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## Marriage Fraud

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## Marriage Fraud

Kerry Abrams\*

*This Article examines the astonishing array of doctrines used to determine what constitutes marriage fraud. It begins by locating the traditional nineteenth-century annulment-by-fraud doctrine within the realm of contract fraud, observing that in the family law context fraudulent marriages were voidable solely at the option of the injured party. The Article then explains how, in the twentieth century, a massive expansion of public benefits tied to marriage prompted new marriage fraud doctrines to develop in various areas of the law, shifting the concept of the injured party from the defrauded spouse to the public at large. It proposes a framework for understanding these new doctrines by demonstrating that courts apply different tests for finding fraud depending on the value of the benefit sought compared to the cost to the individual of using marriage to obtain it. Furthermore, the Article argues that marriage is an ineffective means for distributing public benefits that serve specific objectives; in other*

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*words, marriage is being asked to do too much work. As a possible response to this problem, the Article concludes that lawmakers could disaggregate the components of marriage to which they attach public benefits. This would improve the efficacy of public benefits distribution without entirely dismantling the institution of marriage or jeopardizing the stability that it may provide to society.*

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## INTRODUCTION

In the last two decades, marriage has emerged as an enormously important topic of legal scholarship, not just in the area of traditional family law, but also in constitutional,<sup>1</sup> tax,<sup>2</sup> immigration,<sup>3</sup> social security,<sup>4</sup> welfare<sup>5</sup> and criminal<sup>6</sup> law. The marriage equality movement and its attendant legal questions of whether same-sex couples can be integrated successfully into marriage as we know it animates much of this scholarly interest.<sup>7</sup>

The scholarship on marriage has been remarkably polarizing in its definitions of and assessments of marriage as an institution. Much of the scholarship either advocates for the abolition of marriage altogether or for the replacement of marriage with domestic partnerships or civil unions for all.<sup>8</sup> On

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1. See, e.g., Ariela R. Dubler, *Sexing Skinner: History and the Politics of the Right to Marry*, 110 COLUM. L. REV. 1348 (2010); Martha C. Nussbaum, *A Right to Marry?*, 98 CALIF. L. REV. 667 (2010).

2. See, e.g., Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533 (1995); Edward McCaffery, *Taxation and the Family: A Fresh Look at Behavioral Gender Biases in the Code*, 40 UCLA L. REV. 983 (1993); Shari Motro, *A New "I Do": Towards a Marriage-Neutral Income Tax*, 91 IOWA L. REV. 1509 (2006); Lawrence Zelenak, *Marriage and the Income Tax*, 67 S. CAL. L. REV. 339 (1994).

3. See, e.g., Kerry Abrams, *Immigration and the Regulation of Marriage*, 91 MINN. L. REV. 1625 (2007); Jennifer M. Chacón, *Loving Across Borders: Immigration Law and the Limits of Loving*, 2007 WIS. L. REV. 345.

4. See, e.g., Mary E. Becker, *Obscuring the Struggle: Sex Discrimination, Society Security, and Stone, Seidman, Sunstein & Tushnet's Constitutional Law*, 89 COLUM. L. REV. 264 (1989); Kristin Collins, *Administering Marriage: Marriage-Based Entitlements, Bureaucracy and the Legal Construction of the Family*, 62 VAND. L. REV. 1085 (2009); Goodwin Liu, *Social Security and the Treatment of Marriage: Spousal Benefits, Earnings Sharing, and the Challenge of Reform*, 1999 WIS. L. REV. 1.

5. See, e.g., Anita Bernstein, *For and Against Marriage: A Revision*, 102 MICH. L. REV. 129 (2003); Jill Elaine Hasday, *The Canon of Family Law*, 57 STAN. L. REV. 825 (2004); Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 CALIF. L. REV. 1647 (2005).

6. See, e.g., Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Intimate Life*, 94 IOWA L. REV. 1253 (2009); Jeannie Suk, *Criminal Law Comes Home*, 116 YALE L.J. 2 (2006).

7. See, e.g., various essays in JUST MARRIAGE (Mary Lyndon Shanley ed., 2004); see also *Symposium: Abolishing Civil Marriage*, 27 CARDOZO L. REV. 1155 (2006).

8. See, e.g., MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES* (1995) (arguing that child-parent and other dependency relationships should be the subject of state recognition instead of marriage); NANCY POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE* (2009) (arguing for alternatives to marriage to determine when legally enforceable responsibilities and entitlements have accrued in interpersonal relationships); ROBIN WEST, *MARRIAGE, SEXUALITY, AND GENDER* 205–11 (2007) (advocating universal civil unions); Alice Ristoph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236 (2010) (developing a theory of disestablishment, analogous to religious disestablishment, of the family whereby the government would cease to prefer some family forms over others); Laura Rosenbury, *Friends with Benefits*, 106 MICH. L. REV. 189, 191–92, 229 (2007) (arguing that the traditional legal divide between recognizing caregiving by family members versus friends perpetuates gender inequality, and that rather than focusing on opening marriage to more people, legal reformers should develop ways for the state to recognize nonexclusive forms of caregiving, such as friendships).

the other side of the debate are conservatives who wish to retain marriage but limit it to heterosexual couples<sup>9</sup> and expansionists who also want to retain marriage but open it up to gays and lesbians.<sup>10</sup> The most common compromise position suggests retaining marriage but also making a registry or domestic partnership option available.<sup>11</sup>

This Article approaches the issues of how to define marriage and its proper place in our legal landscape from a different perspective. Instead of asking the question of what marriage *is*, the Article tries to determine what marriage *is not*. It does so by examining when and why the law determines that a particular marriage is a “sham” or a “fraud.” Charges of marriage fraud are becoming increasingly common. For example, one company was prosecuted for arranging marriages between immigrants and U.S. citizens who had never before met and supplying these couples with evidence they could later use to convince immigration officials of the validity of their marriages, including photographs of the brides in their wedding gowns and fancy fake wedding cakes.<sup>12</sup> Additionally, the wife of former New Jersey governor Jim McGreevey asked a court to annul her marriage, claiming she was “duped into marriage by a closeted gay man who needed the cover of a wife to advance his political career.”<sup>13</sup> A major airline sued nine of its pilots for fraudulently divorcing and remarrying their spouses in order to get early lump-sum payouts of their pensions.<sup>14</sup> Utah recently codified common law marriage in order to be able to prosecute fundamentalist Mormons for living a polygamous lifestyle while identifying themselves as “single” on their welfare applications.<sup>15</sup>

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9. See, e.g., Lynn D. Wardle, *Multiply and Replenish: Considering Same-Sex Marriage in Light of State Interests in Marital Procreation*, 24 HARV. J.L. & PUB. POL’Y 771 (2001).

10. See, e.g., William N. Eskridge, *Foreward: The Marriage Cases—Reversing the Burden of Inertia in a Pluralist Constitutional Democracy*, 97 CALIF. L. REV. 1785 (2009).

11. See, e.g., LINDA C. MCCLAIN, THE PLACE OF FAMILIES 198–205 (arguing that government should continue to support marriage and expand it to include same-sex couples but should also develop a registration system to support and recognize a broader range of relationships); Elizabeth S. Scott, *A World Without Marriage*, 41 FAM. L.Q. 537, 545–46 (2007) (arguing a position similar to that of McClain, *supra*); Barbara Stark, *Marriage Proposals: From One-Size-Fits-All to Postmodern Marriage Law*, 89 CALIF. L. REV. 1479 (2001) (advocating a “menu of options” approach); Edward Stein, *Looking Beyond Full Relationship Recognition for Couples Regardless of Sex: Abolition, Alternatives, and/or Functionalism*, 28 LAW & INEQ. 345, 371 (2010) (same). But see Mary Anne Case, *Marriage Licenses*, 89 MINN. L. REV. 1758 (2005) (critiquing both marriage and domestic partnership alternatives as not providing a wide enough range of options); James Herbie DiFonzo, *Unbundling Marriage*, 32 HOFSTRA L. REV. 31, 58–59 (2003) (analyzing “bundles” of benefits that make up marriage and considering which ones are necessary); Vivian Hamilton, *Mistaking Marriage for Social Policy*, 11 VA. J. SOC. POL’Y & L. 307, 370–71 (2006) (identifying functional components of marriage and arguing that only its caretaking and economic support functions deserve state support).

12. *Marriage Fraud Sting Nets Arrests in Florida*, N.Y. TIMES, May 10, 2008, at A13.

13. *McGreeveys Reach Deal on Custody of Daughter*, N.Y. TIMES, May 9, 2008, at B4.

14. Plaintiffs’ Original Complaint and Application for Declaratory and Injunctive Relief, Cont’l Pilots Ret. Plan Admin. Comm. v. Brown, 4:09-CV-01529 (S.D. Tex. May 20, 2009).

15. UTAH CODE ANN. § 30-1-4.5 (LexisNexis 2007); Ryan D. Tenney, *Tom Green, Common-law Marriage, and the Illegality of Putative Polygamy*, 17 B.Y.U. J. PUB. L. 141, 148–49 (2002) (discussing legislative history of Utah statute).

Although in each of these cases the charge is marriage fraud, no single legal marriage fraud test exists. Instead, as this Article reveals, an astonishing array of legal doctrines exist across many fields, all professing to regulate marriage fraud. There are marriage fraud doctrines in family law, tax law, social security law, welfare law, immigration law, and pension law. Many of these doctrines have developed only recently, as the law has grafted more and more benefits onto marital relationships. As a result, courts have increasingly found themselves playing the role of the “marriage police,” trying to determine whether a couple is “really” married or whether, instead, the couple married solely for the extensive benefits attached to marriage. Husbands and wives have also found themselves in the awkward position of trying to demonstrate that they married in good faith by producing documentation of their marriage, such as joint bank accounts and co-owned property, in addition to evidence of a shared life together and even evidence showing that they married for love.

Scholars have written about marriage fraud before, but always from within the context of a specific legal field. For instance, family law scholars will be familiar with the “annulment-by-fraud” doctrine that has been pervasive since the nineteenth century.<sup>16</sup> Scholars in other fields, such as tax law, are certainly aware that marriage is sometimes the basis of a bonus or an entitlement and that it could be invoked fraudulently. But no one has observed that marriage fraud doctrines exist across doctrinal boundaries, attempted to make sense of these doctrines as a whole, or developed a coherent explanation of why marriage fraud doctrines have proliferated so extensively in recent years.

Marriage fraud doctrines, this Article shows, vary considerably depending on the goals of the benefit a person is attempting to use marriage to obtain. The fraud doctrines, in other words, tell us what work the law is asking marriage to do. A close examination of these doctrines and an evaluation of their origin, development, and current utility can tell us something about marriage’s capacity to regulate the distribution of social benefits.

This Article argues that two basic types of marriage fraud doctrines exist. The first, the traditional annulment-by-fraud doctrine developed by family court judges in the nineteenth and early-twentieth centuries, is fundamentally a contract doctrine. A defrauded spouse could rescind a marriage contract through the process of annulment if he or she could demonstrate fraud.<sup>17</sup> The injured party was the other party to the contract—the spouse—not the public. Because marriage was thought of as a form of privatized welfare, the only legal space for sex and procreation, and a permanent relationship, the availability of annulment-by-fraud was severely limited. Only fraud going to the “essentials” of the marriage—lies about sex or procreation—qualified a marriage for annulment.

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16. Albert Momjian, *Annulment*, in 1 FAMILY LAW AND PRACTICE §§ 5.02, 5.03 (Arnold H. Rutkin ed., 2003).

17. *Id.*

In the mid-twentieth century, the law changed dramatically as the second basic type of marriage fraud evolved. The marriage fraud doctrines that proliferated during this time were not contractual in nature, but more akin to criminal law or civil penalties. The victim was not the defrauded spouse, but the public. This Article argues that the reasons for the shift from a solely contract-based doctrine were threefold: the attachment of substantial public benefits to marriage, the rise of no-fault divorce, and the decriminalization of nonmarital sex and procreation. In short, because marriage became easier to get in and out of, and because there were more benefits attached to it, people had greater incentives to use it instrumentally.

These new fraud doctrines vary from very simple rules asking that a couple demonstrate the existence of a valid marriage to the elaborate functional tests we see in immigration law and military benefits law, where the couple must demonstrate through extensive documentary and testimonial evidence that they intended to “establish a life together.” This Article provides a taxonomy of these various tests and theorizes that the more at stake for the public and the easier marriage is to exit while still retaining a benefit, the more intrusive and elaborate the test is likely to be. It also analyzes how marriage fraud might harm the public and assesses the possible social costs of policing it effectively.

The Article thus demonstrates that lawmakers became increasingly anxious about marriage fraud during the twentieth century and that much of this anxiety resulted from the attachment of numerous benefits to an institution that was no longer ubiquitous or permanent. But the Article does not conclude that we should therefore do away with marriage fraud doctrines. Rather, it suggests that these various doctrines might lead us to a critical insight about the legal function of marriage today. Simply put, we are asking marriage to do too much. Marriage has become the receptacle for all sorts of attempts to solve social problems, but it is no longer a robust enough institution to serve this function. Thus, the question scholars and lawmakers should be asking is not *whether* we should have marriage but, instead, *what* marriage is capable of doing.

Understanding marriage as a site for solving social problems provides a novel approach to the question of whether to abolish marriage altogether or let new groups in. Rather than adhering to either school of thought, this Article takes the position that we should isolate and disaggregate the various state interests in marriage and then reconfigure marriage to retain those features relevant to salient interests and to discard those relating to interests that would be better dealt with elsewhere. This approach is far less risky than doing away with marriage altogether and yet prevents us from further grafting benefits onto marriage that do not belong there and that the institution may not be able to sustain. While this approach does not solve the problem of whether same-sex couples or other groups fit within the rubric of marriage, it does lower the stakes for both sides of that debate. If marriage were no longer the primary

locus of public benefits, then it would no longer be the primary target of civil rights reforms or, for that matter, state regulation of relationships.

Part I of this Article analyzes the doctrine of fraud-based annulments. It locates this doctrine within the broader domain of contract fraud and shows why marriage fraud doctrine deviates from contract fraud principles. Part II analyzes the newer marriage fraud doctrines tied to various public benefits and creates a taxonomy of the array of methods that courts and legislatures have developed to identify and prevent fraud, including what it terms “formal marriage,” “marriage-plus,” “functional marriage,” and “integrated” tests. Part III shows why the singular doctrine of marriage fraud proliferated into multiple overlapping and contradictory doctrines during the twentieth century and explores how these new doctrines conceive of the public as the victim. Part IV examines the social costs associated with the ways these new doctrines police a marriage. It also explores how a more cohesive understanding of the disparate definitions of marriage revealed in the previous Parts could help lawmakers disaggregate the elements of marriage and consider ways to reconfigure them to carry out the work marriage is actually capable of doing for the state today.

## I.

### MARRIAGE FRAUD AS CONTRACT FRAUD

Traditional family law—the state law of marriage and divorce—treats marriage fraud as private and contractual, concerning solely the two spouses and not outside parties. The doctrine gives one spouse the opportunity to seek an annulment if the other spouse committed fraud in inducing the marriage.<sup>18</sup> An annulment is analogous to rescission in the contract context: it is a judicial decree that the marriage, in effect, never occurred.<sup>19</sup> A fraudulent marriage is voidable, not void. In other words, only the defrauded party can attack the marriage by requesting an annulment.<sup>20</sup> Third parties have no claim.<sup>21</sup> This doctrine persists today, but was largely developed in the nineteenth and early twentieth centuries.<sup>22</sup>

#### A. The “Essentials” Test

Annulment may be analogically similar to rescission, but it comes with an important difference. The courts crafting the doctrine of annulment-for-fraud

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18. See LESLIE J. HARRIS ET AL., FAMILY LAW 172, 78 (4th ed. 2010).

19. See Momjian, *supra* note 16, §§ 5.02, 5.03.

20. *Id.*

21. *Id.*; see also Estate of Dito v. Dito, 2008 WL 821694 (Cal. Ct. App. Mar. 28, 2008) (holding that grandson of deceased husband has no standing to challenge a marriage as fraudulent).

22. See JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA 180–87 (2011) (tracing the development of annulment law); HENDRIK HARTOG, MAN AND WIFE IN AMERICA 99 (2000) (discussing annulment in nineteenth-century family law).



narrowly limited the availability of the claim. Only fraud that goes to the “essentials” of the marriage can undo a marriage. In the vast majority of the cases, fraud that goes to the “essentials” involves misstatements or omissions about one party’s ability or willingness to engage in sexual intercourse, and, specifically, sexual intercourse leading to procreation.<sup>23</sup> For example, lying about a known inability to conceive is fraud sufficient to obtain an annulment.<sup>24</sup> So is lying about one’s ability to have intercourse.<sup>25</sup> Because even people who are capable of having intercourse and capable of procreation might choose not to engage in either, courts have also granted annulments based on fraud where a person represents that he or she is willing to consummate the marriage but has a secret desire not to do so,<sup>26</sup> or represents willingness to have children but does not intend to have them.<sup>27</sup> In this class of cases, courts have held that no explicit representation of willingness to consummate or have children is

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23. There are some exceptions. New York uses a “materiality” test that asks whether the fraud went to something “vital” to the marriage, and sometimes grants annulments under this test in cases not involving the essentials. *See, e.g., Kober v. Kober*, 211 N.E. 2d 817, 818 (N.Y. 1965) (granting annulment where husband concealed his Nazi past). New Jersey distinguishes between unconsummated and consummated marriages: unconsummated marriages can be annulled for fraud under a materiality test; consummated marriages can be annulled only for fraud going to the essentials. *Bilowit v. Dolitsky*, 304 A.2d 774, 775 (N.J. Super. Ct. Ch. Div. 1973). New York’s unusually broad test may be explained by its historically narrow grounds for divorce; until 1967, divorces were available only for adultery, so annulment doctrine may have provided “wiggle room” to end marriages where the defrauding spouse stubbornly refused to misbehave. Laurence Drew Borten, *Note: Sex, Procreation, and the State Interest in Marriage*, 102 COLUM. L. REV. 1089, 1096 n.33 (2002).

24. *See Vileta v. Vileta*, 128 P.2d 376 (Cal. Ct. App. 1942) (granting annulment for fraud where wife did not disclose known infertility); *Turner v. Avery*, 113 A. 710 (N.J. Ch. 1921) (granting annulment where wife did not tell husband she had undergone an operation rendering her barren); *Williams v. Williams*, 11 N.Y.S.2d 611 (Sup. Ct. 1939); *cf. Irving v. Irving*, 134 P.3d 718 (Nev. 2006) (denying annulment where forty-two-year-old wife had repeated miscarriages, based on lack of evidence of her infertility, lack of evidence that she knew she was infertile at time of marriage, and because husband should have known a forty-two-year-old woman might have difficulty conceiving but married her anyway).

25. *See Stegienko v. Stegienko*, 295 N.W. 252 (Mich. 1940) (granting annulment granted where wife, because of her physical condition, did not intend to have “normal marital intercourse” or bear children); *cf. Manbeck v. Manbeck*, 489 A.2d 748 (Pa. 1985) (granting annulment based on wife’s impotence—but not based on fraud—where impotence consisted of a “psychological block” against intercourse that led the marriage to go unconsummated for twenty-four years).

26. *Rathburn v. Rathburn*, 292 P.2d 274 (Cal. Ct. App. 1956) (granting annulment where wife secretly intended not to consummate marriage); *see also Hyslop v. Hyslop*, 2 So. 2d 443 (Ala. 1941) (granting annulment where husband claimed to have changed his mind about wanting to consummate marriage on the car ride home from the ceremony; court inferred from his actions that his “vows were taken without any bona fide purpose to keep them”); *Zerk v. Zerk*, 44 N.W.2d 568, 568 (Wis. 1950) (granting annulment where wife promised to “perform the duties of a wife and specifically to bear children” but then refused to consummate the marriage).

27. *See, e.g., Mothershead v. Mothershead*, No. B177926, 2005 WL 1460412 (Cal. Ct. App. June 22, 2005) (granting annulment where husband promised to have children but did not want to do so); *Sabbagh v. Copti*, 674 N.Y.S.2d 329 (App. Div. 1998) (granting annulment where husband stopped having sex with wife after her birth control injection wore off and told her that he had never loved her and never intended to have children with her); *cf. Wolens v. Wolens*, No. 99-FC-006390, 2004 WL 1909348 (Ky. Ct. App. Aug. 27, 2004) (denying annulment on procedural grounds, but allegation was that husband intentionally misled wife about desire to have children).

necessary; the promise to engage in “normal” and “natural” intercourse is implicit in the promise to marry, and in making such a promise, a person is making factual representations of capacity and intent.<sup>28</sup>

In sharp contrast, “[f]raudulent misrepresentations . . . as to birth, social position, fortune, good health, and temperament, cannot . . . vitiate [a marriage] contract.”<sup>29</sup> This prohibition has been applied widely, even in cases that would almost certainly meet the requirements to rescind a contract for fraudulent misrepresentation. In one Massachusetts case, *Chipman v. Johnston*, the husband claimed to be in the mining business, to be related to a prominent family conveniently located far away in Alaska, and to have substantial money in a bank in Spokane, Washington, all of which turned out to be false.<sup>30</sup> The court denied the wife an annulment because social standing was irrelevant to the essentials of the marriage: He was the human being whom she intended to marry. He did not impersonate another. Even though she was deluded as to his name and place of residence, that did not affect his personality. His representations as to relatives in another part of the country merely affected at most his social standing.<sup>31</sup>

In another case, *Beckley v. Beckley*, a husband met his future wife through a match-making service.<sup>32</sup> She claimed to be a Sunday school teacher and even forged a note from her pastor.<sup>33</sup> After the wedding, the wife induced him to sell her his house and give her \$235.<sup>34</sup> She promptly kicked him out, saying, “Get a move on you and move quick or I’ll blow you into eternity.”<sup>35</sup> When the husband sought an annulment, the court was unsympathetic. “There was neither fraud, error or duress as known to the law,” the court explained. “He got possession of the same flesh and bones he bargained for . . . the marriage was consummated; they lived together as husband and wife; they are husband and wife.”<sup>36</sup>

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28. *Maslow v. Maslow*, 255 P.2d 65, 68 (Cal. Ct. App. 1953) (granting annulment for fraud because promise to have “normal” and “natural” intercourse is “implicit” in promise to marry); *see also* *Gewirtz v. Gerwitz*, 66 N.Y.S.2d 327 (App. Div. 1945) (denying wife annulment because she waited four years to complain that husband refused to have unprotected sex because children would “annoy him,” but noting in dicta that “implicit in the marriage contract is the representation that the parties will have normal and natural relations and that they will not do anything which will frustrate the normal and natural result of those relations”).

29. *Nerini v. Nerini*, 11 Conn. Supp. 361, 365 (Super. Ct. 1943).

30. *Chipman v. Johnston*, 130 N.E. 65, 66 (Mass. 1921).

31. *Id.*

32. *Beckley v. Beckley*, 115 Ill. App. 27, 28 (1904).

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*; *see also* *Heath v. Heath*, 159 A. 418 (N.H. 1932) (denying annulment where husband claimed to have “sober and industrious habits and sexual virtue, savings and law-abiding conduct” but had been convicted of adultery); *Johnston v. Johnston*, 22 Cal. Rptr. 2d 253, 254 (Ct. App. 1993) (denying annulment where before marriage, husband was “just very polite. Very nice. Very respectful to [wife]. Clean-shaven. Bathed. Just very nice,” but after wedding, he “never treated [wife] with

*B. Explaining the “Essentials” Test*

Why would courts have so limited the availability of annulment-for-fraud? Three interlocking reasons stand out as particularly important: (1) marriage’s role as a form of privatized welfare; (2) the permanence of marriage; and (3) marriage’s role as the exclusive site for state-sanctioned sex and procreation.

