
Choosing Marriage

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Questions about the choice to marry have dominated public discourse in recent years. But with the spotlight focused on the question who can marry whom, few have paid attention to how a couple crosses marriage's legal threshold. Yet a steady stream of cases in recent years — in which individuals have litigated whether they legally married — has revealed that answers to the latter question can have monumental consequences for the individuals who risk being deemed married or unmarried against their will.

This Article has descriptive and normative goals. Descriptively, it exposes the pervasive legal uncertainty regarding both the role and definition of marital choice. It also reveals the stakes of that choice for individuals, the state, and third parties. Normatively, it argues that a valid choice to marry must promote autonomy by facilitating self-authorship and manifesting consent to the legal rights and obligations of marriage. To perform these functions, the relevant act must be objectively measurable and intelligible to the spouses and the law. For this definition to be sufficiently protective of individual interests, states must adopt rigorous standards for establishing consent. Formalities are often crucial in this process, as they are the currency through which couples most commonly telegraph marriage or nonmarriage, but they are not exclusive. This Article considers how objective conduct, burdens of proof, and the timing and scope of relief can also establish a valid choice to marry.

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TABLE OF CONTENTS

INTRODUCTION	2001
I. CHOICE UNCERTAINTIES	2010
A. <i>The Role of Formalities</i>	2011
B. <i>Formal Choice Problems</i>	2013
C. <i>Informal Choice Problems</i>	2019
II. CHOICE FUNCTIONS	2023
A. <i>Enabling Self-Authorship</i>	2024
B. <i>Notifying Spouses</i>	2026
C. <i>Encouraging Relationship-Specific Investment</i>	2030
D. <i>Indicating Consent</i>	2032
E. <i>Facilitating Administration</i>	2035
F. <i>Preventing Shirking</i>	2038
G. <i>Channeling Behavior</i>	2039
III. CHOICE ARCHITECTURE	2042
A. <i>Defining Choice</i>	2042
B. <i>Proving Choice</i>	2047
1. <i>Formalities</i>	2048
2. <i>Objective Evidence</i>	2050
3. <i>Subjective Statements</i>	2052
4. <i>Burden of Proof</i>	2053
5. <i>Timing and Scope of Relief</i>	2056
IV. CHOICE RESOLUTIONS	2059
A. <i>Legally Impossible Choices</i>	2059
B. <i>Conscriptive Common Law Marriage</i>	2063
CONCLUSION.....	2065

INTRODUCTION

“A slavery beyond enduring, / But that ‘tis of their own
procuring.” — Samuel Butler¹

No one is born married. Marriage therefore involves transformation. In the eyes of the law, this transformation is significant. The conclusion that a person is married triggers a different set of rights and obligations in the areas of taxation, inheritance and property rights, medical decision making, evidence, public benefits programs, parentage, and more.² Although some of these rights can be altered by agreement of the spouses, many are mandatory or inalienable — part and parcel of marriage.

Choice theoretically moves a person across this legal threshold. The Supreme Court emphasized in *Obergefell v. Hodges* that the right to marry is “premise[d]” on the act of choice: “the right to personal choice regarding marriage is inherent in the concept of individual autonomy.”³ Even the dissenting justices agreed that parties must enter marriage voluntarily⁴ — they just disagreed that the Constitution protects a person’s right to choose to marry someone of the same sex.⁵

But what does it mean to choose to marry?⁶ Must choice reflect the subjective intent of the parties, and, if so, intent as to what: to assume *all* the legal rights and responsibilities of marriage, some core subset, merely to accept a more amorphous form of legal obligation, or to join a particular social or religious institution irrespective of the law?⁷ And if intent matters, should the law ascertain that intent through the performance of formalities or marriage-like acts? On the flip side, how

¹ SAMUEL BUTLER, *HUDIBRAS*, pt. III, canto I, at 186 (Henry Morley ed., 1886) (1663).

² See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015) (listing areas of the law affected by marital status).

³ *Id.* at 2599.

⁴ *Id.* at 2613 (Roberts, C.J., dissenting) (calling marriage “a voluntary compact between man and a woman”) (citing JOHN LOCKE, *SECOND TREATISE OF CIVIL GOVERNMENT* 39 (J. Gough ed., 1947)).

⁵ Chief Justice Roberts, writing for three dissenting justices, could raise “no serious dispute that, under [existing] precedents, the Constitution protects a right to marry,” but contended that the right definitionally excludes same-sex couples. *Id.* at 2612.

⁶ See Ruth Colker, *The Freedom to Choose to Marry*, 30 COLUM. J. GENDER & L. 383, 401-02 (2015) (criticizing the *Obergefell* decision for not clearly articulating what choice “would truly mean in the marital context”).

⁷ Scholars have questioned how much knowledge of the laws governing marriage and divorce should be required to make an effective choice to marry. See Lynn A. Baker, *Promulgating the Marriage Contract*, 23 U. MICH. J.L. REFORM 217, 221-22 (1990) [hereinafter *Promulgating the Marriage Contract*].

should the law respond if a person harbors a desire not to marry that contradicts her objectively manifested conduct? And at what point in the relationship should the law determine that the couples have made this choice?

At first glance, the answers to these questions might seem obvious. After all, most jurisdictions require the satisfaction of formalities — the issuance of an official license and performance of a state-approved ceremony⁸ — before they will recognize a couple as married. These formalities have captured the public imagination, as the \$50 billion-plus domestic commercial wedding apparatus attests.⁹ The customary rituals — from the proposal to the assembly of family and friends to the walking down the aisle — crescendo to a combination of acts commonly understood to move the couple into marriage: the exchanging of vows, public pronouncement that the couple is married, and signing of the marriage license.

Still, uncertainties about the requisites of choice arise with surprising regularity, as two recent examples will illustrate.

* * *

Stacey and Lesly lived together in a committed relationship since 1986.¹⁰ In 2001, they entered a California registered domestic partnership.¹¹ In February 2010, Lesly's doctors diagnosed her with cancer that had metastasized to her lungs. Her condition worsened, and, on June 3, 2013, her doctor told her that her cancer was terminal. Over the next few days, she and Stacey discovered that her employer would only pay her fully vested pension to a "surviving spouse," which the plan defined as "a person of the opposite sex who is husband or wife."¹² On June 19, 2013, Stacey and Lesly were married

⁸ See DOUGLAS E. ABRAMS ET AL., *CONTEMPORARY FAMILY LAW* 140 (4th ed. 2015).

⁹ See, e.g., Jessica Grose, *The \$51 Billion Wedding Industry Toasts a Post-DOMA Bump*, BLOOMBERG (June 28, 2013, 11:41 AM), <http://www.bloomberg.com/news/articles/2013-06-28/the-51-billion-wedding-industry-toasts-a-post-doma-bump> (discussing the economic benefits of the DOMA ruling on the marriage industry).

¹⁰ The facts of this illustration come from *Schuett v. FedEx Corp.*, 119 F. Supp. 3d 1155, 1157 (N.D. Cal. 2016).

¹¹ *Id.* At the time they registered, a domestic partnership offered a limited set of rights including hospital visitation and medical decisionmaking. But California incrementally expanded the status so that it eventually offered all the rights and responsibilities of marriage at the state level, and made those rights retroactive to the date that the couple first registered. See Kaiponanea T. Matsumura, *Reaching Backward While Looking Forward: The Retroactive Effect of California's Domestic Partner Rights and Responsibilities Act*, 54 UCLA L. REV. 185, 191-96 (2006).

¹² *Schuett*, 119 F. Supp. 3d at 1157-58 (citations omitted).

in a ceremony at their home presided over by a Sonoma County Supervisor and witnessed by friends and family members.¹³ The ceremony had no legal effect, though, because California voters had passed Proposition 8, an initiative measure limiting marriage to opposite-sex couples.¹⁴ Stacey and Lesly were therefore unable to get a marriage license before their wedding ceremony as required by law. Lesly died the next day.

Six days later, in *Hollingsworth v. Perry*,¹⁵ the Supreme Court held that the Proponents of Proposition 8 lacked standing to appeal a trial court decision declaring the proposition unconstitutional.¹⁶ The practical consequence of the *Hollingsworth* decision was to legalize same-sex marriage in California only days after Lesly's death.¹⁷ Stacey then filed a petition with the Superior Court in Sonoma County to establish the existence of her marriage to Lesly, and the court issued an order declaring that she and Lesly had married on June 19, 2013, several days *before* same-sex marriage was legal.¹⁸ Lesly's employer denied Stacey's claim for Lesly's pension benefits as a surviving spouse, asserting that the two were not legally married at the time of Lesly's death.¹⁹

Two-and-a-half years after living with his girlfriend Parisa, Jackson decided to propose.²⁰ He asked Parisa's parents for permission to marry her, and he bought a \$25,000 engagement ring with the help of Parisa's mother. Parisa accepted the proposal and the engagement ring,

¹³ *Id.* at 1158.

¹⁴ See *Strauss v. Horton*, 207 P.3d 48, 59 (Cal. 2009) (describing the legal developments that led to the adoption by voters of Proposition 8), *abrogated by* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

¹⁵ *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

¹⁶ *Id.* at 2655-56. A trial court had held Proposition 8 unconstitutional under the Fourteenth Amendment. *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 927 (N.D. Cal. 2010). The Ninth Circuit ultimately upheld the ruling, albeit on different grounds, but had stayed its mandate pending resolution of the case by the Supreme Court. See *Perry v. Brown*, 671 F.3d 1052, 1096 (9th Cir. 2012), *reh'g en banc denied*, 681 F.3d 1065, 1066-67 (9th Cir. 2012), *cert. granted sub nom.* *Hollingsworth v. Perry*, 133 S. Ct. 786 (2012).

¹⁷ See Chris Megerian et al., *Pride Parade, Weddings Go on in San Francisco as Ruling Stands*, L.A. TIMES (June 30, 2013, 9:56 AM), <http://www.latimes.com/local/lanow/la-me-In-gay-marriage-20130630-story.html>.

¹⁸ *Schuett*, 119 F. Supp. 3d at 1158.

¹⁹ See *id.* at 1158-59.

²⁰ The facts of this illustration come from *Jackson K. v. Parisa G.*, No. 300957/15, 2016 N.Y. Misc. LEXIS 1487, at *1-2 (N.Y. Sup. Ct. Apr. 8, 2016).

and, for the next thirteen months, planned a 200-person wedding. She and her family printed and sent invitations; created a wedding website; registered for gifts; and hired a band, DJ, photographer, and videographer. At the wedding ceremony, guests were handed a four-page program for the “Wedding of Parisa and Jackson” describing the symbolism of Iranian Islamic wedding rituals.²¹ After the ceremony, during which the parties were referred to as the “bride” and “groom” and exchanged rings, Jackson and Parisa signed a marriage contract, written in Farsi, referring to their “eternal union.”²²

Although Jackson and Parisa lived together after the wedding ceremony, and publicly referred to themselves as a married couple, they never obtained a marriage license from the State of New York. They also continued to file tax returns as single individuals. At some point, the validity of their marriage became a point of contention between them, and Parisa denied that she had ever legally married Jackson. Although New York technically requires that a couple obtain a marriage license prior to a marriage ceremony, the state will make an exception for a marriage solemnized by a person authorized by her respective religion.²³ Jackson and Parisa’s ceremony was presided over by Sholeh Shams, who was flown in from California to perform the wedding, and who was identified on several Iranian-American websites as a “solemnizer” and “clergy.”²⁴ Shams submitted an affidavit in support of Parisa, however, in which she stated that she was not authorized to officiate at a wedding in any state at the time of the ceremony. Parisa claimed that she knew Shams was not authorized to perform the marriage even as the ceremony unfolded.²⁵ Yet the court still held that the parties could have crossed that threshold under the circumstances.²⁶

The fact that many same-sex couples were already in marriage-like relationships before the legalization of same-sex marriage raises a

²¹ *Id.* at *2-3.

²² *Id.* at *3-4. The parties disputed whether a proper translation of the document included the terms “marriage,” or “marriage certificate,” but not that it referred to them as “bride” and “groom,” or their union as an “eternal” one. *Id.*

²³ *Id.* at *9-10 (citing N.Y. DOM. REL. LAW §§ 11, 12, 13, 25 (2016)).

²⁴ *Id.* at *5.

²⁵ *Id.* at *10.

²⁶ *Id.* at *16 (denying Parisa’s motion to dismiss the causes of action for the declaration of the validity of the parties’ marriage).

plethora of transition problems that turn on the choice to marry.²⁷ For example, in its 2012 marriage equality legislation, the State of Washington decided to convert the unions of registered domestic partners into legal marriages.²⁸ As a consequence, for over 3,000 couples, the choice to register a domestic partnership was treated as a choice to legally marry despite the probability that some of those couples did not intend to marry.²⁹ People in marriage-like relationships, like Stacey and Lesly, have started to bring legal actions to establish rights premised on the existence of marriage notwithstanding the fact that they were unable to formally marry before their partners died or their relationships ended. Courts have often been sympathetic to these types of claims, looking to commitment ceremonies or shared children as indicia of a choice that was legally impossible to make.³⁰ Many state and federal rights, such as equitable distribution of marital property or social security survivor benefits, turn on the date or length of a marriage.³¹ Thus, even when

²⁷ Since the *Obergefell* decision in the summer of 2015, at least 123,000 same-sex couples married in the United States, many of whom were already in longstanding relationships. See Suzanne A. Kim, *Relational Migration*, 77 OHIO ST. L.J. 981, 982-83 (2016) (identifying novel issues raised by the transition from one relationship status to another).

²⁸ Same Sex Marriage Act, ch. 3, § 10(3)(a) (2012) (codified at WASH. REV. CODE § 26.60.100 (2012)) (“[A]ny state registered domestic partnership in which the parties are the same sex, and neither party is sixty-two years of age or older, that has not been dissolved or converted into a marriage by the parties by June 30, 2014, is *automatically merged into a marriage and is deemed a marriage* as of June 30, 2014.” (emphasis added)). See generally WASH. REV. CODE ANN. § 26.60.010 (2014) (stating that many state residents are part of non-married relationships and that these relationships benefit the public, no matter the gender and sexual orientation of the partners).

²⁹ See Kaiponanea T. Matsumura, *A Right Not to Marry*, 84 FORDHAM L. REV. 1509, 1524-25, 1525 n.90 (2016) [hereinafter *Right Not to Marry*].

³⁰ See, e.g., *Ramey v. Sutton*, 362 P.3d 217, 220-21 (Okla. 2015) (“[I]t was legally impossible for [the] couple to wed The couple’s failure to marry cannot now be used as a means to further deprive the nonbiological parent, who has acted *in loco parentis*, of a best interests of the child hearing.”); *In re Madrone*, 350 P.3d 495, 501 (Or. Ct. App. 2015); see also Peter Nicolas, *Backdating Marriage*, 105 CALIF. L. REV. 395 (2017); Lee-Ford Tritt, *Moving Forward by Looking Back: The Retroactive Application of Obergefell*, 2016 WIS. L. REV. 873, 920-21 (2016) (arguing that “same-sex marriages . . . definitely [begin] on the date of [a couple’s] marriage, not on the date of the *Obergefell* decision”). Allison Tait has also explored the challenge of proving the existence of a marriage absent a legal impediment, but has advanced a more constrained approach based on the formal entrance of an alternate status such as a civil union, or the execution of a cohabitation agreement. See Allison Anna Tait, *Divorce Equality*, 90 WASH. L. REV. 1245, 1302-06 (2015).

³¹ See Nicolas, *supra* note 30, at 401-03; Tait, *supra* note 30, at 1293-94; Tritt, *supra* note 30, at 875-76.

the couples formally marry, courts and tribunals will inevitably have to decide *when* the marriages began, which will require them to determine when the choice to marry occurred.³²

But as Jackson and Parisa's case illustrates, questions about marital choice also arise where the right to marry was long established and the formalities are readily available. A rigid application of formal requirements would prevent Jackson from establishing that he and Parisa had entered into a valid marriage, but the courts allowed his claim to proceed.³³ Cases such as these reveal that acts distinct from formal requirements can sometimes move people from the legal category of unmarried to married.³⁴ Indeed, while states have favored a formal, *ex ante* definition of marital choice, they have kept the back door ajar. A handful of states still recognize common law marriages,³⁵ which are created through the exchange of promises to be married in words of the present tense, plus, in some states, a requirement that the

³² See Nicolas, *supra* note 30, at 402-03, 436 n.237 (noting that the inevitability of same-sex divorce will also lead to conflicts *between spouses* about when they chose to marry); Tait, *supra* note 30, at 1302-11 (describing the likelihood of disputes over the characterization of marital property).

³³ Jackson K. v. Parisa G., No. 300957/15, 2016 N.Y. Misc. LEXIS 1487, at *16 (N.Y. Sup. Ct., Apr. 8, 2016).

³⁴ Janet Halley has observed:

The marriage system in the U.S. has consistently been ambivalent about how hard to try for formality. The chief engines driving this ambivalence, it seems to me, are the desire for formal entry practices and the countervailing desire for thoroughgoing enforcement of rights and obligations where the entry performances are somehow defective.

Janet Halley, *Behind the Law of Marriage (I): From Status/Contract to the Marriage System*, 6 UNBOUND: HARV. J. LEGAL LEFT 1, 24 (2010).

³⁵ These states include, subject to minor substantive variations, Colorado, COLO. REV. STAT. § 14-2-109.5 (2017); Iowa, *In re Estate of Stodola*, 519 N.W.2d 97, 98 (Iowa Ct. App. 1994); Kansas, KAN. STAT. ANN. 23-2502 (2017); Montana, MONT. CODE ANN. § 40-1-403 (2017); New Hampshire, recognizing a surviving common law spouse if a member of a cohabiting pair dies, *see* N.H. REV. STAT. ANN. § 457:39 (2017); Rhode Island, *Zharkova v. Gaudreau*, 45 A.3d 1282, 1290 (R.I. 2012); South Carolina, *Callen v. Callen*, 620 S.E.2d 59, 62 (S.C. 2005); Texas, *see* TEX. FAM. CODE ANN. § 2.401 (2017); Utah, *see* UTAH CODE ANN. § 30-1-4.5 (2017); and the District of Columbia, *Cerovic v. Stojkov*, 134 A.3d 766, 774-75 (D.C. Ct. App. 2016). Several other states have abolished common law marriage prospectively, but continue to recognize marriages entered into before a certain date. *See, e.g.*, GA. CODE ANN. § 19-3-1.1 (2017) (recognizing common law marriages entered before January 1, 1997). And others will recognize common law marriages contracted in other states even though they prohibit couples from entering a common law marriage within the state. *See, e.g.*, DEL. CODE, tit. 13, § 126. (2017) (stating that common law marriages otherwise entered into lawfully will not be invalidated by the failure to take out a license).

couple hold themselves out as married.³⁶ Even those that have abandoned common law marriage tend to be charitable in their application of choice of law rules to recognize common law marriages contracted in other states.³⁷ And states have retained equitable doctrines under which defects in the process of formal choice will not prevent the state from treating a couple as married.³⁸ Conversely, formalities are sometimes insufficient to accomplish that result. For example, couples that have satisfied all the formal requirements may still fall outside of the realm of legal marriage if one spouse later discovers that the couple does not share key beliefs going to the “essentials” of marriage.³⁹ A spouse’s fraudulent representations as to these essentials “vitiat[e] the actual consent of the defrauded party,” meaning that the parties never succeeded in entering a marriage to begin with.⁴⁰ And the federal government has disregarded formalities for the purpose of parceling out valuable benefits, denying the validity of marriage when awarding immigration status in some circumstances,⁴¹ and treating couples as married in order to reject

³⁶ Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 712-13 (1996) [hereinafter *Feminist Proposal*].

³⁷ See CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 26 (2011) (providing examples from New York).

³⁸ See, e.g., *Williams v. Williams*, 97 P.3d 1124, 1128 (Nev. 2004); *Martin v. Coleman*, 19 S.W.3d 757, 760 (Tenn. 2000); *Aghili v. Saadatnejadi*, 958 S.W.2d 784, 788 (Tenn. Ct. App. 1997).

³⁹ See, e.g., *In re Marriage of Igene*, 35 N.E.3d 1125, 1127-28 (Ill. App. Ct. 2015); see also *In re Marriage of Meagher & Maleki*, 31 Cal. Rptr. 3d 663, 667 (Ct. App. 2005) (describing the essentials of marriage as were recognized in California); *Stegienko v. Stegienko*, 295 N.W. 252, 254 (Mich. 1940) (“Marriage may be annulled for fraud of any nature wholly subversive of the true essence of the marriage relationship.”).

⁴⁰ See *In re Marriage of Igene*, 35 N.E.3d at 1127 (noting that a finding of fraud as to the essentials means that “no valid marriage ever existed”).

⁴¹ See Kerry Abrams, *Marriage Fraud*, 100 CALIF. L. REV. 1, 19, 32, 34 (2012) (noting that various marriage fraud tests are designed to “ensure that the types of marriages . . . privileged by the benefit are the types the legislature wants to favor” and that, in the immigration context, the law requires additional proof beyond legal formalities to ensure the marriage is “genuine”); see, e.g., *Surganova v. Holder*, 612 F.3d 901, 904 (7th Cir. 2010) (finding marriage fraud based in part on the failure to cohabit); *Boansi v. Johnson*, 118 F. Supp. 3d 875, 877-78 (E.D.N.C. 2015) (discussing a situation where a couple was refused a visa because they did not live together and because their petition was based on arguably inconsistent answers that the spouses separately provided in response to five out of forty-eight questions). Note, though, that not every ulterior motive for marrying will constitute fraud. See, e.g., *In re Interest of Miller*, 448 A.2d 25, 26, 38 (Pa. Super. Ct. 1982) (upholding the validity of a marriage between a female juvenile and adult male even though the man’s motive was to avoid criminal prosecution for his relationship with the girl).

individual claims for means-tested benefits in others.⁴² These acts can result in couples being married for some purposes but not others.

