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## The Putative Spouse and Marriage by Estoppel Doctrines: An “End Run Around Marriage” or Just a Marriage?

Dana E. Prescott, Esq., Ph.D\*

### I. INTRODUCTION

For generations in the United States, each state determined the definition of a legally recognized marriage.<sup>1</sup> Indeed, the United States Supreme Court long ago held that marriage “has always been subject to the control of the [state] legislature.”<sup>2</sup> For the most part, these early notions of “federalism”<sup>3</sup> permitted states to constrain the definition of a lawful marriage. States did so without much public controversy; at least when consistent with socially and legally

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<sup>1</sup>The political and historical reasons are important though beyond the scope of this paper. Mark E. Brandon, *Family at the Birth of American Constitutional Order*, 77 Tex. L. Rev. 1195, 1199 (1998) (“First, conceptions of the family played an important role in imagining and establishing political authority in England and in her colonies in North America. Second, subtle shifts in the character and function of the institution of the family engendered basic changes in new world political ideology, especially with respect to authority. Third, these changes in turn precipitated the separation of the colonies from the mother country and eventually the establishment of substantially new political institutions.”).

<sup>2</sup>*Maynard v. Hill*, 125 U.S. 190, 205 (1888); *but see Cleveland v. United States*, 329 U.S. 14, 19 (1946) (“The fact that the regulation of marriage is a state matter does not, of course, make the Mann Act an unconstitutional interference by Congress with the police powers of the States.”).

<sup>3</sup>See Martin Diamond, “*The Federalist*” on Federalism: “Neither a National Nor a Federal Constitution, But a Composition of Both,” 86 Yale L.J. 1273, 1273 (1977), for an essay which captures the subtle originations and meaning of this term (“Indeed, as we shall see, most contemporary definitions of federalism are little more than generalized descriptions of the way we Americans divide governing power between the states and the central government.”); see also Dana E. Prescott, *The Supreme Court in United States v. Windsor: Why the “Death” of Fungible Federalism after a Century of Convenience?*, 26 J. AM. ACAD. MATRIM. LAW., 51 (2013), for a discussion of federalism in the context of marriage.

accepted discrimination against groups defined by race, socio-economic class, and other legally and socially constructed categories.<sup>4</sup> Virulent strains of discrimination and privilege in the 19<sup>th</sup> and 20<sup>th</sup> centuries restricted which groups of Americans were worthy of the right to a lawfully recognized marriage and the societal and legal benefits flowing from that status. For these decades, the controversy in state courts and legislatures was much more about how to maintain and enforce exclusions rather than expanding inclusion.<sup>5</sup>

In the 1940s, however, a doctrine of federalism began to emerge which implicated the primacy of state authority over family law, including divorce and the right to raise children without government interference (or perceived interference).<sup>6</sup> Until this strain of federalism began to take root, litigation often concerned the legality of marriage or divorce, the derivative rights of inheritance,

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<sup>4</sup>See Fay Botham, *Almighty God Created the Races: Christianity, Interracial Marriage, & American Law* (2009); Peter Wallenstein, *Tell the Court I Love My Wife: Race, Marriage, and Law—An American History* (2002); Jaime M. Gher, *Polygamy and Same-Sex Marriage—Allies or Adversaries Within the Same-Sex Marriage Movement*, 14 WM. & MARY J. WOMEN & L. 559 (2008); Richard Lewis Jr. & Joanne Ford-Robertson, *Understanding the Occurrence of Interracial Marriage in the United States Through Differential Assimilation*, 41 J. BLACK STUD. 405 (2010).

<sup>5</sup>See, e.g., *Davenport v. Caldwell*, 10 S.C. 317, 338 (1878) (“There was no law forbidding marriage among slaves, but the intention of slavery made the right of property in the master paramount, and natural marriage could not be allowed to interfere with that power, but was absolutely subject thereto, and could be annulled at will; but that did not make it necessarily, and *ab initio*, a nullity between the parties. Such a view of marriage amongst slaves could not affect the rights of third parties, for it was impossible for any such rights to exist, as slaves could not acquire or hold property in their own right.”); *Honey v. Clark*, 37 Tex. 686, 708 (1872) (“Prior to the emancipation of the slaves, marriage with that class was not, in a legal sense, authorized; yet there was that sort of contubernism among them which resulted in procreation of families. There was a certain degree of continence, and, to some extent at least, a moral observance of the matrimonial condition. This, but for the law of bondage, would have been regarded, in every sense, as legal marriage. The laws of slavery did not forbid the coupling together of man and woman in this manner, but none of the marital rights belonging to free and civilized society accompanied this cohabitation and sexual commerce.”).

<sup>6</sup>See Ann Laquer Estin, *Article: Family Law Federalism: Divorce and the Constitution*, 16 WM. & MARY BILL RTS. J. 381, 382 (2007) (“The federalism problem at the core of the divorce debate was ultimately truncated by the Supreme Court in a series of decisions that began in 1942. Acting on the basis of constitutional full faith and credit principles, the Court severed the connection between state power and marital status, changing the shape of both divorce law and American federalism.”).

the significance of coition and consummation, and the consequences for women and children when not of a legally-recognized marriage.<sup>7</sup>

Moreover, during this era, child abuse and domestic violence had yet to emerge as a public health disease in which a victim could obtain civil restraining orders, or the state would seriously consider (short of death in too many cases) criminal charges. The powerful notion of children and wives as property by common law and legislation had embedded a deeply contorted right of privacy within the home as a means to protect abusers' possession and control.<sup>8</sup>

By the 1950s, marriage shifted to a model of the so-called "nuclear family" (later referred to as "intact") but then trends beginning in the 1960s began to significantly alter society's view of stereotypical images of marriage, gender roles, and the choice of

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<sup>7</sup>See *Brooks-Bischoffberger v. Bischoffberger*, 129 Me. 52, 54 (Me. 1930) ("Consummation by coition is unnecessary in the case of a ceremonial marriage."); *Home of Holy Infancy v. Kaska*, 397 S.W.2d 208, 213 (Tex. 1965) ("The law favors legitimacy, and it is the public policy of our state as declared by the Legislature that the legitimacy of children shall not be affected by the divorce of their parents and that the issue of some utterly void marriages shall nevertheless be legitimate."). For a broader discussion of this history, see Charles W. II Taintor, *Legitimation, Legitimacy and Recognition in the Conflict of Laws*, 18 CAN. B. REV. 589, 599 (1940) ("The solution which would more probably be selected by the courts is to prefer the status of legitimacy to that of bastardy and to hold the father alone to be bound and entitled. This would be in accord with the general feeling that legitimacy is the more noble status, a feeling which might override considerations of the possible factual benefit to the child arising from situations in which the mother is able to do much more for it than is the father.").

<sup>8</sup>See Jonathan L. Hafetz, "A Man's Home is his Castle?": *Reflections on the Home, the Family, and Privacy During the Late Nineteenth and Early Twentieth Centuries*, 8 WM. & MARY J. WOMEN L. 175, 184 (2002) ("Judicial doctrines concerning marital violence, interspousal tort suits, and spousal evidentiary privileges helped shield the family from legal interference and the glare of unwanted publicity. Insofar as there was a 'right of privacy' during the nineteenth century, it was closely tied to the four walls of a man's home."); Reva B. Siegel, "The Rule of Love": *Wife Beating as Prerogative and Privacy*, 105 THE YALE L.J. 2117, 2141 (1996) ("We are left with a striking portrait of legal change. Jurists and lawmakers emphatically repudiated the doctrine of marital chastisement, yet responded to marital violence erratically - often condoning it, and condemning it in circumstances suggesting little interest in the plight of battered wives. Given this record, how are we to make sense of chastisement's demise?"); Natalie J. Sokoloff & Ida Dupont, *Domestic Violence at the Intersections of Race, Class, and Gender: Challenges and Contributions to Understanding Violence Against Marginalized Women in Diverse Communities*, 11 VIOLENCE AGAINST WOMEN 38, 47 (2005) ("The belief that non-White others are said to engage in oppressive and misogynistic cultural practices fits long-standing biases and serves to downplay the existence of culturally prescribed and equally horrendous acts of violence against women in White Western communities.").

cohabitation.<sup>9</sup> What arose by the 1960s was an injection into state courts of constitutional law in the realm of due process and privacy rights, as well as early murmurings of civil rights derived from violence, race, and gender. This emerging admixture of federalism then blended by the 1970s, and decades following, with no-fault divorce, non-married parentage rights for fathers and mothers, the equal rights of fathers to child custody, feminism and the economic role and rights of women, the nascent emergence of independent rights for children, and, subsequently, the standing of grandparents and kinship to request some form of *de facto* parental rights from a court over the objection of biological parents.<sup>10</sup>

This historic evolution in social welfare and family law policy was conjoined with a more refined and liberal version of the constitutional law of privacy, its connection to individual civil liberties, and movements to protect women and children from violence through civil and criminal law reforms.<sup>11</sup> The emergence

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<sup>9</sup>See J. Herbie DiFonzo & Ruth C. Stern, *The Winding Road from Form to Function: A Brief History of Contemporary Marriage*, 21 J. AM. ACAD. MATRIM. LAW. 1, 1 (2008) (“Consider this contrast: American marriage was once ‘rigid, work-centered, custom regulated, with well-defined roles for husband, wife, and children,’ but now may be characterized as ‘flexible, pleasure-centered, co-operatively regulated, with loosely defined roles for husband, wife, and children.’”).

<sup>10</sup>See June Carbone, *Marriage as a State of Mind: Federalism, Contract, and the Expressive Interest in Family Law*, 2011 MICH. ST. L. REV. 49, 50 (“[T]he precise meaning of this ‘family law federalism,’ however, is open for renegotiation.”). For historical and policy discussions, see Marv Ann Mason, *The Roller Coaster of Child Custody Law Over the Last Half Century*, 24 J. AM. ACAD. MATRIM. LAW. 451, 451 (2011) (“Welcome to the postmodern family, a landscape of various family configurations, not always united by marriage or related to the children by biology, where no clear rules prevail and the child is rarely given a voice when adults vie for her custody.”); Cynthia A. McNeely, Comment, *Lagging Behind the Times: Parenthood, Custody, and Gender Bias in the Family Court*, 25 FLA. ST. U. L. REV. 891, 906 (1998) (“As the twentieth century concludes, this country seems no closer to resolving child custody issues free of gender bias than it did in the days of the 1800s when fathers automatically received custody. Despite more than 150 years of evidence that custody decisions have been based largely on prevailing social and cultural roles and mandates for men and women, child custody in America today continues to be decided with only lip service to the holistic needs of children.”).

