Unbundling Marriage

James Herbie DiFonzo

Maurice A. Deane School of Law at Hofstra University

Follow this and additional works at: http://scholarlycommons.law.hofstra.edu/hlr

Part of the Law Commons

Recommended Citation

Available at: http://scholarlycommons.law.hofstra.edu/hlr/vol32/iss1/3
UNBUNDLING MARRIAGE

James Herbie DiFonzo*

Two disappointed believers
Two people playing the game
Negotiations and love songs
Are often mistaken for one and the same
Now the man and the woman they remain in contact
Let us say it's for the child
With disagreements about the meaning of a marriage contract
Conversations hard and wild

Marriage is emerging as a "bundle" of legal benefits and burdens. The history of domestic relations has produced a cornucopia of family arrangements, and the yield shows no signs of diminishing. At the same time, our yearning for a halcyon past has led many to the erroneous belief that the family formation consisting of two parents and the children of their 'til-death-do-they-part union is the only culturally authentic and "traditional" one. In fact, as Michael Grossberg has observed, our domestic past has been characterized by "the constant reality of American family diversity." As twenty-first century families

* Professor of Law, Hofstra University School of Law, J.D., M.A. 1977, Ph.D. 1993, University of Virginia. E-mail: lawjhd@hofstra.edu. An embryonic version of this Essay was presented at the Conference on Marriage, Democracy, and Families, Hofstra University School of Law, March 2003. My thanks to Linda McClain, who organized the conference and helped me with ideas for crafting this Essay. Thanks also to John DeWitt Gregory, Joanna Grossman, and Ruth Stern, who lent their critical eyes and wise counsel. A special word of appreciation to Tricia Kasting, whose bibliographic assistance was both exhaustive (for me) and exhausting (for her), and who always labors with grace and humor. The Hofstra University School of Law also offered support by way of a summer research grant, for which I am grateful.

are exploring new contours, the legal system is equally awash with new concepts of marital and nonmarital relationships. This Essay surveys the contested legal terrain of family formation today, and suggests that further development will largely be a product of the coming disaggregation of the legal elements which constitute the state-sanctioned marriage. Marriage is being reformulated in response to a variety of social pressures: from same-sex couples seeking admission; from heterosexual couples seeking to customize their marriages; and from states, municipalities, and private groups crafting alternative versions of marriage-like partnerships. These “disagreements about the meaning . . . of a marriage contract” often do lead to “[c]onversations hard and wild.”

But this Essay concludes that marriage will ultimately be reshaped into a more fluid and multi-factored form, more responsive to the needs of an ever-more diverse population.

In its first section, this Essay defends the continued relevance and importance of marriage against the considerable chorus claiming that society’s familial tasks would be better performed by contractually-bound sets of individuals who ask nothing more from the state than that it enforce domestic obligations as it does other civil contracts. Marriage has, in truth, been reformed and deformed so much and so often that it appears unrecognizable to many cultural observers. However, the battles over its shifting shape should not distract us from the essential function marriage plays in refining and disseminating vital social norms.

The second section discusses the coming “unbundling” of American marriage. Here I suggest that family law is moving from a conception of marriage as an institution with a uniform meaning to a more variegated view that assesses marriage in terms of discrete groupings, or “bundles,” of rights and responsibilities. These new configurations of marriage’s elements are highlighted in the development of civil unions and domestic partnerships, which replicate the privileges and pains of marriage in a marriage-like status. Although

see also MICHAEL GROSSBERG, GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA 9-30 (1985) (discussing a legal climate characterized by disputes over the proper scope of domestic authority, both in public and private realms).

4. SIMON, supra note 1.

5. My discussion of “bundling” principles for the elements of marriage is adapted from the economic theory of bundling, based on “the practice of grouping together several services or products into a single package that is then offered to the consumer at one price.” BUSINESS ENCYCLOPEDIA DICTIONARY, at http://www.economist.com/encyclopedia/Dictionary.cfm (last visited Jan. 19, 2004); see also Scott Worden, Micropayments and the Future of the Web, at http://cyber.law.harvard.edu/fallsem98/final_papers/Worden.html (last visited Jan. 19, 2004) (“Economists refer to the practice of grouping items together for a single sale as bundling.”); infra text accompanying notes 92, 97-98, 142, 147-50, 154.
the role of contract will continue to increase in crafting familial understandings (and misunderstandings), allocating these bundles of domestic burdens and benefits may become the primary way for the state to preserve its important “channelling function.”

The final section of the Essay undertakes a preliminary sketch of the impact of bundling principles on the legal construction of marriage. Provisions regulating domestic partnerships and civil unions, as well as the increase in premarital contracting and such reform proposals as the American Law Institute’s (“ALI”) treatment of “domestic partners” in its recently issued Principles of the Law of Family Dissolution (“Principles”) have shifted the discourse on marriage and divorce in a key way. Although not directly aiming at this target, these legal reforms may yet succeed in reconfiguring the terms of the bargain between the state and every family. Reexamining marriage through its myriad elements may allow us to reconfigure the institution so that the public-private debate continues to be fruitful in expanding marital freedom under law.

I. THE SHAPE-SHIFTING MARRIAGE

Ironies abound in the history of marriage. Throughout the nineteenth century, the dominant legal theory insisted that once husband and wife made a voluntary choice to marry, they lost any further freedom with regard to the marriage, instead subjecting themselves to the terms imposed by the state. The Supreme Court’s most oft-quoted recitation of the legal and cultural contours of marriage occurred in an 1888 case in which the Court condemned the “loose morals and shameless conduct of the husband” as “meriting the strongest reprobation,” but nonetheless rhapsodized upon the lofty ideals of the social obligations of married life:


Marriage, as creating the most important relation in life, as having more to do with the morals and civilization of a people than any other institution, has always been subject to the control of the legislature.

....

The relation once formed, the law steps in and holds the parties to various obligations and liabilities. It is an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress.10

These core concerns with marriage's moral excellence are at odds with the opportunistic behavior at play in the case.11 The husband left his first wife and children in Ohio in 1850, bound for the Oregon Territory.12 He pledged them his continued support and specified that he would either return within two years or send for them.13 But the husband reneged on his promises and abandoned his family.14 He then secured the passage of a legislative act in the Oregon Territory granting him a divorce, and soon afterwards married again.15 The Supreme Court excoriated the husband, but held that the territorial legislature had the power to award the legislative divorce.16

Thus, the Supreme Court's anthem to marital purity was awkwardly sung in a morally messy case. The Court's strident censure of the husband's actions represented particularly feckless dictum in an opinion which both vindicated the wayward husband's means in seeking a legislative divorce, and validated the result he achieved by affirming the state's jurisdiction to bypass the judiciary in awarding the dissolution itself.17 The Justices doubtless considered the goal of reinforcing state control over marriage and divorce to be worth the cost of sanctioning

10. Id. at 205, 211.
12. See Maynard, 125 U.S. at 192.
13. See id.
14. See id.
15. See id. at 193.
16. See id. at 210.
17. See id. at 205, 208.
one spouse's fall from grace. In so doing, the Court echoed one of nineteenth century American society's core beliefs about the family, which did not change as the next century began. As Hendrik Hartog observed, marriage "was the one large relational identity still available in the early twentieth century."\footnote{Hendrik Hartog, Remarks at the Hofstra University School of Law Conference on Marriage, Democracy, and Families (Mar. 14, 2003) (videotape on file with Hofstra Law Review). Note, however, that state sovereignty over marriage was not a value universally or unquestioningly held. In his mid-nineteenth century study of American marriage, historian Auguste Carlier described the tension between individualism and community control in one aspect of marital affairs: It is true, some people hold that the [public rituals] of marriage [are] of no interest; that the union of the individuals is their exclusive affair alone, and concerns no one else. This reasoning arises from the predominant idea in America, that the individual is superior to the community, and that the latter should not exercise any restraints, except in rare cases, and from reasons of most serious moment. But it is forgotten that marriage is the foundation of the family, and creates new relations between persons who have been strangers to each other; and hence come rights and duties of every nature, domestic, civil, political: and we cannot too much protect an institution, the most ancient and respectable of all, where morality is tempered by social condition. \textit{Auguste Carlier, Marriage in the United States} 36-37 (David J. Rothman & Sheila M. Rothman eds., Arco Press, Inc. 1972) (1867).}

Marriage has survived through American history despite continuous wrangling over the proper contours of the institution. When Judge Ben B. Lindsey wrote \textit{Companionate Marriage} in 1927, many fumed at his audacity in defining this form of nuptial union as "legal marriage, with legalized Birth Control, and with the right to divorce by mutual consent for childless couples, usually without payment of alimony."\footnote{Ben B. Lindsey & Wainwright Evans, \textit{The Companionate Marriage} v (1927).} But Judge Lindsey was proposing nothing new: "Companionate Marriage is already an established social fact in this country."\footnote{Id. at v.} He identified this type of connubial status as a rump regime easily able to outwit the formal legal system:

[Companionate Marriage] is conventionally respectable. Sophisticated people are, without incurring social reproach, everywhere practicing Birth Control and are also obtaining collusive divorce, outside the law, whenever they want it. They will continue the practice, and no amount of prohibitive legislation can stop them.\footnote{Id.; see also id. at 244 ("The fact that contraception and divorce by mutual consent (collusion) are illegal does not particularly matter so long as people have the good sense to practice them anyway.").}
Lindsey was correct, of course, and although many claimed he was out to destroy marriage, his only fault may have been a touch of prescience. Writing shortly after World War II, sociologist Paul H. Landis observed that the “companionship family,” which “prizes romance and its ethereal happiness,” was replacing the “institutional family . . . rooted in the traditions of child-bearing, joint economic activity and filial duty.” Overall, the social history of the nineteenth and twentieth century American family may be characterized as “moving from an [sic] hierarchically ordered household closely integrated with the community towards an egalitarian, companionate family sharply separated from the public world.”

At first light of the twenty-first century, however, marriage has moved from the bedrock of society to a more precarious perch atop the sands of a polity in transition. And no wonder. The uprising in divorce law and culture that has characterized the period beginning in approximately 1970, along with the marked increase in cohabitation among unmarried couples, are but two indicia that the relationship between marriage and the state is in flux. What is marriage today?

22. COMPANIONATE MARRIAGE became the “leading literary symbol of the American sexual revolution of the twenties.” CHARLES LARSEN, THE GOOD FIGHT: THE LIFE AND TIMES OF BEN B. LINDSEY 173 (1972). Judge Lindsey’s attacks on the prevailing moral ethos triggered vibrant public reaction. As his biographer noted, “[p]opular magazines and Sunday supplements found the temptation to ballyhoo companionate marriage irresistible.” Id. at 174.


26. From 1990 to 2000, the number of unmarried couples increased seventy-two percent, from 3.2 million to 5.5 million. A Census report released in 2003 indicated that, while married couples make up fifty-two percent of all households, their prevalence continues to decline as the households of unmarried domestic partners, both opposite-sex and same-sex, proliferate. See Christopher Marquis, Total of Unmarried Couples Surged in 2000 U.S. Census, N.Y. TIMES, Mar. 13, 2003, at A22; see also Milton C. Regan, Jr., Calibrated Commitment: The Legal Treatment of Marriage and Cohabitation, 76 NOTRE DAME L. REV. 1435, 1436 (2001) (attesting to signs that, given the proliferation of marital alternatives, the “institutionalization of cohabitation already has begun”).