The law's ambivalence about the role of formalities reveals substantial uncertainty about the relationship between conduct and subjective mental state that will support a legal determination that a couple has married. Given that this determination is a prerequisite to resolving claims of a constitutional dimension — that a person has married or not married — the stakes of the inquiry are high. But the significance of this inquiry has, for the most part, escaped judicial and scholarly attention.⁴³

This Article has descriptive and normative goals. Descriptively, I expose the pervasive uncertainty regarding the substance of marital choice. The legal system has traditionally treated marriage as one half of a foundational binary: married or single. These states of being are thought of as monolithic and oppositional; you're either in, or you're out.⁴⁴ Under this view, even situations of extreme ambiguity must point in one direction or the other. In reality, however, relationships change over time. They sometimes start gradually or sputter to a close.⁴⁵ It is possible for the parties not to know their own intentions

⁴² See 20 C.F.R. §§ 416.1806(a), 416.106(c) (2017) (stating when federal regulations will consider someone to be one's spouse for Supplemental Security Income and discussing that there is a presumption of marriage based on opposite-sex cohabitation unless cohabitants, when questioned, show that they do not hold themselves out as spouses); Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1276, 1313-1332 (2014) [hereinafter *Deprivative Recognition*] (identifying ways in which governments recognize various forms of intimate and non-intimate relationships in order to deny access to valuable financial benefits).

⁴³ Scholars have observed the tenuousness of the line between marriage and nonmarriage. See, e.g., Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 962-63 (2000); cf. Halley, *supra* note 34, at 28-32. Others have analyzed the function of formalities and the tradeoffs inherent in adopting formal or informal marriages. See, e.g., Jessica A. Clarke, *Identity and Form*, 103 CALIF. L. REV. 747, 782-86 (2015) (discussing "formal identity," its traps, and how it functions in the law). And a few scholars have begun to focus on the transition problems inherent in recognizing the new category of same-sex marriages. See, e.g., Nicolas, *supra* note 30; (exploring the phenomenon of backdating marriages for same-sex couples); Tait, *supra* note 30 (looking at equitable distribution and economic partnerships in light of same-sex couples divorces). This Article, in contrast, examines the *mechanisms* by which the law determines that individuals have made a legally effective choice to marry.

⁴⁴ See Halley, *supra* note 34, at 13, 28-32; Clare Huntington, *Repairing Family Law*, 57 DUKE L.J. 1245, 1248 (2008) (criticizing the law for "freezing relationships" rather than seeing them as part of a cycle); Kim, *supra* note 27, at 986.

⁴⁵ See Albertina Antognini, *The Law of Nonmarriage*, 58 B.C. L. REV. 1, 5-10 (2017) (noting the challenges for the law when cohabitants marry, and when married couples cohabit after their relationship breaks down).

regarding marriage, much less their partners' intentions. The rise of long-term cohabitation and childrearing outside of marriage has further blurred the line between marriage and nonmarriage. The choice problems described in this Article reveal the challenge of maintaining the clarity of this binary.⁴⁶

Normatively, I propose a definition of marital choice that unites the individual, social, and legal aspects of marriage. To define choice, we must first identify the functions that the act of choice should perform. Marriage subjects a person to so many different rights and duties that it fundamentally transforms his or her legal status. Concern for individual autonomy requires that the transformation must result from an exercise of the right of self-determination;⁴⁷ it must reflect an act of will.⁴⁸ Relatedly, marital choice must also manifest consent to the transformation of one's legal status.

Yet the choice to marry has also served to promote or deter intimate conduct, to encourage mutual dependency and penalize shirking, and to clarify legal relationships between citizens, the state, and third parties.⁴⁹ To accommodate these other functions, I argue that the relevant act of will and manifestation of consent must be recognizable by society and the law: it must be performed objectively. The choice to marry takes on individual meaning precisely because others — spouse, society, and state — would recognize that choice as marriage. Likewise, the state's ability to promote its agenda depends on the social meaning of marriage to draw a line between conforming and nonconforming relationships. Thus, the choice to marry must entail the voluntary performance of an act or acts by both spouses manifesting their consent to assume a set of core duties associated with marriage.

With a definition in mind, we can then consider how to prove that choice has occurred. Because the objective manifestations of choice should ideally reflect a subjective desire to marry, proof is complicated, yet vital. For this definition to be sufficiently protective of individual interests, states must adopt sufficiently rigorous standards for

⁴⁶ These choice problems also point to a more fundamental question than when marriage starts: they raise the question whether marriage should be the dividing line between regulation and non-regulation of intimate adult relationships.

⁴⁷ See *Obergefell v. Hodges*, 135 S. Ct. 2584, 2597, 2599 (2015) (grouping the decisions whether and whom to marry together with “certain personal choices central to individual dignity and autonomy” that “define personal identity and beliefs”).

⁴⁸ See *id.* at 2599 (quoting *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 955 (2003), for the proposition that the choice to marry is an “act[] of self-definition”).

⁴⁹ For a discussion of these functions, see *infra* Part II.

establishing consent. Formalities are often crucial in this process, as they are the currency through which couples most commonly telegraph marriage or nonmarriage, but they need not be exclusive. The consideration of other forms of proof could allow spouses to enter marriage on their own terms, and could also provide the state with a means to enforce duties upon people who attempt to deny them.

Part I of this Article demonstrates that questions about the sufficiency of marital choice have arisen in a wide range of contexts. Part II lays the groundwork for a systematic approach to these questions by examining the functions of marital choice. Part III uses the functions of marital choice to provide a definition of what that choice entails. It then considers how to prove that choice has occurred, when choice must be ascertained, and whether the determination should affect past, as opposed to future, conduct. Part IV then demonstrates how this refined choice architecture would resolve some of the most pressing choice dilemmas currently faced by the courts.

I. CHOICE UNCERTAINTIES

Every Sunday, the *New York Times* devotes pages in its Fashion & Style Section to wedding announcements.⁵⁰ The first paragraph of each announcement contains the names of the two spouses, the date and location of their ceremony, and the name of the officiant.⁵¹ A ceremony is one of the two formal requirements to establish a valid ceremonial marriage; the other is that the couple obtain and record a marriage license.⁵² In most states, couples must comply with the formalities in order to legally enter a marriage. However, a handful of jurisdictions allow couples to enter marriage informally — through conduct that manifests the intent of the parties to marry.⁵³ This Part examines some of the tradeoffs involved in adopting either a formal or informal definition of marital choice, and demonstrates that both can give rise to uncertainties about whether parties have legally married.

⁵⁰ *How to Submit a Wedding Announcement*, N.Y. TIMES, <http://www.nytimes.com/ref/fashion/weddings/howtosubmitwedding.html> (last visited Mar. 19, 2017) (noting that marriage announcements are published in the Sunday Styles section).

⁵¹ *See id.*

⁵² Clarke, *supra* note 43, at 782 (“The requirements for legal recognition of marriage — generally a license, ceremonial solemnization, and registration — are paradigmatic ‘formalities’ that render legal identities official.”); *see also* ABRAMS ET AL., *supra* note 8, at 140-41.

⁵³ Nicolas, *supra* note 30, at 414-15 (noting that eleven states plus the District of Columbia recognize common law marriage).

A. *The Role of Formalities*

Court clerks and ministerial officials, rather than judges, police the formal requirements for entering a marriage.⁵⁴ Clerks theoretically verify the identities of the applicants and make sure that they meet the legal requirements for marriage, such as age, mental capacity, and sobriety.⁵⁵ When same-sex marriage was illegal, the task of denying marriage licenses to two applicants of the same sex often fell to the clerks.⁵⁶

Once the applicants have obtained a marriage license, states generally require that they participate in an official ceremony in the presence of witnesses, who sign the marriage license along with the officiant.⁵⁷ The clerk then records the license, which requires the clerk to verify that the form of the license is completed properly and accurately and that any additional requirements like waiting periods have been observed.

This process imposes upon officials a limited set of information-gathering obligations to determine that a couple has made a valid choice to marry. Assessment of the information provided is largely ministerial. The workload associated with these tasks can vary from office to office, but is unlikely to be significant.⁵⁸

Scholars have argued that formalities reduce the likelihood of disputes by focusing the parties' attention on the thing that matters⁵⁹:

⁵⁴ See, e.g., ARIZ. REV. STAT. ANN. § 25-121 (2017) (requiring parties to obtain a license from the clerk of a county superior court); CAL. FAM. CODE § 350 (2017) (requiring parties to obtain a license from a county clerk); *Miller v. Davis*, 123 F. Supp. 3d 924, 941 (E.D. Ky. 2015) (concluding that Kentucky's marriage statutes require a clerk to verify the accuracy of information and that the couple is qualified to marry under Kentucky law).

⁵⁵ See, e.g., ARIZ. REV. STAT. ANN. § 25-121 (requiring parties to appear before the clerk and sign an affidavit stating each applicant's name, age, and residential address, and to separately provide their social security numbers); CAL. FAM. CODE § 354 (requiring applicants to present photo identification as to name and birth or to provide witness affidavits, and granting the clerk authority to examine the applicants under oath); *Miller*, 123 F. Supp. 3d at 931 (explaining the process of issuing marriage licenses under Kentucky law).

⁵⁶ See, e.g., *Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 953-54 (N.D. Cal. 2010) (noting that the plaintiffs, two same-sex couples, were denied marriage licenses by county clerks).

⁵⁷ See, e.g., CAL. FAM. CODE §§ 359, 400, 423 (including the procedures necessary for marriage, such as obtaining a license and solemnization).

⁵⁸ See, e.g., *Miller*, 123 F. Supp. 3d at 931 n.1 (estimating, in one rural Kentucky county, that the issuance of marriage licenses required one hour of work per week).

⁵⁹ See Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 801 (1941) (arguing that formalities serve "to mark or signalize the enforceable promise" to the

in the case of marriage, this is the license and the ceremony.⁶⁰ The formalities *become* the “test of enforceability.”⁶¹ Proof of the formalities becomes proof of the thing itself, here, the choice to marry.

In contrast, informal choice requires different state actors to inspect different evidence at a different stage in the parties’ relationship. Courts are typically called upon to determine the existence of a common law marriage upon dissolution or death.⁶² At that point, a court will look to evidence that the parties manifested the choice to marry through statements and conduct establishing their present intent to marry.⁶³ Without legal formalities to rely upon, parties attempting to prove this intent must litigate the issue after the fact, meaning that courts, rather than clerks, must resolve the disputes.⁶⁴ This process involves the examination of the parties, witnesses, and a wide range of documentary evidence tending to establish or refute a commitment to marry and to live as married thereafter.⁶⁵

Although this process is costlier, it also unearths potentially valuable information that can lead to a fuller assessment of the nature of the parties’ relationship. Formal choice depends on a minimal amount of information: the applicants’ names, addresses, ages, and the representation that they participated in an official ceremony witnessed by a few people.⁶⁶ Clerks do not determine whether the couple is well suited to performing the functions of marriage. They lack the means to test commitment and mutual support, much less love or other indicia of conjugality — in other words, the subjective intentions of the parties. Thus, clerks will inevitably admit married couples who will not perform the duties of marriage particularly well. And they will also miss relationships that the state has an interest in recognizing as

parties who contemplate that their acts will have a legal effect); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 492-98 (1975) (discussing the functions of formalities before advocating for a substantial compliance approach); cf. Jeffrey A. Redding, *Formal Marriage*, 60 ST. LOUIS U. L.J. 671, 677-78 (2016) (noting that the marriage license itself offers access to legal benefits and analogizing it to paper currency).

⁶⁰ Clarke, *supra* note 43, at 782.

⁶¹ Fuller, *supra* note 59, at 801; accord Clarke, *supra* note 43, at 786 (noting that formal marriage creates “a clear test of who is married”).

⁶² For examples, see *infra* Part II.E.

⁶³ See Bowman, *Feminist Proposal*, *supra* note 36, at 712-14.

⁶⁴ See Elizabeth S. Scott, *Marriage, Cohabitation and Collective Responsibility for Dependency*, 2004 U. CHI. LEGAL F. 225, 256-57 (2004) [hereinafter *Marriage, Cohabitation*].

⁶⁵ See Dubler, *supra* note 43, at 970-71 (describing the basic elements of a common law marriage).

⁶⁶ See *supra* notes 54–57 and accompanying text.

marriages. Informal marriage allows the state to conclude that the parties married based on evidence of how their relationship actually unfolded over time.

B. Formal Choice Problems

Because formalities shed little light on a person's subjective intention to marry, formalities do not always answer whether the individuals at issue have crossed the threshold of marriage. In some situations, the law has questioned choice even when the couple has observed all the formalities.

Individuals who satisfy all the required formalities may nonetheless see their marriages questioned under one of numerous fraud doctrines.⁶⁷ Kerry Abrams has observed that these doctrines fall into two basic types.⁶⁸ The first, annulment-by-fraud, allows a spouse to annul a marriage if her choice to marry was prompted by a misrepresentation going to the "essentials" of marriage.⁶⁹ The second, public benefits fraud, allows the government or an employer to challenge marriages entered into for instrumental reasons, i.e. to obtain a legal benefit.⁷⁰

In both these situations, something is wrong with at least one spouse's subjective basis for marrying, rendering the choice to marry suspect. In the annulment-by-fraud context, one spouse's misrepresentation on a matter "which the state deems vital to the marriage relationship"⁷¹ renders the marriage voidable by the other spouse. Acceptable misrepresentations typically pertain to the sexual or procreative aspects of marriage; for instance, lying about one's intention not to engage in sexual relations, sterility, or intent to continue an intimate relationship with a third person.⁷²

In the public benefits fraud context, the spouses often share the other's motives for marrying.⁷³ But the government might determine

⁶⁷ See Abrams, *supra* note 41, at 5 (referring to an "astonishing array of legal doctrines . . . all professing to regulate marriage fraud").

⁶⁸ *Id.* at 5-6.

⁶⁹ *Id.* at 7-8.

⁷⁰ *Id.* at 14-15.

⁷¹ *In re Marriage of Meagher & Maleki*, 31 Cal. Rptr. 3d 663, 667 (Ct. App. 2005); *accord Stegienko v. Stegienko*, 295 N.W. 252, 254 (Mich. 1940) ("Marriage may be annulled for fraud of any nature wholly subversive of the true essence of the marriage relationship.").

⁷² See *In re Marriage of Meagher & Maleki*, 31 Cal. Rptr. 3d at 667.

⁷³ For example, see *Boansi v. Johnson*, 118 F. Supp. 3d 875 (E.D.N.C. 2015), in which a couple claimed that they married for non-fraudulent reasons.

that the couple's shared intentions do not reflect proper reasons for a couple to marry.⁷⁴ In the immigration context, for example, so great is the concern that individuals will use marriage instrumentally to obtain favorable legal status that the law requires additional proof beyond legal formalities that the marriage is "genuine."⁷⁵ Immigration examiners might ask questions like, "What is the name of your spouse's manager at work?" or "Do you and your spouse use birth control? What kind?" to probe whether the relationship exhibits financial interdependency, long-term commitment, and intimacy.⁷⁶ Marriages that are not deemed genuine will not be recognized for the purpose of receiving valuable federal benefits, leaving couples in a fragmented marriage that is legal for some purposes but not others.⁷⁷

Unsurprisingly, relationships that do not hew closely to accepted norms are suspect. In the recent case *Boansi v. Johnson*,⁷⁸ for example, a husband and wife lived in separate cities because the husband was unable to obtain an academic teaching job in the wife's hometown, and the wife did not want to uproot her two children or leave her ailing father.⁷⁹ In support of their visa application, the couple provided wedding photos, affidavits from people with personal knowledge of their relationship, statements from their joint bank accounts, copies of jointly signed lease agreements, and the husband's life insurance policy listing his wife as the beneficiary.⁸⁰ But the interviewer reviewing their visa application told the couple that "his supervisor did not like issuing green cards to couples who were not living together."⁸¹ The government ultimately denied the couple's visa

⁷⁴ See *Abrams*, *supra* note 41, at 19 (noting that various marriage fraud tests are designed to "ensure that the types of marriages . . . privileged by the benefit are the types the legislature wants to favor"). Note, though, that not every ulterior motive for marrying will constitute fraud. See, e.g., *In re Miller*, 448 A.2d 25, 29 (Pa. Super. Ct. 1982) (upholding the validity of a marriage between a female juvenile and adult male even though the man's motive was to avoid criminal prosecution for his relationship with the girl).

⁷⁵ See *Abrams*, *supra* note 41, at 32.

⁷⁶ *Id.* at 34 (internal quotation marks omitted).

⁷⁷ Cf. *Kerry v. Din*, 135 S. Ct. 2128, 2138 (2015) (rejecting a married woman's claim that the denial of a visa to her foreign spouse infringed a liberty interest inherent in marriage — the right to live together with one's lawful spouse).

⁷⁸ *Boansi v. Johnson*, 118 F. Supp. 3d 875 (E.D.N.C. 2015).

⁷⁹ See *id.* at 877-78.

⁸⁰ *Id.* at 878.

⁸¹ *Id.*; see also *Surganova v. Holder*, 612 F.3d 901, 904 (7th Cir. 2010) (finding marriage fraud based in part on the failure to cohabit).

petition based on arguably inconsistent answers that the spouses separately provided in response to five out of forty-eight questions.⁸²

Problems also arise when people attempt but fail to comply with the formal requirements for entering into a marriage, or proceed without regard to those requirements in good faith. When the formal deficiency is noticed at a later time, jurisdictions must decide whether the deficiency renders the marriage invalid.

Some jurisdictions are more forgiving than others. For example, although Connecticut requires a couple to obtain a marriage license in order to marry,⁸³ the Connecticut Supreme Court held that two individuals who participated in a religious ceremony without obtaining a marriage license were nonetheless legally married, reasoning that the statute did not expressly state that a non-complying marriage would be void.⁸⁴ In Connecticut, “[t]he policy of the law is strongly opposed to regarding an attempted marriage . . . entered into in good faith, believed by one or both of the parties to be legal, and followed by cohabitation, to be void.”⁸⁵

In contrast, Tennessee courts have required spouses to obtain a marriage license prior to a ceremony without exception.⁸⁶ In *Stovall v. City of Memphis*, a couple participated in a small marriage ceremony without first obtaining a marriage license, but obtained a license and participated in a second ceremony six weeks later.⁸⁷ The husband ended up passing away slightly over two years after the first marriage ceremony, but thirteen days shy of two years after the second.⁸⁸ If the courts measured the marriage from the first ceremony, the wife would meet the two-year cutoff to obtain survivor benefits from her husband’s employer.⁸⁹ The court, however, refused to excuse the spouses’ failure to obtain a marriage license, denying the wife her requested relief.⁹⁰

Even Tennessee, though, allows play in the joints. Tennessee law excuses certain deficiencies short of the complete failure to obtain a

⁸² See *Boansi*, 118 F. Supp. 3d at 878 (noting, for instance, that the husband said that there was one lock on the front door of their Maryland residence while the wife said that there were two).

⁸³ See CONN. GEN. STAT. § 46b-24(a) (2016).

⁸⁴ See *Carabetta v. Carabetta*, 438 A.2d 109, 111-12 (Conn. 1980).

⁸⁵ *Id.* at 111 (citation and quotation marks omitted).

⁸⁶ See *Stovall v. City of Memphis*, No. W2003-02036-COA-R3-CV, 2004 WL 1872896 (Tenn. Ct. App. Aug. 20, 2004).

⁸⁷ See *id.* at *1.

⁸⁸ See *id.*

⁸⁹ See *id.* at *6.

⁹⁰ See *id.*

license. For instance, it will excuse the failure of an officiant to return the marriage license to the issuing clerk within three days of the ceremony.⁹¹ More significantly, it also recognizes the doctrine of marriage by estoppel “when parties have believed in the validity of their marriage and have evidenced that belief by cohabitation.”⁹² This doctrine is conceptually related to the putative spouse doctrine recognized in some form by a majority of states.⁹³ That doctrine allows the civil effects of a legal marriage to flow to parties to a void marriage who contracted to marry in good faith.⁹⁴ A paradigmatic example is when one spouse believes that she has successfully terminated a previous marriage but in fact has not. The fact that her subsequent marriage is technically bigamous may void the marriage but will not deny the spouses the “status-related benefits of marriage, such as property division, pension, and health benefits.”⁹⁵

Through generous statutory interpretation — as in Connecticut — or equitable doctrines — such as the putative spouse doctrine — states minimize the impact of a formally deficient choice to marry. By doing so, they effectively look beyond formal requirements to recognize a wider range of conduct that can trigger marriage or marriage-like rights.

Sometimes, couples cannot comply with the formalities because the law prohibits their relationships. When the law changes, courts must then consider whether people could have chosen to marry when it was legally impossible for them to do so. This problem has arisen most recently with the legalization of same-sex marriage, but it arose following the *Loving v. Virginia* decision striking down anti-miscegenation laws,⁹⁶ and it promises to do so if and when existing restrictions — on plural marriage,⁹⁷ for example — fall in the future.