<sup>11</sup>Even today, abuse remains an embedded public health and social justice problem. See *United States v. Bryant*, 136 S. Ct. 1954, 1956 (2016) (“In response to the high incidence of domestic violence against Native American women, Congress [in 2005] enacted [18 U.S.C. § 117(a)] . . . [which targets] habitual offender[s].”) (citation omitted); *Wee v. Eggener*, 225 P.3d 1120, 1125 (Alaska 2010) (“When a court finds a parent has a history of domestic violence, it generally can grant the perpetrating parent only supervised visitation.”) (footnote omitted). The history of reform at federal and state levels has been

of constitutional and individual rights to be lawfully married without the bar of discrimination gained prominence with the United States Supreme Court's decision in *Loving v. Virginia*,<sup>12</sup> in 1967 which held unconstitutional government restrictions on interracial marriage. The constitutional tensions between state authority to identify and exclude certain groups by status remain today with recent decisions in *United States v. Windsor*<sup>13</sup> and *Obergefell v. Hodges*<sup>14</sup>, defining a lawful marriage on constitutional grounds as including same-sex couples and requiring recognition of that lawful right to marriage and the concomitant right to dissolve that marriage in divorce in any other state. Between these federal cases, state appellate courts endorsed, with powerful rhetoric, the social and legal importance of the institution of marriage and the right of personal privacy as central to personal freedom, the core principles of American constitutional rights, and a bedrock of an egalitarian democracy.<sup>15</sup>

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extensively studied. See Vincent J. Felitti, et al., *Relationship of Childhood Abuse and Household Dysfunction to Many of the Leading Causes of Death in Adults: The Adverse Childhood Experiences (ACE) Study*, 56 AM. J. PREVENTATIVE MED. 774 (2019); Leonard Karp & Laura C. Belleau, *Federal Law and Domestic Violence: The Legacy of the Violence Against Women Act*, 16 J. AM. ACAD. MATRIM. LAW. 173 (1999).

<sup>12</sup>*Loving v. Virginia*, 388 U.S. 1 (1967). For a reminder of how much remains to change in the rigid minds of proponents of racism, see Paul A. Lombardo, *Miscegenation, Eugenics, and Racism: Historical Footnotes to Loving v. Virginia*, 21 U.C. DAVIS L. REV. 421, 422 (1988) (“*Loving* invalidated a Virginia statute that forbade marriages between white persons and persons of other races. Thus, *Loving* struck down one of the most psychologically and socially sensitive laws upon which the American system of apartheid had rested for over three hundred years.”). This rights-language has now entered the uniquely American realm of free speech. See, e.g., *Telescope Media Group v. Lucero*, 936 F.3d 740, 752 (8th Cir. 2019) (“Minnesota’s interpretation of the MHRA interferes with the Larsens’ speech in two overlapping ways. First, it compels the Larsens to speak favorably about same-sex marriage if they choose to speak favorably about opposite-sex marriage. Second, it operates as a content-based regulation of their speech.”).

<sup>13</sup>*United States v. Windsor*, 570 U.S. 744 (2013).

<sup>14</sup>*Obergefell v. Hodges*, 135 S. Ct. 2584 (2015).

<sup>15</sup>See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003) (“Marriage is a vital social institution. The exclusive commitment of two individuals to each other nurtures love and mutual support; it brings stability to our society. For those who choose to marry, and for their children, marriage provides an abundance of legal, financial, and social benefits. In return it imposes weighty legal, financial, and social obligations.”). See also, *Id.* at 955, where the Court goes on to state that, “[b]ecause it fulfils yearnings for security, safe haven, and connection that express our common humanity, civil marriage is an esteemed institution, and the decision whether and whom to marry is among life’s momentous acts of self-definition. Tangible as well as intangible benefits

A brief historical perspective is relevant because, concurrent with these societal and institutional evolutions, a swath of adults in the United States were voluntarily cohabitating without marriage, acquiring and owning assets jointly without marriage, and having children without marriage.<sup>16</sup> What concerns this article, however, is the portion of couples who made a voluntary and intentional choice to be married, publicly and legally (such as joint tax returns), and behaved as such. What they failed to do was to complete technical state law requirements for marriage so as to render a marriage void or voidable at the time of divorce if one putative spouse decided to gain a coldly rational advantage.<sup>17</sup> In addition, these couples may live in states which do not recognize common law marriage, nor do they fall within the ambit of a constitutionally protected class of rights.<sup>18</sup>

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flow from marriage. The marriage license grants valuable property rights to those who meet the entry requirements, and who agree to what might otherwise be a burdensome degree of government regulation of their activities.” This point of privacy in marriage, however, should not be read too broadly. *See, e.g., Williams v. Att’y Gen. of Alaska*, 378 F.3d 1232, 1242-43 (11th Cir. 2004), *rev’d*, 220 F. Supp. 2d, 1257 (N.D. Ala. 2002) (“After an extensive survey of the history of sex in American culture and law—replete with cites to the Kinsey studies and Michel Foucault—the district court concluded that ‘there exists a constitutionally inherent right to sexual privacy that firmly encompasses state non-interference with private, adult, consensual sexual relationships.’ . . . The inquiry should have been focused not broadly on the vast topic of sex in American cultural and legal history, but narrowly and more precisely on the treatment of *sexual devices* within that history and tradition.”).

<sup>16</sup>*See* Andrew J. Cherlin, *Demographic Trends in the United States: A Review of Research in the 2000s*, 72 J. MARRIAGE FAM. 403, 413-14 (2010) (“Cohabiting relationships may not have a clear beginning point. Single parents and their adolescents often disagree on whether new, seemingly cohabiting partners are part of the family. The cross-household ties that multiple partner fertility can create may lead to families without clear boundaries.”); Sara McLanahan, *Diverging Destinies: How Children are Faring Under the Second Demographic Transition*, 41 DEMOGRAPHY 607, 607 (2004) (“How children are faring under the second demographic transition, which began around 1960, is less certain. The primary trends of the second transition include delays in fertility and marriage; increases in cohabitation, divorce, and nonmarital childbearing; and increases in maternal employment.”); *see also* discussion *infra* note 28-31.

<sup>17</sup>From the perspective of rational choice, error may not have a moral component. *See* Jeffrey J. Rachlinski, *The Psychological Foundations of Behavioral Law and Economics*, 2011 U. ILL. L. REV. 1675, 1687 (“Research on judgment and choice that uses the perspective of ecological rationality can thus help pinpoint when people are vulnerable to errors and when they are not. It can also lead to useful ways to facilitate better judgment. This perspective, however, should not reassure conventional law and economics scholars that cognitive mistakes are not real or are not pervasive.”).

<sup>18</sup>*See Wilcox v. Trautz*, 693 N.E.2d 141, 146 (Mass. 1998) (“Nothing we say here today is intended to derogate from the clear distinction we have made in

As explored in this article, the choice to deny a marriage for the economic or personal advantage of one person may not matter in the context of social and political equity<sup>19</sup> as some states have found a pathway for supporting, as valid, a marriage grounded in two equitable doctrines: the *putative spouse doctrine* [PSD] and the *doctrine of marriage by estoppel* [DME].<sup>20</sup> In this article, these doctrines are explored in the context of pronouncements about the value of marriage to a robust and civil society and the concomitant rights and responsibilities which flow from the status of marriage. Besides extensive federal and state benefits, the underlying “partnership theory of marriage” of divorce now decades old, conferred significant economic rights to equitable distribution and spousal support not available to cohabitating couples or voided marriages.<sup>21</sup>

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our cases between the legal rights of married and unmarried cohabitants”). The breadth of rhetoric between majority and dissenting opinions in marriage cases could be an article onto itself (and an even longer footnote). *See, e.g., Donaldson v. State*, 292 P.3d 364, 375 (Mont. 2012) (Nelson, J., dissenting) (“It appears that a majority of voters in these states have seen through the scare tactics and propaganda which ‘family values’ organizations and certain religious groups have used to persuade the electorate that allowing same-sex marriage will harm children, hurt businesses and the economy, intrude on religious freedoms, and undermine the institution of marriage itself.”). No discussion of this sort can ignore one line of reasoning from one judge because this strain is proving immune to ordinary societal antibiotics. *See In re. King*, 200 So. 3d 495, 565 (Ala. 2016) (Moore, C.J., concurring specially) (“Based upon arguments of ‘love,’ ‘commitment,’ and ‘equal dignity’ for same-sex couples, five lawyers, as Chief Justice Roberts so aptly describes the *Obergefell* majority, have declared a new social policy for the entire country. As the Chief Justice and Associate Justices Scalia, Thomas, and Alito eloquently and accurately demonstrate in their dissents, the majority opinion in *Obergefell* is an act of raw power with no ascertainable foundation in the Constitution itself. The majority presumed to legislate for the entire country under the guise of interpreting the Constitution.”).<sup>19</sup> *See Miliano v. Miliano*, 50 A.3d 534, 539 n.3 (Me. 2012) (“The use of the terms ‘equitable’ and ‘equity’ often create confusion. In common parlance, ‘equitable’ can simply connote the general concepts of fairness and impartiality—as in the requirement of 19-A M.R.S. § 953(1) (2011) that distributions of marital property be ‘just’—or it can be used to describe the grant of authority for a court to exercise jurisdiction over specific claims arising from the law of equity.”).

<sup>20</sup>To date, the author could not find a case applying these doctrines to a same sex couple but, given the holdings cited, if a state recognizes a marriage as lawful, then the courts should recognize the right to divorce. *See Williams v. Williams*, 97 P.3d 1124 (Nev. 2004) (describing the putative spouse doctrine); *Lowenschuss v. Lowenschuss*, 579 A.2d 377 (Pa. Super. Ct. 1990) (describing the doctrine of marriage by estoppel).

<sup>21</sup>States, with variation, have adopted concepts of equitable distribution or community property from the National Conference of Commissioners on Uniform State Law’s adoption of the UNIFORM MARRIAGE AND DIVORCE ACT

Because the argument here endorses the consequences of choice, not constricting it, Section II will discuss “common law marriage,” as a doctrine rooted in policies and practices now centuries old. In Section III, a 2019 case, *Belliveau v. Whalen*,<sup>22</sup> in which the Maine Supreme Judicial Court referred, euphemistically, to these equitable doctrines as an “end-run around those [statutory marriage] requirements” and thereby denied equity in a 26-year marriage will be reviewed.<sup>23</sup> Majority and dissenting opinions from other cases adopting or rejecting these doctrines will then be discussed in Section IV.<sup>24</sup> From this analysis, it is argued in Section V that legislatures and courts should adopt a modern version of common law marriage, bounded by doctrines like putative marriage and estoppel and now undergirded by contemporary policies established in the marriage cases from federal and state courts. Such a social and legal policy supports the presumption that marriage, with all the attendant rights and responsibilities, is a more effective alternative for society than stigma, illegitimacy, and economic instability for a maturely, publicly, and intentionally consummated partnership.<sup>25</sup>

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(1971). For the history of the uniform laws and California’s community property doctrine, see GRACE GANZ BLUMBERG, *COMMUNITY PROPERTY IN CALIFORNIA* (7th ed. 2016). Equitable distribution laws remain deeply rooted in that principle. See *Burrow v. Burrow*, 100 A.3d 1104, 1108 (Me. 2014), (“The evolution of the law of marital property reflects the shared or joint enterprise theory of marriage.”); *Tibbetts v. Tibbetts*, 406 A.2d 70, 76 (Me. 1979) (“The ‘partnership theory of marriage is a major guiding principal in the separation and division of property at divorce.”). See Karen Townsend, Comment, *The Uniform Marriage and Divorce Act: New Statutory Solutions to Old Problems*, 37 MONT. L. REV. 119, 126-27 (1976) (“This provision [UMDA in Montana] reflects a new notion that the disposition of property is to be done ‘like the distribution of assets incident to the dissolution of a partnership.’”).

