire attorneys to draft and execute prenuptial agreements so that their marriage will be governed by the rules of their choosing. While all states allow couples to enter into enforceable contracts before marriage that reflect their own preferences and beliefs (to essentially “opt out” of the legislative scheme), this requires couples to (1) understand the relevant state’s marital property laws; (2) recognize that there are other options; (3) determine whether the alternatives better reflect their preferences and beliefs; and (4) draft and execute an enforceable agreement that reflects their choices. In reality, attorneys cost money and even hiring an attorney to draft a relatively simple prenuptial agreement can cost hundreds or thousands of dollars. Relatively few couples can easily afford such services or even recognize the need to enter into such contracts. In addition to the disparities perpetuated by the current system, changes in society and in the law are changing the landscape of marriage already. Consequently, maintaining the *status quo* is far from inevitable, and calls for change continue.

### *B. Religious Marriage, State as Record-Keeper*

In the wake of *Obergefell*, some have argued that marriage should be a religious matter with the state’s involvement limited to a record-keeping function. This approach not only continues to involve the state to some degree, but it also raises constitutional concerns to the extent that religious institutions will be deciding who is allowed to marry. Even if non-religious couples are able to enter into civil unions or have their marriages recognized by the state in some other way, if this system creates a hierarchy of relationships with marriages solemnized by religious institutions receiving more favorable treatment, it is probably unconstitutional.

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263. See, e.g., Nancy D. Polikoff, *Ending Marriage as We Know It*, 32 HOFSTRA L. REV. 201, 202 (2003) (“The law should no longer reward marriage above all other relationships.”); MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 1, 9, 161–66 (1995) (critiquing the culture in which “husband and wife [are] established as the core intimate relationship around which law, politics, and policy revolve” and arguing for increased support for caretakers).

264. Nancy Polikoff, *We Will Get What We Ask for: Why Legalizing Gay and Lesbian Marriage Will Not Dismantle the Legal Structure of Gender in Every Marriage*, 79 VA. L. REV. 1535, 1536 (1993).

Todd Russ, a member of the Oklahoma House of Representatives, sponsored a bill that would result in the state no longer issuing marriage licenses to anyone.<sup>265</sup> Instead, members of the clergy would issue marriage certificates, and those certificates would be filed with the court clerk.<sup>266</sup> Thus, the state would perform a record-keeping function *only* and would “protect” clerks from having to issue licenses to same-sex couples.<sup>267</sup> The bill was criticized because it was deliberately limited to religious couples and would only allow certificates of marriage signed by ordained clergy.<sup>268</sup> If a couple is unable or unwilling to find ordained clergy to issue a license, they could file an affidavit of common law marriage.<sup>269</sup>

In one sense, Russ’ proposal would be a return to marriage regulated by religious institutions (albeit multiple institutions instead of just one religious denomination, as was the case with the Church of England). However, the proposal would not remove the state from all questions involving marriage; instead, it simply would shift part of the administrative burden from the state to clergy (who must decide eligibility to marry and execute the marriage certificate).<sup>270</sup> Presumably, the state would still need to determine (regulate) who is qualified to submit such an affidavit. Thus, it does not truly aim to make marriage an exclusively religious institution, nor is it clear how or if such a transition could be made. Moreover, the proposal appears to relegate non-religious couples to a second-class status to the extent that couples married by clergy would enjoy any rights or benefits that couples in common law marriages would not. It is worth noting that an approach that favors religious couples over non-religious couples may run afoul of the Establishment Clause of the First Amendment, and perhaps of the Fourteenth Amendment’s Equal Protection Clause as well.<sup>271</sup>

### C. *Just a Contract*

Under a purely contractual system, marriage would be a contractual arrangement much like a business partnership. Arguably, this approach most clearly respects marriage as a fundamental right, and limits state interference

265. Greg Horton, *Oklahoma Bill Would Give Clergy Power over Marriage Licenses*, HUFFINGTON POST (Mar 12, 2015), [http://www.huffingtonpost.com/2015/03/12/oklahoma-gay-marriage\\_n\\_6858424.html](http://www.huffingtonpost.com/2015/03/12/oklahoma-gay-marriage_n_6858424.html) [<https://perma.cc/SUX7-LZAS>].

