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In January of this year, along with Hanoch Dagan, I published a piece in the Columbia Law Review tracing the implications for marital property law of a particular normative view of a good marriage.[1] Earlier, I had presented this paper to various law faculties around the United States, and had encountered repeatedly what was, at least initially, an unexpected critique: that perhaps it is illegitimate for the government to attempt to achieve any particular normative end through the institution of marriage. Instead, the argument went, the government should endeavor to be as hands-off as possible with respect to this deeply personal attachment. The rules surrounding marriage, to the extent they must do something, must simply facilitate the actual desires of spouses, and not attempt to change those preferences or social practices to achieve the government's own desires for marriage, however salutary. Faced with this critique, I convinced my co-author to reserve the question of the legitimacy of normatively based marital property rules.[2] It is to this question that I now turn.

I do not purport in this Article to resolve the question. My goal is only to present the critique in its clearest form, in the hopes that it will spark broader debate about the proper role for normativity in marital property law. In Part I, I begin by explaining why the question matters—why the law makes any difference at all to the institution of marriage. Though its role is surely limited, I suggest ways in which the rules of marital property matter, at least on the margin, to marriage itself. In Part II, I then lay out a schema for what might be meant by a "normative" marital property regime—describing possible bases on which the state can set the rules of marital property. Finally, in

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1 Carolyn J. Frantz and Hanoch Dagan, *Properties of Marriage*, 104 Colum L Rev 75 (2004).

2 Id at 79 n 9.

Part III, I attempt to articulate the critique of normativity in marital property law in light of a clearer understanding of the possibilities, and the role of the law. I suggest that the question has a great deal to do with current debates around the right to marry, made more salient in the same-sex marriage context, and that commitments made on that basis may translate into views about how the rules of marital property ought to be crafted. That is, the best articulation of the critique, I think, is that marriage is not so much a state-granted benefit to be used by the government to achieve its own ends, but rather a deeply personal commitment around which the state should exercise caution in using its power. The choice to cast marriage in either of these ways has significance both for state power around the scope of marriage, as well as for the content of the rules that define it.

I. STATE CONTROL OVER MARITAL PROPERTY RULES

The critique of normativity in marital property rules, as I will articulate it, ultimately depends on marital property law making some difference to the institution of marriage itself. It is therefore essential to make the case that marital property law matters to marriage, at least to some modest degree. If the marital property law makes no difference in the actual lives of spouses, many (though perhaps not all[3]) would dismiss as purely academic or even wholly irrelevant the inquiry into which laws to impose. To get a sense of why the marital property law might matter in this context, I begin by specifying various types of legal regulation of marital property. I then describe why laws are "sticky" in this context—why spouses might end up being governed by marital property rules other than those that they might prefer and, in fact, have the power to choose, either through prenuptial contracting or by opting not to marry at all. Finally, I discuss the extent to which the state power over the rules of

[3] Many debates about "expressivist" theories of law focus on the question of whether what the law expresses is relevant, regardless of any tangible effects of that expression. Compare Elizabeth S. Anderson and Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U Pa L Rev 1503, 1531 (2000) ("If expressive theories are right, state action should be wrong—and unconstitutional, if constitutional law tracks expressive concerns—when it expresses impermissible valuations, without regard to further concerns about its cultural or material consequences.") with Cass Sunstein, *On the Expressive Function of Law*, 144 U Pa L Rev 2021, 2047 (1996) (arguing that concern with expressivism apart from attention to consequences "verges on fanaticism"). See also Matthew D. Adler, *Expressive Theories of Law: A Skeptical Overview*, 148 U Pa L Rev 1363 (2000) (highlighting that some expressivists might find reason to be concerned about the content of the law even if it had no effect on actual outcomes).

marital property—which operate almost entirely upon divorce—may impact marriages even while they last.

A. Ways of Regulating Marital Property

The state usually regulates marital property by means of divorce: how property is divided and support is awarded when marriages end is the primary and most obvious way in which the state operates on marital property as a distinct form.[4] There are reasonably few (though there are certainly some) special rules about the governance and disposition of marital property between spouses who remain married.[5] In general, however, ordinary background rules of property operate between spouses, just as they do between any other two people. In non-community property states, the spouse who is the record owner of the property may manage and dispose of the property just as if he were unmarried.[6] In community property states, management of spousal property is much more complex,[7] but even then the direct operation of the law on spousal transactions is exceedingly rare.[8] The rarity of legal intervention in marital property arrangements in community property and non-community property states is reinforced by the operation of the doctrine of marital privacy—court reluctance to intervene in disputes over property between spouses while they are married for fear of improperly intervening in their intimate relationship.[9] The law operates on marriages through both special marital property rules and ordinary background rules, both at the end of marriage and (to a lesser extent) while the marriage lasts. As with all forms of legal regulation, the rules governing marital property can be either mandatory or optional. The law's provisions can read immutable mandatory terms into the marital provisions, or they can operate as mere defaults, filling in blanks where spouses have failed to privately resolve the relevant issues.

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[4] Frantz and Dagan, 104 Colum L Rev at 76 (cited in note 1).

[5] Id at 124-25.

[6] See J. Thomas Oldham, *Management of the Community Estate During an Intact Marriage*, 56 Law & Contemp Probs 99, 100 and n 2 (1993).

[7] Consider id.

[8] See Frantz and Dagan, 104 Colum L Rev at 126 (cited in note 1) (noting generally that the need for judicial involvement is rare "within functioning marriages").

[9] See Oldham, 56 Law & Comtemp Probs at 116-18 (cited in note 6) (describing the operation of the doctrine of marital privacy in community property and non-community property states). For discussion and critique, see Nadine Taub and Elizabeth M. Schneider, *Perspectives on Women's Subordination and the Role of Law*, in David Kairys, ed, *The Politics of Law: A Progressive Critique* 117, 121 (Pantheon 1982).

A large proportion of marital property rules are defaults: the law leaves some room for spouses to contract around provisions for the division of property on divorce and for the governance of marital property during marriage. Spouses may generally designate the proportions in which their property will be divided, as well as which specific items will be included or excluded for the marital estate, and decide for themselves whether spousal maintenance (also called alimony) will be available.[10] They may also, at least sometimes, alter the rules surrounding the governance of property during their ongoing marriage.[11] These significant rules thus technically operate only as defaults.

Spouses' power to order their own marital property arrangements, however, are bounded by several mandatory provisions in the law—immutable terms in the marital contract. For instance, following the doctrine of marital privacy, some courts will not enforce private agreements relating to the governance of property during marriage.[12] There are also serious restrictions on the enforceability of private agreements about child support.[13] And other public policy-based restrictions limit spouses' contractual freedom: for instance, spouses' ability to change the rules of marital property may not extend to changing them in such a way as to burden state public assistance programs.[14]

Most significantly, however, the state does not allow spouses to alter the terms of marital property in ways deemed unconscionable.[15] The notion of unconscionability is complex, containing both procedural and substantive components. Unconscionability may serve simply as a way of protecting against serious procedural problems—for instance, to invalidate contracts most likely made under conditions of coercion or duress.[16] If uncon-

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[10] Uniform Premarital Agreement Act § 3(a)(3) & (4) (West 2001).

[11] Id at § 3(a)(1) & (2).

[12] Compare Judith T. Younger, *Perspectives on Antenuptial Agreements*, 40 Rutgers L Rev 1059, 1071-72 (1988) (describing the impact of the doctrine of marital privacy on terms contemplating alterations of rules of ongoing marriage) with Jana B. Singer, *The Privatization of Family Law*, 1992 Wis L Rev 1443, 1460-61 (describing the trend towards greater recognition of private ordering, even with respect to ongoing marriages).

[13] See, for example, Uniform Premarital Agreement Act § 3(b) (cited in note 10) (disallowing premarital contracts that affect child support). Agreements reached at the time of separation regarding child support are more often enforced, however, even though in theory they are subject to the same scrutiny. See Brian Bix, *Choice of Law and Marriage: A Proposal*, 36 Fam L Q 255, 269 n 56 (2002) (recognizing this phenomenon).