First, through most of the nineteenth century and much of the twentieth, marriage functioned as the primary way to deal with dependency. As such, it was not merely contractual, but a hybrid institution that encompassed aspects of both status and contract. The agreement to marry was contractual in that it required the consent of each party, but once consent had been granted, it resulted in a legal status “affecting both the parties and the community.”<sup>37</sup> As the Supreme Court put it in the famous case of *Maynard v. Hill*, once two people enter into a marriage, “a relation between the parties is created which they cannot change. Other contracts may be modified, restricted, or enlarged, or entirely released upon the consent of the parties. Not so with marriage.”<sup>38</sup> Once a couple was married, certain benefits and obligations automatically attached to the status, including the right of a wife to her husband’s support, the right of a husband to the services of his wife, state involvement in dissolution of the union, and rights of each spouse in the property of the other.<sup>39</sup> “Society” had a “great interest” in maintaining this status, for marriage ensured that someone would provide men with services and that someone would provide women with financial support.<sup>40</sup> Making annulment easily available would have had disastrous economic consequences for many women.<sup>41</sup>

Second, marriage was also largely permanent at this point in history. Divorce was either unavailable or difficult to obtain.<sup>42</sup> If a commercial contract is breached, the nonbreaching party is generally entitled to expectancy damages.<sup>43</sup> There was no directly analogous remedy in marriage; the closest remedy was that an “innocent and injured” spouse might be entitled to a fault-

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respect . . . and on many occasions, unshaven,” as well as lazy, bad in bed, and an alcoholic).

37. *Chipman v. Johnston*, 130 N.E. 65, 66 (Mass. 1921).

38. *Maynard v. Hill*, 125 U.S. 190, 211 (1888).

39. See Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1389–92 (2000) (describing incidents of coverture); Reva B. Siegel, *Home as Work: The First Women’s Rights Claims Concerning Women’s Household Labor, 1850–1880*, 103 YALE L.J. 1073, 1082 (1994) [hereinafter Siegel, *Home as Work*] (describing economic aspects of coverture).

40. *Marshall v. Marshall*, 300 P. 816, 817 (Cal. 1931).

41. Because an annulment meant that a valid marriage had never happened, it also meant that there was no marital property to be divided and that a wife would not be eligible to receive alimony from her ex-husband. Recently, some states have amended this rule. See, e.g., CONN. GEN. STAT. § 46b-60 (2009); OR. REV. STAT. §§ 107.095, 107.105 (2009).

42. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 142–46 (3d ed. 2005) (discussing evolution of divorce law).

43. RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981).

based divorce.<sup>44</sup> Even where divorce was available, it did *not* give a party her expectancy damages, although it sometimes attempted to ameliorate the financial pain of lost support through doctrines such as alimony. It is difficult to quantify what expectancy damages would have looked like in any case; the mere fact of being a divorcée and the social stigma attached to it may have far outweighed any monetary compensation that a wife could have received. Furthermore, a husband's expectancy damages would have included some form of compensation for lost services, something that most wives would not have been in a financial position to provide. In short, divorce was not treated like breach, so it is unsurprising that annulment was not treated like rescission.

Finally, the annulment-for-fraud doctrine arose during a time when marriage was the only legal site for sex and procreation. Nonmarital sex was criminalized as either fornication or adultery.<sup>45</sup> Thus, in order to have a legal sex life at all, a person had to be married.<sup>46</sup> In addition, this doctrine arose during a period in which most children were economic actors in their own right, working on their families' farms or being sent out as apprentices or servants to supplement the family income, and their wages were the property of their fathers.<sup>47</sup> Whereas we now think of children as an additional expense, limiting someone's ability to procreate 150 years ago might well have curtailed his or her very livelihood. The frequent granting of annulments would have created more single people—potential fornicators. It also might have created unmarriageable single women, whom courts, by granting annulments, had decreed to have technically “never married” but as a social matter were nevertheless considered “damaged goods.”

Contrast with the “essentials” test the way in which courts dealt with marriage fraud claims in inheritance cases. There, the “victim” spouse was dead, and the “defrauding” spouse stood to inherit, either because of a bequest in a will or because the other spouse had died intestate. In these cases, the universal rule was that a third party—the decedent's child, other heirs, the administrator of the will, or anyone else—could not collaterally attack the marriage.<sup>48</sup> If the now-deceased spouse had been content with the marriage during his lifetime, there was no reason to second-guess his decision now that

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44. See HARRIS ET AL., *supra* note 18, at 296–300 (describing fault grounds for divorce).

45. See ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 45–56 (3d ed. 1982) (tracing the historical development of the crimes of adultery and fornication).

46. Of course, legal prohibitions did not manage to deter a thriving sex trade, especially by the late-nineteenth century. But the availability of extramarital sex did not make it legal. STEPHANIE COONTZ, MARRIAGE, A HISTORY 190 (2005).

47. See MICHAEL GROSSBERG, GOVERNING THE HEARTH 234–35 (1985).

48. See, e.g., *In re Dykema*, No. C5-96-669, 1996 WL 589104 (Minn. Ct. App. Oct. 15, 1996) (holding that “an annulment of marriage due to fraud is available only to the party who was fraudulently induced to marry. . . . No mechanism exists to nullify a marriage at the application of any person other than the defrauded party”); *Kunz v. Kunz*, 136 P.3d 1278 (Utah Ct. App. 2006) (holding that immigration marriage is voidable, not void, and therefore cannot be attacked after death of spouse).

the sexual and procreative functions of the marriage had ceased. Indeed, to do so might lead to problems of illegitimacy for the children of the marriage contrary to the wishes of the decedent.

So important was marriage as a safe space for sex and reproduction that courts almost universally upheld so-called “limited purpose marriages.” It was no secret that marriage gave people access to certain benefits, such as financial support, legal sex, and legitimate children, and subjected them to burdens. For men, these included the duty to support a wife, and, for women, these included the duty to obey a husband, which might entail the duty to engage in unwanted sex, an abdication of her choice of domicile and management of her property, and control over her own wages.<sup>49</sup> Because marriage so clearly came with such substantial burdens and benefits, people did sometimes marry for specific reasons. A law of “limited purpose” marriages arose, with courts generally denying annulments in cases where a couple married only to achieve a particular purpose. In one case, a man married so that he could retain his position at work and get a raise, but promised his future wife that he would seek an annulment the next day.<sup>50</sup> The court denied the annulment, stating that granting annulments merely because the parties had agreed to one beforehand “would destroy the dignity and lessen the importance of marriage.”<sup>51</sup>

The most common fact pattern for limited purpose marriages involved a couple who had married solely to legitimate a child. In these cases, courts almost universally denied annulments.<sup>52</sup> As one court put it, if the desire for an annulment “offends decency and the public policy” of the state, then no relief can be granted, “no matter how much [the husband] has been imposed upon.”<sup>53</sup> Although courts were fairly circumspect about the specifics of the public policy at issue, there are hints throughout the cases that two concerns were paramount: the protection of children born into the marriage, in terms of social stigma,

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49. See Siegel, *Home as Work*, *supra* note 39, at 1082 (summarizing property law aspects of coverture); Reva B. Siegel, “*The Rule of Love*”: *Wife-Beating as Prerogative and Privacy*, 105 *YALE L.J.* 2117, 2174, 2204 (1996) (discussing persistence of marital rape exemption and explaining domicile aspects of coverture).

50. *Hanson v. Hanson*, 191 N.E. 673, 674 (Mass. 1934); see also *De Vries v. De Vries*, 195 Ill. App. 4 (1915) (denying annulment where parties entered into marriage to prevent nullification of husband’s employment contract).

51. *Hanson*, 191 N.E. at 676.

52. See *Schibi v. Schibi*, 69 A.2d 831 (Conn. 1949) (denying annulment where parties married only to give a name to a prospective child); *Bishop v. Bishop*, 308 N.Y.S.2d 998 (Sup. Ct. 1970); *Erickson v. Erickson*, 48 N.Y.S.2d 588 (Sup. Ct. 1944) (holding similarly to *Schibi*); *Delfino v. Delfino*, 35 N.Y.S.2d 693 (Sup. Ct. 1942) (denying annulment where purpose of marriage was to protect the girl’s name and there was an understanding that the parties would not live together as man and wife); *Bove v. Pinciotti*, 46 Pa. D. & C. 159 (1942); *Campbell v. Moore*, 189 S.E.2d 497 (S.C. 1939) (refusing an annulment where parties entered marriage for the purpose of legitimizing a child); *Chander v. Chander*, No. 2937-98-4, 1999 WL 1129721 (Va. Ct. App. June 22, 1999) (denying annulment where wife married husband to get his pension with no intention to consummate marriage because husband knew that was the purpose of the marriage).

53. *Delfino*, 35 N.Y.S.2d at 695–96.

economic support, and inheritance rights; and a policy of using marriage to “cure” the illegality of out-of-wedlock sex.<sup>54</sup>

The rule stating that limited purpose marriages were valid even applied to cases in which one spouse married the other solely for immigration purposes. In one relatively recent case, for example, a Texas court declared a marriage valid, despite the fact that the parties entered into it solely so that the husband could gain entry to the United States.<sup>55</sup> The rule that “ceremonial marriage under proper certificate is legal and valid,” the court declared, “is one of the strongest in law and cannot be avoided merely because the marriage was entered into for a limited purpose.”<sup>56</sup> These rulings make sense in light of the doctrine of annulment-for-fraud. When both parties know of the limited purpose for the marriage, neither one has been defrauded. There is no private party “victim”; the only potential victims are third parties, including the state. The contractual nature of the annulment remedy precludes compensation to third parties. As we shall see, other, noncontractual marriage fraud doctrines arose to deal with the problem of injury to the state.

Historically, marriages entered into in jest constituted the major exception to annulment-for-fraud cases. In these cases, courts reasoned that consent had not been given because the parties did not mean the marriage to have any effect whatsoever.<sup>57</sup> The jest exception persists today: the most famous recent example occurred when a court annulled pop singer Britney Spears’ Las Vegas marriage to her high school friend, Jason Alexander. Hours after the wedding she sought an annulment, stating in legal papers that she “lacked understanding of her actions to the extent that she was incapable of agreeing to the marriage because [she and Alexander] did not know each other[’]s likes and dislikes, each other[’]s desires to have or not have children, and each other[’]s desires as to State of residency.”<sup>58</sup> In other words, there could be no consent without knowledge, or, as Spears’s publicist put it, it was “a joke [taken] too far.”<sup>59</sup> Thus, the jest cases can be seen not only as an exception to the usual “limited purpose marriage” cases, but also as an entirely separate category of cases altogether: the legal theory in these cases is not fraud but lack of capacity.

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54. See cases cited *supra* note 52. For more on the idea of marriage “curing” illicit sex, see Ariela Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L.J. 756 (2006); Melissa Murray, *Marriage as Punishment* (July 22, 2011) (unpublished draft) (on file with author) (discussing marriage as a punishment for criminal sexual behavior).

55. *Mpiliris v. Hellenic Lines, Ltd.*, 323 F. Supp. 865 (S.D. Tex. 1969), *aff’d*, 440 F.2d 1163 (5th Cir. 1971) (holding that marriage was valid for purposes of bringing a wrongful death action under the Jones Act).

56. *Id.*

57. See *McClurg v. Terry*, 21 N.J. Eq. 225 (1870) (holding marriage void where vows were taken as “a mere jest got up in the exuberance of spirits to amuse the company and themselves”).

58. *Spears v. Alexander*, No. D311371 (Nev. Dist. Ct., Clark County, Jan. 5, 2004).

59. Glenn Puit, *Britney Spears’ 55-Hour Marriage Annulled*, LAS VEGAS REVIEW-JOURNAL, Jan. 6, 2004, [http://www.reviewjournal.com/lvrj\\_home/2004/Jan-06-Tue-2004/news/22935262.html](http://www.reviewjournal.com/lvrj_home/2004/Jan-06-Tue-2004/news/22935262.html), discussed in GROSSMAN & FRIEDMAN, *supra* note 22, at 82.

The marriage fraud doctrine used in annulment cases, then, is quite narrow. Only the defrauded spouse can bring a claim, and courts only accept claims that “go to the essentials” of the marriage—those concerning sex and procreation.<sup>60</sup>

## II.

### PUBLIC BENEFITS FRAUD TESTS

The contractual model of marriage fraud that developed during the nineteenth century has persisted into the twentieth and twenty-first, but new models have sprung up alongside it. Beginning in the mid-twentieth century, new marriage fraud doctrines developed in the areas of tax, immigration, pension, social security, military benefits, and insurance law.<sup>61</sup> Under these theories, the government or an employer, rather than a defrauded spouse, could bring a marriage fraud claim. Each of these areas of law has developed its own definition of what counts as marriage fraud, and these definitions differ wildly from each other and from the annulment-for-fraud test. In many cases, fraud that would secure an annulment is not sufficient to create civil or criminal liability for fraud in a case brought by the state. In many more cases, fraud that would be insufficient to obtain an annulment is more than enough to result in a civil or criminal penalty. In fact, quite often there is no “victim” in the traditional contract sense: both parties to the marriage knew exactly why they were marrying—for insurance benefits, immigration status, or access to a pension. The new marriage fraud doctrines acknowledge not only that the state has an interest in the validity of a marriage, but that this interest might conflict with the interests of both spouses.

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60. Recently, however, some courts have begun to deviate from the long-standing “essentials” doctrine, stretching it to include cases that not only go to willingness or ability to engage in procreative sex, but to other issues concerning sex, such as intent to remain faithful. *See In re Ramirez*, 81 Cal. Rptr. 3d 180, 185 (Ct. App. 2008) (holding that the husband’s actions in marrying wife while continuing to carry on a sexual relationship with her sister “directly relates to a sexual aspect of marriage—sexual fidelity”); *Rabie v. Rabie*, 115 Cal. Rptr. 594, 597 (Ct. App. 1974) (granting annulment where husband never had the intention to fulfill marital duties to his wife, “especially the duties to remain faithful to [her] and remain married to her”); *V.J.S. v. M.J.B.*, 592 A.2d 328, 329 (N.J. Super. Ct. Ch. Div. 1991) (holding that “it is axiomatic that . . . a party will be entitled to an annulment when the spouse *refuses* to have children . . . [and that] the converse is also true . . . a party will be entitled to an annulment when the spouse *insists* on having children, contrary to the express agreement of the parties prior to marriage that they would *not* have children”).

61. Pension fraud cases also developed earlier, as widow’s war pensions were one of the few public benefits tied to marriage that existed in the eighteenth and nineteenth centuries. *See Collins*, *supra* note 4 (discussing Revolutionary War widows’ pensions); *see also* THEDA SKOPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* 66 (1992) (discussing widespread availability of widows’ pensions in the late-nineteenth century); Katherine Franke, *Becoming a Citizen: Post-Bellum Regulation of African-American Marriages*, 11 *YALE J.L. & HUMAN.* 251, 283–84 (discussing Freedman’s Bureau practice of forcing former slaves to choose one husband or one wife from several partners in order to determine who would receive benefits). But it was not until the mid-twentieth century that extensive public benefits attached themselves to most marriages.

While each of these doctrines shares a common goal of ferreting out parties attempting to use marriage instrumentally to obtain a public benefit, how they achieve this goal varies greatly depending on the legal context. This Part categorizes the doctrines based on the tests they employ. It begins by exploring two types of tests that employ bright-line rules: tests that merely require proof of a formal marriage, and “marriage-plus” tests that require a formal marriage plus some other objectively ascertainable criteria, such as age, cohabitation, or being married for a set period of time. It then discusses functional tests, which require a couple to demonstrate that they are “acting married” in order to overcome a charge of marriage fraud. Finally, it analyzes “integrated” tests—tests incorporating both formal, bright-line rules and subjective, functional determinations of whether a marriage is *bona fide*.

### A. Formal Marriage Tests

The simplest test for detecting marriage fraud is the absence of a valid marriage. Requiring a marriage certificate is an easy, bright-line rule that simply asks about the status of the marriage without inquiring into its particulars.<sup>62</sup> Formal marriage tests have the obvious benefit of being easy to administer.<sup>63</sup> They make the most of marriage *qua* status: people might *try* to contract around the specific incidents of marriage, but the status aspect of marriage is robust, and people will be held to the obligations and entitled to the benefits of marriage regardless of their particular intentions or behavior. The disadvantage of a formal rule is that it is both over- and under-inclusive. Some legally married people will not be the kind of people the legislature is trying to benefit, and some nonmarried people may be more worthy.

Contemporary examples of formal marriage rules include some aspects of the federal Internal Revenue Code. For federal income tax purposes, a couple is married if they are married on December 31 of the tax year in question.<sup>64</sup> Only a formal marriage counts for determining whether a couple will be treated as married.<sup>65</sup> Marriage can make an important difference in a couple’s tax

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62. A marriage that is not legally valid would be a marriage where there is no certificate, except in states recognizing common law marriage, or a marriage that is void (as opposed to voidable), such as a bigamous or incestuous marriage. *See supra* Section I.A. Some laws do not even require a certificate for most claimants. For example, a spouse’s statement on an application for social security retirement benefits that he or she was ceremonially married to the working spouse will be accepted as proof if the working spouse confirms it in writing, unless the marriage is less than two years old or there is another reason to doubt the relationship. *See* 20 C.F.R. § 404.725 (2011).

63. For the classic exposition on the virtues of rules versus standards, see HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* (tentative ed. 1958). For a critique of how and when rules and standards are deployed, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

64. I.R.C. § 7703(a) (2006).

65. As we shall see, federal law makes some exceptions to this rule. A same-sex couple who is formally married, for example, will not be treated as married under the Defense of Marriage Act, 1 U.S.C. § 7 (2006).



liability. If a husband's and wife's respective incomes are fairly close in amount, then together they will likely pay substantially more tax than they would have had they been two single people declaring exactly the same income. If their incomes are wildly disparate, however, or if one of them does not have any income at all, then they will pay substantially less than they would pay separately. These tax consequences are commonly referred to as "the marriage penalty" and "the marriage bonus," respectively.<sup>66</sup> What happens if a couple is not formally married but lives together in a long-term relationship that functionally looks like a marriage? Federal tax law treats them as unmarried, and if they seek to obtain the "marriage bonus" by untruthfully stating that they are married, the state can prosecute them for it.<sup>67</sup>

Despite federal uniformity in the availability of marriage-based benefits, whether a particular marriage will be considered formally valid depends on state family law. As a result, although one might assume that formal tests would lead to greater uniformity than functional tests, the use of federal formal marriage tests sometimes leads to wildly disparate outcomes depending on the state law in question. For example, in *U.S. v. Dedman*, a recent marriage fraud prosecution over military death benefits, a young woman named Nelva Holland had married a much older man, John Watson, and claimed entitlement to his military pension.<sup>68</sup> Unfortunately, she was related to her deceased husband by adoption as well as marriage: Watson had adopted Darlene Dedman, a family friend, as an adult, who in turn had adopted Holland when she was nineteen years old, so that she could list Holland as her child for health insurance purposes.<sup>69</sup> Holland was therefore her husband's adoptive granddaughter, and under Arkansas law, where this marriage occurred, a marriage between adoptive relatives was void.<sup>70</sup> Because the marriage was void, the Sixth Circuit upheld a criminal conviction of Dedman (who was both the adoptive daughter

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66. For detailed explanations and critiques, see Motro, *supra* note 2, at 1512; Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805, 807–08 (2008); Marjorie E. Kornhauser, *Wedded to the Joint Return: Culture and the Persistence of the Marital Unit in the American Income Tax*, 11 THEORETICAL INQUIRIES L. 631 (2010); Zelenak, *supra* note 2, at 342.

67. See, e.g., *Freck v. I.R.S.*, 810 F. Supp. 597 (D. Pa. 1992), *vacated*, 37 F.3d 986 (3d Cir. 1994) (ruling that a woman could not avoid tax liability as an "innocent spouse" after she signed tax returns in which the man she was living with underreported their income and where the couple held themselves out as husband and wife and filed joint tax returns but were never married in a formal ceremony and their state of domicile did not recognize common law marriage); *Lizalek v. Comm'r*, 97 T.C.M. (CCH) 1639 (2009) (T.C. Memo 2009-122), *available at* 2009 WL 1530160 (holding a woman not liable for taxes on one-half of her unmarried partner's income where they were "married under the laws of God" but had no marriage certificate and their state of domicile did not recognize common law marriage).

68. *United States v. Dedman*, 527 F.3d 577, 581–82 (6th Cir. 2008); see also 10 U.S.C. § 1477 (2006) (setting forth death benefits for military spouses); 32 C.F.R. § 716.4 (2011) (first-in-line eligible survivor for military death gratuity is a spouse who is "legally married to the member at the time of the member's death").

69. *Dedman*, 527 F.3d at 582–83.

70. *Id.*

of the husband, Watson, and the adoptive mother of the wife, Holland) for making false claims for Watson's pension benefits on her daughter's behalf.<sup>71</sup> The marriage, however, would have been valid in the majority of states, which do not prohibit marriage based on adoptive relationships. That the marriage occurred in Arkansas, then, was "bad luck" according to the court.<sup>72</sup> The court even noted that so long as the underlying marriage was valid, "any person with nothing but the worst motives could enter into a marriage . . . and qualify" for benefits without violating the law.<sup>73</sup>

While formal marriage tests have the benefit of simple administration, they may actually incentivize instrumental marriages. Take, for example, laws concerning eligibility for health insurance.<sup>74</sup> Courts have upheld convictions for insurance fraud and larceny where a person identified a significant other as a "spouse" on a health insurance application.<sup>75</sup> But people who marry only for insurance are nevertheless entitled to it.<sup>76</sup> In some cases, romantic couples or friends who have been together for many years without marriage have chosen to marry solely for health insurance coverage.<sup>77</sup> It is, of course, the tying of the benefit itself—here, health insurance—to marriage that creates the incentive to marry, not the formal rule. But the existence of the formal rule, as opposed to a

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71. *Id.* at 582–83, 588, 603.

72. *Id.* at 597.

73. *Id.*

74. Many employers routinely provide health insurance for the spouses of employees as a matter of custom. Michael A. Ash & M. V. Lee Badgett, *Separate and Unequal: The Effect of Unequal Access to Employment-Based Health Insurance on Same-Sex and Unmarried Different-Sex Couples*, 24 CONTEMP. ECON. POL'Y 582 (2006). Federal law further supports these programs by considering insurance benefits to spouses as not constituting a taxable transfer of income. *Id.* at 474; I.R.C. § 105(b).

75. *See, e.g.,* *Asher v. Alkan Shelter*, 212 P.3d 772 (Alaska 2009) (affirming trial court's determination that ex-wife was liable for fraud when ex-husband represented her as his wife to his employer in order to obtain health insurance for her and she knowingly paid husband for the insurance); *State v. Nosik*, 715 A.2d 673 (Conn. 1998) (affirming trial court's decision to convict woman of insurance fraud and larceny and sentence her to two years of incarceration and five years of probation after she listed her "boyfriend" as a "spouse" on health insurance application and insurance company paid out over \$10,000 for the man's medical bills).

76. One insurance industry spokesman told a reporter that it is unlikely that an insurer would deny coverage to anyone who married for insurance benefits. "I think most people would agree this doesn't rise to the level of fraud." *See Saying "I Do" for a Health Plan*, UNMARRIEDAMERICA.ORG (June 28, 2004), [http://www.unmarriedamerica.org/members/news/2004/May-News/Saying\\_I\\_do\\_for\\_a\\_health\\_plan.htm](http://www.unmarriedamerica.org/members/news/2004/May-News/Saying_I_do_for_a_health_plan.htm) (statement of Dave Hennings, spokesman for the National Health Care Anti-Fraud Association in Washington, D.C.).

77. The late feminist author Andrea Dworkin and her long-term companion, feminist writer John Stoltenberg married, according to Stoltenberg, for insurance reasons due to Dworkin's poor health. *See* Ariel Levy, *Foreward* to ANDREA DWORKIN, *INTERCOURSE*, at xxv (twentieth anniversary ed. 2007) (recounting Stoltenberg's statement at Dworkin's memorial service that their reasons for marrying were practical: "[i]f Dworkin had not been his legal wife, she would not have been covered by his health insurance, and the bills for the frequent surgeries and hospital stays that punctuated the end of her life would have left the couple in financial ruins"); *see also* *Saying "I Do" for a Health Plan*, *supra* note 76 (documenting incidents of heterosexual couples marrying for insurance purposes).

more intrusive functional test, makes it easy to take advantage of the benefit if it is worth it to a particular couple without inviting state scrutiny.

Formal rules usually conceive of marriage as a proxy for financial interdependence and often as a proxy for a traditional relationship in which one spouse—usually a woman—is dependent upon the other—usually a man.<sup>78</sup> The marriage bonus in tax law, for example, is given to couples who have structured their work lives so that one of them is earning most of the money. (The marriage penalty can be seen not as a penalty on marriage itself but as a penalty on egalitarian marriage.) Pension benefits are made available to spouses of wage earners either because of an assumption that the non-wage-earning spouse contributed through homemaking to the earner's ability to work or on a partnership theory of marriage where couples are assumed to be financially interdependent. Health insurance benefits go to spouses because often there is only one fully employed member of a marital couple, especially if the couple has children.