27. As she has done through much of her career, Mary Ann Glendon anticipated the issue of the transformation of nonmarital cohabitation into marriage, when she observed over a quarter-century ago that historically “our legal response to cohabitation has been to pretend it is marriage and then attribute to it the traditional incidents of marriage.” Mary Ann Glendon, Marriage and the State: The Withering Away of Marriage, 62 VA. L. REV. 663, 692 (1976). She predicted that the “interesting question” would become “whether the increase in, and increased visibility and respectability of, informal marriage will bring about a casting-off of these legal fictions and the direct attribution of economic consequences to de facto dependency.” Id. at 693.
Some commentators have thrown up their hands, confessing an inability to hit a moving target. Homer H. Clark, Jr. signaled his surrender in these words:

[C]ontemporary marriage cannot be legally defined any more precisely than as some sort of relationship between two individuals, of indeterminate duration, involving some kind of sexual conduct, entailing vague mutual property and support obligations, a relationship which may be formed by consent of both parties and dissolved at the will of either. 28

More recently, E. J. Graff queried whether marriage is “just an atavistic throwback to a feudal world of family property, of men’s desire to control and patrol women’s reproductive organs—or ... of a woman’s desire to tie down some man while her attractions are still fresh.” 29

Some seek to remove the pedestal from under marriage, toppling the institution and replacing it with other, more loosely structured, affiliations. 30 David B. Cruz has called for a constitutional interpretation

---


Marriage has various meanings to individuals entering into it. Marriage can be experienced as: a legal tie, a symbol of commitment, a privileged sexual affiliation, a relationship of hierarchy and subordination, a means of self-fulfillment, a societal construct, a cultural phenomenon, a religious mandate, an economic relationship, a preferred reproductive unit, a way to ensure against poverty and dependency, a romantic ideal, a natural or divined connection, a stand-in for morality, a status, or a contractual relationship.


29. E. J. Graff, What Is Marriage For? 36-37 (1999). As always, history’s sweep uncovers contemporary queries in the mouths of our ancestors. Turmoil in the married state at the dawn of the twentieth century prompted one commentator to wonder if “marriage as we have known it [will] survive even to the next generation? Can it survive?” Id. at 249 (quoting Felix Adler’s 1905 plaint, Marriage & Divorce) (emphasis in original).

which serves to “disestablish” sex and gender.\textsuperscript{31} Nancy D. Polikoff has questioned whether marriage should continue to be a privileged legal status,\textsuperscript{32} and both Martha Fineman and Judith Stacey have called for the abolition of marriage.\textsuperscript{33} In 2001, the Law Commission of Canada 8 AM. U. J. GENDER SOC. POL’Y & L. 197 (2000); Frank Browning, Why Marry?, N.Y. TIMES, Apr. 17, 1996, in SAME-SEX MARRIAGE: PRO AND CON 133 (Andrew Sullivan ed., 1997) [hereinafter SAME-SEX MARRIAGE] (rejecting marriage for same-sex couples in favor of “civic and legal support for different kinds of families that can address the emotional, physical and financial obligations of contemporary life”); Michael Kinsley, Abolish Marriage, WASH. POST, July 3, 2003, at A23 (calling for the replacement of government-sanctioned marriage by a purely privatized version).

31. See generally David B. Cruz, Disestablishing Sex and Gender, 90 CAL. L. REV. 997 (2002). Under Cruz' proposed constitutional hermeneutics, the “government would be significantly constrained in its ability to rely upon or reinforce sex or gender beliefs or groups.” \textit{Id}. at 999. Another thread in this argument objects to the provision of benefits to same-sex couples on the ground that these measures yield to governments and employers unwanted power to determine family behavior and composition:

The idea that monogamy, co-habitating, and sharing a check book [sic] are behaviors somehow worthy of merit and financial protections is questionable at best. Should corporations or governments be arbiters of how families construct themselves by rewarding some and not others? What if you don’t live with your long-time lover? Or have several long-time lovers? Or none at all? What if you are straight but don’t believe in marriage? What if you’re transgender, and therefore not easily categorizable as having a “same”-sex or “opposite”-[s]ex partner? In the current framework, you’d shift between the cracks—unable to get married and unable to qualify for same-sex domestic partnership benefits. What if you have a long-term relationship with a group of platonic friends? You share check-books [sic] and mortgages but not beds. Or maybe you share beds but not check-books [sic]. The point is: Who cares? By getting corporations to extend benefits to same-sex couples who meet certain criteria we’ve agreed that it’s okay for it to be anyone’s business. We’ve punished those that fall outside the nuclear family model—gay or straight—and we’ve lent support to the idea that society should reward certain kinds of families and relationships.


33. See MARTHA ALBERTSON FINEMAN, \textit{The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies} 228-29 (1995) (calling for the elimination of special rules governing marriage and divorce, and for regulating relationships between adult sexual partners according to the ordinary rules of civil and criminal law); JUDITH STACEY, \textit{Brave New Families: Stories of Domestic Upheaval in Late Twentieth Century America} 269 (1990) (arguing in favor of eliminating marriage as an “ideological concept that imposes mythical homogeneity on the diverse means by which people organize their intimate relationships”). Fineman “would take all the benefits we now attach to marriage and attach them to the caretaker-dependent unit.” Gayle White, \textit{Weighing the Pros & Cons of Marriage: Con: Shift Focus to Caretakers, Dependents}, ATLANTA J. CONST., Mar. 29, 2003, at B1 (quoting Martha Fineman); \textit{see also} Nastich, supra note 30, at 115, 116 (arguing that “marriage itself is unjustifiable” and “elimination of the legal institution of marriage would accomplish the social goals and objectives of marriage more successfully than marriage currently does”); Emily Taylor, Note, \textit{Across the Board: The Dismantling of Marriage in Favor of Universal Civil Union Laws}, 28 OHIO N.U. L. REV. 171, 174 (2001) (advocating the dismantling of all current marriage laws and their replacement by “civil union laws to be used by all couples who seek the state derived benefits of their partnership”).
produced *Beyond Conjugality*, a report calling for the registration of personal adult relationships in lieu of state-sanctioned marriage.³⁴

The contested nature of the institution of marriage may also be seen as a shadow over the Supreme Court's 2003 decision in *Lawrence v. Texas*.³⁵ The case resolved the question whether a state statute making it a crime for two individuals of the same sex to engage in certain intimate sexual conduct violated the Due Process Clause.³⁶ In deciding that it did, the Court left for another day the issue whether a same-sex relationship is ever "entitled to formal recognition in the law."³⁷ However, in dicta, the Court suggested that the states may have less power over these relationships than they have historically exercised.³⁸ The Court elaborated on its rationale in prohibiting the criminalization of intimate, consensual adult behavior:

This, as a general rule, should counsel against attempts by the State, or a court, to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects. It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.³⁹

In his dissent, Justice Scalia contended that the Court's rationale "dismantles the structure of constitutional law that has permitted a distinction to be made between heterosexual and homosexual unions, insofar as formal recognition of marriage is concerned."⁴⁰

Whether Justice Scalia's evaluation proves correct or not,⁴¹ the issue is plainly afire in both our domestic and global culture, as

---

³⁶. See id. at 2475.
³⁷. Id. at 2478. Specifically, the Court noted that *Lawrence* "does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter." Id. at 2484. Justice O'Connor concurred in the result, opining that in making only same-sex sodomy criminal, the Texas statute violated the Equal Protection Clause. See id. at 2486-87 (O'Connor, J., concurring).
³⁸. See id. at 2479-80.
³⁹. Id. at 2478. While the Court held that the Texas statute criminalizing same-sex sodomy ran afoul of the Due Process clause, it also observed that a challenge to the law based upon the Equal Protection Clause was "tenable." See id. at 2482.
⁴⁰. Id. at 2498 (Scalia, J., dissenting). Justice Scalia also observed that the reasoning of Justice O'Connor's opinion concurring in the judgment "leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples." Id. at 2496 (Scalia, J., dissenting).
illustrated by recent comments of President George W. Bush, a report of the various views in American cities and churches, the government of Canada, the Vatican, commentators, and private organized groups.

Certainly, individuals desiring to marry a person of the same sex have at least as strong an interest in having that freedom, as individuals choosing to engage in sexual conduct with a person of the same sex have in the freedom they are exercising. If not, the Court will, at the same time, have given its protection to all forms of non-marital sexual relationships—including wild one-night stands—while deterring the kind of permanent, legally sanctioned relationships on which society has been built.

42. See Neil A. Lewis, Bush Backs Bid to Block Gays from Marrying, N.Y. TIMES, July 31, 2003, at A1 (reporting on President Bush's personal opposition to same-sex marriage, and his exploration of efforts to codify a way to prohibit it).


44. See Chantal Hébert, Gay Marriage Gambit Leaves Little Room for Doubt, TORONTO STAR, July 18, 2003, at http://www.thestar.ca/NASApp/cs/ContentServer?pagename=thestar/Layout/Article_Type&c=Article&cid=1058479813313&call_pageId=968332188492&col=96879972154 (reporting that the Canadian government will not appeal the ruling of the Ontario Court of Appeal that the definition of marriage should be silent on the sexual identity of the partners involved). The issue remains controversial. See Randall Palmer, Gay Marriage an Explosive Issue in Canada, (Aug. 1, 2003), at http://home.eircom.net/content/reuters/worldnews/1130730?view=Printer (reporting on the Canadian cultural and political turmoil over same-sex marriage).


