

## Legal Regulation of Marriage: From Status to Contract and Back Again?

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The purpose of this paper is to give a brief historical overview of the way in which the American legal system has traditionally regulated marriage. I believe that such an historical perspective is important for a number of reasons. First, it reminds us that there was a time when marriage played a much more central role in our legal system than it does today. This was a time when the legal system deliberately encouraged and privileged marriage, two of the things that a number of conference participants have advocated. While this previous legal regime arguably had some benefits, it also rested on assumptions and incorporated key elements that are inconsistent with modern notions of gender equality and individual choice. Thus, a key question becomes whether one can use the legal system to "reinstitutionalize" marriage without also reinstitutionalizing the particular gendered and hierarchical structure that characterized this traditional legal regime. Such an historical perspective helps explain why there is so much reluctance among legal scholars to talk about marriage. Like it or not, the "M" word does come with a great deal of legal baggage and it is important to examine that baggage carefully in order to decide which pieces are worth retaining and which pieces are not.

I take as my point of departure the claim made by a number of scholars that changes in the legal regulation of marriage reflect a steady transformation from marriage as (predominantly) a public status to marriage as (predominantly) a private contract. I think this claim is largely correct, but I believe that insufficient attention has been paid to some of the reasons for this transformation. In particular, I think that what some have termed the "privatization" of marriage is closely linked to notions of gender equality, particularly equality before the law. In other words, the impetus to make marriage more private, and less public, was to a large extent fueled by widespread changes in gender roles that challenged the traditional legal structure of marriage.

Other changes have also played a role. One is the migration from constitutional law to family law of notions of individual privacy and autonomy. Another is the increased dissociation of law and morality. A final factor is the application of economic analysis and rational choice theory to behavior in and around the family. Although I think all four of these factors are important, this paper will focus on the link between privatization and gender equality. (I have addressed the other factors at greater length in Jana Singer, *The Privatization of Family Law*, 1992 Wis. L. Rev. 1443.)

Traditionally, American law treated marriage as a distinct and exclusive legal status. What this means is that, by virtue of entering into marriage, individuals automatically acquired a distinct set of legal rights and obligations. These legal rights and obligations were exclusive to marriage—that is, you did not get them until and unless you married and they attached to *all* marriages, regardless of whether any particular couple or any particular spouse accepted them or desired them.

The United States Supreme Court captured this notion of marriage as a distinct legal status in a well-known 1888 opinion. The Court wrote:

Marriage is something more than a mere contract. The consent of the parties is, of course, essential to its existence, but when the contract to marry is executed, a relation between the parties is created which they cannot change. Other contracts may be modified, restricted or enlarged or entirely released upon the consent of the parties, but not so with marriage. The relation, once formed, the law stepped in and holds the parties to various obligations and liabilities. [*Maynard v. Hill*, 125 U.S. 190, 205 (1888).]

Well, what were these various obligations and liabilities that the law bestowed on married persons? One of the most striking things about them is that they were extremely gendered. Husbands, by virtue of marriage, acquired one set of legal rights and obligations, while wives acquired (or were forced to assume) another quite different set. Put another way, the legal status of husband was significantly different from the legal status of wife.

Perhaps the starkest illustration of these differences was the common-law doctrine of marital merger.

Under this doctrine, marriage quite literally stripped women of their existence as independent legal actors. The famous English jurist, William Blackstone, explained the doctrine this way:

By marriage the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during marriage, or, at least is incorporated into that of the husband, under whose wing, protection and cover she performs everything; and is therefore called in our law-french a *femme-covert*; is said to be *cover-baron*, or under the protection and influence of her husband, her baron, or lord; and her condition during her marriage is called her *coverture*. Under this principle, of the union of person in husband and wife, depend almost all the legal rights, duties and disabilities that either of them acquire by the marriage. [William Blackstone, *Commentaries* \*442.]

Some 100 years after Blackstone wrote, the late Supreme Court Justice, Hugo Black, described the marital merger doctrine a bit more succinctly. "This rule has worked out in reality to mean that though the husband and wife are one, that one is the husband." [United States v. Yeazell, 382 U.S. 341, 361 (1966).]

The doctrine of marital merger had far-reaching legal consequences for women in a wide variety of areas. For example, married women were precluded from entering into legally binding contracts — not just with their husbands, but with anyone. In a famous turn of the century Supreme Court case, the State of Illinois successfully relied on this contractual disability as a justification for excluding all women from the legal profession. [*Bradwell v. Illinois*, 83 U.S. (16 Wall) 130 (1873).] Interestingly, the Supreme Court acknowledged that many women were unmarried, and therefore not affected by any of the duties and incapacities arising out of marriage. However, the Court viewed these women as "exceptions to the general rule" and to women's "paramount destiny" as wives and mothers; the state of Illinois was not required to tailor its laws for such "unusual or extraordinary circumstances."

In addition to disabling women from making contracts, marriage also deprived women of the ability to manage and control their own real property and to

sue or be sued in their own names. Moreover, a married woman was not the owner of any wages she might earn from employment outside the home. Rather, such wages were considered the legal property of the husband. Nor could husbands contract to pay their wives for domestic work, since this, in essence, would amount to a husband paying himself.