<sup>22</sup>*Belliveau v. Whalen*, 213 A.3d 617 (Me. 2019). By way of disclosure, the author was counsel for the father and husband at the hearing and on appeal.

<sup>23</sup>*Id.* at 618.

<sup>24</sup>This policy tension is not limited to the United States. See Bradley S. Smith, *Rethinking the Application of the Putative Spouse Doctrine in South African Matrimonial Property Law*, 24 INT’L. J. L., POL’Y FAM. 267, 269-70 (2010) (“In South African law, the term ‘putative marriage’ (*matrimonium putativum*) refers to the specific instance where a void marriage is visited with limited legal consequences despite its invalidity provided that at least one of the parties to the marriage in good faith believed it to be valid. The bona fides of at least one of the ‘spouses’ constitutes the *raison d’être* for the putative marriage in that the law attempts to avoid the harsh consequences of total invalidity that would otherwise ensue.”).

<sup>25</sup>Legitimizing children for inheritance and labeling children born outside marriage were not trivial matters. See *Robinson v. Ruprecht*, 61 N.E. 631, 634 (Ill. 1901) (“The common law of England recognized no mode of legitimating bastards except by a special act of parliament. In the absence of statutory

## II. THE “WICKED” POLICY OF NOT-A-MARRIAGE

Despite decades of constitutional law and political rhetoric in support of the value of marriage to society, barriers to lawful marriage remained present in scenarios involving technical violations of statutory requirements or whether the birth of children or coition matter.<sup>26</sup> What should matter, as it pertains to marriage and public policy, is that respect for individual self-determination and choice carries consequences if there is objective evidence of an intent to be married such as by ceremony or filing married joint tax returns.<sup>27</sup> As more specifically described below, the consequences to effective policy design and implementation, therefore, in a democratic republic, means recognizing that social evolutions (and pendulum swings which still require a modicum of civil discourse

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enactments, the common law rule would be the law in Illinois. The rule visited the sins of the parents upon the unoffending offspring and could not long survive the truer sense of justice and broader sense of charity that came with the advancing enlightenment and civilization of the race.”) (citations omitted).

<sup>26</sup>See DiFonzo & Stern, *supra* n.9, at 9-10 (“Common law marriage, because it frustrated state efforts to determine who could marry and procreate, was recognized in only eighteen states in the early 1950s. When a jurisdiction retained common law marriage, it did so to ‘regularize unions which the parties were otherwise free to abandon at will and to prevent the bastardization of children.’”); *see also* *Inhabitants of Hiram v. Pierce*, 45 Me. 367, 371 (1858) (“In the absence of any provision of statute declaring marriages between parties of certain ages absolutely void, all marriages regularly made, according to the common law, are valid and binding, although had in violation of the specific regulations imposed by statute.”) (citation omitted).

<sup>27</sup>There are limits on equity, however, when parties to the relationship may violate other public policies. *See, e.g., Norton v. McOsker*, 407 F.3d 501, 509 (1st Cir. 2005) (“Unfortunately for Norton, who waited twenty-three years for an adulterer to finally leave his wife for good so that they could get married and live happily ever after, her happy ending never came to pass. Hoyt instead decided to end the relationship with Norton, having never left his wife. While society does not favor the actions taken by Hoyt in his relationships, Rhode Island law does not provide Norton with a cause of action for palimony arising out of her nonmarital relationship with Hoyt, nor is she able to succeed in a promissory estoppel claim because she has failed to meet the first two, if not all three of the elements of said claim.”); *Hay v. Hay*, 678 P.2d 672, 674 (Nev. 1984) (“We hasten to point out that Nevada does not recognize common law marriage. We recognize that the state has a strong public policy interest in encouraging legal marriage. We do not, however, believe that policy is well served by allowing one participant in a meretricious relationship to abscond with the bulk of the couple’s acquisitions.”) (citation omitted); *Williams v. Ormsby*, 966 N.E.2d 255, 263 (Ohio 2012) (“But palimony is not recognized by Ohio statute or common law, and Ohio does not permit a division of assets or property based on cohabitation. Our state has steadily retreated from recognizing property interests in romantic relationships.”) (citations omitted).

and reflection) should consistently reinforce by public choices and preferences and not merely allow for responsibilities and accountability to be set aside when inconvenient.<sup>28</sup>

The consequences of social evolution are reflected in the data. In the United States, “[c]ohabitation was rare and stigmatized in the 1950s; by the turn of the twenty-first century, it had become accepted both as a precursor to marriage and as a stand-alone relationship.”<sup>29</sup> Even as of 1968, “living with an unmarried partner was rare. Only 0.1 percent of 18- to 24-year-olds and 0.2 percent of 25- to 34-year-olds lived with an unmarried partner” which contrasts with rising rates of cohabitation, such that “the proportion of young adults who are married has declined over time.”<sup>30</sup> Today, “30 percent of young adults ages 18-34 are married, but 40 years ago, in 1978, 59 percent of young adults were married.”<sup>31</sup> If these trends are considered in the context of income disparities and marital status as it impacts children, policies which forbid or restrict marriage as a recognized legal and economic partnership are even more difficult to sustain as harbingers of poverty and economic instability.<sup>32</sup>

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<sup>28</sup>This assertion does not mean all things are acceptable on some scale of moral relativism or extreme example intended to generate irrational responses any more than failing to protect adults and children from violence or abuse for centuries as property or privacy is acceptable today. Whatever the preference, social welfare policy should be driven by a clear lens. See JUNE CARBONE & NAOMI CAHN, *MARRIAGE MARKETS: HOW INEQUALITY IS REMAKING THE AMERICAN FAMILY* 90 (2014) (“It is time to recognize that family scripts have been rewritten, and they have been rewritten along the diverging lines of gender, class, and culture. Marriage is thriving among higher-income, well-educated men and women who have become more likely to stay together; marriage is dying among lower-income, less-educated men and women, and the marriages they do enter into are more likely to end in divorce.”).

<sup>29</sup>Sarah R. Havford & S. Philip Morgan, *The Quality of Retrospective Data on Cohabitation*, 45 *DEMOGRAPHY* 129, 129 (2008).

<sup>30</sup>Benjamin Gurrentz, *Living with an Unmarried Partner Now Common for Young Adults* (Nov. 15, 2018), <https://www.census.gov/library/stories/2018/11/cohabitation-is-up-marriage-is-down-for-young-adults.html>.

<sup>31</sup>*Id.*

<sup>32</sup>See Lawrence B. Finer & Mia R. Zolna, *Unintended Pregnancy in the United States: Incidence and Disparities, 2006*, 84 *CONTRACEPTION* 478, 480 (2011) (“Unintended pregnancy rates increased among cohabitators and formerly-married women. Cohabiting women exhibited both the highest rate and the greatest increase among all individual subgroups measured in this analysis. Rates were even higher among cohabiting women who were under 25 years old or poor or low-income.”). An additional finding suggests that cohabitation may not be a protective or predicative factor for successful marriage. See Wendy D. Manning & Jessica A. Cohen, *Premarital Cohabitation and Marital Dissolution: An Examination of Recent Marriages*, 74 *J. MARRIAGE FAM.* 377, 386 (2012) (“To date, no study has found a protective influence of cohabitation on marital

For political and organizational scholars, complex iterations of social welfare and legal policy are described as “wicked” which may be defined generally “as associated with social pluralism (multiple interests and values of stakeholders), institutional complexity (the context of interorganizational cooperation and multilevel governance), and scientific uncertainty (fragmentation and gaps in reliable knowledge.”<sup>33</sup> In the arena of marriage and divorce, the complex and chaotic blending of data, beliefs, myths, preferences, and policies of individuals and groups fits this metaphorical framework for analysis:

[W]icked problems are relentless. The problems are not going to be solved once and for all despite all the best intentions and resources directed at the problem, and efforts to solve the wicked problem will have consequences for other policy arenas as well. Similar to a stone dropped in the water, the ripples spread rapidly to have an impact on other issue areas.<sup>34</sup>

What “wicked” means to marriage policy may begin with what Professor Ariela R. Dubler grounds as the argument for the doctrine of common law marriage in a *per curiam* opinion written in 1809 by Chancellor Kent for the New York Supreme Court of Judicature.<sup>35</sup> In *Fenton v. Reed*,<sup>36</sup> the Court held a second marriage valid. Although their marriage was considered null and void while the original husband was alive, “no proof of solemnization after his death was needed for their marriage to be valid.”<sup>37</sup> Instead, marriage may be proved by “cohabitation, reputation, acknowledgment of the parties, reception in the family, and other circumstances from which a marriage may be inferred or, as stated in more formal Latin terms, a contract of marriage made *per verba de presenti* amounts to an

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instability. Among subgroups of women facing the greatest risk of divorce, being engaged at the start of cohabitation appears to be protective and tied to significantly lower odds of marital instability. These findings speak to the importance of recognizing socioeconomic variation in the potential role of cohabitation in regard to marital quality and stability”).

<sup>33</sup>Brian W. Head & John Alford, *Wicked Problems: Implications for Public Policy and Management*, 47 ADMIN. SOC'Y 711, 716 (2013) The literature on public administrations is a vast source of case study which would benefit stakeholders and policy maker when examining judicial systems and family law polices.

<sup>34</sup>Edward P. Weber & Anne M. Khademian. *Wicked Problems, Knowledge Challenges, and Collaborative Capacity Builders in Network Settings*, 68 PUBLIC ADMIN. REV. 334, 336-37 (2008).

<sup>35</sup>Ariela R. Dubler, *Governing Through Contract: Common Law Marriage in the Nineteenth Century*, 107 YALE L. J. 1885, 1889 (1998).

<sup>36</sup>*Id.* at 1887.

<sup>37</sup>*Id.* at 1885.

actual marriage, and is valid as if made *in facie ecclesie*.”<sup>38</sup> Because “[t]he parties cohabited together as husband [and] wife, and under the reputation and understanding that they were such; and the wife, during this time, sustained a good character in society,” then “an actual marriage between them could be inferred.”<sup>39</sup>

With this opinion, Professor Dubler concluded that Chancellor Kent, “[s]taked out one defining pole of a controversy that was to rage in the state courts for the next century” which “with varying levels of vitriol, the legitimacy of the doctrine of common law marriage” as the doctrine by which courts could (should is another wicked policy question) recognize unsolemnized, long-term, sexual unions as marriages.<sup>40</sup> As applicable to the PSD and DME debates even today and discussed below, Professor Dubler reveals that the same policy schisms of centuries ago remain the rigid categories for debate today:

To proponents of the doctrine, a group that included a majority of state courts by the last quarter of the nineteenth century, a common law marriage was a valid contract between a man and a woman that demanded judicial enforcement. To opponents of the doctrine, by contrast, common law marriages represented the desanctification of the sacred marital relationship and the abdication of critically needed state control over the most foundational of social relationships.<sup>41</sup>

For generations now, various state courts have struggled with the same inequities and policy principles described by Chancellor Kent in 1809. To avoid the consequences of not-a-marriage, parties initiated civil actions, labeled in shorthand as “palimony”<sup>42</sup> by savvy

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<sup>38</sup>*Id.* at 1885-86 (quoting *Fenton v. Reed*, 4 Johns. at 54).

