

Mercer University School of Law

## Mercer Law School Digital Commons

---

Faculty Publications

Faculty

---

2016

### Gradual Marriage

Jessica Feinberg

Mercer University School of Law, feinberg\_jr@law.mercer.edu

Follow this and additional works at: [https://digitalcommons.law.mercer.edu/fac\\_pubs](https://digitalcommons.law.mercer.edu/fac_pubs)



Part of the [Family Law Commons](#)

---

#### Recommended Citation

Jessica Feinberg, *Gradual Marriage*, 20 Lewis & Clark L. Rev. 1 (2016).

This Article is brought to you for free and open access by the Faculty at Mercer Law School Digital Commons. It has been accepted for inclusion in Faculty Publications by an authorized administrator of Mercer Law School Digital Commons. For more information, please contact [repository@law.mercer.edu](mailto:repository@law.mercer.edu).

## GRADUAL MARRIAGE

by  
Jessica Feinberg\*

*The time has come to reform the law governing marriage. In determining the rights and obligations between spouses arising from marriage, current law does not adequately account for the way in which spousal behaviors and expectations change over the course of a marriage. With regard to intact marriages, under the existing legal framework, the spousal rights and obligations enjoyed by couples in intact marriages arise all at once—at the moment a couple is granted a marriage license—and do not change as the years of marriage pass or as children are born to the marriage. In terms of dissolving marriages, with few exceptions, all marriages are subject to the same broad, default rules for determining post-dissolution spousal rights and obligations without regard to the length of the marriage or the presence of children within the marriage. Moreover, the substantial discretion granted to judges in the marital-dissolution context often leads to unpredictable and inconsistent results. Perhaps as a result of the law’s problematic approach to determining spousal rights and obligations, marriage rates have declined significantly over the past several decades and the institution of marriage has come to occupy an increasingly perilous place in U.S. society. This*

---

\* Associate Professor, Mercer University School of Law. I would like to thank Gary Simson, Theresa Glennon, John Culhane, Cynthia Lee Starnes, Albertina Antognini, Scott Titshaw, and Lindsay Feinberg for their thoughtful feedback. I am grateful to Dean Daisy Floyd for her generous support. Thank you also to the participants in the 2015 Association of American Law Schools Midyear Meeting and the 2015 Feminist Legal Theory Collaborative Research Network Program at the Law and Society Conference for providing insightful suggestions and comments. Finally, thank you to ABF, who provides me with inspiration every day.

*Article sets forth a comprehensive proposal for an improved legal framework governing marriage that is based upon the concept of spousal rights and obligations arising gradually over the course of a marriage. Under the proposed system, various marriage levels would be established, each providing a package of spousal rights and obligations tailored to marriages that have reached that particular level under the default rules. Ascension among the levels would be based primarily upon the length of the marriage and the presence of children within the marriage, factors that play a strong role in shaping spousal conduct and expectations. Implementation of the proposal would result in a significantly improved legal framework governing marriage.*

INTRODUCTION .....	3
I. MARRIAGE, DIVORCE, AND COHABITATION IN THE UNITED STATES TODAY: A BRIEF OVERVIEW .....	6
A. <i>Marriage</i> .....	6
B. <i>Divorce</i> .....	7
C. <i>Cohabitation</i> .....	8
II. LIMITATIONS OF THE CURRENT LEGAL FRAMEWORK GOVERNING MARRIAGE .....	11
A. <i>Consideration of Marriage Duration and the Presence of Children</i> .....	11
1. <i>Intact Marriages</i> .....	11
2. <i>Dissolving Marriages</i> .....	13
B. <i>Criticisms of the Current Framework and the Corresponding State-Based Efforts to Address the Concerns Raised</i> .....	17
III. GOALS THAT A NEW LEGAL FRAMEWORK FOR MARRIAGE SHOULD AIM TO FURTHER .....	24
A. <i>Protecting a Greater Number of Relationships, Helping Couples Determine if Marriage Is Right for Them, and Filtering Well-Suited Relationships into the Institution of Marriage</i> .....	25
B. <i>Providing Relevant Rights to Intact Marriages, Encouraging the Continuation of Low-Conflict Marriages, and Facilitating the Termination of Unhealthy Marriages</i> .....	27
C. <i>Protecting Marital Expectations at Dissolution</i> .....	29
IV. GRADUAL MARRIAGE: A PROPOSAL FOR AN IMPROVED LEGAL FRAMEWORK GOVERNING MARRIAGE .....	30
A. <i>Marriage Duration and Existence of Children as Primary Determinants of Levels</i> .....	32
B. <i>Level One: Trial Marriage</i> .....	36
C. <i>Remaining Levels: Gradual Marriage</i> .....	43
V. THE EFFECTS OF THE PROPOSED FRAMEWORK: THE FURTHERANCE OF IMPORTANT GOALS AND THE POTENTIAL CONCERNS .....	48
A. <i>The Proposed Framework's Advancement of Important Goals: A Brief Summation</i> .....	48

<i>B. Foreseeable Concerns with the Proposed Framework</i> .....	50
CONCLUSION .....	53

## INTRODUCTION

Consider two marriages that exist in the same jurisdiction. Couple number one will remain married for only two years and will not have any children. Their divorce will occur when one of the spouses comes to the realization that she and her spouse disagree on many of the essential components of a shared life and, as a result, are completely incompatible as long-term partners. Couple number two will remain married for thirty years, during which time they will raise two children and make countless decisions about their lives, careers, and finances based upon the overall well-being of their family unit. Their divorce will occur when the spouses reach the mutual conclusion that they have fallen out of love. The two couples described above may appear to be in very different situations with regard to the important characteristics of their marriages, but when it comes to the marriage-based rights and obligations arising between the spouses, the laws governing their marriages while the marriages are intact, as well as the laws governing their eventual divorces, will be largely the same for each couple. More specifically, the package of spousal rights and obligations that will govern the first year of couple number one's intact marriage is almost exactly the same as the package of spousal rights and obligations that will govern the 29th year of couple number two's intact marriage.<sup>1</sup> Moreover, the default legal regime that will determine the spousal rights and obligations arising from couple number one's divorce is largely the same as the default legal regime that will determine the spousal rights and obligations arising from couple number two's divorce.<sup>2</sup>

Currently, the vast majority of the rights and protections that accompany intact marriages are not gradual, meaning that when a couple takes the fifteen or so minutes necessary to apply for a marriage license, and it is subsequently granted by the state, the couple automatically receives a package of state and federal rights and protections that, with few exceptions, does not change over the course of the intact marriage.<sup>3</sup> Consequently, as members of an intact marriage, the couple will enjoy the same spousal rights and protections whether they have been married for one year or 30 years and whether they have children or not. At divorce or the death of one of the spouses, with few exceptions, the same default legal scheme will determine the spousal rights and obligations that stem from the marital dissolution, regardless of whether the couple in question was married for one year or 50 years, and regardless of

---

<sup>1</sup> See *infra* notes 56–66 and accompanying text.

<sup>2</sup> See *infra* notes 67–86 and accompanying text.

<sup>3</sup> See *infra* notes 56–66 and accompanying text.

whether the couple has children.<sup>4</sup> Granted, the laws regarding at least some dissolution-related spousal rights and obligations, such as spousal support and property distribution, likely will provide for the court's consideration factors such as length of the marriage and presence of children within the marriage, along with a long list of other factors, but these laws generally will not instruct the court in any way with regard to how to weigh or apply the various factors.<sup>5</sup> Decisions regarding these rights and obligations will be left completely within the court's discretion.<sup>6</sup>

Perhaps in part as a result of the problems within the legal framework governing marriage, in recent years the institution of marriage has come to occupy an increasingly uncertain position in United States society. Marriage rates have decreased substantially over the past several decades, with marital households now comprising less than half of all households in the United States.<sup>7</sup> Accompanying the decline in marriage rates has been the drastic increase in non-marital cohabitation and births outside of marriage. Between 1960 and 2000, the number of cohabiting opposite-sex couples rose from approximately 500,000 to almost five million, and since then the rate of non-marital cohabitation has continued its rapid rise.<sup>8</sup> The rate of births outside of marriage has also increased steadily, with 41% of all births currently occurring outside of marriage,<sup>9</sup> and births among cohabiting couples accounting for a substantial portion of the rising non-marital birth rate.<sup>10</sup> At the same time, the divorce rate in the United States has stayed consistently high, holding steady at around 40% to 50% in recent years.<sup>11</sup>

It is time to reform the legal framework governing marriage in order to address the problems currently faced by the institution. There are a number of core goals that an improved legal framework governing marriage should seek to further. An important initial goal should be to provide more people with rights and protections for their relationships, something which has become a significant problem with the decline of marriage in recent years. In addition, an improved framework should seek to help couples determine if marriage is the right choice for their relationships, and should aim to filter well-suited relationships into the institution of marriage. Supporting and stabilizing intact marriages to the

---

<sup>4</sup> See *infra* notes 67–85 and accompanying text.

<sup>5</sup> See *infra* notes 86–88 and accompanying text.

<sup>6</sup> *Id.*

<sup>7</sup> Jessica R. Feinberg, *The Survival of Non-Marital Relationship Statuses in the Same-Sex Marriage Era: A Proposal*, 87 TEMP. L. REV. 45, 46 (2014).

<sup>8</sup> *Id.*

<sup>9</sup> Jason DeParle & Sabrina Tavernise, *Unwed Mothers Now a Majority Before Age of 30*, N.Y. TIMES (Feb. 18, 2012), [http://www.nytimes.com/2012/02/18/us/for-women-under-30-most-births-occur-outside-marriage.html?\\_r=0](http://www.nytimes.com/2012/02/18/us/for-women-under-30-most-births-occur-outside-marriage.html?_r=0).

<sup>10</sup> Feinberg, *supra* note 7, at 46.

<sup>11</sup> *Id.* at 59.

greatest extent possible, encouraging the continuation of healthy marriages, and facilitating the termination of unhealthy marriages are also important goals. Finally, it is essential that the improved legal framework governing marriage seeks to provide greater fairness, consistency, and predictability in the context of the rights and obligations arising from marital dissolution.

This Article sets forth a comprehensive proposal for an improved legal framework governing marriage that is based upon the concept of spousal rights and obligations arising gradually over the course of the marriage. More specifically, this Article proposes that the legal framework governing marriage should identify multiple levels of marriage, and spousal rights and obligations should differ depending on the marriage level. Ascension among the levels would be based primarily upon the length of the marriage and the presence of children within the marriage, factors that play a strong role in shaping spousal conduct and expectations. The first level under the proposed system would provide couples with the opportunity to receive important, relevant rights and protections in a low-risk, supportive setting while the couple determines if marriage is right for their relationship. Each additional level would provide a package of rights and obligations tailored to spouses who have reached that level, with the rights and obligations generally becoming more significant with each marriage level. Judicial discretion in altering the default spousal rights and obligations applicable to a couple's marriage level would be limited, thereby providing more fairness, predictability, and efficiency in the context of marital dissolution. Recognizing that there will be some marriages in which expectations differ from that which generally would be expected based upon the length of the marriage and the presence of children within the marriage, couples would have the flexibility to opt-out of the default level applicable to them if they determined that the level was ill-suited at the time for their particular relationship.

This Article is organized in the following manner. Section I provides an overview of the current state of marriage, divorce, and cohabitation within the United States.<sup>12</sup> Section II analyzes the limitations of the current legal framework governing marriage, addressing the problems within the framework with regard to both intact marriages and dissolving marriages.<sup>13</sup> Section III identifies and explains the goals that an improved legal framework governing marriage should seek to further.<sup>14</sup> Section IV sets forth an innovative and comprehensive proposal for an improved legal framework governing marriage that is based upon the gradual accrual of spousal rights and obligations over the course of a marriage.<sup>15</sup> Finally,

---

<sup>12</sup> See *infra* Section I.

<sup>13</sup> See *infra* Section II.

<sup>14</sup> See *infra* Section III.

<sup>15</sup> See *infra* Section IV.

Section V explains how implementation of the proposal would further the goals identified in Section III and addresses the concerns most likely to arise with regard to the proposed framework.<sup>16</sup>

## I. MARRIAGE, DIVORCE, AND COHABITATION IN THE UNITED STATES TODAY: A BRIEF OVERVIEW

### A. *Marriage*

The place of marriage within the societal landscape of the United States has been in flux in recent decades, and its future has become unclear. The proportion of marital households in the United States has decreased significantly since 1950, when married couples made up 78% of all households.<sup>17</sup> In 2010, the Census Bureau reported that, for the first time ever, less than half of all United States households were marital households.<sup>18</sup> In addition, barely over half of all adults are currently married, which also represents an all-time low.<sup>19</sup> The decline in marriage is pervasive and is not confined to one group of individuals, as “[m]arriage rates have dropped among all major racial/ethnic groups and for both men and women.”<sup>20</sup> The percentage of households consisting of a married couple and their minor children has also declined significantly in recent years.<sup>21</sup> In 1970, 40% of all households consisted of married couples with minor children.<sup>22</sup> By 2012, that number had fallen to 20%.<sup>23</sup> Meanwhile, the percentage of births that occur outside of marriage has climbed to 41%.<sup>24</sup> Overall, marriage’s place within United States society has changed drastically in recent decades, and, perhaps unsurprisingly,

---

<sup>16</sup> See *infra* Section V.

<sup>17</sup> Sabrina Tavernise, *Married Couples Are No Longer a Majority, Census Finds*, N.Y. TIMES (May 26, 2011), <http://www.nytimes.com/2011/05/26/us/26marry.html>.

<sup>18</sup> Feinberg, *supra* note 7, at 59.

<sup>19</sup> *Id.*

<sup>20</sup> Diana Lavery & Mark Mather, *In U.S., Proportion Married at Lowest Recorded Levels*, POPULATION REFERENCE BUREAU (Sept. 2010), <http://www.prb.org/Articles/2010/usmarriage Decline.aspx>. However, there are significant class-based differences in the context of entering marriage, with the decline in marriage sharpest among low-income individuals. See Trevor Butterworth, *What’s Behind the US Decline in Marriage? Pragmatism*, FORBES (June 25, 2013), <http://www.forbes.com/sites/trevorbutterworth/2013/06/25/whats-behind-the-us-decline-in-marriage-pragmatism/>; PEW RESEARCH CTR., THE DECLINE OF MARRIAGE AND RISE OF NEW FAMILIES, at i (2010), <http://www.pewsocialtrends.org/2010/11/18/the-decline-of-marriage-and-rise-of-new-families/>.

<sup>21</sup> U.S. CENSUS BUREAU, PUB. NO. 20-570, AMERICA’S FAMILIES AND LIVING ARRANGEMENTS: 2012 1 (2013), <http://www.census.gov/prod/2013pubs/p20-570.pdf>.

<sup>22</sup> *Id.*

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

<sup>24</sup> Feinberg, *supra* note 7, at 59.

approximately four out of ten Americans currently espouse the belief that marriage is becoming obsolete.<sup>25</sup>

### B. Divorce

Despite the extensive changes to the overall marital landscape, the divorce rate has not changed significantly in recent years, consistently hovering somewhere between 40% and 50%.<sup>26</sup> There is significant diversity, however, with regard to the duration of marriages that are disrupted by divorce or legal separation. The median length of a first marriage is approximately eight years.<sup>27</sup> The rate of marital disruption is highest during the early years of marriage.<sup>28</sup> Approximately 20% of all first marriages will be disrupted by divorce or legal separation before five years have passed.<sup>29</sup> In terms of divorces and legal separations that occur after the fifth year of marriage, 13% of first marriages will be disrupted between the fifth and tenth years of marriage, 10% of first marriages will be disrupted between the tenth and fifteenth years of marriage, and 7% of first marriages will be disrupted at some point after the fifteenth year of marriage.<sup>30</sup> These numbers indicate that while the highest risk of marital disruption occurs during the early years of marriage, approximately 35% of all marital disruptions will occur after ten years of marriage have passed.<sup>31</sup> Moreover, with the average life expectancy continuing to rise, it is likely that the number of long-term marriages that end in divorce or legal separation will continue to increase.<sup>32</sup>

In addition to the diversity among marriages that end in divorce or legal separation with regard to relationship duration, there is also signifi-

---

<sup>25</sup> D'Vera Cohn, *Marriage Rate Declines and Marriage Age Rises*, PEW RES. CTR. (Dec. 14, 2011), <http://www.pewsocialtrends.org/2011/12/14/marriage-rate-declines-and-marriage-age-rises/>.

<sup>26</sup> Feinberg, *supra* note 7, at 59.

<sup>27</sup> ROSE M. KREIDER, U.S. CENSUS BUREAU, PUB. NO. 70-97, CURRENT POPULATION REPORTS: NUMBER, TIMING, AND DURATION OF MARRIAGES AND DIVORCES: 2001 9 (2005), <http://www.census.gov/prod/2005pubs/p70-97.pdf>. The median length of disrupted marriages before legal separation is seven years. *Id.*

<sup>28</sup> Alan J. Hawkins, *Will Legislation to Encourage Premarital Education Strengthen Marriage and Reduce Divorce?*, 9 J.L. & FAM. STUD. 79, 87–88 (2007).

<sup>29</sup> Catherine Bigelow, *Marriage, American-Style / The Modern Prenup: Who Gets Them and Who Needs Them*, SFGATE (Jan. 19, 2003), <http://www.sfgate.com/style/bigelow/article/Marriage-American-Style-The-modern-prenup-Who-2678711.php>.