Courts confronting this question often ask whether the couple would have married *but for* the legal restriction, and, if so, when. In *Mueller v. Tepler*,⁹⁸ Charlotte Stacey sought to bring a loss of consortium claim based on a physician’s alleged failure to properly

⁹¹ See *Aghili v. Saadatnejadi*, 958 S.W.2d 784, 788 (Tenn. Ct. App. 1997).

⁹² *Martin v. Coleman*, 19 S.W.3d 757, 760 (Tenn. 2000).

⁹³ See *Williams v. Williams*, 97 P.3d 1124, 1128 (Nev. 2004) (citing similar statutes from California, Colorado, Illinois, Louisiana, Minnesota and Montana).

⁹⁴ See *id.*

⁹⁵ *Id.*

⁹⁶ See *Nicolas*, *supra* note 30, at 424-25 (describing the after-effects of the legalization of interracial marriage following *Loving v. Virginia*, 388 U.S. 1 (1967)).

⁹⁷ See William Baude, Opinion, *Is Polygamy Next?*, N.Y. TIMES (July 21, 2015), at A27), <https://www.nytimes.com/2015/07/21/opinion/is-polygamy-next.html>.

⁹⁸ 95 A.3d 1011 (Conn. 2014).

diagnose her partner's cancer between August 2001 and March 2004.⁹⁹ Stacey and Margaret Mueller had lived together as partners since 1985, but were not married at the time of the allegedly negligent acts.¹⁰⁰ The longstanding rule that the plaintiff and injured spouse must have been married at the time of the injury assumed that "if a couple had the level of mutual commitment that customarily leads to marriage and wanted to be married before the underlying tort occurred, the couple *would have been married*."¹⁰¹ Because Stacey and Mueller "could not have been married before the date of the tortious conduct," the court felt it only fair that Stacey have the opportunity to prove that she and Mueller would have married at the relevant time "if they had not been barred from doing so."¹⁰²

Although the decisions are far from uniform, other courts have followed *Mueller's* lead.¹⁰³ Last year, the Supreme Court of Oklahoma held that a non-biological same-sex parent could not be deprived of standing to seek custody of a child born in a nonmarital relationship because "it was legally impossible for [the] couple to wed"¹⁰⁴ at the time of the child's birth. An Oregon appellate court similarly held that an unmarried same-sex couple could take advantage of a statute conferring parenthood on the husband of a woman who uses donated sperm with his consent if "the same-sex partners *would have* chosen to marry before the child's birth had they been permitted to."¹⁰⁵ This approach has gained support from scholars like Peter Nicolas, who would look for the "date when the same-sex couple likely would have married, but for the unconstitutional prohibition on such marriages."¹⁰⁶

⁹⁹ See *id.* at 1015. The physician allegedly misdiagnosed the decedent with ovarian cancer and although the error was eventually discovered, it was too late to surgically remove some of the tumors. See *id.*

¹⁰⁰ See *id.* at 1014.

¹⁰¹ *Id.* at 1025 (emphasis added).

¹⁰² *Id.* at 1025, 1030.

¹⁰³ For an example of a noteworthy decision contrary to the *Mueller* decision, see *Charron v. Amaral*, 889 N.E.2d 946, 950 (Mass. 2008), which rejected a recovery for the loss of consortium because the couple "would have been married but for the legal prohibition."

¹⁰⁴ *Ramey v. Sutton*, 362 P.3d 217, 220-21 (Okla. 2015) (reasoning that "[t]he couple's failure to marry cannot now be used as a means to further deprive the nonbiological parent, who has acted *in loco parentis*, of a best interests of the child hearing").

¹⁰⁵ *In re Madrone*, 350 P.3d 495, 501 (Or. Ct. App. 2015).

¹⁰⁶ Nicolas, *supra* note 30, at 404; see also Tritt, *supra* note 30, at 920-21 (arguing that "same-sex marriages . . . definitely [begin] on the date of [a couple's] marriage, not on the date of the *Obergefell* decision").

Like the putative spouse doctrine, these cases contemplate that certain conduct can suggest a choice that was formally impossible to make. Relatedly, some jurisdictions have treated the choice to enter a nonmarital status as the choice to marry. As I have detailed in previous work,¹⁰⁷ several states, including Connecticut,¹⁰⁸ Delaware,¹⁰⁹ New Hampshire,¹¹⁰ and Washington,¹¹¹ have deemed people to be married based on their registration for an alternate status such as a civil union or domestic partnership rather than their compliance with the formal entrance requirements for marriage. For these states, the execution of formalities required to enter a nonmarital status approximates the choice to marry.¹¹²

These alternate statuses were not so similar to marriage that the choice to enter a civil union would be essentially the same as a choice to marry.¹¹³ And numerous courts, including Connecticut's own Supreme Court, rejected the equivalence of the statuses, distinguishing between the "transcendent historical, cultural and social significance" of marriage and the perceived inferiority of civil unions.¹¹⁴ In addition

¹⁰⁷ See Matsumura, *Right Not to Marry*, *supra* note 29, at 1511.

¹⁰⁸ CONN. GEN. STAT. § 46b-38rr (2009) (converting existing civil unions to marriages after October 1, 2010); *see also* Act Implementing the Guarantee of Equal Prot., 2009 Conn. Legis. Serv. P.A. No. 9-13 § 12(a).

¹⁰⁹ DEL. CODE ANN. tit. 13, § 218 (2013); *see also* Civil Marriage Equality and Religious Freedom Act of 2013, 79 Del. Laws ch. 19 H.B. No. 75, § 6 (2013).

¹¹⁰ N.H. REV. STAT. ANN. § 457:46 (2010).

¹¹¹ WASH. REV. CODE § 26.60.100 (2012); *see also* 2012 Wash. Legis. Serv. ch. 3 S.S.B. No. 6239 § 10 ("[A]ny state registered domestic partnership in which the parties are the same sex, and neither party is sixty-two years of age or older, that has not been dissolved or converted into a marriage by the parties by June 30, 2014, is automatically merged into a marriage and is deemed a marriage as of June 30, 2014." (emphasis added)).

¹¹² Several states that recognized civil unions prior to legalizing same-sex marriage have not converted those unions to marriages. Hawaii and Illinois have thus far retained their civil unions. *See About Civil Unions*, HAWAII DEP'T OF HEALTH, <http://health.hawaii.gov/vitalrecords/about-civil-unions> (last visited Nov. 20, 2016); *Applying for a Civil Union License*, COOK COUNTY CLERK, <http://www.cookcountyclerk.com/vitalrecords/civilunionlicenses/pages/default.aspx> (last visited Nov. 20, 2016).

¹¹³ See KATHERINE FRANKE, WEDLOCKED 143-50 (2015).

¹¹⁴ *Kerrigan v. Com'r of Pub. Health*, 957 A.2d 407, 417-18 (Conn. 2008) (citation and quotation marks omitted) ("Although marriage and civil unions do embody the same legal rights under our law, they are by no means 'equal.'"); *see also* *Perry v. Brown*, 671 F.3d 1052, 1078-79 (9th Cir. 2012) ("It is the designation of 'marriage' itself that expresses validation, by the state and the community, and that serves as a symbol, like a wedding ceremony or a wedding ring, of something profoundly important. . . . The designation of 'marriage' is the status that we recognize."), *vacated and remanded sub nom. Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013).

to the different meanings of the statuses, the legal consequences of the choice at the federal level were significantly different as well, given that federal law does not recognize civil unions for tax, immigration, and social security purposes, among others.¹¹⁵ Moreover, although the nonmarital statuses required formalities, those formalities differed from those required for marriage. In Washington, for example, couples registered their domestic partnerships by filing a notarized declaration resembling a marriage license in many respects,¹¹⁶ but partners did not have to solemnize their relationship in the presence of a religious or judicial official and two witnesses¹¹⁷ — to perform the ceremonial aspect of marriage. Thus, the states must have considered conduct short of formal requirements sufficient to constitute the choice to marry.

C. Informal Choice Problems

The examples provided in the previous Section reveal the extent to which legal formalities fail to answer when parties have crossed the marriage threshold in the eyes of the law. It is possible in some jurisdictions, however, to dispense with the formalities entirely. Common law marriage brings into focus the question whether formalities are necessary in the first place, and what role they serve.

Throughout the nineteenth century, most states recognized common law marriage.¹¹⁸ The law would treat people who lived together as a married couple whether or not they formalized their relationship *ex ante*, if they held themselves out as a married couple. Although the touchstone of common law marriage was the parties' intent to marry,¹¹⁹ this determination was made at the end of the relationship instead of at the beginning, usually when a common law husband had either died or deserted his wife.¹²⁰

¹¹⁵ See, e.g., *Geiger v. Kitzhaber*, 994 F. Supp. 2d 1128, 1136 (D. Or. 2014). This legal landscape suggests it might be easier to argue that the couple chose the benefits and obligations of marriage at the state level than to argue that they chose the benefits and obligations of marriage writ large.

¹¹⁶ There are some differences: for example, a marriage certificate requires the signatures of at least two witnesses, in contrast to the domestic partnership declaration, which required official notarization. Compare WASH. REV. CODE § 26.60.040 (2009) with *id.* § 26.04.080 (2016).

¹¹⁷ See WASH. REV. CODE § 26.04.070 (2012).

¹¹⁸ See JOANNA GROSSMAN & LAWRENCE FRIEDMAN, *INSIDE THE CASTLE* 80 (2011).

¹¹⁹ See Dubler, *supra* note 43, at 970 (“Intent to marry was central to common law marriage, a doctrine based on established principles of contract law.”).

¹²⁰ See *id.* at 968-69.

To overcome the absence of formalities at the beginning of the relationship and the denial of marriage by one of the common law spouses or third parties at the end, courts would look to evidence that the parties had intended to marry through their conduct. Acting like a married couple, holding themselves out to the public as married, and gaining community acceptance as husband and wife could evince the choice to marry.¹²¹

Most states have abolished common law marriage.¹²² As a consequence, people in marriage-like relationships have found themselves without legal protections if they did not engage in the required formalities. For example, in *Hewitt v. Hewitt*,¹²³ Victoria Hewitt lived with Robert Hewitt for fifteen years, raised the couple's three children, performed domestic functions, and helped to develop Robert's dentistry practice.¹²⁴ Early in their relationship, after Victoria became pregnant when the couple were still college undergraduates, Robert told her that they "were husband and wife and would live as such, no formal ceremony being necessary," and they immediately told their parents they were married and held themselves out as married thereafter.¹²⁵ When their relationship ended, Robert was earning a substantial income; Victoria was earning nothing.¹²⁶ Illinois had abolished common law marriage at the turn of the century¹²⁷ so Victoria asserted a claim for an equal share of property accumulated by the parties under a contract theory.¹²⁸ The court rejected those claims, saying that "the recognition of legally enforceable property and custody rights emanating from nonmarital cohabitation" would essentially reinstitute common law marriage.¹²⁹

However, a handful of common law marriage jurisdictions remain. Moreover, states that have abolished common law marriage will still recognize marriages validly contracted in common law marriage

¹²¹ See *id.* at 970-71.

¹²² See *supra* note 35 (noting the existence of a minority of jurisdictions that still recognize the doctrine).

¹²³ 394 N.E.2d 1204 (Ill. 1979).

¹²⁴ See *id.* at 1205.

¹²⁵ *Id.*

¹²⁶ See *id.*

¹²⁷ See *id.* at 1209-10.

¹²⁸ See *id.* at 1205.

¹²⁹ *Id.* at 1208. This rule was upheld in *Blumenthal v. Brewer*, No. 118781, 2016 WL 6235511, at *15 (Ill. Aug. 18, 2016) ("When considering the property rights of unmarried cohabitants, our view of *Hewitt's* holding has not changed.").

states.¹³⁰ Common law marriage disputes therefore arise with regularity.¹³¹

Same-sex couples have attempted to use the doctrine of common law marriage to recognize relationships based on conduct predating the legalization of same-sex marriage.¹³² In *Coon v. Tuerk*, two men disputed the existence of a common law marriage that allegedly began in 1999.¹³³ The couple started dating in 1994, and began to cohabit sometime prior to May 1999, when Tuerk pulled two rings out of a blue box and asked Coon to marry him.¹³⁴ Coon said “yes” and they both put their rings on.¹³⁵ Years later, in 2013 when the parties were contesting the existence of their marriage, Tuerk claimed that he could no longer remember the words that they exchanged that day, and testified that he was always opposed to marriage.¹³⁶ But the couple often wore their rings after 1999, and were even featured in a 2002 book on the American family written by Al and Tipper Gore in which they claimed to have “each married the guy around the corner.”¹³⁷ Despite the fact that the couple never registered as domestic partners, obtained a marriage license, or had a formal marriage ceremony, the court found the existence of an express mutual agreement to marry.¹³⁸

¹³⁰ See, e.g., *Mott v. Duncan Petroleum Trans.*, 414 N.E.2d 657, 658 (N.Y. 1980) (“[A] common-law marriage contracted in a sister State will be recognized as valid here if it is valid where contracted.”).

¹³¹ The doctrine has been the basis for disputes between numerous opposite-sex couples. See, e.g., *Cerovic v. Stojkov*, 134 A.3d 766, 776 (D.C. 2016) (“[T]he proponent of a common law marriage that precedes a ceremonial marriage must show . . . cohabitation, as husband and wife, following an express mutual agreement . . . in words of the present tense.”); *Callen v. Callen*, 620 S.E.2d 59, 63 (S.C. 2005) (“A lack of intent to be married overrides the presumption of marriage that arises from cohabitation and reputation.”); *Clark v. Clark*, 27 P.3d 538, 542 (Utah 2001) (affirming that the plaintiff satisfied the contested parts of the statutory element to find unsolemnized marriage be legal and valid by showing that the couple held themselves out as a husband and a wife and cohabited).

¹³² See *Coon v. Tuerk*, No. 2012 DRB 002984 (D.C. Super. Ct. Jan. 23, 2014) (Findings of Fact and Conclusions of Law Regarding Common Law Marriage); Lauren McGaughy, *In a First, Texas Court Recognizes Same-Sex Common-Law Marriage*, HOUSTON CHRON. (Sept. 16, 2015), <http://www.houstonchronicle.com/news/politics/texas/article/In-a-first-Texas-court-recognizes-same-sex-6509918.php> (reporting on the settlement between a Texas woman and the family of her deceased same-sex partner, in which the Texas Court recognized the couple’s common law marriage).

¹³³ *Coon*, No. 2012 DRB 002984, at 3.

¹³⁴ *Id.* at 2-3.

¹³⁵ *Id.* at 3.

¹³⁶ *Id.*

¹³⁷ *Id.* at 4 (quotation marks omitted).

¹³⁸ See *id.* at 8-12.

Additionally, states have used common law marriage to conscript people into marriage.¹³⁹ For instance, the federal government has adopted an informal definition of marital choice to determine eligibility for Supplemental Security Income (“SSI”) benefits. Federal regulations “will consider someone to be your spouse (and therefore consider you to be married) for SSI purposes if . . . [y]ou and an unrelated person of the opposite sex are living together in the same household . . . and you both lead people to believe that you are husband and wife.”¹⁴⁰ This presumption runs in favor of finding marriage based on opposite-sex cohabitation unless answers to questions like “What names are the two of you known by?”, “Do you introduce yourselves as husband and wife?”, “Who owns or rents the place where you live?”, and “Do any deeds, leases, time payment papers, tax papers, or any other papers show you as husband and wife?”, show that the cohabitants do not hold themselves out as spouses.¹⁴¹ Applying these regulations in *Dutko v. Colvin*, a judge declared the existence of a marriage between two cohabitants, Robin Dutko and Dan Belcher, a couple who thought of themselves as boyfriend and girlfriend, but who were both on the deed and mortgage to the house they shared and received health insurance through Belcher’s employer.¹⁴²

In *State v. Green*,¹⁴³ the State of Utah prosecuted an avowed polygamist, Thomas Green, under the state bigamy statute.¹⁴⁴ Although Green had participated in both formal and informal marriage ceremonies with his multiple wives, he was careful to divorce one before legally marrying another.¹⁴⁵ At the time the state brought its charges, Green was not legally married to any of the five women with whom he was living and raising children.¹⁴⁶ In order to sustain the bigamy charge, the prosecutors needed to establish an anchor marriage, so they sought a court order deeming Green married to one of his cohabitants, Linda Kunz, under the state common law marriage

¹³⁹ Cf. Aloni, *Deprivative Recognition*, *supra* note 42, at 1313-32 (identifying ways in which governments recognize various forms of intimate and non-intimate relationships in order to deny access to valuable financial benefits).

¹⁴⁰ 20 C.F.R. § 416.1806(a) (2017).

¹⁴¹ 20 C.F.R. § 416.1826(c) (2017).

¹⁴² See *Dutko v. Colvin*, No. 15-CV-10698, 2015 U.S. Dist. LEXIS 150194, at *2-3 (E.D. Mich. Nov. 5, 2015).

¹⁴³ *State v. Green*, 99 P.3d 820 (Utah 2004).

¹⁴⁴ See *id.* at 823.

¹⁴⁵ *Id.* at 822 & n.4.

¹⁴⁶ See *id.*

statute.¹⁴⁷ The court issued an order finding that Green and Kunz were married despite their arguments that they did not consider themselves legally married, and Green was ultimately convicted on several counts of bigamy.¹⁴⁸

Perhaps even more so than within the context of formal choice, these cases raise the possibility that one spouse may be able to establish the existence of a marriage over the objections of the other spouse, or that the state may conclude that the spouses are married or not irrespective of their subjective desires. They also highlight the extent to which one's understanding of one's own relationship might be nuanced, imperfect, or malleable.

The examples in this Part demonstrate that uncertainty about marital choice arise in a wide range of contexts. When viewed in combination, these cases raise questions about the nature of the choice to marry — whether personal or public, formal or informal — that resist easy answers. What might appear to be the optimal approach in one context could cause unsatisfying results in another. Resolving these questions therefore calls for a systematic approach, which the remainder of this Article will develop.

II. CHOICE FUNCTIONS

The lack of consensus about the requisites of marital choice is particularly troubling given the high legal stakes of being deemed married or unmarried.¹⁴⁹ Recognizing whether a person has chosen to marry is central to the question whether the person can legitimately claim that the state wronged him or her in its determination of his or her marital status. This Part lays the groundwork for defining the choice to marry by identifying the various functions that the choice to

¹⁴⁷ See *id.* at 823. The statute, Utah Code section 30-1-4.5, authorizes courts to issue an order deeming a man and woman married if they

(a) are of legal age and capable of giving consent; (b) are legally capable of entering a solemnized marriage under the provisions of this chapter; (c) have cohabited; (d) mutually assume marital rights, duties, and obligations; and (e) . . . hold themselves out as . . . husband and wife.

UTAH CODE ANN. § 30-1-4.5 (2017).

¹⁴⁸ *Green*, 99 P.3d at 823, 834.

¹⁴⁹ See June Carbone & Naomi Cahn, *Nonmarriage*, 76 MD. L. REV. 55, 68-69 (2016) (noting that cohabitation alone generally does not result in the imposition of financial obligations).

marry is said to perform. These functions can serve the interests of the individuals in the relationship on the one hand, or the state and third parties on the other, although these interests can overlap.

A. *Enabling Self-Authorship*

The choice to marry enables self-authorship.¹⁵⁰ Comparing the choice to marry to “choices concerning contraception, family relationships, procreation, and childrearing,” which are “among the most intimate that an individual can make,”¹⁵¹ the Supreme Court has said that the decision “shape[s] an individual’s destiny.”¹⁵² Its status as a “momentous act[] of self-definition”¹⁵³ is enhanced by its association with “other freedoms, such as expression, intimacy, and spirituality.”¹⁵⁴ One can question whether “intimate” choices are necessarily more central to a person’s identity than any number of other choices that can have significant legal and social consequences.¹⁵⁵ And expression, intimacy, and spirituality do not require marriage.¹⁵⁶ Nevertheless, marriage is significant, and thus the choice to marry is significant as well.

Choice is most obviously an exercise of autonomy in that it moves a person from one state (unmarried) to another (married) in accordance with that person’s goals.¹⁵⁷ The basic doctrinal requirements of capacity and consent attempt to ensure that the external manifestations of choice will be consistent with a person’s interests and desires: for example, marriages entered into under threat of force, by someone of unsound

¹⁵⁰ As I have summarized in detail in other work, psychologists, sociologists, and philosophers have compared the development of personal identity to the narrative process. See Kaiponanea T. Matsumura, *Binding Future Selves*, 75 LA. L. REV. 71, 103-07 (2014) (discussing how people’s sense of self is developed through a process of making decisions). At a high level, at least, the metaphor enjoys widespread acceptance. See *id.*

¹⁵¹ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015).

¹⁵² *Id.*

¹⁵³ *Id.* (citing *Goodridge v. Dep’t of Public Health*, 798 N.E.2d 941, 955 (2003)).

¹⁵⁴ *Id.*

¹⁵⁵ See Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 755 (1989) (criticizing the assumption that “matters of sexuality go straight to the heart of personal identity”).

¹⁵⁶ See, e.g., *Obergefell*, 135 S. Ct. at 2620 (Roberts, C.J., dissenting) (“Same-sex couples remain free to live together, to engage in intimate conduct, and to raise their families as they see fit [without marriage.]”).