In addition to their use as rules that regulate the granting of public benefits, formal marriage rules can also ensure that married people do *not* obtain benefits designed for single people. For example, in *People v. Omar*, a woman received cash public assistance, food stamps, and Medi-Cal benefits in the amount of \$20,655 and was prosecuted for welfare fraud and perjury.<sup>79</sup> The defendant had concealed her marriage to her husband, who owned a house, at least two beauty parlors, and a boat and trailer; assets which, along with his unreported income, would have rendered her ineligible for public assistance benefits.<sup>80</sup> In *Omar*, it appears that the husband was indeed supporting the wife and that she therefore did not need welfare.<sup>81</sup>

Formal tests can be under-inclusive, as even a marriage in which one spouse refused to support the other would disqualify the otherwise eligible spouse. The remedy for the needy spouse in such a case would be divorce, followed by an application for benefits, not a claim that the marriage was not “really” a marriage.<sup>82</sup> And in some cases, these rules incentivize the parties not to marry at all. In these cases, marriage still functions as a proxy for financial

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78. For a discussion of the gendered origins of these rules, see *infra* Subsection III.A.1.

79. *People v. Omar*, No. F039137, 2002 WL 1943501 (Cal. Ct. App. Aug. 23, 2002) (imposing a three-year sentence, permanently disqualifying defendant from receiving cash public assistance benefits and disqualifying her from receiving food stamp benefits for one year); see also *State v. Martin*, 616 P.2d 193 (Haw. 1980) (upholding conviction of woman who wrongfully obtained public assistance monies exceeding two hundred dollars by deception as to her marital status and the employment earnings of herself and her husband).

80. *Omar*, 2002 WL 1943501 at \*1.

81. *Id.*

82. Social security law, in some cases, creates an incentive for couples not to marry. If one member of a couple contemplating marriage was married before, she will lose the right to 50 percent of the value of her ex-spouse's social security payments on retirement if she remarries, and may never recoup the benefit through her new marriage. 42 U.S.C. §§ 402(b)(1)(C), (b)(1)(H), (c)(1)(C), (c)(1)(H) (2006).

interdependence, and fraud occurs when the person seeking benefits has concealed the existence of a breadwinning spouse.

### B. “Marriage-Plus” Tests

Most bright-line rules start with a formal requirement of a marriage certificate; some, like the ones described above, stop there. Others add further layers, including temporal, age, procreative, or cohabitation requirements. These rules all share with formal marriage-only rules a preference for bright-line clarity regarding eligibility, but differ from those rules in their anxiety that a simple marriage certificate may be insufficient to ensure that the types of marriages that privileged by the benefit are the types the legislature wants to favor.

#### 1. Temporal Requirements

In some areas of law, legislatures have determined that the easiest way to prevent fraud is simply to create a temporal requirement. If a marriage has not lasted for a specified period of time, then the spouses will not be eligible for benefits based on the marriage. For example, to be eligible to receive veteran’s death benefits a surviving spouse must have been married to a military veteran for at least one year immediately before the pensioner’s death.<sup>83</sup> Thus, in the *Dedman* case discussed earlier, had the marriage between adoptive grandfather and granddaughter been valid, it would have qualified under this test because they had been married for more than one year when the grandfather died and his wife gained access to his pension.<sup>84</sup> Social security law uses a similar scheme: a couple must be married for at least nine months before one of them becomes eligible to receive the other’s social security benefits in the event of his or her death.<sup>85</sup> In a constitutional challenge to the social security rule, the Supreme Court acknowledged that it might sometimes be overbroad, excluding legitimate claimants in order to discourage sham relationships, but upheld the rule under rational basis review.<sup>86</sup> The Court reasoned that while some worthy individuals would be excluded from benefits, the efficiency that would be afforded to numerous other claimants, protecting them from “uncertainties and delays” and obviating the “necessity for large numbers of individualized determinations,” more than compensated for the minor social cost.<sup>87</sup>

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83. *United States v. Dedman*, 527 F.3d 577 (6th Cir. 2008) (stating in dicta that court would not entertain a sham marriage claim because the rule preventing fraudulent marriage was a time-based rule and nothing in the statute referred to parties’ intent).

84. *Id.*

85. 42 U.S.C. §§ 416(c)(1)(e), (g)(1)(e) (2004).

86. *Weinberger v. Salfi*, 422 U.S. 749, 782 (1975).

87. *Id.* at 783; *see also* 29 U.S.C. § 1055(4) (2006) (allowing employer pension plans governed by ERISA to limit definition of spouse to those who have been married throughout the one-year period immediately before the participant’s annuity starting date or death).

Another kind of temporal rule evaluates the value of a marriage, post-divorce, by its length. To be eligible for death-related social security benefits, a divorced person must demonstrate that the marriage upon which the benefits are based lasted at least ten years and that the surviving spouse remained unmarried following the divorce.<sup>88</sup> This eligibility rule can be construed as an antifraud measure that prevents people who, without the time limits, might game the system and collect social security benefits from multiple former spouses, or marry someone on his deathbed solely for his benefits. Here, a formal marriage requirement standing alone functions as a proxy for financial dependence; the addition of a time requirement functions as a proxy for commitment and relative exclusivity. It rewards the traditional gendered division of labor and an antiquated notion of fidelity, awarding benefits to spouses who were dependent on traditional breadwinners during long-term marriages and, by not remarrying, presumably remained dependent and chaste between divorce and the partner's death.

## 2. Age Rules

A less common method for preventing marriage fraud is an age requirement. New Jersey, for example, has an unusual age-based rule for determining whether surviving spouses of certain government employees can receive widow's benefits. Under the New Jersey statute, a "surviving spouse" is a person who married the employee "prior to the time when such employee reached the age of 50 years."<sup>89</sup> The statute then further limits the availability of benefits by stating that "[n]o such surviving spouse shall be eligible for any benefit hereunder who was or shall be more than 15 years younger than the employee at the time of their marriage."<sup>90</sup> Thus, the statute views with suspicion marriages of people over fifty, or marriages between people with significant age gaps. In successfully defending the statute against a constitutional challenge, New Jersey argued that the law had been designed to respond to "trouble with 'death bed marriages[,] which necessitated the paying out of benefits . . . for substantial periods beyond those reasonably calculated from actuarial tables."<sup>91</sup> The state needed to develop a system "to prevent fraud by insuring that benefits inure[d] only to those wives who truly qualif[ied] as bona fide widows, thereby denying benefits to bogus widows."<sup>92</sup> Applying rational basis review, the court determined that even if the statute resulted in

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88. Collins, *supra* note 4, at 1166.

89. N.J. STAT. ANN. § 43:10-18.64(h) (1991).

90. N.J. STAT. ANN. § 43:10-18.50. The trial court opinion in *Lewis v. Harris*, a recent case in which same-sex couples sued for the right to marry in New Jersey, cited *Reiser v. Pension Comm'n of Passaic*, 370 A.2d 902 (N.J. Super. Ct. Law Div. 1976), for the proposition that "courts will not second-guess the Legislature's policy decisions regarding economic, social and philosophical issues." No. MER-L-15-03, 2003 WL 23191114, at \*2 (N.J. Super. Ct. Law Div. Nov. 5, 2003).

91. *Reiser*, 370 A.2d at 912.

92. *Id.*

eliminating some bona fide widows from the pension scheme, it was enough that there was an “evil at hand for correction” and that the law was a rational way to correct it.<sup>93</sup>

Here, marriage once again functions as a proxy for dependency and age steps in as a proxy for long-term commitment. Laws such as New Jersey’s presume that parties who enter into marriages with partners over fifty or more than fifteen years their senior invest less in their relationships, and are therefore less worthy of spousal benefits, than their counterparts in age-similar relationships.

### 3. Procreation Rules

Some legal schemes use children as a proxy for a valid marriage. In social security law, for example, there is an exception to the rule that a couple must be married at least nine months before one of them can receive benefits based on the death of the other. If the surviving spouse is the parent of the deceased spouse’s child, if he or she adopted a child with the deceased spouse, or if either spouse adopted the other’s child, then the surviving spouse qualifies for benefits regardless of the length of the marriage.<sup>94</sup> These rules assume a close link between marriage and procreation: people who have taken on legal obligations to the same child are more likely to also have made a bona fide commitment to each other. Here, the child substitutes for time, which serves as a proxy for long-term commitment, or perhaps the child is itself evidence of the existence of a conjugal family.

### 4. Cohabitation Rules

In addition, some legal doctrines use cohabitation in addition to marriage as a means of determining whether a marriage is legally valid. For example, a Minnesota statute requires a spouse of a state employee to be residing with him at the time of his death to be eligible for his pension benefits. The legislature appears to have been motivated by a desire to both provide “an incentive for spouses to stay with and care for the pensioner” and to “prevent sham marriages.”<sup>95</sup> Here, cohabitation is a proxy for commitment; the law assumes that cohabiting solely for a pension will be difficult to keep up. Similarly,

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93. *Id.* at 190, 914.

94. 42 U.S.C. § 416(a)(2) (2006) (defining “surviving spouse”); § 416(c)(1) (defining “widow”); § 416(g)(1) (defining “widower”). Federal regulations add a requirement that a child born to the marriage be the “natural” child of both parents. 20 C.F.R. § 404.335 (2011).

95. *Scott v. Minneapolis Police Relief Ass’n*, 615 N.W.2d 66, 75–76 (Minn. 2000). Both the New Jersey statute discussed in *Reiser*, see *supra* note 91, and the Minnesota statute discussed in *Scott* involved government-run pension plans and cited the stability of public finances and the threat of sham marriages as justification for statutory eligibility requirements. The lack of case law concerning inquiries into the validity of a marriage in the insurance and *private* pension-plan context may be explained by the possibility that private entities administering insurance or pension plans simply “price-in” the cost of dealing with sham marriages into all issued policies.

federal tax law uses a formal rule for marriage but makes an exception for some married couples who do not cohabit.<sup>96</sup>

### 5. Different Sex Rules

Under the Defense of Marriage Act (DOMA), the word “marriage” means “only a legal union between one man and one woman as husband and wife,” and the word “spouse” refers “only to a person of the opposite sex who is a husband or a wife.”<sup>97</sup> As a result, anyone seeking a federal benefit based on a same-sex marriage will be denied the benefit regardless of the validity of the marriage.<sup>98</sup> This will be true even if a marriage is recognized by the state where it was celebrated. Because same-sex marriage is now available<sup>99</sup> or recognized<sup>100</sup> in a variety of jurisdictions, conflicts between some states’ recognition of marriage and the lack of federal recognition are growing.<sup>101</sup> The

96. 26 C.F.R. § 1.7703-1(b) (setting forth requirements for “married individuals living apart” to include the maintenance of a separate household for more than half of the taxable year and the presence of a dependent child in the household).

97. 1 U.S.C. § 7 (federal definition of “spouse”). *But see* I.R.S. PUBLICATION 17, at 5 (2010) (giving registered domestic partners and married same-sex couples living in community property states—California, Nevada, and Washington—the option of filing separately and splitting income); *see also* Scott James, *For Same-Sex Couples, a Tax Victory that Doesn’t Feel Like One*, N.Y. TIMES, Jan. 14, 2011, at A21A (discussing problems with new IRS rule).

98. Over a thousand such benefits have been identified. Letter from Dayna K. Shah, Assoc. Gen. Counsel, U.S. Gen. Accounting Office, to Bill Frist, Majority Leader, U.S. Senate (Jan. 23, 2004), available at <http://www.gao.gov/new.items/d04353r.pdf>.

99. As of October 7, 2011, the following states offer same-sex marriage: Connecticut, Iowa, Massachusetts, New Hampshire, New York, and Vermont, as well as the District of Columbia. *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008); D.C. CODE § 46-401 (2010); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009); *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); N.H. Rev. Stat. Ann. § 457:1-a (2009); Marriage Equality Act, A8354-2011, available at <http://open.nysenate.gov/legislation/bill/A8354-2011>; VT. STAT. ANN. tit. 15 § 8 (2009). In addition, Argentina, Belgium, Canada, Iceland, the Netherlands, Norway, Portugal, South Africa, Spain, Sweden, and Mexico offer country-wide same-sex marriage. Alexei Barrionuevo, *Argentina Approves Gay Marriage in a First for Region*, N.Y. TIMES, July 16, 2010, at A3 (Argentina, Portugal, Iceland); Dan Levin, *Awaiting a Full Embrace of Same-Sex Weddings*, N.Y. TIMES, July 28, 2010, at A9 (South Africa); Rachel Donadio, *Pope Takes Aim at Abortion and Gay Marriage in Portugal*, N.Y. TIMES, May 14, 2010, at A6 (Norway, Sweden); *World Briefing Americas: Canada: Gay Marriage Approved*, N.Y. TIMES, July 21, 2005, at A6 (Canada, Belgium, the Netherlands, Spain); David Agren, *Court Says All Mexican States Must Honor Gay Marriages*, N.Y. TIMES, Aug. 11, 2010, at A6 (Mexico).

100. New Mexico and Maryland recognize same-sex marriages performed elsewhere. Opinion of Gary K. King, Att’y Gen. (Jan. 4, 2011), available at <http://www.nmag.gov/Opinions/Opinion.aspx?OpID=1131> (opining that New Mexico would likely recognize a same-sex marriage performed elsewhere); Opinion of Douglas F. Gansler, Att’y Gen. (Feb. 23, 2010), available at <http://www.oag.state.md.us/Opinions/2010/95oag3.pdf> (Maryland). Additionally, New Jersey recognizes same-sex marriages performed in other jurisdictions as civil unions. Opinion of Stuart Rabner, Att’y Gen. (Feb. 16, 2007), available at <http://www.nj.gov/oag/newsreleases07/ag-formal-opinion-2.16.07.pdf>. *See also* *Martinez v. Cnty. of Monroe*, 850 N.Y.S.2d 740 (App. Div. 2008) (recognizing Canadian same-sex marriage).

101. *See, e.g.,* M.V. Lee Badgett, *The Economic Value of Marriage for Same-Sex Couples*, 58 DRAKE L. REV. 1081 (2010) (listing and analyzing value of benefits that same-sex couples are denied due to lack of federal recognition); Patricia Cain, *DOMA and the Internal Revenue Code*, 84 CHI-

element in marriage for which the different-sex requirement acts as a proxy is unclear; perhaps insistence on the different-sex requirement demonstrates anxiety that relationships that do not follow traditional gender stereotypes are not dependency relationships, or perhaps the requirement is a proxy for a conjugal family, even though many heterosexual married couples do not ever have children, and many gay couples do.<sup>102</sup>

#### 6. “Divorce-Plus” Rules

Sometimes, the law provides an incentive to divorce rather than to marry. In circumstances where divorce can create eligibility for a benefit, lawmakers have developed divorce fraud doctrines. Many of these function in a similar way as “marriage-plus” rules, with divorce substituting for marriage. In these cases, the court must determine first whether a valid divorce exists and, second, examine some other evidence that is considered dispositive of whether the divorce is “real.” One example of this kind of rule in action is the test for divorce fraud in federal income tax law. Just as some people claim married status to obtain a tax marriage bonus, other couples claim unmarried status to avoid a marriage penalty. Similarly, low-income taxpayers eligible for the Earned Income Tax Credit (EITC) can suffer a marriage penalty and therefore have an incentive to divorce.<sup>103</sup>

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KENT L. REV. 481 (2009). As this Article went to press, the future of DOMA is uncertain. In February of 2011, the Obama Administration announced that it would cease to enforce DOMA because of its belief that the statute is unconstitutional. Letter from Eric H. Holder, Jr., U.S. Att’y Gen., to John A. Boehner, Speaker, U.S. House of Representatives, Letter to Congress on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), *available at* <http://www.justice.gov/opa/pr/2011/February/11-ag-223.html>. In several cases challenging the constitutionality of DOMA, the Bipartisan Legal Advisory Group of the U.S. House of Representatives is defending the statute because the Administration will not defend it. *See, e.g.*, Memorandum of Law in Support of Intervenor-Defendant’s Opposition to Plaintiff’s Motion for Summary Judgment, *Windsor v. United States*, No. 10-CV-8435 (S.D.N.Y. Aug 1, 2011), *available at* <http://docs.justia.com/cases/federal/district-courts/new-york/nysdce/1:2010cv08435/370870/50> (defending DOMA against a challenge where DOMA caused surviving spouse to be subject to estate tax where a federally-recognized marriage would incur no estate tax). In some of the cases, the Department of Justice has gone beyond refusing to defend DOMA and filed briefs arguing affirmatively that DOMA is unconstitutional. *See, e.g.*, Defendants’ Brief in Opposition to Motion to Dismiss, *Golinski v. United States*, No. 10-CV-00257 (N.D. Ca.) (July 1, 2011), *available at* <http://metroweekly.com/poliglot/DOJ-OppToBLAG MtD.pdf> (arguing that DOMA unconstitutionally discriminates against gays and lesbians by denying otherwise eligible individuals access to Federal Employees Health Benefits Plan).

102. These justifications have been offered by states defending their own “mini-DOMAs” in constitutional litigation. *See, e.g.*, *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 964 (Mass. 2003) (rejecting state’s rationale that limiting marriage to opposite-sex couples furthers Legislature’s interest in conserving scarce resources because “same-sex couples are more financially independent than married couples”); *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) (holding that state has a rational basis for denying marriage to same-sex couples because they cannot accidentally reproduce).

103. Alstott, *Earned Income*, *supra* note 2, at 560–64 (describing how the EITC creates disincentives to marry and incentives to divorce and providing examples of how the EITC marriage penalty interacts with federal income tax marriage bonuses and penalties).



The most famous case of tax divorce fraud is *Boyter v. Commissioner*.<sup>104</sup> There, a couple, after realizing they were subject to a marriage penalty, traveled to Haiti in December of 1975 to obtain a divorce decree so that they could file separate tax returns.<sup>105</sup> They promptly remarried in January 1976 and repeated the process the following year with a divorce from the Dominican Republic followed by a prompt remarriage. The couple continued to live together in the same home, and in court the wife testified that they obtained the divorce solely to avoid the marriage penalty.<sup>106</sup> The *New York Times* discussed their scheme in four separate articles in 1980 and 1981.<sup>107</sup> The Boyters framed their litigation as a principled battle against unjust tax laws: “[f]rom the Boyter’s perspective—as well as that of millions of other families with two breadwinners—the reform needed is self-evident: tax law should be blind to how couples choose to live, neither encouraging nor discouraging marriage.”<sup>108</sup>

The courts were not as sympathetic as the *Times*. The Tax Court held that since the determination of marital status must be made in accordance with state law, and it would not recognize the foreign divorce decrees as valid to terminate petitioners’ marriage under Maryland law because at all times petitioners remained domiciled in Maryland. On appeal, the Fourth Circuit found that although the determination of marital status must be made in accordance with state law, the IRS had another tool it could use to attack the validity of the divorce: the “sham transaction doctrine” that tax courts had developed in other contexts.<sup>109</sup>

Under the sham transaction doctrine, a corporation may not transfer assets to a shell corporation that the corporation created solely to receive assets for tax purposes and then dissolved.<sup>110</sup> Instead, the corporation must have some independent valid business purpose for creating the second corporation.<sup>111</sup> In *Boyter*, the Fourth Circuit extended the sham transaction doctrine to apply to divorce, holding that if the underlying purpose of the divorce was to enable “the taxpayers to remain effectively married while avoiding the marriage penalty” then the “the prompt remarriage . . . defeats the apparent divorce when assessing the taxpayers’ liability.”<sup>112</sup> The court compared the speedy remarriage with a “prompt reincorporation of a business enterprise in

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104. *Boyter v. Comm’r*, 74 T.C. 989 (1980).

105. *Boyter v. Comm’r*, 668 F.2d 1382, 1383–84 (4th Cir. 1981).

106. *Id.* at 1384.

107. *Couple Who Divorced to Cut Taxes Ordered to Pay Up*, N.Y. TIMES, Aug. 7, 1980, at A16; *The Marriage Penalty*, N.Y. TIMES, Aug. 17, 1980, at 20; Richard Haitch, *Follow-Up On the News: Tax Split*, N.Y. TIMES, Feb. 15, 1981, at 49; Deborah Rankin, *Filing Status: Key Factor in Determining Tax Rate*, N.Y. TIMES, Feb. 3, 1981, at D1.

108. *The Marriage Penalty*, *supra* note 107, at 20.

109. *Boyter*, 668 F.2d at 1387.

110. *Gregory v. Helvering*, 293 U.S. 465, 469 (1935).

111. *Id.*

112. *Boyter*, 668 F.2d at 1387.

continuous operation.”<sup>113</sup> Under the “sham transaction doctrine,” the remarriage, just like the reincorporation, would “defeat the apparent liquidation of the predecessor” marriage.<sup>114</sup>

Although the IRS attempted to use *Boyster* in several subsequent cases that dealt with divorces allegedly entered into to lessen tax liability, courts have sided with the IRS only in cases where the couple remarried after the tax-incentivized divorce. In cases where the couple remains divorced, the sham transaction rationale is not available. For example, in *U.S. v. Taylor*, the government sought to satisfy a tax lien against a man by going after his pension plan—90 percent of which was transferred to his ex-wife in their divorce proceedings—by contending that the man had obtained a sham divorce in order to shield his assets.<sup>115</sup> The court distinguished *Boyster*, noting that while the couple remarried in that case, in the present situation the couple remained divorced.<sup>116</sup> Thus, the test that appears to operate in the tax context is a “divorce-plus” test: we know that a divorce is fraudulent if it is followed by the “plus” of remarriage.

As with the marriage fraud cases, cases alleging divorce fraud usually use marriage as a proxy for financial dependence and long-term commitment; divorce is a proxy for the opposite. A divorce followed by a remarriage, then, is assumed to show that a committed relationship involving financial dependence still exists. A recent lawsuit tested this theory in the private sector. Continental Airlines sued several of its pilots for divorcing their spouses in order to obtain payouts of their pension benefits before they retired. According to the complaint, Continental provides generous pension benefits that can total up to \$900,000 per individual, paid in a lump sum on retirement.<sup>117</sup> Under the Employment Retirement Income Security Act (ERISA), however, a recipient of the pension benefits could assign his or her benefits to an ex-spouse in the event of a divorce through a Qualified Domestic Relations Order.<sup>118</sup> Continental alleged that the pilots all obtained divorces from their spouses, assigned all or nearly all of the pension benefits as lump sum cash payments to their now ex-spouses, but had “no intention of disassociating as marital

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113. *Id.*

114. *Id.*

115. No. CIV. 396335, 2001 WL 1636505 (D. Minn. Oct. 24, 2001).

116. *Id.* at \*6; see also *In re Freytag*, No. 390-30082-HCA-7, 1993 WL 471317 (Bankr. N.D. Tex. Aug. 12, 1993) (refusing to find divorce a sham because although the wife testified she had obtained a divorce as quickly as she did for tax liability reasons, she also testified that she had previously contemplated divorce, and the couple lived in separate residences since shortly after the divorce).

117. Plaintiffs’ Original Complaint and Application for Declaratory and Injunctive Relief at 10, Cont’l Pilots Ret. Plan Admin. Comm. v. Brown, 4:09-CV-01529 (S.D. Tex. May 20, 2009) [hereinafter Complaint, *Continental v. Brown*].

118. *Brown v. Cont’l Airlines, Inc.*, No. 10-20015 (5th Cir. July 18, 2011), available at <http://www.ca5.uscourts.gov/opinions/pub/10/10-20015-CV0.wpd.pdf>.

partners.”<sup>119</sup> Indeed, after the plans’ funds had been distributed, the pilots and their spouses remarried, usually within a few months.<sup>120</sup> The Fifth Circuit rejected Continental’s attempt to apply a “divorce-plus” analysis to determining the validity of the pension claims, finding no authority to support the notion that a plan administrator has the authority to “engage in complex determinations or underlying motives or intent.”<sup>121</sup> The court further refused to apply the *Boyer* sham transaction doctrine to the case, reasoning that there is “a significant difference between allowing federal tribunals such as the tax, bankruptcy, and immigration courts to consider whether a divorce is a sham, and authorizing a private entity such as Continental to make such a determination, which would involve independently investigating employees’ private lives in order to judge the genuineness of the intentions behind their divorces.”<sup>122</sup>

### C. Functional Marriage Tests

At the other end of the spectrum from bright-line rules requiring only proof of marriage are functional tests. Here, proof of a valid marriage is irrelevant. What matters is whether a couple is *acting* married. Are they, for example, sharing expenses? Living in the same home? Do they have children together whom they co-parent? Do they perform household services for each other?