46. See Elisabeth Bumiller, Cold Feet: Why America Has Gay Marriage Jitters, N.Y. TIMES, Aug. 10, 2003, § 4, at 1 (describing the public's present greater acceptance of gay rights than of the notion of gay marriage); Cathy Young, Gay Rights Go to Court, REASONONLINE (June 2003), at http://reason.com/0306/co.cy.gay.shtml (reflecting on the impact of the gay rights movement on Family Law, and concluding that "a true cultural shift will be brought about by the increased visibility of the human face of same-sex relationships"). One aspect of the "human face" of these relationships may be seen in articles on same-sex weddings in popular magazines, and in the appearance in newspapers of same-sex wedding announcements. See, e.g., Bill Werde, A First at Bride's Magazine: A Report on Same-Sex Unions, N.Y. TIMES, July 28, 2003, at C6 (reporting on the first publication of an article on same-sex weddings in one of the premier bridal magazines, Condé Nast's Bride's magazine). The New York Times on August 3, 2003 carried announcements for one same-sex wedding (in Toronto), two same-sex civil union ceremonies (in Vermont), and one same-sex "commitment" ceremony (in New Hampshire). See Weddings & Celebrations, N.Y. TIMES, Aug. 3, 2003, § 9, at 10. That same issue also carried a news story of the progress of Rev. V. Gene Robinson in his efforts to become the first openly gay elected bishop in the Episcopal Church.
UNBUNDLING MARRIAGE

If marriage survives, it will surely continue its institutional hybridization, moving in the general direction of embracing function over form. As I argued in an earlier essay, “the generative entities of family law, parents and other domestic unions, are undergoing a utilitarian metamorphosis.”48 But the battles over the unsettled edges of marriage should not distract us from a focus on the important role marriage plays in refining and disseminating vital social norms. Strong marriages are good for spouses, their children, and our society.49 The cast of the nuptial union matters less than the stake its members have in declaring and preserving their mutual commitment, intimate happiness, emotional forbearance, and financial support.50 Intact, healthy marriages


Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Griswold v. Connecticut, 381 U.S. 479, 486 (1965). Marilynne Robinson took a different tack, suggesting that the non-meritocratic aspects of the biological family serve a function in providing respite even to those perceived as socially unworthy:

I think the biological family is especially compelling to us because it is, in fact, very arbitrary in its composition. I would never suggest so rude an experiment as calculating the percentage of one’s relatives one would actually choose as friends, the percentage of one’s relatives who would choose one as their friend. And that is the charm and the genius of the institution. It implies that help and kindness and loyalty are owed where they are perhaps by no means merited.
or domestic unions provide the most nurturing homes for children.\textsuperscript{51} Society benefits from the moral, spiritual, and economic strength generated by marital unions exhibiting an ethos of caring.\textsuperscript{52} And history matters. As Nancy Cott has demonstrated, "[f]rom the founding of the United States to the present day, assumptions about the importance of marriage and its appropriate form have been deeply implanted in public policy."\textsuperscript{53}

Not surprisingly, one of the fonts of contemporary marriage reform has been the glut of divorces and the call to arms that many have heeded to reinvigorate the marital institution. The drumbeat during the "divorce counterrevolution" over the adverse effects of divorce has been

\textsuperscript{51} See \textit{AM. PSYCHIATRIC ASS'N, POSITION STATEMENT ON ADOPTION AND CO-PARENTING OF CHILDREN BY SAME-SEX COUPLES} (Nov. 2002):

Numerous studies over the last three decades consistently demonstrate that children raised by gay or lesbian parents exhibit the same level of emotional, cognitive, social, and sexual functioning as children raised by heterosexual parents. This research indicates that optimal development for children is based not on the sexual orientation of the parents, but on stable attachments to committed and nurturing adults. The research also shows that children who have two parents, regardless of the parents' sexual orientations, do better than children with only one parent.


(legalizing gay marriage would offer homosexuals the same deal society now offers heterosexuals: general social approval and specific legal advantages in exchange for a deeper and harder-to-extract-yourself-from commitment to another human being. Like straight marriage, it would foster social cohesion, emotional security, and economic prudence. Since there's no reason gays should not be allowed to adopt or be foster parents, it could also help nurture children.).

\textsuperscript{53} Cott, supra note 52, at 2.
UNBUNDLING MARRIAGE

Initially, this widespread cultural campaign primarily targeted the booming divorce rate, and sought ways to slow the rush to divorce court. In its present second stage, the movement has reconfigured the family dilemma, shifting the target from confounding easy divorce to maintaining a good marriage. The struggle over defining a "good" marriage has ineluctably led to an epistemological battle over marriage itself. What constitutes a marriage? The next section of this Essay considers anew the elements of marriage.

II. BUNDLING THE ELEMENTS OF MARRIAGE

Two tidal waves crashed our cultural shores following the no-fault divorce earthquake. One flood brought with it an excess of autonomy, both individual and, as I shall argue, nuptial. Coming in its wake, the other torrent has sought to wash away the genie of marital freedom. Neither has triumphed. But their vortex may well lead to a radically different way to conceptualize marriage. No-fault divorce was intended in large part to reverse rising divorce rates by eliminating the quick and easily-obtainable fault grounds and instead ushering dissolution-minded spouses into reconciliation programs. The effort failed, primarily because the legal engine of divorce had actually been fueled by mutual

54. See, e.g., James Herbie DiFonzo, Customized Marriage, 75 IND. L.J. 875, 905-33 (2000) (discussing the divorce "counterrevolution").

55. Proposals included a variety of zigzagging alternatives: "restoration of fault as the exclusive dissolution ground; raising the bar of divorce for couples with children; delaying the process of obtaining divorces; and mandating or encouraging anti-divorce counseling and education at both the prenuptial and pre-divorce stages." Id. at 881.

56. The Council on Families in America announced this focal shift from the death of marriage to its revival:

The divorce revolution—the steady displacement of a marriage culture by a culture of divorce and unwed parenthood—has failed. It has created terrible hardships for children, incurred unsupportable social costs, and failed to deliver on its promise of greater adult happiness. The time has come to shift the focus of national attention from divorce to marriage and to rebuild a family culture based on enduring marital relationships.

COUNCIL ON FAMILIES IN AM., MARRIAGE IN AMERICA: A REPORT TO THE NATION 293 (David Popenoe et al. eds., 1995). This transition may also be seen in the phrasing of the titles of noted social researcher Judith Wallerstein's three volumes reporting her study of the impact of divorce on children: from SURVIVING THE BREAKUP (1980) (with Joan Berlin Kelly) to SECOND CHANCES: MEN, WOMEN, AND CHILDREN AFTER DIVORCE (1989) (with Sandra Blakeslee) to THE GOOD MARRIAGE: HOW AND WHY LOVE LASTS (1995) (with Sandra Blakeslee); see also Marriage Movement, supra note 52 (describing a new "grass-roots movement to strengthen marriage" which posits that the divorce revolution has failed, both in terms of the victimization of children and of the disappointed expectations of adults who divorced in order to escape unhappy domestic unions. The Marriage Movement also decries the "unwed-childbearing revolution has failed" which it blames for the "feminization of both parenting and poverty.").

consent, not fault. But now no-fault had done away with the need for consent, and the result—in most states—was unilateral divorce.\textsuperscript{58} This revolution in divorce law initially effected a significant alteration in the institution of marriage, transforming it from the constitutive family entity to a partnership of individuals.\textsuperscript{59}

\textbf{A. Negotiating Limits on Individualism}

But the pendulum of divorce law has swung at last partially back. Once the state largely retreated from the enforcement of fault-driven exit rules to marriage, connubially-minded individuals increasingly began to bargain, \textit{ab initio}, their own terms of disengagement.\textsuperscript{60} Prenuptial contracting, quite rare before the era of no-fault, has blossomed in popularity.\textsuperscript{61} Broader legal and cultural acceptance of couples' bargaining before marriage has led to the related phenomenon of "postnuptial" contracts, in which the couple decides on property division and other issues after exchanging vows, but not in contemplation of divorce.\textsuperscript{62} These developments have had some remarkable if oft-unrecognized consequences. Ever-more-common injections of contract law principles have largely transformed what had once been the status-

\begin{itemize}
\item \textsuperscript{58} See id. at 172.
\item \textsuperscript{59} See, e.g., Janet L. Dolgin, \textit{The Family in Transition: From Griswold to Eisenstadt and Beyond}, 82 GEO. L.J. 1519, 1520 (1994) (studying "the shift from a world in which domestic relations are founded in a hierarchical ideology that manifests natural differences in the actual relationships between people to a world in which domestic relations are founded in an egalitarian ideology that presumes the autonomy of the individual within a world of contract").
\item \textsuperscript{60} Two recent proposals have even called for marriage partners to have substantial power over choice of law issues. See Brian H. Bix, \textit{Choice of Law and Marriage: A Proposal}, 36 FAM. L.Q. 255, 255 (2002); F. H. Buckley & Larry E. Ribstein, \textit{Calling a Truce in the Marriage Wars}, 2001 U. ILL. L. REV. 561, 568-71 (2001).
\item \textsuperscript{61} See Rachel Emma Silverman, \textit{Don't Like Your Preump? Blame Barry Bonds}, WALL ST. J., Apr. 9, 2003, at D1 (observing that such "contracts have become increasingly popular among couples of all ages and incomes who want to set their own marital rules"); Jenifer Warren, \textit{Protections Added to Premuptial Pacts}, L.A. TIMES, Sept. 13, 2001, pt. 2, at 1 (reporting on protective measures adopted to California law in light of the increasing profusion of prenuptial agreements, requiring that a spouse have seven days to sign a premarital deal, that a person waiving alimony be represented by counsel, and that a spouse must receive a full explanation of contract terms in his or her native language); see generally Brian H. Bix, \textit{Premarital Agreements in the ALI Principles of Family Dissolution}, 8 DUKE J. GENDER L. & POL'y 231 (2001).
\item \textsuperscript{62} See Tamar Lewin, \textit{Among Nuptial Agreements, Post- Has Now Joined Pre-}, N.Y. TIMES, July 7, 2001, at A1; Pamela Yip, \textit{Married? Consider a Postump}, SEATTLE TIMES, Mar. 16, 2003, at F6. "Postnuptial" agreements, which have also recently mushroomed, differ from the older separation and property settlement agreements in that the latter are generally negotiated as a prelude to dissolution. See JOHN DE WITT GREGORY ET AL., \textit{UNDERSTANDING FAMILY LAW} § 4.05, at 103-04 (2d ed. 2001).
\end{itemize}
centered realm of domestic relations. But the spread of bargaining theory in family law may in fact succeed in trimming the much-criticized excesses of the individualism inherent in no-fault divorce.

The paradox of our contemporary divorce regime is that, while individuals may leave a marriage without mutual consent, it takes two to tangle with a prenuptial agreement. The transformation is far from complete, as the absolute number of prenuptial contracts is still relatively low, but a progress report must make mention of the return, in many instances, of mutual consent as the running motor of divorce. Plus ça change, plus c’est la même chose: the divorce uprising of the late-twentieth and early-twenty-first century may yet complete a circumnavigation of the legal and cultural globe, leaving divorcing spouses once again jointly in charge of their fate. Despite cultural laxity and communitarian doomsayers, individualism is never unfettered for

63. A glimpse of the astonishing distance traveled down this road by family law may be seen in this excerpt from a 1930 Colorado Supreme Court opinion denouncing and voiding a couple’s attempt to modify a marriage contractually by providing that, in the event of a separation, the husband pay the wife one hundred dollars per year of married life in settlement of her property and alimony claims:

The antenuptial contract was a wicked device to evade the laws applicable to marriage relations, property rights, and divorces, and is clearly against public policy and decency. It was nothing more, in effect, than an attempt, on the part of the [husband], in whose favor the contract was drawn, to legalize prostitution, under the name of marriage, at the price of [one hundred dollars] per year. It was the establishing of a companionate marriage, to exist only so long as neither party objected to a continuance. The wife, under its terms, was made a base hireling. The man could enjoy her companionship, under its covenant, for a single night, and then discard her, or he might continue his companionship with her for a week, or a fortnight, or longer if it pleased his fancy, and then he could, under its terms, capriciously and arbitrarily reject her, and put her adrift by paying the price, at the rate of [one hundred dollars] per year; and thereupon, at his bidding, she must gather up her personal belongings and leave the house within [twenty-four] hours, without any rights, either as wife or widow, and then, as a finale, she would be obliged silently to submit to his action of divorce, without a right to contest the same in court, no matter how vile, false, or unjust the charges made against her reputation or character.