<sup>30</sup> Katharine K. Baker, *The Problem with Unpaid Work*, 4 U. ST. THOMAS L.J. 599, 616 n.101 (2007) (citing CTRS. FOR DISEASE CONTROL & PREVENTION, ADVANCE DATA NO. 323, FIRST MARRIAGE DISSOLUTION, DIVORCE, AND REMARRIAGE: UNITED STATES 5 (2001), <http://www.cdc.gov/nchs/data/ad/ad323.pdf>).

<sup>31</sup> CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 30.

<sup>32</sup> Stephanie Chen, *Why Call It Quits After Decades of Marriage?*, CNN (June 2, 2010), <http://www.cnn.com/2010/LIVING/06/02/al.gore.separation.40years.marriage/index.html>.

cant diversity with regard to the existence of children within such marriages.<sup>33</sup> For example, it is estimated that approximately half of all divorces involve children who are under the age of 18.<sup>34</sup> This means that the remaining half of all divorces either occur before children are born to the marriage or after children born to the marriage reach the age of 18 (the latter situation presumably occurring far less often given that only 7% of first marriages dissolve after more than 15 years).<sup>35</sup> Thus, while the divorce rate has remained relatively consistent in recent years, the characteristics of dissolving marital relationships vary dramatically.

### C. Cohabitation

Accompanying the decline in marriage and the consistently high divorce rate in the United States in recent decades has been the substantial rise in non-marital cohabitation.<sup>36</sup> The number of cohabiting opposite-sex couples increased drastically between 1960 and 2000, rising from approximately 500,000 to almost 5,000,000.<sup>37</sup> Since 2000, the number of cohabiting couples has continued to rise, growing by almost 40% between 2000 and 2008, and by an additional 13% between 2008 and 2010.<sup>38</sup> It is currently estimated that there are approximately eight million cohabiting couples in the United States.<sup>39</sup> Moreover, researchers predict that the number of cohabiting couples will continue to increase.<sup>40</sup>

---

<sup>33</sup> Although researchers disagree with regard to the exact numbers, it is estimated that a substantial percentage of divorces are among childless couples. Vicki Larson, *Are Childless Couples Headed Toward Divorce?*, HUFFINGTON POST (Aug. 1, 2011), [http://www.huffingtonpost.com/vicki-larson/are-childfree-couples-doo\\_b\\_913051.html](http://www.huffingtonpost.com/vicki-larson/are-childfree-couples-doo_b_913051.html) (citing the statistic that “of the divorced couples in the United States, 66 percent are childless compared with 40 percent who have kids”); Molly J. Walker Wilson, *An Evolutionary Perspective on Male Domestic Violence: Practical and Policy Implications*, 32 AM. J. CRIM. L. 291, 315 (2005) (stating that of the four out of ten marriages that end in divorce, half of them will have produced children by the time of the divorce); Andrea Whatcott, *Childless Couples Still Divorce at a Much Higher Rate than Those with Children*, DESERET NEWS (Aug. 8, 2011), <http://www.deseretnews.com/article/700169249/Childless-couples-still-divorce-at-a-much-higher-rate-than-those-with-children.html> (“About 66 percent of American divorced couples are childless.”).

<sup>34</sup> Rebecca Love Kourlis, *It Is Just Good Business: The Case for Supporting Reform in Divorce Court*, 50 FAM. CT. REV. 549, 553 (2012).

<sup>35</sup> See CTRS. FOR DISEASE CONTROL & PREVENTION, *supra* note 30.

<sup>36</sup> Feinberg, *supra* note 7, at 59.

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

<sup>38</sup> *Id.*

<sup>39</sup> BRYAN STRONG, CHRISTINE DEVAULT, & THEODORE F. COHEN, *THE MARRIAGE AND FAMILY EXPERIENCE: INTIMATE RELATIONSHIPS IN A CHANGING SOCIETY* 77 (12th ed. 2014).

<sup>40</sup> Cynthia Grant Bowman, *Social Science and Legal Policy: The Case of Heterosexual Cohabitation*, 9 J.L. & FAM. STUD. 1, 34 (2007).

As the number of cohabiting couples continues to rise, the average length of cohabitation is increasing as well. The average length of time that an individual cohabited with a non-marital significant other was 13 months in 1995.<sup>41</sup> By 2006–2010, the average duration of cohabitation had risen to almost two years.<sup>42</sup> At the three-year mark of their cohabitation, 40% of cohabiting couples will have married, 27% of cohabiting couples will have dissolved their relationships, and 32% of cohabiting couples will still be cohabiting without having married.<sup>43</sup> With regard to the status of such relationships after five years, a 2013 report from the U.S. Department of Health and Human Services states that approximately one-half of the cohabitations had become marriages, approximately one third had dissolved, and the remaining cohabitations had remained intact.<sup>44</sup> These statistics support the Centers for Disease Control and Prevention’s observation that “[c]ohabitation [has become] a common part of family formation in the United States, and serves both as a step toward marriage and as an alternative to marriage.”<sup>45</sup>

In addition, cohabiting couples increasingly are having children. Research indicates that births to cohabiting couples account for the vast majority of the rise in non-marital births in recent years, as approximately one fourth of all births in the United States from 2008 to 2013 were to unmarried cohabiting couples.<sup>46</sup> Moreover, it has become significantly less common for the birth of a child to result in a cohabiting couple choosing to marry.<sup>47</sup> Less than 20% of cohabiting couples will marry within the first year following the birth of a child, a number that has decreased by over one-third since 1995.<sup>48</sup> The households of cohabiting

---

<sup>41</sup> Amanda Gardner, *More U.S. Couples Living Together Instead of Marrying*, CDC *Findings*, HEALTH DAY (Apr. 4, 2013), <http://consumer.healthday.com/public-health-information-30/centers-for-disease-control-news-120/more-u-s-couples-living-together-instead-of-marrying-cdc-finds-675096.html>.

<sup>42</sup> *Id.*

<sup>43</sup> The statistics are for women’s first premarital cohabitations during 2006–2010. CTRS. FOR DISEASE CONTROL & PREVENTION, NAT’L HEALTH STATISTICS REPORTS NO. 64, FIRST PREMARITAL COHABITATION IN THE UNITED STATES: 2006–2010 NATIONAL SURVEY OF FAMILY GROWTH 1 (2013) [hereinafter *PREMARITAL COHABITATION IN THE UNITED STATES*], <http://www.cdc.gov/nchs/data/nhsr/nhsr064.pdf>.

<sup>44</sup> *Id.* at 1, 5.

<sup>45</sup> *Id.* at 7.

<sup>46</sup> Brian Braiker, *CDC: More Babies Being Born to Unmarried Cohabiting Couples*, PARENTING (April 9, 2013), <http://www.parenting.com/blogs/show-and-tell/brian-braiker/co-habitation-wedlock> (“A full 23 percent of all births within the past five years have been to non-married cohabiting women.”); Glenn T. Stanton, *Marriage, Class, and Social Justice*, NAT’L REV. ONLINE (Mar. 6, 2012), <http://www.nationalreview.com/home-front/292530/marriage-class-and-social-justice/glenn-t-stanton> (“Nearly all the increase in unmarried child-bearing over the past ten years is from cohabiting mothers.”).

<sup>47</sup> *PREMARITAL COHABITATION IN THE UNITED STATES*, *supra* note 43, at 6.

<sup>48</sup> *Id.*

couples also often include children from the partners' previous relationships, with cohabiting households currently almost as likely to contain children as marital households.<sup>49</sup>

The rise in cohabitation has led to a number of significant consequences, and chief among them is the lack of legal protections currently accompanying many significant relationships. Unfortunately, under current law, couples who choose cohabitation instead of marriage are often left with few legal protections for their relationships. While the rights and obligations governing marriage number in the thousands and extend to almost every area of the law, very few of these rights and obligations attach to cohabiting relationships.<sup>50</sup> In addition, with regard to dissolution, the legal frameworks governing divorce and legal separation are not applicable to the dissolution of cohabiting relationships. Instead, cohabiting couples generally are left to bring claims arising from the relationship pursuant to contract law or various equitable principles, and in some jurisdictions even these limited remedies are unavailable.<sup>51</sup> Moreover, even in jurisdictions that are willing to recognize claims arising from the dissolution of cohabiting relationships, only written contracts, which cohabiting couples rarely enter into, provide any degree of predictability.<sup>52</sup> If there is no written contract, the result depends upon a "case-by-case determination of whether the court believes the parties' conduct during the relationship created an express or implied contract or gave rise to an equitable claim for relief, which has led to highly unpredictable results."<sup>53</sup> Regrettably, the decline in marriage and rise of cohabitation means that

---

<sup>49</sup> Feinberg, *supra* note 7, at 60.

<sup>50</sup> *Id.* at 74; *see also* Erez Aloni, *Registering Relationships*, 87 TUL. L. REV. 573, 587 (2013) ("Lack of legal recognition [for unmarried couples] also means denial of many benefits and rights that are bestowed by the state and granted by other third parties to a married couple during their relationship, ranging from tax exemptions to hospital visitation rights, immigration rights, parental presumption, and extension of health benefits."); Bowman, *supra* note 40, at 39 (explaining that "cohabitants have been offered very few rights"); Emily M. May, Note, *Should Moving In Mean Losing Out? Making a Case to Clarify the Legal Effect of Cohabitation on Alimony*, 62 DUKE L.J. 403, 421–22 (2012). "The extent to which the law otherwise protects unmarried cohabitants, however, is limited. There is no comprehensive law of cohabitation in the United States. In every American jurisdiction, unmarried cohabitants have fewer legal rights and duties than do married partners [and] the law generally does not recognize cohabitation as a legally significant status." *Id.*

<sup>51</sup> DOUGLAS E. ABRAMS ET AL., *CONTEMPORARY FAMILY LAW* 266–67 (3d ed. 2012); Patricia A. Cain, *Taxing Families Fairly*, 48 SANTA CLARA L. REV. 805, 832 (2008); Deborah A. Widiss, *Leveling Up After DOMA*, 89 IND. L.J. 43, 59 n.78 (2014).

<sup>52</sup> Feinberg, *supra* note 7, at 65.

<sup>53</sup> *Id.*; *see also* Aloni, *supra* note 50, at 590–91 ("Moreover, as is often the case in establishing the rights of unmarried couples, the judicial inquiry inevitably involves an 'intrusive examination into factors that qualify a relationship as "marital-like" . . ." (quoting CYNTHIA GRANT BOWMAN, *UNMARRIED COUPLES, LAW, AND PUBLIC POLICY* 57 (2010)).

significantly fewer individuals receive substantial rights and protections within their relationships.

## II. LIMITATIONS OF THE CURRENT LEGAL FRAMEWORK GOVERNING MARRIAGE

### A. *Consideration of Marriage Duration and the Presence of Children*

One factor that may have contributed to society's decreasing enthusiasm for marriage is that, despite the significant diversity that exists among marital relationships with regard to important characteristics such as the length of the marriage and the presence of children within the marriage, the legal frameworks governing intact and dissolving marriages fail to fairly, predictably, and effectively recognize and accommodate those differences. Instead, the package of legal rights and obligations accompanying intact marriages remains largely the same throughout the course of the marriage.<sup>54</sup> In addition, dissolving marriages within a given jurisdiction are, for the most part, subject to the same broad default rules for determining post-dissolution rights and obligations regardless of the particular characteristics of the marriages in question.<sup>55</sup>

#### 1. *Intact Marriages*

When it comes to the large package of legal rights and obligations accompanying intact marriages that arise from the spousal relationship, with very few exceptions these rights and protections remain the same over the course of the marriage regardless of the length of the marriage or the presence of children within the marriage. As soon as a person becomes lawfully married, he or she receives a wide variety of rights and obligations on the basis of his or her status as a spouse. The rights and protections accompanying intact marriages extend across almost every area of the law and relate to, among other things, taxes, property, testimonial privileges, support, debt liability, healthcare, immigration, Medicare, Social Security, family and medical leave, visitation, financial and health-related decision-making, and various claims in tort and contract.<sup>56</sup> When a child is born during the marriage, new rights and obligations arise between each parent and the child, but the presence of children generally does not change the intra-spousal rights and obligations governing the intact marriage.<sup>57</sup> Similarly, spousal rights and obligations governing intact marriages generally do not increase, decrease, or otherwise change

---

<sup>54</sup> See *infra* Section II.A.1.

<sup>55</sup> See *infra* Section II.A.2.

<sup>56</sup> Feinberg, *supra* note 7, at 74, 83; *Overview of Federal Benefits Granted to Married Couples*, HUM. RTS. CAMPAIGN, <http://www.hrc.org/resources/entry/an-overview-of-federal-rights-and-protections-granted-to-married-couples>.

<sup>57</sup> See *infra* note 69 and accompanying text.

as the marriage increases in length.<sup>58</sup> The vast majority of the rights and obligations accompanying intact marriages arise at the beginning of the marriage, are not conditioned on the marriage lasting a certain number of years, and do not disappear when the length of the marriage reaches a certain number of years.<sup>59</sup>

There are, however, a few exceptions to the general rule that the spousal rights and obligations governing intact marriages do not increase or decrease based upon the length of the marriage. These exceptions tend to arise mainly under federal law.<sup>60</sup> For example, one exception involves eligibility to collect Social Security retirement or Medicare benefits based upon a current spouse's earnings record, which is a right that does not come into existence until a couple has been married for at least one year.<sup>61</sup> Another exception arises in the context of federal immigration law. When a nonresident spouse receives the right to immigrate to the United States based upon his or her marriage to a U.S. resident, the length of the marriage determines the type of immigrant visa that the nonresident spouse will receive.<sup>62</sup> Nonresident spouses who have been married to U.S. residents for over two years at the time they enter the United States receive a permanent visa.<sup>63</sup> If the couple has been married for less than two years at the time the nonresident spouse enters the

---

<sup>58</sup> See, e.g., INTERNAL REVENUE SERV., U.S. DEP'T OF THE TREASURY, PUBLICATION 501, EXEMPTIONS, STANDARD DEDUCTION, AND FILING INFORMATION 6 (2014), <http://www.irs.gov/pub/irs-pdf/p51.pdf> (explaining that a person is eligible to file a joint federal tax return with his or her spouse as soon as he or she is recognized as married under state law); WAGE & HOUR DIV., U.S. DEP'T OF LABOR, FACT SHEET #28F, QUALIFYING REASONS FOR LEAVE UNDER THE FAMILY AND MEDICAL LEAVE ACT 2 (2015), <http://www.dol.gov/whd/regs/compliance/whdfs28f.htm> (explaining that leave under the Family and Medical Leave Act may be taken in order to care for a spouse, and defining a spouse as a "husband or wife as defined or recognized in the state where the individual was married and including individuals in a same-sex marriage or common law marriage"); Ashley E. Rathbun, *Marrying into Financial Abuse: A Solution to Protect the Elderly in California*, 47 SAN DIEGO L. REV. 227, 231–32 (2010) (explaining that as soon as an individual marries, his or her spouse receives power of attorney and healthcare proxy preferences under state statutes governing situations in which the individual has not executed any advance directives naming another person as his or her healthcare proxy or power of attorney).

<sup>59</sup> See Rathbun, *supra* note 58.

<sup>60</sup> See *infra* notes 61–66 and accompanying text.

<sup>61</sup> Christopher R. Tamborini & Kevin Whitman, *Women, Marriage, and Social Security Benefits Revisited*, SOC. SECURITY BULL., no. 4, 2007, at 1, 2, <http://www.ssa.gov/policy/docs/ssb/v67n4/67n4p1.html#mt6>; Medicare Rights Ctr., *Under What Conditions Would My Spouse's Work History Qualify Me for Premium-Free Part A?*, MEDICARE INTERACTIVE, [http://www.medicareinteractive.org/page2.php?topic=counselor&page=script&script\\_id=338](http://www.medicareinteractive.org/page2.php?topic=counselor&page=script&script_id=338).

<sup>62</sup> *Immigrant Visa for a Spouse of a U.S. Citizen (IR1 or CR1)*, U.S. DEP'T OF ST., <http://travel.state.gov/content/visas/english/immigrate/types/family/immediate-relative.html>.

<sup>63</sup> *Id.*

United States on an immigrant visa, however, the nonresident spouse receives only a “conditional visa.”<sup>64</sup> In order for the nonresident spouse to receive a permanent visa, the couple must jointly file an application proving the bona fides of their marriage within 90 days of the two-year anniversary of the nonresident spouse’s entry into the United States;<sup>65</sup> failure to complete the application can result in the nonresident spouse being deported.<sup>66</sup>

Aside from these rare exceptions, the vast majority of the hundreds of spousal rights and obligations that accompany intact marriages are provided to the spouses as soon as they receive a marriage license and remain the same throughout the duration of the intact marriage regardless of how long the marriage has been in existence or whether the couple has children. In terms of dissolving marriages, while the rights and obligations provided to spouses when marriages dissolve through divorce, legal separation, or the death of one of the spouses differ significantly from the rights and obligations that accompany intact marriages, the overall legal frameworks governing intact and dissolving marriages are similar in one important sense. Namely, as with the rights and obligations accompanying intact marriages, dissolution-related spousal rights and obligations generally do not automatically arise, increase, or decrease based upon the duration of the marriage or the presence of children within the marriage.

## 2. *Dissolving Marriages*

There are a number of spousal rights and obligations that arise from the dissolution of a marriage through either divorce or the death of one of the spouses. The major rights and obligations relate to, among other things, marital property, debt liability, spousal support, taxes, inheritance,<sup>67</sup> and eligibility for federal programs like Social Security and Medicare based upon a former spouse’s earnings record.<sup>68</sup> Although the birth or adoption of a child creates many rights and obligations between each spouse and the child both before and after marital dissolution, it generally does not alter spousal post-dissolution rights and obligations.<sup>69</sup> Similar-

---

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

<sup>65</sup> *Id.*; U.S. CITIZENSHIP & IMMIGRATION SERVS., POLICY MANUAL, vol. 12, pt. G, ch. 5 (2015), <http://www.uscis.gov/policymanual/Print/PolicyManual.html>.