Functional marriage tests are nothing new in family law. In fact, state family law in the nineteenth century very frequently recognized “common law marriage,” that is, marriage without a ceremony. A common law marriage generally existed where a couple agreed to be married, cohabited, and held themselves out to their community as husband and wife.<sup>123</sup> Traditionally, courts widely recognized common law marriage as a method of bringing nonconforming relationships within the ambit of the marital ideal.<sup>124</sup> Recognizing a couple as married even without a ceremony or license, for example, prevented women who were abandoned by their partners or widowed from relying on the public fisc for their support.<sup>125</sup> Recognition of common law marriage also prevented children born to these relationships from suffering the stigma and legal disabilities of illegitimacy.<sup>126</sup>

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119. Complaint, *Continental v. Brown*, *supra* note 117, at 8.

120. *Id.* at 13.

121. *Brown v. Continental*, No. 10-20015, slip op. at 9.

122. *Id.*

123. 55 C.J.S. *Marriage* § 10 (2009); *Taylor v. Taylor*, 298 N.Y.S. 912, 914 (N.Y. Dom. Rel. Ct. 1937); *Proctor v. Foster*, 230 P. 753, 754 (Okla. 1924); *McChesney v. Johnson*, 79 S.W.2d 658, 659 (Tex. Civ. App. 1934).

124. Ariela R. Dubler, *Wifely Behavior: A Legal History of Acting Married*, 100 COLUM. L. REV. 957, 968 (2000).

125. *Id.* at 969.

126. See *Rodebaugh v. Sanks*, 2 Watts 9, 11 (Pa. 1883) (stating that if courts were to require marriage ceremonies they would “bastardize a vast majority of the children which have been born within the state for half a century”).

The demise of common law marriage in the majority of the states<sup>127</sup> occurred at least in part out of a concern that recognizing marriages that had not been formally solemnized encouraged fraud.<sup>128</sup> Some commentators have argued that limitation of marriage to formal, ceremonial marriage serves the same purpose as the Statute of Frauds does “in requiring certain important agreements to be written.”<sup>129</sup> Legal historian Ariela Dubler has noted that common law marriage came under particularly vociferous attack during the 1930s.<sup>130</sup> She attributes this largely to anxiety over women’s newly acquired political power and demonstrates that lawmakers shifted their view of women claiming common law marriage from “weak and dependent, the potential victims of unscrupulous men” to “deceitful and conniving . . . powerful and crafty, prey[ing] mercilessly on the weakness and vulnerability of unsuspecting men.”<sup>131</sup>

Her observations about the demise of common law marriage fit well with this Article’s argument about the rise of public benefits. If the “carrots” attached to marriage increase, we might see heightened anxiety about the ease with which one could marry. Cracking down on common law marriage would be one way to prevent those who were not “really” married from claiming to be married. In addition, if legal marriage is the only protected space for sexual expression and procreation, we would expect recognition of functional marriage. In contrast, once cohabitation becomes socially and legally acceptable without marriage, the existence of common law marriage becomes a problem. How can we know that someone intended to marry, simply because they *acted* married, when people act married all the time?<sup>132</sup>

Although most states no longer recognize common law marriage, the use of functional marriage tests to prevent fraud is quite common. There is an important difference between the two types of functional marriage. A common law marriage *is* a marriage, for all purposes. There simply was no ceremony. Therefore, a common law spouse can get divorced, inherit under intestate

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127. Alabama, Colorado, Iowa, Kansas, Montana, Oklahoma, Rhode Island, South Carolina, Texas, and Utah currently recognize common law marriage. IRA MARK ELLMAN ET AL., FAMILY LAW: CASES, TEXTS, MATERIALS 133 (5th ed. 2010).

128. See, e.g., *People v. Lucero*, 747 P.2d 660 (Colo. 1987) (holding public acknowledgment of marriage necessary to guard against fraudulent claims); *Anderson v. Anderson*, 131 N.E.2d 301, 304–05 (Ind. 1956) (noting that common law marriages are a “fruitful source of perjury and fraud” and therefore are “merely tolerated and not encouraged”). For an argument that the concerns about fraud were overblown and that the common law marriage test was effective in distinguishing between meritorious and unmeritorious claims, see Cynthia Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OR. L. REV. 709, 733–34, 50–51 (1996).

129. ELLMAN ET AL., FAMILY LAW, *supra* note 127, at 132.

130. See Dubler, *supra* note 125, at 996–98.

131. *Id.*

132. For proposals to resurrect common law marriage, see Bowman, *supra* note 128; Sonya Garza, *Common Law Marriage: A Proposal for the Revival of a Dying Doctrine*, 40 NEW ENG. L. REV. 541 (2006); Charlotte Goldberg, *The Schemes of Adventuresses: The Abolition and Revival of Common-Law Marriage*, 13 WM. & MARY J. WOMEN & L. 483 (2007).

succession laws, and enjoy hospital visitation rights, tax breaks, and all of the other benefits and burdens of marriage.<sup>133</sup> In contrast, a “marriage” for purposes of functional marriage fraud tests will not necessarily be a marriage for all purposes. It will simply deem a couple “married” for the purpose of qualifying—or disqualifying—them from a particular benefit. For example, spouses who cannot establish a valid marriage in order to obtain social security retirement benefits may be “deemed” to be married if they “went through a marriage ceremony . . . that would have resulted in a valid marriage except for a legal impediment” and did so “in good faith.”<sup>134</sup> This rule prevents those who believed themselves to be married and acted as if they were getting married from being denied benefits.<sup>135</sup>

However, the most notorious of the functional marriage fraud tests disqualified unmarried people for benefits by construing them to be married. The “man-in-the-house” rules common in state welfare law during the 1960s deemed a man’s income to be available to the children of a woman with whom he cohabited, even if he was not actually supporting her children. As a result, the children become ineligible for Aid to Families with Dependent Children (AFDC) benefits.<sup>136</sup>

Some states stretched this rule quite far. Alabama, for example, considered a man to be a “substitute father” for dependent children if he “cohabited” with their mother. “Cohabit” was a euphemism for having sexual relations with her at any time, not a requirement that the man and woman live in the same house.<sup>137</sup> The Warren Court struck this statute down in the 1968 decision *King v. Smith*.<sup>138</sup> In *King*, Mrs. Sylvester Smith, who had four children receiving AFDC benefits, challenged the statute. She had an intimate

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133. ELLMAN ET AL., FAMILY LAW, *supra* note 127, at 131–32.

134. 20 C.F.R. § 404.346 (2011).

135. *See also* 20 C.F.R. §222.14 (stating that for eligibility under the Railroad Retirement Act, a person may be deemed to be a spouse where there is no valid marriage if the claimant went through the marriage ceremony in good faith and was living in the same household as the employee when he or she applied for the spousal annuity or when the employee died). These tests resemble the common law “putative spouse doctrine,” whereby a person who has cohabited with another person in the good faith belief that he or she was married is a putative spouse until knowledge of the impediment to a valid marriage is made known to the person. *See* HARRIS ET AL., *supra* note 18, at 254–58 (discussing putative spouse doctrine).

136. *See* St. John Barrett, *New Role of the Courts in Developing Public Welfare Law*, 1970 DUKE L.J. 1, 17 (describing state “man-in-house” laws and identifying a “common element relating to the sexual misconduct of the mother, varying emphasis was placed on the character of the home environment, the presence of an adult male as a source of income, and the immorality of the mother as reasons for denying aid”).

137. According to the Alabama statute, an “able-bodied man, married or single, is considered a substitute father of all the children of the applicant mother” in three different situations: (1) if “he lives in the home with the child’s natural or adoptive mother for the purpose of cohabitation”; or (2) if “he visits (the home) frequently for the purpose of cohabiting with the child’s natural or adoptive mother”; or (3) if “he does not frequent the home but cohabits with the child’s natural or adoptive mother elsewhere.” *King v. Smith*, 392 U.S. 309, 313–14 (1968).

138. *Id.*

relationship with a Mr. Williams, a married man with nine children of his own. As a result of that relationship, Alabama cut off the Smith children's benefits.<sup>139</sup> Following the *King* ruling, courts struck down other, less extreme man-in-the-house laws, and welfare law went from using a functional marriage rule to a formal marriage rule.<sup>140</sup>

More recently, Utah has redefined marriage in an attempt to punish and deter women from seeking welfare when they have functional husbands.<sup>141</sup> The state became concerned about fundamentalist Mormons who were living in polygamous relationships.<sup>142</sup> The husband would be legally married to his first wife, but—in order to avoid a bigamy prosecution—not married to his other wives.<sup>143</sup> Nevertheless, the husband and his nonlegal wife would “share a home, raise a family, and hold themselves out to the community as man and wife.”<sup>144</sup> This enabled a woman in a polygamous marriage to “claim that she was a single mother and qualify for the accordant welfare benefits, all the while enjoying the benefits of living with her income-earning partner in the unofficial, quasi-marital relationship.”<sup>145</sup> In response, Utah passed a statute that essentially codified common law marriage in Utah, even though most states have repealed their common law marriage statutes.<sup>146</sup> The statute allows courts to order that an unsolemnized marriage is a legal and valid marriage so long as the relationship is between a man and a woman who are capable of giving consent and marrying, who have cohabited, who have mutually assumed marital rights, duties, and obligations, and who have held themselves out as husband and wife.<sup>147</sup> The express purpose of the law, according to its sponsor, was to “preclud[e] these couples from taking advantage of the state welfare system in this fraudulent manner.”<sup>148</sup>

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139. *Id.* at 314.

140. Note, however, that the Supreme Court did not go so far as to say that states had to determine whether a family living in the same home was pooling income to deny children welfare benefits. *See, e.g., Bowen v. Gilliard*, 483 U.S. 587 (1987) (holding Congress acted rationally in requiring all children in the same household to be counted in the household unit for AFDC purposes, even if a child receives support from a noncustodial parent); *Lyng v. Castillo*, 477 U.S. 635 (1986) (holding Congress had a rational basis for classifying parents, children, and siblings who live together as a single household for food stamps eligibility).

141. Tenney, *supra* note 15, at 148.

142. *Id.*

143. *Id.* at 144–45.

144. *See id.* at 148–49 (summarizing Senator Stephen Reese's introduction of the bill as its sponsor on the floor of the Utah Senate).

145. *Id.* at 148.

146. UTAH CODE ANN. § 30-1-4.5 (2007); *see also* CYNTHIA GRANT BOWMAN, UNMARRIED COUPLES, LAW, AND PUBLIC POLICY 23 (2010) (noting that twenty-three states abolished common law marriage between 1875 and 2009).

147. UTAH CODE ANN. § 30-1-4.5; Tenney, *supra* note 15, at 146 n.26.

148. Tenney, *supra* note 15, at 149; *see also* *State v. Holm*, 137 P.3d 726 (Utah 2006) (upholding constitutionality of Utah statute in light of *Lawrence v. Texas*); *State v. Green*, 99 P.3d 820 (Utah 2004) (allowing unsolemnized and unlicensed marriage to serve as a predicate marriage for purposes of a bigamy prosecution).

Functional tests, then, can be used to treat a couple as married—even when they are not formally married—in order to deny the couple benefits. Like the divorce-plus rules, functional marriage fraud tests often prevent couples from disclaiming marital relationships. With these tests, marriage once again acts as a proxy for economic dependence, and the functional aspects of marriage—often, cohabitation—act in turn as proxies for marriage. The tests then assume that a cohabiting couple (or, as with the Alabama statute struck down in *King*, a couple involved in a sexual relationship regardless of their living arrangements) is an economically interdependent couple.

#### *D. Integrated Tests*

Instead of using a purely formal, a marriage-plus, or a purely functional test, some legal doctrines take a “boot and suspenders” approach that integrates all three types. Lawmakers use combination tests when anxiety about marriage fraud is at its height—when the incentives to marry significantly outweigh the burdens of entry and exit. The requirement of a formal marriage prevents the nonmarried from claiming a functional marriage and potentially defrauding the government. At the same time, requiring formally married people to also demonstrate a “plus” factor and a functional marriage limits the number of even formally married people who can obtain benefits.

Immigration law is the most extensive and complex area of law that uses an integrated approach to determine marriage fraud. Federal law provides for the deportation of immigrants who commit immigration marriage fraud and criminal penalties for both immigrants and citizens who participate in fraudulent marriages.<sup>149</sup> First, all immigrants attempting to obtain legal status through marriage must demonstrate a bona fide marriage. The Department of Homeland Security (DHS) uses the familiar *lex loci* rule to determine whether a marriage is valid: it will recognize a marriage as valid in the jurisdiction where it was celebrated, unless doing so would be contrary to strong policy of the jurisdiction recognizing the marriage.<sup>150</sup>

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149. See Immigration and Naturalization Act (INA) § 237(a)(1)(G), 8 U.S.C. § 1227(a)(1)(G) (2006) (immigrant is deportable if she procured a visa or other documentation based on a marriage entered into less than two years prior to admission which was judicially annulled or terminated unless the immigrant establishes that the marriage was not contracted for the purpose of evading any provisions of the immigration laws); INA § 275(c) (“Any individual who knowingly enters into a marriage for the purpose of evading any provision of the immigration laws shall be imprisoned for not more than 5 years, or fined not more than \$250,000, or both.”). Cf. INA § 212 (a)(6)(C) (immigrant is inadmissible if she seeks to procure a visa, other documentation, or admission into the United States by fraud or by willfully misrepresenting a material fact). As a practical matter, in many cases a finding of marriage fraud would also make an immigrant deportable even absent these provisions because it would remove the immigrant’s only legal basis for presence in the United States.

150. See *In re Hoefflin*, 15 I. & N. Dec. 31 (B.I.A. 1974) (holding that where the state law did not recognize petitioner’s “mail-order” Mexican divorce, his marriage to the beneficiary was not valid for the purpose of conferring a preference classification on his spouse). Common law marriages are recognized, but only if they truly are equivalent to ceremonial marriage. See 9 U.S. DEP’T OF STATE

Immigration law then adds some “plus” rules onto the formal marriage requirement. For instance, some jurisdictions (including Montana) recognize proxy marriages that are solemnized without both spouses present.<sup>151</sup> For immigration purposes, however, a proxy marriage is invalid unless it has been consummated.<sup>152</sup> Thus, in a 1950 case before the Board of Immigration Appeals, an Italian proxy marriage was held to be insufficient to grant immigration status to an Italian woman where the marriage had not been consummated, even though the couple entered into the proxy marriage because the woman was pregnant with the man’s child.<sup>153</sup> Immigration law also does not recognize polygamous marriage, even if the marriage is valid where celebrated.<sup>154</sup> Furthermore, as discussed previously, under DOMA, same-sex couples that marry are not eligible for immigration benefits, even if the jurisdiction where the couple celebrated their marriage recognizes the marriage as valid.<sup>155</sup>

The most far-reaching “plus” requirement in immigration law was adopted in 1986 as part of the Immigration Marriage Fraud Amendments (IMFA). The IMFA restricts green cards based on marriage to immigrants whose marriages are at least two years old at the time the green card is granted.<sup>156</sup> Immigrants whose marriages are less than two years old instead receive only “conditional permanent residency” instead of “permanent residency.”<sup>157</sup> In order to become an actual permanent resident, the immigrant and the sponsoring spouse must jointly petition to remove the conditional element of the immigrant’s residency status after the end of an additional two-year waiting period.<sup>158</sup> Otherwise, the federal government will terminate the temporary residency status and the immigrant spouse will be deportable.<sup>159</sup> Congress enacted this rule to deter individuals from marrying solely to obtain green cards.<sup>160</sup> We can infer that Congress reasoned that couples that had

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FOREIGN AFFAIRS MANUAL 40.1 n.1.2: Cohabitation (“In the absence of a marriage certificate, . . . a common law marriage or cohabitation is considered to be a ‘valid marriage’ . . . only if . . . [t]he relationship can only be terminated by divorce.”).

151. MONT. CODE ANN. § 40-1-301 (2009).

152. 8 U.S.C. § 1101(a)(35) (2011).

153. *In re W—*, 4 I. & N. Dec. 209 (B.I.A. 1950).

154. An immigrant who is “coming to the United States to practice polygamy” is, in fact, inadmissible as an immigrant even if he is eligible for an immigrant visa based on employment or a nonmarital family relationship. INA § 212(a)(10)(A).

155. 1 U.S.C. § 7; *see also* *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982) (holding that prior to passage of DOMA, Congress did not intend to extend benefits to “homosexual marriages”). For an argument that *Adams* should not control even if DOMA is struck down or repealed, *see* Scott C. Titshaw, *The Meaning of Marriage: Immigration Rules and Their Implications for Same-Sex Spouses in a World Without DOMA*, 16 WM. & MARY J. WOMEN & L. 537 (2010).

156. INA § 216(g).

157. INA § 216(a)(1).

158. INA § 216(c)(1).

159. INA §§ 216(a), (b), 237(a)(1)(D).

160. 132 CONG. REC. 27,015 (1986) (statement of Rep. Mazzoli); *see also* 132 CONG. REC.



already been married for more than two years were less likely to have married only for immigration benefits. Congress likely believed that applying an additional two-year waiting period to recently married people who applied for benefits would help to ferret out those people who married hastily with the immigration benefits in the forefront of their minds.

IMFA then goes one step further. For immigrants whose marriages are recent enough that they are eligible for only conditional permanent residency, IMFA also applies a functional test in addition to the requirement of a formal marriage. These immigrants, and their sponsoring spouses, must produce documentary and testimonial evidence that their marriages are genuine.<sup>161</sup> This evidence “may” include, but “is not limited to”:

- (1) Documentation showing joint ownership of property;
- (2) Lease showing joint tenancy of a common residence;
- (3) Documentation showing commingling of financial resources;
- (4) Birth certificate(s) of child(ren) born to the petitioner and beneficiary;
- (5) Affidavits of third parties having knowledge of the bona fides of the marital relationship; and
- (6) Any other documentation which is relevant to establish that the marriage was not entered into in order to evade the immigration laws of the United States.<sup>162</sup>

In theory, no one item on this list is dispositive.<sup>163</sup> The law does not require a couple to have children or open a joint bank account. But that does not mean that the regulations do not encourage the couple to comply with a particular vision of what an authentic marriage looks like.

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27,015–17 (1986) (statements of Reps. Lungren, McCollum, and Frank).

161. Two other groups of immigrants are also subject to a “plus” or functional test. An immigrant who receives lawful permanent resident status based on marriage must wait five years before sponsoring a *new* spouse for immigration status or show by “clear and convincing” evidence that the prior marriage was not a sham. INA § 204(a)(2)(A). And an immigrant who marries during deportation proceedings must reside outside the United States for two years following the marriage or demonstrate by “clear and convincing” evidence that the marriage is not a sham. INA § 204(g); § 245 (e)(3). In theory, DHS could investigate any marriage used for immigration purposes in detail because the granting of any visa is discretionary. However, the IMFA narrows the class of marriages that must be investigated by focusing on those it deems most likely to involve fraud. *See generally* § 204(b) (authorizing DHS to investigate visa petitions).

162. 8 C.F.R. § 204.2(a)(1)(i)(B) (for remarriage within five years of marriage-based green card); § 204.2(a)(1)(iii)(B) (for marriage during removal proceedings); § 216.4(a)(5) (for recent marriage). *See also In re Soriano*, 19 I. & N. Dec. 764, 766 (B.I.A. 1988) (listing evidence of bona fides as including: “proof that the beneficiary has been listed as the petitioner’s spouse on insurance policies, property leases, income tax forms, or bank accounts, and testimony or other evidence regarding courtship, wedding ceremony, shared residence, and experiences”).

163. *See Surganova v. Holder*, 612 F. 3d 901, 905 (7th Cir. 2010) (“Nothing in the record indicates that the [Immigration Judge] was using an inflexible rule under which a marriage could never be *bona fide* without cohabitation. All he did was permissibly weigh the couple’s living arrangement as one of several factors supporting his ultimate conclusion.”).

In addition, evidence exists demonstrating that immigration officers do sometimes take the suggested evidence in the regulations as literal requirements. A recent *New York Times* article told the story of an immigrant who had opened a joint account with his wife to comply with the conditional residency regulations listed above. The immigration officials granted him a green card but told him that the joint account was not enough—he also needed to add his wife’s name to another account that was in his name only. His wife observed “my mom has been married 25 years and they don’t have a joint account.”<sup>164</sup> Faced with the potential denial of their visa petition, immigrant- citizen couples alter their behavior to conform to the ideal of marriage as suggested by the regulations and interpreted by immigration officials.

Often, much of an applicant’s file is filled with pictures of the wedding ceremony and reception, evidence that rings were exchanged, and pictures of the honeymoon.<sup>165</sup> Immigration examiners also ask couples questions during their interviews with the intent of determining whether their relationships are bona fide. Questions include: “How much is your current rent/mortgage payment?”; “are you paid weekly, every two weeks, twice a month or monthly? What about your spouse?”; “What is the name of your spouse’s manager at work?”; and “How much money did you receive in your last paycheck/deposit? What about your spouse?”<sup>166</sup> These questions, like the regulations, assume a shared economic life, something many couples have but many do not. Other questions include more intimate details, such as: “Where do you keep your clean underwear? What about your spouse?”; “Do you and your spouse use birth control? What kind?”; and the infamous “What color is your toothbrush? What about your spouse’s?”<sup>167</sup> These questions are not required by statute or regulation. Rather, they are questions that examiners choose to ask based on their own subjective perceptions of the appearance of a bona fide marriage.<sup>168</sup>

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164. Nina Bernstein, *Do You Take this Immigrant?*, N.Y. TIMES, June 13, 2010, at MB1. For a critique of the regulations, see Abrams, *Immigration Law*, *supra* note 3 at 1682–94.

165. See, e.g., *United States v. Islam*, 418 F.3d 1125, 1127 (10th Cir. 2005) (citing testimony regarding pictures of wedding); *Nakamoto v. Ashcroft*, 363 F.3d 874, 882 (9th Cir. 2004) (citing testimony regarding courtship and wedding ceremony as evidence of intent to establish a life together); *United States v. Orellana-Blanco*, 294 F.3d 1143, 1145 (9th Cir. 2002) (noting that husband and wife used a borrowed ring); *United States v. Chowdhury*, 169 F.3d 402, 404 (6th Cir. 1999) (noting that none of bride’s friends or family attended wedding ceremony, that the groom gave her a wedding ring but not an engagement ring, and that there was no formal reception or honeymoon).

166. Nina Bernstein, *Could Your Marriage Pass the Test?*, CITY ROOM BLOG (June 11, 2010, 8:45 PM), <http://cityroom.blogs.nytimes.com/2010/06/11/marriage-test>.

167. *Id.*

168. For the evidence required by regulation, see 8 C.F.R. § 204.2(a)(1)(i)(B) (2011), discussed *supra* note 162. The Adjudicator’s Field Manual suggests asking questions during the interview that will indicate that the couple may have entered into a marriage solely for immigration benefits, including “large disparity of age, [i]nability of petitioner and beneficiary to speak each other’s language, [v]ast difference in cultural and ethnic background; [f]amily and/or friends unaware of the marriage; [m]arriage arranged by a third party; [m]arriage contracted immediately following the beneficiary’s apprehension or receipt of notification to depart the United States; [d]iscrepancies in

Like the other, less intrusive marriage fraud doctrines, the immigration marriage fraud test uses marriage as a proxy for financial interdependency, long-term commitment, and conjugality. The doctrine assumes that in cases where the marriage is more than two years old that it functions as a good proxy for these things; the temporal requirement amplifies the proxy's accuracy and prevents the need for a more intrusive look at the marriage. With the newer marriages, it assumes that a closer look at the marriage is needed. Joint bank accounts and joint ownership of property are proxies for financial interdependence; birth certificates of children are proxies for conjugality. Affidavits of third parties and pictures of the wedding and honeymoon seem to be proxies for long-term commitment. People who suspect their marriages will be short-lived presumably do not engage in public ceremonies and expensive honeymoons. Correct answers to questions about the storage of underwear or the color of a toothbrush may be proxies for either long-term commitment or for conjugality and intimacy. Perhaps the idea is that a person who is only interested in the short-term benefits of marriage would not bother to notice the details of his or her spouse's organizational habits or aesthetic preferences. Or perhaps these questions concern items that are so intimate that only those people actually involved in a sexual relationship would know the answers. The Adjudicator's Field Manual suggests that examiners ask questions to elicit "discrepancies in statements on questions for which a husband and wife should have common knowledge," thus inviting examiners to make their own determinations of what knowledge husbands and wives "should" have.<sup>169</sup>

The search for an adequate test of a marriage's validity has been especially difficult in immigration law because of the value of the benefit. Thus, in immigration law we see courts struggling about how to handle couples who might not otherwise have married, or who would have not married so soon, but for the immigration consequences. The Ninth Circuit, in a long line of cases applying the holding of a 1953 Supreme Court decision, *Lutwak v. United States*, has developed a test for ferreting out marriage fraud in immigration cases commonly referred to as the "establish a life" test, and several other circuits have followed suit.<sup>170</sup> Surprisingly, under the "establish a life" test, a marriage motivated by immigration status is not fraudulent so long as the

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statements on questions for which a husband and wife should have common knowledge; [n]o cohabitation since marriage; [b]eneficiary is a friend of the family; [p]etitioner has filed previous petitions in behalf of aliens, especially prior alien spouses." U.S. CITIZENSHIP & IMMIGRATION SERVS., ADJUDICATOR'S FIELD MANUAL—REDACTED PUBLIC VERSION, Ch. 21.3 Petition for a Spouse, available at <http://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-3481/0-0-0-4484.html>.