¹⁵⁷ The *Obergefell* majority contemplates that people will act in accordance with a set of beliefs central to their “personal identity” or “destiny.” See *id.* at 2597, 2599.

mind, or, most dramatically, without a person's awareness or comprehension, have been declared voidable or void.¹⁵⁸

Importantly, the act of choice is embedded in a socio-legal context. The recent debate over same-sex marriage has raised the question whether the state must recognize the choice of a same-sex couple in order to vindicate that couple's right to autonomy.¹⁵⁹ The dissenting justices noted that none of the restrictions at issue in *Obergefell* interfered with the "right to be let alone."¹⁶⁰ Justice Thomas further observed that same-sex couples remained free to make vows in public or religious ceremonies — to call themselves married.¹⁶¹ But the Court held that legal recognition is a crucial component of the broader external recognition that autonomy requires.¹⁶² Allowing couples to call themselves married without actually invoking the legal consequences of marriage is not enough.¹⁶³ Studies confirm that

¹⁵⁸ See, e.g., *Husted v. Husted*, 35 Cal. Rptr. 698, 701-02 (Ct. App. 1963) (explaining the various reasons for which a marriage may be declared voidable).

¹⁵⁹ See *Obergefell*, 135 S. Ct. at 2593 ("The petitioners in these cases seek to [define and express their identity] by marrying someone of the same sex and having their marriages deemed lawful on the same terms and conditions as marriages between persons of the opposite sex.").

¹⁶⁰ *Id.* at 2620 (Roberts, C.J., dissenting) (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453-54, n.10 (1972)).

¹⁶¹ See *id.* at 2635 (Thomas, J., dissenting).

¹⁶² See *id.* at 2602 (majority opinion) (noting that it would "disparage [same-sex couples'] choices and diminish their personhood to deny them [the right to marry]" (emphasis added)). Crucially, this theory of autonomy was rejected by Justices Thomas and Scalia, who view liberty as "individual freedom from government action," and argued that "receiving governmental recognition and benefits has nothing to do with any understanding of 'liberty' that the Framers would have recognized." *Id.* at 2634, 2636 (Thomas, J., dissenting). This particular disagreement between Justice Kennedy and the dissenters is the subject of a detailed and thoughtful analysis by Professor Susan Frelich Appleton, in *Obergefell's Liberties: All in the Family*, 77 OHIO ST. L.J. 919, 923-30 (2016). The related question whether marriage is merely a private union between a couple or involves a compact with the community that requires public recognition is a matter of longstanding debate. See June Carbone, *The Futility of Coherence: The ALI's Principles of the Law*, 4 J.L. & FAM. STUD. 43, 57-58 (2002) (noting the tension between the Kantian view of marriage as contract and the Hegelian view that marriage transcended a mere agreement between the spouses and became a compact involving community recognition and support). And disagreement between the Justices could reflect a broader disagreement about the nature of marriage itself, although the Justices only hinted about their views on that ultimate question. *Obergefell*, 135 S. Ct. 2584.

¹⁶³ See Matsumura, *Right Not to Marry*, *supra* note 29, at 1540-41. Several other scholars have analyzed the role of social meaning in constructing identity. See, e.g., Clare Huntington, *Obergefell's Conservatism: Reifying Familial Fronts*, 84 FORDHAM L. REV. 23, 25 (2015) [hereinafter *Obergefell's Conservatism*] (recognizing that "[t]he debate over marriage equality was fundamentally about controlling the meaning —

couples expect marriage to convey social and legal legitimacy that also leads to personal validation.¹⁶⁴

This concept of self-authorship is complicated by the fact that the choice to marry must be reciprocated. Just as “[y]our right to swing your arms ends just where the other man’s nose begins,”¹⁶⁵ the decision to marry cannot be exercised unilaterally. Courts have glossed over this aspect of choice because marriage access cases involve claims brought by couples whose preexisting choices have been denied legal recognition by the state. However, we must remember that the choice to marry intermediates between two individuals with distinct and equal autonomy interests. Those autonomy interests include what Gregg Strauss has called “a privilege to exercise the power to marry or not.”¹⁶⁶ Somewhat paradoxically, to exercise the power to marry is to submit to legal duties that constrain as well as confer individual freedoms¹⁶⁷: the exercise of autonomy requires the sacrifice of autonomy.¹⁶⁸ To be effective, the choice to marry therefore must hail the potential spouse and must coordinate the exchange of legal duties. The choice to marry allows two individuals to engage in self-authorship that ultimately allows each to call herself married.

B. Notifying Spouses

The function of self-authorship has received ample recognition and support, but the choice to marry does not only reflect a preexisting

the social front — of marriage”); Nelson Tebbe & Deborah A. Widiss, *Equal Access and the Right to Marry*, 158 U. PA. L. REV. 1375, 1422 (2010) (“[W]hen the government denies access to civil marriage, it not only interferes with the ability of individuals to engage in conduct, but also with their ability to construct a personal and familial identity.”).

¹⁶⁴ See Kim, *supra* note 27, at 994-97. Kim is careful to note that entering a new legal status can also pose challenges to one’s self-image, especially for individuals who might be uncomfortable with certain aspects of marriage. See *id.* at 998-99.

¹⁶⁵ *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2791 (2014) (Ginsburg, J., dissenting) (quoting Zechariah Chafee, Jr., *Freedom of Speech in War Time*, 32 HARV. L. REV. 932, 957 (1919)).

¹⁶⁶ Gregg Strauss, *The Positive Right to Marry*, 102 VA. L. REV. 1691, 1730 (2016).

¹⁶⁷ See, e.g., *id.* at 1726 (noting, for example, that states that recognize adultery as a fault-based ground for divorce effectively impose a duty on spouses not to engage in sexual relations outside of marriage).

¹⁶⁸ This paradox is not unique to marriage. Contract law, for example, simultaneously narrows private freedom and expands it by allowing parties to secure the commitments of others. Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204, 214 (1982).

subjective desire to be married. It also creates and reinforces one's understanding that one is married and transmits information about what that choice entails.

As Janet Halley has observed, "the existence of most marriages is never adjudicated."¹⁶⁹ In practice, this means that some people will believe in the validity of their deficient marriages, or walk away from relationships that may have actually vested them with marital remedies. This, plus the variability of marriage's effects — whether a spouse will be subject to the thousands of legal rights and obligations that vary over time and across jurisdictions — leads Halley to argue that marriages also "flicker."¹⁷⁰ Their substance is not as fixed and integrated as one might assume.¹⁷¹

Knowledge of one's own marriage could flicker as well. To understand this point, consider how nonmarital relationships overlap with marriage. Two people can live together, engage in sexual conduct, buy property together, share income and other assets, divide living responsibilities, conceive and raise children, share deep emotional connections, plan to continue the relationship indefinitely, and more, all without formalizing their relationship.¹⁷² Conversely, married couples can and often do fight, deceive each other, have sex outside the relationship, live apart, and lack strong emotional connections.¹⁷³ Some of these behaviors are strongly associated with marriage or nonmarriage but all can be performed by the married and unmarried alike.

If, as Clare Huntington has argued, familial categories are constituted through performances that take on social meanings,¹⁷⁴

¹⁶⁹ Halley, *Behind the Law of Marriage*, *supra* note 34, at 26.

¹⁷⁰ *Id.* at 52-53.

¹⁷¹ One of the many examples that Halley cites is joint filing of state income tax. *See id.* at 51. The question of marriage for this purpose could be adjudicated in actions involving the "[state] Board of Assessors, federal IRS; criminal prosecution for tax fraud by state or federal prosecutors; private entities to which individuals disclose their income tax returns," etc. *Id.* These uncertainties lead to Halley's choice of description.

¹⁷² Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1254 (1998) [hereinafter *Relational Contract*]; *see also* Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 588-89 (2013) (noting that the same ambiguities make it difficult for courts to discern whether nonmarital couples entered unwritten contractual arrangements).

¹⁷³ *See, e.g.*, Tara Parker-Pope, *Love, Sex and the Changing Landscape of Infidelity*, N.Y. TIMES, Oct. 27, 2008, at D1 (citing survey data showing that, in any given year, about ten percent of married people report having sex outside of marriage).

¹⁷⁴ *See* Clare Huntington, *Staging the Family*, 88 N.Y.U. L. REV. 589, 591 (2013) [hereinafter *Staging the Family*]. Huntington builds primarily on the work of

how can we tell whether people engaging in this full range of acts are performing marriage or nonmarriage? It seems possible that people might feel married when they are sharing a tender moment and feel unmarried when they are having sex with someone other than their partner, regardless of their legal status. And it is also possible that these contradictory impulses will unfold and point in different directions over the course of the relationship.

A key function of the choice to marry is to *communicate knowledge of the marriage* to the spouses, and to remind people that they are married. Building on Huntington's dramaturgical analogy, the choice to marry is a proscenium, transforming identical conduct into the acts of married or unmarried people, as the case may be.¹⁷⁵ The choice to marry is to the couple what the wedding ring is to observers: something that conveys knowledge of marital status. Accompanying this knowledge is awareness that the spouses are entitled to the rights and responsibilities of marriage, as imperfect as their understanding of those rights might be.¹⁷⁶

Relatedly, choice can perform an educational function, conveying information about marriage's substance. States impose duties of support on spouses,¹⁷⁷ but the statutes do not spell out the terms of those duties in all their particulars: for the most part, the commitments are left open-ended.¹⁷⁸ If spousal duties were truly open-

sociologist Erving Goffman and queer theorist Judith Butler to support her contention that people control the impressions they convey to others through performance, and that those performances create legible social categories. *Id.* at 591-92.

¹⁷⁵ Andrew Parker and Eve Kosofsky Sedgwick have used this image, "marriage itself as theater — marriage as a kind of fourth wall or invisible proscenium arch that moves through the world," in *Introduction*, in *PERFORMATIVITY AND PERFORMANCE* 1, 11 (Andrew Parker & Eve Kosofsky Sedgwick eds., 1995). However, they envisioned the marriage play being "for the eyes of others." *Id.* I contemplate the proscenium arch transforming the significance of one's acts *for oneself and one's spouse*.

¹⁷⁶ In contrast, unmarried couples often lack shared understandings about the nature of their relationship and the obligations they might wish to assume. See Carbone & Cahn, *supra* note 149, at 95-96.

¹⁷⁷ See, e.g., CAL. FAM. CODE § 720 (2017) ("Spouses contract toward each other obligations of mutual respect, fidelity, and support.").

¹⁷⁸ See Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758, 1773-74 (2005) (contending that the open-ended duties create a zone of freedom for married couples); Strauss, *supra* note 166, at 1741. Numerous influential scholars have argued that the law's hesitancy to intervene in ongoing marriages is neither benign nor unconscious. See, e.g., Janet Halley, *What Is Family Law?: A Genealogy Part II*, 23 YALE J.L. & HUMAN. 189, 265-67 (2011) (summarizing the history of this critique); Jill Elaine Hasday, *Intimacy and Economic Exchange*, 119 HARV. L. REV. 491, 499-501 (2005) (discussing how the law denies the enforcement of economic agreements between husbands and wives); Reva B. Siegel, *The Modernization of Marital Status Law:*

ended, however, marriage could neither give “character to our whole civil polity,”¹⁷⁹ nor serve as the “keystone of our social order.”¹⁸⁰ On some level, people must share a basic understanding of marital duties for the necessary informal enforcement of marital obligations — either through self- or community-policing — to occur.¹⁸¹ Through its screening of eligible adult relationships and its sorting of those relationships into marriage and nonmarriage, the choice to marry helps to create these norms.¹⁸²

Moreover, although most people who choose to marry do not do so primarily based on legal rules,¹⁸³ the choice to marry still provides partners a minimum quantum of information about their rights and obligations. Spouses are aware that marriage is defined by commitment¹⁸⁴ and the expectation of permanency.¹⁸⁵ Related to that expectation, they also know that the choice to marry will impose

Adjudicating Wives' Rights to Earnings, 1860–1930, 82 GEO. L.J. 2127, 2181-206 (1994) (charting the development of doctrines rendering agreements between husband and wife unenforceable).

¹⁷⁹ *Maynard v. Hill*, 125 U.S. 190, 213 (1888).

¹⁸⁰ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2601 (2015).

¹⁸¹ See Eric A. Posner, *Family Law and Social Norms*, in *THE FALL AND RISE OF FREEDOM OF CONTRACT* 256, 270-71 (F.H. Buckley ed. 1999) (noting the role of community enforcement of marital duties). Sociologists believe that social institutions, such as the family, provide norms that shape people's behavior and even define their objective reality. See Andrew Cherlin, *Remarriage as an Incomplete Institution*, 84 AM. J. SOC. 634, 634-35 (1978). My point here is that choice, as the entry point to the institution of marriage, plays an important role in the process of institutionalization.

¹⁸² Cf. Albertina Antognini, *Family Unity Revisited: Divorce, Separation, and Death in Immigration Law*, 66 S.C. L. REV. 1, 9 (2014) (arguing that moments of rupture within family relationships are central to defining those relationships); Courtney Megan Cahill, *Regulating at the Margins: Non-Traditional Kinship and the Legal Regulation of Intimate and Family Life*, 54 ARIZ. L. REV. 43, 54-60 (2012) (observing how the same-sex marriage movement provided courts the opportunity to define “proper” marital relationships); Kaiponanea T. Matsumura, *Public Policing of Intimate Agreements*, 25 YALE J.L. & FEMINISM 159, 190 (2013) (demonstrating how courts use the public policy doctrine in contract law to shape social norms even in areas where the law is formally agnostic).

¹⁸³ Baker, *Promulgating the Marriage Contract*, *supra* note 7, at 229; Ira Mark Ellman & Sanford L. Braver, *Should Marriage Matter?*, in *MARRIAGE AT THE CROSSROADS* 170, 171 (Marsha Garrison & Elizabeth S. Scott eds., 2012); see also *Obergefell*, 135 S. Ct. at 2607 (noting that the decision to marry is based on many different factors, making it extremely unlikely that heterosexual couples would no longer choose to marry because same-sex couples could).

¹⁸⁴ See *Obergefell*, 135 S. Ct. at 2600.

¹⁸⁵ See, e.g., *id.* at 2600, 2608 (describing marriage as providing the “assurance that while both still live there will be someone to care for the other,” and describing marriage as embodying “a love that may endure even past death”).

consequences for exiting the relationship: people know that married couples must divorce, even if they do not know exactly what the process entails. Therefore, they understand, at a minimum, that marriage entails obligations to their spouse, and that those obligations will be enforced at the end of the relationship.¹⁸⁶

Finally, choice can serve a cautionary function, ensuring that people “take care in making claims so they do not later reverse, resist, or regret their decisions.”¹⁸⁷ The thousands of legal rights and duties that come with marriage give the choice to marry inordinate weight. Choice, especially formal choice, can highlight the seriousness of the decision to become married. The basic requirements of formal marriage in most states — obtaining and recording a marriage license, often satisfying a waiting period, and participating in an official ceremony — all serve this cautionary function.¹⁸⁸

Going hand-in-hand with the function of self-authorship, the choice to marry functions to notify a couple that they are married. Choice is a tool to manipulate the substance of that notice, sharpening one’s knowledge about the legal consequences of the decision, or requiring more certainty about those consequences before allowing them to come about.

C. Encouraging Relationship-Specific Investment

The choice to marry is an exercise in self-definition not only because it allows a person to make a decision with significant personal consequences, but also because it allows two people with distinct autonomy interests to enlist each other in their respective self-narratives. This feature of choice does not merely promote individual autonomy. It also encourages the couple to make beneficial relationship-specific investments.

¹⁸⁶ See Carbone & Cahn, *supra* note 149, at 93-94 (“Marriage is an *institution* that reinforces shared expectations about what it means to marry, even if the spouses do not know each of the 1,000-plus state-provided benefits accorded to marriage or all of the laws on dissolution and death.”); Strauss, *supra* note 166, at 1749-50 (assuming that the choice to marry implies awareness of entering into a relationship carrying imperfect legal obligations).

¹⁸⁷ Clarke, *supra* note 43, at 772.

¹⁸⁸ See *supra* notes 51-52 and accompanying text (describing the basic formalities in most states). As Jessica Clarke notes, these formalities theoretically protect against “unwitting” marriages. Clarke, *supra* note 43, at 786. Whether these requirements actually prevent later regret, or diminish resistance to the legal consequences of marriage, is an open question. One might also question whether lack of information about the legal obligations of marriage renders a former choice somewhat less than fully knowing or intentional.

Economics-influenced scholars have argued that “[a]n intimate relationship that involves a sharing of financial, emotional, and intellectual resources requires joint efforts extending over time.”¹⁸⁹ They note that these joint efforts are enhanced if both parties have more confidence in the other’s commitment; or, conversely, that these investments in the relationship will not be made if there is a possibility that the other party will shirk or behave opportunistically.¹⁹⁰ Much like a contract, by imposing a penalty for breaching one’s commitment, marriage provides the necessary constraint that allows the partners to better achieve their goals.¹⁹¹

Whether the choice to marry actually achieves these ends is subject to debate. As discussed previously, it is highly unlikely that people choosing to marry understand the substance of the legal sanctions that they might face if their relationship ends.¹⁹² Most will not know whether their relationship will be governed by fault-based or no-fault divorce, whether they will encounter waiting periods, or how a court will decide property division and support issues.¹⁹³ Likewise, it is unclear whether people believe that adultery is a crime or whether it can affect one’s entitlement to spousal support: a significant number of spouses commit adultery regardless.¹⁹⁴ These facts make it difficult to conclude that legal constraints encourage marriage or promote its durability.¹⁹⁵

¹⁸⁹ Scott & Scott, *Relational Contract*, *supra* note 172, at 1255; *see also* Posner, *supra* note 181, at 256; Michael J. Trebilcock, *Marriage as a Signal*, in *THE FALL AND RISE OF FREEDOM OF CONTRACT*, *supra* note 181, at 245, 249.

¹⁹⁰ *See* Posner, *supra* note 181, at 269; Scott & Scott, *Relational Contract*, *supra* note 172, at 1256.

¹⁹¹ *See* Posner, *supra* note 181, at 262; Scott & Scott, *Relational Contract*, *supra* note 172, at 1255-56. These assurances might be especially important in a relationship involving specialization, where one party provides uncompensated domestic labor (cleaning, childcare, etc.) while the other participates in the market. *See, e.g.*, Trebilcock, *supra* note 189, at 249 (explaining that marriage requires committing to specialization or relationship specific investments, which is unlikely in the absence of an assurance that a spouse will see a return on their investment). The uncompensated partner would clearly be in a vulnerable position without an expectation that he would be compensated for his lost prospective return. *See id.*

¹⁹² *See supra* note 183 and accompanying text.

¹⁹³ *See* Baker, *Promulgating the Marriage Contract*, *supra* note 7, at 234-37 (expressing skepticism about the public’s level of knowledge about the laws governing marriage).

¹⁹⁴ *See* Michael Castleman, *Marital Infidelity: How Common Is It?*, *PSYCHOL. TODAY: ALL ABOUT SEX* (Oct. 15, 2009), <https://www.psychologytoday.com/blog/all-about-sex/200910/marital-infidelity-how-common-is-it> (citing a study showing that approximately ten percent of spouses admit cheating annually).

¹⁹⁵ Andrew Cherlin has observed that the loosening of restrictions on divorce,

Yet it is still possible for the choice to marry to signal constraint, and therefore to encourage investment in the relationship. If the social meaning of marriage is a relationship defined by commitment, then the choice to marry will signal that commitment.¹⁹⁶ People who choose to marry, for whatever reason, may respond to the choice by making investments that they otherwise would not have made.¹⁹⁷

D. Indicating Consent

The choice to marry also embodies consent to the legal consequences of marriage. Historically, these consequences were particularly momentous. Women who married lost control of their property, personality, and services, and in the process lost the rights to contract or sue.¹⁹⁸ Men, for their part, assumed (comparatively minimal) obligations to provide necessities for their wives and answer for their wrongdoing.¹⁹⁹ Marriage involved significant infringements on highly personal rights, such as the woman's right to refuse the sexual advances of her husband, or the ability of the spouses to exit the relationship.²⁰⁰ Given these consequences, courts long required the couple's consent to make marriage valid, and tailored legal

combined with the growing acceptance of nonmarital cohabitation, has made the constraint rationale less persuasive. Andrew J. Cherlin, *The Deinstitutionalization of American Marriage*, 66 J. MARRIAGE & FAM. 848, 854-55 (2004).

¹⁹⁶ See Scott & Scott, *Relational Contract*, *supra* note 172, at 1255; Trebilcock, *supra* note 189, at 250. I realize there is some dispute about whether there is a widely held meaning of marriage, and what the contours of that meaning might be. Opponents of same-sex marriage, for example, have argued that marriage is characterized by opposite-sex complementarity, monogamy, exclusivity, and permanence. See, e.g., SHERIF GIRGIS ET AL., *WHAT IS MARRIAGE?: MAN AND WOMAN: A DEFENSE* (2012) (explaining how allowing same-sex marriage would contribute to the degradation of what they see as the core characteristics of marriage). In the years leading up to *Obergefell*, it became clear that a majority of the country did not view the opposite-sex requirement as central to the meaning of marriage. See *Changing Attitudes on Gay Marriage*, PEW RES. CTR. (May 12, 2016), <http://www.pewforum.org/2016/05/12/changing-attitudes-on-gay-marriage/> (noting that in 2015, 55% of Americans supported same-sex marriage and 39% opposed).

¹⁹⁷ I am not arguing that people would be less likely to make these investments in the absence of marriage. People frequently change jobs, move across the country, or have children in relationships that have almost no chance of being recognized as a marriage.

¹⁹⁸ E.g., Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073, 1082 (1994).

¹⁹⁹ 1 WILLIAM BLACKSTONE, *COMMENTARIES* *442-45.