[14] Uniform Premarital Agreement Act § 3(a)(8) (cited in note 10) (disallowing contracts in violation of public policy), § 6(b) (disallowing contracts modifying support in such a way as to make a spouse eligible for public assistance).

[15] Id at § 6(a)(2).

[16] See Elizabeth S. Scott and Robert E. Scott, *Marriage as Relational Contract*, 84 Va L Rev

scionability serves merely as a tool for safeguarding the actual consent of contracting parties, it does not provide an immutable restriction on the actual content of contracts: parties may reach whatever substantive conclusions they prefer, as long as they adopt a proper procedure—including, potentially, such requirements as disclosing the proper information to each other with sufficient time, and maybe even legal representation, to make a genuine choice.[17]

But unconscionability may also, at times, operate as a way of protecting against certain undesirable or unfair substantive outcomes, regardless of the nature of the procedure used to reach them. For instance, a jurisdiction might invalidate a contract that allocated marital property between spouses in a way that seemed unfair, even if the means by which the agreement was reached met procedural standards.[18] This more aggressive use of the unconscionability doctrine has most likely appeared with greater frequency in the marital context than it has in other contexts.[19] Though the Uniform Premarital Agreement Act, adopted by about half of the states, contains both a procedural (in the form of fair notice of the other spouse's assets) and a substantive component,[20] a significant number of states continue to follow their common law heritage of scrutinizing the substantive fairness of actual outcomes, regardless of procedure.[21] When states

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1225, 1257 (1998) (describing unconscionability as a mechanism for invalidating contracts in the absence of "free, informed, and rational choice"). Consider Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J L & Econ 293, 303-05 (1975) (arguing that a procedural unconscionability doctrine is a useful tool in limited circumstances).

[17] See Uniform Premarital Agreement Act § 6(a)(2) (cited in note 10). This is not to suggest that the proper scope of unconscionability in the protection of procedural fairness is uncontroversial. See, for example, Arthur Allen Leff, *Unconscionability and the Code: the Emperor's New Clause*, 115 U Pa L Rev 485 (1967) (arguing that the drafters of the Uniform Commercial Code's unconscionability provision fundamentally misunderstood the distinction between procedural and substantive unconscionability); Harry G. Prince, *Unconscionability in California: A Need for Restraint and Consistency*, 46 Hastings L J 459, 472-73 (1995) (noting the debate over whether procedural fairness is necessary when the contract is substantively fair).

[18] See, for example, *Button v Button*, 388 NW2d 546, 551-52 (Wis 1986) (contracts may be invalidated due to substantive unfairness); *Gross v Gross*, 464 NE2d 500 (Ohio 1984) (holding that prenuptial agreements are invalid if they do not meet general fairness tests).

[19] Katharine B. Silbaugh, *Marriage Contracts and the Family Economy*, 93 Nw U L Rev 65, 74-75 (1998) (observing both a "recent acceptance" of prenuptial agreements and a "more stringent" unconscionability standard used in reviewing them); Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 Wm & Mary L Rev 145, 158 (1998) ("[There is] [a]n almost even split among the jurisdictions [ ] on the procedural and substantive fairness elements of [antenuptial] agreements, with the slight majority probably willing to enforce with few or no requirements on those elements.").

[20] See Uniform Premarital Agreement Act § 6(a)(2) (cited in note 10).

[21] See Silbaugh, 93 Nw U L Rev at 75-76 (cited in note 19) (remarking that only a minority of states have begun to move away from "thick reviews of substance").

use unconscionability in such a purely substantive way, the avoidance of certain ostensibly unfair arrangements can be seen as an immutable term in the marital property arrangement between spouses.[22]

B. The Stickiness of Legal Rules

The state, both by setting default rules that spouses can alter through private contract, and by establishing immutable marital obligations, exercises a significant amount of power over the disposition of marital property. Even given the availability of private order, the legal rules surrounding issues of marital property tend to stick—that is, whether or not spouses would actually choose these rules in a situation of perfect choice, they end up with them.

1. *Immutable rules.*

The power the government exercises by adopting mandatory rules is quite obvious—these rules of marital property apply to all spouses and cannot be altered by private contract. Whether or not spouses wish to be bound by them, they will be.

The conclusion seems too obvious to state, but even the power of immutable state rules of marital property is not perfectly straightforward. For those immutable rules triggered only by the decision to marry, they are not immutable in one crucial way: one can always alter them by simply choosing not to marry. This does not reach the entire class of immutable obligations that apply to spouses—for instance, restrictions on private contracting around child support apply to unmarried, as well as married parents,[23] and hence cannot be circumscribed by avoiding marriage. But some immutable obligations only apply to married people. The doctrine of marital privacy's restriction on enforcement of governance contracts during marriage provides one clear example. Courts in some jurisdictions sometimes do not allow spouses to make private contractual arrangements for how their property will be managed and disposed of during marriage,

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[22] Richard Craswell, *Property Rules and Liability Rules in Unconscionability and Related Doctrines*, 60 U Chi L Rev 1, 19 n 35 (1993) (describing this sort of substantive unconscionability as providing an "inalienable entitlement").

[23] Consider Catherine Wimberly, Note, *Deadbeat Dads, Welfare Moms, and Uncle Sam: How the Child Support Recovery Act Punishes Single-Mother Families*, 53 Stan L Rev 729 (2000) (arguing that the Child Support Recovery Act uses enforcement of child support obligations against biological fathers to restrict the choices of single mothers on welfare with respect to supporting their children).

but do not show a similar reluctance to enforce governance contracts in ongoing nonmarital relationships.[24]

More generally, requirements around substantive unconscionability in the marital context look significantly different from substantive unconscionability rules that apply to people who are not married. Marriage triggers an automatic court determination of divorce outcomes, oftentimes explicitly based on what is fair or equitable.[25] The operation of court determinations of equity may only be avoided through a contract that will, itself, at least in some jurisdictions, be scrutinized for fairness in light of assumptions of what spouses owe to each other.[26] Unmarried couples, by contrast, more frequently must find their way *into* obligations with each other, taking on such obligations to one other only through explicit agreement or, in some states, by demonstrating substantial unfairness though reference to various restitutionary doctrines.[27] This significant difference in structure reflects the differential incidence of immutable obligations of sharing and support between married and unmarried persons.

Does the fact that couples may "contract around" these immutable marriage-specific obligations by refusing to enter into the marriage contract itself matter? Randy Barnett has argued that immutable rules need not translate into state control over contracts. Barnett notes that the presence of immutable contract terms poses no significant challenge to his libertarian individual consent-based theory of contractual obligation, so long as sufficient competition exists among contracting regimes.[28] Speaking generally about commercial contracting, Barnett argues:

> If meaningful competition among legal systems existed, commercial parties would choose those legal systems that offer them the best overall package of default and immutable rules. Under these conditions, a general consent to be legally bound . . . might be construed as including a

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[24] See, for example, *Donovan v Scuderi*, 443 A2d 121 (Md 1982) (finding a contract between cohabitants is not void as against public policy); *Kozlowski v Kozlowski*, 403 A2d 902 (NJ 1979) (finding that agreements between cohabitants are enforceable when not based on marriage or the promise to marry); *Poe v Estate of Levy*, 411 S2d 253 (Fla App 1982) (holding that a cohabitant may enforce an express support contract against decedent's heirs).

[25] See, for example, NC Gen Stat § 50-20(f) (1987).

[26] See text accompanying notes 15-22.

[27] These restitutionary doctrines include unjust enrichment and quantum meruit. For a general description and discussion of current practice, see Hanoch Dagan, *The Law and Ethics of Restitution* 177-96 (Cambridge 2003).

[28] Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 Va L Rev 821, 902-05 (1992).