169. *Id.*

170. *Lutwak v. United States*, 344 U.S. 604, 611 (1953) (describing test); see also *Boluk v. Holder*, 642 F.3d 297, 303–04 (2d Cir. 2011) (applying "establish a life" test); *Surganova v. Holder*, 612 F.3d 901 (7th Cir. 2010) (same); *Cho v. Gonzales*, 404 F.3d 96, 100, 103 (1st Cir. 2005) (same); *Nakamoto*, 363 F.3d at 882 (9th Cir. 2004) (reaffirming "establish a life" test); *Bark v. I.N.S.*, 511 F.2d 1200, 1202 (9th Cir. 1975) (adopting "establish a life" test).

couple is willing to take on the burdens as well as the benefits of marriage—to “establish a life” together.<sup>171</sup>

Thus, Ninth Circuit judges have found repeatedly that merely having a motive to marry in order to receive immigration benefits is “at most evidence of intent” of marriage fraud but does not itself make the marriage a sham.<sup>172</sup> One opinion even cited the book of *Genesis* for the proposition that “[m]arriages for money or other ulterior gain are as ancient as mankind, yet may still be genuine, and marriage fraud may be committed by one party to the marriage, or a person who arranged the marriage, yet the other spouse may genuinely intend to marry.”<sup>173</sup> The court found that an “ulterior motive of financial benefit or immigration benefit” for marriage might be evidence of fraud, but “it does not make the marriage a fraud.”<sup>174</sup> In that case, the court reversed and remanded a conviction of marriage fraud where an eighteen-year-old U.S. citizen had accepted \$10,000 to marry a Filipina woman.<sup>175</sup> The husband had made incriminating statements, saying, when his friends inquired about his marriage: “it’s not like for real . . . [it’s] for money” and “one year before you go, you guys gotta write letters to each other . . . and back and forth and stuff. Then when you go to the immigration office you show ’em all the letters [and say] that you guys fell in love and shit.”<sup>176</sup> This evidence suggested that the husband entered into the marriage without intent “to establish a life together” yet did not establish that the wife lacked this intent as well. She, the court explained, might have “intended to establish a life together at the time they were married in gratitude for a visa.”<sup>177</sup> For the Ninth Circuit, a person’s decision to marry for a visa was not the problem; rather, a person’s lack of intention to follow through on the performance of the other aspects of being married—to establish a life together—determined whether the marriage was fraudulent.

Similarly, in another case, the Ninth Circuit reversed a conviction for marriage fraud where the U.S. citizen wife clearly never intended a bona fide marriage and her immigrant husband clearly wanted to marry at least in part for

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171. Military benefits law has also adopted the “establish a life” test. *See, e.g.*, *United States v. Phillips*, 52 M.J. 268 (C.A.A.F. 2000); *United States v. Bolden*, 28 M.J. 127 (C.M.A. 1989) (affirming conviction where airman married friend’s girlfriend so that he could live off-base and paid her \$250 each month of his increased allowance); *United States v. Lee*, 43 M.J. 794 (N-M. Ct. Crim. App. 1995) (affirming servicemember’s sentence of a twelve-month confinement, a \$5,000 fine, and a bad conduct discharge for entering into sham marriage with a Filipina woman for immigration purposes); *United States v. Mickla*, 29 M.J. 749, 751 (A.F.C.M.R. 1989) (dismissing sham marriage charge due to speedy trial provision violation).

172. *United States v. Tagalicud*, 84 F.3d 1180, 1185 (9th Cir. 1996).

173. *Id.* (“Jacob honestly married, twice, but Laban had fraudulently caused him to marry Leah and thereby extorted an additional seven years of work.”) (citing *Genesis* 29:18–30).

174. *Id.*

175. *Id.*

176. *Id.* at 1182 (omission in original).

177. *Id.* at 1185.

a green card.<sup>178</sup> It was conceivable, the court opined, that

while his motivation for marriage was love for a green card rather than love for [his wife], nevertheless he planned to live with [her] as her husband. The jury might infer that he wouldn't have been willing to mow her lawn, clean her house, and lay her carpet without getting paid for it, unless he saw these chores as a husband's or prospective husband's duties.<sup>179</sup>

Trading a visa for the duties of marriage is acceptable under the "establish a life" test; failing to perform marital duties is not. Thus, the government can deport an immigrant even when a couple is having sexual relations and is spending "two to four nights a week together" but chooses not to share an apartment, allegedly because their duties to a granddaughter and ailing relative and the size of the apartments precluded cohabitation.<sup>180</sup> Similarly, the failure to show affection, consummate a marriage, or work to develop a relationship with a spouse's child can be evidence of fraud.<sup>181</sup>

Several circuits have refused to adopt the "establish a life" test, and instead use an "evade the laws" test that more closely tracks the language of the Immigration and Nationality Act (INA). This test looks to motive, not performance.<sup>182</sup> But the "evade the law" test turns out to be very difficult to apply. Is marrying someone you love but would not otherwise marry if immigration was not at stake "evading the law"? What about marrying someone early in a relationship so that you can be together legally to pursue the relationship and figure out whether it has long-term potential? What if the person is someone you would never marry absent the need for a visa but are happy to end up with if the relationship will lead to better economic

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178. *United States v. Orellana-Blanco*, 294 F.3d 1143 (9th Cir. 2002).

179. *Id.* at 1152 (9th Cir. 2002) (reversing and remanding for a new trial where district court admitted Immigration and Naturalization Service officer's notes of Orellana-Blanco's interview answers as a party admission contrary to rule against hearsay); *see also* *Matter of Peterson*, 12 I&N Dec. 663 (B.I.A. 1968) (finding marriage valid for immigration purposes where marriage was never consummated, husband married wife for companionship and because he "needed a housekeeper," and husband was too aged and ill to engage in "normal marital relations"); *Smolniakova v. Gonzales*, 422 F.3d 1037, 1043 (9th Cir. 2005) (reversing order of removal where petitioner "testified that [she and her future husband] dated for a few months until she confided in him about the denial of her asylum application and her pending appeal, and he, in turn, proposed because . . . he expressed strong feelings for her and could not bear the thought of losing her"). *But see* *United States v. Darif*, 446 F.3d 701, 710 (7th Cir. 2006) (holding that jury instruction stating that "[t]he marriage is legitimate so long as [defendant] intended to establish a life with his spouse at the time he married her, even if securing an immigration benefit was one of the factors that led him to marry her" was a misstatement of law).

180. *Surganova v. Holder*, 612 F.3d 901, 904 (7th Cir. 2010) (affirming order of removal based on marriage fraud and noting that the Immigration Judge was "unpersuaded that the size of Surganova's bedroom precluded Beaudion from moving in").

181. *Timbreza v. Ashcroft*, 98 F. App'x. 611 (9th Cir. 2004), *vacated on other grounds sub nom.* *Timbreza v. Gonzales*, 410 F.3d 1082 (9th Cir. 2005).

182. *See, e.g., United States v. Islam*, 418 F.3d 1125 (10th Cir. 2005); *United States v. Rafiq*, 116 F. App'x. 456 (4th Cir. 2004) (per curiam); *United States v. Chowdhury*, 169 F. 3d 402 (6th Cir. 1999).

opportunity in the United States? If one of the spouses admits that immigration was a factor in the decision to marry, the couple will almost certainly flunk the “evade the law” test, even if there was intent to establish a life together.

In the majority of immigration marriage fraud cases, the specific test that courts use likely will not affect the outcome of the case. In a case, for example, involving a simple payment for marriage, where there is no cohabitation or sharing of finances, the couple in question will not be able to show that they intended to “establish a life” together *or* that they did not marry “for purposes of evading the immigration laws.”

But in many cases, it is difficult to tell how important the immigration benefits were in motivating a marriage, and in these cases, the test used matters significantly. Sometimes the “evade the law” test would fail to find immigration fraud where the “establish a life” test would. A couple, for example, could enter into a marriage of convenience—to legitimize a child, for example—without intending to “evade the immigration laws of the United States” and nevertheless flunk the “establish a life test” if they did not plan to live together after marrying.<sup>183</sup>

More commonly, however, the “evade the law” test sweeps more broadly than the “establish a life” test. That is because a couple might be willing to establish a life together purely, or in part, to obtain an immigration benefit, and under the “establish a life” test, marriage in exchange for a visa is just fine. Under the “establish a life” test, performance of marital duties, not motive in getting married, is what matters.

Given the language of the INA and the existence of the “evade the law” test, the persistence of the “establish a life” test seems remarkable. The Ninth Circuit, the leader in developing this test, hears more immigration cases per year than any other circuit.<sup>184</sup> The persistence of this test may indicate that although courts can decide the easy cases with a relatively straightforward test, not all cases are easy. People’s motives in marrying are complex, varied, and rarely straightforward. Getting at a person’s motives can be very difficult. Focusing instead on performance and willingness to engage in marital duties may be a more predictable and objective—if fact intensive—way to adjudicate the bona fides of a marriage.

#### *E. A Theory of Public Benefits Fraud Tests*

In each of the doctrines described above, marriage is standing in for something else. It produces an entitlement to a benefit because lawmakers think

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183. *But see* Marcel De Armas, *For Richer or Poorer or Any Other Reason: Adjudicating Immigration Marriage Fraud Cases Within the Scope of the Constitution*, 15 AM. U. J. GENDER SOC. POL’Y & L. 743 (2007) (arguing that the “establish a life” test is more effective for detecting fraudulent marriages and less likely to pose constitutional problems than the “evade the law” test).

184. *See* ANNA O. LAW, *THE IMMIGRATION BATTLE IN AMERICAN COURTS* 153 tbl.5.1 (2010) (showing immigration dockets for circuit courts).

that it represents a committed, long-term, and possibly conjugal dependency relationship that makes the recipient worthy of the benefit. In looking at the doctrines together, a pattern emerges. When lawmakers think that marriage alone is an adequate proxy for these attributes, they tend to use formal marriage rules. When instead they suspect that marriage alone will not serve as an adequate proxy, they employ “marriage-plus” rules or integrated formal-functional tests.

Compare, for example, the formal marriage test used for health insurance marriage fraud with the integrated test used for immigration marriage fraud. Health insurance is prospective; no one knows when he or she might (or might not) need it. In all but the direst circumstances, a need for health insurance is unlikely to be the factor that tips a couple from cohabitation or friendship to marriage. And even if this need does induce a couple to marry, the couple has to stay together in order for the spouse to enjoy the marriage-based benefit. Thus, the benefit-seeking spouse will remain potentially liable for the other spouse’s debts, obligated to support the spouse, and subject to equitable distribution of property and potential alimony should a divorce occur. In many cases, the threat of having to stay in the relationship for the long term might be enough to deter all but the most desperate to marry. In this context, marriage standing alone may be enough to predict long-term commitment.

In contrast, marriage to a U.S. citizen often makes the difference between lawful immigration and no immigration at all, or, for a person who would otherwise be eligible, the difference between a wait of a few months and a wait of years or even decades.<sup>185</sup> And exit is easy: once the government grants the immigrant a green card, the couple is free to divorce with no consequences for immigration status.<sup>186</sup> The divorced green-card holder is every bit as much a lawful permanent resident as the one who stays married.<sup>187</sup> This ability to get the benefit and then exit the relationship makes marriage in immigration law particularly vulnerable to fraudulent use.<sup>188</sup>

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185. See INA § 203, 8 U.S.C. 1153 (2006) (setting forth quotas for family-based, employer-sponsored, and diversity visa categories); DEPARTMENT OF STATE, VISA BULLETIN Vol. IX, No. 39 (Dec. 2011) (showing wait times for visas currently being approved for various categories).

186. See INA § 237(a)(1)(D) (making deportable any alien whose conditional status is violated by subsequent legal separation or divorce without certain hardship waivers); § 237(a)(1)(G) (establishing rebuttable presumption that if alien’s marriage terminates within two years of the grant of conditional status, the alien entered the marriage for immigration purposes and is therefore deportable). The rebuttable presumption of invalidity does not apply to marriages terminated after the two-year conditional period.

187. Although the government could prosecute an immigrant for fraud where it discovers the fraud after it grants the immigrant a green card, in these (relatively rare) cases, the remedy for the government is rescission of the grant of lawful immigration status. See, e.g., *Baria v. Leno* [sic], 849 F. Supp. 750 (D. Haw. 1994), *rev’d on other grounds sub nom.* *Baria v. Reno*, 94 F.3d 1335 (9th Cir. 1996) (reviewing rescission of lawful permanent resident status based on marriage fraud after ex-wife of immigrant contacted immigration services to report him).

188. But see Maria Isabel Medina, *The Criminalization of Immigration Law: Employer Sanctions and Marriage Fraud*, 5 GEO. MASON L. REV. 669, 711–12 (arguing that even short-term

In general, if a couple is unlikely to use marriage instrumentally, either because the benefit sought is unlikely to be substantial enough to tip the scales toward marriage or because the benefit will cease to be useful once a party exits the marriage, then we would not expect the state to expend its resources to police the functional qualities of the marriage. In these cases, the government will most likely use a formal marriage test. If on the other hand, the benefit is substantial, and one spouse could carry the benefit with her after she exits the marriage, the state has a much stronger interest in looking behind the mere technical validity of the marriage to determine whether it is a relationship the state wants to recognize. Then, the state may use plus factors or intrusive functional tests, such as the “establish a life” test. Another way of putting it is that when marriage is an over-inclusive proxy for an entitlement, the law steps in to find ways to more narrowly articulate the beneficiary class so that some, but not all, married people will benefit.

### III.

#### MARRIAGE FRAUD AS FRAUD ON THE PUBLIC

Now that we have the panoply of marriage fraud doctrines on the table, we can take a step back to answer the questions of “why” and “how.” Why have so many marriage fraud doctrines developed alongside the old “essentials of the marriage” annulment doctrine? And how exactly is marriage fraud harmful to the state? This Part first suggests three interlocking causes for the proliferation of public benefits marriage fraud doctrines. Next, it analyzes the harm by analogizing to modern forms of public fraud, such as securities fraud, where the fraud causes a diffuse harm to the public rather than a harm to a specific individual.

##### *A. From Contract Fraud to Public Benefits Fraud*

The essentials of the marriage doctrine may have focused on fraud the parties to a marriage suffer, but this focus did not mean that the doctrine did not implicate the public. Rather, as shown in Part I, the public had an important interest in marriage. This interest was economic, as marriage was the primary institution for dealing with dependency, and moral, as marriage was the official repository for reproduction and sex.<sup>189</sup> Keeping spouses together in life-long, mutually supportive relationships best served this interest. By the middle of the twentieth century, however, the ability of private contract notions of marriage to effectively police the public’s interests was on the wane. Three developments are crucial to understanding the shift: the rise of the modern administrative state, the introduction of no-fault divorce, and the decriminalization of

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marriage to a stranger puts the U.S. citizen spouse at financial risk because it exposes her to a duty to support that is still enforceable upon separation or divorce and that this risk is adequate to deter fraud).

189. See *supra* Part I.



nonmarital sex. Taken together, these factors led to a world in which a “fraudulent” marriage could harm the public not only through the failure of spouses to properly support each other and constrain each other’s sexuality, but also by making direct claims on the public coffers.

### *1. Public Benefits Linked to Marriage*

The rise of the modern administrative state reconstituted the meaning of marriage by using it as a category for eligibility for public benefits. Prior to the New Deal and the advent of the quota system of immigration admissions, marriage had functioned as a kind of privatized welfare system. However, during this earlier period the system was largely internal to the couple’s means. If a woman married a man thinking he was richer than he was, she would, unfortunately for her, not live in the style she had expected, but her impoverished husband would still have a marital duty to support her in a manner consistent with his station in life.<sup>190</sup> The state was not injured by her poverty.<sup>191</sup> But in the twentieth century, the meaning of marriage began to change as the government began to tie more and more benefits to marital status.

In the 1920s, marital status became suddenly much more important because it provided a way to evade strict immigration quotas designed to racially regulate the growth of the nation.<sup>192</sup> Marital status had always been important for Asian immigrant women, who were deemed to be likely prostitutes or excluded laborers absent marriage to an admissible husband.<sup>193</sup> Marital status had also been important for female immigrants in general, for without a male breadwinner, a female immigrant was often considered “likely to become a public charge,” and excluded at the port of entry.<sup>194</sup> The onset of

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190. Twila L. Perry, *The “Essentials of Marriage”: Reconsidering the Duty of Support and Services*, 15 Yale J.L. & Feminism 1, 8–12 (2003).

191. The main exception proves the rule: in the case of military pensions for widows of veterans, which were made available to women throughout the nineteenth century, administrative decision makers developed much narrower definitions of marriage than judges applying the common law, and developed fraud doctrines in order to protect the public fisc. See Collins, *supra* note 4, at 1118–40.

192. See MAE M. NGAI, IMPOSSIBLE SUBJECTS: ILLEGAL ALIENS AND THE MAKING OF MODERN AMERICA 17–21 (2004) (discussing introduction of race-based quotas); Kerry Abrams, *Peaceful Penetration: Proxy Marriage, Same-Sex Marriage, and Recognition*, 2011 MICH. ST. L. REV. 141, 154–64 (discussing how marriage allowed a way around the quotas for immigrant women).

193. See Kerry Abrams, *Polygamy, Prostitution, and the Federalization of Immigration Law*, 105 COLUM. L. REV. 641, 699–702 (2005) (showing how the Page Law of 1875 was used to exclude Chinese women who did not conform to notions of proper marriage); Todd Stevens, *Tender Ties: Husbands’ Rights and Racial Exclusion in Chinese Marriage Cases, 1892–1924*, 27 LAW & SOC. INQUIRY 271 (2002) (showing that courts interpreted the Chinese Exclusion Act to permit wives to enter if they were joining husbands because it would be unthinkable for a man to not be entitled to the services and companionship of his wife).

194. See MARTHA GARDNER, *THE QUALITIES OF A CITIZEN: WOMEN, IMMIGRATION, AND CITIZENSHIP: 1870–1965*, at 87–92 (2009) (discussing effects of public charge designation on unmarried female immigrants).

quotas for European immigrants forced Congress to confront the issue of what status it should give to immigrants who married U.S. citizens or legal immigrants. In its 1921 Emergency Quota Act, Congress made children of U.S. citizens under the age of eighteen exempt from the quotas, and gave “preference” to “wives, parents, brothers, sisters, children under eighteen years of age, and fiancées” of aliens who had applied for citizenship.<sup>195</sup> In 1924, Congress amended these provisions to make wives (but not husbands) of U.S. citizens who were residing within the United States exempt from the quotas and gave “preference” within the quotas to husbands of citizens.<sup>196</sup> Almost overnight, legal immigration status had gone from a relatively easy acquisition—at least for a European immigrant—to a scarce benefit. Marriage to a male citizen became one of the easiest ways to obtain this status, and in fact was the only method that did not require a blood tie.

The reasons Congress granted superior rights based on marriage to immigrant women over immigrant men are enormously complex.<sup>197</sup> For our purposes, the important point is that Congress did not grant immigration benefits to spouses evenhandedly after determining that marriage was an institution worth encouraging through the addition of a new benefit. Rather, Congress granted immigration benefits in a highly gendered way that was reflective of social norms and expectations at the time. Men were presumed (and legally required) to be the breadwinners for their families, and women were presumed (and legally required) to follow their husbands. At the time Congress amended the provisions, a husband determined his wife’s domicile.<sup>198</sup> For many years, he had also determined her citizenship.<sup>199</sup> The government grafted immigration benefits onto the existing marriage system, in which the husband-as-breadwinner and decision maker model was still dominant.<sup>200</sup> If a husband was expected to support his wife, then she needed to be physically present to provide services for him in return.<sup>201</sup> Further, wives were understood to undergird the stabilizing and constraining effects of the family on men.<sup>202</sup>

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195. Act of May 19, 1921, Pub. L. No. 67-5, § 2(d), 42 Stat. 5, 6.

196. Immigration Act of 1924, Pub. L. No. 68-139, § 4(a), 43 Stat. 153, 155.

197. For extensive discussion of the interactions of married women’s citizenship law and immigration law, see CANDICE BREDBENNER, *A NATIONALITY OF HER OWN: WOMEN, MARRIAGE, AND CITIZENSHIP* (1998); NANCY COTT: *PUBLIC VOWS, A HISTORY OF MARRIAGE AND THE NATION* (2000); GARDNER, *supra* note 194; Leti Volpp, *Divesting Citizenship: On Asian American History and the Loss of Citizenship Through Marriage*, 53 UCLA L. REV. 405 (2005).

198. See Kerry Abrams, *A Legal Home: Derivative Domicile and Women’s Citizenship* (Oct. 25, 2011) (unpublished manuscript) (tracing history of marital derivative domicile rule and married women’s citizenship law).

199. BREDBENNER, *supra* note 197 (discussing history of married women’s citizenship).

200. Janet M. Calvo, *Spouse-Based Immigration Laws: The Legacies of Coverture*, 28 SAN DIEGO L. REV. 593, 600–03 (1991).

201. See Stevens, *supra* note 193; Nancy Cott, *Marriage and Women’s Citizenship in the United States, 1830–1934*, 103 AM. HIST. REV. 1440, 1468 (1998) (arguing that the “principle that American male citizens ought to be able to create and sustain their chosen families” was so entrenched that it sometimes “triumphed over the racialized nationalism of the period”); cf. HARTOG, *supra* note

Similarly, the new system of social security instituted as part of the New Deal relied on then-existing legal and social understandings of marriage as a means of determining a person's eligibility for benefits. The Social Security Act (SSA), enacted by Congress in 1935, provided old age insurance for workers who paid into the system through payroll taxes.<sup>203</sup> This Act initially made benefits unattainable for most women, as it specifically excluded intermittent or short-term work and work involving "domestic service in a private home."<sup>204</sup> Only 15 percent of married women worked outside the home in 1940, and many of these were domestic workers.<sup>205</sup> But soon, Congress amended the Act, accommodating women by adding benefits for widows and aged wives of recipients.<sup>206</sup> These benefits used marriage—an established legal institution that required husbands to support their wives—to provide new, public benefits to women by expanding the concept of their husbands' support. The government would not step in to support all women; rather, it would step in when a breadwinning husband died or when he retired. The woman's support would be tied to the man's successful performance of his role as provider.<sup>207</sup>

There was no reason that lawmakers had to link benefits to marriage. Congress could have decided, for example, that each American citizen could sponsor one immigrant of his or her choice for admission to the United States, or designate one friend or family member (or stranger) as a beneficiary for pension, insurance, or other benefits purposes. But marriage was a convenient and nearly ubiquitous legal category that already carried important social and legal meanings. Marriage was the legal and social institution that dealt with female dependency, and it was therefore perfectly poised to be extended to further provide for the public welfare.<sup>208</sup>

Underlying the assumption that public benefits should be tied to marriage was the reality that most people were married and that most wives were financially dependent on their husbands.<sup>209</sup> Public benefits stepped in to

22, at 165 (arguing that although coverture gave husbands and wives reciprocal duties, the husbands' duties existed not for the benefit of wives but instead to "rationalize and justify a structure of power").

202. BREDBENNER, *supra* note 172, at 120–21 (showing how immigration law gave immigrant wives but not husbands nonquota status to encourage stability and morality); COTT, *supra* note 197, at 155 (discussing early immigration law's attitude toward marriage).