<sup>39</sup>*Id.* at 1886.

<sup>40</sup>*Id.*

<sup>41</sup>Dubler, *supra* note 35, at 1886 (emphasis added).

<sup>42</sup>See Noel Myricks, “Palimony”: *The Impact of MARVIN v. MARVIN*, 29 FAM. RELATIONS 210, 211 (1980) (“It was a term with a Madison Avenue appeal that some imaginative writer used to describe the award received by Michelle Marvin. In either case, the concept took root in the public mind but not the courts.”). See, e.g., *Wooldridge v. Wooldridge*, 856 So. 2d 446, 453 (Miss. 2003) (“Steve and Debra resumed cohabitation approximately one month after their divorce, and but for want of obtaining another marriage license, they lived in the same relationship in which they had lived from 1973 through 1994, holding themselves out to the public as well as their two daughters as having legally remarried. While we do not sanction palimony, we do believe in equitable distribution consistent with each party’s contribution.”); *Maeker v. Ross*, 62 A.3d 310, 316 (N.J. Super. Ct. App. Div. 2013) (“Palimony is a claim for support between unmarried persons, which our Supreme Court first recognized as a viable cause of action in *Kozlowski v. Kozlowski*, 80 N.J. 378, 403 A.2d 902

media an marketers, as well as civil equity and tort causes of action for constructive trust, partition, fraud, or unjust enrichment<sup>43</sup> The New York Supreme Court, for example, noted, with seeming frustration only a few years ago, that:

it has previously diagnosed, at length, what it perceives as the dangers posed by constructive trust actions based on inferred or implied pre-marital promises between couples. Unraveling these complex inter-personal transactions risks resurrecting palimony-like claims and claims outlawed by the demise of common law marriage in New York. The public policy contortions created by the confluence of equitable distribution claims under the Domestic Relations Law and common law constructive trust claims, if they merit reappraisal, must be deconstructed by some higher authority.<sup>44</sup>

There are several policy arguments in support of the New York court's reasoning. Among those responses are that religious and cultural beliefs are entitled to respect and protection within the realm of state policy and constitutional rights.<sup>45</sup> Whether in the form or tradition or practice or faith or scripture, religious viewpoints belong in the public square as a function of healthy debate and organizing

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(1979). Because palimony actions are based upon principles of contract, plaintiff's cause of action accrued at the time defendant is alleged to have breached the agreement, not at the time the promise of lifetime support was purportedly made.”).

<sup>43</sup>See, e.g., *Blumenthal v. Brewer*, 69 N.E.3d 834, 860 (Ill. 2016) “As noted in *Hewitt* and the line of cases that follow its holding, unmarried individuals may make express or implied contracts with one another, and such contracts will be enforceable if they are not based on a relationship indistinguishable from marriage.”); *Cassidy v. Cassidy*, 982 A.2d 326, 328 (Me. 2009) (“A constructive trust may be imposed to do equity and to prevent unjust enrichment when title to property is acquired by fraud, duress, or undue influence, or is acquired or retained in violation of a fiduciary duty.”) (citation omitted); *Harman v. Rogers*, 510 A.2d 161, 165 (Vt. 1986) (“In sum, plaintiff's implied contract claim fails, not because of the nature of the parties' relationship, but because she did not sustain her burden of showing a mutual expectation of payment over and above her \$3 per hour wage.”).

<sup>44</sup>*Bower v. Bower*, 988 N.Y.S.2d 521, 521 (N.Y. App. Div. 2014).

<sup>45</sup>See Ann Laquer Estin, *Foreign and Religious Family Law: Comity, Contract, and the Constitution*, 41 PEPP. L. REV. 1029, 1033 (2013) (“Constitutional doctrines provide the clearest possible threshold definition of both due process and public policy, and provide a useful lens for examining the types of concerns that courts might have in deciding these cases. In my view, state courts have generally done a good job using comity, contract, and the Constitution to manage cases involving foreign and religious family law.”); Joel A. Nichols, *Religion, Marriage, and Pluralism*, 25 EMORY INT'L L. REV. 967, 985 (2011) (“There are hard and yet unresolved questions about how a liberal democracy like the United States is going to incorporate all its citizens into the polity and promote values of liberty, equality, and nondiscrimination while also respecting and promoting religious liberty and personal autonomy.”).

principles that respect the dignity and worth of every human being.<sup>46</sup> The more liberal viewpoint toward policies related to marriage (or divorce for that matter) should not diminish the importance of viewpoints grounded in principles that view marriage or not-to-marry as individual freedoms to choose with known consequences. As one scholar pointed out rather persuasively for practitioners, “constitutional law has rarely provided a suitable tool for understanding family relationships, and that its limitations become increasingly transparent as society becomes less and less certain about how to evaluate the changing contours of the domestic sphere.”<sup>47</sup>

Nevertheless, refusing to acknowledge the history of marriage and divorce in the United States as it pertained to bias and bigotry in conjunction with current demographic realities is unsound policy and practice; not anti-religion, neo-conservative, or neo-liberal.<sup>48</sup> By way of example, there is substantial literature tracing the history of common-law marriage but what is always a surprise to some in the policy arena is how “new” is often only the re-packaged old.<sup>49</sup> The rigidity and exclusivity of categories (married or not married) still

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<sup>46</sup>See, e.g., Loren Marks, *How Does Religion Influence Marriage? Christian, Jewish, Mormon, and Muslim Perspectives*, 38 MARRIAGE & FAM. REV. 85, 88 (2005) (“Several studies link religiosity (including strong religious beliefs) with increased marital satisfaction and duration, increased commitment and fidelity.”); Margaret L. Vaaler, et al., *Religious Influences on the Risk of Marital Dissolution*, 71 J. OF MARRIAGE AND FAM. 917, 931 (2009) (“In sum, our findings demonstrate modest but important influences of multiple dimensions of religious involvement on the risk of marital dissolution.”).

<sup>47</sup>Janet L. Dolgin, *The Constitution as Family Arbiter: A Moral in the Mess?*, 102 COLUM. L. REV. 337, 339 (2002).

<sup>48</sup>These labels are fluid and change from generation to generation. The literature is vast, but see, for example, Milan Zafirovski, *LIBERAL MODERNITY AND ITS ADVERSARIES: FREEDOM, LIBERALISM AND ANTI-LIBERALISM IN THE 21ST CENTURY* (2007).

<sup>49</sup>See, e.g., Jennifer Thomas, *Common Law Marriage*, 22 J. AM. ACAD. MATRIMONIAL LAW. 151, 156 (2009) (“The doctrine of common law marriage was adopted in state courts for several reasons. The first and probably most important rationale for the adoption of common law marriage was the belief that marriage derived from a natural right that every human possessed. Marriage is a civil contract between two people that should not be disrupted unless there is a statute specifically stating the common law marriages are invalid.”); *Meister v. Moore*, 96 U.S. 76, 80-81 (1877) (“State marriage regulations requiring a license and ceremony are not mandatory, but rather directory, because marriage is a common right, because a statute may declare that no marriages shall be valid unless they are solemnized in a prescribed manner; but such an enactment is a very different thing from a law requiring all marriages to be entered into in the presence of a magistrate or a clergyman, or that it be preceded by a license, or publication of banns, or be attested by witnesses.”).

matters today as a matter of policy because *not* having the status of married may mean *no* equitable distribution and spousal support for an economically disadvantaged spouse but married may mean access to economic rights, including those judicially-enforced rights, as well as social security and private pensions.<sup>50</sup> For example, a common enough fact pattern is, as follows:

H and W move in together and, over the next 15 years, cohabitate and have 3 children. A few years into the relationship, they get “engaged” and W wears an engagement ring. They refer to themselves as “fiancés” and enroll their children in school as a married couple, obtain health insurance, and buy a house, cars, and use credit cards. When they separate, they file a parental rights action but no action for distribution of marital property acquired during the relationship or spousal support.<sup>51</sup>

In a common law marriage, however, a state, on that fact pattern, may recognize as did the Chancellor in 1809, that the circumstances of the relationship (cohabitation, coition, and children, for example) may create a legally binding marriage (contract or license) even without intent expressed by a public

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<sup>50</sup>*See, e.g., Chaves v. Chaves*, 84 So. 672, 675 (Fla. 1920) (“The only foundation for an order for alimony, suit money and counsel fees pendente lite is the fact of marriage between the parties.”); *Davis v. Misiano*, 366 N.E.2d 752, 753 (Mass. 1977) (nonmarital partners have no right to separate support and alimony).

<sup>51</sup>*See, e.g., Cerovic v. Stojkov*, 134 A.3d 766, 774-75 (D.C. 2016) (“It is well established that a party claiming that a common law marriage exists must prove the existence of that common law marriage by a preponderance of the evidence. It is similarly settled that where two marriages are at issue, there is a presumption that the later marriage is the valid one.”); *Kelley v. Kelley*, 9 P.3d 171, 176 (Utah Ct. App. 2000) (“In 1987, the Legislature adopted section 30-1-4.5 of the Utah Code to provide a mechanism by which the state will recognize a relationship as a marriage although there was no solemnization. This is commonly referred to as a common law marriage.”) (citation omitted); *Mueggenborg v. Walling*, 836 P.2d 112, 113 (Okla. 1992) (“A common-law marriage requires competent parties, who enter the relationship by mutual agreement, exclusive of all others, consummating arrangement [sic] by cohabitation and open assumption of marital duties, and such relationship must be established by evidence that is clear and convincing.”); *Luis v. Gaugler*, 185 A.3d 497, 503 (R.I. 2018) (“However, because common-law marriage remains the law in Rhode Island, to prove it ‘we have adopted the clear and convincing standard of proof.’ ‘The existence of a common-law marriage vel non is intrinsically a fact-intensive inquiry.’ The required showings are that (1) the parties had the capacity to marry; (2) the parties seriously intended to enter into a mutual husband-wife relationship; and (3) the parties’ conduct was of such a character so as to lead to a belief in the community that they were married.”) (citations and footnote omitted).

ceremony ( an aspect of the equitable doctrines described below).<sup>52</sup> Unlike PSD or DME, a common-law marriage “does not depend for its validity upon any religious or civil ceremony but is created by the consent of the parties as any other contract.”<sup>53</sup> The policy reasons were multi-faceted: “(1) marriage was considered a natural right granted to every person; (2) marriage was favored over illicit relationships; (3) children born out of wedlock were considered illegitimate and, therefore, did not enjoy certain legal protections; and (4) concern that women would become economically dependent upon the state.”<sup>54</sup> If these principles have value then denying others such a “natural right” to be married, as argued for in common law marriage, is poor social and legal policy.<sup>55</sup> Conversely, recognition of common law marriage, like the equitable doctrines discussed below, supports policies which enforce accountability and stability for spouses and children.<sup>56</sup>

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<sup>52</sup>Prior to its abolition [January 1, 2005], “[a] common-law marriage [could] only [have been] created by an exchange of words in the present tense, spoken with the specific purpose that the legal relationship of husband and wife is created by such exchange.” *Bell v. Ferraro*, 849 A.2d 1233, 1235 (Pa. Super. Ct. 2004).