266. *Id.*

267. *See id.*

268. *Id.*

269. *Id.* It is unclear how common law marriages would differ from religiously solemnized marriages, or what would need to be included in the affidavit.

270. *See* H.R. 1125, 55th Leg., 1 Reg. Sess. (Ok. 2015) (requiring the clergy who perform the wedding ceremony to execute the marriage certificate which must state that “the parties are not disqualified from or incapable of entering into the marriage”).

271. *See* U.S. CONST. amends. I, XIV § 1. Without additional information about the precise text and implementation of the proposed law, it is impossible to fully consider the constitutional implications. In any event, such an inquiry is beyond the scope of this Article.



accordingly. The contract would also be enforceable in every state, thereby providing consistency even if couples were to change domicile. However, this system would place an increased burden on people without access to legal counsel or the desire or ability to negotiate the terms of the agreement on their own. In fact, most will not know what terms should be included, what their options are, or the legal import of different terms. Moreover, state rules still regulate contracts. States' rules related to competency to contract would therefore still regulate who could marry.<sup>272</sup> In other words, treating marriage as a contractual relationship would not avoid all controversial issues.

This idea of marriage as a contractual relationship has been proposed and debated for many years without success.

For many years, the idea of marriage contracting has been a minor theme in American legal and popular discussion. The topic routinely appears in journalistic pieces; an occasional feminist advocates its legalization; student notes comment on cases or particular jurisdictions' treatment of marriage contracts; guides for practitioners surface intermittently. . . . Despite this plentiful discussion, we have not, in any fundamental sense, taken marriage contracting seriously. We have flirted with, edged around, played at the topic. Clearly it has continuing attraction, yet a sense of unreality, of intellectual or polemical gameplaying remains.<sup>273</sup>

Ultimately, treating marriage as just another contract is an idea that has not gained traction in almost half a century, and given the inequities discussed above, there is no reason to pursue it now.

#### *D. Marriage Terms Chosen by the Couple, Not the State*

Rather than impose one rule on all state citizens, states should allow individuals to choose the rules that best suit their personal beliefs and circumstances. The challenge is to establish a system that allows all couples to define the terms of their own marriage, yet still makes marriage accessible to all citizens, allows states to set limited boundaries that reflect the public policies of the state, and protects children of the marriage. Moreover, any system that allows couples to choose the terms of their marital contract must not place an undue burden on states in terms of administrative and enforcement costs. The solution is for states to require (or at least empower) couples to choose the terms that will apply to certain aspects of marriage that are currently determined by the

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272. For example, minimum age requirements for marriage and mental competency requirements are simply specific applications of general rules of competency necessary to enter into an enforceable contract.

273. Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CAL. L. REV. 204, 208–09 (1982).

state, without requiring them to contract around the state default rules. The issue on which this approach would have the greatest impact, and the focus of the remainder of this section, is marital property rights.

### 1. *What Will Couples Be Allowed to Choose?*

All states allow parties to enter into prenuptial contracts that define property rights.<sup>274</sup> The change proposed here is that all couples would be able to choose the rules that would apply to their marriage, even if they do not have the financial means to contract around them, or do not recognize the need to execute a prenuptial agreement.<sup>275</sup> Few individuals have sufficient legal knowledge to draft and execute an enforceable agreement on their own, and the cost of hiring lawyers to draft and review agreements is more than most couples are able or willing to spend. Under this proposal, the state would provide information describing how different types of property can be categorized and treated before and after marriage, and allow the intended spouses to choose how their property should be categorized and treated after marriage. The parties can choose to accept the default state rules, but they will at least have the opportunity to make a different choice. Moreover, they will know before entering into marriage what those rules are (or at least have both the opportunity and incentive to learn the rules).