The contract is utterly void. It is against public policy. The marriage relation lies at the foundation of our civilization. Marriage promotes public and private morals, and advances the well-being of society and social order. The sacred character of the marriage relation is indissoluble, except as authorized by legislative will and by the solemn judgment of a court. It cannot be annulled by contract, or at the pleasure of the parties.

Popham v. Duncan (In re Duncan’s Estate), 285 P. 757, 757-58 (Colo. 1930). It is a measure of the gendered universe of family law that a court of that era could only conceive of a prenuptial agreement as converting the wife into a prostitute.

64. See, e.g., N.Y. DOM. REL. LAW § 170 (McKinney 1999) (stating that an action for divorce can be maintained by either the husband or wife); What Are the Key Elements Necessary for a Valid Agreement?, at http://family-law.freedvice.com/pre_martial_agreement/key_elements.htm (last visited Jan. 19, 2004) (stating that a prenuptial agreement must generally be signed by both the husband and wife).
long. In marriage and divorce, nuptial autonomy may well overpower individual might.

My argument demurs from those writers who view individualism as the ersatz capstone of the course of American life in recent decades.65 Similarly, it ventures a partial dissent from a portion of Henry Maine's celebrated thesis about the ineluctable movement from status to contract. Maine posited that the "individual is steadily substituted for the Family, as the unit of which civil laws take account."66 He continued:

Nor is it difficult to see what is the tie between man and man which replaces by degrees those forms of reciprocity in rights and duties which have their origin in the Family. It is Contract. Starting, as from one terminus of history, from a condition of society in which all the relations of Persons are summed up in the relations of Family, we seem to have steadily moved towards a phase of social order in which all these relations arise from the free agreement of individuals.67

The rise of contract certainly parallels the ascendancy of individual freedom in law. But the continuing infusion of contractual norms into marital relations will also serve, at least in part, to render individual action subservient to the will of the nuptial pair. Contractual understandings allow for greater individual scope of action, but still "[e]very contract reduces freedom."68 The maverick impulse driving marital bargains collides with the desire to limit future individualism at the heart of contract. In this way, the no-fault revolution has sprouted the seeds of its own Thermidorian reaction, as couple-crafted covenants begin to organize the escape from the excessive freedom of no-fault divorce.

At the same time as prenuptial contracts began to proliferate, the divorce counterrevolution zeroed in on the surging divorce rates of the last third of the twentieth century. Concerned with what they perceived


as the collapse of moral values, these reformers against no-fault denounced a "divorce culture" whose aim was the "abolition of marriage." Seeking to transform our society into one supportive of stronger families, they then honed the tools to reinforce the marital contract in the most conservative way possible: they defined marriage exclusively in heterosexual terms, and they employed legal craft and cultural cunning to promote life-long marriages between men and women.

69. BARBARA DAFOR WHITEHEAD, THE DIVORCE CULTURE (1997). Whitehead's book had its genesis in her influential 1993 article, Dan Quayle Was Right, ATLANTIC, Apr. 1993, at 47 [hereinafter Whitehead, Dan Quayle Was Right]. In that piece, Whitehead argued that Americans in the 1970s largely destigmatized divorce because the mores had shifted from protecting children's well-being to pursuing adult happiness. See id. at 52.

70. MAGGIE GALLAGHER, THE ABOLITION OF MARRIAGE: HOW WE DESTROY LASTING LOVE (1996). Some of these critics sounded apocalyptic alarms. See, e.g., id. at 3-4 ("The overthrow of the marriage culture and its replacement by a postmarital culture is the driving force behind almost all of the gravest problems facing America—crime, poverty, welfare dependence, homelessness, educational stagnation, even child abuse."); COUNCIL ON FAMILIES IN AMERICA, MARRIAGE IN AMERICA: A REPORT TO THE NATION 4 (1995) (warning that our failure to halt the erosion of marriage "is nothing less than an act of cultural suicide").

"Abolition of marriage" rhetoric has its own politico-linguistic history. Contemporary concern about the demise of marriage flows from an altogether different font than the same expression a century ago. When John Beverley Robinson wrote "The Abolition of Marriage" slightly more than a hundred years before Maggie Gallagher penned her identically named tract, his target was the legal prison marriage represented in the Victorian era: "Marriage is the privilege conferred by law, which is in the end by force, by which one person holds the person or the property of another against their will." John Beverley Robinson, The Abolition of Marriage, LIBERTY, July 20, 1889, at 6-7, available at http://www.geocities.com/CapitolHillI6181/abolmar.htm (last visited Jan. 19, 2004); see also BARBARA GOLDSMITH, OTHER POWERS: THE AGE OF SUFFRAGE, SPIRITUALISM, AND THE SCANDALOUS VICTORIA WOODHULL 274 (1998) (describing Victoria Woodhull's comparable "war upon marriage").

71. See, e.g., DAN QUAYLE & DIANE MEDVED, THE AMERICAN FAMILY: DISCOVERING THE VALUES THAT MAKE US STRONG 2 (1996) ("America has truly reached a new consensus" to "support the unified model of father, mother, and child."); Whitehead, Dan Quayle Was Right, supra note 69, at 48 ("The social arrangement that has proved most successful in ensuring the physical survival and promoting the social development of the child is the family unit of the biological mother and father."); Maggie Gallagher, Fatherless Son Champions Marriage, N.Y. POST, Sept. 1, 2000, available at http://www.allianceformarriage.org/press/MaggieGallager.htm (last visited Dec. 24, 2003) (objecting to the characterization of family breakdown as "family diversity"). The Alliance for Marriage displays its motto as "More Children Raised in a Home with a Mother and a Father." Alliance for Marriage, Mission Statement, at http://www.allianceformarriage.org (last visited Dec. 24, 2003). The organization's mission statement expresses its "dedication to promoting marriage and addressing the epidemic of fatherless families in the United States." Id.

This revanchist argument has not gone unchallenged. Where some see a surrender of moral values in the divorce-friendly culture, others apprehend a "new morality" in the reshaping of family structure. See Naomi R. Cahn, The Moral Complexities of Family Law, 50 STAN. L. REV. 225, 228 (1997). Supporters of pluralistic family configurations maintain that moral discourse about the family has not disappeared. Rather, it has diverged from a focus on "fault, sexuality, and
The Defense of Marriage Act ("DOMA")\textsuperscript{72} and the Covenant Marriage statutes exemplify this double-barreled campaign.\textsuperscript{73} DOMA provided a mandatory gloss on all federal laws and regulations by directing that marriage "means only a legal union between one man and one woman as husband and wife."\textsuperscript{74} The Covenant Marriage statutes similarly posit a union between "one male and one female who understand and agree that the marriage between them is a lifelong relationship."\textsuperscript{75} Both measures thus take up arms against the "Campaign to Redefine Marriage,"\textsuperscript{76} the phrase used by those who oppose same-sex

patriarchal privileges" within families comprising of two married parents of opposite sex and their biological offspring, shifting to a consideration of "fairness, equity, and caregiving" within "kinships of responsibility." Id. at 228-29; see Barbara Bennett Woodhouse, "It All Depends on What You Mean by Home": Toward a Communitarian Theory of the "Nontraditional" Family, 1996 UTAH L. REV. 569, 587 (1996); see also Katharine T. Bartlett, Saving the Family from the Reformers, 31 U.C. DAVIS L. REV. 809, 816 (1998) (favoring "respect or moral accommodation for a broad range of family forms that are capable of providing nurturing environments to its members").


74. 1 U.S.C. § 7 (2000). Congress further defined the term "spouse" in any federal act or agency rule to refer "only to a person of the opposite sex who is a husband or wife." Id. In 2001 and 2002, the Federal Marriage Amendment, described as "the best and most realistic chance we have to preserve and protect traditional marriage," was introduced in the House of Representatives in an effort to inscribe DOMA into the Constitution. See Stanley Kurtz, Marriage's Best Chance, NAT'L REV. ONLINE (Aug. 16, 2001), at http://www.nationalreview.com/contributors/kurtz08l60l.shtml. The text of the amendment read as follows:

Marriage in the United States shall consist only of the union of a man and a woman.
Neither this Constitution or the constitution of any State, nor state or federal law, shall be construed to require that marital status or the legal incidents thereof be conferred upon unmarried couples or groups.


75. LA. REV. STAT. ANN. § 9:272(A) (West 2000). In general, covenant marriage laws allow a couple to opt out of the generally applicable no-fault divorce law and agree to terms which will make it more difficult for them to later divorce.

conjugal unions, fearing “unprecedented, disastrous effects, especially on children.”

The 1864 edition of Joel Prentiss Bishop’s authoritative family law treatise defined marriage as “one man and one woman united in law for life” in a civil status whose source was “the law of nature.” A generation later, James Schouler’s treatise explained that the rights and obligations of the marital status “are fixed by society in accordance with principles of natural law, and are beyond and above the parties themselves.” Both DOMA and Covenant Marriage represent Procrustean efforts to retrofit modern domestic unions to the standards of the world of Bishop and Schouler, with policy arguments and social science research on marital stability replacing reliance on natural law. Ostensibly, they aim to strengthen marriage. But the cultural and legal battles over marriage and its simulacra are likely to result in an unintended, but almost unavoidable, consequence.

B. Bundles of Marital Rights and Obligations I: Civil Unions

In 1999, the Vermont Supreme Court issued “the most closely-watched opinion in [its] history” in a case involving the denial of marriage licenses to three same-sex couples. These sets of partners had lived together in committed relationships for periods ranging from four to twenty-five years, and two of the couples had raised children together. Acknowledging the “deeply-felt religious, moral, and political beliefs” which swirled around the issue, the court decided that the Common Benefits Clause of the Vermont Constitution required the state to extend to same-sex couples the benefits and protections that its laws provide to opposite-sex married couples. Rather than directing the

77. Id. at 634 (footnote omitted); see also Stanley Kurtz, Love and Marriage, NAT’L REV. ONLINE (July 30, 2001), at http://www.nationalreview.com/contributors/kurtz073001.shtml (arguing that if marriage is extended to homosexual unions, “it is children who will pay the price”).

78. 1 JOEL PRENTISS BISHOP, COMMENTARIES ON THE LAW OF MARRIAGE AND DIVORCE § 3 (4th ed. 1864).


82. See id. at 867.

83. Id. at 867-77. The Common Benefits Clause reads, in pertinent part, as follows:

That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or
issuance of marriage licenses, however, the court left to the state legislature “[w]hether [the remedy shall be] . . . inclusion within the marriage laws themselves or a parallel ‘domestic partnership’ system or some equivalent statutory alternative.”

In its opinion, the Vermont court quickly dispensed with most of the rationales the State had advanced in support of limiting marriage to opposite-sex couples. The court focused its analysis on whether a crucial link between marriage and both procreation and child-rearing had been established. In doing so, it responded to the State’s three-pronged argument. The State had pressed its interest “in promoting a permanent commitment between couples who have children to ensure that their offspring are considered legitimate and receive ongoing parental support.” The State also contended that the legislature could reasonably have feared that “sanctioning same-sex unions ‘would diminish society’s perception of the link between procreation and child

advantage of any single man, family, or set of men, who are a part only of that community.

VT. CONST. ch. I, art. 7.