<sup>53</sup>*Luis v. Gaugler*, 185 A.3d 497, 502-03 (R.I. 2018) (quoting OTTO E. KOEGEL, COMMON LAW MARRIAGE AND ITS DEVELOPMENT IN THE UNITED STATES 7 (1922)). The doctrine “expanded to Western America in the nineteenth century due to the lack of religious officials to perform marriage ceremonies and the difficulty of traveling.” *Id.* at 503 (quoting Jennifer Thomas, *Common Law Marriage*, 22 J. AM. ACAD. MATRIM. LAW. 151, 156-57 (2009)).

<sup>54</sup>*Id.*

<sup>55</sup>The debate concerning natural rights has a long history beyond the scope of this article. What is important to note is that use of the language “natural rights” has its counter use against expanding civil law to some groups or expanding autonomy to others. See Shannon Holder, *Natural law, Natural Rights, and Same-Sex Civil Marriage: Do Same-Sex Couples Have a Natural Right to be Married*, 19 TEX. REV. L. & POL. 63, 71 (2014) (“What if, apart from the sexual act, there is a natural right to same-sex civil marriage because of the nature of marriage itself? If there is a natural right to same-sex civil marriage, then there is an implicit obligation that is placed upon citizens to accept such unions as legitimate. If, however, there is no natural right to same-sex civil marriage, then there is no obligation for citizens to treat same-sex civil marriage as true marriage.”); Michael Anthony Lawrence, *Reviving a Natural Right: The Freedom of Autonomy*, 42 WILLAMETTE L. REV. 123, 185 (2006) (“If the freedom of autonomy is to be revived from its current slumber in modern-day America, Americans must develop a greater understanding of the nature and rich history of this most basic natural right.”).

<sup>56</sup>Although this argument is sometimes classified as conservative in terms of a preference for fault-based divorce, for example, the argument is actually premised on the liberal view of freedom of choice but with consequences which society finds more important and valuable, such as financial support and stability for spouses and children. See Margaret F. Brinig & Frank H. Buckley, *No-Fault Laws and At-Fault People*, 18 INTERNAT. REV. OF L. AND ECON. 325,

### III. THE *BELIVEAU V. WHALEN* APPROACH TO NOT-A-MARRIAGE

Belliveau appealed from a family court order dismissing his complaint for divorce after the trial court found that the parties were never legally married.<sup>57</sup> The facts as reported by the court are summarized here. In May of 1992, Belliveau and Whelan traveled to England to be married.<sup>58</sup> Upon arriving they attempted to obtain a marriage license from the local town hall but were denied a license because they did not meet the residency requirement.<sup>59</sup> Despite this, Belliveau and Whelan went ahead with their planned wedding ceremony, which was officiated by a friend who was neither a minister nor an official authorized to solemnize marriages there.<sup>60</sup> Upon their return to Maine, they held a “wedding reception,” but did not seek or obtain a marriage license in Maine, nor did they take any other steps to create a valid marriage.<sup>61</sup>

Over the next twenty-six years, Belliveau and Whelan held themselves out to others as only a married couple.<sup>62</sup> Belliveau and Whelan filed joint income taxes, signed medical insurance documents as a married couple, and signed and had notarized a “Property Ownership Agreement” that characterizes them as “husband and wife.”<sup>63</sup> This agreement indicates that, in the event of

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326 (1998) (“Our results suggest a policy response to increased divorce levels. Social conservatives argue persuasively that increased divorce levels have harmed women and children and coarsened civil society.”). In states, a party may raise “condonation” as an affirmative defense to adultery as a fault-based justification for divorce. This point matters because condonation is an example of how the common law found that prospective behavior may trump past behavior with consequences-but no do-over-later. *See* *Schneider v. Richardson*, 438 A.2d 896, 897 (Me. 1981) (“Condonation means a blotting out of the offense imputed so as to restore the offending party to the same position he or she occupied before the offense was committed. If the evidence is undisputed the question is one of law. Condonation occurs when the injured spouse, with knowledge of the conduct, undertakes expressly or impliedly to overlook and forgive the wrongs and restores the other spouse unconditionally to the enjoyment of all marital rights.”) (citations omitted). *See generally* Timothy B. Walker, *Disarming the Litigious Man: A Glance at Fault and California’s New Divorce Legislation*, 1 PAC. L.J. 182 (1970).

<sup>57</sup>*Belliveau v. Whalen*, 213 A.3d 617 (Me. 2019).

<sup>58</sup>*Id.*

<sup>59</sup>*Id.*

<sup>60</sup>*Id.*

<sup>61</sup>*Id.*

<sup>62</sup>*Id.*

<sup>63</sup>*Id.* at 617-18.

a divorce, Whelan would retain exclusive ownership of the property.<sup>64</sup> In March 2017, Belliveau filed a complaint for divorce.<sup>65</sup> In response, Whelan asserted that the parties were never legally married and sought dismissal.<sup>66</sup> After holding an interim hearing, the court agreed with Whelan and dismissed the complaint.<sup>67</sup>

In a short and unanimous decision, the court noted that requirements for a valid marriage are statutory and that the court has historically declined to recognize common law marriage but “continuously left policy decisions regarding marriage and divorce to the Legislature.”<sup>68</sup> The court found that there “is no dispute that Belliveau and Whelan did not comply with the statutory requirements to enter into a valid marriage.”<sup>69</sup> Nevertheless, Belliveau “asks us to create an end-run around those requirements by adopting one, or both, of two equitable doctrines—the putative spouse doctrine or the doctrine of marriage by estoppel.”<sup>70</sup> The court declined to do so because “the adoption of either of these doctrines by us would be an infringement on the Legislature’s function and would only introduce new uncertainties into our law.”<sup>71</sup> In a footnote, the court recognized that in some states, the legislature has adopted the putative spouse doctrine, or some version of it, by statute.<sup>72</sup> In other states, “courts have judicially adopted one or both of the doctrines.”<sup>73</sup> Yet, in “other states, courts have declined to adopt the doctrine in deference to the legislature’s policy-making function.”<sup>74</sup>

What may be puzzling about the exercise of judicial restraint here, and on these facts, is that the preference for a valid marriage,

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<sup>64</sup>*Id.*

<sup>65</sup>*Id.*

<sup>66</sup>*Id.*

<sup>67</sup>*Id.* at 618.

<sup>68</sup>*Id.* (citing *Pierce v. Sec’y of U.S. Dep’t of Health, Educ. & Welfare*, 254 A.2d 46, 47 (Me. 1969) (“Sound public policy dictates that there be a minimum of uncertainty as to whether or not a [valid] marriage exists.”)).

<sup>69</sup>*Id.*

<sup>70</sup>*Id.*

<sup>71</sup>*Id.* (quoting *Grishman v. Grishman*, 407 A.2d 9, 12 (Me. 1979)).

<sup>72</sup>*Id.* at 618 n. 1.

<sup>73</sup>*Id.*; see *Williams v. Williams*, 97 P.3d 1124, 1128-29 (Nev. 2004); *Xiong v. Xiong*, 648 N.W.2d 900, 905-06 (Wis. Ct. App. 2002); *Martin v. Coleman*, 19 S.W.3d 757, 760-61 (Tenn. 2000); *Lowenschuss v. Lowenschuss*, 579 A.2d 377, 381-82, 386 (Pa. Super. Ct. 1990); *Chrismond v. Chrismond*, 52 So. 2d 624, 628-29 (Miss. 1951).

<sup>74</sup>*Id.*; see *Hill v. Bell*, 747 S.E.2d 791, 791-93 (S.C. 2013); *Watts v. Watts*, 405 N.W.2d 303, 309 (Wis. 1987); *Goldin v. Goldin*, 426 A.2d 410, 412-13 (Md. Ct. Spec. App. 1981).

and its importance to society and family, appears to depend upon whether marital *status* is deemed unworthy—historically and politically—by race or poverty or sexual orientation as described by case law for generations.<sup>75</sup> State supreme courts have the last word (again absent some federal constitutional issue not present) relative to defining matters of marriage and divorce; as a function of constitutional separation of powers (legislative prerogatives)—even when not overtly mentioned—and courts may also exercise comity by avoiding ancient principles equity to prevent misfeasance or malfeasance.<sup>76</sup> The same-sex marriage debate is an example of a confluence of social factors and political authority merging with private and public acceptance and support for the *right* to marry by choice not exclusive categories of status alone.<sup>77</sup> If so, what may matter is that Belliveau himself was not part of a class entitled to constitutional protection but if he and this publicly-acknowledged “wife” and “husband” had been subject to such constitutional protection, the result may have been different.

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<sup>75</sup>See discussion *supra* notes 1-16. Almost a century and a half before *Belliveau* was decided the Court decided another case. See *Carter v. Parker*, 28 Me. 509, 509 (1848) (“The marriage of the demandant with Jonathan Carter, was denied. A witness testified, that he had known her more than sixty years, that she lived during that period and until his death with Jonathan Carter as his wife, that they had and reared a numerous family of children; that he knew her at Concord, N. H. where it was said, she was published and married. In the absence of any testimony tending to rebut it, this testimony would authorize the conclusion, that they were legally married.”).

<sup>76</sup>See Dana E. Prescott, *Consent Decrees, the Enlightenment, and the Modern Social Contract: A Case Study from Bates, Olmstead, and Maine’s Separation of Powers Doctrine*, 59 ME. L. REV. 75, 110 (2007) (“Thus, a doctrine of separation of powers may be formulated from the premise that it is essential for the establishment and maintenance of political harmony that government be divided into identifiable, functional (or functionalist) parts. In this sense, the Constitution reflects the law’s boundedness as it is part inspirational and part procedural.”); Jennifer Wriggins, *Maine’s Act to Protect Traditional Marriage and Prohibit Same-Sex Marriages: Questions of Constitutionality Under State and Federal Law*, 50 ME. L. REV. 345, 348 (1998) (“Civil marriage in Maine and other states is regulated by state statute, and marriage regulation is generally considered to be within the state’s police power. However, the state’s power to regulate marriage is subject to constitutional limitations.”).

<sup>77</sup>As anyone familiar with slavery, the Old or New Jim Crow, and other mutations of racism understands, certain groups are rather creative at hiding beliefs or adapting language to the historical and political moment. See Darlene C. Goring, *Premature Celebration: OBERGEFELL Offers Little Immigration Relief to Binational Same-Sex Couples*, 59 HOW. L.J. 305 (2015); Ira C. Lupu, *Moving Targets: OBERGEFELL, HOBBY LOBBY, and the Future of LGBT Rights*, 7 ALA. C.R. & C.L.L. REV. 1 (2015); Leeford Tritt, *Moving Forward by Looking Back: The Retroactive Application of OBERGEFELL*, 2016 WIS. L. REV. 873.