<sup>66</sup> 8 U.S.C. § 1186a(c) (2012). If the marriage has ended prior to the filing of the application, the nonresident spouse is subject to removal from the country unless certain conditions are met. *Remove Conditions on Permanent Residence Based on Marriage*, U.S. CITIZENSHIP & IMMIGR. SERVS. (2015), <http://www.uscis.gov/green-card/after-green-card-granted/conditional-permanent-residence/remove-conditions-permanent-residence-based-marriage>.

<sup>67</sup> See generally ABRAMS ET AL., *supra* note 51.

<sup>68</sup> *Retirement Planner: Benefits For Your Divorced Spouse*, SOC. SECURITY ADMIN., <http://www.ssa.gov/retire2/yourdivspouse.htm>.

<sup>69</sup> While the presence of minor children means that the court must make

ly, the spousal rights and obligations that stem from dissolution generally do not automatically arise, increase, or decrease based upon the length of the marriage, and judicial intervention is required for all divorces regardless of the duration of the marriage or the presence of children.<sup>70</sup>

As in the context of intact marriages, however, in the post-dissolution context there are rare exceptions wherein either the length of marriage or the presence of children within the marriage is determinative of spousal rights and obligations.<sup>71</sup> These exceptions arise mainly under federal law.<sup>72</sup> For example, with regard to dissolutions that occur due to divorce, the length of the marriage is determinative of a divorced spouse's right to claim Medicare and Social Security retirement or survivor's benefits on the basis of an ex-spouse's earnings record.<sup>73</sup> In order to be eligible for such benefits, the individual seeking the benefits must have been married to the individual upon whose record he or she claims the benefits for at least ten years prior to the divorce.<sup>74</sup> With regard to dissolutions that occur due to the death of one of the spouses, to collect Social Security survivor's benefits following a spouse's death, a surviving spouse must have been married to the deceased individual for at least nine months.<sup>75</sup> In addition to the length of the marriage, the presence of

---

determinations regarding child support and child custody, these rights and obligations arise between each spouse and the children, not between the two spouses. More specifically, if there are minor children involved in the dissolution, the spouses will also receive rights and obligations relating to the custody, care, and financial support of their children. However, while the presence of children means that each spouse's rights with regard to the care, custody, and support of the children must be determined, the presence of children does not automatically alter the spouses' post-dissolution rights and obligations to each other. Although the spouse who does not receive primary physical custody of the child generally has to pay child support to the other spouse, that money ultimately is owed to the child and is to be used for the benefit of the child. Unlike spousal support, child support is not an obligation owed by one spouse to the other spouse. *See, e.g.,* *Stewart v. Stewart*, 287 S.E.2d 378, 379 (Ga. Ct. App. 1981) ("Child support is the right of the child and not of its custodian."); *Williams v. Williams*, 87 Cal. Rptr. 754, 756 (Ct. App. 1970) ("[T]he [support] obligation is due to the child . . . [and] the parent, to whom such support is paid, is but a mere conduit for the disbursement of that support."); *see also* Tia M. Young, Comment, *Removing the Veil, Uncovering the Truth: A Child's Right to Compel Disclosure of His Biological Father's Identity*, 53 *How. L.J.* 217, 228 (2009) ("Furthermore, child support is the *right* of the child, not the option or choice of the child's [custodial parent].").

<sup>70</sup> Feinberg, *supra* note 7, at 62.

<sup>71</sup> *See infra* notes 73–77 and accompanying text.

<sup>72</sup> The presence of children is determinative most commonly with regard to benefits a spouse is eligible for upon the death of the other spouse. *See infra* note 77 and accompanying text.

<sup>73</sup> SOC. SECURITY ADMIN., *supra* note 68; Medicare Rights Ctr., *supra* note 61.

<sup>74</sup> SOC. SECURITY ADMIN., *supra* note 68; Medicare Rights Ctr., *supra* note 61.

<sup>75</sup> SOC. SECURITY ADMIN., PROGRAM OPERATIONS SYSTEM MANUAL, § RS 00207.011 WIDOW(ER)'S BENEFIT DEFINITIONS AND REQUIREMENTS, <https://secure>.

children within the marriage is determinative of certain spousal rights in the context of Social Security survivor's benefits.<sup>76</sup> For example, the existence of minor children within the marriage may render inapplicable the aforementioned marriage-length requirements for a spouse or ex-spouse to collect Social Security survivor's benefits based upon the deceased individual's earnings record.<sup>77</sup>

While there are only a few post-dissolution spousal rights and obligations for which the length of the marriage or the presence of children within the marriage is determinative, these factors usually play at least some role in judicial decisions regarding two extremely important dissolution-related rights.<sup>78</sup> The distribution of marital property and the provision of spousal support upon divorce represent two of the most well-known and frequently litigated post-dissolution rights between spouses.<sup>79</sup> In most states, legal determinations regarding the distribution of marital property and the provision of spousal support upon divorce depend on a list of factors arising from statutes or common law,<sup>80</sup> and the duration of the marriage and the presence of children within the marriage are almost always among the factors provided for the court's consideration.<sup>81</sup>

More specifically, with regard to judicial determinations of spousal support, in addition to the statutory factors of the length of the marriage and the presence of a child whose care limits a spouse's employment potential, other factors set forth in the spousal-support statutes of a majority

---

ssa.gov/poms.nsf/lrx/0300207001; Mary Beth Franklin, *How Long Must Clients Be Married to Collect Social Security on Each Other? It Depends*, INV. NEWS: RETIREMENT 2.0 (Nov. 27, 2013), <http://www.investmentnews.com/article/20131127/BLOG05/131129912#>; Medicare Rights Ctr., *supra* note 61.

<sup>76</sup> See *infra* note 77 and accompanying text.

<sup>77</sup> *Survivors Planner: If You're the Worker's Surviving Divorced Spouse*, SOC. SECURITY ADMIN., <http://www.socialsecurity.gov/survivorplan/ifyou3.htm>; SOC. SECURITY ADMIN., *supra* note 68. There are a number of other benefits in the Social Security context for which length of marriage or presence of children plays a determinative role. For example, the number of credits a deceased individual must have earned in order for his spouse to receive survivor's benefits is less if the spouse is caring for the deceased's children. *Benefits Planner: Social Security Credits*, SOC. SECURITY ADMIN., <https://www.ssa.gov/planners/credits.html#&a0=3>. In addition, the portion of the estate to which a surviving spouse is entitled when an individual dies intestate is reduced in some states where the couple has adult children. See Mary Randolph, *How an Estate Is Settled If There's No Will: Intestate Succession*, NOLO, <http://www.nolo.com/legal-encyclopedia/how-estate-settled-if-theres-32442.html>.

<sup>78</sup> See *infra* notes 85–87 and accompanying text.

<sup>79</sup> See ABRAMS ET AL., *supra* note 51, at 470.

<sup>80</sup> Robert Kirkman Collins, *The Theory of Marital Residuals: Applying an Income Adjustment Calculus to the Enigma of Alimony*, 24 HARV. WOMEN'S L.J. 23, 32 (2001); David N. Hofstein, Scott J.G. Finger & Ellen Goldberg Weiner, *Update to Equitable Distribution in Large Marital Estate Cases*, 21 J. AM. ACAD. MATRIM. LAW. 439, 439–40 (2008).

<sup>81</sup> See *infra* notes 86–88 and accompanying text.

of states include the physical and mental health of each spouse; the needs of each spouse; the earning potential of each spouse; the ages of each spouse; the standard of living enjoyed during the marriage; the ability of the spouse from whom support is sought to pay; the property distributed as a result of the divorce; and the financial means and resources of each spouse.<sup>82</sup> Moreover, a few other factors are used by at least one-fourth of the states in making spousal-support determinations. These factors include, *inter alia*, marital fault; the contributions of one spouse to the career, education, or employment of the other spouse; and the effect that absence from the job market has had on a spouse's career-related prospects.<sup>83</sup>

With regard to property distribution, in addition to the factors of the length of the marriage and the custodial responsibility for the children of the marriage, the factors most commonly governing such decisions also include the age of each spouse; the mental and physical health of each spouse; the needs of each spouse; the earning potential of each spouse; the financial situation of each spouse; the standard of living during the marriage; and the contribution of each spouse to the acquisition, appreciation, or depreciation of marital property.<sup>84</sup> Other common factors that courts consider in making property-distribution determinations include marital fault; financial misconduct; the separate property owned by each spouse; the liquidity of the property subject to distribution; the contribution of one spouse to the earning power of the other spouse; the foregoing of employment, educational, or training opportunities by one spouse during the marriage; and any award of spousal support issued by the court.<sup>85</sup>

Unfortunately, while most marital-property distribution and spousal-support laws list as factors the length of the marriage<sup>86</sup> and the presence of children,<sup>87</sup> they are presented within an extensive, nonexhaustive list

---

<sup>82</sup> Collins, *supra* note 80, at 33–34.

<sup>83</sup> *Id.* at 34–35.

<sup>84</sup> Hofstein et al., *supra* note 80, at 441–43; David N. Hofstein, Ellen Goldberg Weiner, & Christopher Marrone, *Equitable Distribution in Large Marital Estate Cases*, 17 J. AM. ACAD. MATRIM. LAW. 307, 310–13 (2001).

<sup>85</sup> Hofstein et al., *supra* note 80, at 442–43, 445; Hofstein et al., *supra* note 84, at 312–13.

<sup>86</sup> Collins, *supra* note 80, at 33 (listing length of the marriage as one of the factors most commonly used in spousal-support statutes); Hofstein et al., *supra* note 80, at 442 (listing length of the marriage as one of the factors commonly used in property-distribution statutes).

<sup>87</sup> Collins, *supra* note 80, at 34 (listing “presence of a child in the home whose care precludes or limits employment” as one of the factors most commonly used in spousal-support statutes); Brett R. Turner, *State Statutes and Case Law Summaries*, 3 EQUIT. DISTRIB. OF PROPERTY 3D app. A (database updated 2014), Westlaw EQDP (surveying state property-distribution laws, many of which list the presence of children as a factor).

of factors for the court to consider, and there is no guarantee that these two factors will have any significant effect on the court's decision. Notably, the statutes are completely silent with regard to how the court should weigh each of the many factors listed, which leaves the court to use its discretion in considering an unwieldy list of diverse factors.<sup>88</sup> Current law therefore fails to ensure that the important factors of marriage duration and presence of children within the marriage are adequately considered in determining marital-property and spousal-support rights upon divorce.

*B. Criticisms of the Current Framework and the Corresponding State-Based Efforts to Address the Concerns Raised*

As detailed above, in the context of marriage there are few rights and obligations between spouses for which the objective and important factors of marriage duration or presence of children are determinative. Instead, these two important factors play either an unpredictable, tenuous role or no role at all with regard to many of the spousal rights and obligations that arise from marriage. This has contributed to the inconsistent, inefficient, unpredictable, and unfair results that often occur in legal disputes involving spousal rights and obligations.<sup>89</sup> Although the factors of marriage duration and presence of children play only limited roles both in the laws governing intact marriages and in the laws governing dissolving marriages, criticism has focused mainly on the laws governing dissolution, as this is the context in which legal claims involving spousal rights and obligations most often arise.<sup>90</sup> While this Article will not restate all the detailed criticisms advanced by legal scholars and commentators, it is important to understand the basic problems faced by the laws governing dissolution, as well as how the legal treatment of the

---

<sup>88</sup> Alicia Brokars Kelly, *Actualizing Intimate Partnership Theory*, 50 FAM. CT. REV. 258, 264 (2012) (“The ‘rule’ for alimony nationwide is that it is to be awarded in the court’s discretion based on consideration of a non-exhaustive list of factors, none of which are accorded any particular weight.”); Twila B. Larkin, *Guidelines for Alimony: The New Mexico Experiment*, 38 FAM. L.Q. 29, 38 (2004) (“While statutes enumerate specific factors for consideration in determining alimony, the statutes are uniformly silent as to the manner in which these factors should be utilized in calculating an award[, n]ot a single jurisdiction ranks the relative significance or weight of any statutory factor[, and n]o statute explains how a judge should apply the criteria listed.”) (footnotes omitted); Sarah E. Fette, Comment, *Learning from Our Mistakes: The Aftermath of the American Divorce Revolution as a Lesson in Law to the Republic of Ireland*, 7 IND. INT’L & COMP. L. REV. 391, 416 (1997) (explaining that under most state property distribution statutes “judges may base their decisions on any of the statutory factors which they personally deem important they may give a single factor . . . ‘disproportionate and dispositive weight.’” (quoting Cynthia Starnes, *Divorce and the Displaced Homemaker: A Discourse on Playing with Dolls, Partnership Buyouts and Dissociation Under No-Fault*, 60 U. CHI. L. REV. 67, 93 (1993))).

<sup>89</sup> See *infra* notes 99–105 and accompanying text.

<sup>90</sup> See *infra* notes 99–105 and accompanying text.

important factors of marriage duration and presence of children has contributed to these problems. The criticism has arisen in the context of vital post-dissolution rights such as the divorce-based rights of spousal support and property distribution, where objective factors like marriage duration and presence of children play only limited roles.<sup>91</sup> It has also arisen in the context of dissolution-related rights that involve no consideration of these factors, including, for example, certain inheritance-related spousal rights and rights relating to the process that must be undertaken in order to obtain a divorce.<sup>92</sup>

For some dissolution-related rights, marriage duration and presence of children are factors, but often play only tenuous, unpredictable roles. With regard to spousal support, which is often one of the most contentious divorce-related issues,<sup>93</sup> a common criticism set forth by legal commentators and scholars is that “[t]he broad discretion vested in judges to determine alimony eligibility and quantification, together with the absence of a theory to guide decision-making, has produced an alimony regime that is marked by unpredictability, uncertainty, and confusion.”<sup>94</sup> Critics assert that the rules governing spousal support, which simply provide a nonexhaustive, lengthy list of factors for judges to consider without indicating how the factors should be weighed or applied, essentially amount to an “anything goes” legal framework, leading to unfair and inconsistent decisions.<sup>95</sup> Critics have further stressed that judges may weigh the factors in any manner that they please, and “may give a single factor . . . ‘disproportionate and dispositive weight.’”<sup>96</sup> In recent years, the virtually unlimited discretion provided to judges has resulted in the provision of spousal-support awards in only 15% of divorce cases, with the awards often providing only a limited amount of support for a short time period.<sup>97</sup> The lack of predictability has also discouraged divorcing parties from settling their disputes, which results in a greater number of couples having to endure the financially and emotionally draining process of litigating these claims, and increased the clog in the court system.<sup>98</sup>

Similar criticisms regarding a lack of consistency, predictability, and fairness have been made by legal commentators and scholars with regard to the laws governing marital-property distribution upon divorce. As is the case with spousal support, judicial decisions regarding marital-

---

<sup>91</sup> See *infra* notes 99–105 and accompanying text.

<sup>92</sup> See *infra* notes 131–138 and accompanying text.

<sup>93</sup> Larkin, *supra* note 88, at 38.

<sup>94</sup> Cynthia Lee Starnes, *Alimony Theory*, 45 FAM. L.Q. 271, 271 (2011).

<sup>95</sup> Kelly, *supra* note 88, at 264; Larkin, *supra* note 88, at 38.

<sup>96</sup> Fette, *supra* note 88, at 416 (quoting Starnes, *supra* note 88, at 93).

<sup>97</sup> Kelly, *supra* note 88, at 264.

<sup>98</sup> Rachel Biscardi, *Dispelling Alimony Myths: The Continuing Need for Alimony and the Alimony Reform Act of 2011*, 36 W. NEW ENG. L. REV. 1, 20, 36 (2014); Kelly, *supra* note 88, at 264.

property distribution upon divorce generally are made through the consideration of a nonexhaustive list of factors, and the weight given to each factor is left to the discretion of the judge.<sup>99</sup> At the most, the statutes merely require that judges consider each of the factors listed.<sup>100</sup> Due to the use of this system in which “trial judges have virtually unfettered discretion in dividing assets, the financial fate of the economically disadvantaged party often depends on the goodwill or prejudice of a particular judge.”<sup>101</sup> The discretion judges have to “base their decisions on any of the statutory factors [that] they personally deem important”<sup>102</sup> has led to unfair and unpredictable results.<sup>103</sup> Unsurprisingly, research indicates that the lack of guidance and unfettered judicial discretion in this context have also resulted in judicial abuse, leading the majority of states to begin to investigate gender-based bias within their court systems.<sup>104</sup> Overall, divorce has been decried as one of, if not the most, “discretion-filled areas of law,” and this discretion is most apparent in the areas of spousal support and marital-property distribution.<sup>105</sup>

In an attempt to respond to these criticisms, a handful of states have undertaken legal reform in recent years to make dissolution-related spousal rights more predictable and consistent. Most of the reform has occurred in the spousal-support context, wherein a few states have created formulas and bright-line rules for determining spousal-support awards upon divorce. Within these formulas and rules, marriage duration serves as a determinative component.<sup>106</sup> It is important to note, however, that

---

<sup>99</sup> See Hofstein et al., *supra* note 80, at 439–41.

<sup>100</sup> *See id.*

<sup>101</sup> Fette, *supra* note 88, at 416.