The marital merger doctrine also had a significant impact on the legal relationship between the spouses. Because husband and wife are considered one person in law, they can neither contract with nor sue each other. Nor could spouses testify for or against each other in civil or criminal proceedings. More generally, the legal fiction that the husband and wife were a single entity was one of the rationales that supported the law's traditional refusal to recognize marital rape or to provide remedies for victims of spousal violence.

Although most of the specific legal disabilities associated with the marital merger doctrine were formally abandoned in the late 19th century with the passage of the Married Women's Property Acts, the notion of married persons as a single legal entity continued to exert a significant influence over the laws affecting spouses well into the 20th century. As late as 1958, the Supreme Court reaffirmed the evidentiary rule that precluded spouses from testifying against each other in criminal cases; that rule was later modified to allow the witness spouse alone to decide whether to testify. [See *Tammell v. United States*, 445 U.S. 40 (1980) (overruling *Hawkins v. United States*, 358 U.S. 74 (1958)).] Similarly, inter-spousal tort immunity — that is, the restriction on spouses suing each other for civil wrongs, persisted in a majority of States until the mid-1970s and still exists in modified form in a few jurisdictions. Still more tenacious is the common law rule that a husband is legally incapable of raping his wife; this remnant of the marital unity doctrine persisted intact until the 1980's, and it continues to influence the criminal law in a number of states.

This brief historical description of the traditional notion of marital merger may help explain why so many feminist scholars are wary of calls to reinstitutionalize marriage.

Long after formal abandonment of the marital merger doctrine, the State continued to define the terms of marriage in ways that were both hierarchal and gender-based. The husband, as the legal head of house-

hold, was responsible for the financial support of his wife and children; the wife, as the domestic partner, was responsible for providing household services, including housework, child care and sex.

To be sure, nobody actually wrote out these state-defined obligations and gave them to couples when they married. Moreover, because of the law's reluctance to "intervene" in an ongoing marriage, it has always been quite difficult for spouses to enforce any marital rights or obligations while a marriage is intact. But the legal system did enforce the gender-based terms of the traditional marriage contract in a number of other ways. In particular, both the requirements for, and consequences of, divorce reflected these state-imposed obligations. Under the fault-based divorce regime, for example, a wife who refused to go along with her husband's choice of domicile could be found guilty of desertion, which was a common, fault-based ground for divorce.

Wives who had fulfilled their marital obligations were (in theory) entitled to alimony in the event of a divorce, since alimony was seen as a continuation of the husband's marital support obligations. However, wives who were deemed "at fault" in a divorce — for example, the wife who had an affair, or who objected to her husband's choice of domicile — generally forfeited their entitlement to alimony, regardless of their financial need. And wives could never be ordered to pay alimony, regardless of their financial means, since wives were not legally obligated to support their husbands financially. Quite a disincentive for the reversal of gender roles during marriage.

The law also employed a number of devices to prevent spouses from modifying the State-imposed terms of the marriage contract. Under traditional contract law doctrine, private agreements that purported to change the "essential incidents of marriage" — defined as the husband support duties and the wife's domestic obligations — were void as a matter of public policy. [See *Graham v. Graham*, 33 F. Supp. 936 (E.D. Mich. 1940).] As courts routinely explained, public policy in such a vital matter as the marriage contract should not be made to yield to subversive private agreements and personal considerations.

Other, more specific, contract doctrines further restricted the opportunities for private ordering within marriage. Courts sometimes refused to enforce agree-

ments between husbands and wives on the ground that these agreements lacked the essential quid pro quo necessary to create a legally binding contract. For example, an early Wisconsin case held that a husband's promise to support his wife did not constitute valid consideration for the wife's return promise to devise property to him since, by pledging his continued financial support, the husband had promised only what the law already required of him. [*Ryan v. Dockery*, 114 N.W. 820 (1908).] Similarly, a Virginia court found that a married woman's promise to give up her pre-home and business in order to follow her husband across the country was merely the performance of her legal and moral duty as a wife and hence did not constitute valid consideration for her husband's written agreement to release all rights in her estate. [*Ballard v. Cox*, 62 S.E.2d 1 (Va. 1950).]

Thus, the gender-based terms of the traditional marriage contract were not simply what the economists call "default rules" — provisions that apply only if the parties have not agreed to the contrary. Rather, they were state-imposed elements of marriage, that the parties could not change (in any legally enforceable way) even if they both desired to do so.

Another key way in which the law traditionally defined marriage as a distinct legal status was by distinguishing sharply in virtually all important contexts between married persons and persons in intimate relationships outside of marriage. Laws criminalizing adultery, fornication, and non-marital cohabitation effectively carved out marriage as the only legitimate arena for sexual intercourse. On the civil side, the availability of private tort remedies for things like enticement and alienation of affections penalized third parties who intentionally interfered with the marriage relationship. Claims for loss of consortium protected husbands and later, wives, against third parties who negligently impaired marital relations. No similar legal doctrines protected non-marital intimate relationships from such deliberate or negligent third-party impairment.