²⁰⁰ See Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1388, 1392 (2000) [hereinafter *Contest and Consent*] (noting the role of marital choice in limiting the right to divorce and justifying marital rape).

requirements to reduce the opportunity of third parties to influence the couple's consent.²⁰¹ Consent provided the moral and legal legitimation for acts by spouse and state that would not be legitimate otherwise.²⁰²

Arguably, changes to the institution of marriage have made the consequences of the choice to marry less extreme, and the role of consent less vital. As Justice Kennedy observed in *Obergefell*, marriage has become more egalitarian, and overtly sexist laws have largely been struck down or reformed.²⁰³ All states have adopted some form of no-fault divorce, allowing spouses to end the relationship based on their personal views.²⁰⁴ They also allow the parties to alter default property arrangements through private agreement.²⁰⁵

Yet the consequences of marrying are still significant, and still require consent in two respects. First, marriage imposes legal duties that run between the spouses. For instance, a determination that a couple is married transforms one's relationship to property.²⁰⁶ On the most basic level, every dollar earned is presumed to be marital property instead of separate property.²⁰⁷ The financial consequences of marrying may outlast the marriage, with one spouse owing the other alimony for either a fixed or indefinite term.²⁰⁸ Without consent, the act by the state of redistributing property from one person to another would be problematic. That is because a state's power to deprive a

²⁰¹ See J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 479-80 (4th ed. 2002) (noting that English ecclesiastical courts allowed a couple to enter marriage solely by exchanging consent in words of the present tense). Roman marriage, too, was premised on the concept of consent. See SUSAN TREGGIARI, ROMAN MARRIAGE: *IUSTI CONIUGES* FROM THE TIME OF CICERO TO THE TIME OF ULPIAN 54 (1991) ("[T]he other necessary condition for marriage was that each intended to be married to the other.").

²⁰² See ALAN WERTHEIMER, CONSENT TO SEXUAL RELATIONS 119-20 (2003) (defining consent).

²⁰³ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2595-96 (2015); see also Hasday, *Contest and Consent*, *supra* note 200, at 1502-03 (noting that marital rape exceptions, child custody, and alimony laws are predominantly gender-neutral).

²⁰⁴ See ABRAMS ET AL., *supra* note 8, at 531.

²⁰⁵ See *id.* at 1054-55.

²⁰⁶ See, e.g., *Davis v. Davis*, 643 So. 2d 931, 932-33 (Miss. 1994) (involving a dispute whether to characterize over \$7,000,000 of property as joint or separate).

²⁰⁷ See, e.g., CAL. FAM. CODE § 760 (2016) ("Except as otherwise provided by statute, all property, real or personal, wherever situated, acquired by a married person during the marriage while domiciled in this state is community property.").

²⁰⁸ See Jana B. Singer, *Alimony and Efficiency: The Gendered Costs and Benefits of the Economic Justification for Alimony*, 82 GEO. L.J. 2423, 2425-26 (1994) (identifying the various justifications for the imposition of alimony awards and the trend away from indefinite awards of support).

person of her lawful property, real or otherwise, is subject to limits.²⁰⁹ Moreover, spouses owe each other non-delegable duties of caregiving and support, even though personal services contracts typically cannot be specifically enforced.²¹⁰ The choice to marry effectively functions as a waiver of individual objections to this type of state action.

Second, the choice to marry represents consent to the state's categorization of a person as married or single, and to the application of laws that categorize on the basis of that status. Marriage still offers a distinct set of legal rights that non-spouses have no power to recreate,²¹¹ and spouses at times lack the power to alter.²¹² Some of these rules tend to benefit married individuals. Unmarried individuals, for example, have no standing to sue for wrongful death of their partners²¹³ or to inherit property in the absence of a will.²¹⁴ On the other hand, some rules impose disadvantages, such as the denial of means-tested benefits²¹⁵ or higher taxes.²¹⁶ Marriage also changes one's legal relationship to one's children: most states, for example, have some form of a marital presumption that gives a husband parental and custodial rights for any child born to his wife.²¹⁷ Unmarried fathers, in contrast, must take steps to establish their paternity and custody,

²⁰⁹ See generally U.S. CONST., amend. V (“[N]or shall private property be taken for public use, without just compensation.”); *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164, 167 (1998) (noting that money in a trust account is private property within the meaning of the Takings Clause, and that “a State, by *ipse dixit*, may not transform private property into public property without compensation” (quoting *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980))).

²¹⁰ For an example of non-delegable duties of support, see *Borelli v. Brusseau*, 12 Cal. App. 4th 647 (Cal. Ct. App. 1993). In *Borelli*, the court held that a wife was personally obligated to provide nursing-type care to her incapacitated husband. See *id.* at 654. This runs against the general rule against the specific enforcement of personal services contracts. See RESTATEMENT (SECOND) OF CONTRACTS § 367(1) (AM. LAW INST. 1981) (“A promise to render personal service will not be specifically enforced.”).

²¹¹ See Kerry Abrams, *Citizen Spouse*, 101 CALIF. L. REV. 407, 431-32 (2013) (describing the many rights included in the status of marriage that confer valuable social citizenship).

²¹² See, e.g., Matsumura, *Public Policing*, *supra* note 182, at 177-78 (identifying the limits that courts place on the freedom of spouses to contract around spousal duties).

²¹³ See *Holguin v. Flores*, 122 Cal. App. 4th 428, 438 (Ct. App. 2004).

²¹⁴ See Cynthia Grant Bowman, *The New Illegitimacy: Children of Cohabiting Couples and Stepchildren*, 20 AM. U. J. GENDER SOC. POL’Y & L. 437, 441 (2012).

²¹⁵ See *supra* notes 139-42 and accompanying text.

²¹⁶ See Matsumura, *Right Not to Marry*, *supra* note 29, at 1515 (describing what is colloquially referred to as the “marriage penalty”).

²¹⁷ See Clare Huntington, *Postmarital Family Law: A Legal Structure for Nonmarital Families*, 67 STAN. L. REV. 167, 178 (2015); see also Carbone & Cahn, *supra* note 149, at 86-91.

which can work to their benefit or detriment, or the benefit or detriment of their partners, depending on their respective desires.²¹⁸

E. Facilitating Administration

The choice to marry alerts the state, which uses marital status to determine the legal treatment of its citizens, and third parties, who may depend on choice to provide certainty regarding the consequences of the relationships they create with the couple. A tremendous number of rights turn on marital status.²¹⁹

Some rights are only triggered when spouses ask for them. So, for example, marital status will become an issue in the immigration context if a person wishes to sponsor the visa application of her spouse.²²⁰ Likewise, spouses must apply for Social Security retirement or survivors benefits based on their marriage.²²¹ Relatedly, disputes about the validity of a marriage are frequently brought to the attention of courts, either by partners at the end of the relationship, or by third parties who stand to benefit if the marriage is found to be invalid.²²² In these situations, the state must determine the existence of a valid marriage in order to determine to whom valuable rights will flow.²²³ Courts inevitably analyze the circumstances under which the parties chose to marry to answer this question, often looking for a marriage license as proof that this choice has occurred.²²⁴ When the parties

²¹⁸ See Carbone & Cahn, *supra* note 149, at 114-15 (noting that unmarried parents have the freedom to negotiate informal parenting relationships because they operate outside the law).

²¹⁹ See *United States v. Windsor*, 133 S. Ct. 2675, 2690 (2013) (noting the existence of over 1,000 federal statutes and regulations that turn on marital status).

²²⁰ See *Abrams*, *supra* note 41, at 31-32 (describing the process by which spouses may petition the government for permanent residency).

²²¹ See *Retirement Planner: Benefits for You as a Spouse*, SOC. SEC. ADMIN., <https://www.ssa.gov/planners/retire/applying6.html> (last visited July 1, 2016); *How You Apply for Survivors Benefits*, SOC. SEC. ADMIN., <https://www.ssa.gov/planners/survivors/howtoapply.html> (last visited July 1, 2016).

²²² See, e.g., *Coon v. Tuerk*, No. 2012 DRB 002984 (D.C. Super. Ct. Jan. 24, 2014) (involving a petition to recognize a common law marriage by one of the purported spouses); *In re Estate of Smallman*, 398 S.W.3d 134 (Tenn. 2013) (involving a challenge to the validity of marriage by two surviving children who stood to inherit more if the marriage was invalidated).

²²³ In these cases, validity is virtually synonymous with choice, as courts will look to the moment of choice to determine validity.

²²⁴ See, e.g., *Complaint, Boansi v. Johnson*, 118 F. Supp. 3d 875 (E.D.N.C. 2015) (No. 2:14-CV-47-BO) (attaching the marriage license as proof of a valid marriage).

bring the issue of marriage to the state's attention, the challenge is to make an accurate determination that the parties have married.

Some rights, however, depend on the state ascertaining the marital status of parties who have yet to alert the state to their marriages. There are various justifications for state intrusiveness in this context. First, the state might want to ensure that benefits are being distributed to the proper recipients. A spouse's income is factored into a person's eligibility for certain means-tested benefits, like Supplemental Security Income.²²⁵ Married individuals may sometimes owe a different — and greater — amount of income tax than they would if single.²²⁶ One's eligibility to discharge debts in bankruptcy could change if a spouse's resources are taken into account.²²⁷ The misallocation of resources based on the failure to identify marital status can enrich certain individuals at the expense of the public.²²⁸

A second reason for states to actively search for marriages is to ensure that citizens are not circumventing criminal laws based on marital status, like bigamy and adultery,²²⁹ by hiding their marriages. These situations, while uncommon, reveal the state's interest in knowing the marital status of its citizens at all times.

Likewise, parties who transact with couples have an interest in knowing whether they are married. In community property states, for example, spouses are jointly liable for most debts incurred during the marriage.²³⁰ In common law jurisdictions, debts incurred by spouses for the benefit of the family are treated as marital debts.²³¹

²²⁵ See, e.g., Richard Balkus & Susan Wilschke, *Treatment of Married Couples in the SSI Program*, SOC. SEC. ADMIN. (Dec. 2003), <https://www.ssa.gov/policy/docs/issuepapers/ip2003-01.html>.

²²⁶ See Anthony C. Infanti, *LGBT Families, Tax Nothings*, 17 J. GENDER, RACE & JUST. 35, 40 (2014).

²²⁷ See, e.g., David Gray Carlson, *Means Testing: The Failed Bankruptcy Revolution of 2005*, 15 AM. BANKR. INST. L. REV. 223, 261 (2007) (noting that a married debtor filing a Chapter 7 bankruptcy petition in her own name must disclose spousal income).

²²⁸ See, e.g., Balkus & Wilschke, *supra* note 225 (noting \$26 million in SSI overpayments attributed to issues with marital status reporting in 2000).

²²⁹ See Deborah L. Rhode, *Why is Adultery Still a Crime?*, L.A. TIMES (May 2, 2016), <http://www.latimes.com/opinion/op-ed/la-oe-rhode-decriminalize-adultery-20160429-story.html> (noting that adultery is a crime in twenty-one states but is rarely prosecuted); *supra* notes 143-48 and accompanying text (describing the attempt by Utah prosecutors to deem individuals common-law-married in order to prosecute them for bigamy).

²³⁰ See Andrea B. Carroll & Christopher K. Odeton, *Gay Marriage and the Problem of Property*, 93 WASH. U. L. REV. 847, 855 (2016); see also *Lezine v. Sec. Pac. Fin.*, 925 P.2d 1002, 1010 (Cal. 1996).

²³¹ See, e.g., *Jonas v. Jonas*, 241 A.D.2d 839, 840 (N.Y. App. Div. 1997).

Additionally, a majority of states have recognized some version of the common law doctrine of necessities, which allows creditors of a spouse to pursue payment from the other spouse for the provision of necessities of support.²³² In practice, claims of this type are often brought by hospitals for the payment of medical bills.²³³ In light of these legal rules, it is theoretically possible that third parties will rely on one's marital status when extending credit, entering a contract, or providing a service.

Marital status can also affect the obligations of employers in several respects. Employers that offer health insurance to workers typically extend coverage to their spouses as well.²³⁴ It could therefore be costlier to hire married as opposed to unmarried workers. Spouses, but not others, are also sometimes entitled to significant financial benefits, such as survivor's benefits under Workers' Compensation laws²³⁵ or pension plans.²³⁶ Although these costs are not always paid straight from employers' pockets, the additional claims can raise insurance premiums or deplete investment funds.²³⁷ Given these consequences, employers have challenged claims by surviving spouses on the grounds that the spouses have not established the validity of their marriages under the relevant definition.²³⁸

²³² See ABRAMS ET AL., *supra* note 8, at 203.

²³³ See Twila L. Perry, *The "Essentials of Marriage": Reconsidering the Duty of Support and Services*, 15 YALE J. L. & FEMINISM 1, 12 & n.39 (2003).

²³⁴ See Erika Eichelberger, *Obamacare Doesn't Make Employers Cover Spouses. Does that Matter?*, MOTHER JONES (May 20, 2013), <http://www.motherjones.com/mojo/2013/05/obamacare-healthcare-coverage-spouses> ("Right now there are virtually no employers that just offer coverage for the employee and their children.")

²³⁵ See, e.g., *Estate of Slaughter v. City of Hampton*, 285 S.W.3d 669 (Ark. App. 2008); *PNC Bank Corp. v. Workers' Comp. Appeal Bd.*, 831 A.2d 1269, 1281 (Pa. Commw. Ct. 2003).

²³⁶ See, e.g., *Schuett v. FedEx Corp.*, 119 F. Supp. 3d 1155 (N. D. Cal. 2016).

²³⁷ See, e.g., ADP, WORKERS' COMPENSATION 101 GUIDEBOOK, <https://www.adp.com/sitecore/content/insurance/insights-and-tools/guidebooks/workers-compensation-101/q7-how-are-workers-compensation-premiums-calculated.aspx> (last visited Jan. 28, 2017) (explaining that premiums are affected by past claims).

²³⁸ See, e.g., *Estate of Slaughter*, 285 S.W.3d 669; *Elk Mount. Ski Resort v. Workers Comp. Appeal Bd.*, 114 A.3d 27 (Pa. Commw. Ct. 2015); *Thomas v. 5 Star Transp.*, 770 S.E.2d 183 (S.C. Ct. App. 2015). It is unclear whether employers change their *ex ante* hiring practices to be more responsive to marital status. In some states, marital status is a protected classification. See Courtney G. Joslin, *Marital Status Discrimination 2.0*, 95 B.U. L. REV. 805, 808-09 (2015). And even where it is not, employers may face pressure not to hire based on marital status, either because of the potential for such decisions to implicate protected classifications like sex, or because of market pressures.

There is an additional category of third parties with much at stake in a couple's marriage. Heirs and beneficiaries can stand to lose substantial portions of their expectancies depending on the validity of a decedent's marriage. Most states have elective share statutes that guarantee surviving spouses a minimum percentage — usually one-third to one-half — of the decedent's estate.²³⁹ A child from a decedent's prior marriage might therefore find herself with half what she otherwise would have received under her parent's will if the parent was married at death. Unsurprisingly, disputes about the validity of a marriage often arise between spouses and beneficiaries.²⁴⁰ Clarity about a testator's marital status could reduce the likelihood of costly litigation, and could discourage reliance on expectancies that are less likely to come about.

F. Preventing Shirking

Defining choice broadly risks conscripting unwilling or unwitting participants into marriage. But defining choice narrowly poses the risk that partners will be able to avoid obligations to each other or improperly enrich themselves at the state's expense. Choice is therefore a lever to impose legal obligations between intimate partners.

There are many instances in which both partners share the desire to remain unmarried and do not wish to owe each other legal duties.²⁴¹ As Marsha Garrison has observed, many cohabiting couples do not view cohabitation as an alternative to being married, but as an alternative to being single.²⁴² But other partners may be agnostic as to their obligations to each other, or may mistakenly believe that they have created a legal relationship. That was the case in *Hewitt v. Hewitt*,²⁴³ discussed above, where Robert told Victoria that they would live as married without a marriage ceremony, let Victoria devote her efforts toward domestic tasks and developing his professional career, and then refused to divide his property with her when the relationship ended.²⁴⁴

²³⁹ See generally Susan N. Gary, *Share and Share Alike? The UPC's Elective Share*, 12 PROB. & PROP. 18, 20 (1998) (collecting approaches in various states).

²⁴⁰ See, e.g., *In re Estate of Duffy*, 707 S.E.2d 447 (S.C. Ct. App. 2011); *In re Estate of Smallman*, 398 S.W.3d 134 (Tenn. 2013).

²⁴¹ See Courtney G. Joslin, *The Gay Rights Canon and the Right to Nonmarriage*, 97 B.U. L. REV. 425, 443-44 (2017).

²⁴² See Marsha Garrison, *Is Consent Necessary? An Evaluation of the Emerging Law of Cohabitant Obligation*, 52 UCLA L. REV. 815, 842-44 (2005) (citing examples).

²⁴³ *Hewitt v. Hewitt*, 394 N.E.2d 1204 (Ill. 1979).

²⁴⁴ See *id.* at 1205.

Depending on how broadly interpersonal duties are defined, all of these scenarios can give rise to concerns about shirking. That concern is most extreme when one party stands to benefit from the other's mistaken belief that they are married without having to owe reciprocal duties if the relationship comes to an end. In *Hewitt*, Robert dissuaded Victoria from seeking the legal protections that accompany marriage. Without those legal protections, Robert was able to keep most of the property accumulated during the relationship as well as the full value of his salary (over \$260,000 in today's dollars)²⁴⁵ going forward. States could have an incentive to attempt to expand the definition of choice to impose marriage or marriage-like obligations.²⁴⁶

G. Channeling Behavior

Much ink has been spilled about the state's interests in promoting marriage: marriage recognizes and dignifies emotional bonds between intimate partners;²⁴⁷ creates an environment thought to be especially promising or appropriate for raising children;²⁴⁸ facilitates long-term economic arrangements;²⁴⁹ privatizes dependency;²⁵⁰ promotes views about morality and gender roles;²⁵¹ and more.²⁵²

²⁴⁵ See *id.* (noting that Robert's salary was \$80,000). Using the Consumer Price Index inflation calculator on the U.S. Bureau of Labor Statistics website, \$80,000 in 1979 has the same buying power as \$264,470.52 in 2016. BUREAU OF LABOR STATISTICS' CPI INFLATION CALCULATOR, http://www.bls.gov/data/inflation_calculator.htm (last visited Mar. 21, 2017).

²⁴⁶ The common law marriage definition of choice, an agreement to be married expressed in the present tense, would likely have produced a marriage in *Hewitt*. See *Hewitt*, 394 N.E.2d at 1210 (noting that Victoria would likely have established a valid common law marriage had it not been abolished). It would be trickier to deem cohabitants married based only on the nature of their relationship, but that outcome remains a possibility if one's intent to marry can be proven through objective conduct. I will discuss these issues in greater depth in Part III.

²⁴⁷ See, e.g., *Obergefell v. Hodges*, 135 S. Ct. 2584, 2599 (2015) (noting that "through [marriage's] enduring bond, two persons together can find other freedoms, such as expression, intimacy, and spirituality[,] and that "[t]here is dignity in the bond"); David L. Chambers, *What If?: The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 453 (1996) (identifying emotional bonds between married couples as one of the three central categories of states' recognition of marriage).

²⁴⁸ See, e.g., *Obergefell*, 135 S. Ct. at 2600; Chambers, *supra* note 247, at 453.

²⁴⁹ See, e.g., Chambers, *supra* note 247, at 453.

²⁵⁰ See, e.g., Linda C. McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channeling Function of Family Law*, 28 CARDOZO L. REV. 2133, 2169 (2007).

²⁵¹ See, e.g., Katharine K. Baker, *The Stories of Marriage*, 12 J.L. & FAM. STUD. 1, 22-23 (2010) (arguing that marriage is a "gender factory"); Melissa Murray, *Marriage as Punishment*, 112 COLUM. L. REV. 1, 6-7 (2012) (noting the role of marriage in

An important second-order function of the choice to marry from the state's perspective is to control access to marriage in a way that promotes the first-order goals of marriage policy. For example, until recently, states articulated a view of marriage that was based on gender differentiation and complementarity.²⁵³ States promoted this goal by declaring that marriages between people of the same sex would be *void ab initio*.²⁵⁴ But states also advanced this policy by refusing to issue marriage licenses to same-sex couples — by controlling the manner of choice.²⁵⁵

The distinction between first- and second-order functions becomes clearer in the context of bigamy prosecutions. Bigamous marriages, like the same-sex marriages of yesteryear, are void.²⁵⁶ Unlike same-sex intimate conduct,²⁵⁷ however, bigamy is still a crime.²⁵⁸ States cannot police bigamy simply by denying marriage licenses because of the unlikelihood that people in bigamous unions will alert the authorities to their presence. As in the *Green* case discussed earlier,²⁵⁹ people intentionally entering bigamous relationships will avoid legally marrying to diminish the likelihood of being prosecuted for subsequent marriages.²⁶⁰ If formal choice were the only way to

regulating sexuality); Carl E. Schneider, *The Channeling Function in Family Law*, 20 HOFSTRA L. REV. 495, 498 (1992) (describing the expressive and channeling functions of family law, which promote and direct people into approved social institutions).

²⁵² See, e.g., Case, *supra* note 178, at 1783 (seeing marriage as an “off-the-rack” rule to structure relations between a couple and third parties).

²⁵³ See, e.g., *Latta v. Otter*, 771 F.3d 456, 485-86 (9th Cir. 2014) (Berzon, J., concurring) (noting that opposite-sex marriage classifications are based on “archaic and stereotypic notions” of gender).