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

<sup>103</sup> Katharine K. Baker, *Homogenous Rules for Heterogeneous Families: The Standardization of Family Law When There Is No Standard Family*, 2012 U. ILL. L. REV. 319, 364 (“[W]hat consistently distinguishes [equitable-distribution statutes] from their predecessors is not that they are more equitable, but that they are more unpredictable.” (quoting Mary Ann Glendon, *Family Law Reform in the 1980s*, 44 LA. L. REV. 1553, 1556 (1984))).

<sup>104</sup> Fette, *supra* note 88, at 416.

<sup>105</sup> L.J. Jackson, *Alimony Arithmetic: More States Are Looking at Formulas to Regulate Spousal Support*, A.B.A. J., Feb. 2012, at 15. Moreover, because trial-court decisions regarding the rights and obligations arising from divorce are generally reviewed by appellate courts under an abuse-of-discretion standard, it is very difficult for parties to successfully appeal such decisions. Collins, *supra* note 80, at 25 (“The general standard for appellate reversal of an alimony award from a trial court requires a finding of abuse of discretion, which renders the correction of idiosyncratic or inconsistent support awards all the more difficult.” (footnote omitted)); *see also* John C. Sheldon, *Anticipating the American Law Institute’s Principles of the Law of Family Dissolution*, ME. B.J., Jan. 1999, at 22 (“Marital property issues tend to be fact-intensive, and marital distribution statutes tend to be vague and to rely heavily on judicial discretion.”).

<sup>106</sup> *See infra* notes 107–110 and accompanying text.

these formulas and rules generally use marriage duration solely to restrict eligibility for spousal support and to limit the amount of time for which a person can receive spousal support. They generally do not employ marriage duration to create an entitlement or raise a presumption of entitlement to spousal support. For example, Maine restricts the types of alimony that can be granted for marriages lasting fewer than ten years and sets a rebuttable, maximum duration of half the length of the marriage for spousal-support awards granted for marriages lasting between 10 and 20 years.<sup>107</sup> Similar to the approach in Maine, Delaware imposes a maximum duration of half the length of the marriage for spousal-support awards for marriages lasting fewer than 20 years.<sup>108</sup> Under Utah law, an award of spousal support cannot be of a duration that is longer than the length of the marriage,<sup>109</sup> and Texas altogether prohibits spousal support for marriages lasting fewer than ten years.<sup>110</sup>

In another attempt to bring about more consistency, fairness, and predictability in the spousal-support context, the American Law Institute (“ALI”) has proposed a spousal-support formula that uses the length of the marriage as a determinative factor, but otherwise differs significantly from the formulas that have been adopted in states thus far.<sup>111</sup> Unlike the state-based formulas that use length of the marriage only to limit or deny support, the ALI’s proposed formula creates presumptions both in favor of and against the issuance of spousal support.<sup>112</sup> More specifically, the ALI proposal sets forth two types of spousal-support categories. The first type compensates a spouse who is married to someone with significantly greater earning capacity for the loss in the marital standard of living as a result of the dissolution.<sup>113</sup> The second type compensates a spouse for the loss to his or her earning capacity as a result of his or her performing a disproportionate share of childcare activities during the marriage.<sup>114</sup>

Under the ALI proposal, an individual is presumed to be entitled to an award if the marriage or caretaking lasted for a state-determined duration and there exists a state-determined degree of spousal-income disparity.<sup>115</sup> Where the presumption of entitlement arises, it can be overcome only if its application would yield a “substantial injustice.”<sup>116</sup> Similarly, an award may be made where no presumption of entitlement arises only if it

---

<sup>107</sup> ME. REV. STAT. ANN. tit. 19-A, § 951-A (2014).

<sup>108</sup> DEL. CODE ANN. tit. 13, § 1512(d) (2009).

<sup>109</sup> UTAH CODE ANN. § 30-3-5 (8j) (LexisNexis 2013).

<sup>110</sup> TEX. FAM. CODE ANN. § 8.051 (West 2005).

<sup>111</sup> See *supra* notes 107–110 and accompanying text.

<sup>112</sup> AM. LAW INST., PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 5.04–.05 (2002).

<sup>113</sup> *Id.* § 5.04.

<sup>114</sup> *Id.* § 5.05.

<sup>115</sup> *Id.* §§ 5.04–.05.

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

can be shown that the lack of an award will result in a substantial injustice.<sup>117</sup> To set the presumptive value of the award, the ALI proposes that states apply a state-specified percentage to the difference between the spouses' incomes that increases with the length of the marriage or period of primary caretaking responsibility.<sup>118</sup> With regard to determining the length of the spousal-support award, the ALI proposal uses a formula that multiplies the duration of the marriage or caretaking period by a state-determined percentage to create a presumptive length for the award.<sup>119</sup> This serves the purpose of ensuring not only that the duration of the award is not too lengthy, which is the sole purpose of many of the existing state-based formulas, but also that the duration of the award is not too short. A presumption of indefinite duration arises under the ALI proposal where the marriage has lasted a state-specified duration and the obligee is over a state-specified age.<sup>120</sup>

In addition to the criticism of the law governing rights such as spousal support and marital-property distribution, in which the factors of marriage duration and presence of children play only tenuous, unpredictable roles, other criticism has focused on dissolution-related rights that demonstrate a complete disregard for these important factors.<sup>121</sup> One example of this involves rights relating to the process that couples must undertake in order to dissolve their marriages.<sup>122</sup> Judicial involvement is required to obtain a divorce regardless of whether the marriage has lasted for 1 year or 50 years, and regardless of whether the couple has children.<sup>123</sup> To attain a divorce, generally, either one spouse must prove that the other spouse is at fault for the breakdown of the marriage, which can lead to lengthy, costly, and hostile judicial hearings. Or, a no-fault divorce can be sought, in which case the couple generally is subject to a

---

<sup>117</sup> *Id.* § 5.04.

<sup>118</sup> *Id.* §§ 5.04–.05.

<sup>119</sup> *Id.* § 5.06.

<sup>120</sup> *Id.*

<sup>121</sup> *See infra* notes 122–138.

<sup>122</sup> *See, e.g.,* Donald R. Collins, *A Legal Doctrine for the Starter Marriage*, 33 OKLA. CITY U. L. REV. 793, 794 (2008) (criticizing the current legal regime governing dissolution for requiring the same divorce process for short- and long-term marriages); Marsha Garrison, *Reforming Divorce: What's Needed and What's Not*, 27 PACE L. REV. 921, 941 (2007) (suggesting that instead of requiring the same divorce procedure for all couples, New York should adopt the summary-dissolution procedures of other states for short-term marriages with no children and limited assets in order to “reduce divorce delay, expense, and pain”); Lloyd Cutsumpas & B. Moses Vargas, Comment, *Summary Dissolution: Is Connecticut's Current System as Effective as It Should Be?*, 6 CONN. PUB. INT. L.J. 327, 328 (2007) (criticizing the current one-size-fits-all process for divorce and suggesting that “individuals who have been married for a minimal amount of time with limited assets and no children should only have to follow minimal procedures to get divorced”).

<sup>123</sup> *See* Feinberg, *supra* note 7, at 62 & n.159.

waiting period that can range from months to years, depending on the state.<sup>124</sup> Due to the mandatory nature of the requirements involved, divorce in this country can be a costly, time-consuming, and emotionally draining experience,<sup>125</sup> even for individuals involved in the shortest of marriages.

A minority of states have attempted to address the criticism of the one-size-fits-all divorce process through the implementation of summary-dissolution procedures as alternatives to their standard divorce procedures.<sup>126</sup> The presence of children and duration of the marriage are usually determinative of eligibility for the summary-dissolution procedures.<sup>127</sup> More specifically, common requirements for summary-dissolution eligibility are that the marriage has existed for less than a specified amount of time, that children are not involved, and that there are limited marital assets and debts.<sup>128</sup> Couples who qualify for summary dissolution are generally able to have their marriages dissolved by the court in a timelier manner, and without undergoing a judicial hearing.<sup>129</sup>

Another example of the law disregarding the length of the marriage in setting forth post-dissolution rights and obligations occurs within the context of inheritance rights following the death of one of the spouses.<sup>130</sup> In most states, when a spouse dies either without a will (“intestate”) or with a will that disinherits the surviving spouse, the portion of the decedent spouse’s estate that the surviving spouse receives is a set percentage determined by state law that does not in any way depend on the length of the marriage.<sup>131</sup> Critics have asserted that the failure to consider the

---

<sup>124</sup> See ABRAMS ET AL., *supra* note 51, at 425.

<sup>125</sup> See Jeffrey R. Baker, *The Failure and Promise of Common Law Equity in Domestic Abuse Cases*, 58 LOY. L. REV. 559, 586 (2012) (“[D]ivorce remains costly and time-consuming . . . .”); Richard Birke, *Mandating Mediation of Money: The Implications of Enlarging the Scope of Domestic Relations Mediation from Custody to Full Service*, 35 WILLAMETTE L. REV. 485, 492 (1999) (“Divorces are potentially expensive, time consuming, and emotionally draining to litigate.”); Paul Lermack, *The Constitution Is the Social Contract so It Must Be a Contract . . . Right? A Critique of Originalism as Interpretive Method*, 33 WM. MITCHELL L. REV. 1403, 1438 n.202 (2007) (“Even in no-fault American states, where divorces can be had on the simple statements of the parties that the marriage has broken down, the dissolution of a marriage, with the concomitant untangling of finances, duties, and family ties, becomes an expensive and time consuming process.”).

<sup>126</sup> See, e.g., CAL. FAM. CODE § 2400 (2015); COLO. REV. STAT. § 14-10-120.3 (2013); MINN. STAT. § 518.195 (2015); MONT. CODE ANN. § 40-4-130 (2013); NEV. REV. STAT. § 125.181 (2013); OR. REV. STAT. § 107.485 (2013).

<sup>127</sup> See statutes cited *supra* note 126.

<sup>128</sup> See statutes cited *supra* note 126.

<sup>129</sup> See, e.g., CAL. FAM. CODE §§ 2400–2403 (2015); COLO. REV. STAT. § 14-10-120.3 (2013); MINN. STAT. § 518.195 (2015); MONT. CODE ANN. § 40-4-130 (2013); NEV. REV. STAT. §§ 125.181–182 (2013); OR. REV. STAT. §§ 107.485–490 (2013).

<sup>130</sup> See *infra* notes 131–42 and accompanying text.

<sup>131</sup> See *infra* note 134 and accompanying text (discussing the minority of states

length of the marriage in determining the portion of the estate to which the surviving spouse is entitled leads to unfair results.<sup>132</sup> This criticism is based on the notion that the expectations and behaviors of spouses in short-term marriages differ significantly from the expectations and behaviors of spouses in long-term marriages, and that this should be reflected by the laws governing spousal-disinheritance issues.<sup>133</sup> To address this concern in the context of a surviving spouse's rights when he or she has been disinherited, a handful of states have adopted the Uniform Probate Code's elective-share proposal.<sup>134</sup> Under this approach, "the surviving spouse receives a variable portion of the augmented estate based on the length of the marriage,"<sup>135</sup> with the portion to which the surviving spouse is entitled increasing with marriage length.<sup>136</sup> If an individual dies intestate, however, the length of the marriage generally is not considered in determining the portion of the estate that the surviving spouse will re-

---

that make the percentage of the estate to which a disinherited spouse is entitled dependent on the length of the marriage); *see also Intestate Succession*, NOLO, <http://www.nolo.com/legal-encyclopedia/intestate-succession> (compiling each state's approach to intestate succession).

<sup>132</sup> *See, e.g.*, Thomas P. Gallanis & Josephine Gittler, *Family Caregiving and the Law of Succession: A Proposal*, 45 U. MICH. J.L. REFORM 761, 775 (2012) (describing the modern view that "[the] surviving spouse of a long-term marriage should receive a greater portion of the decedent's estate than the surviving spouse of a short-term marriage"); Lawrence W. Waggoner, *Spousal Rights in our Multiple-Marriage Society: The Revised Uniform Probate Code*, 26 REAL PROP. PROB. & TR. J. 683, 734-35, 742 (1992) (explaining why a system in which the elective-share percentage is based upon the length of the marriage will be superior to "conventional elective-share systems[, which] produce grossly inaccurate results in nearly every case").

<sup>133</sup> *See* Gallanis & Gittler, *supra* note 132, at 776 (describing the Uniform Probate Code's approach to the elective share). "[W]ith respect to a marriage lasting fifteen years or more, the UPC presumes that all (100 percent) of the property owned by either spouse will have been the fruit of their marital partnership, hence the UPC provides that the surviving spouse should get half of this (or 50 percent) as an elective share. With respect to a contrasting example of a marriage lasting less than a year, the UPC presumes that very little (only 3 percent) of the property owned by either spouse will have been the fruit of the marital partnership . . . ." *Id.*

<sup>134</sup> *See North Carolina Ties Surviving Spouses' Rights to the Length of the Marriage*, MCGUIREWOODS (Nov. 20, 2013), <http://www.mcguirewoods.com/Client-Resources/Alerts/2013/11/North-Carolina-Surviving-Spouses-Rights.aspx>. "Even though the Uniform Probate Code employs the sliding percentage scale, it is worth noting that only eight other states (Colorado, Hawaii, Minnesota, Montana, Oregon, South Dakota, Tennessee and West Virginia) have adopted this approach for their elective share statutes. . . . Thus, North Carolina joins a distinct minority of states with this aspect of its elective share law." *Id.*

<sup>135</sup> Laura A. Rosenbury, *Two Ways to End a Marriage: Death or Divorce*, 2005 UTAH L. REV. 1227, 1249 (2005).

<sup>136</sup> UNIF. PROB. CODE §§ 2-202, 2-203 (UNIF. LAW COMM'N 2014) (amended 2010) (stating that the surviving spouse is entitled to one-half of the "marital-property portion of the augmented estate," and using length of the marriage to determine what percentage of the augmented estate constitutes the marital-property portion).

ceive;<sup>137</sup> this is true even under the Uniform Probate Code's approach to intestate succession.<sup>138</sup>

While identifying and analyzing every spousal right and obligation for which marriage duration and presence of children are not dispositive is beyond the scope of this Article, this Section has highlighted some of the most problematic examples of spousal rights and obligations for which marriage duration, presence of children, or both play either tenuous roles or no role at all. Only a few states have taken concrete steps to remedy the substantial harm caused by the failure to consider these factors adequately in determining spousal rights and obligations, and thus significant problems continue to pervade the legal framework governing marriage. In order to craft an appropriate solution to these problems, it is necessary first to ascertain the specific goals of an improved legal regime governing marriage, and then to identify the types of legal reform that will further those goals.

### III. GOALS THAT A NEW LEGAL FRAMEWORK FOR MARRIAGE SHOULD AIM TO FURTHER

Despite all of the issues currently faced by the institution of marriage in the United States, it is clear that for the foreseeable future, marriage will remain as the primary legal status for adult-relationship recognition. Approximately 90% of middle-aged adults are married or have been married in the past, researchers predict that a similar percentage of women who are currently in their twenties or thirties will marry, and the vast majority of young adults plan to marry in the future.<sup>139</sup> Thus, while proposals aimed at eliminating marriage as a legal status and as a proxy for distributing rights and obligations are important,<sup>140</sup> it is equally important to consider how this institution, which is very unlikely to be eliminated anytime soon, can be improved to protect individuals more effectively. Similarly, proposals that focus on the promotion of legal statuses that function as alternatives to marriage are valuable.<sup>141</sup> Ideally, the greater availability of non-marital statuses and the improvement of the current legal framework governing marriage would work together to promote a better system of adult relationship recognition in the United States. The existence of such statuses as marriage alternatives, however, will not solve

---

<sup>137</sup> See NOLO, *supra* note 131 (providing every state's intestate-succession rules).

<sup>138</sup> UNIF. PROB. CODE §§ 2-101, 2-102 (2010).

<sup>139</sup> Marsha Garrison, *Reviving Marriage: Could We? Should We?*, 10 J.L. & FAM. STUD. 279, 284–85, 287 (2008).

<sup>140</sup> See, e.g., MARTHA ALBERTSON FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* 133–38 (2004) (advocating for the abolishment of civil marriage as a legal category).

<sup>141</sup> See, e.g., Aloni, *supra* note 50, at 586–91; WILLIAM N. ESKRIDGE, JR. & DARREN R. SPEDALE, *GAY MARRIAGE: FOR BETTER OR FOR WORSE?* 252–55 (2006).

all of the significant problems currently faced by the institution of marriage. Thus, it is essential that marriage is improved regardless of the future viability of non-marital statuses.

In order to effectively and comprehensively improve the institution of marriage in the United States, a new legal framework governing marriage should aim to accomplish a number of important underlying goals. An initial goal should be to provide more people with rights and protections for their relationships, something that has become a significant problem with the decline of marriage in recent years. In addition, an improved framework should seek to help couples determine whether marriage is the right choice for them, and should aim to filter well-suited relationships into the institution of marriage. Supporting and stabilizing intact marriages to the greatest extent possible, encouraging the continuation of healthy marriages, and facilitating the termination of unhealthy marriages are also essential goals. Finally, an improved legal framework should seek to provide more fairness and predictability in the context of the rights and obligations arising from the dissolution of both short- and long-term marriages.