> general consent even to those immutable rules that one cannot contract around.[29]

Similarly, if being married and not being married were in meaningful competition, with spouses freely choosing between them based on the desirability of the associated immutable rules, there would be little if any state power associated with immutability within the purely optional marriage context.

Marriage clearly does not operate in this way. Couples are not neutral between marriage and non-marriage, choosing each based on the merits of the legal obligations thereby entailed. At the very least, there is substantial social pressure to marry.[30] Surely many couples marry because they believe others expect them to, or because of their own desire to engage in a symbolic act with personal meaning, rather than because they choose to openly endorse the legal terms of the institution. Data also suggests that couples are reasonably ignorant of the legal consequences of their decision to marry, making the view of marriage as embodying a personal preference for legal consequences even more implausible.[31] Given this, one can view the immutable rules of property attached to marriage as the government exercising power by free riding on another social phenomenon. Because couples' decisions to marry remain relatively insensitive to the content of legal rules, the state can manipulate the situation and power to impose its own desired rules upon married couples.

Moreover, even if couples did make the marriage/non-marriage choice purely based on rational preferences between the relevant legal regimes, the market of legal benefits and burdens presented to them is not a particularly robust one. There are some legal benefits to being married—those relating to the immigration and tax laws being among the most frequently discussed—that cannot be obtained through private contracting.[32] Given such a limited market, the government exercises power by bundling these goods together: in order to receive other benefits

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[29] Id at 905.

[30] See, for example, Rhona Mahoney, *Kidding Ourselves: Breadwinning, Babies, and Bargaining Power* 67-73 (Basic Books 1996) (describing some of the causes and effects of this implicit pressure to marry).

[31] Lynn A. Baker and Robert E. Emery, *Where Every Relationship is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 L & Human Beh 439, 441 (1993) (finding, among marriage license applicants, a knowledge of the divorce law "only slightly better than chance").

[32] See, for example, Jennifer Gerarda Brown, *Competitive Federalism and the Legislative Incentives to Recognize Same-Sex Marriage*, 68 S Cal L Rev 745, 786 (1995) (noting tax deductions and prison visitation rights as benefits available only through marriage).

gained solely through marriage, spouses accept immutable terms relating to marital property that they would not otherwise choose.

2. *Default rules.*

The state's power over the content of marital property rules does not limit itself to immutable rules: the choice of default rules also has a significant effect on marital relationships. In all contractual contexts, the government's choice of default rules matters to the arrangements finally reached. Two primary reasons indicate why defaults make a difference.

First, the choice of default rules has an impact on the results ultimately reached, by changing the costs of striking, or not striking, particular deals. Most obviously, default rules place the transaction costs of private contracting on those who prefer a different outcome.[33] The effect of default rules on costs may also be more complex. Rather than simply making it more expensive to reach any solution other than the default provided for in the law, default rules may, for instance, be designed to give particular parties incentives to reveal information, thus altering the contracts that will likely be formed.[34] For instance, Dagan and I have argued that a default rule of equal sharing has the desirable effect of forcing a spouse who prefers more independence in the relationship to reveal that preference.[35] However they operate, the government's choice of default rules does significantly affect the actual outcomes reached between private parties. Yet, acknowledging the state's power to impact outcomes through the setting of default rules does not indicate how the state will use this power. The state could choose to intentionally set default rules to facilitate contractors' preferences, thus minimizing the impact of the power of the state in setting default rules. This sort of facilitative default rule regime is, in fact, precisely what the critique of normatively based marital property rules, which I discuss in the next Part, recommends. But for now, it is simply important to note the power of the state to set default rules in all contractual contexts.

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[33] See Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 Cornell L Rev 608, 613-17 (1998) (describing the interaction between default rules and transaction costs).

[34] See Ian Ayres and Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 Yale L J 87, 91 (1989) (introducing the concept of "penalty default" rules designed for information-forcing purposes).

[35] See Frantz and Dagan, 104 Colum L Rev at 97 n 92 (cited in note 1).

Second, default rules matter to actual outcomes because they may play a role in shaping the actual preferences of contracting parties. Russell Korobkin has referred to this as a "status quo bias"—that (in addition to the desire to avoid the transaction costs of contracting away from the default rules provided), whether through habit, persuasion, or any other reason, contractors may simply come to prefer the outcomes represented by the defaults.[36] Preference-endogeneity may also make default rules sticky, thus making the state's choice of rules a significant source of power.

The state's general power to set default rules in all contractual contexts is significantly heightened in the marital context. The incidence of private contracting around the terms of marriage is markedly low—around 5 percent.[37] As I have already argued, the limited state of knowledge about the content of the legal rules surrounding marriage and divorce make it highly unlikely that the stickiness of the marital property defaults reflects genuine spousal preferences for the content of the rules.[38]

It seems very likely that the transaction costs of contracting around marital defaults are particularly high. First, there are potential interpersonal costs: a future spouse could perceive a request to sign a prenuptial agreement as a signal of lack of commitment to, or optimism about, the impending marriage.[39] Spouses may also have difficulty with properly assessing the importance of the contractual terms governing their divorce—at least two studies have shown significant irrationalities in individuals' assessments of their own chances of divorce.[40] This irra-

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[36] Consider Korobkin, 83 Cornell L Rev 608 (cited in note 33) (arguing that contractors prefer default rules as part of their general preference for the status quo).

[37] See Frantz and Dagan, 104 Colum L Rev at 80 n 12 (cited in note 1).

[38] See Part I B 1.

[39] Consider Heather Mahar, *Why Are There So Few Prenuptial Agreements?*, Olin Center Discussion Paper No. 436 (2003), available online at <http://www.law.harvard.edu/programs/olin_center/papers/pdf/436.pdf> (visited May 17, 2004) (finding support for the theory that false optimism and negative signaling effects explain the tendency to forgo prenuptial agreements); Baker and Emery, 17 L & Human Beh at 448 (cited in note 31) (speculating that the systematic optimism of young adults about the likelihood of divorce may explain the scarcity of prenuptial agreements); Saul Levmore, *Norms as Supplements*, 86 Va L Rev 1989, 2021 (2000) (arguing that raising the subject of prenuptial agreements signals distrust because there is no norm of entering into such agreements).

This effect has been called an "attitudinal negotiation cost." See Edward A. Bernstein, *Law & Economics and the Structure of Value Adding Contracts: A Contract Lawyer's View of the Law & Economics Literature*, 74 Or L Rev 189, 229, 232 (1995).

[40] See Baker and Emery, 17 L & Human Beh at 446 (cited in note 31) (finding a large discrepancy between individuals' accurate perceptions about the likelihood of divorce in the overall population and overly optimistic assessments of their own likelihood of divorce); Mahar, *Why Are There So Few Prenuptial Agreements?* at 15-16 (cited in note 39) (finding that respondents' underestimation of their own chances of divorce was pervasive and significant).

tionality may make spouses, either before or during the marriage, unlikely to try to protect their interests upon divorce through private contract, even where the costs of not doing so exceed the benefits.

C. State Power over Marriage

That the legal rules surrounding marital property exhibit a significant degree of stickiness seems beyond serious dispute. But the actual rules surrounding marital property are of relatively limited importance. They generally only directly operate upon property when, and if, spouses decide to divorce. Given this limitation, what impact do the rules of marital property have on the nature of the institution of marriage itself? What difference does the law make regarding how couples actually organize their property while they are married, and, more generally, with respect to how they view the attachment they have?