²⁵⁴ See, e.g., ARIZ. REV. STAT. § 25-101 (2016) (“Marriage between persons of the same sex is void and prohibited.”).

²⁵⁵ See, e.g., Case, *supra* note 178, at 1761-64 (discussing the example of *Baker v. Nelson*).

²⁵⁶ See, e.g., CAL. FAM. CODE § 2201 (2016) (noting that a “subsequent marriage contracted by a person during the life of his or her former spouse, with a person other than the former spouse, is illegal and void”).

²⁵⁷ See *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down a statute criminalizing, private, consensual homosexual sodomy).

²⁵⁸ See, e.g., UTAH CODE § 76-7-101 (“A person is guilty of bigamy when, knowing he has a husband or wife or knowing the other person has a husband or wife, the person purports to marry another person or cohabits with another person.”).

²⁵⁹ See *State v. Green*, 99 P.3d 820, 822 (Utah 2004) (noting that *Green* avoided being in more than one licensed marriage at a time).

²⁶⁰ *Brown v. Buhman* provides a counterexample. 947 F. Supp. 2d 1170 (D. Utah 2013). In that case, a polygamist family starring in the reality television show *Sister Wives* brought a challenge to Utah's criminal bigamy statute. The husband, Kody Brown, had legally married Meri Brown, bringing his subsequent non-legal marriages

establish the “anchor” marriage, polygamous relationships could evade prosecution. Recognizing informal choice, as the state did in *Green*,²⁶¹ provides a crucial means to advance its moral viewpoints.²⁶²

Loosening the definition of marital choice can also serve other purposes. At one point, the state might have swept more people into marriage to combat immorality, by recasting cohabitation as marriage and legitimizing children.²⁶³ Now, the same action could privatize dependency by conscripting cohabitants into marriage.²⁶⁴ Informal choice could serve as a tool to make a greater number of people responsible for providing support to each other.²⁶⁵ This explains why the Social Security Administration has defined marriage for the purpose of determining SSI benefits to presume that a cohabiting heterosexual couple is married unless they can successfully rebut that presumption.²⁶⁶

These functions exist in tension with each other. Most basically, states sometimes have an interest in deeming two people to be married or unmarried, either because the relationship bears certain hallmarks that the state associates with certain legal consequences, or because a party to the relationship has requested that the state recognize the relationship as a marriage. But the state’s interests can conflict with the preferences of the spouses. These tensions raise three questions. First, which of the functions, if any, are mandatory? Second, to what extent must the mandatory functions of marital choice accommodate the other functions? And third, given that definition, how should the state determine whether that choice has been exercised, especially where the parties to the purported marriage disagree?

well within the definition of the statute, which criminalized plural marriage or cohabitation with a married person. *See id.* at 1178.

²⁶¹ *See supra* notes 143–48 and accompanying text.

²⁶² Although marital choice has historically performed this function, I argue in the remainder of this Article that this function is impermissible to the extent it marries people against their will and in the absence of consent. *See infra* Parts III.A, IV.B.

²⁶³ *See* Dubler, *supra* note 43, at 969.

²⁶⁴ *See, e.g.,* Dutko v. Colvin, No. 15-CV-10698, 2015 U.S. Dist. LEXIS 150194 (E.D. Mich. Nov. 5, 2015).

²⁶⁵ *See, e.g.,* Dubler, *supra* note 43, at 968; Laura A. Rosenbury, *Federal Visions of Private Family Support*, 67 VAND. L. REV. 1835, 1866 (2014).

²⁶⁶ *See supra* notes 140–41 and accompanying text.

III. CHOICE ARCHITECTURE

Choice moves two people²⁶⁷ across the marriage threshold. The functions discussed in Part II reveal the values at stake in the determination whether a couple has exercised that choice. It is to the conjoined challenges of definition and proof that this Part now turns.

A. *Defining Choice*

Some of the functions of marital choice are mandatory, either because they are protected by the Constitution or are central to the fair administration of laws. A definition of marital choice must therefore reflect and safeguard these functions.

When identifying the minimum requisites of marital choice, self-authorship and consent are the starting points. The Court has firmly grounded the right to marry in the concepts of liberty and autonomy.²⁶⁸ The emphasis the Court has placed on the value of personhood-defining choices makes it virtually inconceivable that a state could deem a person married against her will.²⁶⁹ Consider the examples of *State v. Green*, in which a man was deemed to be married to one of several women with whom he was cohabiting so that he could be prosecuted for bigamy;²⁷⁰ Washington's conversion of domestic partnerships into marriages;²⁷¹ or *Dutko v. Colvin*, which held that a cohabiting couple was married for the purposes of denying SSI benefits.²⁷² These state interventions would be deeply offensive to individual autonomy if premised on a claimed prerogative to marry people at the state's election. They would also threaten basic

²⁶⁷ As this Article moves from the descriptive to normative realm, I pause to note that my focus on couples does not suggest that the same principles would not apply with equal force to polyamorous relationships, were states to recognize a right of polyamorous partners to marry. For a comprehensive analysis of first-order considerations involving plural marriage, see Hadar Aviram & Gwendolyn M. Leachman, *The Future of Polyamorous Marriage: Lessons from the Marriage Equality Struggle*, 38 HARV. J.L. & GENDER 269 (2015).

²⁶⁸ See Matsumura, *Right Not to Marry*, *supra* note 29, at 1532-34; (discussing *Obergefell*); see also Colker, *supra* note 6, at 402.

²⁶⁹ See Matsumura, *Right Not to Marry*, *supra* note 29, at 1545. (“[T]he right to marry could not promote self-definition if the state could choose people’s spouses or deem them legally married against their will.”).

²⁷⁰ See *State v. Green*, 99 P.3d 820, 822 (Utah 2004).

²⁷¹ See *supra* Part I.B.

²⁷² See, e.g., *Dutko v. Colvin*, No. 15-CV-10698, 2015 U.S. Dist. LEXIS 150194, at *3 (E.D. Mich. 2015).

assumptions of how the law assigns and redistributes property and other legal rights.²⁷³

Instead, the results flow from the assumption that the parties in those cases chose to marry. Choice therefore performs two related functions: manifesting an act of will in the direction of marriage, and representing consent to the imposition of marriage's obligations. This reasoning takes the following form:

Major premise: if A exercises his will/consents to marry B, the state may, at B's request or on its own initiative, impose a set of legal obligations on A that corresponds to the legal obligations of marriage.

Minor premise: A exercises his will/consents to marry B

Conclusion: It is permissible for the state to impose a set of legal obligations on A.²⁷⁴

If we accept the major premise, which is implied by the Court decisions culminating in *Obergefell*,²⁷⁵ we must still determine what constitutes an appropriate exercise of will and consent.

The exercise of will may manifest itself subjectively, objectively, or as a combination of the two.²⁷⁶ That is to say that we may make the determination entirely based on one's state of mind, one's performance of a token act, or both. In the criminal law context, scholars have defended the subjective view on the grounds that autonomy resides in the ability to will the alteration of moral rights and duties. If consent is normatively significant because it constitutes an expression of autonomy, then it must depend on the person's state of mind at the relevant time.²⁷⁷ If the purpose of requiring the performance of a token act is merely to reflect the mental state, then the act itself is morally irrelevant.²⁷⁸ In the *Jackson K. v. Parisa G.* case, this view would vindicate Parisa, who claimed to harbor a desire not to marry Jackson

²⁷³ See *supra* notes 206–10 and accompanying text.

²⁷⁴ I borrow this syllogism from Alan Wertheimer, *What Is Consent? And Is it Important?*, 3 *BUFF. CRIM. L. REV.* 557, 561 (2000) [hereinafter *What Is Consent?*].

²⁷⁵ This premise lies at the heart of a right not to marry. See Matsumura, *Right Not to Marry*, *supra* note 29, at 1541-44.

²⁷⁶ Wertheimer, *What Is Consent?*, *supra* note 274, at 566 (identifying three different accounts of consent in the context of consent to sexual relations: a subjective view, based entirely on one's mental state; a performative view, based on a token act; and a hybrid view, requiring both a sufficient mental state and token act).

²⁷⁷ Heidi Hurd, *The Moral Magic of Consent*, 2 *LEGAL THEORY* 121, 124-25 (1996); see also Larry Alexander, *The Moral Magic of Consent (II)*, 2 *LEGAL THEORY* 165 (1996).

²⁷⁸ See Hurd, *supra* note 277, at 137.

even as she participated in a lavish ceremony culminating in the signing of a document referring to the couple's "eternal union" as "husband" and "wife."²⁷⁹

Even in the criminal context, however, other scholars have defended an objective, or performative, view of consent. If consent renders it permissible for A to do something to B, then B's mental state alone — unaccompanied by any outward manifestation — would seem incapable of authorizing A to act.²⁸⁰ This challenge would be more acute in other contexts, especially those that affirmatively create duties and obligations.²⁸¹ For this reason, contract law has largely rejected a subjective approach.²⁸² The reliance on inaccessible evidence would "undermine the security of transactions by greatly reducing the reliability of contractual commitments."²⁸³ Although intent is not an irrelevant consideration, to privilege subjective intent over objectively manifested behavior would effectively incentivize contracting parties to generate evidence of contradictory intentions with which to undermine the validity of unfavorable agreements.²⁸⁴ Improper motives aside, a subjective approach would promote uncertainty and likely result in increased disputes.²⁸⁵ Contract law has therefore largely treated the relevant moral acts as objective ones.²⁸⁶

²⁷⁹ Jackson K. v. Parisa G., No. 300957/15, 2016 N.Y. Misc. LEXIS 1487, at *4 (N.Y. Sup. Ct. Apr. 8, 2016).

²⁸⁰ See Alexander A. Boni-Saenz, *Sexual Advance Directives*, ALA. L. REV. 1, 6 n.23 (2016) ("Since consent gives notice to a sexual partner about what her obligations are, some communicative element seems essential to the legal system."); Wertheimer, *What Is Consent?*, *supra* note 274.

²⁸¹ See WERTHEIMER, *supra* note 202, at 120 ("Consent can . . . work as a promise or a way of acquiring an obligation to do something, as when B consents or promises at Time-1 to do X at Time-2.").

²⁸² See Joseph M. Perillo, *The Origins of the Objective Theory of Contract Formation and Interpretation*, 69 FORDHAM L. REV. 427, 428 (2000) (summarizing the historical development of the objective theory).

²⁸³ Randy E. Barnett, *A Consent Theory of Contract*, 86 COLUM. L. REV. 269, 273 (1986) [hereinafter *Consent Theory*]; see Brian H. Bix, *Contracts*, in THE ETHICS OF CONSENT: THEORY AND PRACTICE 251, 253 (Franklin G. Miller & Alan Wertheimer eds., 2010) ("While contract law discussions may sometimes point to the internal aspects of consent, the actual doctrinal tests focus on externals.").

²⁸⁴ See Randy E. Barnett, *Contract Is Not Promise; Contract Is Consent*, 45 SUFFOLK U. L. REV. 647, 651 (2012).

²⁸⁵ See *id.*

²⁸⁶ See, e.g., *Lucy v. Zehmer*, 84 S.E.2d 516, 521 (Va. 1954) ("In the field of contracts, as generally elsewhere, [w]e must look to the outward expression of a person as manifesting his intention rather than to his secret and unexpressed intention. The law imputes to a person an intention corresponding to the reasonable meaning of his words and acts.") (internal quotation marks omitted) (quoting First

There are particularly strong reasons to think that the choice to marry requires a performative act. First, marriage cannot be created unilaterally, but, like contracting, requires that two individuals choose to marry each other. An individual's right to autonomous self-definition does not extend to conscription of an unwilling partner.²⁸⁷ The full panoply of conduct occurring within an intimate relationship makes it inevitable that uncertainties will arise as to the nature of both partners' commitment. Couples may live together (or not), engage in intimacy (or not), provide emotional or financial support (or not), raise children together (or not), while being married or unmarried. Both partners therefore depend on the choice to marry to hail the other, necessitating some sort of objective manifestation of will. Because one cannot unilaterally choose to marry, the act of will must communicate both the desire to marry and the receptivity to the other's desire to marry. In other words, A cannot choose to marry B without some indication that B would also choose to marry A, because A's exercise of will in that instance would be unilateral. A would be choosing something, but it would not be marriage.²⁸⁸ If the relevant act of will must simultaneously elicit a reciprocal act of will, it cannot be purely subjective.

Moreover, marriage occurs between two people in a relationship that extends over time. Setting aside the challenge of proving that both spouses exercised their will to marry subjectively, a subjective view would struggle to account for the changing subjective views of the spouses. Imagine a couple who, while attending a wedding ceremony for friends, begin to dance. Both form the desire to be deemed legally married to the other. A few weeks later, one fails to take out the trash, inspiring a feeling of disgust in the other and a desire not to be deemed legally married. A purely subjective view provides little basis for privileging the choice to enter a marriage over the choice to exit, or

Nat'l Bank of Roanoke v. Roanoke Oil Co., 192 S.E. 764, 770 (Va. 1937)); Barnett, *Consent Theory*, *supra* note 283, at 303 (arguing that "whether one has consented to a transfer of rights . . . generally depends not on one's subjective opinion about the meaning of one's freely chosen words or conduct, but on the ordinary meaning that is attached to them"); Wertheimer, *What Is Consent?*, *supra* note 274, at 567-68 ("As a general proposition, nobody thinks that the consent that gives rise to a binding promise refers to anyone's mental state. To promise is to promise, not to have the intent or desire to promise."); *but see* Chunlin Leonhard, *The Unbearable Lightness of Consent in Contract Law*, 63 CASE W. RES. L. REV. 57, 61-62 (2012) (cautioning that various forms of manipulation in the market often render even objectively manifested consent illusory).

²⁸⁷ See *supra* notes 165-68 and accompanying text.

²⁸⁸ See *supra* notes 165-68 and accompanying text.

to let the marriage lapse. Neither viewpoint seems inherently more central to one's self-definition. Nor is a purely individual-centered approach consistent with the institution of marriage as a site of mutual obligation.²⁸⁹

These observations support the conclusion that the exercise of will must involve the performance of an objective act. A second, related question is whether the law should treat the desire to marry and the desire to waive one's objections to the imposition of the legal and perhaps social obligations attendant to marriage — consent to marriage — as one and the same. The answer to that question should be “yes.”

The act of will reflecting a desire for marriage is significant precisely because of the social and legal contexts in which it is performed. As discussed in Part II.A above, the *Obergefell* Court held that the choice to marry involves more than the bare desire to call oneself married, divorced from the legal impact of that utterance. Same-sex couples were already able “to make vows to their partners in public ceremonies, to engage in religious wedding ceremonies, [and] to hold themselves out as married.”²⁹⁰ The choice to marry is therefore a choice to invoke the “symbolic recognition and material [legal] benefits”²⁹¹ of marriage. Of course, beliefs about marriage may be somewhat idiosyncratic, and norms may vary from community to community.²⁹² There is a core set of norms, however, upon which both individual-centered and state-centered understandings of marriage depend, even if they are not norms with which individuals personally agree.²⁹³ The individual only understands whether he is performing marriage based on his best estimation of whether the law would actually recognize the performance as marriage. Effective choice therefore requires the convergence of individual autonomy and the law around this set of norms. This convergence effectively means that the relevant act of will also signifies an intent to be bound by the legal regime the individual has elected,²⁹⁴ which establishes consent.

²⁸⁹ See Strauss, *supra* note 166, at 1742-46.

²⁹⁰ *Obergefell v. Hodges*, 135 S. Ct. 2584, 2635 (2015) (Thomas, J., dissenting).

²⁹¹ *Id.* at 2601.

²⁹² Cf. Elizabeth S. Scott, *Social Norms and the Legal Regulation of Marriage*, 86 VA. L. REV. 1901, 1919 (2000) (noting the existence of relationship-specific norms and widely-held social norms).

²⁹³ For example, a number of couples have open, or “monogamish” relationships. See Edward Stein, *Plural Marriage, Group Marriage and Immutability in Obergefell v. Hodges and Beyond*, 84 UMKC L. REV. 871, 879 (2016). I am confident, though, that these couples recognize that their arrangement contravenes the norm of fidelity between spouses.

²⁹⁴ See Scott, *Marriage, Cohabitation*, *supra* note 64, at 236 (characterizing the

Two principles emerge from the foregoing analysis. First, neither the government nor an individual has the right to impose marriage on another individual without that person's consent. Each individual must voluntarily assume marriage's core duties — namely, open-ended duties of financial and emotional support accompanied by expectations of permanency. That said, the voluntary acceptance of these duties can establish a choice to marry regardless of whether the individual subjectively believed that she was choosing to marry.²⁹⁵ In short, the choice to marry involves the performance of acts by both spouses indicating their desire and consent to assume a set of core duties that the law would recognize as marriage.

This definition of choice unites the personal, social, and legal understandings of marriage: it grounds individual autonomy within the context of social norms and legal obligations. But it gives rise to two concerns. First, it raises the concern that people might inadvertently stumble into marriage or face state conscription. This danger is especially pronounced because intimate relationships will often give rise to innumerable acts — words, conduct — that suggest weakly or strongly that both partners have assumed spousal obligations. Second, and conversely, it could be deemed too dismissive of the state's interests in regulating marital choice. Crucial to this definition, therefore, are evidentiary safeguards that protect an individual's right not to be married and recognize, when appropriate, the interests of the state.²⁹⁶

B. Proving Choice

The foregoing definition establishes that only individuals can move themselves across marriage's threshold. However, individuals, third parties, and the state all share an interest in properly identifying a couple as married.²⁹⁷ Providing certainty as to marital status enables

exchange of marital vows as “an implicit agreement to be bound by a regime of informal social norms . . . and by a set of legal rights and obligations”); Lawrence W. Waggoner, *Marriage Is on the Decline and Cohabitation Is on the Rise: At What Point, if Ever, Should Unmarried Partners Acquire Marital Rights?*, 50 *FAM. L.Q.* 215, 235 (2016) (expressing skepticism that married partners have “full knowledge” of marital rights, but noting that the formalities “signify intent” to acquire those rights).

²⁹⁵ Ideally, and in a vast majority of instances, the objective conduct will match a person's subjective views.

²⁹⁶ Cf. Richard Craswell, *Contract Law, Default Rules, and the Philosophy of Promising*, 88 *MICH. L. REV.* 489, 514-15 (1989) (noting that autonomy-based theories of contract require “specification of the conditions under which a party's apparent consent will be recognized as valid”).

²⁹⁷ See *supra* Part II.E.

both spouses to define their identities and to invest in their relationship, third parties to transact with the couple with more confidence, and the state to assign rights and liabilities. Moreover, although a government may lack the authority to move people into marriage full stop, it surely retains some interest in controlling access to marriage and protecting people both inside and outside of marital relationships. This Section examines how questions related to the form and burden of proof, as well as the timing and scope of relief, can accommodate the state and individual interests.

1. Formalities

Proof that a couple has engaged in the required legal formalities²⁹⁸ is usually a reliable indicator of the mutual assumption of marital duties because these acts have a broadly recognized social and legal significance: they serve to highlight the legal relevance of the acts that are performed, warn people away from making legal commitments they don't intend, and ultimately serve as proof of the choice the couple has made.²⁹⁹ Outside the rare cases like *Husted v. Husted*,³⁰⁰ in which a woman claimed that she was sedated when she participated in a marriage ceremony and therefore did not know its "force and effect,"³⁰¹ execution of these formalities reflects both an intent to marry and notice of marriage. Formal choice is particularly effective at managing spouses' subjective understandings of their relationship over time, reminding them that they are legally married. And it provides a clear record of the marriage for the state and interested third parties.³⁰²

However, formalities can reveal little about a partner's subjective intentions. That leads to two potential challenges. First, proof of formal choice may conflict with claims that a person held a private, contrary desire not to marry. But because it is so widely understood

²⁹⁸ See *supra* notes 54–57 and accompanying text.

²⁹⁹ See Clarke, *supra* note 43, at 786; Fuller, *supra* note 59, at 800; Gregory Klass, Contract Exposition and Formalism 14, 43 (Feb. 2017) (unpublished manuscript), <http://scholarship.law.georgetown.edu/facpub/1948/> (noting that "the function of a legal formality is to provide a cheap and effective *tool* with which parties can *realize* their intent," and that formalities "are typically designed for users who intend the legal outcomes that attach to them"); cf. Tess Wilkinson-Ryan, *Intuitive Formalism in Contract*, 163 U. PA. L. REV. 2109, 2126–29 (2015) (summarizing experimental findings indicating that laypersons attribute heightened significance to the execution of formalities in determining the enforceability of promises).

³⁰⁰ 35 Cal. Rptr. 698 (Ct. App. 1963).

³⁰¹ *Id.* at 699.

³⁰² See *PNC Bank Corp. v. Workers' Comp. Appeal Bd.*, 831 A.2d 1269, 1281 (Pa. Commw. Ct. 2003).

that engaging in the formalities makes one married,³⁰³ we can have confidence that the person consented, at the very least, to the imposition of basic legal obligations. That makes it possible to impose strict liability for a marriage notwithstanding subjective feelings to the contrary. Evidence that a spouse did not choose to marry (such as living in separate places) will not overcome the spouse's execution of the formalities.³⁰⁴

Second, proof of formal choice will not say much about a party's willingness to perform the essentials of marriage.³⁰⁵ As discussed above, a couple does not need to provide evidence of love or companionship to formally marry. Marriage fraud tests must therefore depend on other forms of proof to establish that the couple has performed the unspecified duties of marriage.³⁰⁶

Looking at the problem of marriage fraud in this light, however, raises questions about the legitimacy of government policies that second-guess a couple's choice to marry. First, if formal marriage is enough to establish a spouse's basic legal obligations — preventing that spouse from avoiding divorce laws, for example — why is that not enough to justify the distribution of legal benefits without second-guessing the spouse's choice? The coexistence of two standards, one to impose liability on a spouse and one to distribute benefits, suggests that marriage is something less than an integrated whole, an implication that the state should theoretically avoid.³⁰⁷ Second, we might ask why the government is committed to ferreting out fraud in this context; why it cares to enforce unarticulated duties when it has consistently denied spouses the right to enforce those same duties when they have petitioned the courts for redress.³⁰⁸ The reasons for departing from a bright-line rule favoring the validity of formal choice in order to police fraud, in other words, are quite weak.