*A. Protecting a Greater Number of Relationships, Helping Couples Determine if Marriage Is Right for Them, and Filtering Well-Suited Relationships into the Institution of Marriage*

With the declining marriage rate and increasing rate of non-marital cohabitation, a substantial number of individuals currently lack legal protections within their important relationships.<sup>142</sup> Not only is the number of cohabiting couples on the rise, but the average length of cohabitation is also increasing, resulting in individuals spending greater lengths of time in relationships that lack legal protections.<sup>143</sup> An important initial goal of a new legal framework governing marriage should be to encourage more individuals involved in significant cohabiting relationships to opt-in to receiving legal rights and protections for their relationships. Providing legal protections to relationships that would otherwise remain unprotected likely would result in greater stability within the relationships and more just outcomes for the individuals involved in such relationships in the event of dissolution.<sup>144</sup>

While providing legal protections to more relationships is an important goal in and of itself, the issues faced by the institution of marriage will not be solved by simply having more couples opt-in to it. The framework therefore needs to accomplish more than merely encouraging more couples to marry. Marriage will be strengthened only if couples

---

<sup>142</sup> See *supra* Section II.

<sup>143</sup> See *supra* notes 40–42 and accompanying text.

<sup>144</sup> See *supra* notes 50–53 and accompanying text (discussing the inadequate rights and protections applicable to the dissolution of cohabiting relationships).

who are truly ready and well-suited for marriage opt-in. It will not be strengthened by couples who are not ready or whose relationships are not well-suited for marriage nevertheless choosing to marry and then shortly thereafter undergoing messy and acrimonious divorce proceedings. As Professor Marsha Garrison has noted, “[b]ecause only low-conflict, enduring relationships offer significant personal benefits to adult partners and their children, only initiatives aimed at promoting this narrow category of marriages are justifiable.”<sup>145</sup> Consequently, efforts “that aim to promote marriage more broadly should be resisted.”<sup>146</sup>

In terms of determining whether a relationship is well-suited for marriage, as the consistently high divorce rate in this country demonstrates, it remains true that many individuals are unable to predict whether marriage is the right choice for their relationships. Moreover, it is clear that depending upon cohabitation alone to make such a determination is insufficient. While many couples view cohabitation as providing a trial run for marriage, and cohabitation likely filters out some portion of relationships that are not suitable for marriage,<sup>147</sup> it does not effectively filter out all such relationships.<sup>148</sup> Notably, couples who cohabit before marriage experience divorce rates roughly equal to couples who do not cohabit before marriage.<sup>149</sup> This is unsurprising—the legal consequences and societal expectations of marriage and cohabitation are wholly different.<sup>150</sup>

Considering that the highest rate of divorce occurs during the early years of marriage and that premarital cohabitation does not significantly lessen the probability of divorce,<sup>151</sup> it seems that to truly be able to determine whether marriage is suitable for their relationships, couples need to actually experience at least some of the legal consequences and societal expectations that accompany marriage. Thus, while providing rights to more relationships, the legal framework governing marriage also needs to reflect and provide for the fact that many couples do not know whether marriage is right for them until they try it. In this regard, an improved legal framework governing marriage should facilitate couples’ evaluations of their relationships by providing a trial period during which cou-

---

<sup>145</sup> Garrison, *supra* note 139, at 314.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 301 (“[T]he rise of cohabitation may have further reduced the number of conflicted marriages by eliminating them before marriage takes place.”).

<sup>148</sup> See *infra* note 149 and accompanying text.

<sup>149</sup> Taryn Hillin, *New Research Says Living Together Before Marriage Doesn’t Lead To Divorce*, THE HUFFINGTON POST (Mar. 11, 2014), [http://www.huffingtonpost.com/2014/03/11/divorce-cohabitation-stud\\_n\\_4936928.html](http://www.huffingtonpost.com/2014/03/11/divorce-cohabitation-stud_n_4936928.html); Stephanie Pappas, *Cohabitation Doesn’t Cause Divorce After All*, FOX NEWS (Mar. 10, 2014), <http://www.foxnews.com/health/2014/03/10/cohabitation-doesnt-cause-divorce-after-all/>.

<sup>150</sup> See *supra* notes 50–53 and accompanying text.

<sup>151</sup> See *supra* notes 28–30 and accompanying text.

ples can experience some of the legal and societal consequences of marriage. In addition, the framework should provide a fair, simple, and efficient exit process for those couples who determine during the trial period that marriage is not right for them, so that such couples may be filtered out of the institution of marriage prior to undergoing significant financial and familial entanglement. The availability of this type of exit process, which explicitly acknowledges the difficulty of determining whether a relationship is suitable for marriage prior to entering the institution, ideally will have the added benefit of allowing couples to avoid the hostility, blame, and stigma that often accompany early marital dissolution.<sup>152</sup> A system that succeeds in filtering well-suited relationships into marriage, and poorly-suited relationships out of marriage before significant entanglement occurs, will undoubtedly improve the institution of marriage.

*B. Providing Relevant Rights to Intact Marriages, Encouraging the Continuation of Low-Conflict Marriages, and Facilitating the Termination of Unhealthy Marriages*

Beyond granting important protections to relationships that otherwise would remain unprotected and performing an initial filtering function, an improved legal framework governing marriage should aim to provide more relevant support to the relationships that remain within the institution after the trial period. It also should encourage the continuation of healthy, low-conflict marriages and facilitate the termination of the portion of marriages that inevitably will become unhealthy despite the support provided by the legal framework. In order to provide more relevant rights and protections to intact marriages, the framework governing intact marriages must depart from its current one-size-fits-all approach. More specifically, an improved framework should provide rights and obligations that adjust over the course of the marriage to better reflect and support the spouses' current situation. This would result in marriage serving a more useful function throughout the course of the marital relationship. Couples should also be provided with greater flexibility and autonomy to structure their ongoing marriages in the manner that is best for them, based upon the unique circumstances of their relationships.

Encouraging the continuation of low-conflict marriages and facilitating the termination of unhealthy marriages are also essential goals. Marriage advocates often claim that marriage is important because it improves the well-being of individuals in our society.<sup>153</sup> These advocates

---

<sup>152</sup> For a discussion of the feelings of shame and stigma that often accompany early marital dissolution, see PAMELA PAUL, *THE STARTER MARRIAGE AND THE FUTURE OF MATRIMONY* (2002).

<sup>153</sup> See, e.g., LINDA J. WAITE & MAGGIE GALLAGHER, *THE CASE FOR MARRIAGE*

frequently tout the physical, mental, and financial benefits that accompany marriage, both for the spouses and for their children.<sup>154</sup> It is important to understand, however, that the benefits of marriage to spouses and their children are directly dependent upon the quality of the marital relationship.<sup>155</sup> Low-conflict marriages are “associated with significant health, wealth, and happiness benefits for adult marriage partners and, to an even greater extent, their children.”<sup>156</sup> High-conflict marriages, however, have quite different effects on the well-being of the spouses and their children.<sup>157</sup> Marriages which involve significant discord and stress are associated with negative health results for the spouses.<sup>158</sup> Not only do high-conflict marriages have negative health effects for the spouses, but such marriages are also often severely detrimental to the children involved.<sup>159</sup> More specifically, “researchers have found that the continuation of a high-conflict marriage is *negatively* associated with children’s health and happiness, just as it is for adults; indeed, longitudinal surveys show that ‘parents’ marital unhappiness and discord have a broad negative impact on virtually every dimension of offspring well-being.”<sup>160</sup>

Thus, while it is important that the legal framework governing marriage initially filters well-suited relationships into the institution,<sup>161</sup> it is equally important that the framework provides the type of support that will give those marriages the best chance of remaining low-conflict. Healthy marriages should be encouraged and celebrated by the legal framework governing marriage, and the specific rights and protections provided under the framework should reflect the strong commitment to supporting and maintaining healthy, low-conflict relationships. In addition, the legal framework should encourage couples to communicate about and evaluate their marriages frequently, so that core relationship problems can be identified and addressed in a timely manner. Acknowledging that there are limits, however, to a legal framework’s ability to maintain healthy spousal relationships is also essential.

---

(2001).

<sup>154</sup> *See id.*

<sup>155</sup> Garrison, *supra* note 139, at 313.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 300–01. “Researchers have thus consistently charted negative health effects associated with marital discord and stress. Accordingly, the health and well-being benefits associated with marriage make a case only for low-conflict marriage.” *Id.* (footnote omitted).

<sup>158</sup> *Id.*

<sup>159</sup> *See id.* at 307.

<sup>160</sup> *Id.* (quoting PAUL R. AMATO & ALAN BOOTH, A GENERATION AT RISK: GROWING UP IN AN ERA OF FAMILY UPHEAVAL 219 (1997)).

<sup>161</sup> Garrison, *supra* note 139, at 310–11 (“[T]o provide lasting benefits to children, state policy must succeed not just in encouraging parents to marry, but also to marry well and stay married.”).

Inevitably, some relationships will deteriorate despite a marriage-supportive legal framework. Individuals and situations undoubtedly change over the years, and love is a complex and incompletely understood human emotion.<sup>162</sup> A legal framework that does not explicitly acknowledge this reality and instead blindly attempts to encourage all marriages to remain ongoing does not protect the well-being of those involved in the institution of marriage.<sup>163</sup> As mentioned above, to promote the well-being of families, the framework should encourage the evaluation of marriages by the parties involved. This will aid individuals in recognizing when their marriages are unhealthy and allow them to react accordingly by taking steps to improve or, if that is not possible, end the marriage. While it has been established that marital dissolution is associated with some negative consequences for the children involved, living within a high-conflict marriage is associated with even greater negative effects for children.<sup>164</sup> Accordingly, there will be instances in which ending the marriage is in the best interests of the spouses and their children, and an optimal legal framework should facilitate dissolution in such situations.<sup>165</sup> In addition, it is important that the laws governing marital dissolution are reformed to provide more fairness, consistency, and predictability so that the law is not responsible for dissuading individuals in high-conflict marriages from seeking dissolution.

### C. *Protecting Marital Expectations at Dissolution*

As long as there is marriage, there will also be marital dissolution. Unfortunately, the current laws governing marital dissolution face significant problems relating to fairness, efficiency, consistency, and predictability.<sup>166</sup> These problems not only affect the individuals who undergo the dissolution process, but they also affect overall societal views of marriage. The issues pervading the current laws governing dissolution cast marriage in a negative light and likely contribute to the current societal discomfort and uncertainty with regard to the institution of marriage.<sup>167</sup> The lack of fairness, efficiency, predictability, and consistency in the dissolution context has resulted in marriage becoming a very high-risk undertaking, which has likely deterred a significant number of people from marrying.

---

<sup>162</sup> This complexity is reflected by the consistently high divorce rate in the United States. *See supra* note 11 and accompanying text.

<sup>163</sup> *See supra* notes 157–160 and accompanying text.

<sup>164</sup> Garrison, *supra* note 139, at 307.

<sup>165</sup> *Id.* at 314 (“Indeed, for high-conflict relationships, the data suggest that government policy should aim at discouraging marriage and facilitating divorce.”).

<sup>166</sup> *See supra* Section II.B.

<sup>167</sup> *See supra* note 25 and accompanying text.

The people most directly affected by the problematic laws governing dissolution, however, are those who actually experience marital dissolution. The law must do a better job of protecting these individuals. In terms of fairness, it is important that the new legal framework governing marriage departs from the existing framework in that it does not provide one set of broad default rules to govern all marital dissolutions. For example, a 50-year marriage in which three children were raised should not be subject to the same set of broad default rules as a 3-year marriage that does not involve children. As noted above, marriages that end in divorce vary significantly in terms of length and presence of children.<sup>168</sup> A new framework should aim to more effectively protect the differing expectations involved in marriages marked by significantly different objective characteristics. In addition to changing the substantive rules governing the rights and obligations arising from dissolution, to accommodate the vastly different types of marriages undergoing dissolution more fairly and efficiently, the procedure involved in obtaining a marital dissolution should be changed to depart from its current one-size-fits-all model.<sup>169</sup>

In terms of predictability and consistency, it is important that the new framework removes the unbridled discretion that judges currently have with regard to important post-dissolution rights, such as spousal support and property distribution.<sup>170</sup> Instead, the law should employ clear rules and presumptions and should grant post-dissolution rights and obligations based upon important and easily identifiable, objective factors. This clarity would provide married individuals with a better understanding of their spousal rights and obligations; it would also mean that spouses could rely upon the availability of such rights and obligations in the event of dissolution. In addition to leading to more just and consistent outcomes in the dissolution context, this would allow individuals to make more informed decisions regarding their marital conduct and would encourage couples to settle their dissolution-related disputes, thereby avoiding the financial and emotional costs of litigation. While providing greater fairness, efficiency, consistency, and predictability in the dissolution context will require significant changes to current law, it is an essential component of an improved legal framework governing marriage.

#### IV. GRADUAL MARRIAGE: A PROPOSAL FOR AN IMPROVED LEGAL FRAMEWORK GOVERNING MARRIAGE

To most effectively further the goals identified above, an improved legal framework governing marriage should be based upon the underlying concept of marriage as a gradual, not immediate, accrual of rights

---

<sup>168</sup> See *supra* Section II.A.2.

<sup>169</sup> See *supra* notes 122–125 and accompanying text (discussing the divorce process).

<sup>170</sup> See *supra* Section II.A.2.

and obligations between spouses. That is, a marriage should not be governed by the same broad set of default rules on day 10 of the marriage as it is on day 10,000 of the marriage. This Article proposes that the legal framework governing marriage should identify multiple levels of marriage, and the rights and obligations governing marriage should differ depending on the level of the marriage. The first marriage level would provide spouses with the opportunity to determine whether marriage is right for their relationship in a low-risk, supportive setting.<sup>171</sup> Additional marriage levels would gradually provide spouses with greater rights and obligations.<sup>172</sup> The rights and obligations arising at each level would be clear. In addition, judicial discretion in altering the rights and obligations would be limited, leading to increased fairness, predictability, and consistency within the legal framework governing marriage.

Ascension among marriage levels would be based primarily upon two important criteria: the length of the marriage and the presence of children within the marriage. These two criteria represent easily measurable, objective considerations that serve as strong indicators of the general types of expectations within marriage.<sup>173</sup> Recognizing that all marriages are unique, however, and that there will be marriages in which expectations differ from that which would generally be expected based upon the length of marriage and presence of children, the default rules at each level would be constructed primarily as strong presumptions as opposed to inflexible rules mandated for every marriage. Moreover, couples would be encouraged to evaluate their relationships at each level and have the flexibility to opt-out of the default level applicable to their relationship if they determined that the level was ill-suited at that time for their particular relationship.

In setting forth the details of this proposal, this Section will proceed as follows. It will first explain why the duration of the marriage and the presence of children within the marriage should be the primary determinants for the various marriage levels.<sup>174</sup> It will then identify the structure and substance of the first marriage level (“level one”) under the proposed framework.<sup>175</sup> It will conclude by discussing the structure and substance of the additional marriage levels as well as the manner through which couples would ascend among the levels under the proposed framework.<sup>176</sup> The proposal set forth here aims to serve as a starting point for wider discussion and exploration of how the legal framework govern-

---

<sup>171</sup> See *infra* Section IV.B.

<sup>172</sup> See *infra* Section IV.C.

<sup>173</sup> See *infra* Section IV.A.

<sup>174</sup> See *infra* Section IV.A.

<sup>175</sup> See *infra* Section IV.B.

<sup>176</sup> See *infra* Section IV.C.

ing marriage could be reformed to serve spouses and their families better, both during and after marriage.

*A. Marriage Duration and Existence of Children as Primary Determinants of Levels*

The differing marriage levels under the proposed legal framework will depend primarily upon the length of the marriage and the presence of children within the marriage. More specifically, marriages will ascend to higher levels at set intervals as the marriages increase in duration. In addition, the presence of children within the marriage, whenever this first occurs, will result in the marriage rising by one additional level, regardless of the current marriage level. There are a number of reasons supporting the proposed system's use of the length of the marriage and presence of children as the primary factors for determining marriage levels, as these factors are extremely relevant considerations with regard to the conduct and expectations of most married individuals.<sup>177</sup>

In terms of marriage length, generally the greater the duration of the marriage, the more decisions that will have been made jointly by the spouses and the more conduct that will have been undertaken by the spouses based upon the well-being of the family unit as opposed to the individual well-being of the spouses.<sup>178</sup> Decisions, both small and large, are made by the spouses each day, and the "myriad of small and large decisions over time and daily practice come together to create a shared life."<sup>179</sup> Importantly, research demonstrates that "[a] part of a life together, spouses share money; allocate market and care labor; and share financial decisions about production, investment, and consumption."<sup>180</sup> It is only logical that as the duration of the marriage increases, these types of behaviors between the spouses will grow both in number and significance.

More specifically, with regard to economic behaviors, the vast majority of married couples merge their finances completely.<sup>181</sup> In fact, only 17% of married couples keep their finances separate to any degree.<sup>182</sup> Researchers have explained that within marriage, "broadly sharing financial

---

<sup>177</sup> See *infra* notes 178–208 and accompanying text.

<sup>178</sup> Alicia Brokars Kelly, *Money Matters in Marriage: Unmasking Interdependence in Ongoing Spousal Economic Relations*, 47 U. LOUISVILLE L. REV. 113, 124 (2008) ("Together, spouses decide how to accommodate many interests and variables, commonly focusing on the welfare of the family as a whole, not singularly on its individual members.").

<sup>179</sup> *Id.*

<sup>180</sup> Alicia Brokars Kelly, *Better Equity for Elders: Basing Couples' Economic Relations Law on Sharing and Caring*, 21 TEMP. POL. & C.R. L. REV. 387, 395 (2012).

<sup>181</sup> Alicia Brokars Kelly, *Navigating Gender in Modern Intimate Partnership Law*, 14 J.L. & FAM. STUD. 1, 22 (2012).