There is, rather obviously, no clear answer to these questions. Let me suggest, however, some ways in which the law might make a difference. Most directly, even though the rules of marital property operate almost entirely upon divorce, spouses considering how to order their behavior during marriage might take into account the effects that this behavior would have on their property settlement in the event of divorce. For instance, rules about the transmutation of separate property (the turning of separate property into marital property during a marriage) might, on the margins, give spouses reasons not to share or combine certain assets.[41] To the degree this occurs, the sticky marital property rules provided by the state would matter to the conduct of individual marriages. There may also be a more indirect effect. The rules of marital property might send a social message about the nature of marriage itself that could become incorporated into the meaning of the institution, thus shaping the behavior of present and future couples.[42] For instance, community property rules, emphasizing sharing in marriage, might make couples reconceptualize their marriages as more communal.[43]

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[41] See J. Thomas Oldham, *Tracing, Commingling, and Transmutation*, 23 Fam L Q 219, 246-47 (1989) (describing the transmutation by use doctrine, "which punishes generous spouses" and rewards "[s]pouses who hoard," by transforming separate property used by both spouses into marital property).

[42] See Frantz and Dagan, 104 Colum L Rev at 94-98 (cited in note 1) (discussing the role of the law in marriage generally).

[43] Hanoch Dagan, *The Craft of Property*, 91 Cal L Rev 1517, 1542 (2003) (observing the expressive significance of community property).

The significance of both of these effects probably remains relatively small. As to the first direct effect, limited spousal knowledge of the likelihood of divorce (not to mention the fact that, for many spouses, the likelihood of divorce is in fact low), and a lack of knowledge about the content of the rules of the marital property law,[44] make serious rational consideration of the effects on marital behavior of post-divorce legal outcomes seem unlikely. Lack of knowledge about the content of the marital property law must also affect the expressive power of the law: in particular, the minute and technical details of the marital property law seem very unlikely to influence social understanding of the institution.

The law's effect on marriage must also be limited for another reason—generally in life, but particularly in marriage, the law must compete for attention with a large number of other important and deeply held commitments. Cultural and religious forces, social conventions, romantic love—these influences and many others impact the meaning of the institution of marriage and influence spouses' choices within individual marriages. The law, if it is to make a difference, must find its place among a range of powerful forces.

For all of these reasons, any claim that the law acts as a primary determinant of the nature of the institution of marriage is almost surely false. But it is equally implausible, I think, to claim that the marital property law makes no difference whatsoever in the content of marriages. The law regulating families is certainly more in the public consciousness than any other area of the law, except possibly criminal law. News stories and television shows depict the legal consequences of divorce, and the divorce rate of about 50 percent[45] indicates that a large number of people either have been divorced or know someone who has been divorced. At least in its broader contours, people do talk about marital property law.

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[44] See text accompanying note 31.

[45] Rose M. Kreider and Jason M. Fields. *Number, Timing, and Duration of Marriages and Divorces: Fall 1996* 17-18, in Current Population Reports 70-80 (U.S. Census Bureau Feb 2002), available online at <http://www.census.gov/prod/2002pubs/p70-80.pdf> (last visited May 17, 2004) (estimating divorce rate for recent marriages at just under 50 percent).

II. WAYS OF USING STATE POWER

Given its degree of power, how should the state use it? This Part outlines potential government agendas for marriage and the ways in which legal rules might effectively implement them.

A. Spouse-Focused Approaches

1. *Facilitating existing spousal preferences.*

One possible approach for the state is to use the marital property law to simply facilitate the actual preferences of spouses. Much contracts literature focuses on identifying the proper rules to achieve this goal for contracting parties.[46]

Actual contracting in the real world is characterized by transaction costs and other kinds of information and bargaining failures that can present obstacles to mutual preference-satisfaction through contract.[47] Appropriately designed legal rules, both immutable and default, can eliminate the effects of these obstacles to achieving ideal agreements. They aim at enabling parties to reach the agreement that they would reach in a world without transaction costs and other contracting difficulties.[48] A facilitative approach to the rules of marital property would aim at enabling spouses to reach whatever agreement they would reach in the absence of the significant bargaining failures associated with marriage.

Facilitative legal rules can take many forms. The most obvious is that of attempting to mimic the bargain that couples would strike in the absence of transactional difficulties.[49] These types of default rules have been called "majoritarian" or "hypothetical," because they generally rely on assessments of the arrangements most contractors (in this case, spouses) would reach in a hypothetical world with perfect bargaining.[50] If the law seeks

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[46] See, for example, David Charny, *Hypothetical Bargains: The Normative Structure of Contract Interpretation*, 89 Mich L Rev 1815 (1991) (arguing for an explicit set of default rules to replace the hypothetical bargain approach to contract interpretation).

[47] See id at 1840-47 (describing the obstacles to and the process of applying an instrumental approach to contract law).

[48] Consider id at 1815 (discussing how courts interpret contracts in terms of what the parties would have bargained for).

[49] See Ian Ayres and Robert Gertner, *Majoritarian vs. Minoritarian Defaults*, 51 Stan L Rev 1591, 1592 (1999) (noting that majoritarian rules derive from the theory that incomplete contracts result from high transaction costs).

[50] See id (referring to these rules as "hypothetical" or "majoritarian"). Alan Schwartz refers to such contract terms as "problem-solving." See Alan Schwartz, *The Default Rule Paradigm and the Limits of Contract Law*, 3 S Cal Interdiscipl L J 389, 390 (1993).

to facilitate spousal preferences, it could attempt to construct such a hypothetical bargain and replicate its terms in the marital property law, most likely in terms of default rules that couples could contract around if their preferences diverged substantially from those of the norm.

Mimicking hypothetical preferences, however, is not the only option for setting the rules of marital property. As in contracts more generally, spousal preferences may, in certain circumstances, be more effectively facilitated through a more creative use of the law's power. Penalty default rules, for instance, which adopt outcomes unpleasant enough for certain contracting parties, thus causing them to reveal crucial information at the bargaining stage, might possibly be employed in the marital context (though the forces working against premarital contracting might make this a risky strategy).[51] The state has a broad range of legal tools available for facilitation of preferences.[52]

One strategy for facilitating spousal preferences presents itself with particular force in regard to marriage: forced specification of terms at the time of marriage.[53] Though this strategy has some appeal if the state's goal is facilitating preferences (after all, who better than spouses themselves could know how to facilitate their own preferences), like all other legal rules, its effectiveness would have to be evaluated based on actual performance. The systematic irrationalities and signaling problems that cause spouses not to write prenuptial agreements in the first place would almost surely infect their decisionmaking if forced to write an agreement at the beginning of marriage.[54] Actual bargaining in the marital context is likely to diverge significantly from ideal bargaining. Though forced contracting is one possible

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[51] See Ayres and Gertner, *Filling Gaps*, 99 Yale L J at 91 (cited in note 34) (introducing the concept of penalty default rule). Henry Smith has suggested a "penalty default" type rule for an intermediate tax-filing system in marriage. See Henry E. Smith, *Intermediate Filing in Household Taxation*, 72 S Cal L Rev 145, 151-53 (1998).

[52] I am also leaving aside one of the more troubling questions of rule setting: how general rules may be. That is, when coming up with rules to govern marriage, how well must they take into account variation among couples? Can there be only one set of marital property rules, or should the government present several—a menu of options? For a discussion of the generality problem in default rule setting, see Charny, 89 Mich L Rev at 1840-47 (cited in note 46).

[53] Jeffrey Evans Stake, *Mandatory Planning for Divorce*, 45 Vand L Rev 397, 400 (1992) ("[N]o change in the law could do more to facilitate private ordering of property and income after divorce than a requirement that couples choose their own futures."). See also Kaylah Campos Zelig, Note, *Putting Responsibility Back into Marriage: Making a Case for Mandatory Prenuptials*, 64 U Colo L Rev 1223 (1993).

[54] See text accompanying note 39.

tool to facilitate spousal preferences, and might in fact turn out to be the most effective, it is not necessarily so.