Proof of formalities is usually sufficient to hold a person legally responsible for the choice to marry. The mere fact that formalities can establish a choice to marry, however, does not mean that they are the only way to prove that choice.

³⁰³ See Clarke, *supra* note 43, at 785-86 (noting the extent to which formalities are “well known in U.S. popular culture”).

³⁰⁴ See, e.g., Case, *supra* note 178, at 1771.

³⁰⁵ See *supra* Part I.A.

³⁰⁶ See Abrams, *supra* note 41, at 19.

³⁰⁷ See *Fitzsimmons v. Mini Coach of Bos., Inc.*, 799 N.E.2d 1256, 1257 (Mass. 2003) (noting the problem with conceiving of marriage as a piecemeal collection of rights and obligations).

³⁰⁸ See, e.g., sources cited *supra* note 178.

2. Objective Evidence

An alternative to evidence of compliance with legal formalities is evidence of conduct indicating the assumption of the rights and obligations of marriage. This evidence could cover a wide range of commitments and take an equally wide variety of forms. For example, evidence that a couple is living together, jointly parenting children, sharing income and dividing household expenditures, publicly referring to themselves as a married couple, can all suggest the choice to marry.³⁰⁹ Partners who act this way may have defined themselves as married, understand themselves to be married and even have identified themselves to the government as married. In short, proof of choice through consideration of objective evidence can perform most of the functions of marital choice.³¹⁰

There are several problems with relying on objective evidence, however. Intentionally non-marital relationships can bear a striking similarity to marriages.³¹¹ The definition of marital choice I propose above requires both partners to assume a core set of duties that the law would recognize as a marriage. It would not be enough to merely live with a partner or engage in intimate conduct: to establish a choice to marry, the partners would have to point to evidence that both partners assumed various open-ended obligations.³¹² But this definition is not so protective of individual autonomy that it requires magic words.³¹³ It might be possible to voluntarily assume the relevant duties without an explicit contemporaneous agreement or even consciously invoking the term “marriage,” although evidence that the partners did not intend to

³⁰⁹ See, e.g., *Coon v. Tuerk*, No. 2012 DRB 002984, at 3-5 (D.C. Super. Ct. Jan. 23, 2014) (detailing the circumstances based on which plaintiff sought to establish that he and his ex-partner were common law married, so that he could then obtain a legal separation and subsequent legal benefits pertaining thereto).

³¹⁰ The one function it will necessarily perform less well is notifying third parties of the existence of a marriage. However, it is highly unlikely that most third parties will investigate a person's marital status before dealing with that individual. For important transactions, third parties have adopted forms of diligence allowing them to identify the characteristics of people with whom they want to deal. Creditworthiness is more important to a lender than marital status, for example, and lenders will investigate a person's credit before transacting with him.

³¹¹ See, e.g., *PNC Bank Corp. v. Workers' Comp. Appeal Bd.*, 831 A.2d 1269, 1280 (Pa. Commw. Ct. 2003) (noting that confusion can arise between cohabitation and common law marriage).

³¹² See *supra* Part III.A.

³¹³ Although perhaps not as ritualistic as the marriage ceremony or a private wax seal, magic words are themselves formalities, intended to effect a particular legal change by their very use. See *Klass, supra* note 299, at 51.

be legally married would also be highly relevant. Given the necessarily open-ended nature of the inquiry, partners who cohabit bear some risk of being conscripted into common law marriages, either at the hands of a partner who seeks to establish a marriage,³¹⁴ or the state.³¹⁵ That outcome would jeopardize the autonomy interest that the proposed definition of marital choice endeavors to protect. The broad scope of potentially relevant proof also suggests that choice based on objective conduct might not place the spouses on notice of the marriage and trigger investment in the relationship as effectively as formal choice. Given this state of affairs, as I discuss below, the law must closely scrutinize evidence of the choice to marry to avoid conscription.

Moreover, reliance on objective evidence is inherently ascriptive. That is, courts ask whether the parties' conduct matches performances that the law deems salient.³¹⁶ These performances tend to reinscribe a narrow view of acceptable performances that often reflect harmful stereotypes.³¹⁷ Because the legally salient performances will not match every individual's subjective beliefs, reliance on these performances will also be both over- and under-inclusive.

These concerns about ascription are legitimate but unavoidable. People can only choose marriage if they know what it is they are choosing, and a convergence around social norms — and not the law itself, in most cases³¹⁸ — provides that knowledge. Nonmarriage, too, depends on these norms. Identity is always generated within some context.³¹⁹ The law should be sensitive to the distributional effects of the performances it embraces and can endeavor to change them,³²⁰ but

³¹⁴ See *Coon*, No. 2012 DRB 002984, at 12.

³¹⁵ See *Dutko v. Colvin*, No. 15-CV-10698, 2015 U.S. Dist. LEXIS 150194, at *3 (E.D. Mich. 2015) (deeming a couple to have held themselves out as married for the purpose of denying SSI benefits).

³¹⁶ See *Clarke*, *supra* note 43, at 757 (noting that ascriptive identity measures “conformity” to “social or cultural norms”); see also *Huntington, Staging the Family*, *supra* note 174, at 618-39 (describing and critiquing the salience of normatively acceptable performances).

³¹⁷ See *Huntington, Staging the Family*, *supra* note 174, at 627-28 (noting that command performances often require gender differentiation and therefore exclude same-sex families).

³¹⁸ See *Baker, Promulgating the Marriage Contract*, *supra* note 7, at 235.

³¹⁹ See GEORGE HERBERT MEAD, *ON SOCIAL PSYCHOLOGY* 239 (Anselm Strauss ed., 1964).

³²⁰ See *Huntington, Staging the Family*, *supra* note 174, *passim*. The *Obergefell* decision noted that the social meaning of marriage has changed over time, see *Obergefell v. Hodges*, 135 S. Ct. 2584, 2595 (2015), and changed the social meaning of marriage by extending the definition of marriage to encompass same-sex couples, see *id.* at 2608. See also *Huntington, Obergefell's Conservatism*, *supra* note 163, at 26

a world without such performances, whatever their content, is simply not reality. Partners who fall outside the realm of approved norms can always fall back on the formalities.³²¹

Finally, if both members of a couple privately promise each other that they are married, they can place each other on notice that they are married and begin to maximize their investment in the relationship. But the fact of their marriage might escape the notice of the state or third parties, who might continue to interact with the couple as if they were unmarried. There is a possibility that the couple will benefit by minimizing its tax burden or obtaining benefits on behalf of one spouse that the other spouse's formal presence would disallow.³²² At first, this might seem like a reason to insist on formal choice. In many instances, however, the couple must identify itself as married to claim the relevant benefit. As a result, the circumstances in which a couple would be provided benefits as single while actually married are relatively few, and the chance that the status would affect third parties is also somewhat minimal.³²³ Moreover, the benefits of insisting on formal choice to address these abuses must be weighed against the couple's autonomy interest in determining the circumstances under which they choose to marry, and the benefits of having informal, in addition to formal, marriages.³²⁴

3. Subjective Statements

Subjective statements — claims about one's desire to marry or not — may come the closest to revealing the will of the parties but they are unreliable for several reasons. They are classic examples of self-serving evidence: “evidence that supports the proponent's case while giving the opponent no opportunity to examine its veracity.”³²⁵ The law typically discounts such evidence when it is not accompanied by corroboration because it is impossible to verify the probability of the statements being true or to scrutinize it.³²⁶ Consider the facts from

(arguing that the Court endorsed a particular social understanding of marriage).

³²¹ See Case, *supra* note 178, at 1765 (arguing that formal marriage allows couples to structure their relationships as they see fit).

³²² See *supra* Part II.E. To my knowledge, no one has quantified the financial cost to the government of such evasion.

³²³ See *supra* Part II.E.

³²⁴ First-order functions of informal marriage might include protecting the more economically vulnerable partner and privatizing dependency.

³²⁵ Alex Stein, *Inefficient Evidence*, 66 ALA. L. REV. 423, 451 (2015).

³²⁶ See *id.* at 431-32.

Jackson K v. Parisa G.,³²⁷ discussed above, in which the parties participated in an elaborate wedding ceremony during which they referred to themselves as husband and wife, but which was officiated by a person who later denied her authority to perform the marriage.³²⁸ Parisa asserted that she did not intend her participation in the ceremony to result in a legal marriage.³²⁹ This statement, without more, provides no basis to assess its accuracy.

Subjective statements are also unreliable because they convey memories and perceptions, which are subject to change. What someone *intended*, more so than what someone *did*, is inherently linked to self-perception and emotion.³³⁰ As a person experiences life changes, he will attribute new significance to old events, reinterpreting and adapting the past to meet his present needs.³³¹ Parisa likely remembers participating in a wedding ceremony; but how reliable is Parisa's recollection of her subjective intentions on that day, especially in light of the antagonism that developed in her relationship with Jackson? These reservations support the conclusion that subjective statements can be considered in the presence of other corroborating evidence, but should be no more persuasive than other forms of evidence.³³²

4. Burden of Proof

Questions about forms of proof do not answer the question how much is required. This question rarely arises in the context of formal choice because the formalities do a good job satisfying evidentiary concerns about marital choice. The acts of applying for a marriage license, signing it in the presence of witnesses, and participating in a state-sanctioned ceremony greatly exceed the formalities required of

³²⁷ No. 300957/15, 2016 N.Y. Misc. LEXIS 1487, at *1-4 (N.Y. Sup. Ct. Apr. 8, 2016).

³²⁸ *Id.*

³²⁹ *Id.* at *8.

³³⁰ See O. Carter Snead, *Memory and Punishment*, 64 VAND. L. REV. 1195, 1242 (2011) (“[T]he meaning of a memory and its impact on future actions depend on the emotions that attend it.”).

³³¹ See *id.* at 1229-30.

³³² Note the distinction between statements that attempt to establish a person's state of mind, and statements that testify as to the existence of an event or terms of an agreement, which may sometimes be the only evidence available. See *East v. East*, 536 A.2d 1103, 1106 n.2 (D.C. 1988) (noting in the jurisdiction a preference for testimony regarding the existence of a present intent to establish a common law marriage).

routine agreements, and resemble the formalities required of other acts of heightened legal significance, like testation.³³³

Given the stakes of a determination that a couple is legally married, courts analyzing other forms of proof must carefully scrutinize the purported choice. Historically, jurisdictions recognizing common law marriages would often apply an evidentiary presumption *in favor* of marriage based on cohabitation.³³⁴ Doubtless this presumption served as a useful alternative to the imposition of the harsh criminal consequences or the stigma of illegitimacy,³³⁵ but those justifications no longer apply.³³⁶ Remaining common law marriage jurisdictions are either neutral towards common law marriage or actively disfavor it.³³⁷

Those that are neutral typically require proof by a preponderance of the evidence.³³⁸ In *East v. East*,³³⁹ for example, Margaret testified that her partner Paul announced, at a dinner party, “From here on in, Margaret and I are married.”³⁴⁰ Paul denied making that statement but testified that Margaret had claimed, at the same party, that the couple had been married that same day by a justice of the peace, and that he did not correct Margaret to avoid embarrassing her in front of the

³³³ See, e.g., David Horton, *Wills Law on the Ground*, 62 UCLA L. REV. 1094, 1104 (2015).

³³⁴ See, e.g., *Gall v. Gall*, 21 N.E. 106, 108-109 (N.Y. 1889) (“The cohabitation, apparently decent and orderly, of two persons opposite in sex, raises a presumption of more or less strength that they have been duly married.”).

³³⁵ See *Meister v. Moore*, 96 U.S. 76, 81 (1877) (noting the presumption that state statutes prescribing certain formalities for entering marriage would be “held merely directory; because marriage is a thing of common right, because it is the policy of the State to encourage it, and because, as it has sometimes been said, any other construction would compel holding illegitimate the offspring of many parents conscious of no violation of law”).

³³⁶ See *Staudenmayer v. Staudenmayer*, 714 A.2d 1016, 1021 n.8 (Pa. 1998) (noting the changing relevance of cohabitation based on the elimination of social taboos).

³³⁷ See *Metro. Life Ins. Co. v. Johnson*, 645 P.2d 356, 359-60 (Idaho 1992) (collecting cases and distinguishing between approaches).

³³⁸ In *Cerovic v. Stojkov*, 134 A.3d 766, 776 (D.C. 2016), the D.C. Court of Appeals recently reiterated that a party need only establish the existence of a common law marriage by a preponderance of the evidence. See *id.* at 774. Although D.C. courts had applied a clear and convincing evidence standard to prove the existence of a common law marriage before a ceremonial one, the *Cerovic* court held that the heightened burden of proof did not apply where a party sought to establish the existence of a common law marriage to a person she later formally married. See *id.* at 775-76. It also made clear that as between ceremonial and common law marriages, the law expressed no preference. See *id.* at 777.

³³⁹ *East v. East*, 536 A.2d 1103 (D.C. 1988).

³⁴⁰ *Id.* at 1104.

guests.³⁴¹ Based on this conflicting testimony, the court found the existence of a common law marriage.³⁴²

Other states have required that a party prove an agreement to marry by the more demanding clear and convincing evidence standard.³⁴³ Although this evidentiary standard is flexible in practice, it is more likely that contradictory or internally inconsistent evidence will undermine evidence supporting the existence of a common law marriage.³⁴⁴

The appropriate standard of proof could differ based on the party against whom the claimed marriage is asserted. To apply the more lenient preponderance standard in a dispute between partners risks conscripting a spouse who never intended to assume the duties of marriage. For example, regardless of whom a court would find more credible, one might harbor doubts that the dinner conversation in *East* placed the partners on notice that they had created a legal marriage.³⁴⁵ In light of the importance of self-definition, notice, and consent, the more demanding clear and convincing evidence standard is minimally necessary to establish marital choice; the preponderance standard is insufficient.

However, the *agreement* by partners that they are or are not married does not pose the same threat to autonomy. The government or third parties have lesser interests in establishing or challenging a marriage than the couple. Consider a couple who claim to be married when they file their income tax returns, or a couple who agree they are unmarried when one applies for SSI benefits. These situations pose a risk that the couple will mis-identify themselves for the purpose of government benefits, but would not jeopardize the autonomy or self-identification of the spouses. Situations where the parties agree they are married or unmarried call for less skepticism, and might therefore be better suited to a preponderance standard.³⁴⁶

³⁴¹ *Id.*

³⁴² *Id.* at 1106.

³⁴³ *Staudenmayer v. Staudenmayer*, 714 A.2d 1016, 1021 (Pa. 1998) (noting that the burden to prove a common law marriage is a “heavy” one and requiring proof by clear and convincing evidence in order to satisfy it).

³⁴⁴ *See id.* at 1022.

³⁴⁵ *See East*, 536 A.2d at 1104.

³⁴⁶ This is especially true because estoppel principles would prevent parties from opportunistically claiming marriage for certain principles but not others. Many states define judicial estoppel broadly enough for it to be applicable here: “(1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position . . . ; (4) the two positions are totally inconsistent; and (5) the first position

Recognizing this reality, some jurisdictions have treated claims more favorably when a common law spouse asserts the existence of marriage against the estate of the spouse, rather than the spouse herself. Pennsylvania, for example, has adopted a presumption in favor of marriage based on proof of cohabitation and reputation of marriage where one spouse is deceased.³⁴⁷ New Hampshire does not recognize common law marriage between living spouses, but will allow a surviving cohabitant, reputed to be living as husband and wife for a period of three years preceding the death, to establish a claim against the estate as a surviving spouse.³⁴⁸ This approach is consistent with the superior interest of the surviving spouse in defining herself as married over the interests of the estate's beneficiaries.³⁴⁹

5. Timing and Scope of Relief

Related to the form of proof is the timing of the inquiries whether a couple has chosen to marry and when that marriage occurred. Formal choice is equated with *ex ante* choice: the relevant legal act is thought to precede the status of marriage.³⁵⁰ Other forms of choice are characterized as *ex post* inquiries, performed at some later time and looking backwards to determine whether in fact choice occurred.³⁵¹ Most of the time, these characterizations are accurate. For the vast

was not taken as a result of ignorance, fraud, or mistake." *In re Marriage of Lawson*, No. E038587, 2006 WL 2223796, at *5 (Cal. Ct. App. Aug. 4, 2006) (quoting *Jackson v. County of Los Angeles*, 70 Cal. Rptr. 2d 96, 103 (Cal. App. 2d Dist. 1997)) (estopping a party who represented that his marriage was valid in an adoption proceeding from challenging that marriage in a later proceeding). Even in the absence of an applicable estoppel claim, a party's official representation regarding marriage would be strong evidence of that position.

³⁴⁷ See *Staudenmeyer*, 714 A.2d at 1021.

³⁴⁸ See *Bowman, Feminist Proposal*, *supra* note 36, at 770-71. Other jurisdictions are more suspicious of claims brought by surviving "spouses," and will purport to scrutinize them more closely. See, e.g., *In re Fisher's Estate*, 176 N.W.2d 801, 805 (Iowa 1970) (requiring consistent and convincing evidence of common law marriage in this context).

³⁴⁹ Although beneficiaries may stand to inherit significant amounts, they lack a fixed or vested interest until the person dies. See *In re Brockmire*, 424 S.W.3d 445, 449 (Mo. 2014) (en banc) (noting the complete absence of a property interest until the decedent's death). Expectancies exist at the whims of the property holder, who can marry, disinherit heirs (not spouses), or squander her money before death. See *id.*

³⁵⁰ See *ex ante*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "ex ante" as "[b]ased on assumption and prediction, on how things appeared beforehand, rather than in hindsight").

³⁵¹ See *ex post*, BLACK'S LAW DICTIONARY (10th ed. 2014) (defining "ex post" as "viewed after the fact, in hindsight").

majority of couples, the execution of formalities resolves the question whether and when the couple has married. The license and ceremony serve as proof of the marriage and perform the functions of marital choice.³⁵² Even in jurisdictions that recognize common law marriage, most couples will formally marry, leaving courts to decide a handful of *ex post*, informal marriages.

However, both formal and informal marriage can raise questions about when the marriage began. Formalities need not signal the absolute beginning of a marriage, and objective conduct could theoretically suffice to create marriage before its end.³⁵³ Today, marriage regularly follows cohabitation, making it less descriptively accurate to view formal choice as a purely *ex ante* choice: in many cases, a relationship bearing many of the hallmarks of marriage precedes formal choice, sometimes by years, and some courts have even recognized the existence of marital rights before formal choice has occurred.³⁵⁴ These ambiguities provide a compelling reason to allow *ex post* choice.

Although a relationship may develop organically, rights, for better or worse, have starting and ending points. A first inquiry is whether to apply the determination that a couple has chosen to marry both retrospectively and prospectively, or prospectively only. Purely prospective application would involve the recognition of marital rights and obligations only after the determination that a choice to marry occurred. For example, it would create marital property rights only after a formal marriage,³⁵⁵ or deny a spouse the right to sue for loss of consortium based on injuries sustained prior to that date.³⁵⁶ It would

³⁵² See Clarke, *supra* note 43, at 784-85.

³⁵³ See, e.g., Cerovic v. Stojkov, 134 A.3d 766, 774 (D.C. 2016) (asking whether the parties had a valid common law marriage before their formal marriage); Bansda v. Wheeler, 955 A.2d 189, 197-99 (D.C. 2010) (same).

³⁵⁴ See Nelson v. Nelson, 384 N.W.2d 468, 472 (Minn. Ct. App. 1986) (holding that cohabitants who later formally married “were living together as husband and wife” for a three-year period prior to their marriage); Antognini, *supra* note 45, at 18-21, 48-51 (identifying a split amongst jurisdictions in treating property obtained by cohabitants preceding marriage as part of a continuous whole); see also Cerovic v. Stojkov, 134 A.3d 766, 774 (D.C. 2016) (asking whether the parties had a valid common law marriage before their formal marriage).

³⁵⁵ See, e.g., Rolle v. Rolle, 530 A.2d 847, 851 (N.J. Super. Ct. Ch. Div. 1987) (instituting a “simple and definitive rule” against equitably dividing property acquired “prior to the date of the marriage”).

³⁵⁶ See, e.g., Feliciano v. Rosemar Silver Co., 514 N.E.2d 1095, 1096 (Mass. 1987) (denying a wife standing to sue for injuries sustained several years before the couple formally married, even though the couple had been living together for twenty years at the time of the injury).

also start the clock at the moment choice occurred for the purposes of doling out benefits dependent on the length of marriage, like social security survivor benefits.³⁵⁷ Outside of the few states that have recognized premarital conduct as the basis for the creation of marital obligations,³⁵⁸ formal marriage is largely prospective in nature. Informal marriages, likewise, could be recognized prospectively only. That is, the judicial recognition of a marriage could create rights starting on that date.