203. Social Security Act of 1935, Pub. L. 74-271, §§ 201–02, 49 Stat. 620.

204. *Id.* §§ 201(b), (c).

205. ALICE KESSLER-HARRIS, IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA 146 (2001).

206. Social Security Act Amendments of 1939, Pub. L. 76-379, §§ 202(b), (d), 53 Stat. 1360, 1364, 1365.

207. See KESSLER-HARRIS, *supra* note 205, at 142–46 (showing how the SSA amendments used gender stereotypes about roles in marriage to justify the expansion of benefits for widows and aged wives of recipients).

208. Indeed, Professor Alice Kessler-Harris has shown that lawmakers extended benefits to wives and widows in the 1939 SSA amendments in order to pay down a surplus that they did not want to spend on agricultural and domestic workers, who were largely black. *Id.* at 150.

209. See UNITED STATES CENSUS SUMMARY, Vol. 2, Table 16 (1940) (12,845,259 women in

amplify a husband's support of his wife, not to replace it. For example, as early as the early-nineteenth century, war widows received pensions from the government.<sup>210</sup> These pensions were compensatory: had the husbands lived, they would have supported their wives, so the government stepped in to replace the husbands by fulfilling their support duties and thereby preventing war widows from becoming destitute.<sup>211</sup> Similarly, the first wrongful death statutes gave tort remedies to widows who had lost their breadwinning husbands, but not to widowers.<sup>212</sup> Many modern benefits work in a similar fashion: social security death benefits for the spouse of a worker who has paid into the system, for example, essentially compensate the surviving spouse for the loss of a provider.<sup>213</sup> Similarly, tax breaks for married couples in which one spouse is the primary earner and the other specializes in domestic work are a way of recognizing that in these families, one salary is actually supporting two people and should be taxed less as a result.<sup>214</sup> Employers voluntarily provide other benefits, such as health insurance, to employees and extend these benefits to spouses of employees as a matter of customary practice.<sup>215</sup> These benefits recognize the reality that in many families only one worker would qualify for employment-based health care—generally by working full-time for an employer large enough and successful enough to provide the benefit. As a result, including spouses as beneficiaries would cover more people—largely women involved in childrearing.

Another important reason that marriage became the site for public benefits was that traditional marriage provided ample burdens to counteract the temptation to marry solely for benefits. Marriage bestowed benefits, to be sure. For husbands, these included the services of a wife; for a wife they included financial support from her husband; for both, they included access to legal sex, the possibility of legitimate children, and social status.<sup>216</sup> But these benefits

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labor force out of female population of 65,507,688); Vol. 4, Table 5 (showing that over 61 percent of both male and female population over age of fifteen were married, and over 80 percent of men and women age thirty-five to forty-four were married), available at <http://www.census.gov/prod/www/abs/decennial/1940.html>; see also KESSLER-HARRIS, *supra* note 205, at 146 (discussing women's dependence on men during 1930s).

210. See Collins, *supra* note 4, at 1097–1106.

211. As Kristin Collins has shown, these pensions may have used a substitution theory, but in actuality they created a new system of public benefits that gave women more than they would have received under intestacy law. *Id.* at 1111–12.

212. John F. Witt, *From Loss of Services to Loss of Support: The Wrongful Death Statutes, the Origins of Modern Tort Law, and the Making of the Nineteenth-Century Family*, 25 LAW & SOC. INQUIRY 717 (2000); for a discussion of the ideological connections between widows' pensions, wrongful death actions, and changes in inheritance law, see Kristin A. Collins, "Petitions Without Number": *Widows' Petitions and the Early Nineteenth-Century Origins of Marriage-Based Entitlements*, 30 LAW & HIST. REV. (forthcoming 2012) (draft on file with author).

213. See KESSLER-HARRIS, *supra* note 205, at 144.

214. See Motro, *supra* note 2, at 1512.

215. Ash & Badgett, *supra* note 74.

216. See Siegel, *Home as Work*, *supra* note 39.

came with teeth. A husband was entitled to his wife's services, but he had to support her. A wife would receive support, but owed her services to her husband. For both, the "right" to sex also entailed a duty to engage in it.<sup>217</sup> Since exiting a marriage was very difficult, the state did not need to worry that a person would marry only to obtain benefits because, sooner or later, the individual would feel the burdens as well.

Marriage was therefore not an irrational institution on which to graft public benefits. A person who is committed for life to another person is unlikely to choose that person only for his health insurance, his pension, or his military housing benefits. Even if a person were this instrumental, she would be stuck forever with the person she chose—along with his insurance, pension, and housing—and so we might not worry too much about the social consequences of her seemingly private decision. But the addition of a cluster of new public benefits to the benefits-burden equilibrium changed marriage: there were simply more reasons to marry without a counteracting increase in burdens. We might say that the "carrots" offered for entering marriage increased.

## 2. *The Rise of No-Fault Divorce*

Soon after the "carrots" associated with marriage increased, the "stick" that had traditionally kept spouses married—and therefore deterred spouses from entering marriage lightly—all but disappeared. Prior to the 1970s, almost all states had only fault-based divorce.<sup>218</sup> Fault grounds typically included abandonment, adultery, impotency, and extreme cruelty.<sup>219</sup> Some states had even more restrictive laws: New York's only ground for divorce until 1967 was adultery,<sup>220</sup> and South Carolina did not allow judicial divorce at all until 1949.<sup>221</sup> Even where fault-based divorce was available, a spouse seeking one had to demonstrate that he or she was the innocent and injured spouse.<sup>222</sup> If both parties were guilty, then the defendant could use the defense of

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217. *Id.*

218. Although they were not styled as "no-fault" laws, several states did experiment with expansive divorce grounds before the 1970s. See James Herbie DiFonzo, *Customized Marriage*, 75 IND. L.J. 875, 887 (2000).

219. Heather Flory, "I Promise to Love, Honor, Obey . . . And Not Divorce You": *Covenant Marriage and the Backlash Against No-Fault Divorce*, 34 FAM. L.Q. 133, 137 (2000).

220. New York went from providing for divorce only in cases of adultery in 1966 to providing divorce on multiple grounds, including cruel and inhuman treatment, abandonment, imprisonment of three or more consecutive years, adultery (with an expansive definition that included oral or anal sexual conduct), or living apart pursuant to a decree or judgment of separation for a period of two or more years. 1966 N.Y. LAWS 833, 834 (codified as amended at N.Y. DOM. REL. LAW §§ 170(1)–(6) (McKinney 2010)). This last ground was changed to one year in 1968. Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL RTS. J. 381, 410 n.196 (2007). New York State amended its no-fault statute in 2010 to allow for unilateral no-fault. 2010 N.Y. SESS. LAWS ch. 384 (McKinney).

221. DiFonzo, *supra* note 218, at 917 (2000).

222. GROSSMAN & FRIEDMAN, *supra* note 22, at 162.

“recrimination” to block the divorce.<sup>223</sup> In 1970, California passed the nation’s second no-fault divorce law, which made divorce available at the request of either party in cases of irreconcilable differences.<sup>224</sup> Many other states followed suit, so that within several years, most states in the nation offered at least the option of no-fault divorce.<sup>225</sup>

Of course, people did get out of unhappy marriages before the advent of no-fault divorce. As legal historian Hendrik Hartog has shown, separation without divorce was more common than has been appreciated.<sup>226</sup> And collusive divorces, where one spouse privately agreed to allow the other to bring an adversarial suit on grounds of adultery or cruelty, were more common than genuinely contested divorces by the mid-twentieth century.<sup>227</sup> Nevertheless, even collusive divorce required two people who wanted to divorce, or at least recognized that one of them wanted it enough that it was not worth the other’s energy to fight it. In contrast, no-fault divorce made divorce possible even where one party vehemently opposed it. No-fault divorce, therefore, made the possibility of unilateral marriage fraud—fraud engaged in by only one spouse—easier.

No-fault divorce also made bilateral fraud easier. Under the fault system, couples had the option of obtaining collusive divorces, but there were no guarantees of success. The law still required an “innocent and injured” spouse to demonstrate grounds for divorce. If a judge did not believe that the grounds were genuine, or did not find the plaintiff to be innocent of fault, the unlucky couple might find themselves married forever.<sup>228</sup> No-fault divorce changed this dynamic; now, both spouses could be equally culpable and still get the divorce one or both of them wanted.<sup>229</sup> If the increased use of collusive divorce under

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223. *Id.*

224. See Flory, *supra* note 219, at 137 (stating that “[i]n 1969 California became the first state to adopt a ‘pure’ no-fault divorce statute. One by one, states followed California’s lead, adopting similar statutes establishing ‘irretrievable breakdown’ or ‘incompatibility’ as grounds for divorce.”).

225. Lawrence M. Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 664, n.60 (1984). For an illustration of the rise in divorce rates from the mid-nineteenth century into the 1970s and 1980s, see Paul C. Glick & Sung-Ling Lin, *Recent Changes in Divorce and Remarriage*, 48 J. MARRIAGE & FAM. 737 (1986). According to the Glick-Lin report, the divorce rate per 1,000 married women rose steadily from 0.3 in 1867 to 5.3 in 1979. Despite dips to 1.3 during the Great Depression and 2.1 during the baby boom, the divorce rate continued an upward trend across the twentieth century, nearly doubling from 2.5 in 1965 to 5.3 in 1979. *Id.* at 738. The current divorce rate is 3.4 per 1,000 population, as compared to a marriage rate of 6.8 per 1,000 total population. Ctrs. for Disease Control & Prevention, *Births, Marriages, Divorces, and Deaths: Provisional Data for 2009*, NAT’L VITAL STAT. REP., Aug. 27, 2010, at 1 tbl.A, available at [http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58\\_25.pdf](http://www.cdc.gov/nchs/data/nvsr/nvsr58/nvsr58_25.pdf).

226. See HARTOG, *supra* note 22, *passim*.

227. GROSSMAN & FRIEDMAN, *supra* note 22, at 163 (estimating that 90 percent of divorces were “collusive and fraudulent” under the fault system).

228. See, e.g., *Kucera v. Kucera*, 117 N.W. 2d 810 (N.D. 1962) (denying wife’s petition for divorce where she demonstrated extreme cruelty but her husband’s counterclaim also demonstrated that she was guilty of cruelty toward him).

229. Under most no-fault regimes, the only impediment to the grant of a unilaterally sought

the fault grounds in the early- and mid-twentieth century made the instrumental use of marriage somewhat more likely, the availability of no-fault made it much more so. The possibility of “divorce on demand” created the potential for the widespread instrumental use of marriage as a vehicle for opting into particular benefits of marriage and then opting out before the burdens became oppressive.

### 3. *The Decriminalization of Nonmarital Sex*

Finally, the third important twentieth-century change in marriage was a shift in the social and legal norms regarding extramarital sexuality. By the 1970s, in many communities a person no longer needed to be married to have a socially sanctioned sexual relationship.<sup>230</sup> Although statutes criminalizing adultery and fornication were still on the books in many states (and still are today<sup>231</sup>), states did not widely enforce these statutes in the latter third of the twentieth century.<sup>232</sup> In fact, the pervasiveness of collusive divorce throughout the twentieth century, where adultery was often the alleged ground, indicates a general lack of criminal enforcement—if prosecution were a likely outcome, many people would not likely have been willing to falsely claim to have committed adultery. Thus, as early as 1932, Karl Llewellyn could say, “Are we to take the statutes against fornication and adultery seriously today?”<sup>233</sup> Since nonmarital sex was unlikely to be punished, fewer people felt the need to marry at all.

Despite the lack of criminal enforcement, the law did regulate nonmarital sex. Until recently, courts continued to “invoke fornication and adultery provisions in order to explain why injuries inflicted by nonmarital intercourse are noncompensable; the theory [wa]s that the plaintiff’s crimes should not provide the basis for her recovery in tort.”<sup>234</sup> In addition, adultery and

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divorce is separation for a specified time period. *See, e.g.*, UNIF. MARRIAGE & DIVORCE ACT §302 (a)(2) (1974) (divorce granted if court finds that the marriage is irretrievably broken supported by evidence that the parties have lived separate and apart for a period of more than 180 days). And in states that have adopted the UMDA, an even faster divorce is available if a party can show “serious marital discord.” *Id.* For an extensive discussion of waiting periods and a critique of the logic of requiring a waiting period, see Difonzo, *supra* note 218, at 945–49.

230. This is not to say that there is not still an aspiration that sex should occur exclusively within marriage, especially in particular localities. But even where this aspiration is widely shared, its practice is not widely successful. *See* NAOMI CAHN & JUNE CARBONE, *RED FAMILIES V. BLUE FAMILIES: LEGAL POLARIZATION AND THE CREATION OF CULTURE 2* (2010) (arguing that families in “red states” have a different set of values regarding marriage, sexuality, and child-rearing than families in “blue states,” and that the “red families” often fail to live up to their ideals).

231. BOWMAN, *supra* note 146, at 16 n.22 (noting that, as of January 2009, Idaho, Illinois, Massachusetts, Minnesota, South Carolina, Utah, and West Virginia retained criminal fornication statutes and that Florida, Michigan, Mississippi, North Carolina, South Carolina, Virginia, and West Virginia retained criminal cohabitation statutes).

232. Anne Coughlin, *Sex and Guilt*, 84 VA. L. REV. 1, 21–25 (1998) (noting a lack of criminal enforcement).

233. K. N. Llewellyn, *Behind the Law of Divorce: I*, 32 COLUM. L. REV. 1281, 1299 (1932).

234. Coughlin, *supra* note 232, at 23.

fornication have been “zealously” prosecuted within the military against soldiers.<sup>235</sup> And some courts continue to base child custody decisions on the extramarital sexual behavior of the children’s parents, or alter alimony or property determinations if one of the divorcing spouses committed adultery.<sup>236</sup> But by the early twentieth century, outright criminal prosecution was on the wane, and in 2003 the Supreme Court finally declared the criminalization of private sexual behavior unconstitutional in *Lawrence v. Texas*.<sup>237</sup> The *Lawrence* decision had implications for civil enforcement as well. In 2005, a court held that, under *Lawrence*, it was unconstitutional to use Virginia’s fornication statute to preclude a tort cause of action for negligent transmission of herpes.<sup>238</sup>

As sex outside of marriage became more acceptable, both legally and socially, the legal disabilities surrounding illegitimacy began to disappear. At common law, nonmarital children were “bastards” and were denied the right to inherit.<sup>239</sup> This gave parents a strong incentive to marry if they wanted their children to be socially and financially secure. Beginning in the 1960s, however, the Supreme Court began to dismantle the legal distinction between marital and nonmarital children. It held, for example, that nonmarital children were entitled to claims under Louisiana’s Wrongful Death Act for the death of their mother just as marital children were, and that a nonmarital child could recover under state workers’ compensation law for the death of a father.<sup>240</sup> Nonmarital children continue to be treated differently than marital children for some purposes, including the inheritance law of some states,<sup>241</sup> but speaking very generally, the social and legal stigmas attached to nonmarital children have declined dramatically in the past century.

These changes, coupled with the ease of access to no-fault divorce, made marriage less of a “stick.” The threat of permanence no longer existed, nor did the threat of becoming a social and legal outsider if one divorced, or, for that matter, failed to marry. A person could now become a mother or father and have short- or long-term sexual relationships, all outside of marriage, without

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235. *Id.* at 24.

236. See Ira Ellman, *The Place of Fault in a Modern Divorce Law*, 28 ARIZ. ST. L.J. 773, 783, 783 n.26 (1996) (noting that fifteen states still give their courts discretion to consider fault in alimony adjudications and property allocations); Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809, 817 (2010).

237. 539 U.S. 558 (2003) (striking down Texas homosexual sodomy statute).

238. *Martin v. Zihlerl*, 607 S.E.2d 367 (Va. 2005); *cf. In re J.M.*, 575 S.E.2d 441 (Ga. 2003) (striking down Georgia’s fornication statute on the grounds that it violated the state constitution’s right to privacy).

239. See 1 WILLIAM BLACKSTONE, COMMENTARIES \*454 (“rights and incapacities [of] bastard children”).

240. *Levy v. Louisiana*, 391 U.S. 68 (1968) (Wrongful Death Act recovery); *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972) (worker’s compensation recovery).

241. See, e.g., *I.N.S. v. Nguyen*, 533 U.S. 53 (2001) (nonmarital child of U.S. citizen father required to submit more proof of relationship to father than marital child); *Labine v. Vincent*, 401 U.S. 532 (1971) (denial of right of intestate succession to nonmarital child not unconstitutional).



fear of prosecution or social shunning. Marriage, while still a powerful institution, had lost some of its coercive force. It could now be used instrumentally, purely to obtain a benefit, and discarded when the parties no longer needed it.

### *B. Harms to the Public*

The mere fact that marriage can be used instrumentally, however, does not mean that the government should waste resources preventing people from doing so. After all, people enter into relationships all the time for instrumental reasons, such as when they enter into employment contracts to earn money. What makes marriage fraud different from some other instrumental uses of institutions is its harm to the state, or at least lawmakers' perception of this harm. The intensity of the (perceived) harm must vary, because of the wide range of responses, from simple formal marriage rules to highly intrusive, and expensive to administer, integrated rules such as the "establish a life" test. What follows is an analysis of the potential harms to the state and why the tests vary as much as they do.

#### *1. The Concept of Harm: Fraud on the Market*

A first step to understanding why the state feels harmed by marriage fraud is to understand marriage fraud not as private contractual fraud, but as fraud on the public. In contractual annulment-for-fraud cases, identifying the victim was easy—so easy, in fact, that the fraud made the marriage voidable but not void.<sup>242</sup> The victimized spouse, and only the spouse, could end the marriage, but the victim's family members, community, the public at large, and the state had no standing to challenge the validity of the marriage if the victim was content to remain married.<sup>243</sup> In the public benefits marriage fraud cases, harm to one of the spouses suddenly becomes irrelevant, or, at most, only part of the problem.

Instead, the harm is to the public at large or even to the state itself. In this respect, the new marriage fraud doctrines resemble another body of twentieth-century law, the federal criminal law that established new crimes, including financial fraud.<sup>244</sup> As William Stuntz observed, the old canard that "ordinary lying is not a crime" is no longer true: "a good deal of ordinary lying fits within the definition of one or another federal felony."<sup>245</sup> Criminal financial fraud, like marriage fraud, no longer requires an individual victim.<sup>246</sup> In fact, in many

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242. See *supra* Part I, notes 18–19.

243. See *supra* Part I.

244. See, e.g., 18 U.S.C. § 1346 (2006) (defining a "scheme . . . to defraud" as used in federal mail and wire fraud statutes to "include[] a scheme or artifice to deprive another of the intangible right of honest services").

245. William Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 517–18 (2001).

246. David Mills & Robert Weisberg, *Corrupting the Harm Requirement in White Collar Crime*, 60 STAN. L. REV. 1371, 1446 (2008) (criticizing criminal securities fraud as a crime in search of a victim).

cases the person who normally would be in the place of “victim” may have benefited from the fraud. Just as two people might collude in marriage fraud to seek the benefits of marriage, the shareholders of a particular corporation might benefit from fraud that enhances the corporation’s stock prices even if the fraud harmed the public by distorting the market.

The financial fraud context offers a preliminary answer to the question of how the public can be a victim. Altering the functioning of the market could harm everyone, because participants in the market rely on the “integrity” of the market price, which is in turn set by the millions of exchanges occurring on the market every day.<sup>247</sup> This “fraud on the market” theory is useful for thinking about marriage fraud because it recognizes that the harms of fraud might be diffuse and difficult to quantify and nevertheless cause genuine harm.<sup>248</sup> The analogy also suggests that marriage fraud will be difficult to police and require ever-changing methods as defrauders develop new techniques for working the system.<sup>249</sup>

## 2. Harms to the Public in Marriage Fraud Cases

Marriage fraud, like financial fraud, might impose diffuse harms on the public. Hence, even without individual, identifiable victims, lawmakers appear to have a strong hunch that they must do something to prevent the instrumental use of marriage. Although marriage fraud does not distort stock prices, it could entail significant harm to the public, both financial and expressive.

### a. Financial Harms

First, marriage fraud might harm the public by costing it money. If the evil-doers did not commit fraud to gain access to benefits, then society could better spend the money somewhere else. Social security benefits given to a spouse could instead go back into the social security system to be spent on someone else. If the entity giving the benefit is a private employer, as with health insurance, employer-sponsored pensions, or even gym memberships, the harm to the public is less direct but still present—the fraud will cost the employer money, and the employer will pass on these costs to consumers, that is, the public. The employer may also pass the costs on to other insureds in the

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247. *Basic v. Levinson*, 485 U.S. 224, 243–44 (1988). *But see Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336, 342 (2005) (holding that to recover in a fraud-on-the-market case, a plaintiff must demonstrate more than just an inflated stock price but also show actual economic loss).

248. See RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* §15.8 423–24 (3d ed. 1986), *cited in* 485 U.S. 224, 254 n.5 (White, J., dissenting in part) (noting that the question of damages under fraud-on-the-market theory is problematic because it rests on assumptions about social costs that are difficult to quantify).

249. See Samuel W. Buell, *Novel Criminal Fraud*, 81 N.Y.U. L. REV. 1971, 1973 (2006) (arguing that open-ended tests are necessary because the defrauder “seeks to accomplish indirectly . . . what would not be permitted directly”; she attempts to “take without violating the basic prohibition against theft”).

pool—other employees of that particular employer, or other employees who use the same services.

But in the case of marriage, a problem lurks behind this theory of harm. What if the couple had a bona fide marriage and not a “fake” one? Then, presumably, they would be entitled to claim the benefit. In theory, each “ideal worker”<sup>250</sup> is entitled to include one spouse as a beneficiary on his insurance policy, as a beneficiary for social security purposes and as a dependent for tax purposes. It is not as if we ration marriage licenses because we cannot afford to have everyone in society marry. Why should the public care how successful, honest, or satisfying his marriage is, so long as he is not claiming benefits for more than one spouse?

Perhaps the answer lies in the structure of the benefits markets themselves. On their surface, these markets appear to assume that benefits should be freely allocated to ideal workers, their spouses, and their children. In reality, however, the system operates on the tacit assumption that not everyone has a spouse. Single workers effectively subsidize health insurance for their married co-workers’ spouses. Similarly, in the context of immigration, U.S. citizens are entitled to sponsor an immigrant spouse, but the system assumes that most citizens will marry other citizens so that the number of citizens sponsoring immigrant spouses will remain low as a percentage of the total population. And we could even think of the federal tax system as burdening some types of couples to benefit others: the total cost of the marriage “bonus” given to some couples is largely offset by the marriage penalty imposed on others.<sup>251</sup>

If we understand marriage benefits as subsidized by those who do not use them (or, in the case of the marriage bonus and penalty, subsidized by those who do not perform marriage in a traditional breadwinner/homemaker fashion), the “marriage-plus” rules and functional tests suddenly look not only like fraud prevention mechanisms but also like methods for cabining the definition of marriage. This limitation ensures that not everyone can claim marital benefits and enough benefits will remain for those who conform to the privileged definition.<sup>252</sup> The contractual system of marriage as privatized welfare worked

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250. See JOAN WILLIAMS, UNBENDING GENDER: HOW WORK AND FAMILY CONFLICT AND WHAT TO DO ABOUT IT 1, 274 (2000) (arguing that market work is organized around the ideal of a worker who works full-time and overtime and takes little or no time off for childbearing or child rearing).

251. According to government reports, in 1996 more than twenty-one million married couples found their tax bills increased by an average of nearly \$1,400 because they filed jointly, while another twenty-five million found their tax bills decreased by an average of about \$1,300. CONG. BUDGET OFFICE, FOR BETTER OR FOR WORSE: MARRIAGE AND THE FEDERAL INCOME TAX 29–30 (1997), available at <http://www.cbo.gov/ftpdocs/0xx/doc7/marriage.pdf>. Additionally, in that year, aggregate marriage penalties totaled about \$29 billion while marriage benefits added up to about \$33 billion. *Id.*

252. Cf. Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why, and How the Burden of Care for Children Should Be Shifted*, 76 CHI.-KENT L. REV. 1753, 1762 (2001) (noting that employees with more dependents frequently obtain perquisites worth more than those offered to single or childless employees).

best when everyone was married; the more recent system of using marriage as a proxy for entitlement to benefits works best if not everyone can qualify.