What might spousal preference-satisfaction look like in current marital property law? It is difficult to accurately predict what spouses would agree to if they could engage in a perfect bargain. For illustrative purposes in this Article (to contrast with other approaches), I am going to make a few guesses. Nothing in particular turns on the accuracy of these guesses, though I have tried to make them at least plausible. I will focus on two types of issues, gender equality and the degree of commitment between spouses.

a) Gender equality. The rules of marital property can provide more or less support for gender equality within the marital relationship. Consider, for example, methods of dividing existing marital property upon divorce. Compared with equal division norms, division of marital property based on market valuations of labor within the family are, for instance, almost surely destined to result in women receiving fewer marital resources than men receive. Given the lower market valuation of "women's work," only counter-factual assertions of the market value of household labor are likely to lead to equal divisions based on market-valued contributions.[55] The division of property upon divorce is likely to affect not only the equality of outcomes after the marriage is over, but also, to some extent, power and decision-making during the marriage. The spouse who will receive a greater proportion of the marital goods can more credibly threaten exit, differentially affecting husbands' and wives' voices within the marriage itself.[56]

As Amy Wax has surmised, however, given various background conditions (wage differentials, differentials in the length of reproductive life, and social expectations), women may have a difficult time striking a perfectly gender-egalitarian bargain with men. Because men have better nonmarital options than women do, women will have reasons to marry men, even on inegalitarian

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[55] See Frantz and Dagan, 104 Colum L Rev at 100-06 (cited in note 1).

[56] Susan Moller Okin, *Justice, Gender, and the Family* 137-38, 161, 167-68, 180-81 (Basic Books 1989) (describing the relationship between voice and exit, and noting that men are better off and women less so after divorce). See also June Carbone, *Income Sharing: Redefining the Family in Terms of Community*, 31 Houston L Rev 359, 405 (1994) (observing that men's implicit threat of exit has contributed to women's diminished power within marriage); Amy L. Wax, *Bargaining in the Shadow of the Market: Is There a Future for Egalitarian Marriage?*, 84 Va L Rev 509, 544-51, 626-36 (1998) (describing the adverse impact of bargaining disparity, partially due to men's exit threat advantage, on women's choices within marriage).

terms.[57] Given these social conditions, it is plausible that a hypothetical transaction-free bargain between men and women would not result in a gender-egalitarian marital property law.

b) Degrees of commitment. No-fault, unilateral divorce is now the virtually universal law of the United States.[58] Divorce rates remain reasonably high—around 50 percent.[59] Couples presented with the option of choosing a more restrictive divorce law through optional marital regimes, like covenant marriage, overwhelmingly choose not to do so.[60] Based on these phenomena, one could reasonably assume that marrying couples now value a permanent commitment less than marrying couples in the past did. Today's couples may take more seriously the possibility that they will wish to divorce, and even remarry. The rules of marital property reflect the degree of permanent commitment of marriage. A legal system that distributes a substantial amount of post-marital goods from the higher wage-earning spouse to the other spouse—usually taking the form of alimony—more greatly reflects a long-term commitment view of marriage than a legal system that treats the financial relationship between the spouses as over at the time of divorce (what is often called the "clean break" philosophy). Given current social understandings of marriage, in striking a hypothetical bargain, we might guess that spouses would more likely gravitate towards the clean break theory of legal arrangements than a theory that would entail a greater degree of commitment.

2. *Paternalism.*

Facilitating existing spousal preferences is not the only spouse-focused goal that the state might have regarding marital property. Instead of taking spousal preferences as a given, the government might attempt, through the rules of marital prop-

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[57] See Wax, 84 Va L Rev at 551 (cited in note 56) ("Because men generally have better options in these markets than women, the value of the right to exit from a marriage is on average greater for men than for women.").

[58] Joel A. Nichols, Comment, *Louisiana's Covenant Marriage Law: A First Step Toward a More Robust Pluralism in Marriage and Divorce Law?*, 47 Emory L J 929, 939 (1998) ("[I]n 1985, South Dakota became the fiftieth state to adopt a no-fault divorce law.").

[59] Mahar, *Why Are There So Few Prenuptial Agreements?* at 1 n 3 (cited in note 39) ("Assuming current rates of marital disruption, 'about 50 percent of first marriages for men under age 45 may end in divorce, and between 44 and 52 percent of women's first marriages may end in divorce.'") (internal citations omitted).

[60] For a general discussion of the merits of covenant marriage, see F. H. Buckley and Larry E. Ribstein, *Calling a Truce in the Marriage Wars*, 2001 U Ill L Rev 561, 572-75.

erty, to act somewhat paternalistically. A paternalist agenda would attempt to enable spouses to reach not the agreement they would reach in the absence of transaction costs, but to correct spouses' own understandings of their own welfare.[61] A government with a paternalist agenda could utilize the same tools as the facilitative government—immutable rules, default rules, forced contracting—but with a different desired endpoint.

I suggest some ways a paternalist agenda might change marital property rules in the two contexts I have already identified, gender equality and degree of commitment. Again, I make no attempt to claim in this Article that either of these arguments is actually *true*. They are just arguments that adopt a paternalist form.

a) Gender equality. Women might not understand the degree to which inegalitarian marriage challenges their own autonomy and self-respect and challenges their own well-being. They may systematically overvalue the marital outcome at the cost of the equality outcome for any number of reasons—they may, for instance, overestimate the burdens associated with remaining single, or the chance that they will remain unmarried if they insist upon equality. If women would actually be better off if they insisted on egalitarian marriages (even if that meant they sometimes were not able to marry at all), regardless of what they would prefer, a paternalist spouse-focused marital property law might be more egalitarian.

b) Degree of commitment. Couples may actually enjoy having a greater degree of commitment in their relationships than they realize. Designing the marital property law to provide for more post-divorce support might send a message about the value of long-term commitment that would, in the end, decrease the chances that a particular couple would divorce. Couples may find that they enjoy remaining married more than they thought that they would. A paternalist spouse-focused marital property law might therefore provide for more post-divorce support than that for which couples would ordinarily contract.

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[61] Consider Cass R. Sunstein and Richard H. Thaler, *Libertarian Paternalism is Not an Oxymoron*, 70 U Chi L Rev 1159, 1159-67 (2003) (arguing for a "self-conscious" attempt "to steer people's choices in directions that will improve the choosers' own welfare").

B. Externalities

1. *Concerning currently existing third parties.*

The state need not craft legal rules surrounding marital property simply with the interests of spouses in mind. In particular, some of the immutable rules of marriage appear to have been crafted with an eye to the externalities inherent in the disposition of marital property. Private marriages may have effects both on particular third parties, such as children, and on taxpayers in general, through the state.[62] In my two contexts, the impact of the law on presently existing third parties might influence the setting of the marital property law in some of the following ways.

a) Gender equality. As Amy Wax has pointed out, insisting on gender equality in marital property rules might ultimately result in fewer marriages.[63] If marriage benefits children (if, that is, children whose parents marry have better lives) or the government (people who marry may be more productive workers, for instance, or be generally less likely to rely on the state for support),[64] then the government may wish to make marriage less egalitarian, in order to make it more frequent. A focus on externalities would allow the state to consider this type of third-party claim when establishing the rules of marital property.

b) Degree of commitment. Similar factors that would cause the government to encourage more, rather than fewer, marriages, might also lead it to adopt rules that make marital commitments more serious, discouraging divorce among those who have already married (although if Wax is right that restrictive rules might make fewer people marry in the first place, then the strength of the effect is not at all clear). If lower rates of divorce benefit the government or children, and more future-directed support would lead to lower rates of divorce, then an externality-focused government might wish to adopt more commitment-oriented marital property rules.

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[62] See, for example, NJ Stat Ann § 2A:34-23(g) (West 1999) ("In all actions for divorce . . . where judgment is granted on the ground of institutionalization for mental illness the court may consider the possible burden upon the taxpayers of the State as well as the ability of the party to pay in determining an amount of maintenance to be awarded.").

[63] Wax, 84 Va L Rev at 658-59 (cited in note 56)

[64] All of these claims are made, in great detail, online at <http://www.marriagemovement.org/> (last visited May 17, 2004).