<sup>182</sup> *Id.*

resources is an entrenched social norm and . . . this behavioral standard is so strong that a hesitance to share money is often interpreted as a lack of commitment to the relationship and a violation of mutual trust thought essential in marriage.”<sup>183</sup> Married couples generally associate the merging of their finances “with equality and fairness, with a belief in the longevity of the relationship, and [with] a . . . ‘togetherness’ seen as vital in the relationship.”<sup>184</sup> As a result of these characteristics, for most married couples, as the years of marriage increase, so too does the overall amount of finances that will have been merged between the spouses.

In addition to merging their finances, spouses tend to make joint decisions and to base their conduct upon the welfare of the family unit, as opposed to their individual welfare.<sup>185</sup> Some of the most consequential decisions married couples make together relate to each spouse’s responsibilities within and outside the home. Within marriage, “spouses typically engage in a myriad of exchanges—economical and psychological—sharing labor (in and out of the market) and leisure.”<sup>186</sup> Frequently, one spouse, most often the wife in opposite-sex marriages, will take on more of the unpaid domestic obligations, freeing the other spouse to spend more time engaging in paid work.<sup>187</sup> In taking these steps, “spouses contribute capital and labor to the marital partnership in the expectation that their mutual contributions will generate shared value.”<sup>188</sup> Along with taking on more of the domestic work, research indicates that married women are more likely than cohabiting women to make career sacrifices to support their spouses’ careers.<sup>189</sup> The result of the spouses’ decisions with regard to the allotment of labor within marriage is that the earning capacity of the spouse who takes on a greater domestic role is decreased, while the earning capacity of the other spouse is increased.<sup>190</sup> This in-

---

<sup>183</sup> Kelly, *supra* note 178, at 122.

<sup>184</sup> *Id.* at 134 (quoting Charlott Nyman & Sandra Dema, *An Overview: Research on Couples and Money*, in MODERN COUPLES SHARING MONEY, SHARING LIFE 7, 16 (Janet Stocks et al. eds., 2007)).

<sup>185</sup> *Id.* at 124 (“Together, spouses decide how to accommodate many interests and variables, commonly focusing on the welfare of the family as a whole, not singularly on its individual members.”); Alicia Brokars Kelly, *Explaining Intuitions: Relating Mergers, Contributions, and Loss in the ALI Principles of the Law of Family Dissolution*, 8 DUKE J. GENDER L. & POL’Y 185, 194 (2001) (“The decision making process changes within marriage: it is no longer a simple question of whether a contemplated choice will be good (or bad) for the individual, but instead whether a decision will result in a benefit (or harm) for the two of them together.”).

<sup>186</sup> Kelly, *supra* note 185, at 193.

<sup>187</sup> Kelly, *supra* note 180, at 395.

<sup>188</sup> Cynthia Lee Starnes, *Mothers as Suckers: Pity, Partnership, and Divorce Discourse*, 90 IOWA L. REV. 1513, 1543 (2005).

<sup>189</sup> Margaret F. Brinig, *The Influence of Marvin v. Marvin on Housework During Marriage*, 76 NOTRE DAME L. REV. 1311, 1317 (2001).

<sup>190</sup> Starnes, *supra* note 188, at 1515–16.

crease in the earning capacity of one spouse and decrease in earning capacity of the other spouse generally becomes greater with each passing year of marriage.<sup>191</sup> Thus, as one scholar has explained, within marriage the “reallocation of loss is proportional to the length of the marriage in part because [the spouse who takes on more domestic obligation’s] sense of financial loss itself increases with marital duration.”<sup>192</sup> Overall, “the longer spouses are married, the more their human capital is intertwined.”<sup>193</sup>

The presence of children is also an essential consideration in the context of many of the important rights and obligations that arise from marriage. The presence of children in a marriage typically results in one of the spouses making career-related sacrifices in order to devote more time to childrearing.<sup>194</sup> In opposite-sex marriages, the person making career- or employment-related sacrifices for the welfare of the family unit is most often, but not always, the wife.<sup>195</sup> Married mothers are significantly more likely than cohabiting mothers to make career sacrifices to care for their children.<sup>196</sup> Moreover, research indicates that among married mothers who have a child under the age of one, slightly over half do not engage in any paid work outside the home.<sup>197</sup> Among married mothers with children under the age of six, approximately 40% do not engage in any paid work outside the home.<sup>198</sup> Strikingly, while over half of women have left the workforce at least once for reasons relating to caring for

---

<sup>191</sup> Ira Mark Ellman, *The Theory of Alimony*, 77 CALIF. L. REV. 1, 75 (1989) (“Where the wife’s claim is based on a loss in earning capacity arising from her performance of domestic obligations, the amount of her loss will typically increase with the length of the marriage.”).

<sup>192</sup> Kelly, *supra* note 185, at 192.

<sup>193</sup> *Id.* at 197.

<sup>194</sup> Pamela Laufer-Ukeles, *Selective Recognition of Gender Difference in the Law: Revaluing the Caretaker Role*, 31 HARV. J.L. & GENDER 1, 2 (2008). “In the typical family comprising a married couple and children, one spouse modifies her potential for income in the workplace in order to care for those children, either partially or entirely, by leaving the workplace altogether. In the vast majority of cases, that parent is the mother.” *Id.*

<sup>195</sup> *Id.*; see also SUZANNE M. BIANCHI, JOHN P. ROBINSON & MELISSA A. MILKIE, CHANGING RHYTHMS OF AMERICAN FAMILY LIFE 13 (2006) (“[I]t remains most common for couples to follow what is termed a neo-traditional model—with a wife’s career and labor force participation taking a backseat to a husband’s career advancement, especially when children are young.”).

<sup>196</sup> Brinig, *supra* note 189, at 1317.

<sup>197</sup> Suzanne M. Bianchi, *Family Change and Time Allocation in American Families*, 638 ANNALS AM. ACAD. POL. & SOC. SCI. 21, 34 (2011) (“[O]nly 46 percent of married mothers with a child under age one report any paid work hours . . .”).

<sup>198</sup> U.S. DEP’T OF LAB., BUREAU OF LAB. STATS., USDL 05-876, EMPLOYMENT CHARACTERISTICS OF FAMILIES IN 2004, tbl. 4 (2005), [http://www.bls.gov/news.release/archives/famee\\_06092005.pdf](http://www.bls.gov/news.release/archives/famee_06092005.pdf).

members of their families, only 1% of men have done the same.<sup>199</sup> Leaving the workforce, even if only for a few years while children are young, can have significant effects on a spouse's future earning capacity.<sup>200</sup> Research indicates that women who exit the workforce for only two to three years, which seems at first glance to be a very brief period of time, suffer a 30% decrease in lifetime earnings.<sup>201</sup> Notably, the labor-force participation rate (the percent of the population working or looking for work) is higher for unmarried mothers than married mothers.<sup>202</sup>

Even in situations where neither spouse leaves the workforce completely to care for children, it is common for one of the spouses to reduce his or her workforce participation to a part-time basis or make other career-related sacrifices to devote more time to the care of the children.<sup>203</sup> Again, this is usually, but not always, the wife in opposite-sex marriages.<sup>204</sup> This, too, has significant negative effects on the caretaking spouse's long-term earning capacity.<sup>205</sup> Overall, research indicates that "the more likely a woman is to have dependent children and be married, the more likely she is to be a low earner and have fewer hours in the labor market [while t]he opposite holds for men: marriage and dependent children make it much more likely that a man has higher earnings and works longer hours."<sup>206</sup>

In summary, the length of the marriage and the presence of children are essential, highly relevant factors to understanding spousal expectations and behaviors and determining the spousal rights and obligations that should arise from marriage. In addition, these factors have the added advantage of being both objective and easily measurable. Indeed, as one scholar has noted, "duration is the only standard related to a mar-

---

<sup>199</sup> Angie K. Young, *Assessing the Family and Medical Leave Act in Terms of Gender Equality, Work/Family Balance, and the Needs of Children*, 5 MICH. J. GENDER & L. 113, 115–16 (1998).

<sup>200</sup> See Kelly, *supra* note 181, at 27.

<sup>201</sup> *Id.*

<sup>202</sup> U.S. DEP'T OF LAB., BUREAU OF LAB. STATS., USDL 15-0689, EMPLOYMENT CHARACTERISTICS OF FAMILIES—2014, at 2 (2015), [http://www.bls.gov/news.release/archives/famee\\_04232015.pdf](http://www.bls.gov/news.release/archives/famee_04232015.pdf).

<sup>203</sup> Laufer-Ukeles, *supra* note 194, at 31–32 ("In a typical marital relationship in which children are raised, the wife chooses to work a modified schedule and care for her children at least part-time, therefore earning a reduced income.").

<sup>204</sup> See JANET C. GORNICK & MARCIA K. MEYERS, FAMILIES THAT WORK 8 (2003) ("Many mothers engage in various forms of underemployment, opting for jobs that demand less of them than their skills would otherwise warrant or working part-time or intermittently (or both)."); Bianchi, *supra* note 197, at 21 ("Mothers continue to scale back paid work to meet childrearing demands.").

<sup>205</sup> See Bianchi, *supra* note 197, at 41; Starnes, *supra* note 188, at 1516.

<sup>206</sup> INST. FOR WOMEN'S POL'Y RESEARCH, RESEARCH-IN-BRIEF: *Still a Man's Labor Market: The Long-Term Earnings Gap* (2008), <http://www.iwpr.org/publications/pubs/still-a-mans-labor-market-the-long-term-earnings-gap>.

riage that requires no discussion, negotiation, or interpretation for its application.”<sup>207</sup> Thus, it is logical for these two factors to be the primary determinants in setting forth the differing levels of marriage and their corresponding rights and obligations under the proposed system. Even the current legal framework governing marriage recognizes, to a certain extent, the importance of these two factors in determining a number of the important rights and obligations arising from marriage. Federal law utilizes these factors as determinants for important rights in a number of areas, such as Social Security, Medicare, and immigration.<sup>208</sup> In addition, these factors are two of the most commonly used factors set forth by state laws with regard to property distribution and spousal support.<sup>209</sup> The proposed system, however, departs from state-based approaches of listing these as two of many factors for the court to consider, without any guidance as to how much weight, if any, should be given to each factor.<sup>210</sup> Instead, the proposed system promotes fairness, predictability, and consistency by using these factors as the primary determinants of the rules and presumptions governing the spousal rights and obligations arising from marriage.<sup>211</sup>

#### B. *Level One: Trial Marriage*

The first level under the proposed system, which would automatically attach upon marriage to couples without children, unless they explicitly opt-out of this level into an advanced level, represents an important and unique aspect of the proposal. As an initial matter, the proposed marital framework should not depart from the current framework. For the legal status of marriage to attach to their relationships, couples should need to affirmatively opt-in to the status. Because a goal of the proposed framework is to grant individuals greater autonomy in structuring their rela-

---

<sup>207</sup> Collins, *supra* note 80, at 53.

<sup>208</sup> HUM. RTS. CAMPAIGN, *supra* note 56.

<sup>209</sup> See, e.g., Collins, *supra* note 80, at 33–34 (“Thirty-nine of the forty states that list criteria (97.5%) cite the duration of a marriage as a factor to be considered in awarding alimony. . . . [M]any [state statutes] (72.5%) take into account the presence of a child in the home whose care precludes or limits employment as a significant factor.”); Hofstein et al., *supra* note 80, at 448 (“A frequently mentioned consideration in equitable distribution is the length of the parties’ marriage prior to separation or divorce.”); Jeffrey G. Sherman, *Prenuptial Agreements: A New Reason to Revive an Old Rule*, 53 CLEV. ST. L. REV. 359, 369 n.48 (2005–06) (pointing to research indicating that length is the third most commonly used factor in state property distribution statutes); see also Turner, *supra* note 87 (explaining that the presence of children and/or the parties’ caretaking responsibilities for children are factors in most state property-distribution statutes).

<sup>210</sup> See *supra* note 88 and accompanying text.

<sup>211</sup> See *infra* Sections IV.B and IV.C.

tionships,<sup>212</sup> it is only logical that couples should have the ability to determine whether they wish for a legal status to attach to their relationships in the first place, and to make decisions regarding their conduct within their relationships accordingly.

Level one should encourage partners who are contemplating making significant commitments to each other to seek legal protections for their relationship, and should aid couples in determining whether marriage is well-suited for their relationships before significant financial and familial entanglement occurs. Spouses who enter into level one should be considered legally married, and they should be granted spousal rights and obligations in a manner that will allow them to experience, in a significant way, the societal, cultural, and legal expectations involved in marriage. The rights and obligations should be substantially more limited than those that arise later in the marriage, however, and the dissolution process should be far less onerous than that which is required at the more advanced marriage levels. Despite the fact that it will function as a trial period for many couples, level one should still be labeled as marriage, requiring couples to make an official public commitment. This is important to ensure that couples are able to experience, in a significant manner, both the support and expectations that they will encounter from the world around them as a result of marrying.

The idea of a legal status that functions as a trial marriage for a substantial portion of couples who enter it is not without precedent. For example, in France, the civil-solidarity pact (“PACS”) is available as an alternative to marriage, and for many couples it serves as a trial marriage.<sup>213</sup> The PACS provides couples with fewer rights and obligations than those that accompany standard marriage.<sup>214</sup> More specifically, the default rules for the PACS favor the separation of property and do not provide spousal support.<sup>215</sup> Rights provided by the PACS relate to social security, immigration, employment benefits, gift- and inheritance-tax exemptions, the ability to file joint tax returns, and bereavement leave.<sup>216</sup> Moreover, members of a PACS must provide mutual support to each other during the relationship, and each partner is responsible for non-excessive debts incurred by the other partner for purposes of everyday life.<sup>217</sup> Couples who

---

<sup>212</sup> See *supra* Section III.B.

<sup>213</sup> Robert Korengold, *Marriage or PACS? In France Things Are Changing*, BONJOURPARIS (Oct. 27, 2009), <http://www.bonjourparis.com/story/marriage-or-pacs-france-things-are-changing/>.

<sup>214</sup> Feinberg, *supra* note 7, at 54–55.

<sup>215</sup> Aloni, *supra* note 50, at 640.

<sup>216</sup> Marie A. Failing, *A Peace Proposal for the Same-Sex Marriage Wars: Restoring the Household to Its Proper Place*, 10 WM. & MARY J. WOMEN & L. 195, 208–09 (2004); Scott Titshaw, *The Reactionary Road to Free Love: How DOMA, State Marriage Amendments, and Social Conservatives Undermine Traditional Marriage*, 115 W. VA. L. REV. 205, 272 (2012).

<sup>217</sup> Feinberg, *supra* note 7, at 55–56.

enter into PACSs and later terminate their relationships experience far less of the time, cost, and emotional drain involved in dissolving standard marriages.<sup>218</sup> Judicial involvement is not required to dissolve a PACS, and only occurs where there is a disagreement and one party brings a post-dissolution lawsuit.<sup>219</sup> Notably, the vast majority of PACSs that end in dissolution are dissolved through the mutual request of the parties.<sup>220</sup> A significant number of couples have opted to marry after spending a period of time in a PACS.<sup>221</sup> Marriage, which automatically dissolves a PACS, has been the reason for PACS dissolutions in over one-third of all cases.<sup>222</sup> The availability of a status that functions as a trial period for marriage for many couples is thus serving an important filtering function in France—helping to identify those couples who are ready for marriage and those who are not.

Under the proposed system, the specific package of rights and obligations accompanying intact marriages at level one should be designed to support and stabilize the relationship to the greatest extent possible. It also should introduce couples to the types of obligations that marriage entails and provide a fair and efficient dissolution process for couples who determine that their relationships are not suitable for marriage at this early trial stage. To this end, rights that are aimed primarily at supporting and stabilizing intact relationships, and that are not premised upon the couple having reached a deep level of economic entanglement, should accompany level one. For example, rights relating to family and medical leave, testimonial privileges, marital parentage presumptions, and health insurance benefits are among the types of rights that should be provided at level one. Rights such as those under Social Security and Medicare that provide benefits to one spouse in an intact marriage, based upon the earnings record of the other spouse, should not be available at level one, as neither the length of the marriage nor the reasonable financially related expectations accompanying the marriage at level one justify these types of rights.<sup>223</sup> The current immigration rule for sponsorship of spouses in marriages that have existed for less than two years, which requires that the immigrating spouse be given a conditional visa until the

---

<sup>218</sup> YUVAL MERIN, EQUALITY FOR SAME-SEX COUPLES 139–40 (2002).

<sup>219</sup> *Id.*

<sup>220</sup> PETER DE CRUZ, FAMILY LAW, SEX AND SOCIETY 272 (2010) (referring to research indicating that “dissolution is usually consensual, with more than 80 percent of dissolutions occurring at the request of the two partners”).

<sup>221</sup> Aloni, *supra* note 50, at 641.