### 2. *How Will Couples Choose?*

Implementation of this proposal should not require significant resources. Rather than applying the default state rule unless the parties contractually agree otherwise, marriage licenses could include a form asking the parties to identify any valuable real or personal property owned by either party, and asking how it should be treated after the marriage. The form could list examples of property (such as homes, rental, or investment property) and could instruct couples to identify any such property and designate whether it should be treated as property owned separately by one spouse or as community property. Straightforward definitions of terms,<sup>276</sup> as well as brief, easy to understand explanations of the legal effect of each choice could be provided on the form; further explanations

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274. See Oldham, *supra* note 234, at 83 (“During the past four decades, all U.S. states have accepted the general idea that spouses may make an enforceable agreement specifying the economic consequences of divorce.”); Katherine D. Black et. al., *Community Property for Non-Community Property States*, 24 QUINNIPIAC PROB. L.J. 260, 281 (2011) (“An express antenuptial contract will generally govern all the property of the parties, not only in the matrimonial domicile, but in every other place, and such a contract is subject to the same governing law as other contracts.”).

275. While default rules would still apply if couples failed to select an option, the choice not to select an option is still a choice. Thus, all couples would be making a choice with respect to the rules that would apply to them.

276. For example: “Community property” is owned by both the husband and wife with each spouse generally holding a one-half interest in the property. “Separate property” is owned by only one spouse, with the other having no interest in the property.

could be available online, in the license office, and in video or written form. The explanations could also give guidance with respect to how each form of property would be treated in the event of divorce or the death of one spouse.

The complexities of the tax system and of the laws affecting property upon divorce or death of a spouse<sup>277</sup> will likely prevent couples from fully understanding all of the implications of each possible choice, but this system would still provide sufficient information for couples to make a *more* informed choice. At a minimum, it might alert couples of the need to have frank discussions about how property will be treated after marriage and about the rights of each party in property owned before the marriage and in property acquired after marriage. In some cases, the information will help couples understand the need for and benefits of consultation with a lawyer before making a choice. While the expense of legal representation may still be a deterrent, individuals can better determine whether the cost is justified for their specific circumstances once they have been alerted to issues that may arise.

While some will certainly remain confused after reading the explanations (or will not care enough to attempt to understand), this approach provides more information and choice than the current system, which imposes rules without any opportunity for choice. Moreover, it provides notice to couples that certain aspects of their marriage are governed by law (or by contract), and not solely by their intentions.<sup>278</sup>

### 3. *Benefits of This Proposal*

Aside from allowing couples to choose how their property will be treated after marriage, this approach also confers the benefit of a more informed citizenry. Typically, only those with the assets and resources necessary to draft and execute a prenuptial agreement have even a general understanding of the laws governing their rights in marriage. Everyone else learns about their rights and obligations only when it is too late to exercise their right to choose—usually when contemplating divorce or when one spouse dies. Asking couples to choose the terms of their marriage allows them to enter into marriage with this knowledge, and to make choices during the marriage with a better understanding of the consequences of those choices.

For example, rather than simply moving into a home previously owned by her fiancé, a prospective wife might insist that she be granted an interest in the property in the event of divorce, or an interest in the entire property upon her partner's death (particularly if the couple intends for her to be a stay-at-home

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277. See generally Kingma, *supra* note 242 (discussing difficult tax and estate planning issues related to classification of property owned by married individuals and couples).

278. For instance, some couples may erroneously believe that their informal understanding of property ownership will be enforced by the law. Thus, one spouse may not understand that he has no right to property owned by his spouse before the marriage. The proposed system will attempt to correct these mistaken beliefs.

parent who may not contribute financially to the cost of paying off or maintaining the home). Another couple could choose to have the mortgage and taxes on a vacation home paid solely out of one spouse's income if the house is going to remain her separate property.

This approach is somewhat different from proposals requiring premarital contracts as a form of "mandatory divorce planning,"<sup>279</sup> although the implementation may share some similarities.<sup>280</sup> The goal of the proposal is not solely to plan for financial support or distribution of property and assets in the event of death or divorce; instead, it is intended to allow the couple to define the terms, expectations, and roles of each party *during* the marriage *and* in the event of divorce or death. If, for example, a couple decided that certain property would remain one spouse's separate property during the marriage and that any increase in its value or any income from the property would be that spouse's alone, that would affect that spouse's income and perhaps some of the spending and saving decisions of each party over the course of that marriage.