In 2003, the Massachusetts Supreme Judicial Court held that “barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution.” Goodridge v. Dep’t of Pub. Health, 798 N.E.2d 941, 969 (Mass. 2003).

84. Baker, 744 A.2d at 867. The court added that “[w]hatever system is chosen, however, must conform with the constitutional imperative to afford all Vermonters the common benefit, protection, and security of the law.” Id. One justice concurred with the holding, id. at 889-97 (Dooley, J., concurring), while another justice filed a partial concurrence and dissent, objecting to the majority’s opinion as advisory, see id. at 897-912 (Johnson, J., concurring in part and dissenting in part). Instead of referring the matter to the legislature for it to craft an appropriate remedy, Justice Johnson would have enjoined the State from denying marriage licenses to same-sex couples. See id. at 898.

85. See id. at 886. Specifically, the Supreme Court dismissed the State’s asserted interests in “‘promoting child rearing in a setting that provides both male and female role models,’” “simplifying surrogacy contracts and sperm donors, ‘‘bridging differences’’ between the sexes, providing disincentives for marriages of convenience attributable to tax, housing or other benefits, preserving inter-jurisdictional marriage law uniformity, and generally safeguarding marriage from ‘‘destabilizing change.’’” Id. at 884 (quoting State’s brief). The court reasoned that the State’s claim that its laws supported a privileged position for opposite-sex couples with regard to child-rearing was belied by the legislative policy granting same-sex couples equality with their heterosexual counterparts in the areas of adoption, child support, and the regulation of parent-child contact after dissolution of a relationship. See id. at 886. The court found no evidence of a legislative preference for uniformity with other states’ marriage laws. See id. at 885. The court rejected as speculative the State’s claims that recognizing same-sex unions might promote marriages of convenience or otherwise adversely affect the institution of marriage. See id. Finally, the court rejected the State’s claim that the long history of intolerance of same-sex intimacies mandates continued constitutionally unequal treatment of same-sex unions. See id.

86. See id. at 881.

87. Id. (quoting the brief of the State Attorney General).
rearing...[and] advance the notion that fathers or mothers...are mere surplusage to the functions of procreation and child rearing.'" 88 Finally, the State pointed to the inability of same-sex couples to procreate on their own, and argued that sanctioning such unions ""could be seen by the Legislature to separate further the connection between procreation and parental responsibilities for raising children."" 89

Unquestionably, marriage has historically meant the ""joining of the two sexes into a community that connects the generations."" 90 Half a century ago, the United States Supreme Court affirmed that ""[m]arriage and procreation are fundamental to the very existence and survival of the race."" 91 But the Vermont court chose to address whether this historic linkage still reflected social reality. This question devolved into two related lines of inquiry—has society countenanced means other than through the heterosexual marital union to procreate and raise children; and has marriage acquired other central meanings which should be legally sanctioned.

The Baker court found that the State undeniably had a convincing and enduring interest in championing a ""permanent commitment between couples for the security of their children."" 92 To that end, state sanctioning of the unions of those capable of having children was eminently justified. But the court observed that the secular blessings of marriage are unreservedly also extended to heterosexual couples who never intend to have children, as well as to those incapable of procreating. 93 Thus, the link between marriage and procreation is

88. Id.
89. Id.
90. Coolidge & Duncan, supra note 76, at 639.
93. See id; accord Lawrence v. Texas, 123 S. Ct. 2472, 2498 (2003) (Scalia, J., dissenting) (recognizing that ""the encouragement of procreation"" is not a strong argument in support of limiting marriage to heterosexuals, ""since the sterile and the elderly are allowed to marry"). The Massachusetts Supreme Judicial Court similarly rejected the connection between marriage and child-bearing:

Our laws of civil marriage do not privilege procreative heterosexual intercourse between married people above every other form of adult intimacy and every other means of creating a family. [State law] contains no requirement that the applicants for a marriage license attest to their ability or intention to conceive children by coitus. Fertility is not a condition of marriage, nor is it grounds for divorce. People who have never consummated their marriage, and never plan to, may be and stay married.

Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 961 (Mass. 2003). In its recent decision invalidating the common law limitation of marriage to heterosexuals, the Court of Appeals for Ontario held that the government had failed to show a rational connection between the opposite-sex requirement in marriage and the encouragement of procreation and childrearing. ""The ability to 'naturally' procreate and the willingness to raise children are not prerequisites of marriage for
significantly under-inclusive.” Conversely, same-sex parents are increasingly engaged in raising a considerable number of children, with many such couples conceiving a growing number of children through the varied methodologies of assisted reproduction. The marriage statutes thus exclude many who, through their conduct in rearing children whom they have brought into the world, are fulfilling one of the goals of marriage even though they are prevented from enjoying its protection.

The court then turned to the question whether the essence of marriage has expanded beyond the responsibility for bearing and raising children. It began with the historically-grounded avowal that marriage legally includes, but is not limited to, the contractual undertaking of the parties. The “value-added” by the societal imprimatur is considerable, opposite-sex couples. Indeed, many opposite-sex couples that marry are unable to have children or choose not to do so.” Halpern v. Canada (A.G.), [2003] 225 D.L.R.4th 529, 566.

The Ontario court elaborated on the weakness of the rationale linking marriage to procreation and child raising:

Importantly, no one, including the [Attorney General of Canada], is suggesting that procreation and childrearing are the only purposes of marriage, or the only reasons why couples choose to marry. Intimacy, companionship, societal recognition, economic benefits, the blending of two families, to name a few, are other reasons that couples choose to marry. . . . [S]ame-sex couples are capable of forming “long, lasting, loving and intimate relationships.” Denying same-sex couples the right to marry perpetuates the contrary view, namely, that same-sex couples are not capable of forming loving and lasting relationships, and thus same-sex relationships are not worthy of the same respect and recognition as opposite-sex relationships.

Id. at 558-59.

94. Baker, 744 A.2d at 881. Concern with children at risk in domestic break-up has led over the years to an assortment of proposals legally elevating marriages with children over childless unions. These reforms have almost never been enacted, however, because of concern with degrading those marriages in which the partners are either incapable of having, or choose not to bear, children. DiFonzo, supra note 54, at 933 (“[S]ome critics today argue that the public policy that uplifts families with children does a disservice to childless marriages. The protection afforded to couples who procreate ‘turns the having of children into the real solemnization of the marriage.’”) (quoting David M. Wagner, Divorce Reform: An Emerging Issue Laps at Legislative Shores, WORLD & 1, Jan. 1998, available at http://www.worldandi.com/public/1998/january/wagner.cfm (last visited Jan. 16, 2004).

95. See Baker, 744 A.2d at 881.

96. See id. at 882; accord Goodridge, 798 N.E.2d at 963 (noting the state’s concession that “people in same-sex couples may be ‘excellent’ parents. . . . [who] have children for the reasons others do—to love them, to care for them, to nurture them,” but indicating that “task of child rearing for same-sex couples is made infinitely harder by their status as outliers to the marriage laws); Halpern, 225 D.L.R.4th at 558 (“While it is true that, due to biological realities, only opposite-sex couples can ‘naturally’ procreate, same-sex couples can choose to have children by other means, such as adoption, surrogacy and donor insemination. An increasing percentage of children are being conceived and raised by same-sex couples.”) (citation omitted).

97. See Baker, 744 A.2d at 882.

98. See id. at 883; BISHOP, supra note 78, § 3; SCHOULER, supra note 79, § 1073, at 1346. A modern and consonant definition may be found in GREGORY ET AL., supra note 62, § 2.03 (“[T]here

http://scholarlycommons.law.hofstra.edu/hlr/vol32/iss1/3
for "the marriage laws transform a private agreement into a source of significant public benefits and protections." The court found that these public goods are not centered on procreation and child-rearing. To the contrary, they reflect the cornucopia of public interests at play in the exercise of the state's regulatory authority. These include, for example, the right to bring a lawsuit for the wrongful death of a spouse; the right to receive a portion of the estate of a spouse who dies intestate; the right to bring an action for loss of consortium; the right to workers' compensation survivor benefits; the right to spousal benefits statutorily guaranteed to public employees, including health, life, disability, and accident insurance; the opportunity to be covered as a spouse under group life insurance policies issued to an employee; the opportunity to be covered as the insured's spouse under an individual health insurance policy; the right to claim an evidentiary privilege for marital communications; homestead rights and protections; the presumption of joint ownership of property and the concomitant right of survivorship; hospital visitation and other rights incident to the medical treatment of a family member; and, finally, the right to receive, and the obligation to provide, spousal support, maintenance, and property division in the event of separation or divorce.

That the court identified key rights and obligations in relation to dissolution proceedings is, of course, unremarkable. But, as we shall see, the state legislature chose to funnel civil union dissolutions into the ordinary court processes applicable to the break-ups of marriages.

---

100. See id. at 884.
101. See id. at 883-84.
103. See id. §§ 401-404; see also id. § 551 (providing protection against disinheretance through elective share provisions); id. § 903 (granting preference in being appointed as the personal representative of a spouse who dies intestate).
104. See id. tit. 12, § 5431.
108. See id. § 4063.
111. See id. § 2.
113. See id. tit. 15, §§ 751-752.
114. See id. § 1206 (giving the state's family law courts jurisdiction over civil union dissolutions, which shall be dictated by the same procedures for dissolving marriages).
This decision makes the civil union law unique. Most domestic partnership acts, even when they provide more than symbolic measures, allow the parties to dissolve their relationship with little or no consequences. One commentator on marital alternatives prior to civil unions argued that “[i]t is the crucial obligation to share material assets—not only in good times during the course of a relationship, but in settling accounts when it ends—that most distinguishes the burdens of marriage from those imposed by domestic partnership laws in the United States.”

Recognizing that the state must provide appropriate methods for fairly resolving the child custody, support, and property issues at the demise of these unions provides another affirmation that they share the public space allocated to family formation. Modern divorce law probably deserves at least some of the opprobrium it has garnered for destabilizing marriage. But divorce also serves several therapeutic ends: it provides a legally-created and culturally-accepted forum for closure; it supplies nomenclature for the parties to use in referring to their former status and its attributes; and it facilitates, in many cases, the parties’ move to a new stage in their individual lives. Same-sex couples normally


117. By no means am I suggesting that “disuniting” civil unions will be a simple task, or one entirely analogous to dissolving marriages. See, e.g., Associated Press, Houston Judge Dismisses Gay Divorce Case, Apr. 2, 2003, available at http://gaylawnet.com/news/2003/pa0304.htm#houston. (reporting on Texas judge who initially granted a divorce to a gay couple who had entered into a Vermont civil union, and then reversed his ruling when the State Attorney General intervened on the grounds that the court could not grant a divorce where no marriage had existed); see also generally Joanna Grossman, Vermont Civil Unions: Will Sister States Recognize Them? An Early Status Report, FINDLAW’S WRIT (May 20, 2003), at http://writ.news.findlaw.com (discussing the difficulties to be encountered in dissolving civil unions).
have access to none of those social or legal benefits. Providing a means to legally dissolve these unions fills the vacuum experienced by many same-sex partners whose life partnerships have ended: “When a relationship that was only marginally recognized comes to an end, it is almost as though it never existed.”