<sup>222</sup> *Id.*

<sup>223</sup> This is not a significant departure from the status quo with regard to these rights, which are already dependent on the marriage having reached a certain length. See *supra* notes 63 & 70.

marriage is more established, would fit well as the applicable spousal-immigration rule governing the trial-marriage period.<sup>224</sup>

Similarly, laws that penalize individuals financially for marrying should not be applicable during level one, as such laws assume complete economic intertwinement between spouses.<sup>225</sup> Thus, for example, laws that remove existing Social Security benefits in certain circumstances when an individual remarries<sup>226</sup> or disqualify an individual from means-tested public benefits based upon his or her spouse's earnings would not apply during level one.<sup>227</sup> In addition to reflecting the minimal spousal financial entanglement that will occur during level one, this is essential for furthering the proposed system's underlying goal of encouraging couples considering marriage to try the institution. The decision to marry, especially among lower-income individuals and elderly individuals (groups that make up a significant portion of the population engaging in non-marital cohabitation)<sup>228</sup> can be affected by financial disincentives. A lack of financial stability is often cited by unmarried couples as a reason for not marrying.<sup>229</sup> The absence of marriage-related penalties during level one is also essential to supporting and stabilizing relationships to the greatest extent possible during the early years of marriage, when the risk of divorce is greatest.<sup>230</sup>

In terms of the general types of obligations between spouses in intact marriages that should arise during level one, entering level one should remain a relatively low-risk undertaking in order to encourage couples to try marriage. Any obligations should reflect the trial-like nature of level one and the limited duration and absence of children within marriages

<sup>224</sup> See *supra* notes 63–66 and accompanying text.

<sup>225</sup> See Garrison, *supra* note 139, at 323. “[W]e cannot simply dismiss initiatives aimed at eliminating marriage penalties: Rule-evasion that substitutes informal for formal marriage produces certain procedural costs. To the extent that formal marriage promotes marital commitment and stability, rule-evasion may also contribute to the decline of enduring, high-quality marriage.” *Id.*

<sup>226</sup> See, e.g., SOC. SECURITY ADMIN., *supra* note 68 (“If your divorced spouse remarries, he or she generally cannot collect benefits on your record . . .”).

<sup>227</sup> Adam Carasso & C. Eugene Steuerle, *The Hefty Penalty on Marriage Facing Many Households with Children*, FUTURE CHILD., Fall 2005, at 157, 159. (“[M]ost transfer programs for low-income families with children contain mainly marriage penalties—the additional income introduced by a spouse generally reduces or even ends benefits received before the marriage.”); Catherine Rampell, *‘Marriage Penalty’ Takes a Bite Out of Working Families*, WASH. POST (Apr. 14, 2014), [http://www.washingtonpost.com/opinions/catherine-rampell-marriage-penalty-takes-a-bite-out-of-working-families/2014/04/14/a7e51e58-c3f8-11e3-bcec-b71ee10e9bc3\\_story.html](http://www.washingtonpost.com/opinions/catherine-rampell-marriage-penalty-takes-a-bite-out-of-working-families/2014/04/14/a7e51e58-c3f8-11e3-bcec-b71ee10e9bc3_story.html).

<sup>228</sup> Erez Aloni, *Deprivative Recognition*, 61 UCLA L. REV. 1276, 1280–81 (2014) (“[T]he largest groups of cohabitants include poor and low-income individuals who are the beneficiaries of means-tested programs [and] the elderly . . .”).

<sup>229</sup> Garrison, *supra* note 139, at 322.

<sup>230</sup> See *supra* notes 28–29.

that fall into level one under the default rules. However, in order to help couples determine whether marriage is the suitable choice for their relationship, at least some basic responsibilities arising from the marriage should apply at level one. Since financial incompatibility is among the strongest predictors for divorce, it is important that couples have the experience of sharing certain basic financially related responsibilities early in the marriage, and that they are encouraged to communicate their views on financial issues.<sup>231</sup> Therefore, under level one, spouses should be responsible for sharing household and common expenses; they should also be responsible for the non-excessive debts of the other spouse that were incurred for the benefit of the marriage.<sup>232</sup>

Post-dissolution rights and obligations for relationships that dissolve during level one should also be minimal. This is logical for a number of reasons. As an initial matter, a principal purpose of level one is to allow couples to experience a low-risk trial period for marriage, and significant post-dissolution obligations are not compatible with this purpose. Moreover, since spouses will understand level one as a trial period, they will be better able to manage their expectations about the relationship and conduct themselves accordingly. In addition, as a default rule, level one applies only to marriages of the shortest relative duration that do not involve children. The limited duration and absence of children within marriages that dissolve at level one will generally mean that there were relatively limited opportunities for one spouse to engage in career-related and other sacrifices for the welfare of the marital unit, from which he or she cannot recover, as well as a decreased probability of the couples' becoming financially entangled to an irreparable degree.

Consequently, spousal support should be presumed unavailable for dissolutions that occur at level one, and the property obtained by either spouse during the marriage should be presumed to be his or her separate property. In addition, if during level one a spouse dies intestate or disinherits the surviving spouse, there should be a presumption of limited or no inheritance rights for the surviving spouse.<sup>233</sup> To reflect the reality that some marriages will involve differing expectations despite the structure of the trial period, however, the legal framework governing post-dissolution rights at level one should involve presumptions that can be rebutted in appropriate circumstances.

The limited post-dissolution rights and obligations arising from level one will also allow for a significantly easier dissolution process than that

---

<sup>231</sup> Jeffrey Dew et al., *Examining the Relationship Between Financial Issues and Divorce*, 61 FAM. REL. 615, 624 (2012).

<sup>232</sup> This is the approach that Belgium takes for individuals who have entered the country's legal cohabitation status. See Feinberg, *supra* note 7, at 56.

<sup>233</sup> See *supra* notes 135–136 and accompanying text (explaining UPC proposal for determining a surviving spouse's elective share amount based upon the length of the marriage).

which accompanies most marital dissolutions today.<sup>234</sup> Dissolution at level one should not require judicial intervention. Instead, parties should be able to exit the marriage without undergoing a costly, time-consuming, and emotionally draining judicial process. Dissolution under the proposed system should be granted administratively after a brief waiting period, with notice provided to one party in the event that the other party seeks the dissolution unilaterally. Moreover, the procedure should be called something other than divorce to reflect level one's purpose as a low-risk trial period for marriage and to reduce the stigma associated with early marital failure.<sup>235</sup> Reducing the stigma associated with early marital failure will serve the important purpose of encouraging people who learn through the trial period that their relationship is ill-suited for marriage to terminate the relationship before greater financial and familial entanglement occurs.

It is important to note that the type of dissolution procedure proposed here is not without precedent in the United States. As mentioned above, summary dissolution, which allows for marital dissolution in a quicker timeframe and without a judicial hearing, is available in a number of jurisdictions for dissolution of marriages that share certain characteristics.<sup>236</sup> The most common types of requirements that must be met in order for marriages to be eligible for summary dissolution are that the marriages are short in length, do not involve children, and involve a small amount of marital property<sup>237</sup>—characteristics that will generally be shared by marriages placed into level one under the default rules of the proposed system.<sup>238</sup> In addition, a number of non-marital statuses in the United States allow for dissolution purely administratively, with judicial involvement only occurring in the event that one party brings a post-dissolution lawsuit.<sup>239</sup>

In terms of the level at which couples who are entering marriage should initially be placed and the autonomy couples should have to opt-out of that level, as noted above, all couples who do not yet have a common child should be placed in level one by default rule when they marry. Couples who have children at the time of entering marriage, however, should not be placed in level one; instead, the default rule should place these couples in level two. A default rule that places couples who already share a common child at the time of marrying into level two makes sense for a number of reasons. Individuals who share a child automatically have

---

<sup>234</sup> See *supra* notes 124–125 and accompanying text.

<sup>235</sup> For a discussion of the feelings of shame and stigma often accompanying early marital dissolution, see generally PAUL, *supra* note 152.

<sup>236</sup> Feinberg, *supra* note 7, at 79.

<sup>237</sup> *Id.*

<sup>238</sup> Upon marrying, couples without children would automatically be placed in level one under the default rules of the proposed system.

<sup>239</sup> Feinberg, *supra* note 7, at 79.

a significant and ongoing legal relationship because, from the time of the child's birth, they share the legal obligation to support the child.<sup>240</sup> The existence of a common child, therefore, necessarily ties the parties together in a long-term, significant manner and justifies the couple's placement in a level that provides greater rights and obligations.<sup>241</sup> Moreover, since the well-being of children is undoubtedly affected by the well-being of their parents, the support-related rights and obligations parents have to each other should be adjusted when children are involved.<sup>242</sup> In addition, the existence of a common child frequently results in one member of the relationship altering his or her life in order to devote more time to caring for the child and often leads to significantly decreased earning capacity for that individual.<sup>243</sup> Thus, the limited post-dissolution rights accompanying level one are far less appropriate for couples who share a common child.

It is important to understand that, as with all other levels, couples would have the ability to opt-out of the level initially applicable to their marriage. For example, a couple without children would have the ability to opt-out of level one and into an advanced level if that couple determined that the package of rights and obligations at the advanced level was better suited for their relationship. Likewise, couples who share a common child would have the choice to opt-out of level two and into another level, including level one. While, for the reasons discussed above, placing a couple with children into level one would not be ideal, it is important that couples with children are not dissuaded from marrying, and level one would provide a number of stabilizing and supportive rights that the couple and their children would not have if the couple remained unmarried.<sup>244</sup> While couples with children should have the autonomy to opt-in to level one, the standard dissolution procedure under level one should not be available to such couples.<sup>245</sup> Instead, limited judicial involvement must occur at dissolution in order to determine child-custody and child-support issues. Notably, while a couple would have the ability to opt-out of the default level that is initially applicable to its marriage, it is probable that most couples would abide by the default rules upon entering marriage. This seems especially likely when considering the dearth of

---

<sup>240</sup> ABRAMS ET AL., *supra* note 51, at 589.

<sup>241</sup> *See id.*

<sup>242</sup> *See, e.g.*, Michelle Brandt, *A Look at How Parents' Financial Woes Affect Children's Social Behavior*, STAN. MED.: SCOPE (Jan. 26, 2012), <https://scopeblog.stanford.edu/2012/01/26/a-look-at-how-parents-financial-woes-affect-childrens-social-behavior/>.

<sup>243</sup> *See supra* notes 194–206.

<sup>244</sup> The package of rights provided under level one includes, for example, coverage for the spouses under the Family and Medical Leave Act.

<sup>245</sup> *See supra* notes 124–125, 233–235, for a description of the proposed standard-dissolution procedure for marriages that dissolve while the couple is at level one.

couples who, upon entering marriage, use contracts to opt-out of the current default rules governing marriage.<sup>246</sup>

The remaining essential detail regarding level one involves the length of time for which this level should last under the default rules. Considering the purpose and structure of level one, a two-year default duration for this level would likely be most logical. This would allow couples to spend a significant amount of time experiencing a number of important legal, societal, and cultural consequences and expectations of marriage before being asked to make important decisions about the future of their relationships. It also generally represents a reasonable amount of time for a couple to wait before having children, completely intertwining its finances, and making career-related and other sacrifices for the benefit of the marriage as it evaluates the long-term marital suitability of its relationship.<sup>247</sup>

In summary, the rights and obligations, as well as the efficient, low-risk exit process provided by level one, will encourage more couples to obtain supportive and stabilizing legal protections for their relationships while they determine if marriage is the best option for them. These features of level one will also provide fair and predictable results in the event of dissolution, filter poorly suited relationships out of the institution of marriage before significant entanglement occurs, and filter well-suited relationships into the institution. Finally, although it is not the primary justification for the creation of level one, level one will likely provide a long-term alternative to traditional marriage for some couples—particularly those who structure their relationships in a manner that differs significantly from the traditional norms within most marriages—that allows these couples to enjoy a package of rights and protections that is more useful and relevant to their relationships.<sup>248</sup>

### C. *Remaining Levels: Gradual Marriage*

Following level one, spousal rights and obligations would gradually increase as the spouses ascend to higher marriage levels. This proposal will not detail how each one of the hundreds of spousal rights and obligations accompanying marriage would fit within the proposed framework. To obtain a stronger understanding of how a gradual marriage system could work in practice, however, it is helpful to consider how some of the most important spousal rights and obligations would function. This Sub-

---

<sup>246</sup> ABRAMS ET AL., *supra* note 51, at 840.

<sup>247</sup> Baker, *supra* note 30, at 616 (“Many couples do not have children before year five, and even those that do have not had time to develop an entrenched gendered division of paid and unpaid work.”); PAUL, *supra* note 152, at 5 (explaining that “more couples are delaying children for three, four, five years into their marriages”).

<sup>248</sup> For a comprehensive proposal regarding the implementation of a legal alternative to marriage, see generally Feinberg, *supra* note 7.

section will first explore how a number of the essential rights and obligations accompanying marriage would operate under the proposed system. It will then identify and discuss the process through which couples would ascend among marriage levels under the proposed framework.

The package of rights and obligations arising at each level would be aimed at reflecting the general characteristics of marriages that fall within that level under the default rules, protecting spouses, and supporting marriages in relevant, useful ways. For example, the ability to collect Social Security and Medicare benefits based upon a spouse's earnings record would arise at an advanced level, reflecting the types of expectations and financial behaviors that develop over the years between spouses. This would remain in place as the couple continues to ascend among the marriage levels.<sup>249</sup> Similarly, marriage-related penalties arising out of certain entitlements and means-tested public benefits from which couples are exempted at the trial level, and which are premised upon an assumption that the spouses have formed a financial unit, would arise at an advanced level, ideally after the couple had received the time and support necessary to become a financially stable marital unit. This would remain in place at subsequent levels.<sup>250</sup> Other important spousal rights and obligations that would not arise at the trial level, such as, for example, the right to sponsor an immigrant spouse for a permanent visa, would also arise after the trial level and remain in place throughout the remaining levels.<sup>251</sup> Moreover, to celebrate and encourage long-term marriages, various mutually advantageous spousal tax-related and other benefits would be provided to marriages as they reached advanced levels.<sup>252</sup>

In addition to the rights and obligations that would appear for the first time at an advanced marriage level and remain the same thereafter, other types of rights and obligations would increase in scope or degree as the spouses ascended among the marriage levels. This would be true for many of the spousal rights and obligations that arise in the dissolution context. To facilitate the gradual increase of these rights and obligations, the proposed system would employ formulas. The use of such formulas would add significantly greater consistency, predictability, and fairness in the marital-dissolution context.<sup>253</sup>

---

<sup>249</sup> See *supra* note 61 and accompanying text for the current marriage-duration requirement for collecting Social Security and Medicare benefits based upon a spouse's earnings record.

<sup>250</sup> See *supra* note 224 and accompanying text.

<sup>251</sup> See *supra* notes 63–66 and accompanying text.

<sup>252</sup> Tax rights that are based on marriage currently arise at the time of the marriage and do not change as the marriage increases in length. See IRS PUB. 501, *supra* note 58, at 6 (explaining that a person is eligible to file a joint federal tax return with his or her spouse as soon as he or she is recognized as married under state law).

<sup>253</sup> See *supra* Section II.B for a discussion of the problematic aspects of the laws currently governing marital dissolution.

In the area of spousal support, for example, for marriages that have advanced past level one, a formula should be implemented both for determining whether a spouse is entitled to support and for determining the amount and duration of the support award.<sup>254</sup> Under the spousal-support formula, beginning at level two, there would be a strong presumption in favor of a spousal-support award if there was a specified degree of difference between the spouses' incomes. The percentage of difference that would need to exist for a presumption of spousal support to become applicable would lessen with each marriage level. This means that the right to spousal support would become stronger at each level as the marriage continued in duration.<sup>255</sup> States would then determine how the presumption could be rebutted. This may involve, for instance, a showing that the earning capacity of the spouse seeking support was not negatively affected by spousal decisions made for the well-being of the family unit, or that there is a lack of need on the part of the spouse seeking support.<sup>256</sup> For individuals eligible for support, the support amount would be determined by applying a specified percentage to the difference in spousal income, with the specified percentage increasing at each level such that the amount of support a spouse is entitled to would also grow at each level.<sup>257</sup> The length of the award could similarly be presumptively determined by applying to the marriage duration a specified percentage that increases at each level.<sup>258</sup> Under this or a similar type of formula, the right to spousal support would increase gradually as the couple ascended through the marriage levels.

In the property realm, under the proposed system there would be a presumption of joint property for property obtained at level two and eve-

---

<sup>254</sup> See *supra* notes 107–110 and accompanying text for a discussion of the formulas that a handful of states have implemented in the spousal support context.

<sup>255</sup> This is not the same as the approach taken for determining spousal-support eligibility under the ALI proposal. Unlike the formula proposed here, under the ALI proposal, the degree of spousal disparity needed for award eligibility would not change depending on the length of the marriage. See *supra* note 120 and accompanying text.

<sup>256</sup> Kelly, *supra* note 88, at 264. “An entitlement to alimony related to the length of the marriage provides a rough approximation of the continued effects of partnering. Equalizing living standards accords equal value to care and market work, and acknowledges the long lasting effects from financial merger.” *Id.*

<sup>257</sup> This mirrors the part of the ALI proposal that addresses the method of determining spousal-support amounts for eligible individuals. States apply a specified percentage to the difference between the spouses' incomes that increases with the length of the marriage or period of primary caretaking responsibility. See *supra* note 123 and accompanying text.

<sup>258</sup> This is not the same as the approach taken for determining spousal-support duration under the ALI proposal. Unlike the formula proposed here, under the ALI proposal, the percentage applied to the marriage duration in order to determine the award length would not change depending on the duration of the marriage. See *supra* note 124 and accompanying text.

ry level thereafter. In addition, as the couple ascends through the levels, an increasing percentage of each spouse's separate property obtained during level one would transmute<sup>259</sup> to marital property until, upon reaching one of the higher levels, all the property obtained by either spouse during level one would become marital property. For the distribution of marital property, the presumptive minimum percentage to which a significantly lower-earning spouse would be entitled would increase at each level. The difference in income which would need to exist for a spouse to be determined "significantly lower earning" would be set by state law and would decrease at each level. A related approach would exist in the context of inheritance rights in situations where the decedent spouse died intestate or disinherited his or her spouse. More specifically, there would be a presumption of spousal-inheritance rights that arose after the trial level, and the percentage of the estate to which the surviving spouse would presumptively be entitled would increase at each level.