This theory of harm may partially explain the myriad cases involving gay people who, helped by their friends, engage in marriage fraud in order to be with, or obtain benefits for, their partners who are ineligible because of the different-sex requirement discussed previously.<sup>253</sup> Numerous immigration and military benefits cases, for example, involve a U.S. citizen marrying the partner of a gay friend so that he can be reunited with his partner.<sup>254</sup> In these cases, the fraud does not result from too many immigrants being sponsored but rather from the wrong person sponsoring the immigrant. The U.S. citizen sponsor is not sponsoring a second spouse; he is merely using his ability to sponsor a spouse, which would otherwise go unused, to help a friend. Nor is the “real” husband—the gay U.S. citizen—sponsoring anyone at all; in fact, he is forgoing his ability to sponsor a spouse and instead allowing a friend to do it for him. The harm, then, is not that an “extra” person obtained a status—both U.S. citizens were, in fact, entitled to sponsor *someone* for that status. Instead, the harm is that the system is simply not designed to allow everyone to claim a spouse, and someone whom the system has excluded is nevertheless attempting to claim the benefit.<sup>255</sup>

A slight twist on this theory is the theory that marriage fraud robs insurers, both private and public, of their ability to adequately predict the payouts they must make. Health insurance and life insurance companies, for example, set rates and make predictions based on actuarial tables showing the statistical likelihood of death at given ages; insurance companies and public insurance programs, such as social security, make similar predictions about the likelihood of a person having a disability, being married, or having other dependents. The harm to the public if someone claims a spouse who is not “really” his or her spouse is not only that the state is forced to pay for someone it did not anticipate having to pay for, but that the claimant has robbed the state of its

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253. See *infra* Subsection II.B.5.

254. See, e.g., Gustavo Arellano, *What's a Little Marriage Fraud Between Amigos?*, PHOENIX NEW TIMES, July 8, 2010, <http://www.phoenixnewtimes.com/2010-07-08/news/what-s-a-little-marriage-fraud-between-amigos> (discussing a woman marrying her gay friend so that he could remain in the country); Heather Ratcliffe, *Sham Marriage Nets Year of Probation*, ST. LOUIS POST-DISPATCH, Oct. 13, 2007, at A10 (explaining how a gay man arranged a marriage between his friend and his partner so that his partner could stay in the country); see also *Joaquin-Porras v. Gonzales*, 435 F.3d 172, 174 (2d Cir. 2006) (referring to marriage between a gay man and a lesbian as fraudulent even though they testified it was intended to “provide companionship for both parties”); *Correa v. Pasquarell*, No. SA-02-CA-0960-RF, 2004 WL 212935 (W.D. Tex. 2004) (describing an allegation by I.N.S. that a woman’s marriage was not bona fide because she was a lesbian and her husband was a gay man); *United States v. Phillips*, 52 M.J. 268, 269 (C.A.A.F. 2000) (involving a servicemember charged with larceny for entering into sham marriage so he could move off-base with his gay partner).

255. Cf. *Fiallo v. Bell*, 430 U.S. 787, 797–99 (upholding against equal protection challenge Congress’s definition of “child” as excluding children of unmarried fathers, and noting that Congress frequently provides “some—but not all—families with relief from various immigration restrictions”).

ability to make predictions about the number of claimants and ensure that its programs are adequately funded.<sup>256</sup>

*b. Expressive Harms*

So marriage fraud might be expensive for the state. Might it also result in expressive harms? Many of the antifraud pronouncements Congress has made involve not expense but concern about protecting marriage itself. As Representative Barney Frank put it during hearings on the IMFA, “[m]arriage is a very important and a very sacred institution, and we should not stand by while people trifle with it to get into the country.”<sup>257</sup> This kind of expressive harm might be thought of not as fraud on the market, but as fraud on the voters. Voters elect legislators who put a certain kind of public benefits program in place, which rewards certain kinds of marriages—that is, heterosexual and gender-traditional. Use of marriage fraud to obtain the benefit without conforming to the statutorily imposed definition of marriage denies voters and the citizenry their public policy preferences as expressed in voting practices.

Anxiety about harm to marriage as an institution could also justify the “establish a life” test. The logic goes something like this: if a couple is willing to marry and to live so as to create the appearance of sincere companionship, then their private motives for marrying will not damage the institution. Put differently, their willingness to embrace the “stick” aspects of marriage—commitment, mutual support, and conjugality—justifies their interest in a particular “carrot.” But if they are unwilling to embrace the stick, the institution might crumble.

According to some critics, the instrumental use of marriage does not just cheapen marriage. It also undermines marriage from within by de-gendering the institution.<sup>258</sup> In this view, the fact that public benefits are structured to encourage traditional breadwinner/homemaker gender roles cuts in favor of maintaining them. Individuals who are not willing to take on these roles but want the benefits anyway threaten the institution by making it less about civilizing men, protecting against female dependency, and nurturing children.<sup>259</sup> Instead, for couples unwilling to conform to traditional marriage roles, marriage is about the two individuals who make up the marital unit and their autonomous needs. With this theory in mind, we can read *Boyster*, the “divorce fraud” tax case, as punishing a couple for having the audacity to create

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256. Of course, the state often does not adequately fund its programs. The point here is that it is not only the cost to the state that is the problem, but the threat to the state’s ability to plan.

257. 132 CONG. REC. 27,016 (1986) (statement of Rep. Barney Frank).

258. See, e.g., Monte Neil Stewart, *Judicial Redefinition of Marriage*, 21 CAN. J. FAM. L. 11 (2004) (arguing that along with implicating separation of powers issues, judicial treatment of the civil union/marriage debate ignores the overall policy concerns inherent in the gendered nature of marriage); see generally Wardle, *supra* note 9 (arguing that civil unions cannot advance the social goals that gendered marriage can and has done historically).

259. See Wardle, *supra* note 9, at 779–80.

a dual-breadwinner family. Marriage in this view is not an equal institution, but instead a status that shapes behavior along gendered lines to produce societally beneficial results.

A similar critique underlies the common charge that same-sex marriages are “counterfeit” or “fake.”<sup>260</sup> Since same-sex couples cannot procreate with each other without outside help, some scholars have accused them of seeking “marriages of convenience entered into primarily for the tangible benefits.”<sup>261</sup> A “real” marriage, on this theory, would be one in which the couple engaged in procreative sex. To return to the example mentioned in the financial harms section above, a person who uses a fraudulent immigration marriage to a third party to facilitate reunification with that party’s same-sex partner might be understood as harming the public financially by taking a spot that would not otherwise have been used. But such a marriage also alters marriage itself by introducing an alternative model that involves neither gendered roles nor procreative sex.

A problem with both of these critiques is that they make assumptions about what marriage is that may simply be untrue for many people. In order to identify an expressive harm to marriage, we must identify what marriage is, and how exactly the expression of a different vision dilutes, misrepresents, or destroys it. But there seems to be little cultural consensus on what marriage is today.<sup>262</sup> The greater harm to marriage may occur not from opening it up to more types of people, but from insisting that it is a coercive, gendered institution, one that many people might find unappealing.<sup>263</sup>

One other expressive harm might result from marriage fraud, particularly in the immigration context. Fraud might be a kind of invasion of the polity, an unwanted inclusion of new members whom the state would not have chosen if it had known the truth about them. An important purpose behind granting immigration status based on marriage is the idea that marriage serves a civilizing function. Immigrants will be more successful and assimilate more quickly if they are married to U.S. citizens; marriage tames the immigrant and

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260. See Courtney M. Cahill, *The Genuine Article: A Subversive Economic Perspective on the Law’s Procreationist Vision of Marriage*, 64 WASH. & LEE L. REV. 393, 397 (2007) (arguing that “the counterfeiting analogy to same-sex relations . . . is intimately tied to concerns about sodomy and same-sex procreation—each of which . . . is viewed as a fraudulent imitation that not only threatens the currency of marriage but also represents a kind of economic fraud”).

261. George W. Dent, Jr., *Traditional Marriage: Still Worth Defending*, 18 BYU J. PUB. L. 424, 424 (2004), cited in Cahill, *supra* note 260, at 450. Cahill also quotes Pat Robertson making a similar claim: “[Homosexuals are] self-absorbed narcissists who are willing to destroy any institution so long as they can have affirmation of their lifestyle.” *Id.* at 446.

262. See CAHN & CARBONE, *supra* note 230 (delineating two different visions of family life in America); COONTZ, *supra* note 46 (showing various meanings of marriage over time).

263. See Kerry Abrams & Peter Brooks, *Marriage as a Message: Same-Sex Couples and the Rhetoric of Accidental Procreation*, 21 YALE J.L. & HUM. 1, 33–35 (2009) (arguing that vision of marriage endorsed by some justices in state same-sex marriage litigation is unlikely to appeal broadly to the public).

turns him into a citizen.<sup>264</sup> A person who uses marriage fraudulently to obtain lawful status becomes a member—first as a green-card holder, which in turn creates eligibility for naturalized citizenship—without undergoing the acculturating process that marriage is imagined to produce.<sup>265</sup> An undeserving interloper now has the opportunity to become a citizen, saddling the citizenry with an unqualified new member and leaving a more deserving immigrant waiting in line.

Public benefits marriage fraud, then, could cause the state harm, whether financial or expressive. Such harm would have no particular victim; instead the harm would be dispersed across the public. Some people, however, might experience more concentrated harm than others. For instance, people pushed back in the queue for a green card would suffer more from immigration marriage fraud than the citizenry in general.

But the types of harm experienced by the state may not be as compelling upon closer examination. The financial harms result not from thievery but from the way the system is structured. It is designed to reward marriage—and particular forms of marriage, at that—by taxing the nonmarried and those in egalitarian marriages. If the benefits are intended as a carrot, then should it be any surprise that people are willing to marry to get them?<sup>266</sup> And the potential expressive harms force us to ask what exactly marriage is, who gets to control its meaning, and why doing exactly what the state is incentivizing people to do—marrying for a benefit—is wrong if they are not also marrying for other reasons.

#### IV.

#### RECONFIGURING MARRIAGE

We saw in Part II that, in many cases, marriage, standing alone, is a poor proxy for eligibility for entitlements, and in those cases, lawmakers try to further circumscribe who will be eligible by crafting tests that either add additional formal requirements, such as a time lapse, age, or cohabitation, to marriage, or add functional requirements for performing marriage in an idealized way. Put another way, marriage turns out to be a poor proxy in some circumstances

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264. See Kerry Abrams, *Becoming a Citizen: Marriage, Immigration, and Assimilation*, in GENDER EQUALITY: DIMENSIONS OF WOMEN'S EQUAL CITIZENSHIP (Linda McClain & Joanna Grossman eds., 2009); see also INA § 319(a), 8 U.S.C. § 1430(a) (2006) (reducing residency requirement for obtaining naturalized citizenship from five years to three years where immigrant is married to U.S. citizen during the period of residency).

265. In the case of gay or lesbian immigrants in long-term relationships, of course, this acculturation process would have occurred, just not through the official sponsor. But perhaps in these cases the problem for the state is that the wrong acculturation process has occurred. The rules of immigration, like tax and social security law, encourage marriages structured along traditional gender lines, and by acculturating through a same-sex relationship, the immigrant has evaded this form of acculturation. See Abrams, *supra* note 264 (arguing that heterosexual marriage functions as a crucible for becoming a citizen and critiquing this process).

266. See Medina, *supra* note 188, at 711 (“Engaging in conduct to avail oneself of a governmental benefit does not, in and of itself, cause harm to the government or to the public.”).

because it is overinclusive; it is simply too easy to get married for instrumental purposes, and lawmakers must do something to tighten up the system.

But even in those circumstances where the law has not added “plus” or functional tests to the formal marriage requirements, we might still ask whether marriage is a good proxy for benefit eligibility. It is possible, in other words, that marriage is actually a radically underinclusive proxy for eligibility. As we saw in Part III, marriage fraud’s harm to the state is largely a harm to a system predicated on the idea that married people are worthier recipients of benefits because they are married and that marriage as a concept has a single meaning worth defending. Society demands that marriage do an enormous amount of work, and it important to ask whether marriage is the right mechanism for determining eligibility at all.

This final Part explores the consequences of asking marriage to do so much work. First, it argues that grafting so many benefits onto marriage has costs. Second, it argues that these costs suggest that we might be better off disaggregating public benefits from marriage and explores how this might be done.

#### *A. The Costs of Tying Public Benefits to Marriage*

Despite the harms the state suffers from marriage fraud, there are good reasons to think that marriage fraud doctrines should be abandoned, or at least modified. These reasons are not the result of problems with the marriage fraud doctrines themselves. The fraud doctrines are merely a symptom of an underlying problem—the law’s continued overreliance on marriage as a privileged status for public benefits.

##### *1. Marriage Targets the Wrong Beneficiaries*

One cost of using marriage as a proxy for benefit eligibility is that it simply may not work. Marriage, as we have seen, is often a poor enough proxy for entitlement that the law imposes other requirements, whether they are formal “plus” rules or fuzzy functional tests to demonstrate eligibility. These tests presuppose that there is a cultural ideal of marriage that can be translated easily into a legal test. Whether this was true at one point in time is debatable,<sup>267</sup> but it seems clear that enough people have abandoned these cultural ideals today that marriage practice varies substantially. As we saw with some of the more intrusive, “integrated” tests such as the “establish a life” test, the standards to which we hold people in obtaining some benefits are standards that much of the formally married population could not meet if so tested. No-fault divorce and the decriminalization of sex led to the development of many

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267. See STEPHANIE COONTZ, *THE WAY WE NEVER WERE: AMERICAN FAMILIES AND THE NOSTALGIA TRAP 2* (1992) (arguing that “many of our ‘memories’ of traditional family life [are] myths” and that “[f]amilies . . . have never lived up to nostalgic notions about ‘the way things used to be’”).



marriage fraud doctrines, but it does not follow that we therefore need to require more than simply formal marriage to protect marriage from fraud. Instead, we might conclude that marriage is simply no longer capable of serving as a proxy for public benefits eligibility.

In fact, some of the factors that led to the grafting of public benefits onto marriage are the very reasons that marriage is no longer a good criterion for determining eligibility. When public benefits were initially allocated on the basis of marital status, marriage was becoming less permanent, but the vast majority of people who married stayed married until one of the spouses died.<sup>268</sup> The majority of married women did not work outside the home or worked very little; marriage was the way in which women obtained financial security.<sup>269</sup> There was a cultural and legal consensus that sex and procreation were best left to married couples, and so public benefits that encouraged or rewarded marriage were less controversial than they are today.

Flash forward to 2012, where marriage's role in managing dependency and childrearing has changed dramatically. Today, people are much less likely to marry and much more likely to divorce.<sup>270</sup> When they do marry, women today are more likely to be in the labor force than they were before; most married women work outside the home, and nearly half of married women not only work but work full-time.<sup>271</sup> And marriage is also no longer the nearly exclusive site for procreation: approximately 40 percent of births are to unmarried mothers.<sup>272</sup> In the 1930s, most women were married, it was likely that a married woman with children would have little or no income of her own, and the premature loss of her husband would have been financially devastating. Although some families today are structured similarly to a 1930s family, marriage is simply no longer an accurate predictor of female dependency or the existence of dependent children.

Even if marriage is not always an accurate predictor of dependency, it still might be a good idea to sometimes use marriage, or something like it, to

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268. Between 1930 and 1935, the marriage rate in the United States hovered between approximately 8 and 10 per 1,000 in population, while the divorce rate was only approximately 1.5 per 1,000. Thomas C. McCormick & Douglas W. Oberdorfer, *Marriage and Divorce Rates in Wisconsin, 1920–35*, 47 AM. J. SOC. 563, 565 (1942).

269. See KESSLER-HARRIS, *supra* note 205, at 146.

270. In 2009, there were 6.8 marriages per 1,000 people; and 3.4 divorces per 1,000 people. Ctrs. for Disease Control and Prevention, *supra* note 225, at 1 tbl.A. Compare to the rates in the 1930s, *supra* note 268.

271. See U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, USDL-11-0396, EMPLOYMENT CHARACTERISTICS OF FAMILIES—2010, at 10 tbl.5 (2011), available at <http://www.bls.gov/news.release/pdf/famee.pdf>, tbl.5 (finding that among married women with children under eighteen in 2010, 47.5 percent were employed full-time and 64.4 percent were employed overall).

272. In 2008, nonmarital births were 41 percent of all births; in 2009, 26 percent of children lived with one parent, and 79 percent of those children lived with their single mother. FED. INTERAGENCY FORUM ON CHILD & FAMILY STATISTICS, AMERICA'S CHILDREN IN BRIEF: KEY NATIONAL INDICATORS OF WELL-BEING, 2010, at 4 (2010), available at [http://www.childstats.gov/pdf/ac2010/ac\\_10.pdf](http://www.childstats.gov/pdf/ac2010/ac_10.pdf).

subsidize caregiving in the home through entitlements. Lawmakers might decide, for example, that spouses who take time off from full-time paid work to care for children are made economically vulnerable through this choice and should be protected through entitlements. But marriage no longer appears to be a neat proxy for who should get this entitlement. Instead, lawmakers might want to ask whether a person has lost market income because of care work and determine whether this kind of care work is something the government wants to subsidize, regardless of whether the person is married to an “ideal worker,” cohabiting with one, or single.<sup>273</sup> If the state is going to subsidize dependency, marriage is no longer the way—or at least not the only way—to do it. Lawmakers should ask specifically why they believe marriage functions well as a proxy for benefit eligibility, and then determine whether it is as good a proxy as they assume before reflexively grafting more benefits onto marriage at the expense of other methods of benefits allocation.<sup>274</sup>

A problem related to the inaccurate targeting of beneficiaries is the institutional competence (or lack thereof) of those who make decisions about marriage fraud. Indeed, the functionaries who determine which marriages are fraudulent may be ill equipped to do so. In the classic annulment case, it was the parties to the marriage who determined whether the fraud was egregious enough to bring a claim for annulment. This doctrine supported family privacy by preventing interested (or simply nosy) third parties from intruding. In contrast, the public benefits marriage fraud doctrines sometimes invalidate even those marriages that couples experience as genuine. The people making these decisions may not be trustworthy, and the opportunity for review of their determinations is limited.<sup>275</sup> Family law courts may be notoriously subjective

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273. See FINEMAN, *supra* note 8, at 228 (proposing the abolition of marriage as a legal category and in its place “the construction of protections for the nurturing unit of caretaker and dependent”); see also MAXINE EICHNER, *THE SUPPORTIVE STATE: FAMILIES, GOVERNMENT, AND AMERICA’S POLITICAL IDEALS* 105 (2010) (arguing that the state’s interest in privileging adult intimate relationships is caretaking, and so the state therefore has an interest in supporting a “considerably broader range of relationships than the heterosexual couples who can now choose to marry . . . the state has valid reason to support all of the following horizontal relationships involving caretaking: two elderly sisters who live together and take care of one another, a nonmonogamous homosexual couple, a commune of five adults who live together with their children, and a heterosexual married couple”).

274. See Martha L.A. Fineman, *Masking Dependency: The Political Role of Family Rhetoric*, 81 VA. L. REV. 2181, 2186 (1995) [hereinafter Fineman, *Masking Dependency*] (arguing that “politicians and pundits” refuse to “address and to assess the continued viability of ideological assumptions” about how families function). For an example of a case in which the Supreme Court explicitly recognized that Congress was using marriage as a proxy for increased economic well-being (and therefore a reduced need for public welfare), see *Califano v. Jobst*, 434 U.S. 47 (1977).

275. See, e.g., INA § 242(a)(2), 8 U.S.C. § 1252(a)(2) (2006) (limiting judicial review of discretionary immigration decisions to questions of law); Gerald Neuman, *On the Adequacy of Direct Review After the Real ID Act of 2005*, 51 N.Y.L. SCH. L. REV. 133, 136–37 (2006/07) (explaining that section 242 now channels appeals directly into the circuit courts, precluding district court review, and limits review to questions of law); cf. Katherine Silbaugh, *The Practice of Marriage*, 20 WISC. WOMEN’S L.J. 189, 192 (arguing that the centralized view of the state as “creating” civil marriage “puts the state at the center of disputes over social meaning that state actors are ill-equipped

and of varying quality, but at least they have expertise in their subject matter. They hear family cases day in and day out and have a sense of the variety in how couples experience married life. Other courts undertaking functional tests of marriage and legislatures crafting functional, integrated, and “plus” rules for determining eligibility are less likely to have this broad view of what constitutes a “typical” marriage.<sup>276</sup> Their value judgments are likely to conflict with the lived experience of many people subject to their rules.<sup>277</sup>

## 2. *Marriage Obscures Discrimination*

Even though marriage is in many cases a poor proxy for eligibility, its persistence as a legal status conferring important public benefits obscures the inequalities it creates in the public benefits system. Many people would welcome the opportunity to obtain the benefits currently granted through marriage—health insurance, government- or employer-subsidized pensions, the opportunity to sponsor a family member or friend for immigration status, housing subsidies. It is not clear why married citizens are more deserving of these benefits than unmarried citizens. Marriage obscures the arbitrariness of who gets the benefits by expanding the number of people who get them and thus preventing a public clamor for benefits for all. For some benefits, such as health care, that lie beyond the reach of individual people absent an employer-subsidized insurance policy, marriage prevents a significant percentage of the population from going without. Only a little over half of single women, for example, have health insurance, but 83 percent of married women have it, presumably because they have access to an “ideal worker’s” health care policy.<sup>278</sup> Marriage thus gives a veneer of stability to a system that gives substantial benefits to people who have not paid into it directly. The moral superiority we attach to those who marry makes these entitlements seem

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institutionally to handle”).

276. Scholars writing about marriage law have described the tendency of bureaucrats to contract the rights of claimants, even absent their explicit discretion to do so, in similar contexts. *See, e.g.,* Elizabeth F. Emens, *Changing Name Changing: Framing Rules and the Future of Marital Names*, 74 U. CHI. L. REV. 761, 823–27 (2008) (describing the phenomenon of “desk clerk law,” where clerks refuse to allow future spouses as much control over their marital names as the law on the books gives them); Collins, *supra* note 4, at 1149 (using Max Weber’s theory of bureaucracy to account for why administrative officials denied so many pension petitions to women who would have been considered “married” under state law). This concern appears to have, at least partially, influenced the Fifth Circuit’s reasoning in the *Continental* case, discussed *supra* in Section II.B. Recall that in *Continental*, the court held that it was inappropriate for employers to be passing judgment on the marriages of their employees. Unlike administrative law judges, the court suggested, private employers invade the privacy of individuals and exceed their authority when they make subjective judgments about the validity of marriage or divorce. *See* *Brown v. Cont’l Airlines, Inc.*, No. 10-20015 (5th Cir. July 18, 2011), available at <http://www.ca5.uscourts.gov/opinions/pub/10/10-20015-CV0.wpd.pdf>.

277. *See* Fineman, *Masking Dependency*, *supra* note 274.

278. Bernstein, *supra* note 5, at 161 (citing LINDA WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE: WHY MARRIED PEOPLE ARE HAPPIER, HEALTHIER, AND BETTER OFF FINANCIALLY* 60 (2000)).

earned. As Kristin Collins has shown, the federal government “redistributes far more money to women by way of marriage-based entitlements such as Social Security than through need-based ‘welfare.’”<sup>279</sup> Marriage is an institution entered into primarily by the middle-class, upper-middle class, and wealthy.

In contrast, the poor are far less likely to be married at any given time, or to ever marry.<sup>280</sup> So if the benefits attached to marriage are so extensive that they tempt people to commit fraud to obtain them, then why are the poor not clamoring to marry? One reason may be that the benefits offered are inducements that matter only once a person has moved beyond subsistence, and marriage might actually threaten that subsistence. For many poor, single mothers, marriage creates one more legal dependent—a husband—without doing anything to make that dependent easier to support.<sup>281</sup> Poor women frequently choose not to marry the fathers of their children because they believe, often with good reason, that they will not contribute financially to the well being of their families or because they are seeking a more egalitarian relationship than they believe the fathers will offer.<sup>282</sup> Furthermore, many of the benefits are of use primarily to caregivers who opt out of the workforce for periods of time. The option to take 50 percent of a spouse’s social security benefit in lieu of 100 percent of one’s own, for example, is only useful if a person has an “ideal worker” spouse and can afford to work a less-than-fulltime schedule, something many poor people lack. So, too, with marriage-based health insurance and the federal tax marriage bonus—couples where both parties are equal wage-earners but neither party is an “ideal worker,” or where both parties work full-time in multiple low-paying, part-time jobs, will reap no tax or health-care benefits from being married. Tying public benefits to marriage is therefore regressive—it takes taxpayer money and redistributes it to a group that is already disproportionately wealthy. The people who are most likely to need many of these benefits will be the least likely to obtain them.