The enumeration in *Baker*, as the above discussion suggests, does not exhaust the corpus of “rights, powers, privileges, and responsibilities triggered by marriage,” but only illustrates its range and diversity. It confirms the conclusion expressed by a concurring Justice in *Baker* that “the complexity of the current system of government-created benefits and burdens has made civil marriage a modern-day emolument, a government recognized and supported special status . . . .” When measured against the formidable array of legal encumbrances and advantages flowing from a marriage license, the assertion that society sanctions domestic unions as the cradle of childhood proves to be a woefully inadequate representation of a far richer tableau. Providing for

118. Kathy Duggan, *I Earned This Divorce*, N.Y. TIMES, July 25, 1996, in SAME-SEX MARRIAGE, supra note 30, at 302; id. at 300-02 (describing the author’s frustration at lacking access to divorce after the end of her same-sex relationship:

I find myself wishing our marriage was legal for a reason I never anticipated. I want a divorce.

What I want is a forum where I can act out all the anger, frustration, and disappointment of a failed relationship. One where I can hand responsibility for the haggling over our possessions to a professional . . . I want a ritual that takes apart our relationship as deliberately as we put it together);

*see also* STACEY, supra note 2, at 123 (Married heterosexuals “have the privilege of divorce and we don’t. We’re left out there to twirl around in pain.”) (quoting a gay lawyer).


121. *Baker*, 744 A.2d at 889 (Dooley, J., concurring). In concurring in part and dissenting in part, Justice Johnson noted:

This case concerns the secular licensing of marriage. The State’s interest in licensing marriages is regulatory in nature. The regulatory purpose of the licensing scheme is to create public records for the orderly allocation of benefits, imposition of obligations, and distribution of property through inheritance. Thus, a marriage license merely acts as a trigger for state-conferred benefits.

*Id.* at 898-99 (citations omitted).
the nurture of children is a cardinal obligation of society; marriage serves this end, but it satisfies many other social aims as well.\footnote{122}

Following \textit{Baker v. Vermont}, the state legislature passed the "Act Relating to Civil Unions."\footnote{123} This statute preserved the legal definition of marriage in heterosexual terms,\footnote{124} but made it clear that those who established a civil union "may receive the benefits and protections and be subject to the responsibilities of spouses."\footnote{125} The statute declared its intention to render civil unions the legal equivalents of marriage: "Parties to a civil union shall have all the same benefits, protections and responsibilities under law, whether they derive from statute, administrative or court rule, policy, common law or any other source of civil law, as are granted to spouses in a marriage."\footnote{126} The legislature then promulgated a "list of legal benefits, protections and responsibilities of spouses, which shall apply in like manner to parties to a civil union."\footnote{127}

\footnote{122.} Perhaps marriage's role in the "complexity of the current system of government-created benefits and burdens," \textit{id}. at 889 (Dooley, J., concurring), provides the modern and best answer to the natural law argument that marriage's central function is to build the state by producing a worthy citizenry. \textit{Cf.} \textit{CICERO, DE OFFICIS} (Walter Miller trans., 1975) (1913):

> For since the reproductive instinct is by Nature's gift the common possession of all living creatures, the first bond of union is that between husband and wife; the next, that between parents and children; then we find one home, with everything in common. And this is the foundation of civil government, the nursery, as it were, of the state. . . . Then follow between these, in turn, marriages and connections by marriage, and from these again a new stock of relations; and from this propagation and after-growth states have their beginnings.

\textit{id}. at 57, 59; \textit{see also generally} Mark Strasser, \textit{Natural Law and Same-Sex Marriage}, 48 DEPAUL L. REV. 51, 74 (1998) (arguing that all the state's interests in marriage, including "the promotion of stability, the limitation of the disorganized breakdown of relations, and the provision of a home for the production and rearing of children," would be furthered by recognizing same-sex unions as marriages).

\footnote{123.} 2000 VT. Acts & Resolves 91 (codified at VT. STAT. ANN. tit. 15, §§ 1201-1207 (Supp. 2001)).

\footnote{124.} \textit{See} VT. STAT. ANN. tit. 15, § 1201(4) (2002) (defining marriage as "the legally recognized union of one man and one woman").

\footnote{125.} \textit{id}. § 1201(2).

\footnote{126.} \textit{id}. § 1204(a). The legislature's intention to equalize the status of married person with that of member of a civil union was articulated in unmistakable terms. \textit{See}, e.g., \textit{id}. § 1204(b) ("A party to a civil union shall be included in any definition or use of the terms 'spouse,' 'family,' 'immediate family,' 'dependent,' 'next of kin,' and other terms that denote the spousal relationship, as those terms are used throughout the law."); \textit{id}. § 1204(c) ("Parties to a civil union shall be responsible for the support of one another to the same degree and in the same manner as prescribed under law for married persons."); \textit{id}. § 1204(d) ("The law of domestic relations, including annulment, separation and divorce, child custody and support, and property division and maintenance shall apply to parties to a civil union.").

\footnote{127.} \textit{id}. § 1204(e).
Although the statute describes it as "nonexclusive," the list is a nearly encyclopedic compendium of the blessings and duties of marriage. In both their scope and their detail, these rights and responsibilities constitute the elements of marriage, and supply the frame of reference for the continuing debate over the rules governing the entrance, exit, and content of marriage. Because of their importance—and because few statutes so clearly detail the elements of marriage—the list merits an extensive summary. It includes laws relating to the acquisition, ownership, and transfer of real and personal property (including eligibility to hold property as tenants by the entirety); as well as tort actions dependent upon spousal status, such as wrongful death, emotional distress, loss of consortium, or dramshop. Laws dealing with probate, adoption, certain kinds of group insurance, spouse abuse programs, prohibitions against discrimination based on marital status, victim's compensation rights, worker's compensation benefits, and provisions for affirmation of relationship are also itemized. Key health law provisions are included, relating to the provision of medical care, hospital visitation and notification, terminal care documents, durable power of attorney for health care execution and revocation, and the making, revoking and objecting to anatomical gifts by others. Also covered are family leave and public assistance benefits, as well as laws relating to immunity from compelled testimony and the marital communication privilege. The list extends to a surviving spouse's homestead rights, laws relating to loans to veterans, and the definition of a family farmer and family landowner rights to fish and hunt. Also encompassed are certain tax laws, state pay for military service, application for an absentee ballot, and the legal requirements for assignments of wages. In addition to this sizable compilation, the burdens and benefits at stake include those relating to the partners' mutual economic support, as well as the corpus of domestic relations legislation on annulment, separation and divorce, child custody and support, and property division and spousal maintenance.

128. Id.
129. See id. § 1204(e)(1).
130. See id. § 1204(e)(2).
131. See id. § 1204(e)(3)-(9), (24).
132. See id. § 1204(e)(10)-(11), (19).
133. See id. § 1204(e)(12), (13), (15).
134. See id. § 1204(e)(16)-(18), (22).
135. See id. § 1204(e)(14), (20), (21), (23).
136. See id. §§ 1204(f), 1204(c), 1204(d), 1205, 1206.
C. Bundles of Marital Rights and Obligations II: Domestic Partnership Ordinances and Private Programs

Domestic partner benefits have proliferated in recent years. In contrast to the civil union statute, these municipal ordinances and private industry plans direct the extension of a portion of the universe of marital attributes to same-sex unions and unmarried heterosexual couples. Although the advantages afforded by these laws fall short of those provided to members of civil unions, they are far from insubstantial. Domestic partners may be entitled to health insurance plan participation, as well as to illness, disability, and bereavement leave. Additionally,


Occasionally, a court will, even in the absence of a domestic partnership ordinance, decide to extend to unmarried partnerships a right traditionally linked to marriage. For instance, in Lozoya v. Sanchez, 66 P.3d 948 (N.M. 2003), the New Mexico Supreme Court held that “a claim for loss of consortium is not limited to marriage partners.” Id. at 951. In order to recover, an unmarried claimant “must prove a close familial relationship with the victim.” Id. at 957. In evaluating the proffered relationship, the trial court must consider a variety of factors:

[T]he duration of the relationship, the degree of mutual dependence, the extent of common contributions to a life together, the extent and quality of shared experience, and . . . whether the plaintiff and the injured person were members of the same household, their emotional reliance on each other, the particulars of their day to day relationship, and the manner in which they related to each other in attending to life’s mundane requirements.

Id. (quoting Dunphy v. Gregor, 642 A.2d 372, 378 (1994)) (internal quotation marks omitted) (alteration in original).

138. See Craig A. Bowman & Blake M. Cornish, Note, A More Perfect Union: A Legal and Social Analysis of Domestic Partnership Ordinances, 92 COLUM. L. REV. 1164, 1194-95 (1992) (sorting the features of domestic partnerships into two clusters, “benefits for partners of municipal employees and registration of the relationship with city hall”). Symbolism and substance are often interlaced. As part of New York City’s response to the terrorist attack of September 11, 2001, it amended its Domestic Partner Registry “to extend New York City’s commitment to recognizing rights of same sex partners by revising the definition of ‘domestic partners’ in the administrative code to include person who have . . . entered civil unions or marriages not explicitly recognized by New York State in other jurisdictions.” New York., N.Y., Local Law No. 24 § 1 (2002).

139. See, e.g., ME. REV. STAT. ANN. tit. 24-A, § 2832-A (2003) (mandating that group or blanket health insurers make benefits available to domestic partners, “at appropriate rates and under the same terms and conditions as those benefits . . . provided to spouses of married certificate holders covered under a group policy”); ATLANTA, GA., ORDINANCE § 2-858 (1996) (extending health and dental coverage as well as bereavement leave).
the public registration provisions may facilitate the granting of hospital visitation rights and may supply proof of an officially-sanctioned relationship when needed at other times. 140

Several examples illustrate the "proliferation of domestic partnership legislation and contractual arrangements."141 Atlanta's Domestic Partnership Benefits Ordinance extends health, dental, sick leave, and funeral leave benefits to city employees and their registered domestic partners.142 San Francisco has passed an ordinance requiring employers contracting with the city government to offer the same benefits to employees' domestic partners as they offer to their legal spouses.143 The Hawaii legislature enacted a law regulating "reciprocal beneficiaries," as part of its reaction to the decision in Baehr v. Lewin.144 Reciprocal beneficiaries may receive health insurance coverage, possess health care decision-making authority and hospital visitation privileges, obtain the rights of a spouse in a decedent's estate, and sue for the wrongful death of their partners.145 As of 2001, "[e]ight states and 105 city and county governments or quasi-government agencies" provided benefits, including health insurance, to their employees' domestic partners.146


143. See THE STATE OF THE WORKPLACE, supra note 140, at 15.

144. 852 P.2d 44, 67 (Haw. 1993) (indicating that the state law limiting marriage to heterosexual couples was subject to strict scrutiny constitutional analysis). See Hawaii Reciprocal Beneficiaries Act, 1997 Haw. Sess. Laws 2786, Act 383 (H.B. 118) (1997) (codified at HAW. REV. STAT., §§ 72C-1 to -7 (Supp. XII 2001) and in other diverse code sections). This law was primarily intended to extend to registrants rights against third parties similar to those afforded to spouses. See HAW. REV. STAT. § 572C-2 (Supp. XII 2001).