It may also be the case that the court was concerned that uncertainty in the law is a prescription for avoiding judicial adoption of such a doctrine.<sup>78</sup> A review of these rather unique facts likely leaves these parties as a class of one. And state supreme courts such as Virginia,<sup>79</sup> as described below, have prospectively applied the scope of holdings for centuries to new fact patterns without much difficulty and, in later cases, affirmed, expanded, or distinguished common law, contract, or equitable doctrines related to marriage.<sup>80</sup> Nothing novel there since the inception of this constitutional republic at the federal and state levels. What may have mattered as a matter of equity jurisprudence, but did not, is that such a decision left a child without married parents, divested a spouse of rights to federal and state benefits, and gave imprimatur to the benefits from inaccurately filed federal and state tax returns, among other under oath statements that they were legally married for decades.<sup>81</sup>

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<sup>78</sup>See, e.g., *Davis v. Davis*, 643 So.2d 931, 934-35 (Miss. 1994) (“We are of the opinion that public policy questions of such magnitude are best left to the legislative process, which is better equipped to resolve the questions which inevitably will arise as unmarried cohabitation becomes an established feature of our society. While the judicial branch is not without power to fashion remedies in this area, we are unwilling to extend equitable principles to the extent plaintiff would have us to do, since recovery based on principles of contracts implied in law essentially would resurrect the old common-law marriage doctrine which was specifically abolished by the Legislature.”).

<sup>79</sup>See *infra* Part IV.

<sup>80</sup>See, e.g., *Blumenthal v. Brewer*, 69 N.E.3d 834, 851 (Ill. 2016) (“As explained supra, our decision in *Hewitt* did no more than follow the statutory provision abolishing common-law marriage, which embodied the public policy of Illinois that individuals acting privately by themselves, without the involvement of the State, cannot create marriage-like benefits. *Hewitt* clearly declared the law on the very issue in this case. Yet, the appellate court in this case declined to follow our ruling, despite the facts being almost identical to *Hewitt*. This was improper. Under the doctrine of *stare decisis*, when this court ‘has declared the law on any point, it alone can overrule and modify its previous opinion, and the lower judicial tribunals are bound by such decision and it is the duty of such lower tribunals to follow such decision in similar cases.’); *Van v. Zahorik*, 597 N.W.2d 15, 21 (Mich. 1999) (“The present matter may be distinguished from the cited cases on the basis that here the parties were never married to each other. However, this is a distinction without a difference with respect to the elements of equitable estoppel. The cited cases emphasized the length of time during which the putative father held himself out as a father rather than the existence of a marriage relationship in finding estoppel.”).

<sup>81</sup>As in many states, equitable estoppel can apply against private parties and even the government. See *John F. Murphy Homes, Inc. v. State*, 158 A.3d 921, 927 (Me. 2017) (“To prevail on an equitable estoppel claim against a government entity, the proponent of the claim must demonstrate by ‘clear and satisfactory’ evidence that (1) the statements or conduct of a governmental official or agency induced the party to act, or here, to fail to act; (2) the reliance was detrimental to the party; and (3) the reliance was reasonable.”); *Kamp v.*

#### IV. EQUITABLE DOCTRINES OF MARRIAGE

##### A. PUTATIVE SPOUSE DOCTRINE

In *Williams v. Williams*,<sup>82</sup> the Nevada Supreme Court, in an annulment case, succinctly outlined PSD, as follows:

*Under the putative spouse doctrine, when a marriage is legally void, the civil effects of a legal marriage flow to the parties who contracted to marry in good faith.* That is, a putative spouse is entitled to many of the rights of an actual spouse. A majority of states have recognized some form of the doctrine through case law or statute. States differ, however, on what exactly constitutes a “civil effect.” *The doctrine was developed to avoid depriving innocent parties who believe in good faith that they are married from being denied the economic and status-related benefits of marriage, such as property division, pension, and health benefits.*

*The doctrine has two elements: (1) a proper marriage ceremony was performed, and (2) one or both of the parties had a good-faith belief that there was no impediment to the marriage and the marriage was valid and proper.* “Good faith” has been defined as an “honest and reasonable belief that the marriage was valid at the time of the ceremony.” Good faith is presumed. The party asserting lack of good faith has the burden of proving bad faith. Whether the party acted in good faith is a question of fact. Unconfirmed rumors or mere suspicions of a legal impediment do not vitiate good faith “so long as no certain or authoritative knowledge of some legal impediment comes to him or her.”<sup>83</sup> However, when a person receives reliable information that an impediment exists, the individual cannot ignore the information, but instead has a duty to investigate further. Persons cannot act “blindly or without reasonable precaution.”<sup>84</sup> Finally, once a spouse learns of the impediment, the putative marriage ends.<sup>85</sup>

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*Department of Human Services*, 980 A.2d 448, 465 (Md. 2009) (“Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse and who on his part acquires some corresponding right, either of property, of contract, or of remedy.”) (citation omitted).

<sup>82</sup>97 P.3d 1124 (Nev. 2004).

<sup>83</sup>*Id.* at 1128 (footnotes omitted and emphasis added).

This doctrine is distinguished from common law marriage by virtue of elements of a “proper marriage ceremony” and that one or both (in this case both) parties had a good faith belief that they had a valid marriage” for decades.<sup>84</sup>

In several cases related to pension rights, death benefits, or tort actions, for example, courts have been unwilling to expand the doctrine when there is a valid first marriage. In *Hill v. Bell*,<sup>85</sup> for example, the South Carolina Supreme Court declined to adopt the putative spouse doctrine at least in the context of a second relationship and while a spouse was still legally married. The Court held that statute and precedent was contrary to South Carolina’s statutory law and marital jurisprudence.<sup>86</sup> In *Ferry v. De Longhi America Inc.*,<sup>87</sup> the federal district court addressed the doctrine in the context of a wrongful death suit. Applying California law, the Court reasoned that the putative spouse doctrine protects “innocent parties who believe they were validly married.”<sup>88</sup> The question is whether a reasonable person could harbor a good faith belief in the existence of a lawful marriage because courts may “whether efforts were made to create a valid marriage and whether the party was ignorant of the infirmity rendering the marriage void or voidable.”<sup>89</sup> Nevertheless, the federal court was unwilling to expand the doctrine to allow the plaintiff to recover in a tort action.<sup>90</sup>

As one author reasoned, the “putative marriage rule provides the proverbial bridge to civil effects in the event parties fail in their attempt to contract a valid marriage, believing in good faith they had

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<sup>84</sup>As is common enough in family law, courts have recognized that retrospective changes in intent are not dispositive or credible absent some other form of evidence. See *Carter v. Carter*, 419 A.2d 1018, 1021 n.3 (Me. 1980) (“Motivation for the gift is irrelevant. In any event, retrospective statements of intention offered at the time of divorce to defeat the other spouse’s interest are highly suspect.”) (partially overruled on other grounds).

<sup>85</sup>747 S.E.2d 791 (S.C. 2013).

<sup>86</sup>See *id.* at 792 (“All marriages contracted while either of the parties has a former wife or husband living shall be void.”).

<sup>87</sup>276 F.Supp.3d 940 (N.D. Cal. 2017).

<sup>88</sup>*Id.* at 951.

<sup>89</sup>*Id.* at 952 (citations omitted).

<sup>90</sup>The history of federalism and the application of state law in federal courts is fascinating but beyond the scope of this article. Federal courts, however, have restrictions when applying substantive state laws whether in tort or marriage. See Michael Steven Green, *Horizontal Erie and the Presumption of Forum Law*, 109 MICH. L. REV. 1237, 1239 (2010) (“The obligations of a state court when interpreting sister-state law go to the heart of what it means to have fifty states cohabiting a federal union. The vertical analogue—namely, a federal court’s obligations when interpreting state law—has been given plenty of judicial and academic scrutiny.”).

done so” and has been described as “ameliorative or corrective,” to give “innocent spouses to a legally null marriage the civil effects to which parties in a valid marriage enjoy.”<sup>91</sup> In other words, and as suggested by *Williams* and similar cases,<sup>92</sup> “if one or both of the parties celebrate a marriage, believing it to be properly contracted in form and in substance, but some legal impediment plagues its validity, the putative marriage rule would allow the good faith party or parties to the marriage to enjoy the civil effects of valid marriage, notwithstanding its invalidity.”<sup>93</sup> As decided in *Beliveau*, however, conventional forms of equitable relief are not universally adopted to a spouse and co-parent as compared with a contractor or shareholder.<sup>94</sup>

## B. MARRIAGE BY ESTOPPEL

The doctrine of marriage by estoppel is the standard application of ancient estoppel principles of equity. Cases may arise when a spouse seeks to argue that a prior divorce was invalid such that the current marriage must be void. In *Lowenschuss v. Lowenschuss*,<sup>95</sup> for example, the court was “completely unpersuaded by husband’s protestations concerning his conduct after 1974 when he allegedly first discovered that wife’s divorce was invalid. It is of no significance that husband then privately considered himself unmarried and told wife that he did.”<sup>96</sup> For nine years, much less than the 26 years in *Beliveau*, Husband conducted himself as a married man and he and his wife continued to raise their children together with the only change afterward being that the husband filed his tax returns separately.<sup>97</sup>

As the court reasoned, whatever husband may have thought about his marital status, or whatever he may have told wife about their marital status, none of this alters the fact that the parties both continued to live as husband and wife and “continued to conduct themselves as if there was no impediment to their marriage.”<sup>98</sup> Husband cannot now contradict his course of conduct and most

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<sup>91</sup>Monica Hof Wallace, *The Pitfalls of a Putative Marriage and the Call for a Putative Divorce*, 64 LA. L. REV. 71, 73 (2003).

<sup>92</sup>See *supra* note 73.

<sup>93</sup>*Id.*

<sup>94</sup>See discussion *supra* at notes 68-74.

<sup>95</sup>579 A.2d 377 (Pa. Super. Ct. 1990).

<sup>96</sup>*Id.* at 385.

<sup>97</sup>*Id.*

<sup>98</sup>*Id.* at 386.

importantly, as the court bluntly asserted, possess the unilateral “right to decide when the parties are to be considered married and when they are not, *depending on what suits his personal or economic interest.*”<sup>99</sup> As the court summarized Pennsylvania law and its public policy toward family and marriage:

No social purpose will be served by a decision that this marriage simply does not exist and that wife is still the legal wife of her first husband and that her four children were born of an illicit relationship. To hold that husband may now raise this challenge simply in order to avoid the financial obligations of his marriage would be grossly inequitable. Such a decision would contravene the strongly entrenched policy of this Commonwealth favoring preservation of the family unit. Moreover, a decision which would allow husband to avoid his marital obligations at this late juncture would be completely inconsistent with the Commonwealth’s contemporary attitude toward divorce, which is grounded in the application of equitable principles to achieve economic justice and overall fairness between the parties.<sup>100</sup>

In a more recent decision, the Virginia Supreme Court in *MacDougall v. Levick*,<sup>101</sup> in a closely decided four to three division, vacated a decision of the Virginia Court of Appeals denying the application of equitable estoppel to these facts. In this case, the parties participated in a wedding ceremony in their home in the presence of friends and family in 2002.<sup>102</sup> Before the ceremony, the officiating rabbi discovered that the parties had not yet obtained a marriage license.<sup>103</sup> The rabbi suggested that they participate in the ceremony that day as long as they obtained a marriage license and submitted the marriage certificate to the rabbi as soon as possible.<sup>104</sup> MacDougall went to the courthouse with Levick to obtain the

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<sup>99</sup>*Id.* (emphasis added).