Using marriage as a proxy for entitlement also discriminates in some circumstances against dual-income earning couples. Several marriage benefits can be understood as subsidizing the traditional breadwinner-homemaker family at the expense of everyone else. Social security, for example, gives the spouse of an eligible retiree who is herself of retirement age a choice: collect 100 percent of her own earned benefit or the equivalent of 50 percent of her spouse’s benefit instead.<sup>283</sup> The higher-earning spouse still gets to keep 100

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279. Collins, *supra* note 4, at 1164 (noting that “ninety-eight percent of all recipients of Social Security survivors’ benefits are women, and over forty percent of all women who receive Social Security benefits receive them as wives rather than as workers”).

280. See CAHN & CARBONE, *supra* note 230, at 3 (2010); Bernstein, *supra* note 5, at 159–60, 169.

281. Onwuachi-Willig, *supra* note 5, at 1683–89 (2005).

282. Linda McClain, *Love, Marriage, and the Baby Carriage: Revisiting the Channeling Function of Family Law*, 28 CARDOZO L. REV. 2133, 2146–47 (2007).

283. See 42 U.S.C. § 402(b)(1) (2006) (setting forth wife’s benefits).

percent of his benefits, so the net retirement entitlement to the couple choosing the second option is 150 percent of the higher-earning spouse's benefits. For many spouses (disproportionately wives), 50 percent of the husband's income over his lifetime will be worth more than 100 percent of her own, due to lower wages, more part-time work, and temporary absences from the labor force for childbirth or child care.<sup>284</sup> For a couple in this situation, the working wife's income contributes nothing to the eventual benefit—the couple receives 150 percent of the husband's benefit, just as if she had not worked at all. All of the money that the working wife who does not collect her own benefits contributed to social security goes back into the system, thus giving her little incentive to work outside the home if the work is not going to yield substantial enough income to exceed 50 percent of her husband's income over time.<sup>285</sup> In fact, she would have been just as well off in terms of retirement benefits by not working at all. So, too, the federal income tax marriage bonus that some couples receive is largely offset by the marriage penalty imposed on others. Families paying the penalty, generally dual-income couples, might understandably consider themselves subsidizing a lifestyle (a traditional breadwinner/stay-at-home spouse arrangement) through the tax system.<sup>286</sup> Of course, the government can reform neither the social security nor the tax systems without harming someone. If dual-income earners are not taxed at a higher rate, then sole breadwinners with adult dependents will be subject to a higher tax burden, which will increase the burden on non-wage-earning caregivers. Moreover, repealing social security spousal benefits would primarily harm low-income caregivers, essentially ending discrimination against one group of women at the expense of another.<sup>287</sup> The point here is that tying the benefits to marriage obscures the social problem being addressed—fairly compensating non-wage-earning caregivers for their work—and the legal system deals with this problem at the expense of wage-earning caregivers.<sup>288</sup>

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284. For critiques of this system, see Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2059–66 (1996); Becker, *supra* note 4, at 276–85; Liu, *supra* note 4, at 12–16; McCaffery, *supra* note 2, at 996–1001.

285. See McCaffery, *supra* note 2, at 987–88, 996–1005.

286. See Kornhauser, *supra* note 66, at 645–50 (discussing effects of differential tax treatment of married people).

287. See Alstott, *supra* note 284, at 2004–05 (arguing that three feminist values—achieving equal treatment, encouraging women's market work, and assisting caregivers—cannot all be achieved simultaneously).

288. See Nancy Staudt, *Taxing Housework*, 84 GEO. L.J. 1571, 1630–31 (1996) (noting that the current system makes women's access to benefits contingent on high levels of market work or the longevity of their marriages and arguing that the tax system should impute wages to housework based on its economic value and then subject those wages to payroll and income taxation, thus treating women “who perform household labor as having earned their benefits in the same manner as waged laborers”); see also WILLIAMS, *supra* note 250, at 274 (recommending that we “end the practice of tying work benefits to the ideal worker norm in the context of Social Security, unemployment, the Family and Medical Leave Act, ERISA, and the tax system”); Liu, *supra* note 4, at 46–53 (critiquing and building on Staudt's proposal); Katharine Silbaugh, *Turning Labor into Love: Housework and the*

### 3. *Unbalancing Marriage*

A third cost in asking marriage to do so much work is that the institution may become unbalanced. Marriage currently functions as a default status that lawmakers use reflexively when allocating public benefits. As such, it is an ever-expanding pot of benefits with no symmetrically increased burdens. To return to the carrot-and-stick metaphor, lawmakers keep adding carrots to marriage without adding any corresponding sticks.<sup>289</sup> Traditional marriage was a balanced system in that each spouse owed duties to the other and received benefits in return.<sup>290</sup> The public benefits grafted onto marriage have made marriage lopsided, largely because people receive enormous benefits for being married, but no longer have to do as much in return. The more benefits lawmakers add, the more they should expect people to use marriage instrumentally to obtain them. Hence, it may not be the spouses “fraudulently” seeking benefits who are weakening marriage, but the lawmakers who have asked marriage to do more than it can do. The expressive harms to marriage caused by fraud may actually be harms resulting from marriage being too attractive to a certain subset of the population when it no longer has a uniform meaning. In other words, tying so many benefits to marriage may harm it—to the extent that marriage still connotes commitment, permanence, and fidelity, creating extensive reasons for using it instrumentally without concomitant burdens makes it less likely to stay true to those ideals.

#### *B. Disaggregating Marriage*

During the last fifteen years, the same-sex marriage movement has advocated for access to marriage, both as an expression of recognition and social status<sup>291</sup> and as a means of obtaining the “carrots” associated with

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*Law*, 91 NW. U. L. REV. 1 (1996) (examining methods of valuing housework).

289. There are a few exceptions. In 1996, for example, Congress amended the INA to require that U.S. citizens or residents who sponsor their family members for lawful permanent resident immigration status must sign a binding Affidavit of Support that demonstrates that they can support the immigrant at 125 percent of the poverty line. *See* INA §§ 212(a)(4)(C)(ii), 213A(a)(1)(A), 8 U.S.C. §§ 1182(a)(4)(C)(ii), 1183(a)(1)(A) (2006). This requirement functions as a check on the privilege of sponsoring an immigrant: the U.S. citizen spouse must also be able to support the immigrant. Although the Affidavit of Support system has serious flaws, *see* Abrams, *Immigration Law and the Regulation of Marriage*, *supra* note 3, at 1700–07, it is a good example of the state attempting to add a stick when it makes a carrot available.

290. Of course, these duties were not reciprocal and much of nineteenth- and twentieth-century feminism was devoted to rectifying the inequalities inherent in the system. *See* Siegel, *supra* note 39, at 1082–85. Unequal though it was, it was “balanced” in the sense that each party gained something through marriage and simultaneously took on substantial burdens.

291. *See, e.g., Perry v. Schwarzenegger*, 704 F. Supp. 2d 921, 970 (N.D. Cal. 2010) (“Domestic partnerships lack the social meaning associated with marriage, and marriage is widely regarded as the definitive expression of love and commitment in the United States.”); *In re* Opinions of the Justices to the Senate, 802 N.E.2d 565, 570 (Mass. 2004) (“The bill’s absolute prohibition of the use of the word ‘marriage’ by ‘spouses’ who are the same sex is more than semantic. The dissimilitude between the terms ‘civil marriage’ and ‘civil union’ is not innocuous; it is a considered choice of

marriage.<sup>292</sup> Questions about whether same-sex couples should seek recognition or whether marriage instead should be dismantled altogether have dominated the legal scholarship produced on marriage during this period.<sup>293</sup> Proponents of dismantling marriage argue that the discrimination inherent in privileging the married over the unmarried is discriminatory and harmful.<sup>294</sup> They build on arguments, long-advanced by feminists, that even modern marriage is tainted by its origins as a sexist and hierarchical institution.<sup>295</sup> Some argue that marriage operates by distinguishing between those who are engaged in “good,” state-approved sex and those who are not, thus necessarily creating a hierarchy even if it is not based on gender.<sup>296</sup> In contrast, proponents of maintaining marriage insist that the state should foster marriage because the commitment it requires of couples leads to healthier, longer-lasting families and because we might lose an important force that binds society together if we abandon marriage altogether.<sup>297</sup> The marriage proponents mount similar

language that reflects a demonstrable assigning of same-sex, largely homosexual, couples to second-class status.”); Suzanne A. Kim, *Marital Naming/Naming Marriage: Language and Status in Family Law*, 85 IND. L.J. 893, 902 (2010) (“A state-enforced difference in terminology such as that between ‘marriage’ and ‘civil union’ affects same-sex couples’ status because it both reflects and reinforces their marginalized status relative to opposite-sex couples.”); Marc R. Poirier, *Name Calling: Identifying Stigma in the “Civil Union”/“Marriage” Distinction*, 41 CONN. L. REV. 1425, 1425 (2009) (“[T]he ‘civil union’/‘marriage’ distinction has a cultural meaning that will create a stigmatic injury by reinforcing and activating dormant, dispersed sites of stereotyping and prejudice against gay men and lesbians.”).

292. See, e.g., *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 955–56 (Mass. 2003) (stating that “[t]he benefits accessible only by way of a marriage license are enormous, touching nearly every aspect of life and death”); *Baker v. State*, 744 A.2d 864, 883–84 (Vt. 1999) (enumerating the benefits granted to spouses by Vermont law); see also Shah, *supra* note 98 (identifying 120 federal laws enacted between September 1996 and December 2003 granting benefits based on marital status).

293. See, for example, the sources cited *supra* notes 8, 10–11.

294. See, e.g., FINEMAN, *supra* note 8, at 230; POLIKOFF, *supra* note 8 at, 7 (arguing that “people in any relationship other than marriage suffer, sometimes to a level of economic or emotional devastation”); Rosenbury, *supra* note 8, at 219 (arguing that “marriage law has been irreparably shaped by [its] history,” in which it “solidif[ie]d men’s position as the head of their households”).

295. See POLIKOFF, *supra* note 8, at 48 (discussing effect of feminist critique of marriage on gay rights movement); Angela P. Harris, *Loving Before and After the Law*, 76 FORDHAM L. REV. 2821, 2843 (2008) (arguing that marriage justifies the maintenance of patriarchal power by “throwing a blanket of privacy” over the family); cf. Martha Albertson Fineman, *Why Marriage?*, 9 VA. J. SOC. POL’Y & L. 239, 245–49 (2001) (arguing that marriage evolved to deal with female dependency and is therefore no longer necessary).

296. See, e.g., MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* (1999) (arguing against same-sex marriage because marriage perpetuates shame surrounding sex between consenting but uncommitted adults); Katherine Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1414–16 (2004) (arguing that the pursuit of marriage by same-sex couples limits their freedom).

297. See MILTON C. REGAN, *ALONE TOGETHER: LAW AND THE MEANINGS OF MARRIAGE 5* (1999) (identifying an “internal stance” in which a spouse makes decisions based on the best interests of the marriage relationship and an “external stance” that allows a spouse to reflect critically on whether a marriage serves her autonomous best interests); Bruce Hafen, *Individualism and Autonomy in Family Law: The Waning of Belonging*, 1991 BYU L. REV. 1, 31–42 (arguing that family law can preserve cultural notions of family and interrelatedness in the face of social and legal change that

arguments regardless of whether they favor opening marriage up to same-sex couples or instead keeping it exclusive to different-sex couples. For the exclusionists, marriage's disciplinary power is uniquely necessary for heterosexuals, who are in danger of reproducing accidentally.<sup>298</sup> For the inclusionists, marriage is an important civil right for gays and lesbians, largely because it provides an opportunity to demonstrate responsible adulthood.<sup>299</sup>

All of these approaches share a common trait. They assume that "marriage," even as its meaning has shifted over time, has a stable meaning today. Scholars proposing a "menu of options" approach, for example, suggest that we would do well to keep traditional marriage on the table but make civil unions, domestic partnerships, reciprocal beneficiary arrangements, and contract enforcement alternatives available as well, because they would provide choices, allowing some people to opt out of the aspects of traditional marriage that they do not want.<sup>300</sup> And much of the concern that proponents of dismantling marriage express is that if traditional marriage is allowed to persist, it may crowd these new, potentially more appealing options off the table.<sup>301</sup> In contrast, some inclusionist proponents of marriage worry that the existence of a

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emphasize individual autonomy); Elizabeth S. Scott & Robert E. Scott, *Marriage as a Relational Contract*, 84 VA. L. REV. 1225, 1231–32 (1998) (arguing that the law has failed to, but should protect, marital investment and discourage opportunistic defection and afford couples the opportunity to undertake legally binding commitments in marriage).

298. See, e.g., *Goodridge v. Dep't of Health*, 798 N.E.2d 941, 995 (Mass. 2003) (Cordy, J., dissenting) (arguing that state has a rational basis for denying marriage to same-sex couples because they cannot accidentally reproduce); *Hernandez v. Robles*, 855 N.E.2d 1, 7 (N.Y. 2006) (holding same); *Morrison v. Sadler*, 821 N.E. 2d 15, 24–26 (Ind. Ct. App. 2005) (holding same); *Andersen v. King County*, 138 P.3d 963, 981 (Wash. 2006) (holding the same as in *Goodridge*); *Lewis v. Harris*, 188 N.J. 415, 458 (2005) (holding same). For a critique of the accidental procreation argument, see *Abrams & Brooks*, *supra* note 263, *passim*.

299. EVAN WOLFSON, *WHY MARRIAGE MATTERS: AMERICA, EQUALITY, AND GAY PEOPLE'S RIGHT TO MARRY* 3, 55 (2004).

300. See, e.g., William N. Eskridge, Jr., *Essay, Comparative Law and the Same-Sex Marriage Debate: A Step-by-Step Approach Toward State Recognition*, 31 MCGEORGE L. REV. 641, 658 (2000) (describing the "menu of options" approach available in the Netherlands and elsewhere); Larry E. Ribstein, *A Standard Form Approach to Same-Sex Marriage*, 38 CREIGHTON L. REV. 309 (2005) (analogizing marriage to a business organization, arguing for several legal forms of association); Carol Weisbrod, *The Way We Live Now: A Discussion of Contracts and Domestic Arrangements*, 1994 UTAH L. REV. 777, 810–11 (arguing that states can offer several contract options for the structuring of relationships including civil unions and various religious unions).

301. These alternatives have appeal outside the same-sex relationship context. For example, the civil union option created by some states may be especially popular with senior citizens, who risk losing their social security survivor benefits on remarriage but might like traditional marriage benefits, such as hospital visitation rights and cohabitation in care facilities. Barry Kozak, *Civil Unions in Illinois: Issues that Illinois Lawyers Should Consider*, CBA REC., Apr. 2011, at 30, available at <http://www.edigitalpub.com/publication/?i=67643&p=30>. California and Washington State's domestic partnership benefits are explicitly available *only* to same-sex couples or different-sex couples over age sixty-two. CAL. FAM. CODE § 297(b)(5) (West 2004 & Supp. 2010); WASH. REV. CODE § 26.60.030(6) (Supp. 2007). For an argument that the menu-of-options approach is a temporary one that will eventually result in marriage for all, see David D. Meyer, *Fragmentation and Consolidation in the Law of Marriage and Same-Sex Relationships*, 58 AM. J. COMP. L. 115 (Supp. 2010).



marriage alternative would still perpetuate inequality, and, as a result, remain committed to traditional marriage for all.<sup>302</sup>

But what is “marriage”? As the myriad marriage fraud doctrines show, the particular package of benefits and burdens offered by marriage has varied widely throughout the years. When courts refer to a “right to marry,” they refer not to particular benefits currently included in marriage but instead to the right of access to whatever privileged status the state is currently offering.<sup>303</sup> Focusing solely on whether same-sex couples will have access to “marriage” or whether couples of all stripes should have access to “marriage alternatives” presupposes that marriage itself has a certain, fixed meaning. But there is no reason we could not instead, or in tandem with a “menu of options” approach, also interrogate the definition of marriage. As Suzanne Kim has recently argued, it is possible to support “skeptical marriage equality,” in which we recognize the importance of equality for same-sex couples while simultaneously taking a hard look at the substance of the right sought.<sup>304</sup> We need not abolish marriage outright and risk the harms to society and relationships that some worry about, but neither do we need to keep marriage as the overburdened status relationship it has become.

Instead of abolishing marriage or maintaining the status quo, we could reconfigure marriage so that its legal meaning better represents its current social meaning. To do this, we could classify the various benefits and obligations of marriage into functional categories that could, in theory, be disaggregated from one another.<sup>305</sup> We could then think about what combinations of functional categories might ideally make up modern marriage, and which categories we could instead split off altogether. The core questions should be: What do we want marriage to do, and what is marriage capable of doing?

Tax breaks (or penalties), social security benefits, health insurance for spouses, privileged immigration status, and military benefits are all public benefits that appear to be tied to marriage for somewhat arbitrary reasons. In

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302. See, e.g., Ian Ayers, Op-Ed, *Separate, Unequal: How Civil Unions Fall Short of Marriage*, HARTFORD COURANT, June 10, 2005, at A13 (arguing that the Connecticut civil union law is inadequate because it did not grant full marriage equality).

303. For a more detailed explanation, see Scott, *supra* note 11, at 545–46; see also Cass R. Sunstein, *The Right to Marry*, 26 CARDOZO L. REV. 2081 (2005).

304. See Suzanne A. Kim, *Skeptical Marriage Equality*, 34 HARV. J.L. & GENDER 37 (2011). Professor Kim’s argument parallels critiques of equality feminism. Equality may be important as a principle, but what if the results of formal gender equality are still not enough? See Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1279 (1987) (arguing that the sameness/difference divide can be overcome by looking to men’s and women’s interests and positions within a social and legal system rather than by focusing solely on the content of the benefit provided).

305. James Herbie DiFonzo has suggested that the debate over same-sex marriage, civil unions, and domestic partnerships could benefit from thinking about the “bundles” that should appropriately attach to a status based on intimacy. See DiFonzo, *supra* note 11, *passim*. See also Hamilton, *supra* note 11 (arguing that marriage can be divided into functional components and only some of them deserve state support).

each of these cases, we should articulate what the link between the benefit and marriage is and determine whether we should continue to tie them together. Public benefits would instead largely be individualized (health insurance for none or for workers or for all), or reciprocal, but not tied to marriage. For instance, each person could designate a beneficiary, who might often be a spouse but would not have to be.

Some benefits, like privileged immigration status, may be difficult to disentangle, but it is certainly not impossible. If the government's interest in family-based immigration is in uniting families and encouraging the assimilation of new residents, then there may be more precise ways to meet these goals than by relying on marriage. For example, we could continue to allow dependent children to obtain legal status as immediate relatives not subject to quotas<sup>306</sup> but also allow each citizen to sponsor just one adult without inquiring into the nature of that relationship. We could further prohibit the selling of the right to sponsor an adult, which would serve as a check on abuse of the right. The law currently requires family sponsors to agree to support the immigrants they sponsor at 125 percent of the poverty line for a substantial period, an obligation that is enforceable by the government, should the immigrant seek welfare, and by the immigrant herself.<sup>307</sup> This requirement might serve as a further check on the frivolous use of the sponsorship entitlement.

Alternatively, the government might take citizens out of the sponsorship business entirely and require a potential immigrant to demonstrate eligibility through a combination of factors, including a demonstrated tie to a U.S. citizen family member, employer, or even friend, education, language fluency, or job prospects.<sup>308</sup> The road taken would depend in part on what traits

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306. INA § 201(b)(2), 8 U.S.C. § 1151(b)(2) (2006).

307. INA §§ 212(a)(4), 213A.

308. Canada's "points" system has partially implemented this idea. Canada's law retains family sponsorship, but defines "family" much more broadly than the U.S. law. CITIZENSHIP & IMMIGRATION CAN., IMM 3900 E, SPONSORSHIP OF A SPOUSE, COMMON-LAW PARTNER, COMMON-LAW CONJUGAL PARTNER OR DEPENDENT CHILD LIVING OUTSIDE CANADA 3, 6 (2010) [hereinafter *Sponsorship of a Spouse*], available at <http://www.cic.gc.ca/english/pdf/kits/guides/3900E.pdf> (stating that Canadians may sponsor spouses, common law partners, common law conjugal partners, dependent children); CITIZENSHIP & IMMIGRATION CAN., IMM 5196 E, SPONSORSHIP OF PARENTS, GRANDPARENTS, ADOPTED CHILDREN, AND OTHER RELATIVES 4 (2011), available at <http://www.cic.gc.ca/english/pdf/kits/guides/5196E.PDF> (stating that Canadians may sponsor spouses, common law partners, common law conjugal partners, dependent children, parents, grandparents, and adopted children; in limited circumstances, they may also sponsor siblings, nephews, nieces, and grandchildren; and they may sponsor any other person with whom they have a family relationship if they have no Canadian relatives or potential sponsees that fit into one of the aforementioned categories). In addition, immigrants to Canada may qualify under the points system if they reach a certain level of points based on educational background, language fluency, job prospects, and family ties, among other factors. CITIZENSHIP & IMMIGRATION CAN., IMM EG7000, APPLICATION FOR PERMANENT RESIDENCE: FEDERAL SKILLED WORKER CLASS 3, 6 (2011), available at <http://www.cic.gc.ca/english/pdf/kits/guides/EG7.pdf>.

lawmakers are trying to reward when they give someone an immigration benefit based on marriage.

The outcomes of using an incremental approach that considers each benefit and inquires into its specific relationship to marriage may vary. Legislators might decide that no public benefits should be tied to marriage. Or they might decide that strong justifications remain for tying some benefits to marriage. But the burden would be on lawmakers to articulate the assumptions they are making about marriage and why it would be a better proxy for eligibility than, say, being the parent of a dependent child. Marriage would no longer be the reflexive depository for government largesse.

Even if lawmakers decided to remove marriage as a criterion for *all* public benefits, this approach would still preserve marriage as a status and avoid the potential pitfalls of doing away with marriage altogether. Marriage would be effectively downsized to what it was before the modern administrative state was created. The administrative state would persist, but the link between it and marriage would be weakened. Marriage would therefore no longer be recognized as the most favored category for determining benefits. Even this option would not threaten the primacy of marriage as the preferred arrangement for long-term adult intimacy.

A rethinking of marriage need not be a question of abolishing marriage entirely or simply letting new groups into the established status. Instead, disaggregating public benefits from marriage would go far toward remedying the flaws in a system that puts too much pressure on marriage. Being more precise about what we want marriage to do and what it is actually capable of doing would mitigate the harm of not offering it equally to everyone and resolve the problem that many people either do not want or do not have the opportunity to participate in it. It would also provide an avenue for a much-needed conversation about what we mean when we use the word “marriage.” So far, this conversation has largely centered on whether marriage means access to economic benefits or something intangible, a social recognition of a privileged status. Perhaps instead marriage could mean a particular configuration of benefits. Many of the benefits currently associated with marriage could be severed from marriage, and either made available to everyone, regardless of marital relation; to some people if they were willing to enter into a publicly recognized (but not necessarily marital) relationship with another person or other persons; or to no one at all.

#### CONCLUSION

The proliferation of marriage fraud doctrines in the past century reveals two important features of modern marriage: its ubiquity and its incoherence. Marriage is the status category used to allocate benefits across a wide variety of doctrinal legal regimes, yet it is insufficient enough as a status category that it frequently needs to be supplemented or altered in order to function as a rough

proxy for the behavior the entitlements are intended to reward or compensate. This Article has offered a close exploration of marriage fraud doctrines as an entry point for thinking about the role marriage currently plays in our legal system and how we might recalibrate this role. The failure of marriage to function as an adequate proxy for eligibility in many public benefit programs may indicate that marriage is not, or is no longer, the appropriate status category for determining eligibility for social welfare programs administered by the state.

Marriage fraud doctrines offer just one glimpse into the legal functions performed by twenty-first century marriage. Interrogating marriage itself is an important part of the marriage equality and marriage alternatives projects pursued by so many activists, academics, and same-sex couples today. If we are to work to make marriage a more egalitarian institution, we must clearly understand what it is, what it can do, and what it cannot. This Article has suggested that we may be expecting marriage to do far more work than it is capable of doing. But we need not do away with marriage altogether to remedy the problem. Many scholars have theorized that marriage offers an important pre-commitment mechanism that keeps couples together in difficult times and provides stability for their children. A piece-by-piece downsizing—but not dismantling—of marriage would begin to rectify the problem of the discrimination and inefficiencies caused by over-privileging marriage without destroying it.