Another advantage to allowing such choice in the marriage contract is that other jurisdictions could choose to honor the couples' choices even if the couple were to move to another jurisdiction. Much as prenuptial agreements are enforceable in all states, the choices made on the marriage license could form a contract that could be enforced no matter where the couple lived.<sup>281</sup> This would relieve courts of the burden of determining which state's rules should apply to various property, or of applying the rules of multiple states depending upon when the property at issue was acquired and where the property was located. It also frees spouses from having to enter into a new contract (or execute a first contract) before moving to a state whose laws are contrary to their wishes.<sup>282</sup>

#### 4. Disadvantages and Concerns

If one partner understands the risks and benefits of various options better than their intended spouse, that person may steer their fiancé toward an option that disproportionately advantages him or her. This is essentially the same argument made against prenuptial agreements when there is an imbalance in

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279. See Stake, *supra* note 202, at 425–47 (advocating mandatory premarital agreements that address post-dissolution support obligations, child custody, and the role of fault in distributing assets, in addition to the post-dissolution division of property).

280. *Id.* at 429–30 (proposing a "standardized form on which the parties would choose the terms of their premarital agreement").

281. The destination state may choose not to treat the selection as an enforceable premarital agreement and instead apply its own rules in the event of divorce or death of a spouse. However, all states would have an incentive to honor the parties' choices to the extent that the process of choosing property distribution rules serve the same policy goals as prenuptial agreements and to the extent that the process for making the choice includes the safeguards required for enforceable prenuptial agreements (such as full disclosure of assets and access to counsel).

282. Since most people do not consult marital property rules before moving to another state, this system would also prevent a party from being unhappily surprised by the rules in effect in the destination state.

bargaining power—and the critique has some validity. However, if information is provided to each person before they are issued the marriage license, each enters into the relationship with more knowledge than they would have had under the current system. In addition, those same concerns arise in states whose default rules may advantage one party over the other. Finally, it is better to address such questions through broad policies that consider issues of fundamental fairness and equity in property division than to deprive all couples of choices in order to protect a few.

There is also some cost associated with this proposal. States will need to amend or create marriage license forms and provide sufficient and understandable information to allow couples to intelligently choose among the options. However, this investment of time and administrative cost must be weighed against the benefits of a system that allows individuals to make informed decisions about their financial futures. Moreover, everyone should understand the legal effect of marriage on their property rights.

While there is also a risk that a couple may not understand the information and options provided and ultimately make choices that leave them worse off than the default rule, this is a rather low hurdle to overcome (a matter of drafting reader-friendly language) and there are certainly couples who will be better off. Certainly, there is no reason to believe that ignorance is generally preferable to information. Thus, this risk does not justify clinging to the current system.

### *E. Issues for Future Inquiry*

#### *1. Marital Obligations*

As noted above, courts have historically refused to enforce agreements between spouses. While that has changed with respect to prenuptial and (to a lesser extent) postnuptial agreements, courts still cite public policy when refusing to enforce some types of marital agreements, and many limit enforcement to issues related to property rights.<sup>283</sup> Limiting prenuptial agreements to property issues arguably deprives people of the ability to make choices about the other terms of their relationships.<sup>284</sup> While public policy should prevent parties from entering into agreements that negatively affect the rights of children (such as agreements not to seek child support in the event of divorce) or that are the product of undue influence or coercion, there could be a presumption that competent adults are able to set the terms of their relationship on a variety of issues (including, for instance, compensation for a spouse who works outside of the home and provides financial support while the other spouse obtains a degree, or rights upon divorce for a spouse who leaves the workforce to

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283. See Kaiponanea T. Matsumura, *Public Policing of Intimate Agreements*, 25 *YALE J.L. & FEMINISM* 159, 159 (2013) (discussing and criticizing “the use of the public policy doctrine to avoid enforcement of intimate agreements”).

284. See *id.*

care for children). Parties could also spell out behavior (such as adultery or gambling) that will result in specific consequences (particularly financial consequences) in the event of divorce.<sup>285</sup> While these types of agreements may seem distasteful to some, allowing parties to bargain freely over these issues is more rational and reasonable than requiring couples to leave their resolution to the courts' discretion and to the courts' notions of equity in the event of divorce.

## 2. Divorce

It seems well-settled that divorce should be available to all married couples.<sup>286</sup> While no-fault divorce statutes were originally intended to reduce divorce rates, their continued existence long after it became clear that they utterly failed in achieving that purpose indicates that states recognize that requiring couples to remain married when even one of them desires to leave the relationship is unwise.