<sup>100</sup>*Id.* (citations omitted); *see also* Heuer v. Heuer, 704 A.2d 913, 919 (N.J. 1998) (“Defendant’s assertion that his marriage to plaintiff is invalid is totally inconsistent with cohabiting together as husband and wife for an extended period. He seeks to injure plaintiff by depriving her of alimony and equitable distribution under the statutory scheme set forth at N.J.S.A. 2A:34-23. As the Court observed in Newburgh, “[u]nder certain circumstances, one who enters into and accepts the benefits of a marriage may be equitably estopped” from later denying its validity. This is a case in which quasi-estoppel applies, and it does not require proof that defendant somehow participated in the Alabama proceedings.”) (citation omitted).

<sup>101</sup>805 S.E. 2d 776 (Va. 2017).

<sup>102</sup>*Id.* at 776.

<sup>103</sup>*Id.*

<sup>104</sup>*Id.*

license and told MacDougall that he would mail the marriage register out right away to the rabbi, and she agreed and kissed him goodbye.<sup>105</sup> As the rabbi testified, he was “completing” the solemnization that began with the ceremony and that his receipt of the marriage register in the mail demonstrated the couples “intention to complete the ceremony.”<sup>106</sup> Levick testified that he understood that they “needed a license and it had to be signed by the rabbi” and that “it was *necessary* to do [so] in order to be *lawfully* married.”<sup>107</sup>

In 2009, the marriage began to deteriorate so the couple entered into a “marital agreement” to “form the foundation of a divorce or separation agreement, should either come to pass.”<sup>108</sup> During a divorce proceeding years later, however, Levick asserted for the first time that their marriage was void *ab initio* such that he could repudiate a marital agreement requiring him to pay spousal support and to distribute marital assets. The trial court agreed with Levick’s reasoning. The Court of Appeals agreed only in part, holding that the marriage was merely voidable, not void *ab initio*. The Virginia Supreme Court held that, “We disagree entirely with Levick’s reasoning and hold that the marriage was not voidable or void *ab initio*. The circuit court, therefore, had authority to distribute the marital assets consistent with the marital agreement and to continue its adjudication of the divorce proceeding.”<sup>109</sup> While the majority “admired the brevity of Levick’s reasoning, it illustrated to the majority the aphorism, often attributed to Albert Einstein, that ‘[e]verything should be made as simple as possible, but not simpler.’”<sup>110</sup>

The analysis was grounded on a core premise of Virginia law governing marriages: “The public policy of Virginia has been to uphold the validity of the marriage status as for the best interest of

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<sup>105</sup>*Id.*

<sup>106</sup>*Id.*

<sup>107</sup>*Id.* (emphasis in original).

<sup>108</sup>*Id.*

<sup>109</sup>*Id.* at 776-77. Since Maine became a state in 1820 and drew its earliest interpretation of laws from Massachusetts, there was a distinction, as in many states, between voidable or void *ab initio*. See *Inhabitants of Hiram v. Pierce*, 45 Me. 367, 372-73 (Me. 1858) (“By the law of Massachusetts, ‘all marriages contracted while either of the parties has a former wife or husband living, shall be void.’ If this were the only provision, all such marriages would be void, *ab initio*. But, by the statute already cited, all such marriages are excepted from prohibition, when contracted in good faith, after a desertion and absence of the former husband or wife for the space of seven years. And, by another provision, all such marriages may be annulled.”).

<sup>110</sup>*Id.* at 778 (quoting THE ULTIMATE QUOTABLE EINSTEIN 475 (ALICE CALAPRICE ED., 2011)).

society,” and, thus, the presumption of the validity of a marriage ranks as “one of the strongest presumptions known to the law.”<sup>111</sup> As the court reasoned, it “will be readily conceded that English and American tribunals tend, in construing the marriage acts, to uphold every marriage, if possible, notwithstanding a non-compliance with the literal forms.”<sup>112</sup> In “our opinion, this robust presumption withstands all of Levick’s arguments against it.”<sup>113</sup>

Indeed, and as noted by the majority, the dissents’ void-*ab-initio* theory, much like the decision in *Beliveau*, would be particularly harsh to MacDougall. After the parties married, she left a successful career to become an uncompensated chief operating officer for Levick’s business and, during her marriage, made \$380,000 in personal loans to the business which then “served as the principal reasons for the monetary and property-distribution provisions in the marital agreement.”<sup>114</sup> The dissents view, however, would “treat her multi-year investment over the course of her marriage as irrelevant.”<sup>115</sup> The majority wrote that in taking the void-*ab-initio* path, the dissent overlooked the significant hardships its reasoning would cause to others as well:

Creditors of one spouse could seek to strip a couple of the protection of a tenancy by the entirety through a challenge to the validity of the marriage, even when the couple is happily married and wants to remain so. Every legal benefit afforded to lawfully married couples—such as joint-filing status for federal and state income tax filings; rights under wills, trusts, and other estate-planning instruments; beneficiary status in retirement and insurance policies; and a variety of similar benefits that presuppose the existence of a lawful marriage—could be retroactively challenged and expose both parties to the allegedly invalid marriage to a host of unforeseeable financial consequences.<sup>116</sup>

The differences in gender between the two voided-out spouses may not be a coincidence and not relevant to the outcome of each of the cases discussed. In either case, the dissent in *Levick* mirrored the decision of the Court in *Beliveau* and rejected the equitable estoppel argument. Notably, “such an equitable estoppel argument raises a number of significant public policy questions” when parties have

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<sup>111</sup>*Id.* (citations omitted).

<sup>112</sup>*Id.* (citation omitted).

<sup>113</sup>*Id.*

<sup>114</sup>*Id.* at 784.

<sup>115</sup>*Id.*

<sup>116</sup>*Id.*

admittedly failed to meet the statutory requirements because “such a radical departure from established law is a matter for the legislature, not the judiciary.”<sup>117</sup> These policy tensions are reflected in a body of cases winding between a preference for the strictures of marriage law as immutable and equitable recourse as available to enforce other policy considerations such as the efficacy of marriage and unfair advantage of an intimate partner and parent.

As the Florida Supreme Court wrote plainly a century ago, the essential elements of common law marriage are: “(1) mutual consent, and (2) capacity. It is the agreement itself, and not the form in which it is couched, which constitutes the contract, and the words used or the ceremony performed are, like cohabitation and repute, merely evidence of marriage.”<sup>118</sup> Similarly, the putative spouse and marriage by estoppel doctrines may not meet the rudiments of statutory strictures but the critical elements of a legal marriage are present: public intent, public ceremony, and public behavior upon which there is reliance and benefit conferred by society and relationship. If there is an intent *to being married* and modern society believes marriage is critical to economically and legally protecting spouses, children, and community there should not be barriers to the *adult choice of being married* irrespective of any demographics possessed by of the voided spouse.

## V. CONCLUSION

In 1961, an author argued that common law divorce may suggest a “reasonable hypothesis that informality in contracting marriage engenders informality in terminating marriage; that parties naturally may assume that if they could ‘do it themselves’ in entering into marriage, then ‘do it yourself’ was permissible and legal for ending the relationship.”<sup>119</sup> The long and divisive doling

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<sup>117</sup>*Id.* at 796 (Powell, J., dissenting).

<sup>118</sup>*Chaves v. Chaves*, 84 So. 672,676 (Fla. 1920). For a critical analysis, see John B. Crawley, *Is the Honeymoon Over for Common-Law Marriage: A Consideration of the Continued Viability of the Common-Law Marriage Doctrine*, 29 CUMB. L. REV. 399 (1998).

<sup>119</sup>Henry H. Foster Jr. *Common Law Divorce*, 46 MINN. L. REV. 43, 62 (1961). One of struggles when teaching or writing these days is to give historical context to behaviors and policies which are overtly offensive and still explain that explicit change in law does not mean an equivalent implicit change in practice. The “fact remains, however, that our law of marriage and divorce for the most part has devolved from the canon law of churchmen rather than lawyers. That is an important historical fact because law as a craft inculcates the art of

out of the right to be legally marriage has, at various times, been used as a cudgel or form of social control to define “who is worthy” in American society and, thereby, excluded certain groups from social welfare benefits, economic mobility, and equitable access to systems like courts or agencies.<sup>120</sup> If the legal status of marriage is a tangible preference or choice,<sup>121</sup> and a person acts like there is a marriage and accepts the legal, societal, and economic benefits of that status, and no other public policy is violated (duress, fraud, minority or disability), then is rejection of these equitable doctrines premised much more on “who is worthy” than principles of equity and policy beyond mere rhetoric?

The search by legal scholars to find and impose an empirical and rule-based system for judicial decision-making is many generations old. It may be re-packaged from time-to-time but the polar arguments between law as organic and socially based and changing to rigid and predictable is hardly novel.<sup>122</sup> In this sense, the right to state approval of a marriage may be viewed through various lenses of ideology or unworthiness but, inevitably, submerges, historical elements of privilege and bias. For scholars tracing common law marriage there is a connection to *Loving* in that strange way that bigotry and racism, like a public health disease, adapts from one generation to the next. Until recently, at least in

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compromise whereas theology unrealistically may insist upon maintaining dogma at all cost.” *Id.* at 63.

<sup>120</sup>This is a painful historical topic, but it does analogously link with the history of marriage in the United States, along with many other aspects of social justice. See Thomas C. Leonard, “*More Merciful and Not Less Effective*”: *Eugenics and American Economics in the Progressive Era*, 35 HIST. OF POL. ECON. 687, 704 (2003) (“Biological fitness determines who is worthy and thereby entitled to social justice, and who is unworthy, and thereby entitled to social control. Groups deemed eugenically unfit—immigrants, blacks, those defective in character and intellect—are treated not as victims, but as threats to the health and well-being of the worthy poor and of society at large.”).

<sup>121</sup>See J. Herbie DiFonzo, *How Marriage Became Optional: Cohabitation, Gender, and the Emerging Functional Norms*, 8 RUTGERS J.L. & PUB. POL’Y 521, 540 (2010) (“Marriage is in decline, but cohabitation rates are soaring. Defined as a man and woman living together in a nonmarital sexual relationship, cohabitation rivals marriage as a means to create a family. It has not, however, dislodged the ideal of marriage in the public mind.”).