Nor were unmarried cohabitants afforded access to the courts to resolve financial or property disputes arising from the breakup of their relationship. And the law was very clear about why. Persons involved in such non-marital relationships had engaged in illegal and/or immoral conduct, and the judicial system should not lend its hand to help them work out their

differences when those illicit relationships dissolved. [See, e.g., *Rehak v. Mathis*, 238 S.E.2d 81, 83 (Ga. 1976).]

An elaborate network of statutes and common-law doctrines also distinguished sharply between children born within a marriage and those born outside of it. As one family historian has explained, "[t]he law used matrimony to separate legal from spurious issue. It defined the latter as *filius-nullius*, the child and heir of no one." Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America*, Chapel Hill: University of North Carolina Press, p. 197 (1988). Similarly, state and federal programs designed to compensate families for the death or disability of a wage earner typically excluded out-of-wedlock children as eligible beneficiaries. A major justification for these sharp legal distinctions between marital and non-marital children was to protect the exclusivity of the marital unit and to punish adults who engaged in sex outside of marriage. [See Singer, *The Privatization of Family Law*, 1992 Wis. L. Rev. 1446-1449.]

Over the past 30 years, the Supreme Court has eliminated as unconstitutional most of the categorical legal distinctions between marital and non-marital children. In particular, these Supreme Court cases have explicitly rejected the traditional notion that differential treatment of children born inside and outside of marriage is justified as a way of encouraging matrimony and of expressing society's condemnation of liaisons beyond the bounds of marriage. [See *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164, 175 (1972).]

In reality, the economic and social circumstances of children born or raised outside of marriage continue to be significantly more precarious than those of their marital counterparts. And some legal distinctions between marital and non-marital children continue to exist. But the legal distinctions that remain are more likely to reflect the difficulties of proving paternity than they are to demarcate a separate and unequal legal status for children born out-of-wedlock. As Professor Mary Ann Glendon has noted, this equalization of the legal status of marital and non-marital children has "gone far toward depriving formal marriage of one of its traditionally most important effects: That of distinguishing the legitimate family from all others." Mary Ann Glendon, *Transformation of Family Law: State, Law and Family* p. 82 (1989).

Let me briefly use the no-fault divorce revolution as a final illustration of the transformation from marriage-as-status to marriage-as-contract. Under the fault-based divorce regime, it was the State that determined whether and when a couple could dissolve their union. A spouse who sought to enter marriage had to prove to a court that her partner had breached his State-imposed obligations and that she was innocent of marital fault. If a spouse seeking a divorce failed to establish one of the State-sanctioned grounds for terminating a marriage, she couldn't legally end her union, even if both she and her spouse desired to do so. Indeed, under the doctrine of recrimination, if a court found that both spouses had breached their marital obligations, neither could obtain a divorce. They would be punished by being forced to stay together.

Thus, under the fault-based divorce regime, divorce was decidedly not the recognition of a private decision to terminate a marriage, whether that decision was mutual or unilateral. Instead it was a privilege granted by the State to an innocent spouse against a guilty one. Moreover, a finding of guilt in a fault-based divorce proceeding had consequences that endured long beyond the breakup of the marriage. Fault was a significant determinant of the financial and parenting consequences of divorce, and in many States, it restricted a party's ability to remarry, often for a number of years after the divorce.

With the adoption of no-fault divorce statutes, the State ceded to the spouses, themselves, indeed often to one spouse acting unilaterally, the authority to make these decisions. Under a no-fault divorce regime, the decision to end a marriage generally rests on unreviewed private judgment. The State's role is diminished to one of solemnization and recording, akin to its role in marital licensing. Thus, the current debate over reviving fault requirements for divorce is, in many respects, a debate about public vs private control of marriage — about marriage as (predominantly) a public status vs. marriage as a private contract.

What does the very brief history that I've sketched counsel about how to evaluate such contemporary efforts? One important thing this history tells me is that the move from status to contract in family law was inexorably linked to the rethinking of traditional

gender roles and the push for gender equality before the law.

Because the traditional State-imposed marriage contract both stereotyped and subordinated women, limitations on divorce, and on the contractual freedom of spouses, became identified with the perpetuation of inequality between the sexes. It made sense for advocates of gender equality to espouse contractual freedom in and around marriage as one way of avoiding the sexism of the traditional State-imposed marriage rules. At the same time, supporters of marital contracting and unilateral divorce were able to use gender equality arguments to support their calls for increased private ordering.

Contemporary research about the effects of divorce on women has caused many scholars to think critically

about the asserted link between privatization and gender equality. By the same token, the history of marriage as a distinctly gendered legal status should cause marriage advocates to think harder about what it should mean to reinstitutionalize marriage as a public status.

Obviously, dissatisfaction with conceptualizing marriage solely as a vehicle for individual fulfillment is part of what brings all of us here and what informs the larger public policy effort to strengthen marriage. But to avoid the inequalities of the past, advocates must be willing to look inside the black box of marriage and to ask what kind of public and private institution it is that we seek to reinvigorate. Only then will it be possible to strengthen marriage in ways that are consistent with notions of equal respect and gender equality in both the public and private spheres.