Couples would ascend through the marriage levels primarily based on the length of their marital relationship, with a one-time additional one-level advancement occurring when a child is added to the relationship for the first time.<sup>260</sup> After the initial two years spent at level one, the length of time that couples would spend at each level would gradually increase until the couple reached the final level. Before a couple ascended to a new default level applicable to their relationship, they would receive notice of the scheduled ascension and the ability to opt-out of that ascension. Although some couples would likely choose to remain at a lower level indefinitely after determining that the package of more limited rights and obligations best suited their particular relationship, it is anticipated that most couples would not opt-out of advancing to the next level when the time came. People tend to remain within the default rules in most contexts, as opposed to opting-out of such rules,<sup>261</sup> something that has been demonstrated in the marriage context by the dearth of individuals who currently opt-out of the default rules governing marriage.<sup>262</sup>

Notice of the specifics of the opt-out process would be sent to each spouse approximately three months before the ascension to the next level was scheduled to occur. The notice would describe the rights and obli-

---

<sup>259</sup> Transmutation of property is defined as "the change of the character of property, either from separate to marital property or from marital to separate property." *Divorce: How Property Ownership Changes*, LAWYERS.COM, <http://family-law.lawyers.com/divorce/divorce-how-property-ownership-changes.html>.

<sup>260</sup> This one-time advancement would not apply to couples who already had children upon entering the institution and consequently started by default at level two.

<sup>261</sup> Cass R. Sunstein, *Deciding by Default*, 162 U. PA. L. REV. 1, 5 (2013) ("What is striking and somewhat (though decreasingly) mysterious is that default rules nonetheless have a large impact, because they tend to stick.").

<sup>262</sup> See *supra* note 245 and accompanying text.

gations arising at the subsequent level, how those rights and obligations would differ from those governing the couple's current marriage level, and the process for opting-out. It is likely that most couples choosing to opt-out of a scheduled ascension would do so mutually, in which case they would complete and sign a form indicating their intention to opt-out and submit the form to a local registration office. A spouse could also unilaterally opt-out of the ascension by filling out the relevant form and serving notice on the other spouse by a designated date before the scheduled ascension, in which case the ascension would not occur.

Notably, the proposal set forth here differs greatly from various proposals that have been advanced regarding the use of renewable contracts or similar mechanisms to govern marriage.<sup>263</sup> In those proposals, a marriage would end by default after a set number of years unless the couple took action to renew the contract.<sup>264</sup> By contrast, under the system proposed here, inaction by the couple would mean not only that the couple remains married, but also that the spouses would be taking on greater rights and obligations within the marriage.<sup>265</sup> Thus, under the proposed system, momentum favors the continuation of the marriage, not its termination. Moreover, the decision that couples would be asked to make at

---

<sup>263</sup> See, e.g., Atom Araullo, 'Renewable Marriage' Proposed, ABS-CBN NEWS (Jan. 11, 2010), <http://www.abs-cbnnews.com/lifestyle/01/11/10/renewable-marriage-proposed> (stating that in the Philippines, "[w]omen's party-list group 'Isa-Ako Babaeng Astig Aasenso' or 1-ABAA plans to propose in Congress a measure requiring couples to renew their marriage after 10 years, or else their marriage would be null and void"); Madeline Chambers, *Glamorous Bavarian Wants Law to Allow 7-Year Itch*, REUTERS (Sept. 21, 2007), <http://www.reuters.com/article/2007/09/21/us-germany-politics-marriage-idUSHAR05782220070921> (describing German legislator Gabriele Pauli's proposal for a seven-year marriage that automatically terminates unless the couple elects to renew); Collins, *supra* note 122, at 815–20 (setting forth a "term-of-years" proposal in which couples in "starter marriages" would sign an agreement setting forth the length of the marriage and subsequently would either allow the marriage to expire or convert the marriage to a permanent marriage); Jennifer A. Drobac & Antony Page, *A Uniform Domestic Partnership Act: Marrying Business Partnership and Family Law*, 41 GA. L. REV. 349, 404–05 (2007) (proposing four types of domestic partnerships, including a "provisional domestic partnership [that] lasts for only one year and is renewable annually if the partners so choose"); Alex Leff, 'Til 2013 Do Us Part? Mexico Mulls 2-Year Marriage, REUTERS (Sept. 29, 2011), <http://www.reuters.com/article/2011/09/30/us-mexico-marriage-idUSTRE78S6TX20110930> (describing a proposal by Mexico City lawmakers for the establishment of marriage contracts in which the minimum term "would be for two years and could be renewed if the couple stays happy"); WALTER WADLINGTON, DOMESTIC RELATIONS 5 (successor ed. 1984) (identifying that in 1971 and 1972, a bill was submitted to the Maryland state house proposing "a contract for marriages" that would last for three years, with an option for the couple to renew if they wished).

<sup>264</sup> See *id.*

<sup>265</sup> See *supra* notes 249–252, 259–262 and accompanying text.

each level is not whether to stay married; it is merely whether to keep the marriage at its current level or advance to a higher level.<sup>266</sup>

A framework based upon ascension between marriage levels would provide spouses with important opportunities throughout their marriage to evaluate and discuss their relationship. Toward the end of each level, spouses would need to decide whether there existed a mutual desire to ascend to the next level.<sup>267</sup> It is anticipated that this decision would lead to an evaluation of the relationship by each spouse and a discussion between the spouses regarding the state of their marital relationship. Increased communication between the spouses regarding the state of the marriage and any major concerns of either spouse with regard to the marriage would be a positive development.<sup>268</sup> It would allow the spouses to better identify and understand each other's needs and desires, and it would give spouses the opportunity to correct or improve behaviors that may be harming the marital relationship, thereby adding greater overall stability to the marriage.

Moreover, the knowledge and understanding that one's spouse will be making an important decision about the future of the marriage at some not-so-distant date may encourage individuals to work harder at maintaining a mutually healthy and happy marital relationship. This knowledge may also help spouses avoid taking the marriage for granted and to assert ownership of the course of the marriage. In addition, in situations where one spouse does not desire to ascend to the next level, that knowledge could help the other spouse to better manage his or her relationship-related expectations and to conduct himself or herself within the relationship accordingly. Finally, the increased marital evaluation encouraged by the proposed framework may also more effectively facilitate the termination of the type of unhealthy marriages discussed above.

## V. THE EFFECTS OF THE PROPOSED FRAMEWORK: THE FURTHERANCE OF IMPORTANT GOALS AND THE POTENTIAL CONCERNS

### A. *The Proposed Framework's Advancement of Important Goals: A Brief Summation*

The proposed system will further each of the goals identified in Section III of an improved legal framework governing marriage. With regard to furthering the goal of encouraging more cohabiting couples to obtain legal rights and protections for their relationships, the supportive, help-

---

<sup>266</sup> See *supra* notes 259–262 and accompanying text.

<sup>267</sup> See *supra* notes 259–262 and accompanying text.

<sup>268</sup> See generally LEE M. SHULMAN ET AL., I DO . . . AGAIN: THE RENEWABLE MARRIAGE (2009) (suggesting couples schedule time every 30 days to “renew” their marriage contract in order to maintain a more healthy relationship).

ful rights and obligations, as well as the efficient, low-risk exit process accompanying the first marriage level, will encourage couples to obtain legal protections for their relationships while they determine whether marriage is suitable for them. The gradual nature of the spousal rights and obligations accompanying marriage under the proposed system, in addition to the clear rules governing such rights and obligations, will also help to encourage more couples to obtain legal protections for their relationships, as these reforms will make the consequences of entry into the institution less risky, unpredictable, and inconsistent. The goal of filtering suitable relationships into the institution of marriage will be advanced by level one, which allows couples to experience to a significant degree the cultural, societal, and legal expectations accompanying marriage while at the same time providing an efficient, low-risk, and straightforward exit process for couples who determine that marriage is not the right choice for their relationships.

In terms of the goal of creating a more effective legal framework for intact marriages, the rights and obligations granted to spouses at each level will be tailored to marital relationships that have reached that particular level: there will no longer be a one-size-fits-all approach with regard to important spousal rights and obligations. This will result in significantly better support and protections for intact marriages. Moreover, with regard to the goal of facilitating the continuation of healthy marriages and the termination of unhealthy marriages, the existence of ascending levels of marriage and the corresponding decisions couples will need to make upon reaching the various levels will require couples to evaluate and discuss their relationships. Ideally, increased communication and marital evaluation by spouses will result in the continuation of low-conflict marriages, the termination of marriages that remain high-conflict despite increased communication and evaluation, and more effective spousal efforts to improve the marriages that fall somewhere in between. Moreover, the clear and predictable rights and obligations governing each level will more effectively facilitate the termination of unhealthy marriages, as there will be far less risk and uncertainty involved for individuals in unhealthy marriages who wish to terminate their relationships.

Finally, the proposed legal framework will further the essential goal of remedying the lack of predictability, consistency, and fairness that currently exists in the marital-dissolution context. Easily identifiable marriage levels, based upon the objective factors of length of the marriage and presence of children within the marriage, and clear rights and responsibilities accompanying each level will provide much-needed predictability and consistency to judicial determinations of post-dissolution rights and obligations. Moreover, the accompanying limits on judicial discretion with regard to the determination of these post-dissolution rights and obligations will further enhance consistency and predictability

in this context, and will also increase fairness, as important rights and obligations will no longer be left to the whims and potential biases of the particular judge hearing the case. Importantly, with regard to the essential goal of increasing fairness in the dissolution context, the gradual nature of the rights and obligations arising from marriage and the tailoring of such rights and obligations to individual marriages based upon their current level will provide for a dissolution framework that more effectively protects the spouses and their marital expectations. These attributes of the proposed system will also allow parties to make better-informed decisions and will promote dissolution-related settlements, which will permit more spouses to avoid costly, time-consuming, and emotionally draining litigation.

*B. Foreseeable Concerns with the Proposed Framework*

The proposed legal framework, while offering significant improvements to the current legal framework governing marriage, may also raise a number of concerns. One important concern is that the factors of marriage length and presence of children—the primary determinants of a couple’s default marriage level and the accompanying package of legal rights and obligations—cannot be used to accurately identify the conduct and expectations of all married couples. While, as detailed above, it is likely that the factors of marriage duration and presence of children as a general matter represent the strongest overall objective indicators of marital conduct and expectations, it is undoubtedly true that some couples’ marital conduct and expectations will differ from that which would be predicted based on these factors. The proposed framework, however, acknowledges this reality and seeks to address this concern in two distinct manners.

First, under the proposed system, all couples are allowed to opt-out of the default level applicable to their relationship if the spouses determine that the package of rights and obligations accompanying that level does not reflect the conduct and expectations within their particular relationship. Thus, couples whose relationship characteristics differ from those that would generally be expected based upon the length of the marriage and the presence of children within the marriage have the ability to choose the marriage level that is best-suited to their relationship. Second, many of the important spousal rights and obligations within the proposed framework are structured as presumptions.<sup>269</sup> Consequently, courts would have the ability to depart from the presumptive results in situations where such a departure is justified based upon the couple’s marital conduct and expectations.

---

<sup>269</sup> See *supra* Section IV.

Another important potential concern with the proposed framework involves the presumption against spousal support at level one. The concern is that the presumption could hurt dependent parties whose marriages dissolve at this level as well as their children. An initial response to the concern regarding dependent spouses is that, because level one lasts for only two years under the default rules and, in addition, will be understood by the parties as a trial period, it is unlikely that one spouse would engage in conduct and decision-making during this level based on an expectation of continued support from the other spouse. Another response to this concern is that the low-risk structure of level one is essential to encouraging couples who would otherwise cohabit to marry, and thereby receive important rights and protections for their relationships that they generally would not receive as cohabitants. Moreover, the spousal-support rule at level one is structured as a presumption, as opposed to an absolute rule, so that in compelling circumstances a spouse whose marriage dissolves during this level would be able to receive spousal support.<sup>270</sup> As for concerns regarding harmful effects on children due to the presumption against spousal support at level one, it is important to note that under the proposed framework's default rules, couples with children would not be governed by the rules of level one. Specifically, under the default rules, couples with existing children at the time of marrying would automatically be placed at level two and couples who did not have children at the time of marrying would undergo the one-time, one-level ascension upon adding children to their relationship for the first time.<sup>271</sup>

Concerns may also be raised about the ability of couples to opt-out of the default level applicable to their marriage. There may be a fear that, in some cases, an individual with superior bargaining power will take advantage of his or her spouse when choosing the marriage level applicable to the couple's relationship. In a sense, this concern is similar to current concerns regarding coercion and superior bargaining power in the context of pre-nuptial, post-nuptial, and separation agreements, in which couples can opt-out of the default rules in favor of their own terms regarding important spousal rights and obligations such as property distribution and spousal support.<sup>272</sup> Under the proposed system, however, as opposed to altering certain rights or obligations in any manner they deem fit, couples would be choosing among levels, each consisting of state-created packages of rights and benefits that are aimed at providing rights and obligations that balance each other, as well as a floor of protection for the spouses.<sup>273</sup> In addition, throughout the levels under the

---

<sup>270</sup> See *supra* Section IV.B.

<sup>271</sup> See *supra* notes 240–243, 260 and accompanying text.

<sup>272</sup> See ABRAMS ET AL., *supra* note 51, at 856–57.

<sup>273</sup> See *supra* Section IV.

proposed system, many of the important spousal rights and obligations would be structured as presumptions so that in appropriate circumstances a court would have the ability to protect a party with inferior bargaining power regardless of the marriage level.<sup>274</sup> Providing couples with the autonomy to opt-out of default marriage levels that do not reflect the nature of their relationships also recognizes the reality that marriages differ greatly. The ability to opt-out of default marriage levels is essential to effectively protect those relationships in which the spouses conduct themselves in ways that would not necessarily be predicted based upon the length of the marriage or the presence of children within the marriage.

Other concerns may focus on a perceived encouragement of marriage termination under the proposed system. There may be concerns that the ease of dissolution at level one, as well as the necessity for marriage evaluation at each level, will result in more individuals deciding to end their marriages. With regard to the ease of dissolution at level one, a low-risk and efficient dissolution framework is essential for encouraging couples who would otherwise remain in non-marital cohabitations to try marriage and thereby receive important protections for their relationships. In addition, if the experience in level one demonstrates to one or both parties that the relationship is not suitable for marriage, then it is best that the marriage is terminated before significant financial and familial intertwinement occurs, which is facilitated by the more efficient dissolution procedure at this level. Moreover, it is simply more logical to have an uncomplicated and efficient dissolution process at level one, as the rights and obligations accompanying this level do not require substantial judicial involvement.<sup>275</sup>

With regard to the related concern that the ongoing marriage evaluation parties will have to undertake to determine whether they would like to opt-out of advancement to the next level will cause more marriages to dissolve, it is important to note that the decision couples must make at each level relates not to whether the parties wish to dissolve their relationship, but instead to whether they would like to remain at their current level or advance to the next level.<sup>276</sup> In addition, more frequent marriage evaluation may actually aid couples in remaining married by encouraging them to communicate their feelings and concerns about the marriage and to make adjustments accordingly. Moreover, even if marriage evaluation does cause some couples to determine that dissolution is warranted for their relationship, marriage dissolution is not always a poor choice. As discussed above, for individuals who are in unhealthy, unhap-

---

<sup>274</sup> See *supra* Section IV.

<sup>275</sup> See *supra* Section IV.B.

<sup>276</sup> See *supra* notes 263–268 and accompanying text.

py marriages, it is dissolution that will often be the best choice for the spouses' overall well-being and the well-being of their children.<sup>277</sup>

### CONCLUSION

The institution of marriage is at a crossroads. Marriage rates have decreased significantly, non-marital cohabitation is at an all-time high, and the divorce rate remains at a substantial 40–50%. The existing rules governing both intact and dissolving marriages are deeply problematic. The one-size-fits-all approach to intact marriages, in which spousal rights and obligations arise all at once at the moment a couple is granted a marriage license and generally do not change as the years of marriage pass or as children are born to the marriage, insufficiently protects the diverse spectrum of marriages in existence today. With regard to dissolving marriages, the substantial discretion granted to judges and the use of the same broad default rules for determining post-dissolution spousal rights and obligations, without regard to the length of the marriage or the presence of children within the marriage, often leads to unfair, unpredictable, and inconsistent results. Perhaps as a result of the law's flawed approach to determining spousal rights and obligations, the institution of marriage has come to occupy an increasingly perilous place in U.S. society.

The time has come to reconsider the structure of this important, longstanding institution. Restructuring the legal framework governing marriage so that spousal rights and obligations arise in a gradual, clear, and relevant manner as couples ascend between distinct marriage levels would provide a more logical, effective, and efficient legal framework for marriage. The comprehensive reform to the legal framework governing marriage proposed in this Article aims to revitalize the institution and to make it a more useful, relevant option for couples across the United States. While proposed change to any longstanding institution, especially one that is often referred to as the bedrock of society,<sup>278</sup> will always face resistance, the risks of not acting to improve the institution of marriage far outweigh the risks involved in updating its structure to better accommodate today's relationships.

---

<sup>277</sup> See *supra* notes 155–165 and accompanying text.

<sup>278</sup> Mark Strasser, *A Little Older, a Little Wiser, and Still Committed*, 61 RUTGERS L. REV. 507, 513–14 (2009) (referring to marriage as “the relationship that is viewed as the bedrock of society”).