2. *Concerning future spouses.*

The universe of possible externalities to consider in crafting the marital property law is potentially much broader than just these reasonably straightforward examples. For instance, to the extent that marital property law may have longer-term impacts on the institution of marriage itself, there may be effects of the marital property law on future generations of spouses.[65] The existence of this kind of externality most likely depends on the law having an expressive effect on the nature of the institution into the future. The state might have a goal of changing the institution of marriage so that, in the future, spouses might have a greater degree of preference-satisfaction. It might choose to pursue this goal even at the expense of the preference-satisfaction of current spouses. Consider the possible impact of such a goal (whether correctly or incorrectly translated into concrete recommendations) in the two contexts I have identified.

a) Gender equality. Though it may serve the interests of current spouses to strike an inegalitarian marital bargain, if we created egalitarian rules of marriage, the institution of marriage may, over time, change. If the state sets an example of egalitarianism, more spouses might come to prefer egalitarianism (either on its own terms, or because it has good subsidiary effects, like a deeper marital bond). As more marriages become egalitarian, the world may change to better enable this sort of marriage—social norms around childrearing may change, for instance, and perhaps employment requirements would be altered to better allow for joint responsibility for raising children. Once those changes have been made, egalitarian marriages will become more feasible for a larger number of couples, who will derive a greater satisfaction from them than they would have from the inegalitarian arrangement couples would now reach. But to make that change, couples now must suffer a diminution in their preference-satisfaction. Taking into account potential benefits to future generations of spouses might therefore diverge from the interests (even paternalistically defined) of present spouses.

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[65] How precisely to take into account the interests of future generations, even under welfarist assumptions, is controversial. See, for example, Daniel A. Farber, *From Here to Eternity: Environmental Law and Future Generations*, 2003 U Ill L Rev 289 (describing the difficulty of using economics to correctly value our obligations with respect to future generations).

b) Degree of commitment. A similar story could arise regarding the degree of commitment in marriages. It may be that marriages would be more satisfying if people felt that divorce offered a lesser option. But the message about the value of commitment sent by future-directed property obligations might take a few generations to fully take hold. In the interim, spouses would have more future-directed obligations than they would like, without getting enough of the offsetting benefit that the eventually greater degree of marital commitment would provide.

C. "Pure" Normativity

A final option is that the government might attempt to use the rules of marital property to make marriages morally better, without a necessary increase (and possibly even with a decrease) in the satisfaction, or even paternalistically defined welfare, of current spouses or third parties. This of course presupposes a moral system that operates irrespective of preference-satisfaction or even paternalistic welfare-enhancement of current spouses or third parties. But plenty of moral systems take just that form—relying on a theory of the good that is, at least in some aspects, separate from spousal welfare.[66] If the government held such a moral theory, it might take the following stances, and set marital property law accordingly.

a) Gender equality. It is certainly easy to imagine a moral claim that looks like the following: Inegalitarian marriages are subordinating to women, and as such (under any number of moral or political theories), they are wrong and unfair. The marital property law therefore ought to insist upon (or at least push for) egalitarianism through equal division and other egalitarian norms.

[66] One possibility for coming up with a normatively appealing stance towards marriage, for instance, would be to employ a Rawlsian hypothetical bargain type of framework—what spouses would agree to if they did not know in advance which position they would have in the marriage. This sort of hypothetical bargain is, I take it, the basis of the Scotts' approach to the good marriage. Consider Scott and Scott, 84 Va L Rev 1225 (cited in note 16).

b) Degree of commitment. As a free-standing moral matter, one might think that spouses ought to be at least encouraged to keep the moral commitments they make through marriage. As significant post-divorce asset sharing fulfills those obligations, it should be made an immutable, or at least a default, rule.

The stances the government might take when crafting marital property rules are thus widely varied, and much more nuanced than the normative/facilitative dichotomy would suggest. At the very least, marital property rules motivated by what I have called "pure" normativity ought to be considered normative, and either actual facilitation of spousal desires, or some paternalistic correction thereof, ought to be considered facilitative. The question of where to put consideration of externalities of various types is complex, and first requires a fuller articulation of the critique against normativity in the marital property rule setting context.

III. THE CRITIQUE OF NORMATIVITY IN THE RULES OF MARITAL PROPERTY

A critique of normativity in the context of marital property rules might assume any number of forms. Some may deny the existence of "pure" normativity altogether—they deny that there are moral claims separate from satisfaction of the preferences, or interests, of present or future persons.[67] Setting rules based on that category of concern, therefore, would be nonsensical rather than illegitimate. Or objections might be more practical—that whatever goals the state can justifiably pursue, it cannot practically achieve them through the tool of marital property—that marital property law is too remote from people's actual marriages to make any difference.[68]

Some might also have more general objections to the use of the law to achieve particular types of goals, objections that are not specific to the marital context. Libertarians, for instance, might be skeptical of purely normative legislation, as well as paternalism and some protection of third-party interests, because of their interference with individual autonomy.[69] Others may find

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[67] This would be a standard view of utilitarians. Consider Shelley Kagan, *Normative Ethics* 61-62 (Westview 1998).

[68] See Part I C.

[69] See, for example, Charles Fried, *Right and Wrong* 163 (Harvard 1978) ("[I]n the pursuit of fairness, of positive right, lawmakers may not themselves violate negative rights, not even as a means to the end that others respect negative rights.").

reasons to be skeptical of state attempts to pursue moral agendas, even if they do not have a general libertarian perspective.[70]

All of these questions are too grand for me to even begin to address in this Article, although the answers to them will obviously impact the ways in which the state should set marital property rules. I want to turn instead to a very particular criticism—a criticism unique to marriage. I believe it captures the intuitions of many of the critics of normatively based marital property rules, and it is worthy of separate consideration.[71]

The marriage-specific critique of normatively based marital property rules, as I understand it, goes to the very heart of the nature of marriage itself. Marriage is a deeply private intimate attachment, but also a creature of the state. If one views marriage as a private relationship, there is reason to be reluctant about state attempts at normativity. If one views marriage as a state institution, however, state agenda-pushing seems considerably less controversial. So which, or which combination of the two, is marriage? The argument for a non-normatively based marital property regime can be articulated as a form of preferred government non-interference in private relationships. Because marriage is a private, intimate thing, the argument goes, the government has no business attempting to manipulate marriage based on its own views of what a "good" marriage looks like. To the extent that the government must do something about the division of marital property, it should strive, insofar as possible, merely to facilitate what spouses want, rather than to push what the government wishes that they would do. This would minimize governmental intrusion into the state institution of marriage.

Putting aside for now the ambiguity in exactly *which* methods of marital property rule setting this critique would endorse or reject, is there anything to be said for this notion of the particular importance of non-interference in marriage? The idea that the state should avoid interfering in some private decisions is of course not a novel one. There is a constitutional tradition, echoed by the recent Supreme Court decision in *Lawrence v Texas*,[72] striking down a criminal ban on consensual sodomy, requiring state non-interference in intimate matters. The birth

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[70] See, for example, Schwartz, 3 S Cal Interdiscipl L J at 392 (cited in note 50) (arguing that "the state should not create normative or transformative default rules at all").

[71] See Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 Harv L Rev 1497, 1504 (1983) ("The idea that the state should not intrude upon the family has, for most people today, a great deal more appeal than does classical laissez-faire economics.").

[72] 123 S Ct 2472 (2003).

control cases, *Eisenstadt v Baird*[73] and *Griswold v Connecticut*,[74] along with the abortion cases, particularly *Roe v Wade*[75] and *Planned Parenthood of Southeastern Pennsylvania v Casey*,[76] exhibit a constitutional command to keep some private things private.