<sup>122</sup>See Jerome Frank, *Mr. Justice Holmes and Non-Euclidean Legal Thinking*, 17 CORNELL L.Q. 568, 571 (1931) (“[T]raditional jurisprudence is founded upon the erroneous notion—sometimes expressed but more often implicit—that there are self-evident truths about the judicial process which must not and cannot be questioned, from which self-evident truths a legal system can be worked out logically as the ancient geometers had worked out their system from self-evident geometrical axioms.”).

historical terms, marriage was thus historically framed as a bundle of obligations to society, not a package of rights between individuals owed protection by society.<sup>123</sup>

There are a couple of other salient historical and policy points that guided (and should still guide) a discussion of equitable doctrines like PSD and DME. First, there is a tendency to forget that a child born outside wedlock was once derogatorily labeled, ostracized, and lost rights to inheritance and parentage.<sup>124</sup> Although that era has seemingly passed because open derogation is offensive at least among some portions of American society, it is still a reality that a child born of a marriage and then divested of that status is now a child born-out-of-wedlock. Perhaps that does not matter anymore but much policy has historically derived from a preference to value the status of marriage for children because research suggests the differences and advantaged across lifespans.<sup>125</sup>

Second, women without marital status in centuries past were subject to stigma, violence, isolation, and shunning so marriage was a preference for safety and survival.<sup>126</sup> The *Beliveau* case, however, involved a stay-at-home father and a professional wife who escaped spousal support and equitable distribution despite decades of marriage. This decision may well reflect the limits of equitable

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<sup>123</sup>For this discussion, see Dubler, *supra* note 35, at 1898.

<sup>124</sup>There are many books and articles on the policy and history as it pertains to restrictions on the rights of children. See Dubler, *supra* note 35, at 1902 (“Opponents of common law marriage recognized the strength of their judicial adversaries’ argument that the doctrine was needed to avoid rendering illegitimate the offspring of many unsolemnized unions. Nevertheless, they argued that the need to protect society outweighed the need to legitimate even innocent children. As George Elliot Howard, a leading opponent of common law marriage, argued in his history of marriage: ‘Far better that the children of a delinquent minority should bear the stain of illegitimacy than that the welfare of the whole social body should be endangered.’”); see also *Arsenault v. Carrier*, 390 A.2d 1048, 1050-51 (Me. 1978) (“Under the old ‘bastardy’ statutes, the mother, except where indigent, was the real party in interest.”).

<sup>125</sup>See Solangel Maldonado, *Illegitimate Harm: Law, Stigma, and Discrimination Against Nonmarital Children*, 63 FLA. L. REV. 345, 347 (2011) (“Despite these legal and demographic changes, nonmarital children continue to suffer legal and social disadvantages as a result of their birth status.”).

<sup>126</sup>There are many books and articles on this topic but for perspectives, see NANCY E. DOWD, IN DEFENSE OF SINGLE-PARENT FAMILIES (1999); LORI D. GINZBERG, WOMEN AND THE WORK OF BENEVOLENCE: MORALITY, POLITICS, AND CLASS IN THE NINETEENTH-CENTURY UNITED STATES (1992). The influence of race as a factor for single women and mothers must be considered in that context as well. See Barbara Omolade, *The Unbroken Circle: A Historical and Contemporary Study of Black Single Mothers and Their Families*, 3 WIS. WOMEN’S L.J. 239 (1987).

doctrines when the case does not involve a constitutionally protected class such as fathers and husbands. But the distinction is critically important because there are still categories of women, particularly teenage mothers, who are subject to the penalties of non-marriage and the resulting social and economic stigma but who also may not be a protected class.<sup>127</sup>

This is not, however, a discussion alone about the efficacy of marriage and all the truths or myths which surround that institution and its politics. In *Ridley v. Grandison*,<sup>128</sup> a unique case (because Georgia allows jury trials in family law matters), a jury found a common law marriage valid and this finding was affirmed by the Georgia Supreme Court in a four to three decision. The dissent, however, wrote in language which describes the need for continuity rather than chaos regarding the institution of marriage:

Plainly, the law of common law marriage is chaos that cries out for order. The materials found in the Appendix represent only eight years of turmoil, and only that disclosed at the appellate level. They reflect documentation of controversies that have been assembled subsequent to our case of *Johnson v. Green*, 251 Ga. 645 (309 S.E.2d 362) (1983). In that case, which arose from circumstances similar to this case, the present writer suggested: If it be the policy of the law to foster marriage as an institution essential to the stability and health of the Republic, we ill-serve that goal by discounting the existence of this most important of all human relationships to a swearing match—akin to the question of which driver had the green light; or, which of two brawlers struck the first blow; or, how long did the pain of whiplash endure. Finally, if marriage is a state “not to be undertaken lightly” (as observed at almost every wedding) it should not be too burdensome to require of parties who intend to

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<sup>127</sup>See June Carbone, *Morality: Public Policy and the Family: The Role of Marriage and the Public/Private Divide*, 36 SANTA CLARA L. REV. 267, 269 (1995) (“While many societies overtly attempt to enforce chastity (public whippings, the scarlet letter), the more common mechanisms are a combination of adoption, abortion, shotgun marriages and the stigmatization of illegitimacy that effectively prevent single mothers from raising children on their own.”); Helen Wilson & Annette Huntington, *Deviant (M)others: The Construction of Teenage Motherhood in Contemporary Discourse*, 35 J. OF SOC. POL’Y 59, 69 (2006) (“The presentation of teenage motherhood as a significant social or public health problem at a time of declining teen birth rates in the UK, US and NZ highlights the ideologies underpinning contemporary beliefs about welfare dependency and social inclusion which inform contemporary social policy in this area.”).

<sup>128</sup>*Ridley v. Grandison*, 389 S.E.2d 746, 746 (Ga. 1990)

commit their very lives to each other that they make plain to all the world such an intent by undergoing a ceremony of marriage.<sup>129</sup>

The dissent articulates the policy discussions and social preferences cited in this article but perhaps not in support of its thesis. Ceremony and intent, not deception or honest error, are the touchstones for equity and equitable doctrines for centuries based upon reliance and representation to the community (and the IRS).<sup>130</sup> Thus, marriage does matter for many reasons to society.<sup>131</sup> In the not so distant past, even the status of marriage provided restricted economic or legal protection for women.<sup>132</sup> But it is the modern economic partnership formed by a marriage which benefits society and children's stability in home and community and provides, concomitantly, direct and collateral benefits from taxation to health insurance to pensions to spousal support.<sup>133</sup>

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<sup>129</sup>*Id.* at 749 (Weltner, J., dissenting)

<sup>130</sup>*See Snetsinger v. Montana University System*, 104 P.3d 445, 451 (Mont. 2004) (“Common law marriage in Montana is an equitable doctrine used to ensure people are treated fairly once a relationship ends. Under our common law, such a marriage is established when a couple: 1) is competent to enter into a marriage, 2) mutually consents and agrees to a common law marriage, and 3) cohabits and is reputed in the community to be husband and wife. A closer examination of common law marriage in Montana discloses that the concept is designed, in part, to prevent an unjust economic harm to couples who have held themselves out as husband and wife as our common law marriage cases typically deal with the equitable distribution of economic benefits after the death of one of the parties or separation of the relationship.”) (citations omitted).

<sup>131</sup>For a review of the argument related to marriage and its economic and social consequences, see Elizabeth S. Scott & Robert E. Scott, *Marriage as Relational Contract*, 84 VA. L. REV. 1225, 1333 (1998) (“Stable families fulfill many functions that the state would otherwise be required to provide at greater cost (such as the care of sick and elderly members). Most importantly, children benefit if their parents’ marriage endures. Traditional law gave marriage a highly privileged status, and opting out was extremely costly. While marriage continues to carry some legal privileges, the trend is clearly toward less differentiation between married couples and cohabiting couples or single persons.”).

<sup>132</sup>*See e.g. In re Reben*, 342 A.2d 688, 691-92 (Me. 1975) (“At common law a married woman had no separate identity before the law. In the eyes of the old common law, a husband and wife became one person upon marriage and that person was the husband.”); *but see id.* at 699 (Dufrense, C. J., dissenting) (“It is true that ‘the common law is not in its nature and character an absolutely fixed, inflexible system, like the statute law. It is rather a system of elementary principles and of general juridical truths, which are continually expanding with the progress of society, and adapting themselves to the gradual changes of trade and commerce, and the mechanic arts, and the exigencies and usages of the country.’”) (citation omitted).

<sup>133</sup>Nobel Prizes have been awarded on the topic of valuing contributions to households and society. *See* Victor R. Fuchs, *Nobel Laureate: Gary S. Becker: Ideas about Facts*, 8 J. OF ECON. PERSPECTIVES 183 (1994).

The challenge of modernity and the design of social welfare policies should be much more about supporting partnerships which, decades of economic research makes plain, foster familial and social stability. Americans, after all, are a nation of rights-qua-rights but with a powerful drift these days away from any concomitant responsibility to each other or society. The courts, and federalism's authority, however, play a role in reinforcing equity and equality of *rights and responsibilities*; a role which should not be lightly ignored in a society which proselytizes in favor of marriage.<sup>134</sup> Even in the very famous (though vastly over-valued and under influential) "palimony" case of *Marvin v. Marvin*,<sup>135</sup> the California Supreme Court noted that, "Lest we be misunderstood, however, we take this occasion to point out that the structure of society itself largely depends upon the institution of marriage, and nothing we have said in this opinion should be taken to derogate from that institution."<sup>136</sup>

It may seem odd to finish this article with reference to *Marvin* when its media influence so outweighed its policy impact, but it was ahead of its time and it did change public thinking about marriage as contract outside religious proscriptions.<sup>137</sup> Though prescient as to societal changes, the law has not yet caught on to the consequences of divesting partners who, unlike *Marvin*, were more than a sheer contract but an intentional matrix of choices and behaviors. A legally-recognized and binding marriage is an enforceable partnership made by such choices and behaviors; not an "end round" the law in which a public partner (and parent) is a "sucker"<sup>138</sup> falling

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<sup>134</sup>See Roderick M. Hills Jr. *Towards a Universal Field Theory of National Private Rights and Federalism*, 76 MONT. L. REV. 41, 53-54 (2015) ("We the people are often deeply divided about matters of fundamental cultural importance. We're divided by sex, the education of children, marriage, abortion—religious matters, really. These are issues of intrinsic rather than instrumental importance—good and evil—for which compromise and negotiation are psychologically painful, and the risk of dogmatic insistence on your point of view is unusually high. And if you live in that world, of hot red and bright blue divisions, a rational Congress would leave such matters to state governments. Because they would realize they cannot possibly resolve these kinds of issues at the national level.").

<sup>135</sup>557 P.2d 106 (Cal. 1976).

<sup>136</sup>*Id.* at 122.

<sup>137</sup>See footnote 42, *supra*. Some scholars have given *Marvin* credit for an impact on the marriage debates. See Cynthia Grant Bowman, *Legal Treatment of Cohabitation in the United States*, 26 L. & POL'Y 119, 126 (2004) ("While many states have adopted the Marvin approach, other states reacted with alarm to the long and messy Marvin litigation, especially because it required the court to examine and weigh highly intimate details of the couple's relationship.").

<sup>138</sup>This term is drawn from an interesting article. See Cynthia Lee Starnes, *Mothers as Suckers: Pity, Partnership, and Divorce Discourse*, 90 IOWA L. REV.

speedily and without any rights into a dark hole where equitable doctrines disappear.

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1513, 1552 (2004) (“Equally available is a reform model based not on relief for suckers, but on rights for partners. Partnership casts mothers as full stakeholders in a joint venture, infusing reform discourse with an egalitarian vocabulary free of stigmatizing conceptions of husbands and wives. Moreover, partnership establishes a baseline of spousal equality-in contribution, in responsibility, in right-against which all inequalities must be justified, all old law tested for its ability to fit within a gender-neutral paradigm.”).