Because all states allow for divorce without a finding of fault, it might be argued that allowing states to continue regulating divorce does not impose any real burden on married couples seeking a divorce. However, a recent Tennessee case highlights the power of the state to force couples to stay married even when both parties wish to end the relationship.<sup>287</sup> In that case, the court refused to grant a divorce petition in which both parties filed divorce complaints alleging irreconcilable differences.<sup>288</sup> The court's holding was based, in part, on the judge's understanding of the effect of the Supreme Court's holding in *Obergefell*. Clearly incensed by that holding, the judge stated:

The conclusion reached by this [Tennessee Chancery Court] is that Tennesseans, corporately, have been deemed by the U.S. Supreme Court to be incompetent to define and address such keystone/central institutions such as marriage and, thereby, at minimum, contested divorces. Consequently, since only our federal courts are wise enough to address the issues of marriage—and therefore contested divorces—it only follows that this Court's jurisdiction has been preempted.<sup>289</sup>

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285. Some courts and commentators have opposed such terms because they resurrect—at least in part—the fault-based system that was rejected and replaced by the no-fault scheme. Williams, *supra* note 235, at 835–36. As such, they are arguably in violation of public policy. *Id.* (citing *Diosdado v. Diosdado*, 118 Cal. Rptr. 2d 494, 496 (Cal. Ct. App. 2002) (holding that the liquidated damages clause of a postnuptial agreement that imposed penalties for infidelity was contrary to the public policy reflected in California's no-fault divorce laws)).

286. It may be persuasively argued that there is a constitutional right to divorce, but that discussion is beyond the scope of this Article. Instead, this discussion is limited to whether, as a policy matter, the state should be allowed to regulate the right to divorce.

287. See Order Dismissing Complaint and Counter-Complaint at 15–16, *Bumgardner v. Bumgardner*, No. 14-0626 (Ch. Ct. Hamilton Cty., Tenn. Aug. 31, 2015).

288. *Id.* at 5–6.

289. *Id.* at 5.

Ultimately, the judge concluded that he was “not convinced that [the] marriage [was] irretrievably broken” and dismissed the complaint and counter-complaint for divorce.<sup>290</sup> In other words, the court required two people who no longer wished to be married to remain married indefinitely.

While the judge’s assertion that *Obergefell* deprived the court of jurisdiction to decide a divorce case is absurd, the mere fact that the court has the power to force a couple to stay in a marriage they consider undesirable reveals the dangers inherent in allowing the state to decide the fate of intimate relationships. Although it is advisable for the state to set procedures by which the marriage is dissolved, and by which property, child custody, and support obligations are determined, allowing the state to determine *if* a couple may divorce may not be prudent.

## VII. CONCLUSION

The state role in regulating marriage is declining, and justifiably so. Given the changing characteristics of married couples and the evolving roles of men and women in relationships and in society, there is no legitimate reason to allow the state to define all of the rights of each party to a marriage.

With respect to property rights, giving parties the ability to choose the rules that govern their property rights without requiring them to hire a lawyer and draw up a contract themselves allows couples to make the choice that best fits their beliefs and circumstances. Importantly, it also allows that choice to follow them from state to state.

Ultimately, allowing couples to choose the terms that govern their marital contracts reflects the reality that we live in a heterogeneous society, and that each state includes people with widely varying beliefs, resources, goals, and ideals. There is no reason why such a disparate population should be governed by a single set of marriage rules. If people are expected to form a lasting bond and live harmoniously in their relationship, they must have a voice in the rules that govern the parameters of that relationship. Structuring marriage procedures to better inform couples of the effect of marriage on their property rights and to enable them to choose the rules that will govern their marriage appropriately balances the interest of the state in ensuring that property rights are easily determinable and the interest of couples in entering into marriage on their own terms.

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290. *Id.* at 15. The judge also noted that the parties had not executed a marital dissolution agreement, which was a prerequisite to divorce on the ground of irreconcilable differences. *Id.* at 7. Thus, the court could have dismissed the complaint solely because of the couple’s failure to file a necessary form. However, the language of the opinion indicates that the judge simply did not believe the couple should divorce; as the judge, he had the power to decide the fate of the couple’s relationship.