146. THE STATE OF THE WORKPLACE, supra note 140, at 6. Although no federal domestic partnership law has been enacted, the Department of Interior and Department of State have been praised as "models" in ensuring that:

[E]quitable benefits and privileges are granted to all employees, including relocation benefits, access to facilities and services, domestic partner visas, bereavement leave, insurance coverage, access to Government resources (e.g., meeting space, electronic bulletin boards, the Department/Agency website, administrative leave), and overall equal
Developments pioneered in private industry sometimes propel public policy, and "may ultimately have even more impact than litigation or legislation in producing the circumstances to secure recognition of same-sex partners." 147 Professor Lynn D. Wardle, an opponent of extending domestic partnership benefits to same-sex couples, has noted that the creation and dissemination of these entitlements in the private sector "signals a notable change in social mores." 148 On all levels of government and throughout private industry, domestic partner benefits are becoming more common: From August 1999 to August 2001, the number of public and private employers providing such benefits in the United States increased by fifty percent, from 2,856 employers to 4,285, including many of the largest corporate employers. 149 Some commentators have criticized domestic partnership laws for only partially incorporating marital benefits.150


150. See, e.g., Christensen, supra note 116, at 1734 ("The much-heralded advent of local domestic partnership laws . . . is mostly about modest symbolic gestures accompanied by few if any tangible benefits."); Debbie Zielinski, Domestic Partnership Benefits: Why Not Offer Them to Same-Sex Partners and Unmarried Opposite Sex Partners?, 13 J.L. & HEALTH 281, 298 (1999) ("[T]he benefits bestowed upon married couples are far more than those given to individuals living in a domestic partnership."). The argument in the text does not suggest an equivalency between civil unions and domestic partnership or reciprocal beneficiary laws. To the contrary, the text celebrates that they are different, that distinct combinations of the elements of marriage may achieve diverse policy aims.
In its *Principles*, the ALI has included a chapter governing *inter se* claims of domestic partners. The ALI defined domestic partners broadly to include "two persons of the same or opposite sex, not married to one another, who for a significant period of time share a primary residence and a life together as couple." The *Principles* aim to achieve a fair distribution of economic gains and losses between the parties at the termination of the domestic partnership. While they do not endow domestic partners with rights vis-à-vis governments or employers, the ALI *Principles* treat domestic partnerships as quasi-marriages, thus furthering the cultural blurring of cohabitation and marriage. Moreover, by declining to observe any distinction between heterosexual and homosexual domestic partners, the ALI has effectively registered its concurrence with the social movement favoring their equivalence.

The process of devising and disseminating civil unions and domestic partnerships is a labor in the vineyard of bundling and unbundling marriage. The civil union statute aims to package all the elements of traditional marriage and transpose them into the newly-created status, which is intended to mirror marriage. The panoply of domestic ordinances and private plans unbundle the full complement of marital elements, and install the combination which seems appropriate to the public or private employer, often achieved after a period of negotiation. I submit that these illustrations are the beginning of a trend toward compartmentalizing marriage.

What justifies calling these bundles the "new" elements of marriage? After all, many of the provisions share a common law pedigree. Marital status is, moreover, fundamentally woven into our legal culture. Although the incidents of marriage are generally governed by state law, the enormous range of such attributes is reflected in a United States General Accounting Office study which reported that

---

151. See ALI PRINCIPLES, supra note 7, ch. 6 ("Domestic Partners").
152. Id. § 6.01(1).
153. See id. § 6.02(1). A secondary purpose of the Domestic Partners chapter is "protection of society from social-welfare burdens that should be borne . . . by individuals." Id. § 6.02(2).
marital status is a factor in the administration of 1,049 federal laws.\textsuperscript{155} The sum of these elements comprises the legal content of contemporary marriage in the United States. To a lesser extent, these elements are also components of domestic partnerships. The fresh turn taken by family law may be seen in the varied combinations of the old elements of marriage in the evolving marriage-like institutions. In its final section, this Essay contends that focusing on the scope of what elements of marriage society should allow and require of intimate, committed couples represents a distinctive way to analyze all domestic unions and marriages, whether of same- or opposite-sex couples.

III. EVERY MARRIAGE A "CIVIL UNION"?

This final portion of the Essay undertakes a preliminary sketch of the impact of bundling principles on the legal construction of marriage.\textsuperscript{156} The argument thus far has suggested that the campaign for same-sex marriage (or at a minimum for achieving domestic partnerships to rival marriage) has begun generating a thorough reexamination, or even a reconfiguration, of the elements of marriage.\textsuperscript{157}


156. Bundling theory explores the differing effects of grouping elements in various combinations rather than presenting them individually, whether in a commercial or cultural marketplace. See, e.g., MILTON FRIEDMAN & ROSE D. FRIEDMAN, FREE TO CHOOSE: A PERSONAL STATEMENT 299-309 (1980) (presenting a bundling theory of free speech, and applying it to a proposed economic bill of rights); Craig Anthony (Tony) Arnold, The Reconstitution of Property: Property as a Web of Interests, 26 HARV. ENVTL. L. REV. 281, 290 (2002) (noting that "bundle of rights has caught on as the primary metaphor for property today"); Deanna L. Kwong, The Copyright-Contract Intersection: SoftMan Products Co. v. Adobe Systems, Inc. & Bowers v. Baystate Technologies, Inc., 18 BERKELEY TECH. L.J. 349, 367 (2003) ("Bundling averages demand over multiple products so as to achieve the most effective price, given the different groups of consumers. Bundling reduces transaction and enforcement costs by potentially avoiding wasteful investment in the valuation of the components of a bundle.") (footnotes omitted); Arti K. Rai & Rebecca S. Eisenberg, Bayh-Dole Reform and the Progress of Biomedicine, 66 LAW & CONTEMPO. PROBS. 289, 297-98 (2003) (exploring whether "market forces will motivate the emergence of patent pools and other institutions for bundling intellectual property rights, thereby reducing transaction costs and permitting the parties to realize gains from exchange") (footnote omitted); Larry E. Ribstein, From Efficiency to Politics in Contractual Choice of Law, 37 GA. L. REV. 363, 441 (2003) ("Lawmakers’ incentives to condition enforcement of contractual choice on the contracting parties’ residence in the designated state help constrain inefficient enforcement of contractual choice by bundling choice of residence with the choice of the state’s laws.").

157. I am not unmindful of the Sturm und Drang which divides advocates of civil unions and other same-sex marital alternatives from those who insist that our social and constitutional tenets of equality demand opening the door marked “marriage” to gays. Champions of same-sex marriage have derided the civil union as “an unjust, two-tiered apartheid system in which those of us who are deemed to be abnormal are not to be treated equally under the law.” Johnson, supra note 115, at 17.
But the next question asks whether the shifting marital contours affect only same-sex unions, or do they more broadly adumbrate an alteration of the social and legal world of the family?

Opponents of affording connubial recognition to gay and lesbian couples often claim that implementing such nouveau legal regimes would markedly and adversely affect the traditional heterosexual marriage. Lynn Wardle has argued that heterosexual marital unions have appropriately received special legal preference because they make uniquely valuable contributions to the state, to society, and to individuals.158 David Orgon Coolidge and William C. Duncan made the case that once society extends marriage to same-sex couples, “the core concept of marriage will be altered.”159

Instead of a unique community, marriage becomes one more relationship. And why should this relationship be so special? If it has no necessary connection to children, or even to sex, what makes it different from an ordinary friendship? Friendships are multiple; why limit marriage to two persons? Sexual relationships can be multiple; why promote exclusivity? Relationships come and go, and reasonably so; why promote permanence? If marriage is a freely chosen

---

158. See Lynn D. Wardle, Legal Claims for Same-Sex Marriage: Efforts to Legitimate a Retreat from Marriage by Redefining Marriage, 39 S. TEX. L. REV. 735, 754 (1998) [hereinafter Wardle, Legal Claims]. Wardle enumerates the areas in which heterosexual marriages benefit the public welfare more than homosexual unions: “(1) safe sexual relations, (2) procreation and childrearing, (3) the status of women, (4) the stability, strength, and security of the family union, (5) the integrity of the basic unit of society, (6) civic virtue and public morality, (7) interjurisdictional comity, and (8) government efficiency.” Id; see also Lynn D. Wardle, “Multiply and Replenish”: Considering Same-Sex Marriage in Light of State Interests in Marital Procreation, 24 HARV. J.L. & PUB. POL’Y 771, 775 (2001) (suggesting that “advocates of same-sex marriage are unlikely to be able to establish that committed same-sex unions are capable of matching the potential and actual contributions made by heterosexual unions (traditional marriages), and for that reason same-sex marriage should not be legalized”).

159. Coolidge & Duncan, supra note 76, at 639.
relationship unconnected to sex, children, exclusivity or permanence, why have legal marriage at all? Why not simply abolish it and let people create their own contracts? In short, if one removes the reason for the concept, its other elements come apart. No element, taken alone, adequately explains the concept of legal marriage.160

Allowing homosexual couples to marry, these authors conclude, “opens the door to ‘polyamory.’”161 Gay marriage destabilizes all marriage.162

On the other end of the spectrum, some advocates of the new legal dispensation praise the recent freedoms in family forms precisely because of their potential disruption of an institution they see as deeply flawed.163 Pointing to the continued subjection of women within a patriarchal framework they see as unyieldingly oppressive, some feminists eagerly envisage legalized same-sex marriage as a vehicle “to destabilize the gendered definition of marriage for everyone.”164 Judith Stacey expects the democratization of marriage to foster creative
affiliations which will shatter the "customary forms." She posits, for instance, the marriage of two friends who share a mutual commitment not founded on romantic attraction. And why stop at two? Stacey also recommends challenging the "dyadic limitations of Western marriage and seek[ing] some of the benefits of extended family life through small-group marriages arranged to share resources, nurturance and labor."

This Essay nominates a different yardstick to measure the changes in the institution of marriage. Legal provisions regulating domestic partnerships and civil unions, as well as such innovative documents as the ALI's recently approved Principles, have transformed key components in the discourse on marriage and divorce. Although not directly aiming at this target, these legal reforms may succeed in reconfiguring the terms of the bargain between the state and every family. Focusing on marriage's functions rather than on its inherent natural or secular meanings may ultimately shift the public debate away from whether any particular type of couple fits within the definition of marriage, and toward a more pragmatic inquiry into whether particular types of entitlements and obligations should be available to all our domestic households.