Granting relief prospectively is much less controversial than granting it retrospectively. Prospective application allows all parties to conform their conduct to the parties' marital status.³⁵⁹ Conversely, it blunts arguments based on the unfairness of imposing unexpected liabilities. A spouse can hardly argue that it would be unfair to divide property acquired after the date of marriage, especially with easy access to divorce. Moreover, even seemingly opportunistic marriages, for example, to claim a valuable benefit, would not give rise to fraud provided the couple would be estopped from, or penalized for, later changing their position regarding their marital status.³⁶⁰ Reducing the possibility of a future change in position would reduce the risk of a couple having their cake and eating it too.³⁶¹

Although retrospective relief would raise many concerns, there are reasons to think that those concerns are overstated. Peter Nicolas and Lee-ford Tritt have observed, for instance, that statutes of limitation would prevent parties from asserting stale legal claims.³⁶² Loss of consortium actions are often subject to a state's statute of limitations for tort actions;³⁶³ claims for overpaid taxes must be brought within a

³⁵⁷ See Nicolas, *supra* note 30, at 401 (noting the requirement that a couple be married for nine months).

³⁵⁸ See *supra* note 354.

³⁵⁹ Cf. LON L. FULLER, *THE MORALITY OF THE LAW* 53 (1964) (identifying the purpose of the law as governing human conduct by rules).

³⁶⁰ See *supra* note 346.

³⁶¹ Or, as a Pennsylvania court put it, treating marriage like a legal raincoat that the parties can put on and take off as they please. *PNC Bank Corp. v. Workers' Comp. Appeal Bd.*, 831 A.2d 1269, 1281 (Pa. Commw. Ct. 2003), *superseded by statute*, 23 Pa.C.S.A. § 1103 (2005), *as recognized in Elk Mt. Ski Resort, Inc. v. Workers' Comp. Appeal Bd.*, 114 A.3d 27, 33 (Pa. Commw. Ct. 2015).

³⁶² See Nicolas, *supra* note 30, at 427 (citing *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 756 (1995) for the proposition that taxpayers' ability to sue for a refund of taxes collected under an unconstitutional law could be limited by the statute of limitations for tax actions); Tritt, *supra* note 30, at 943-44 (analogizing to retroactive remedial issues in the context of trusts and estates).

³⁶³ See, e.g., 735 ILL. COMP. STAT. 5/13-523 (2016) (noting that the statute of limitations is the same for personal injury actions).

certain period after the return at issue was filed if they can be brought at all.³⁶⁴

The scope of relief provides a tool for courts and legislatures to mitigate the effects of a determination that a couple has legally married.

In sum, courts and lawmakers have several options to craft rules that mitigate some of the more dangerous impacts of this Article's definition of marital choice. They could heighten burdens of proof where the consequences pose a significant risk to the parties' autonomy or vested legal rights or recognize marriages prospectively only. They could also approach disputes between the couple differently than disputes between a unified couple and the state or third parties.

IV. CHOICE RESOLUTIONS

This Part highlights two different types of choice problems to illustrate how my approach to defining marital choice would resolve questions that those problems pose.

A. Legally Impossible Choices

How should the law respond to a claim by a partner in a same-sex relationship that she is entitled to property rights going back to a time before same-sex marriage was legal because the couple would have married but for the legal impediment? There are clearly persuasive arguments in favor of granting the claim, as the party could be negatively impacted by measuring from a recent, formal date as opposed to some earlier time.³⁶⁵ As discussed in Part I, concerns about unfairness have led courts to recognize relationships as marriages if the couple would have married "but for" a legal impediment.³⁶⁶

Under the definition I provide in Part III.A, the court would not recognize an earlier choice to marry because the partners could not have consented to assume a set of core duties that the law would recognize as marriage.³⁶⁷ Because this approach may sound hard-hearted, further explanation is required.

³⁶⁴ See 26 U.S.C. § 6511 (2012).

³⁶⁵ See, e.g., Nicolas, *supra* note 30, at 396-99.

³⁶⁶ See *supra* notes 103-06 and accompanying text.

³⁶⁷ Depending on the state, their commitments may have given rise to contractual obligations. Compare *Marvin v. Marvin*, 557 P.2d 106, 116 (Cal. 1976) (allowing unmarried cohabitants to enter contracts regarding their earnings and property rights

The inquiry whether a party would have married at some earlier time is inherently indeterminate because it is inherently counterfactual: how can one choose to do something that is legally impossible to do? The conclusion by a court that a couple would have married is an act of retrospective prophecy.³⁶⁸ The court interprets the parties' actions at a historical moment when marriage equality is the law. This context casts previous conduct in the glow of inevitability. Years or decades ago, however, marriage equality was far from certain.³⁶⁹ Indeed, studies have shown that without marriage as an option, people struggled to define their relationships or to predict the legal ramifications of their actions.³⁷⁰

The significance of our choices is inevitably shaped by the landscape in which we make them. In *In re Madrone*, former same-sex partners Karah and Lorrena disputed whether they would have chosen to marry had the option been available to them.³⁷¹ Several years into their relationship, the couple had a commitment ceremony with family and friends. Both agreed that they did not intend to create a legal relationship because they "did not believe in such social constructs" and "shared a common belief in freedom from marriage."³⁷² Lorrena further asserted that she was hesitant about their relationship but took comfort in her knowledge that the ceremony *would not be legally binding*.³⁷³ The court acknowledged the difficulty of recreating a choice made under vastly different legal circumstances, but reasoned that the context could actually explain away the parties' opposition to

unless premised on sex), *with* *Blumenthal v. Brewer*, No. 118781, 2016 WL 6235511, at *14-15 (Ill. Aug. 18, 2016) (holding that individuals in marital-like relationships cannot agree to create marital-like obligations on public policy grounds).

³⁶⁸ See Matsumura, *Binding Future Selves*, *supra* note 150, at 114 (observing that courts often impose finality when it does not really exist); see also PETER BROOKS, *ENIGMAS OF IDENTITY* 134 (2011).

³⁶⁹ See, e.g., Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 286 (1994) (noting that it was "impossible to say" whether same-sex marriage would be legalized in the mid-1990s).

³⁷⁰ E.g., Corinne Reczek, Sinikka Elliot, & Debra Umberson, *Commitment Without Marriage: Union Formation Among Long-Term Same-Sex Couples*, 30 J. FAM. ISSUES 738, 745-48 (2009) (reporting results of an interview study in which long-term same-sex couples struggled to define when their relationships became committed, and how the role of commitment ceremonies altered their views of their relationships); see also Chambers, *supra* note 247, at 450 (noting that in 1996, early in the modern marriage equality movement, advocates of same-sex marriage focused more on the symbolism of legal recognition than on the legal consequences).

³⁷¹ *In re Madrone*, 350 P.3d 495, 496 (Or. Ct. App. 2015).

³⁷² *Id.* (internal quotation marks omitted).

³⁷³ *Id.* at 496-97.

marriage: “It stands to reason that a person who has been denied the benefits of a social institution might react to that denial by rejecting the institution’s validity or worth but might, once the prohibition is lifted, change his or her view and embrace the institution.”³⁷⁴ But the converse may also be true: it may be easier to nominally agree to something when that statement imposes no legal consequences. One might be more willing to call oneself someone’s “life partner” without the Damoclean sword of divorce hanging over one’s head.

Moreover, arguments in favor of such legally impossible choices depend on, and reinforce, unexamined assumptions about desert.³⁷⁵ Distinctions based on notions of desert are troubling because of their tendency to reinscribe a hierarchy of intimate relationships that privileges marriage over other types of relationships and expects that couples will choose to marry.

Recall the story of Stacey and Lesly discussed in the Introduction. In that case, the couple participated in a marriage ceremony one day before Lesly’s death, and a few weeks before such marriages were legal.³⁷⁶ In response to the defendant’s challenge to the validity of their marriage, the court clearly sympathized with Stacey, saying, “They wanted to marry, intended to marry, and did everything possible to legally marry while [Lesly] was still alive.”³⁷⁷ Yet couples who do not marry the moment the law allows are afforded much less sympathy. Elaine Villaverde and Karen Hight were registered domestic partners who did not marry during the two year period after same-sex marriage became legal in California.³⁷⁸ The court denied their subsequent spousal bankruptcy petition, blaming them for “their choice not to become spouses” and failure to “rip that badge [of inferiority] off by getting married.”³⁷⁹

These examples show that the law uses the choice to marry to reward and punish. Yet even a sympathetic case like Stacey and Lesly’s is not so clear-cut. Can we really say that Stacey and Lesly did “everything possible” to marry when they did not, unlike 18,000 same-sex couples, marry in the twenty-three-week window when

³⁷⁴ *Id.* at 502.

³⁷⁵ See Fred Feldman & Brad Skow, *Desert*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2015), <http://plato.stanford.edu/entries/desert/#Aca> (last visited July 25, 2016) (defining “[a] typical desert claim” as “a claim to the effect that someone deserves something from someone on some basis”).

³⁷⁶ See *Schuett v. FedEx Corp.*, 119 F. Supp. 3d 1155, 1158 (N.D. Cal. 2016).

³⁷⁷ *Id.* at 1161.

³⁷⁸ See *In re Villaverde*, 540 B.R. 431, 432 (Bankr. C.D. Cal. 2015).

³⁷⁹ *Id.* at 437.

same-sex marriages were legal in California in 2008, five years before Lesly's death?³⁸⁰ Of course, they might have had reasons for not marrying when so many others did — they might have felt uncertainty about the legality of those marriages, or did not have time to plan a wedding celebration, or might have had reservations about marrying — but then so might many others, including Elaine and Karen. These facts show that the cases are not really so differently situated that one can confidently say that they *deserve* opposite outcomes.

That the law should not conclude that couples in these circumstances have chosen to marry is not to say that couples would be left with no legal protections. It is particularly cruel for a government that prevented couples from legally marrying to turn around and deny entitlements based on the length of the parties' marriage.³⁸¹ Those governments could remedy the unfairness by relaxing durational requirements for same-sex couples or by making the effect of a legal marriage retroactive.³⁸² To the extent that this retroactivity imposes a financial burden, that burden would be justified by the state's responsibility for its own discriminatory conduct. This problem, moreover, will soon dissipate with the passage of time: as of the writing of this Article, every same-sex couple in the country has had the option to marry for over one year, obviating durational requirements of less than that length.³⁸³

Disputes between same-sex spouses over the length of their marriages, on the other hand, are only likely to increase as many relationships inevitably end.³⁸⁴ Unlike remedial backdating against the

³⁸⁰ Cf. *Strauss v. Horton*, 207 P.3d 48, 121 (Cal. 2009) (upholding the legality of 18,000 same-sex marriages performed in 2008 before Proposition 8 amended the California Constitution to limit marriage to opposite-sex couples), *abrogated by* *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). Stacey and Lesly could also have traveled out of state to marry.

³⁸¹ See Nicolas, *supra* note 30, at 437. Given the relatively short durational requirements in most cases, this problem should largely resolve itself.

³⁸² See *id.* at 37-49. This was effectively the outcome of a recent decision in which the Pennsylvania Superior Court granted a survivor's uncontested petition to establish the existence of a common law marriage against the estate of his spouse who died before same-sex marriage became legal in the state. See *In re Estate of Carter*, 2017 Pa. Super. LEXIS 256, at *21-24 (Pa. Super. Ct. Apr. 17, 2017). Importantly, in *Estate of Carter*, no one opposed the existence of a common law marriage: the petition was supported by the decedent's family. *Id.* at *21. The recognition of a marriage therefore posed no risk to the autonomy interest of one of the partners.

³⁸³ See *id.* at 6-7 (noting a minimum marriage length of nine to twelve months for most entitlements).

³⁸⁴ See generally Carroll & Odinet, *supra* note 230 (describing various property-related expectations that would be upended through the retroactive recognition of

government, to effectively deem a spouse married before she chose marriage would be to cast aside the functions of marital choice without regard to the parties' individual autonomy. Here, too, though, the law might offer some relief. Where a couple registered for a civil union or domestic partnership that created marriage-like rights,³⁸⁵ they also signed up for the obligations attendant to those statuses, which often included marriage-like remedies.³⁸⁶ Partners could establish similar obligations based on agreements or equity in jurisdictions that allow them.³⁸⁷ These remedies, however, cannot stem from an improper conclusion that the couple has chosen to marry.

B. *Conscriptive Common Law Marriage*

I earlier highlighted the case of Thomas Green, who, as discussed above, was deemed to be married to Linda Kunz, one of several women with whom he was cohabiting, so that he could be prosecuted for bigamy.³⁸⁸ My proposal would not permit this result.

Green challenged the constitutionality of the state's prosecution of him on the grounds that it infringed his right to the free exercise of religion.³⁸⁹ In that sense, he did not deny that he considered himself to be religiously married to Kunz. Moreover, he and Kunz (as well as the rest of his "wives") behaved in many respect like spouses do, engaging in intimate acts, raising children, and managing a shared household.³⁹⁰ But he also divorced Kunz before marrying another of his wives.³⁹¹ He did so knowing that plural marriages were both illegal and criminal. He therefore did not believe that his continued cohabitation with Kunz was creating open-ended duties that society and the law would recognize as marriage, nor would it be objectively reasonable for him to believe he was choosing to marry. Additionally, Green's use of

certain same-sex marriages).

³⁸⁵ See, e.g., Civil Union Law, 2005 Conn. Pub. Acts No. 05-10 § 14 (giving parties to a civil union the same legal rights as married couples).

³⁸⁶ See Tait, *supra* note 30, at 1306.

³⁸⁷ See, e.g., Ann Laquer Estin, *Ordinary Cohabitation*, 76 NOTRE DAME L. REV. 1381 (2001) (describing the range of remedies available to cohabiting couples). In fact, there is a significant history of same-sex couples using agreements to secure their respective interests in shared property before formal statuses became available. See Elizabeth S. Scott & Robert E. Scott, *From Contract to Status: Collaboration and the Evolution of Novel Family Relationships*, 115 COLUM. L. REV. 293, 346 (2015).

³⁸⁸ See *State v. Green*, 99 P.3d 820, 822-23 (Utah 2004).

³⁸⁹ *Id.* at 825.

³⁹⁰ See *id.* at 822-23.

³⁹¹ *Id.* at 822 n.4.

formal divorce should function as a type of shield: it provides strong evidence supporting the argument that he did not intend to believe himself to be or consent to be treated as legally married.

One justice, concurring in the result, expressed his reservations about the state's power to conscript Green into marriage, noting that many people, for non-religious reasons, enter into intimate relationships with people other than their spouses while still married, for instance, during periods of separation preceding divorce.³⁹² Theoretically, they too could be subject to criminal prosecution. The threat of prosecution raises the stakes of a determination that a couple is common-law-married, but only serves to highlight the risks that every common law marriage dispute poses.³⁹³

As the *Dutko v. Colvin*³⁹⁴ case discussed in Part I.C. demonstrates, the federal government also engages in marriage conscription. Within the SSI context, the government treats a cohabiting couple as married unless the couple can establish that they do not hold themselves out as married.³⁹⁵ This definition in turn can affect eligibility for Medicaid, which is based in part on SSI eligibility.³⁹⁶ This presumption in favor of marriage makes it too easy for the state to impose marriage against the will of the spouses. The facts in *Dutko* demonstrated, at most, that the partners had uncertain views about their relationship: Dutko referred to Belcher as her "spouse or relative" on an SSI application, but she also told a Social Security representative repeatedly that Belcher was her "boyfriend" and said that she was receiving health insurance benefits from Belcher's employer as his "domestic partner."³⁹⁷ This inconclusive and contradictory evidence cannot establish the choice of the parties to marry.

Of course, in adopting the presumption in favor of marriage, the Social Security Administration was likely trying to prevent opportunistic behavior by the partners. The rule in favor of finding an existing marriage and considering spousal income to determine

³⁹² *Id.* at 834 (Durham, C.J., concurring).

³⁹³ The very risk that an earlier common law marriage will render a later ceremonial marriage bigamous has led jurisdictions like the District of Columbia to adopt a presumption — "one of the strongest presumptions known to the law" — against recognizing the earlier marriage. *Mayo v. Ford*, 184 A.2d 38, 41 (D.C. 1962). If a clear and convincing evidence standard is needed to prevent that outcome, so to should such a standard apply here.

³⁹⁴ *Dutko v. Colvin*, No. 15-CV-10698, 2015 U.S. Dist. LEXIS 150194 (E.D. Mich. 2015).

³⁹⁵ *See supra* notes 140–42 and accompanying text.

³⁹⁶ *See* 42 C.F.R. § 435.120 (2012).

³⁹⁷ *Dutko*, 2015 U.S. Dist. LEXIS 150194, at *3-4.

eligibility for benefits privatizes dependency. Many disability rights advocates have characterized this approach as a marriage penalty, and have criticized marriage eligibility rules for means-tested programs like SSI and Medicaid for burdening the right of disabled people to marry.³⁹⁸ However one frames it, partners structuring their lives *around* the federal eligibility rules would not understand themselves to have assumed the open-ended duties of support that characterize marriage — exactly the opposite. The very adoption of the rule admits that the choice not to formally marry will often be intentional.

CONCLUSION

This Article has various implications for the future of marriage law in this country. First, its insights about what the choice to marry requires go hand-in-hand with arguments about the right not to marry. One's right not to marry is only infringed if we can say with some confidence that one has not exercised the choice to marry.

Second, this Article's analysis of the relationship between self-authorship and consent is relevant to policy proposals affecting non-marital relationships. The American Law Institute ("ALI") and influential scholars have proposed the creation of status obligations for couples that have cohabited for a sufficient length of time,³⁹⁹ created economic interdependency,⁴⁰⁰ or demonstrated the requisite commitment.⁴⁰¹ To these scholars, interpersonal duties do not arise from express commitments, but from the nature of the relationship

³⁹⁸ See, e.g., Elizabeth F. Emens, *Intimate Discrimination: The State's Role in the Accidents of Sex and Love*, 122 HARV. L. REV. 1307, 1390-91 (2009) (noting opposition to marriage penalties for disabled individuals); Robert E. Rains, *Disability and Family Relationships: Marriage Penalties and Support Analogies*, 22 GA. ST. U. L. REV. 122 (2006).

³⁹⁹ See AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS ch. 6 (2002); BOWMAN, *supra* note 37, at 221-23 (proposing that couples who cohabit for a period of two years or cohabit and have a child together be treated as if married unless they affirmatively contract out of the status). Scholar Grace Ganz Blumberg has also advocated for the equivalent treatment of married and cohabitating couples after the cohabitating relationship bears indicia of support and permanence. Grace Ganz Blumberg, *Cohabitation Without Marriage: A Different Perspective*, 28 UCLA L. REV. 1125, 1159-63 (1980).

⁴⁰⁰ See Alicia Brokars Kelly, *Actualizing Intimate Partnership Theory*, 50 FAM. CT. REV. 258, 259 (2012); Tait, *supra* note 30, at 1294 (proposing the imposition of marriage-like property obligations based on the partners' intent to form an economic partnership).

⁴⁰¹ See Waggoner, *supra* note 294, at 239-45 (proposing a "Uniform De Facto Marriage Act" that would deem couples "sharing a common household in a committed relationship" and not disqualified from marrying each other to be "spouses").

itself.⁴⁰² Relationships that are characterized by economic or emotional interdependency — those that mimic marriages — should trigger marriage-like obligations.⁴⁰³ Previous critiques of the ALI proposal have focused on threats to the autonomy of cohabitants, many of whom might not have intended to assume legal obligations.⁴⁰⁴ This Article sharpens that argument by revealing that choice functions as consent in two senses: consent to the redistribution of property between two individuals, and consent to different legal treatment based on marital status that might benefit or burden individuals.⁴⁰⁵ The ALI proposal is problematic precisely because it proposes private obligations in the absence of objective manifestations of the first type of consent, and further ignores the responsibility of the state to support the relationship.

Third, by clarifying what it means to enter marriage, this Article sheds light on the nature of marriage as an institution creating, but also depending upon, social norms. The importance of these norms as an organizing principle — both for people within and outside marriage — suggests an ongoing role for an institution with a relatively coherent and simple social meaning, both from the perspective of reducing information costs for those seeking to enter the institution,⁴⁰⁶ and those seeking to create relationships in marriage's shadow.⁴⁰⁷

⁴⁰² See Grace Ganz Blumberg, *The Regularization of Nonmarital Cohabitation: Rights and Responsibilities in the American Welfare State*, 76 NOTRE DAME L. REV. 1265, 1295-99 (2001) (defending the ALI proposal to impose marriage-like property obligations on people who cohabit for a certain length of time); Ira Mark Ellman, "Contract Thinking" Was Marvin's Fatal Flaw, 76 NOTRE DAME L. REV. 1365, 1373 (2001) ("[P]eople do not think of their intimate relationships in contract terms.").

⁴⁰³ See Ellman, *supra* note 402, at 1377-78; Garrison, *supra* note 242, at 834-38.

⁴⁰⁴ See, e.g., Garrison, *supra* note 242, at 856-57 (critiquing the threat of conscription to autonomy).

⁴⁰⁵ See *supra* notes 206-10 and accompanying text.

⁴⁰⁶ See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 4 (2000) (noting the principle that property rights must conform to certain standardized forms in order to effectively perform their functions).

⁴⁰⁷ Cf. Douglas NeJaime, *Before Marriage: The Unexplored History of Nonmarital Recognition and Its Relationship to Marriage*, 102 CALIF. L. REV. 87, 163 (2014) (observing the dialogical relationship between marriage and nonmarital relationships).