Exactly what private things must constitutionally exist outside the regulation of the state, of course, remains a matter of significant confusion. After *Lawrence*, does it make the most sense to conclude that the Court has (without putting things exactly this way) recognized a right to engage in recreational sex without reproductive consequences?[77] Or perhaps the principle has a different scope—providing a right not so much to the physical acts, but to the particular sort of relationships thereby characterized? There are some indications of a more relationship-focused view in *Lawrence*. Justice Kennedy associated the protection of sodomy with the creation of relationships that have emotional content: "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring."[78]

Constitutional concerns around relationship formation can also be seen in the enigmatic "right to marry." On several occasions, the Court has recognized the existence of such a right. In *Loving v Virginia*,[79] which invalidated restrictions on interracial marriage, the Court declared:

> The freedom to marry has long been recognized as one of the vital personal rights essential to the orderly pursuit of happiness by free men. Marriage is one of the "basic civil rights of man," fundamental to our very existence and survival.[80]

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[73] 405 US 438 (1972).

[74] 381 US 479 (1965).

[75] 410 US 113 (1973).

[76] 505 US 833 (1992).

[77] See Mary Anne Case, *Of "This" and "That" in* Lawrence v Texas, 2004 S Ct Rev at 32-35 (forthcoming). For a pre-*Lawrence* interpretation favoring a right to recreational sex, see Richard D. Mohr, *Mr. Justice Douglas at Sodom: Gays and Privacy*, 18 Colum Hum Rts L Rev 43, 80-82 (1986). Compare with David B. Cruz, *The Sexual Freedom Cases? Contraception, Abortion, Abstinence, and the Constitution*, 35 Harv CR-CL L Rev 299 (2000) (rejecting an interpretation of Supreme Court precedent that would establish a right to have intimate sexual relations).

[78] *Lawrence*, 123 S Ct at 2478. See also Michael J. Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 Cal L Rev 521, 534 (1989) (making a similar argument about enduring homosexual relationships pre-*Lawrence*).

[79] 388 US 1 (1967).

[80] Id at 12.

In *Boddie v Connecticut*,[81] which required states to allow indigent persons to obtain a divorce without paying filing fees and court costs, the Court noted the implications for difficult divorce proceedings on the right to marry (and particularly, in that context, re-marry).[82] In *Zablocki v Redhail*,[83] which invalidated restrictions on marriage of persons delinquent in their child support obligations, the Court explained the right thus:

> It is not surprising that the decision to marry has been placed on the same level of importance as decisions relating to procreation, childbirth, child rearing, and family relationships. . . . [I]t would make little sense to recognize a right to privacy with respect to other matters of family life and not with respect to the decision to enter the relationship that is the foundation of the family in our society.[84]

Finally, in *Turner v Safley*,[85] the Court relied on the right to marry, when it invalidated restrictions on marriage by prisoners, based in part on the importance to private relationships of expressing "emotional support and public commitment."[86]

The Court's recognition of the right to marry suggests a principle of constitutional protection for intimate relationships more generally, beyond their sexual and reproductive components. The right to marry suggests a broader interest in organizing one's intimate personal attachments as one wishes. The right to marry itself only directly controls *entry* into marriage (and how far it extends will certainly be the subject of much debate, as same-sex marriage issues work their way further into public, and judicial, consciousness). But might the concept also apply to the legal rules that affect the content of marriages once they are formed? If so, this might ground a claim that the rules of marital property (at least insofar as they actually affect ongoing marriages)[87] should be as non-obtrusive as possible—to facilitate the sorts of marriages spouses want (or at least those marriages that are good for them), rather than attempt to shape marriages on the basis of some other criterion.

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[81] 401 US 371 (1971).
[82] Id at 376-77.
[83] 434 US 374 (1978).
[84] Id at 386.
[85] 482 US 78 (1987).
[86] Id at 95.
[87] See text accompanying notes 4-11.

The doctrine of marital privacy—the idea that the state should not interfere to resolve ordinary disputes between spouses in an ongoing marriage—can be seen as an example within marriage of the "hands-off" approach taken in the right to marry.[88] In addition to remaining agnostic about *who* should marry, the doctrine of marital privacy suggests that the state should also refuse to take a position on how couples ought to organize their lives once they are married. This position has been greatly criticized, though it remains a force in American family law jurisprudence. Largely gone are the days when the doctrine of marital privacy allowed physical violence in the marital home,[89] but courts are still reluctant to resolve disputes about property allocation between currently married spouses.

An argument against certain kinds of agenda-pushing in marital property law might look somewhat similar to the doctrine of marital privacy: both are based on a common idea of the state staying out of the content of functioning marriages. There is one large structural difference, however, between the two different approaches of being hands-off about marriage. The doctrine of marital privacy involves the state actually refraining from acting on a range of questions presented to it during marriage.[90] Marital privacy-respecting rules governing marital property, by contrast, involve more clearly affirmative government action—the setting of particular methods of deciding property division and support upon divorce.

In a sense, however, this difference is more real than it is apparent. As critiques of marital privacy have long noted, judicial non-interference in intra-marital disputes does not actually represent a hands-off approach to the functioning of marriages as much as it represents a particular *kind* of state control over marriage. What the doctrine of marital privacy actually does is leave spouses at the mercy of background legal rules that allocate control over marital goods and decisionmaking.[91]

Marital privacy-based restrictions on the content of marital property rules have the potential to be more neutral in actual substance than they currently are. If the state made efforts to set

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[88] See text accompanying note 9.

[89] See Reva Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 Yale L J 2117, 2118 (1996) (noting that domestic abuse persists even though feminist challenges to the use of marital privacy to shield domestic violence have resulted in widespread legal reforms).

[90] See text accompanying notes 23-24.

[91] See Olsen, 96 Harv L Rev at 1504-07, 1509-13 (cited in note 71).

the legal rules around marriage to best approximate what spouses actually want, it might result in more autonomy-respecting than any formal rules requiring non-intervention in marital affairs. I have already made this point with respect to suggestions that the most marital privacy-respecting form of regulation for marital property would be a regime that requires spouses to privately contract for the marital property rules that will apply to them.[92] While such a regime might seem, in form, to embody less state intrusion in marriage, whether it will substantively do a better or worse job of giving spouses what they want without state interference is an open question.[93]

Questing after substantive, rather than formal, neutrality in the rules of marital property, however, complicates matters significantly. Which of the approaches that I have described above counts as substantively neutral? The last category—the most purely normative approach—would almost certainly appear, to any critic, as the state attempting to impose its own views of marriage on couples. Some version of the spouse-centric goal—more or less paternalistic—would surely qualify as the state staying out of marriage.

Consideration of externalities is more complex. In contracts literature more generally, rules designed to avoid negative externalities are typically seen as justified when there is no good way for the parties on whom the externalities fall to protect themselves.[94] At least as to harms to children, and perhaps also to future generations of spouses or to the state, this may be true in the context of marital property rules. But there is genuine room for debate about the extent to which externalities—and particular types of externalities—are on or off limits when the government sets out to regulate private conduct.[95] Surely the fact that people may be offended (a negative externality, at least of a sort) by the property arrangement one might wish to strike with one's spouse should not be a motivating force, if the idea of marriage as a protected private attachment makes any sense at all. But is the same thing true for the interests of vulnerable chil-

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[92] See Part II A 1.

[93] See text accompanying notes 53-54.

[94] See, for example, Ayres and Gertner, 99 Yale L J at 88-89 (cited in note 34) (acknowledging an academic consensus that immutable rules in contract can be normatively justified when third parties "cannot adequately protect themselves").

[95] See Don Herzog, *Externalities and Other Parasites*, 67 U Chi L Rev 895, 910-14 (2000) (book review) (criticizing economists' identification of externalities as "covertly" dependent on moral assumptions and political theory).

dren? The answer requires a far more nuanced examination than anyone thus far has provided of just what would motivate a "privacy"-type right in the marital property context.