165. STACEY, supra note 2, at 127.
166. See id.
167. Id. Note that, although the positions on either end on this ideological continuum posit that legal recognition of same-sex unions will lead to similar sanctioning of multiple-partner relationships, there is no logical or experiential connection between these propositions. There has been no showing that homosexual couples are any more likely than their heterosexual cousins to extend their amorous unions to multiple partners. Polygamy, as once practiced and sanctioned by the Church of Jesus Christ of the Latter-Day Saints (and as continued by schismatic sects of that Church) has always involved heterosexual, polygynous marriages. Moreover, the legislative and judicial efforts to date have excluded the spread to multiple partners. For example, the Vermont civil union statute mirrored marriage in limiting the civil union to two individuals. See VT. STAT. ANN. tit. 15, §§ 1201-1207 (Supp. 2002). Similarly, in invalidating the common-law heterosexual definition of marriage, the Court of Appeal of Ontario reformulated it as "the voluntary union for life of two persons to the exclusion of all others." Halpem v. Canada (A.G.), [2003] 225 D.L.R.4th 529, 570. See Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969 n.34 (Mass. 2003) (rejecting the notion that "the restrictions on incestuous or polygamous marriages are so dependent on the marriage restriction that they too should fall if the marriage restriction falls").
168. ALI PRINCIPLES, supra note 7.
169. See Chambers, supra note 120, at 450-51 (observing that the debate on same-sex marriage has pivoted on the symbolism of marriage, rather than the content of the attributes to be fairly allocated by the state, and arguing that the opponents of extending marriage to gays seem "motivated not by a view of the inappropriateness of extending particular legal entitlements to same-sex couples but by views about some 'inherent' meaning of marriage and by views about the social unacceptability of gay people and gay relationships"). I am not, of course, sanguine that all those who view same-sex couples' access to the marital institution as a moral dilemma will accede to my suggestion for an alternate frame of reference. I submit this proposal as an effort to further dispassionate analysis, well aware that the issue will continue to spark considerable controversy.
This view of marriage concentrates on considering which elements, or which bundles of elements, appropriately pertain to specific unions or types of partnerships. What greater lucidity will this methodology afford? Seeing marriage in this way may clarify our view of the essential nature of marriage (by determining which pre-sorted bundle of rights and responsibilities provides a floor for social recognition), and of the range of permissible options allocatable by private ordering (by deciding which elements, or bundles thereof, may be chosen by the parties).

Family law is at present a battleground in which the front lines between public realm and private choice are particularly contested. The power of the state to draw the perimeter around marriage has been dramatically weakened, in large measure by actions of the state itself. But it is not clear that unfettered private ordering will usurp the field, or that a rational polity would desire such a rococo result. The question then becomes how to temper the grasp of contractual freedom by the reach of the law which defines the limits of that bargaining power. In other words, although couples will continue to magnify the role of contract in crafting familial understandings (and misunderstandings), allocating these bundles of domestic benefits and burdens may become the primary way for the state to preserve its important channeling function to "build[], shape[], sustain[], and promote[]" this key institution of social life.

170. For example, prenuptial agreements fixing the financial consequences in the event of divorce have been praised for their ability to enhance private ordering in an area of law where the official state regime has failed so many so often. By "empowering couples to commit themselves reliably, judicial enforcement of premarital [contracts] allows the parties to structure the economic consequences of future behaviors and, by doing so, to manipulate the incentives they will face in the future." Jeffrey Evans Stake, Mandatory Planning for Divorce, 45 VAND. L. REV. 397, 415-16 (1992) (footnote omitted).

171. See DiFonzo, supra note 54, at 961-62 ("We need legislatures to withhold the legal imprimatur from radical domestic experimentation, and we need courts to continue to monitor these agreements for reasonableness, particularly in the emerging area of prenuptial bargains that oh-so-confidently rely on romantic desire to deny future freedom.").

172. Schneider, supra note 6, at 496; see also Chambers, supra note 120, at 448 (concluding that [T]he number of significant distinctions resting on marital status remains large and durable; that in some significant respects the remaining distinctive laws of marriage are better suited to the life situations of same-sex couples than they are to those of the opposite-sex couples for whom they were devised; and, most broadly, that the package of rules relating to marriage, while problematic in some details and unduly exclusive in some regards, are a just response by the state to the circumstances of persons who live together in enduring, emotionally based attachments); Barbara Bennett Woodhouse, Sex, Lies, and Dissipation: The Discourse of Fault in a No-Fault Era, 82 GEO. L. J. 2525, 2526 (1994) (identifying "a dual function of family law, both as a mechanism for
Several intertwined consequences of this new debate may be ventured. One contemporary trend in family law today seeks "opportunities for replacing one-size-fits-all laws with individually tailored regimes." The significant increase in couples customizing their marriages exemplifies this propensity for marital privatization. As was mentioned earlier, an ever-growing number of couples have shaped the form of their marriages by drafting prenuptial agreements fixing many of their legal rights and obligations vis-à-vis each other and the state. Another source for creative tinkering is illuminated by the flashlight which civil unions and domestic partnerships aim at traditional marriage. Careful cataloguing of the diverse elements of marriage highlights the many meanings of contemporary conjugality: the multiplicity of the behaviors, duties, relationships, and social boons encompassed by marriage laws and norms. This Linnaean endeavor may appear only to be classifying the components, but the resulting roster serves as a working platform for specialization and recombination. Even if civil unions seek to replicate marriage rather than shape it, other marriage-like measures have proven supple in negotiating the political waters to shape specific benefits and obligations.

The process of sketching the organization of the myriad attributes of marital and quasi-marital unions has only begun. Professor William Eskridge's preliminary assessment divides this universe of social rules and norms into three categories. The first set consists of commands requiring private parties to heed or be chargeable to the "emotional unity of the married or unioned couple." A second division relates to parental rights and obligations, while the third classification deals with the parties as an economic unit "for purposes of their own internal accounting, their commercial dealings with third parties, and their obligations (taxes) to the state." An earlier effort by Professor David meeting the needs of family members and as a vehicle for expressing our values and aspirations about family life to ourselves and to our children").

173. Stake & Grossberg, supra note 3, at 539 (remarks by Jeffrey Evans Stake); see Barbara Stark, Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law, 89 CAL. L. REV. 1479, 1482 (2001) (explaining "why one-size-fits-all" marriage "actually fits none," and devising alternative "Marriage Proposals" as more suitable to "postmodern marriage law; that is, marriage law that explicitly contemplates varied, changing, contextualized forms of marriage, [which] may in fact be more compatible with contingent, problematic, but nevertheless enduring human love, than the reified abstraction we now call "marriage").

174. See supra text accompanying notes 61-63.

175. See generally Eskridge, supra note 157.

176. Id. at 867. These rules treat the partners as emotional fiduciaries for the well-being of each other. See id.

177. Id.
Chambers, predating the enactment of the civil union law, shuffled the deck of marriage-like characteristics, but dealt out a similar array. Chambers suggested three criteria: regulations that "recognize emotional attachments;"\textsuperscript{178} those dealing with parenting,\textsuperscript{179} and those setting out the partner-partner and couple-state economic framework.\textsuperscript{180} Much work remains to be done on the permissible content of these bundles of marriage elements, as well as on issues such as the treatment of "strategic bundling"\textsuperscript{181} and the exact contours of the marriage floor. In all these ways, American law treats married persons quite differently than the unmarried; but while the legal system provides certain couples with a marriage script, it allows for a great deal of improvisation.

The growing extent of this marital diversity suggests that the concerns raised in this Essay are not limited to conjugal unions "at the margins"\textsuperscript{182} but apply to marriage—however constituted—as a whole. Whether the vehicle is a prenuptial agreement, civil union, domestic partnership benefit, or quasi-marriage under the ALI Principles, one constant holds. Public laws and private bargains intended to expand domestic entitlements and freedoms cannot help but eventually to limit them. Thus, another family law trend reemerges. The state continues to set the floor, the ceiling, and sometimes even the walls within which experimentation in family forms occurs and unfolds. The unbundling of marital benefits and duties will by no means lessen the state's role in domestic relations. As Michael Grossberg reminds us, "we have inherited a persistent and consistent debate about private ordering in

\textsuperscript{178} Chambers, supra note 120, at 454. Intestacy laws and rules for allocating decision-making for an incompetent relative illustrate this type.

\textsuperscript{179} See id. at 461-70.


\textsuperscript{181} "Strategic bundling" might consist of decisions made by one party to the marriage to obtain an advantage over the other, and involve the obligation of the state to craft the applicability and terms of any remedy. For an illustration of the use of "strategic bundling" in a different context, see Samuel Noah Weinstein, United States v. Microsoft Corp., 17 BERKELEY TECH. L.J. 273, 290 n.105 (2002).

\textsuperscript{182} See Michael Grossberg, Remarks at the Hofstra University School of Law Conference on Marriage, Democracy, and Families (Mar. 14, 2003) (videotape on file with Hofstra Law Review) (discussing the impact marriages "at the margins" have had upon the course of family law).
family law." The historical power struggle between public decree and private devising in our domestic life is never-ending. We quest for an elusive equilibrium, but each generation sets the appropriate balance by its own lights, and each successor era realigns the public see-saw.

The danger is that the present debate on the very public stage in which our marriage morality play is enacted can be polarizing. It can give the erroneous impression that the debate is either-or, homosexual marriage or not, survival of traditional marriage or not, when in fact the policy palette holds many pigments, some of which stand out while others blend in. Historian Stephanie Coontz observed that “[m]ost discussions of family issues assume too sharp and permanent a division between different family forms.” She recommended that we pay more heed to the bridges between different family forms, “the fluidity of those categories, and the many transitions people make in their lives, as they or their relatives move through several different types of families and households.” Looking through the prism of marriage's manifold elements may allow us to consider and implement a broader array of policy prerogatives so that the public-private debate continues to be fruitful in expanding marital freedom under law.

IV. CONCLUSION

Marriage is a palimpsest, a cultural artifact with multiple layers beneath the surface. Some of those layers reveal a heterosexual dyad centered on child-raising. Other layers chronicle family ties established through toil rather than blood. Rubbing to reach another level, the writings point to the need for hospital visitation rights, so that if your life partner is critically injured, the hospital will allow you to see him or her, or at least tell you whether your loved one is alive or dead. Not every layer has been thoroughly canvassed: whether marriage remains a duet...

183. Stake & Grossberg, supra note 3, at 554 (remarks by Michael Grossberg). Grossberg notes that “private ordering in family law is not new, and . . . has a complicated past that has helped produce the equally complicated present in which we struggle over its meaning.” Id. at 553.

184. STEPHANIE COONTZ, THE WAY WE REALLY ARE: COMING TO TERMS WITH AMERICA'S CHANGING FAMILIES 3 (1997). In extending the marital prerogative to same-sex couples, Massachusetts' highest court set concerns about marriage's demise in historical context:

Alarms about the imminent erosion of the “natural” order of marriage were sounded over the demise of antimiscegenation laws, the expansion of the rights of married women, and the introduction of “no-fault” divorce. Marriage has survived all of these transformations, and we have no doubt that marriage will continue to be a vibrant and revered institution.


185. COONTZ, supra note 184, at 3.
or includes the pursuit of polyphony is as yet unclear, with the historical
evidence running in both directions.

Each of these examples of family rights and concerns involve a
different combination of the elements of marriage. Considering marriage
in the abstract, or in terms of some asserted central meaning, does not
sufficiently credit the contingency of history. The marital universe is
expanding, but the result need not be family entropy. The next step in
this venture of family law involves "conversations hard and wild":186
imagining, combining, and implementing different bundles of marital
elements. Unbundling marriage, and searching for appropriate alloys of
its elements, may accommodate marriage’s increasingly divergent
constituencies, as well as the greater social good of nourishing healthy
families in a pluralistic world.

186. See Simon, supra note 1.