Whatever attitude toward marital property the government should take to be consistent with privacy in this context, it is unlikely that such a requirement would ever technically be constitutionalized in a technical sense. In part, this likely outcome is purely practical—worries about how a court would administer such a constitutional right, present in some debates about constitutionalization of other rights,[96] are significant in this context. How would a court know whether rules were set to be facilitative or normative, or as a matter of intent or of actual execution? And would they mandate particular property rules as a remedy? It seems highly unlikely that the Supreme Court would ignore the serious practical problems that constitutionalization of such a substantive, rather than formal, vision of neutrality poses. But these concerns do not necessarily preclude the argument that states ought to consider it their duty to be facilitative, rather than normative, when it comes to marital property. Norms that can effectively be constitutionalized do not constitute the entirety of the universe of norms worth caring about.

Even putting aside the administrative difficulties with constitutionalizing such a requirement, constitutionalization still might seem unlikely. The doctrine of marital privacy has never achieved constitutional status, despite the relative simplicity of its application—courts could conceivably mandate staying out of disputes between married people. The non-constitutionalization of marital privacy might result from any number of things. It might reflect skepticism about the relationship between formal and substantive neutrality (that marital privacy really reflects neutrality), or might reflect a reluctance to constitutionalize a non-interference norm where one spouse has actually sought government intervention. More profoundly, it might call into question the thought that non-intervention in marriage is such an important value.

In fact, there is something strange about protecting the privacy of intimate relationships that take the marital form. Civil marriage is a governmental creation—a state institution that private parties may or may not enter into, at will. Privacy norms

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[96] See, for example, Jan G. Deutsch, *Neutrality, Legitimacy, and the Supreme Court: Some Intersections Between Law and Political Science*, 20 Stan L Rev 169, 246-47 (1969) (outlining administrative and practical problems with the judicial analysis of apportionment cases).

much more typically embody negative liberties—freedom *from* various government interventions, freedom to live one's life (or at least aspects of one's life) as one wishes.[97] But once a couple has entered into legal marriage, they are, at least arguably, in the range of the positive—within an optional government program that may, permissibly, condition its benefits upon playing by its rules.

Consider an analogy from parental rights. Government-sponsored programs may require that parents behave in certain state-preferred ways (for instance, revealing the identity of a child's biological father) as a condition of receiving benefits, even though the state could not directly require such behavior.[98] Why isn't the analysis the same for marriage? If the state wants to give couples a benefit—an affirmative government program called marriage—why can it not attempt to shape their behavior within marriage?

The implication of this argument is that the matter might look considerably different for the property rules that apply to unmarried cohabitants than for the property rules that apply to married people. Unmarried cohabitants have not "registered" to receive any particular benefit. Perhaps not surprisingly, there is even more academic and judicial support for facilitative property rules for unmarried cohabitants—rules that reflect their actual preferences. To a large extent, the rules relating to property division for unmarried cohabitants attempt to track explicit or implicit manifestations of their intent.[99] The American Law Institute's new proposal for unmarried cohabitants—to treat them for property purposes as though they were married after a sustained period of cohabitation, regardless of whether they have given other indications of a desire to share property in this way[100]—has met with a significant criticism on exactly this basis.[101] Because

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[97] See, for example, *Bowers v DeVito*, 686 F2d 616, 618 (7th Cir 1982) ("The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services.").

[98] See Dorothy E. Roberts, *The Only Good Poor Woman: Unconstitutional Conditions and Welfare*, 72 Denver U L Rev 931, 941-43 (1995) (describing how dependence on welfare operates as a waiver of privacy).

[99] See, for example, *Tolan v Kimball*, 33 P3d 1152 (Ala 2001) (finding property of unmarried cohabitants to be divided based on the parties' intent); *Beal v Beal*, 577 P2d 507 (Or 1978) (holding the same). Equitable doctrines, like quantam meruit, sometimes trump perceived intent. See, for example, *Watts v Watts*, 405 NW2d 303, 306 (Wis 1987).

[100] American Law Institute, Principles of Family Dissolution, §§ 6.03-6.06 (2003).

[101] See, for example, Lynn D. Wardle, *Deconstructing Family: A Critique of the American Law Institute's "Domestic Partners" Proposal*, 2001 BYU L Rev 1189, 1213 ("The ALI [ ] proposes to bind individuals to a contract that they have not made, to obligations they have not chosen to assume, to

of the administrative difficulties in ascertaining intent, such a facilitative approach to property rules among unmarried cohabitants is unlikely to be a good candidate for constitutionalization, but the intimacy/privacy argument about the content of intimate relationships applies most naturally to intimate relationships that do present the complication of how to categorize marriage. To the extent that an argument based on intimacy can seem to require the state to be "hands off" with respect to the property relationship between intimates, perhaps that argument applies only to unmarried cohabitants rather than to people who choose to enter into the institution of marriage.

But this argument against a hands-off approach to marriage may prove too much. The Supreme Court has already recognized a right to marry, and has even given it constitutional status.[102] This right would seem to be subject to the same critique. The right to marry is, structurally, not the same as the right (which may potentially exist post-*Lawrence*) to have recreational sex. The right to marry is, perversely, not a privacy-based right to be left alone, but rather a right to have the state *interfere* in the relationship.

The debates about same-sex marriage will surely reflect this awkwardness in the right to marry. Arguments to extend marriage to same-sex couples that are based on the particularly suspicious nature of sexual-orientation[103] or sex-based[104] categorizations do not require reliance on the right to marry. But for broader claims for same-sex marriage that resound in a privacy right around marriage—that it is not the government's business to say who may or may not marry—distinctions are harder to draw. This is not to say that they could not be drawn, just as *Lawrence* drew a line, based on exploitation between consensual sex between adults and sex involving minors or sex for financial profit.[105] But the easiest argument for restricting marriage to its

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commitments they have not agreed to assume.").

[102] See text accompanying notes 72-86.

[103] See, for example, Richard Delgado, *Fact, Norm, and Standard of Review—The Case of Homosexuality*, 10 U Dayton L Rev 575, 583-85 (1985) (evaluating the idea that homosexuals represent a "quasi-suspect" class); Note, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 Harv L Rev 1285, 1287-92 (1985) (arguing that an equal protection approach would better produce equality for homosexuals than would dependence on the more specific and limited protections of privacy rights, such as the right to marry).

[104] See, for example, Andrew Koppelman, *Why Discrimination against Lesbians and Gay Men Is Sex Discrimination*, 69 NYU L Rev 197, 199 (1994) (arguing that discrimination against homosexuals is sex discrimination in that it "reinforces the hierarchy of males over females").

[105] *Lawrence*, 123 S Ct at 2484. The best arguments for prohibiting siblings and polygamists from marrying would have to be based on similar concerns about exploitation.

more usual forms—that the government makes marriage, and that it ought to be able therefore to say what marriage is—is challenged by the existence of the positive right to participate in the government institution.

One easy option for working one's way out of this conundrum would be to deny the existence of the right to marry in the first place. This would not necessarily require concluding that the Supreme Court has always been wrong. At a time when marriage carried with it a degree of monopoly power over other private behaviors—reproduction and sex, most specifically—the right to marry may have been necessary to protect other private behaviors.[106] As that degree of monopoly power lessens—in *Lawrence,* in particular, over recreational sex—the need for a right to marry may correspondingly disappear.[107]

But there may be more going on with the right to marry than just marriage's relationship to other protected activities. Though it takes the form of a government benefits package, legal marriage plays a social role that is far more profound and personal. Couples seem to care about legally marrying for reasons that have nothing at all to do with the legal consequences—reasons that are more deeply personal.[108] This makes marriage itself a sort of hybrid institution, both personal and governmental, a tool both for personal intimate expression and for governmental control. And the question of what the state should do about marital property is, really, no less than the question of which of those characters ought to control, or whether there is some way of accommodating both of them simultaneously.

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[106] See Case, 2004 S Ct Rev at 52 (cited in note 77). See also *Zablocki*, 434 US at 386 ("[If the] right to procreate means anything it all, it must imply some right to enter the only relationship in which the State of Wisconsin allows sexual relations legally to take place.").

[107] See Case, 2004 S Ct Rev at 52 (cited in note 77).

[108] See text accompanying notes 30-31.